Court File Nos. T-402-19 / T-141-20 / T-1120-21

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

BOOK OF AUTHORITIES OF THE SETTLEMENT IMPLEMENTATION COMMITTEE
(CLAIMS PROCESS APPROVAL)

June 7, 2024

SOTOS LLP
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8

David Sterns / Mohsen Seddigh

Tel: 416-977-0007
Fax: 416-977-0717

KUGLER KANDESTIN LLP
1 Place Ville-Marie, Suite 1170
Montréal, QC H3B 2A7

Robert Kugler

Tel: 514-878-2861
Fax: 514-875-8424

MILLER TITERLE + CO.
300 - 638 Smithe Street
Vancouver BC V6B 1E3

Joelle Walker

Tel: 604-681-4112
Fax: 604-681-4113

Lawyers for the plaintiffs, Xavier Moushoom, Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Meawasige), Jonavon Joseph Meawasige, and Zacheus Joseph Trout

NAHWEGAHBOW, CORBIERE
5884 Rama Road, Suite 109
Rama, ON L3V 6H6

Dianne G. Corbiere

Tel: 705.325.0520
Fax: 705.325.7204

FASKEN MARTINEAU DUMOULIN
55 Metcalfe St., Suite 1300
Ottawa, ON K1P 6L5

D. Geoffrey Cowper, K.C.

Tel: 613.236.3882
Fax: 613.230.6423

Lawyers for the plaintiffs Assembly of First Nations, Ashley Dawn Louise Bach, Karen Osachoff, Melissa Walterson, Noah Buffalo-Jackson by his Litigation Guardian, Carolyn Buffalo, Carolyn Buffalo, and Dick Eugene Jackson also known as Richard Jackson

TO: **PAUL B. VICKERY**
3 Forsyth Lane
Ottawa ON K2H 9H1

Paul B. Vickery

Tel: 613-402-4957

Lawyers for the Defendant

AND TO: **CLARKE CHILD AND FAMILY LAW**
36 Toronto Street Suite 950
Toronto, ON M5C 2C5

Sarah Clarke

Tel: (416) 260-3030

CONWAY BAXTER WILSON LLP/S.R.L.
400-411 Roosevelt Ave
Ottawa, ON K2A 3X9

Thomas G. Conway
David Taylor
Logan Stack

Rel: 613.780.2002

Lawyers for the Caring Society

INDEX

TAB	DECISION
1.	*Breckon v Cermaq Canada Ltd*, 2024 FC 225
2.	*Châteauneuf v Canada*, 2006 FC 286
3.	*Dufault v The Toronto-Dominion Bank*, 2024 ONSC 961
4.	*Eidoo v Infineon Technologies AG,* 2014 ONSC 6082
5.	*Fontaine et al v The Attorney General of Canada et al*, 2013 ONSC 684
6.	*Fontaine v Canada (Attorney General)*, 2014 ONSC 283
7.	*Fontaine v Canada (Attorney General)*, 2014 ONSC 4585
8.	*Heyder v Canada (Attorney General),* 2019 FC 1477
9.	*Lin v Airbnb, Inc*, 2021 FC 1260
10.	*Manulife Bank of Canada v. Conlin*, [1996] 3 SCR 415
11.	*Manuge v Canada*, 2013 FC 341
12.	*Manuge v Canada*, 2024 FC 68
13.	*McCrea v Canada*, 2019 FC 122
14.	*McLean v Canada*, 2019 FC 1075
15.	*McLean v. Canada (Attorney General)*, 2023 FC 1093
16.	*Moushoom v. Canada (Attorney General)*, 2022 FC 1212
17.	*Moushoom v Canada (Attorney General)*, 2023 FC 1533
18.	*Riddle v Canada*, 2018 FC 641
19.	*Stonechild v Canada*, 2022 FC 913
20.	*Stonechild v Canada*, 2022 FC 914
21.	*Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1415
22.	*Tiller v Canada*, 2020 FC 321 (reasons) and 2020 FC 320 (order)

23.	*Tk'emlúps te Secwépemc First Nation v Canada*, 2021 FC 988
24.	*Toth v Canada*, 2019 FC 125

TAB 1

Federal Court

Cour fédérale

Date: 20240209

Docket: T-1664-19

Citation: 2024 FC 225

2024 FC 225 (CanLII)

Montréal, Quebec, February 9, 2024

PRESENT: Mr. Justice Gascon

PROPOSED CLASS PROCEEDING

BETWEEN:

IRENE BRECKON and GREGORY SILLS

Plaintiffs

and

CERMAQ CANADA LTD., CERMAQ GROUP AS, CERMAQ NORWAY AS, CERMAQ US LLC, GRIEG SEAFOOD ASA, GRIEG SEAFOOD B.C. LTD., LERØY SEAFOOD GROUP ASA, LERØY SEAFOOD USA, INC., MARINE HARVEST ATLANTIC CANADA INC., MOWI ASA, MOWI CANADA WEST INC., MOWI DUCKTRAP, LLC, MOWI USA, LLC, NOVA SEA AS, OCEAN QUALITY AS, OCEAN QUALITY NORTH AMERICA INCORPORATED, OCEAN QUALITY PREMIUM BRANDS, INC., OCEAN QUALITY USA INC., and SALMAR ASA

Defendants

2024 FC 225 (CanLII)

ORDER AND REASONS

I. Overview

[1] The plaintiffs, Mr. Gregory Sills and Ms. Irene Breckon [Plaintiffs], bring two separate motions under sections 334.29 and 334.4 of the *Federal Courts Rules*, SOR/98-106 [Rules]. The first motion seeks the judicial approval of a class action settlement [Settlement Agreement] while the second one asks the Court to approve the payment of three related expenses, namely: i) the legal fees and disbursements sought by class counsel Koskie Minsky LLP, Sotos LLP, and Siskinds LLP [Class Counsel Fees]; ii) the commission of a litigation funder [Commission] under a Litigation Advance Agreement [LAA]; and iii) an honorarium to each of the two representative Plaintiffs [Honorarium].

[2] The Settlement Agreement, a copy of which is attached as Annex "A" to this Order, was executed on September 22, 2023, between the Plaintiffs and the defendants, Cermaq Canada Ltd., Cermaq Group AS, Cermaq Norway AS, Cermaq US LLC, Grieg Seafood ASA, Grieg Seafood BC Ltd., Grieg Seafood Sales North America Incorporated (formerly known as Ocean Quality North America Inc.), Grieg Seafood Sales Premium Brands, Inc. (formerly known as Ocean Quality Premium Brands Inc.), and Grieg Seafood Sales USA Inc. (formerly known as Ocean Quality USA Inc.), Lerøy Seafood AS, Lerøy Seafood USA Inc., Marine Harvest Atlantic Canada Inc., Mowi ASA, Mowi Canada West Inc., Mowi Ducktrap, LLC, Mowi USA, LLC, Nova Sea AS, SalMar ASA, and Sjór AS (formerly known as Ocean Quality AS) [together, the Defendants]. The proposed settlement was reached in the context of a class action proceeding [Class Action] filed by the Plaintiffs in relation to an alleged conspiracy between the Defendants

to fix, maintain, increase, or control the price of farmed Atlantic salmon, contrary to Part VI of the *Competition Act*, RSC 1985, c C-34 [Competition Act].

[3] For the reasons that follow, I will approve the Settlement Agreement, I will approve in part the proposed Class Counsel Fees, and I will decline to approve the LAA and the Honorarium.

2024 FC 225 (CanLII)

II. Background

A. *Procedural context*

[4] The Class Action was initiated by a statement of claim filed on October 11, 2019, in Court file no. T-1664-19 [Statement of Claim]. A second statement of claim was filed on January 3, 2020, in file no. T-8-20. The two claims were subsequently consolidated on April 26, 2021, by order of this Court, under file no. T-1664-19.

[5] The Statement of Claim arises from allegations of price-fixing in the market for farmed Atlantic salmon. In essence, the Plaintiffs allege that the Defendants conspired to increase the spot market for farmed Atlantic salmon in Oslo, Norway with the intention of increasing prices in North America and elsewhere. They maintain that the Defendants' unlawful conspiracy constitutes offences under Part VI of the Competition Act, in particular sections 45 and 46, and they seek damages pursuant to subsection 36(1) of the Competition Act.

[6] In the consolidated Statement of Claim, the class is defined as follows: "[a]ll persons in Canada who purchased [farmed Atlantic salmon and products containing or derived from farmed Atlantic salmon purchased or sold in Canada] from April 10, 2013 to [February 20, 2019]"

[Class]. The Class therefore includes both direct and indirect purchasers of farmed Atlantic salmon.

[7] The Class Action was commenced following an investigation into the pricing of farmed Atlantic salmon by the European Commission. In February 2019, the European Commission announced in a press release that it had carried out unannounced inspections at the premises of several salmon companies, which were unnamed, based on concerns that the inspected companies may have violated the European Union [EU] competition rules prohibiting cartels and restrictive business practices. A few months later, in November 2019, the Antitrust Division of the United States Department of Justice [US DOJ] opened its own criminal investigation into allegations of collusion between the Defendants. The Defendants Mowi ASA, SalMar ASA, Lerøy Seafood Group ASA, and Grieg Seafood ASA each filed notices with the Oslo Børs — the Oslo Stock Exchange — disclosing that they or their subsidiaries had received, or were advised they would receive, subpoenas from the US DOJ.

[8] In addition to this Class Action, parallel class action proceedings have been commenced in British Columbia and Quebec in relation to the same alleged conspiracy. Counsel in the three Canadian class actions are working on a coordinated basis, with this Class Action being the "lead action." These parallel proceedings are *Chin v Cermaq Canada Ltd et al* (Supreme Court of British Columbia Vancouver, Registry No. 211995) [BC Action] and *Langis et al v Grieg Seafood ASA et al* (Cour Supérieure du Québec, District de Québec No. 200-06-000245-202) [Quebec Action].

[9] Similar class proceedings have also been commenced in the United States in the following matters: *In Re: Farm-Raised Salmon and Salmon Products Antitrust Litigation* (United

2024 FC 225 (CanLII)

States District Court Southern District of Florida Miami Division, File No. 19-21551-CV-Altonaga) [US Direct Purchaser Action] and *Wood Mountain Fish LLC et al v Mowi et al,* (United States District Court Southern District of Florida Fort Lauderdale Division, File No. 19-22128-CIV-Smith/Louis) [US Indirect Purchaser Action].

2024 FC 225 (CanLII)

[10] The US Direct Purchaser Action was settled in May 2022 for USD$85 million and was approved by the US courts in September 2022. The US Indirect Purchaser Action was also settled a few months later, in December 2022, for an amount of USD$33 million, and was approved by the US courts at the end of February 2023.

[11] On October 6, 2023, this Court rendered an order certifying the Class Action for settlement purposes only [October 6 Order]. The October 6 Order further approved the Notice of Certification and Settlement Approval Hearing [Notice] as well as the plan to disseminate the Notice [Notice Plan] to the members of the Class [Class Members].

[12] The motions for approval of the Settlement Agreement and for the approval of related payments were heard together by the Court on November 20, 2023.

B. *Overview of the Settlement Agreement*

[13] The parties entered into the Settlement Agreement on September 22, 2023, subject to this Court's approval. The Plaintiffs' legal counsel, Koskie Minsky LLP, Sotos LLP, and Siskinds LLP [together, Class Counsel], have concluded that the Settlement Agreement is fair, reasonable, and in the best interests of the Plaintiffs and the Class Members.

[14] The material terms of the Settlement Agreement include the following:

- The settlement is valued at $5,250,000 [Settlement Amount], which will be paid into a settlement fund [Settlement Fund]. Class Counsel have prepared a protocol for the distribution of the Settlement Fund, after deducting administration expenses, Class Counsel Fees, disbursements, and amounts owing to the litigation funder under the LAA [Funding Fees].
- The Settlement Agreement defines the class for the purposes of the settlement [Settlement Class] as follows: "all Persons in Canada who purchased farmed Atlantic salmon and products containing or derived from farmed Atlantic salmon purchased or sold in Canada from April 10, 2013 to the date of this Order, except the Excluded Persons and any Opt-Out" [Settlement Class Members]. This Settlement Class definition is nearly identical to the definition of the Class in the Statement of Claim.
- The Settlement Fund will be distributed to eligible Settlement Class Members with purchases totaling at least $1 million of farmed Atlantic salmon between April 10, 2013 (the start of the class period), and February 28, 2019 (the date of the European Commission's raids on the Defendants' premises) [Qualifying Settlement Class Members].
- To account for consumer and other claims that will not qualify for the $1 million threshold, the distribution protocol proposes a *cy-près* payment in the amount of $250,000 to Food Banks Canada [*Cy-près* Payment]. For the Quebec portion, the *Cy-près* Payment shall be lowered by any amounts payable to the Fonds d'aide aux actions collectives [Fonds d'aide], pursuant to section 42 of the *Act respecting the Fonds d'aide aux actions collectives*, CQLR, c F-3.2.0.1.1 and calculated in accordance with Article 1.

2024 FC 225 (CanLII)

(2°) of the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*, RSQ, c F-3.2.0.1.1, r 2. For the purposes of calculating the amount payable to the Fonds d'aide, 23% of the *Cy-près* Payment will be notionally allocated to Quebec.

- The direct settlement benefits will be distributed to Qualifying Settlement Class Members on a *pro rata* basis (i.e., proportionally), based on the volume of the Qualifying Settlement Class Member's salmon purchases as against the total volume of all Qualifying Settlement Class Members' salmon purchases. The amount of Qualifying Settlement Class Members' salmon purchases will be finally determined by Class Counsel, with no right of appeal or review, based on purchase information submitted by the Qualifying Settlement Class Member, or where available, sales data provided by the Defendants pursuant to the terms of the Settlement Agreement.
- The Settlement Agreement is an all-party settlement agreement and would resolve the litigation in its entirety. This includes the discontinuance of the BC Action and the Quebec Action.

[15] With respect to Class Counsel Fees, Section 11.1 of the Settlement Agreement provides that Class Counsel may seek approval of the Court for the payment of Class Counsel Fees contemporaneously with seeking approval of the Settlement Agreement. In June 2020, Class Counsel had entered into a fee agreement with the Plaintiffs, which provides for a contingency fee not exceeding 33% of the total amounts recovered by the Class, plus any amounts awarded by the Court in respect of costs, as well as disbursements and applicable taxes [Retainer Agreement].

2024 FC 225 (CanLII)

[16] Class Counsel have prepared a protocol for the distribution of the “net” settlement funds that will remain in the Settlement Fund after deducting administration expenses, Class Counsel Fees, disbursements, and Funding Fees.

[17] Class Counsel estimates that, subject to this Court’s approval, after deductions of $1,483,125 for Class Counsel Fees representing 25% of the Settlement Fund plus applicable taxes, $144,231.64 (inclusive of taxes) for disbursements, $1,000 for Honorarium payments, and $1,250,000 for the Funding Fees, there would be approximately $2,362,643 left for distribution. Once the *Cy-près* Payment in the amount of $250,000 is made to Food Banks Canada, there will be $2,112,643 left in the Settlement Fund, which will be distributed to Qualifying Settlement Class Members proportionally.

[18] Furthermore, Food Banks Canada has proposed to share the *cy-près* funds proportionally with their provincial associations for the purchase of food for food banks in their communities. In the event the net Settlement Fund is not paid out completely, either due to uncashed cheques, residual interest or other reasons, a further donation will be made to Food Banks Canada if the amount is less than $20,000. In the event the residual amount is greater than $20,000, further direction will be sought from the Court.

[19] As far as the Honorarium is concerned, the Settlement Agreement provides that Class Counsel may ask the Court for the approval of an Honorarium of $500 to each of Mr. Sills and Ms. Breckon, totalling $1,000.

[20] I pause to observe that, in section 3.1, the Settlement Agreement provides that the “Settlement Amount represents the full amount to be paid pursuant to this Settlement Agreement

2024 FC 225 (CanLII)

and shall be all-inclusive of all amounts, including without limitation, Class Counsel Fees, Class Counsel Disbursements, any honoraria for the Plaintiffs, any distributed amounts to the Settlement Class, any cy pres donations, and Administration Expenses," and thus contains no direct reference to the Funding Fees or to the LAA. It is only in the draft Notice attached as a schedule to the Settlement Agreement that the litigation funder and the LAA are specifically mentioned.

2024 FC 225 (CanLII)

[21] The Defendants do not oppose the terms of the Settlement Agreement relating to Class Counsel Fees nor the request made for an honorarium to the Plaintiffs. They have also agreed to pay the Class Counsel Fees, the Honorarium, and applicable taxes that are approved by the Court. As indicated above, all of these amounts will be deducted from the Settlement Amount.

C. *Notices to Class Members*

[22] On October 18, 2023, in accordance with the Notice Plan and the October 6 Order, Class Counsel commenced the distribution of notices via social media (Facebook and Instagram). As of November 16, 2023 (one day prior to the end of the two-month social media campaign), the number of impressions received from the social media notices was 2,827,272.

[23] Furthermore, in accordance with the Notice Plan and the October 6 Order, Class Counsel emailed the Notice to the direct purchaser customers of the Defendants based on the mailing list provided by them to Class Counsel. While most of the Defendants provided a list of emails, one did not. For that Defendant, Class Counsel mailed copies of the Notice to all of its customers. Subsequently, Class Counsel received emails for that Defendant's customers. Emails were then sent. A number of email bounce backs were received. Class Counsel conducted searches to try to

find updated contacts for those customers, failing which it followed up with defence counsel. They advised that some clients may be past clients, given the class period. The implication is that some may no longer be in business. Ultimately, there were only four customers with email bounce backs that could not be contacted through alternative backup emails. For those customers, letters attaching the Notice were mailed on October 25, 2023.

2024 FC 225 (CanLII)

[24] Additionally, in accordance with the Notice Plan and the October 6 Order, Class Counsel mailed out the Notice to the 1,067 companies identified in the mailing list from Data Axle. Class Counsel also emailed the Notice to their respective mailing lists of individuals who have registered with Class Counsel to receive updates on the status of the litigation and to the following industry associations, requesting distribution to their membership: Canadian Federation of Independent Grocers, Food, Health and Consumer Products of Canada, Restaurants Canada, and Food Processors of Canada.

[25] Finally, the press release jointly drafted and agreed to by the parties was distributed to media outlets and publications through publication on Canadian Newswire on October 30, 2023.

III. <u>Analysis</u>

[26] The motions are seeking the Court's approval for the Settlement Agreement, Class Counsel Fees, the LAA, and the Plaintiffs' Honorarium. Each of these requests will be dealt with in turn. In conducting its assessment, the Court must first determine whether the Settlement Agreement should be approved. In the affirmative, the Court must then determine whether to approve the Class Counsel Fees, the LAA, and the Honorarium.

A. *The Settlement Agreement*

(1) The test for the approval of class action settlements

[27] Rule 334.29 provides that a class proceeding settlement must be approved by the Court. The legal test to be applied is whether the proposed settlement is "fair, reasonable and in the best interests of the class as a whole" (*Lin v Airbnb, Inc*, 2021 FC 1260 at para 21 [*Lin*]; *Bernlohr v Former Employees of Aveos Fleet Performance Inc*, 2021 FC 113 at para 12 [*Bernlohr*]; *Wenham v Canada (Attorney General)*, 2020 FC 588 at para 48 [*Wenham*]; *McLean v Canada*, 2019 FC 1075 at paras 64–65 [*McLean*]).

[28] The factors to be considered in the analysis have been reiterated by the Court on several occasions (*Moushoom v Canada (Attorney General)*, 2023 FC 1739 at para 83 [*Moushoom*]; *Lin* at para 22; *Bernlohr* at para 13; *Wenham* at para 50; *McLean* at paras 64–66; *Condon v Canada*, 2018 FC 522 at para 19 [*Condon*]). They are similar to the factors retained by the courts across Canada. These factors are non-exhaustive, and their weight will vary according to the circumstances and to the factual matrix of each proceeding. They can be summarized as follows:

1. The terms and conditions of the settlement;
2. The likelihood of recovery or success;
3. The expressions of support, and the number and nature of objections;
4. The degree and nature of communications between class counsel and class members;
5. The amount and nature of pre-trial activities including investigation, assessment of evidence, and discovery;
6. The future expense and likely duration of litigation;

2024 FC 225 (CanLII)

7. The presence of arm's length bargaining between the parties and the absence of collusion during negotiations;
8. The recommendation and experience of class counsel; and,
9. Any other relevant factor or circumstance.

2024 FC 225 (CanLII)

[29] A proposed settlement must be considered as a whole and in context. Settlements require trade-offs on both sides and are rarely perfect, but they must nevertheless fall within a "zone or range of reasonableness" (*Lin* at para 23; *Bernlohr* at para 14; *McLean* at para 76; *Condon* at para 18). Reasonableness allows for a spectrum of possible resolutions and is an objective standard that can vary depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation to class members. However, not every disposition of a proposed settlement agreement must be reasonable, and it is not open to the Court to rewrite the substantive terms of a proposed agreement (*Wenham* at para 51). The function of the Court in reviewing a proposed class action settlement is not to reopen and enter into negotiations with litigants in the hope of improving the terms of the agreement (*Condon* at para 44). In the end, the proposed settlement is a "take it or leave it" proposition (*Moushoom* at para 57; *McLean v Canada (Attorney General)*, 2023 FC 1093 at para 37; *Lin* at para 23).

[30] In mandating that both the class action settlements and the payment of class counsel fees be subject to the Court's approval (i.e., Rules 334.29 and 334.4), the Rules place an onerous responsibility on the Court to ensure that the class members' interests are not being sacrificed to the interests of class counsel, who have typically taken on a substantial risk and who have a great deal to gain not only in removing that risk but in recovering a significant reward from their contingency fee arrangement (*Lin* at para 24, citing *Shah v LG Chem, Ltd*, 2021 ONSC 396 at

para 40 [*Shah*]). The incentives and the interests of class counsel may not always align with the best interests of the class members. It thus falls on the Court to scrutinize both the proposed settlement agreement and the proposed class counsel fees and administrative expenses, as they will typically be interrelated (*Lin* at para 24). I pause to observe that the Court has a similar responsibility with respect to litigation funding agreements entered into by the plaintiffs in relation to proposed class proceedings (*Ingarra et al v Dye & Durham Limited et al*, 2024 FC 152 at para 23 [*Ingarra*]; *Difederico v Amazon.com Inc*, 2021 FC 311 at para 29 [*Difederico*]).

2024 FC 225 (CanLII)

[31] This is especially important where, as is the case here, the net amount that will remain in the Settlement Fund for Qualifying Settlement Class Members is markedly lower than the Settlement Amount after deduction of the Class Counsel Fees and other expenses such as the Funding Fees.

(2) Application to this case

(a) Terms and conditions of the settlement

[32] Under the terms and conditions of the Settlement Agreement, the question to be determined is whether the proposed Settlement Agreement, when considered in its overall context, provides significant advantages to the Class Members, compared to what would have been an expected result of litigation on the merits (*Lin* at para 25).

[33] The key terms of the Settlement Agreement, as seen by the parties, revolve around a Settlement Amount valued at $5,250,000, which includes payment of the following elements: compensation to Qualifying Settlement Class Members; the *Cy-près* Payment of $250,000; Class Counsel Fees and disbursements; Funding Fees; administration expenses; and the Honorarium

payments. Furthermore, the Settlement Agreement's release clause [Release Clause] provides that the Defendants will be forever and absolutely released from any claims in relation to the present action or to any claims related in any way to the released claims, and that the release shall remain in effect notwithstanding the discovery or existence of additional or different facts and evidence. The Release Clause applies to all Class Members, and not only to the Qualifying Settlement Class Members.

2024 FC 225 (CanLII)

[34] As discussed at the hearing before the Court, three major issues arise in relation to the terms and conditions of the Settlement Agreement. First, the scope and extent of the Release Clause, which requires all Class Members to waive their rights — despite the limited benefits provided by the settlement — and indemnifies the Defendants for any future claims regardless of what new evidence or information might be discovered. Second, the fact that the Settlement Agreement, when considered in its overall context, provides minimal advantages to the Class Members as a whole — especially the indirect purchasers —, compared to a reasonably expected result of following through with the litigation on the merits. Third, the consideration of the *Cy-près* Payment as a benefit to the Class Members other than the Qualifying Settlement Class Members.

(i) The Release Clause

[35] Pursuant to the Release Clause, the Defendants will receive a full and final release in relation to the subject matter of the Class Action, namely, allegations of price-fixing amongst the Defendants resulting in purchasers of farmed Atlantic salmon allegedly paying supra-competitive prices.

[36] The Release Clause raises some concerns for numerous reasons. First, based on the wording of the Release Clause, any future actions "related in any way to Released Claims" are barred from being raised. Given that the Class definition includes every Canadian consumer, this Release Clause will bar all future action from anyone who purchased farmed Atlantic salmon from the Defendants for any possible similar future case. As such, the scope of the Release Clause is very broad.

2024 FC 225 (CanLII)

[37] Indeed, upon encountering a similar release clause in *2038724 Ontario Ltd v Quizno's Canada Restaurant Corporation*, 2014 ONSC 5812 [*Quizno's*], Justice Perell highlighted the following problems with such a clause, at paragraphs 55 and 56 of his decision:

> [55] The scope of the release is too broad. In my opinion, it is fair to have Class Members release their existing claims against the Defendants. And it would have been fair to bar claims that are a continuation of the particular existing claims. However, in my opinion, it is unfair to categorically bar all future claims of the types identified in the Statement of Claim, which is a possible interpretation of the proposed release.
>
> [56] Interpreting how the release would apply in the future is, of course, speculative at best because the factual nexus for the application of release is unknown. However, by way of analogy, if the Plaintiffs' current claim against the Defendants was a nuisance claim, it would be fair to bar future claims based on the existing nuisance or it might be fair to bar future claims based on a continuation of the existing nuisance, but, in my opinion, it would not be fair or reasonable to bar all future claims based on presently unknown new nuisances perpetrated by the Defendants in the future.

[38] Given that the Release Clause in this case explicitly requires the Class Members to "agree and covenant not to sue any of the Releasees on the basis of any Released Claims or to assist any third party in commencing or maintaining any suit against any Releasees related in any way to

Released Claims” [emphasis added], it would appear that the Release Clause is overly broad in the same sense as the release clause in *Quizno's*.

[39] Second, the Release Clause requires all Class Members to waive their rights of action, despite the fact that the consumer members of the Class will only receive the indirect benefit of a *cy-près* donation from the Settlement Fund, and no direct individual benefit.

[40] In *Quizno's*, Justice Perell singled out this problem as well, in the following terms: “[i]t is one thing for Class Members to not have gained anything by a class action, it is another thing to give up rights as the price for settling the Class Action, and such a settlement would not be in the Class Members' best interests” (*Quizno's* at para 61, citing *Waldman v Thomson Reuters Canada Limited*, 2014 ONSC 1288 [*Waldman*]). Indeed, in *Waldman*, the court was seized of a situation similar to the case at bar, where a *cy-près* trust would be established in lieu of the class members receiving an individual benefit. In that case, Justice Perell concluded that, “I, however, do not find that the Settlement Agreement is substantively, circumstantially, or institutionally fair to Class Members. In this regard, I agree with the general sentiment of the objectors to the Settlement that the Settlement Agreement brings the administration of justice and class actions into disrepute because: (a) the Settlement is more beneficial to Class Counsel than it is to the Class Members; and (b) in its practical effect, the Settlement expropriates the Class Members' property rights in exchange for a charitable donation from Thomson” [emphasis added] (*Waldman* at para 95). Ultimately, Justice Perell's decision in *Waldman* was overturned by the Divisional Court for mischaracterizing the licenses as an expropriation of a property right (*Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622 (Div Ct) at para 18).

2024 FC 225 (CanLII)

[41] In their supplementary submissions filed after the hearing at the request of the Court, the Plaintiffs emphasized that the Release Clause is appropriately circumscribed and remains limited to the allegations raised in the Statement of Claim, and that the language used was modelled on similar releases approved by various Canadian courts in “auto parts” price-fixing class actions. In addition, the Plaintiffs claimed that the *Quizno’s* precedent could be distinguished on the basis that the release clause in that case sought to release all future claims in relation to conduct that was not a continuation of the conduct covered by the underlying claim (*Quizno’s* at para 55). The concerns with future problems with the Release Clause do not arise in this case, say the Plaintiffs.

2024 FC 225 (CanLII)

[42] The Plaintiffs also pointed to other court decisions where settlement agreements were approved with release clauses even in cases where the class members only received indirect benefits provided through a proposed *cy-près* distribution (*Loewenthal v Sirius XM Holdings, Inc*, 2021 ONSC 4482 at para 39 [*Loewenthal*]). In approving the proposed settlement in that case, the Ontario court explicitly addressed a concern raised by an objector, who argued that the release in the settlement was too broad given that the class was being asked to give up something of value in exchange for indirect benefits provided through the proposed *cy-près* distribution. The court reviewed the terms of the release and was satisfied that the release was not overbroad, and ultimately noted that settlements are a compromise (*Loewenthal* at para 39).

[43] The Release Clause contained in the Settlement Agreement certainly raises some concerns, as it is broadly drafted and could be interpreted to bar future claims against any form of anticompetitive conduct committed by the Defendants, even though it does not purport to release claims involving negligence, personal injury, failure to deliver goods, damaged or

2024 FC 225 (CanLII)

delayed goods, product defects, securities, or other similar claims. That said, after carefully considering the arguments raised by the Plaintiffs and the authorities they cited, I am ready to accept that the Release Clause does not fit among those release clauses that the Court should be reluctant to approve, and I am satisfied that the Defendants do not unfairly obtain an overbroad release in the circumstances.

(ii) Benefits to Class Members

[44] Turning to the benefits provided by the Settlement Agreement, one cannot help but note that the Statement of Claim in this case alleged damages of up to $1 billion. Therefore, the Settlement Amount represents a tiny fraction — merely 0.525% — of that claim, and can certainly be qualified as extremely modest. While litigation conditions can change and parties can settle at varying amounts based on the strength of their claims, the Settlement Amount in this case is a far cry from the initially alleged damages, to the point where one might question the acceptability of such a marginal recovery. This is particularly true given the present context, where the Settlement Amount is so low that the vast majority of Class Members (who likely would have anticipated receiving something from the settlement) will not receive anything from the settlement, apart from the moral satisfaction of making the *Cy-près* Payment to Food Banks Canada.

[45] Indeed, based solely on the Class definition, which describes the class as <u>all persons in Canada</u> who purchased farmed Atlantic salmon and products containing or derived from farmed Atlantic salmon purchased or sold in Canada from April 10, 2013 to February 20, 2019, it would be fair to assume that all Class Members, particularly the indirect consumer purchasers, were

intended to participate in a possible settlement. The two Plaintiffs are themselves regular consumers and indirect purchasers of farmed Atlantic salmon from the Defendants.

[46] However, the Settlement Agreement does not offer any benefit for its consumer members, outside of the *cy-près* contribution. This raises concerns, given the fact that the consumer Class Members are likely the smaller purchasers of farmed Atlantic salmon and thus arguably those who are most reliant on the class action procedural vehicle to advance their claims. Conversely, the Qualifying Settlement Class Members — being large direct purchasers with more than $1 million in annual salmon purchases — arguably possess the requisite resources to lodge their own individual claims against the Defendants, whereas this is likely the only reasonable option for the consumer Class Members to advance their claims.

[47] In short, it appears that, further to the Settlement Agreement, it is the consumer Class Members who are being deprived of access to the Settlement Fund, while the Qualifying Settlement Class Members will divide up the benefits that remain after deductions. In other words, when considered in its overall context, the Settlement Agreement provides extremely timid advantages to the Class Members as a whole — especially the indirect purchasers, compared to a potential reasonably expected result of following through with the litigation on the merits.

[48] In their supplementary submissions, the Plaintiffs indicated that many precedents exist where settlement agreements in the class action context result in differentiated treatment of class members at the distribution stage. Furthermore, they observed that, while the proposed Settlement Agreement is certainly modest, there is no realistic alternative for a satisfactory resolution of the Class Action for the Class Members. I acknowledge these points, but the fact

2024 FC 225 (CanLII)

remains that the limited actual benefits to the Class Members are a negative factor undermining the approval of the Settlement Agreement.

(iii) *Cy-près* distribution

[49] A key term of the Settlement Agreement is the *Cy-près* Payment, as it represents the sole benefit of the agreement for indirect purchasers. The Plaintiffs contend that Class Members who do not qualify for direct compensation will receive indirect benefits, through this *cy-près* donation to Food Banks Canada in the amount of $250,000. They submit that in *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype*], the Supreme Court of Canada held that "the precedent for *cy-près* distribution is well established" and is "a method the courts have used in indirect purchaser price-fixing cases" (*Sun-Rype* at paras 25–26).

[50] It is worth noting that the Supreme Court itself highlighted that a *cy-près* distribution by "its very name, meaning 'as near as possible', implie[s] that it is not the ideal mode of distribution, [but] it allows the court to distribute the money to an appropriate substitute for the class members themselves" [emphasis added] (*Sun-Rype* at para 26).

[51] I recognize that *Sun-Rype* is a helpful precedent in the current matter. However, in *Sun-Rype*, the Supreme Court was contemplating the compensation of an unidentifiable class of indirect purchasers for a claim arising under British Columbia's *Class Proceedings Act*, RSBC 1996, c 50 [CPA]. These facts do not entirely align with the facts in the present matter. First, this Class Action is not subject to British Columbia's CPA, where subsection 34(1) expressly contemplates the possibility of *cy-près* distributions. Moreover, Class Counsel have identified no cases from this Court having specifically considered *cy-près* payments. It is also worth noting

2024 FC 225 (CanLII)

that *Sun-Rype* was a case dealing with class certification, not with the approval of a settlement agreement.

[52] The *Waldman* case discussed above dealt with the approval of a settlement agreement and a *cy-près* distribution, and it determined that the *cy-près* distribution did not justify the approval of the proposed settlement agreement (*Waldman* at para 100). Indeed, according to *Waldman*, which was rendered after the Supreme Court had issued its judgment in *Sun-Rype* (*Waldman* at paras 100–101):

> [100] The cy-près trust fund is a public good, but it does not justify approving the Settlement Agreement. Many, but not necessarily all, Class Members as members of the legal profession may be pleased to see the establishment of a trust to support public interest litigation and the training of law students, but the purpose of class actions is not to fund worthy projects but to provide procedural and substantive access to justice to Class Members.
>
> [101] In my opinion, in the case at bar, there is no access to substantive justice for the claims of Class Members and no meaningful behaviour modification for Thomson.
>
> [Emphasis added.]

[53] However, as pointed out by the Plaintiffs, it is well accepted that, in some cases, receiving indirect *cy-près* compensation instead of direct monetary compensation can nevertheless meet the objectives of class proceedings, namely, access to justice and behaviour modification (*Harper v American Medical Systems Canada Inc*, 2019 ONSC 5723 at para 47; *Sorenson v easyhome Ltd*, 2013 ONSC 4017 at para 28). In other words, in circumstances where an aggregate settlement recovery cannot be economically distributed to individual class members, the Court can approve a *cy-près* distribution to credible organizations or institutions that will indirectly benefit class members. In their supplementary submissions, the Plaintiffs

2024 FC 225 (CanLII)

referred the Court to several class action proceedings where courts have approved settlements involving *cy-près* distributions for certain class members or all class members who would not receive direct compensation (see, for example, *Emond v Google LLC*, 2021 ONSC 302 at para 37 and *Alfresh Beverages Canada Corp v Hoechst AG*, [2002] OTC 19, [2002] OJ No 79 (QL) (SC) at para 16).

2024 FC 225 (CanLII)

[54] Here, further to my analysis and after consideration of the Plaintiffs' submissions and materials, I am satisfied that, while not being ideal, the *cy-près* distribution is appropriate given the small magnitude of the Settlement Amount and the practical and economic difficulties to provide direct compensation to all Class Members. It certainly does not alleviate the fact that the Settlement Agreement offers strictly no financial gains for the vast majority of Class Members, but it is not enough to justify refusing the approval of the Settlement Agreement.

(iv) Conclusion on the terms and conditions

[55] In light of the foregoing, I am satisfied that, when considered in their overall context and taking the agreement as a whole, the terms and conditions of the Settlement Agreement can be considered fair, reasonable, and in the best interests of the Class Members. I accept, with some reserve, that they provide advantages to the Class Members, which might not have been achieved with the continued litigation, and are a positive factor supporting the approval of the Settlement Agreement.

(b) *The likelihood of recovery or success*

[56] The next factor to consider is the likelihood of recovery or success. This factor refers to the likelihood of success of the Plaintiffs' Class Action if it were to proceed on the merits. It

must be assessed at the time when the parties choose between proceeding with the litigation and settling the matter. Under this factor, the Court must determine whether the proposed Settlement Agreement is an attractive viable alternative to continued litigation (*Lin* at para 39).

2024 FC 225 (CanLII)

[57] Here, the Plaintiffs put forward many risk factors related to proceeding with the litigation that, in their view, limit the likelihood of recovery or success altogether. Notably, the Plaintiffs identify the risk that this Court might determine that the pleadings do not disclose a "sufficient description of the formation of an unlawful conspiracy" and therefore do not disclose a reasonable cause of action. Indeed, citing *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 [*Jensen*], conf'd 2023 FCA 89, leave to appeal to the Supreme Court dismissed, *Chelsea Jensen, et al v Samsung Electronics Co Ltd, et al*, 2024 CanLII 543 (SCC)), the Plaintiffs indicate that, because of this recent development in the jurisprudence, there is now a much higher risk that the Court might find no basis for the alleged conspiracy. They also note that the discontinuance of the US DOJ's investigation and the subsequent absence of guilty pleas render the contested prosecution of this Class Action more difficult from a pragmatic standpoint. Moreover, the Plaintiffs submit that the Defendants asserted that the expert economic evidence they put forward does not provide a workable methodology for establishing harm on a class-wide basis. The Court has not yet tested the expert evidence and there is no way of knowing how a trier of fact would weigh this evidence. Finally, as was the case in *Lin*, the Plaintiffs also identify the risk with having to enforce a judgment against non-Canadian defendants, as is the case for many of the Defendants (*Lin* at para 44).

[58] I accept that there are increased risks with proceeding with litigation at a merits trial, and that there does not appear to be a high likelihood of success in this case. All of these

observations reflect the fact that the Plaintiffs' likelihood of success at the common issues trial, or even at certification, remains uncertain and difficult to predict. I am therefore satisfied that the Settlement Agreement is a reasonable and attractive viable alternative to litigation for the Plaintiffs and the Class, because litigating the Class Action could have led to unforeseen conclusions.

2024 FC 225 (CanLII)

[59] In sum, when the parties decided to conclude the Settlement Agreement, it was uncertain and questionable whether the Plaintiffs' Class Action could be litigated successfully on the merits, given the state of the law, the expert evidence, and the recent jurisprudence of the Court. These factors are still relevant today. This is a positive factor supporting the approval of the Settlement Agreement.

(c) *The expressions of support, and the number and nature of objections*

[60] The deadline for opting out of the Class Action was November 30, 2023. As of November 23, 2023, 12 requests to opt out have been received, all on behalf of individual consumers. Additionally, only one objection was received by the deadline of November 20, 2023. The objector is a direct purchaser customer of several of the Defendants [Objector]. The Objector confirmed purchases of several million dollars from the Defendants, and is therefore a Qualifying Settlement Class Member.

[61] The Objector objected to the quantum of the settlement, suggesting that the overcharge should be 5% of the Defendants' net sales to Canada. They attached an analysis of sales reported by the Defendants to conclude that a 5% overcharge should result in total damages of over $50

million. Moreover, the Objector referred to having records that detailed the existence of a cartel and its practices.

[62] In response, Class Counsel advised the Objector that they agreed the proposed settlement was not ideal or perfect, and that the settlement proceeds were modest, compared to what Class Counsel hoped to achieve when the case was started. Class Counsel further advised the Objector that the 5% overcharge he suggested was not unreasonable. However, Class Counsel advised that the difficulty did not lie in estimating an overcharge; the difficulty was in proving the existence of a conspiracy, and the risk that the EU investigation — now some four years old — would result in no charges, or charges that would not be contrary to Canadian competition laws. As a result, rather than obtaining nothing, a modest settlement was reached with the Defendants, which Class Counsel states is approximately 6.2% of the settlement in the US Direct Purchaser Action, ignoring currency conversion issues.

[63] After discussing the issues with the Objector for approximately 30 minutes, the Objector explained that they now better understood the rationale for the Settlement Agreement and asked that their objection be withdrawn. The Objector was concerned, since they were the only objector to the Settlement Agreement, that the Defendants would treat them unfairly in the future, as the Objector continues to purchase millions of dollars' worth of farmed Atlantic salmon from them. The Objector agreed to a compromise, whereby their concerns and the subsequent discussions would be shared with the Court, without identifying the Objector in any manner whatsoever.

[64] Concerning the opt-outs, the number of opt-outs in this case is small compared to the size of the Class. However, it is noteworthy that the only opt-outs received were all on behalf of

2024 FC 225 (CanLII)

individual consumers. This seems to indicate that, as was mentioned above, the Settlement Agreement provides limited benefits to the consumer Class Members.

[65] Turning to the objections, there is technically none, given the withdrawal of the sole objection voiced by the Objector. However, it remains important to consider that one of the Qualifying Settlement Class Members disagreed with the quantum of the Settlement Agreement.

[66] Here, the few opt-outs and lack of formal objections support a finding that the Settlement Agreement should be approved (*Lin* at para 48). It must be underlined that the Class Members were given an opportunity to voice their concerns and object to the Settlement Agreement, and very few did so. Having considered the objection received — and its withdrawal —, I am of the view that this is not sufficient to conclude that the Settlement Agreement should not be approved. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the Class as a whole (*Condon* at para 69).

(d) ***The degree and nature of communications between Class Counsel and Class Members***

[67] The degree and nature of communications between Class Counsel and Class Members is another important factor to consider for the approval of the Settlement Agreement.

[68] In this case, there is no doubt that Class Counsel and the Plaintiffs have communicated well. With regard to the communications between Class Counsel and Class Members more generally, since the commencement of this Class Action, Class Counsel has maintained and updated a website to publish basic information regarding the case, including a mailing list that allows interested individuals to subscribe for updates.

2024 FC 225 (CanLII)

[69] Turning to the Notice and the Notice Plan, the Notice was materially improved in the October 6 Order, further to the Court's comments regarding the contents of the Notice. The Notice Plan of the Settlement Agreement was robust and comprised two separate phases: direct notice and indirect notice. In the context of the direct notice phase, Class Counsel sent individual notices either through email or direct mail to the following stakeholders:

- the direct purchaser customers of the Defendants, to the extent such information was provided to Class Counsel in accordance with the terms of the Settlement Agreement;
- anyone who had registered with Class Counsel to receive updates on the status of the litigation; and,
- 1,067 companies located in Canada and identified by Data Axle as having corporate locations with 50 or more employees and/or individual locations with 100 or more employees and operating in the following business sectors: fish smoking & curing (manufacturers), fish packers (manufacturers), food-canned (manufacturers), canned & cured fish & seafoods (manufacturers), seafood packers (manufacturers), seafood – wholesale, fish and seafood brokers (wholesalers), food service distributors (wholesalers), foods – carryout, restaurants, caterers, restaurant management, and grocers (retail), but excluding irrelevant categories such as pizza chains, bars or pubs, fast food chains, etc.

[70] Class Counsel subsequently endeavoured to track any returned undeliverable emails or mail and promptly re-mail with a forwarded address.

[71] In the context of the indirect notice, the parties jointly drafted publications sent to nationwide media outlets through publication on Canada Newswire and IntraFish. Class Counsel

2024 FC 225 (CanLII)

also published the Notice on their respective websites and social media, and provided a copy to the following industry associations for distribution to their membership: Canadian Federation of Independent Grocers, Food, Health and Consumer Products of Canada, Restaurants Canada, and Food Processors of Canada. As noted above, as of November 16, 2023 (one day prior to the end of the two-month social media campaign), the number of impressions received from the social media notices was 2,827,272.

2024 FC 225 (CanLII)

[72] Furthermore, unlike in *Lin*, where various important elements had not been disclosed in the notice to class members, such as the quantum of the total settlement amount, the precise list of deductions from the total settlement amount (including class counsel fees or administration expenses) when these impacted the net settlement amount to be received by the class members, the quantum of these various deductions (including the quantum of the class counsel fees), and the percentage of the total settlement amount to be received by class counsel as legal fees, these elements were all disclosed and explained in the Notice approved by the Court in the October 6 Order (*Lin* at para 55).

[73] Consequently, the degree and nature of communications between Class Counsel and Class Members is a positive factor supporting the approval of the Settlement Agreement.

(e) *Amount and nature of pre-trial activities including investigation, assessment of evidence, and discovery*

[74] At the time the Settlement Agreement was executed, very limited investigation, discovery, evidence gathering, and pre-hearing work had been completed by the parties. In fact, as the Plaintiffs noted in their submissions, there has been no assessment of evidence nor discovery whatsoever and they have no knowledge of the merits of the alleged conspiracy claim.

In addition, limited progress was made on the certification motion itself, in light of the settlement discussions between the parties. Consequently, the amount and nature of pre-trial activities necessary to take the case to trial remains high. Furthermore, the Plaintiffs themselves note that, because the US class action cases have fully resolved, this Class Action could not obtain the fruits of the US plaintiffs' investigatory work, which would have involved reviewing and translating hundreds of thousands of foreign-language documents. This is but a small part of the activities that would be required if the trial were to continue until its completion.

2024 FC 225 (CanLII)

[75] Therefore, an important amount of necessary pre-trial work still has to be completed, and the evidence indicates that the parties had a good sense of the extent of this significant remaining pre-trial work. In the circumstances, the parties were properly positioned to understand the amount and nature of pre-trial activities linked to continued litigation at the time of choosing to settle. This factor thus supports the approval of the Settlement Agreement.

(f) ***Future expense and likely duration of litigation***

[76] Courts have recognized that an immediate payment to class members through a settlement agreement is a factor in support of a proposed settlement. In this case, if there is no settlement now, counsel for the parties anticipate that a long time will be needed for a trial on the merits and for potential appeals, with the need for expert evidence.

[77] Given that the proposed Class Action is in its early stages, this factor militates in favour of settlement approval. The proposed Settlement Agreement provides for compensation now, as opposed to years down the road.

[78] Furthermore, the Plaintiffs submit that continuing the litigation would result in substantial delays, prolonging the time before Class Members might receive any compensation, if at all. Assuming the proposed Class Action is certified — a possibility that remains uncertain —, the earliest start date for the common issues trial, based on their estimations, would be August 2026.

2024 FC 225 (CanLII)

[79] I am satisfied that this is another factor militating in favour of finding that the proposed Settlement Agreement is fair and reasonable and in the best interests of the Class, and should be approved.

(g) *Arm's length bargaining between the parties and the absence of collusion during negotiations*

[80] There is a strong presumption of fairness when a proposed class action settlement, which was negotiated at arm's length by experienced counsel for the class, is presented for Court approval (*Lin* at para 60).

[81] The Plaintiffs argue that this Settlement Agreement was the culmination of nearly a year of arm's length discussions between Class Counsel and counsel for the Defendants. Throughout this period, despite being engaged in settlement talks, both parties prepared for the certification motion, thereby maintaining the pressure to resolve the dispute, with both parties facing risks at certification. This Court has held that arm's length settlements negotiated in good faith should "not be too readily rejected" as the parties are best placed to assess the risks and costs associated with complex class litigation, and the rejection of a settlement carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost (*Manuge v Canada*, 2013 FC 341 at para 6 [*Manuge*]).

[82] In sum, I am satisfied that the negotiations leading to the Settlement Agreement were arm's length and adversarial in nature between Class Counsel and counsel for the Defendants, spanning almost a year. This, again, supports the approval of the Settlement Agreement.

2024 FC 225 (CanLII)

(h) *Recommendation and experience of Class Counsel*

[83] Finally, Class Counsel are of the view that the proposed Settlement Agreement is fair, reasonable, and in the best interests of the Class Members. They recommend approval by the Court.

[84] Class Counsel and their firms are experienced, well-regarded plaintiffs' class action counsel. They have a wealth of experience in a substantial number of class actions to draw upon. Class counsel's recommendations are significant and are given substantial weight in the process of approving a class action settlement (*Lin* at para 62; *Condon* at para 76). This is the case here.

(3) Conclusion on the Settlement Agreement

[85] In light of the foregoing, and despite the fact that the proposed Settlement Agreement is far from ideal and provides very limited benefits to the Class Members, several of the factors recognized by the courts militate towards approving the Settlement Agreement.

[86] Ultimately, it is the role of the Court to protect the interests of the Class Members. Here, it is true that the Settlement Agreement does not bear all the hallmarks of an acceptable Settlement Agreement. In fact, it bears some marked resemblance to other settlement agreements that have been rejected by some Canadian courts. Seized with similar terms in settlement agreements, the Ontario Superior Court of Justice in *Quizno's* and *Waldman* determined that the

respective settlement agreements were not fair, reasonable, or in the best interests of the class members.

[87] There are certainly some important flaws in this Settlement Agreement that raise issues regarding the reasonableness of the proposed Settlement Agreement for the Class Members — and particularly the consumer Class Members who represent, numbers wise, the vast majority of the Class Members. Furthermore, the quantum of the Settlement Agreement is not even remotely reflective of the Statement of Claim. It is somehow ironic that the proposed Settlement Agreement in this matter ends up only rewarding, in monetary terms, the subset of Class Members that, arguably, is less likely to require the class action procedural vehicle to access justice and defend their rights. In other words, the only Class Members who stand to directly benefit from the Settlement Agreement will be the largest purchasers of farmed Atlantic salmon, along with Class Counsel and the litigation funder, who have taken on a risk and have a great deal to gain not only in removing that risk but in recovering a significant reward from their contingency fee arrangement (*Lin* at para 24; *Shah* at para 40).

[88] But the fact that a settlement is less than ideal for any particular class member is not a bar to approval for the Class as a whole (*Condon* at para 69). In the end, I am satisfied that I was presented with sufficient evidence to allow me to make an objective, impartial, and independent assessment of the fairness and reasonableness of the proposed Settlement Agreement (*Condon* at para 38). A settlement is never perfect, and the Court needs to keep in mind that a settlement is always the result of a compromise, but that it puts an end to the dispute between the parties and provides certainty and finality. Taking a holistic view of the matter, I am therefore satisfied that, in the context of the entirety of the factors, this Settlement Agreement ought to be

2024 FC 225 (CanLII)

approved, as it represents a fair and reasonable settlement that, in the circumstances, is in the best interests of the Class as a whole.

B. *Class Counsel Fees and other payments*

2024 FC 225 (CanLII)

[89] I now turn to the Class Counsel Fees and other payments sought by the Plaintiffs in their second motion.

[90] Pursuant to the terms of the Retainer Agreement, Class Counsel are entitled to fees equal to 33% of the Settlement Amount. However, partly because of the LAA and the Commission to be paid to the litigation funder, Class Counsel is only requesting a fee of 25% of the Settlement Amount and the reimbursement of its disbursements. This would amount to an award of $1,312,500 for Class Counsel Fees, plus applicable taxes and disbursements, to be paid from the Settlement Amount. Furthermore, there will be no separate fee approval applications in the BC or the Quebec Actions. Counsel in those actions will be paid from the fees awarded in this case.

[91] In light of the impact of the LAA on the fees sought by Class Counsel, I first need to deal with the Plaintiffs' request for approval of the LAA and the payment of the Funding Fees, before addressing the Class Counsel Fees.

(1) The LAA and the Funding Fees

[92] Under the auspices of requesting the Court to approve Class Counsel Fees, the Plaintiffs also request that the Court approve the LAA in relation to the prosecution of this Class Action and order that the amounts due to the litigation funder be paid out of the Settlement Amount. At the outset, I underline that it seems somewhat counterintuitive to request the approval of the

LAA *ex post facto* the conclusion of a Settlement Agreement and at a point where Class Counsel has already entered into the agreement and has effectively drawn funds from the LAA.

[93] More specifically, Class Counsel request the Court's approval to deduct from the Settlement Amount the $500,000 in disbursements already advanced by Claims Funding Australia Pty Ltd [Funder] under the LAA as well as an additional $750,000 for the Commission payable to the Funder. Although the Funder would be entitled to a Commission of $812,500 under the LAA, the Funder has agreed to reduce the amount payable to $750,000.

2024 FC 225 (CanLII)

(a) *The test for the approval of litigation funding agreements*

[94] In *Difederico*, Chief Justice Crampton outlined the general test for the approval of litigation funding agreements, drawing from pan-Canadian jurisprudence as well as case law from this Court in laying out this framework. The crux of the test stems from the principle that a litigation funding agreement "should not be champertous or illegal and […] must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants" (*Difederico* at para 34, citing *Houle v St Jude Medical Inc*, 2017 ONSC 5129 at para 71 [*Houle*]).

[95] Accordingly, Chief Justice Crampton enumerates the following factors that must be considered by the Court in approving a litigation funding agreement (*Difederico* at para 36, citing *Jensen v Samsung*, (Court file no. T-809-18, February 7, 2019) at para 6; *Houle* at paras 73–88; *Flying E Ranche Ltd v Canada (Attorney General)*, 2020 ONSC 8076 at paras 28–34; *JB & M Walker Ltd v TDL Group Corp*, 2019 ONSC 999 at para 6; *Drynan v Bausch Health Companies Inc*, 2020 ONSC 4379 at para 17; *Dugal v Manulife Financial Corporation*, 2011

ONSC 1785 at para 33; *Stanway v Wyeth Canada Inc*, 2013 BCSC 1585 at para 15; *David v Loblaw*, 2018 ONSC 6469 at para 12):

1. Have the basic procedural and evidentiary requirements for the Court's consideration of the litigation funding agreement been satisfied?
2. Is third party funding necessary to facilitate meaningful access to justice?
3. Is the litigation funding agreement champertous?
4. Is the litigation funding agreement fair and reasonable to current and prospective class members as a group?
5. Will the litigation funding agreement make a meaningful contribution to deterring wrongdoing?
6. Does the litigation funding agreement interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?
7. Does the litigation funding agreement protect relevant legal privileges and the confidentiality of the parties' information?
8. Does the litigation funding agreement protect the legitimate interests of the defendants?

[96] A negative response to any of the questions above can be fatal to the approval of a litigation funding agreement (*Difederico* at para 37; *Eaton v Teva Canada Limited*, 2021 FC 968 at para 21 [*Eaton*]). As such, each criteria must be assessed independently. At the end of the day, the Court must be satisfied that "it is in the best interest of justice to approve the [litigation funding agreement]" (*Difederico* at para 35).

[97] As Chief Justice Crampton also pointed out, and at the risk of repeating myself, it is important to underline that the Court is vested with a general supervisory role in class

2024 FC 225 (CanLII)

proceedings that requires it to be mindful of the best interests of class members as a whole (*Difederico* at para 29, citing *Frame v Riddle*, 2018 FCA 204 at para 24 and *Ottawa v McLean*, 2019 FCA 309 at para 13). This includes the best interests of prospective class members, whose interests may not be entirely aligned with those of the representative plaintiffs, class counsel, or third parties who are prepared to fund all or part of the proceeding (*Houle v St Jude Medical Inc*, 2018 ONSC 6352 at paras 22, 41). Accordingly, litigation funding agreements entered into in relation to proposed class proceedings before the Court must be approved by the Court, even when they have been executed by the representative plaintiffs after having received the advice of independent legal counsel (*Difederico* at para 29; *Houle* at paras 63–70).

2024 FC 225 (CanLII)

(b) ***Application to this case***

[98] Turning to the case at bar, I find that the LAA fails to meet two crucial components of the test articulated in *Difederico*. I accept that the LAA satisfies the requirements of some factors listed above. This is the case for the following: 1) the fact that the LAA does not interfere with the solicitor-client relationship, Class Counsel’s duty to the Class Members, or the carriage of the proceeding; 2) the protection of relevant legal privileges and of the confidentiality of the parties’ information; and 3) the protection of the legitimate interests of the Defendants.

[99] However, I conclude that the LAA fails to meet the basic procedural requirements for its approval by the Court, and that it is neither fair nor reasonable to current and prospective Class Members since it offers highly disproportionate benefits to the Funder. This is amply sufficient to deny the approval of the LAA and to refuse that amounts owed to the Funder be deducted from the Settlement Amount.

(i) The basic procedural and evidentiary requirements for the Court's consideration of the LAA are not satisfied

[100] The basic procedural and evidentiary requirements for the approval of a litigation funding agreement require that: a) the plaintiffs have received independent legal advice prior to entering into the funding agreement; b) the retainer and the funding agreement have been disclosed to the Court; c) a prompt request for approval of the funding agreement has been made to the Court; d) reasonable notice has been provided to the parties; e) the retainer and funding agreement have been disclosed to the Defendants with appropriate redactions; and f) evidence of the relevant background circumstances has been proffered (*Difederico* at para 38; *Houle* at para 74).

[101] Here, the LAA misses the mark on most of those fronts. With respect to a), a typical litigation funding agreement is made between a representative plaintiff and the litigation funder. By contrast, this LAA was concluded between Class Counsel and the Funder. Therefore, no independent legal advice was obtained.

[102] With respect to b) and c), it is clear that the LAA was not promptly disclosed to the Court. Class Counsel erroneously believed that because the contract was between the Funder and Class Counsel, Court approval was not required in the same way that Court approval would not be required if Class Counsel obtained a bank loan or line of credit to fund the case. However, Class Counsel acknowledge that the Court's approval is now required, since Class Counsel seek to deduct the amounts owing pursuant to the LAA from the proposed Settlement Amount.

[103] Regarding the promptness of the disclosure of the LAA, one cannot help but remark that the approval of this LAA — from which Class Counsel has already drawn funds — has come to

2024 FC 225 (CanLII)

the Court at the eleventh hour. Many words could describe this timeline; however, “prompt” is certainly not one of them.

[104] In their submissions, Class Counsel referred to Justice Perell’s qualification of “prompt disclosure” in *Fehr v Sun Life Assurance Company of Canada*, 2012 ONSC 2715 [*Fehr*], where it was stated that “the court’s jurisdiction over the management and administration of proposed and certified class actions entails that a third party funding agreement must be promptly disclosed to the court and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent and it must be reviewed in order to ensure that there are no abuses or interference with the administration of justice” [emphasis added] (*Fehr* at para 89). Here, it is undisputed that the LAA has not only come into force without the Court’s approval, but the Court’s approval is only being sought at the very last moment possible.

[105] In sum, the first step of the test set out in *Difederico* for the approval of litigation funding agreements is clearly not met. Class Counsel have not satisfied the basic procedural and evidentiary requirements for the Court’s consideration of the LAA. The failure to satisfy the first step of the test is a strong factor weighing against approving the LAA, and is likely fatal, in and of itself, to its approval.

(ii) The LAA is unfair and unreasonable to current and prospective Class Members

[106] But there is much more. In my view, the commission regime found in the LAA and agreed to by Class Counsel is unfair and unreasonable when juxtaposed with the Settlement Amount, the standard profit sharing regime found in the Ontario Class Proceedings Fund

2024 FC 225 (CanLII)

[Ontario CP Fund] — which caps the return on advanced funds to 10% of total proceeds —, and legal precedents having approved litigation funding agreements. Furthermore, the terms and conditions contained in the LAA yield disproportionate returns to the Funder.

2024 FC 225 (CanLII)

[107] The Plaintiffs submit that, while Class Counsel may be faulted for not having sought pre-approval of the LAA, an unintended benefit is that Class Counsel are able to make modifications to their fee arrangement, knowing the actual amount of settlement proceeds, with a view to blunting the impact of the Funder's Commission on the Class Members. In this respect, Class Counsel submit that they have reduced their requested fees by $420,000 (from 33% to 25% of the Settlement Amount), and are assuming responsibility for administering the distribution of the Settlement Funds, rather than incurring the expense of a third party administrator, involving estimated fees of approximately $100,000. According to the Plaintiffs, taking into account these $520,000 "offsets" results in a total net commission to the Funder of approximately $230,000, which represents approximately 4.3% of the total Settlement Amount.

[108] I am not convinced by the Plaintiffs' arguments.

[109] In order to determine whether the Court can approve the LAA, the agreement has to be assessed as it reads, before the indirect adjustment made to it by Class Counsel through the reduction of Class Counsel Fees. The determination of what is a fair and reasonable litigation funding agreement is highly contextual (*Ingarra* at para 31; *Difederico* at para 57, citing *Houle* at para 81), and the LAA presented to the Court by the Plaintiffs fails to meet any of the benchmarks laid out in the jurisprudence.

2024 FC 225 (CanLII)

[110] Leaving aside the “offsets” referred to above, at the end of the day, the Funder stands to receive 14.3% of the Settlement Amount for its contemplated Commission of $750,000, and nearly a quarter of the Settlement Amount for the combination of the reimbursement of its advanced funds and its Commission. These percentages are high when contrasted with percentages approved in other litigation funding agreement cases. For example, the Ontario CP Fund proceeds distribution matrix provides for 10% of the recovery to be given to the litigation funder in most scenarios. In fact, in *Difederico* and *Eaton*, the Ontario CP Fund was considered for benchmarking purposes. In *Difederico*, the litigation funder would not receive more than the 10% levy generally obtained by the Ontario CP Fund in 90% of possible scenarios going from a complete victory for the plaintiffs (in that case, a recovery of $12 billion) to a complete failure of the class proceeding (i.e., a zero recovery) (*Difederico* at para 61). Similarly, in *Eaton*, the funding fees in that case were equal to 10% of the claim proceeds and were indeed within the range of similar fees that have been approved by Canadian courts (*Eaton* at para 30). The funding fees were well below 10% of total proceeds for more than 80% of potential outcomes in that proposed class proceeding, ranging between complete success (a recovery of $2.75 billion) and complete failure (a zero recovery).

[111] In the current case, the situation is materially different. This is not a case where the terms of the LAA are more favourable to the Class Members than the terms that would be applicable should the proceeding be funded by the Ontario CP Fund (*Eaton* at para 41). It is the reverse. Given that the Funder’s recovery in this case exceeds what has been considered fair and reasonable in *Difederico* and *Eaton*, this factors negatively towards the approval of the LAA.

[112] The LAA also raises major concerns from two other perspectives. The jurisprudence has established a “presumptive range of validity” of 30% to 35% of the recovery proceeds, for a combined return to the litigation funder and class counsel (*Ingarra* at para 41; *Difederico* at para 65; *Eaton* at para 44). In both *Difederico* and *Eaton*, the proposed litigation funding agreement indeed fell well within that presumptive range of validity. In the current case, at $2,062,500 (namely, $1,312,500 for the reduced Class Counsel Fees and $750,000 for the Funder’s Commission), the contemplated combined return of the Funder and Class Counsel would exceed 39% of the Settlement Amount, over the upper limit of this presumptive range of validity. This again defies the rules of fairness and reasonableness to the Class Members.

[113] Finally, another metric to be considered is the actual return to the Funder for its financing support. The contemplated $750,000 Commission for the Funder on its funding of $500,000 for disbursements would translate into a return on investment of 150% over a maximum period of about two years (based on the information on the record, it would appear that the $500,000 was not advanced before the second half of 2021 by the Funder, to cover expert fees incurred by the Plaintiffs).

[114] This, in my view, would grant an unreasonable, exorbitant, and highly questionable rate of return to the Funder. I pause to underscore that, contrary to typical litigation funding agreements, this LAA does not modulate the rate of return to the Funder in relation to the actual proceeds resulting from the Class Action. It instead provides for a Commission expressed as a multiplier of the amounts advanced, which increases with the duration of the loan. This reflects the pure financing nature of the LAA. In other words, the consideration to be paid to the Funder for providing disbursements funding is a rate of return entirely independent from the actual

2024 FC 225 (CanLII)

results of the Class Action. Ironically, in their submissions to the Court, Class Counsel stated that they erroneously believed that the LAA was not subject to the Court's approval in the same way that Court approval would not be required if Class Counsel obtained a bank loan or line of credit to fund the case. In light of the rate of return to be received by the Funder (namely, an annual rate of some 75%), had the LAA funding arrangement been a financing vehicle offered in the form of a bank loan with interest, it could have been considered an illegal rate of interest under the *Criminal Code*, RSC 1985, c C-46, which prohibits annual rates of interest exceeding 60%. Put differently, the terms of the LAA, which the Plaintiffs ask the Court to approve, bear many attributes of what could otherwise be qualified as a predatory lending practice or a loan shark agreement. The Court cannot accept that.

2024 FC 225 (CanLII)

[115] For all forms of financing or investment, the rate of return sought by an investor or a lender is a reflection of the expected level of risk and the ability of the borrowers to meet their financial obligations in time and in full. It may be that, for a litigation funder, the risk undertaken in financing certain class action disbursements is so high and the risk of default so great that it requires exorbitant or predatory rates of return to justify advancing the money. But, if the risk of a contemplated class action not being successful is so high that litigation funding can only be available at a cost bordering extortion, approving such litigation funding agreements certainly does not serve the interests of justice.

[116] In light of the foregoing, I conclude that the LAA cannot be considered fair nor reasonable to current and prospective Class Members and that the Funder would be significantly overcompensated for assuming the risk of financing the proposed class proceeding. In sum, no

matter what metric is used to satisfy the fair and reasonable test, the proposed LAA does not meet any.

(iii) The LAA is champertous

[117] In light of the foregoing, I also must conclude that the LAA is champertous.

[118] In *Difederico*, the Court determined that the assessment of this factor should address two considerations. The first is whether there is any evidence of any actual improper motive, as opposed to one that may be deemed to be improper based on the quantum of the return contemplated by the litigation funding agreement. The second consideration is whether the fees set forth in the litigation funding agreement exceed the outer limit of what might possibly be considered reasonable, fair, or proportionate (*Difederico* at paras 54–55; *Eaton* at paras 29–30). Accordingly, this second consideration overlaps with the requirement that the LAA be fair and reasonable to current and prospective Class Members.

[119] I acknowledge that there is no evidence of any improper motive by the Funder in this case. The LAA appears to be purely of a financial nature. The mere fact that a funder may unreasonably profit from a funding agreement is not sufficient, in and of itself, to support a finding of improper motive or officious meddling (*McIntyre Estate v Ontario (Attorney General)* (2002), 61 OR (3d) 257 (Ont CA) at paras 26–28).

[120] However, the same cannot be said about the reasonableness, fairness, and proportionality of the profits to be received by the Funder in the overall distribution of proceeds from the Settlement Agreement. As discussed in the previous section, there is no doubt that the LAA in the present matter is therefore champertous.

2024 FC 225 (CanLII)

(iv) The LAA is not necessary to facilitate meaningful access to justice and makes no meaningful contribution to deterring wrongdoing

[121] I do not dispute that, in certain circumstances, litigation funding agreements can facilitate access to justice or assist in deterring wrongdoing by allowing plaintiffs to advance their claims against alleged wrongdoers. For example, the Court noted in *Difederico* that, to the extent that class actions are successful, either by obtaining a favourable judgment or award or by reaching a settlement that reflects a sound claim, other firms could likely be deterred from engaging in behaviour similar to the alleged anticompetitive conduct (*Difederico* at para 79).

[122] However, in this case, I find no evidence that the LAA was necessary to give access to justice to the Plaintiffs nor that the actual Settlement Agreement contains any indication of a deterrent effect on the Defendants. Consequently, I am not persuaded that these two elements support the approval of the LAA.

(c) *Conclusion on the LAA*

[123] The LAA has failed to satisfy the basic procedural and evidentiary requirements for the Court's consideration. Notably, the LAA should have been brought to the Court's attention at the earliest conjecture, rather than at the last minute, after the agreement with the Funder has been concluded, and after Class Counsel has already drawn funds from the LAA. The LAA is also manifestly unfair and unreasonable to current and prospective Class Members, due to the Funder's recovery being significantly more than what has been deemed reasonable by this Court for litigation funding agreements, and largely exceeding any acceptable rate of return.

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

[124] I must once again underline that Class Counsel are asking the Court not only to approve the LAA but also to deduct the Funder Fees from the Settlement Amount ultimately available to the Class Members. It would be unfair and unreasonable to ask the Class Members to bear the burden of such an unreasonable funding agreement. I would further add that, in the Retainer Agreement, no mention was made of fees or commission to be paid to a litigation funder in the fee calculation example used to illustrate the effect of the contingency fee payment on the proceeds actually left to the Class Members. True, there was a provision in the Retainer Agreement (section 8) alluding to the possibility of a third-party litigation funder who "might be entitled to a percentage of recovery obtained on behalf of the Class, and/or a payment of interest calculated on the basis on the amount of funds advanced," with no more details. There was also, in the Notice approved in the October 6 Order, a reference to the actual monetary amount to be paid to the Funder. But nowhere was it explained to the Class Members that they were paying to the Funder a rate of return of about 150% over two years for its funding of disbursements, regardless of the outcome of the Class Action.

[125] For those reasons, I will not approve the LAA nor order that amounts owed to the Funder under that agreement be paid out of the Settlement Amount. This refusal will be a factor to take into account in the assessment of the Class Counsel Fees, which I will now discuss.

(2) Class Counsel Fees

(a) *The test for the approval of class counsel fees*

[126] Rule 334.4 provides that all payments to counsel flowing from a class proceeding must be approved by the Court. The overarching test applicable to class counsel fees is that they have

to be “fair and reasonable in all of the circumstances” (*Lin* at para 70; *Condon* at para 81; *Manuge* at para 28).

[127] The Court has established a non-exhaustive list of factors to assist in the determination of whether the class counsel fees are fair and reasonable (*Moushoom* at para 83; *Lin* at para 71; *Wenham v Canada (Attorney General)*, 2020 FC 590 [*Wenham 2*] at para 33; *McLean v Canada*, 2019 FC 1077 [*McLean 2*] at para 25; *McCrea v Canada*, 2019 FC 122 at para 98; *Condon* at para 82; *Manuge* at para 28). Again, these factors are similar to the factors retained by the courts across Canada. They include the following elements:

1. The risk undertaken by class counsel;
2. The results achieved;
3. The time and effort expended by class counsel;
4. The complexity and difficulty of the matter;
5. The degree of responsibility assumed by class counsel;
6. The fees in similar cases;
7. The expectations of the class;
8. The experience and expertise of class counsel;
9. The ability of the class to pay; and
10. The importance of the litigation to the plaintiff.

[128] In situations where, as is the case here, class counsel benefit from litigation funding support, such funding is an additional element that, in my view, the Court needs to consider in determining whether the class counsel fees are fair and reasonable, as such litigation funding

2024 FC 225 (CanLII)

support obviously alleviates the risk undertaken by class counsel, and typically impacts the residual amount available to class members.

[129] As is the case for the factors governing the approval of settlement agreements, these factors are non-exhaustive, and their weight will vary according to the particular circumstances of each class action (*Lin* at para 72). However, the risk that class counsel undertook in conducting the litigation and the degree of success or results achieved for the class members through the proposed settlement remain the two critical factors in assessing the fairness and reasonableness of a contingency fee request by class counsel (*Moushoom* at para 84; *Condon* at para 83). The risk undertaken by class counsel includes the risk of non-payment but also the risk of facing a contentious case and a difficult opposing party (*Wenham 2* at para 34).

[130] It has long been recognized by the courts that, for class proceedings legislation to achieve its policy goals, class counsel must be well rewarded for their efforts, and the contingency agreements they negotiate with plaintiffs should generally be respected. The percentage-based fee contained in a retainer agreement is presumed to be fair and should only be rebutted or reduced "in clear cases based on principled reasons" (*Condon* at para 85, citing *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 8).

[131] That being said, it is important to underline, once again, the Court's role to protect the class, and there may be circumstances where the Court has to substitute its view for that of class counsel, in the interest of the class. The Court must consider all the relevant factors and then ask, as a matter of judgment, whether the class counsel fees fixed by the proposed agreement or asked by counsel are fair and reasonable and maintain the integrity of the profession (*Shah* at para 46). This is especially true where, as in this case, the amount of class counsel fees comes out of the

2024 FC 225 (CanLII)

global settlement amount available to class members. Here, it is clear that the net settlement funds available for distribution to Class Members represents the difference between the Settlement Amount and the sum of Administration Expenses, Class Counsel Fees, Funder Fees, Honorarium, and applicable taxes.

2024 FC 225 (CanLII)

[132] In the same vein, where the fee arrangement with class counsel is part of the settlement agreement, the Court must decide on the fairness and reasonableness of the proposed fee arrangements in light of what class counsel has actually accomplished for the benefit of the class members. The class counsel fees must not leave the impression or bring about conditions of settlement that appear to be in the interests of the lawyers, but not in the best interests of the class members as a whole. Stated differently, there has to be some proportionality between the fees awarded to class counsel and the degree of success obtained for the class members (*Lin* at para 75).

(b) *Application to this case*

(i) Risk undertaken by Class Counsel

[133] The risk factor refers to the risk undertaken by class counsel when the class proceeding is commenced. It is measured from the commencement of the action, not with the benefit of hindsight when the result looks inevitable. This risk includes all of the risks facing class counsel, such as the liability risk, recovery risk, and the risk that the action will not be certified as a class action or will not succeed on the merits (*Condon* at para 83). The litigation risk assumed by class counsel is a function of the probability of success, the complexity of the proceedings, and the time and resources expended to pursue the litigation (*Lin* at para 77).

[134] These risks were addressed above in the likelihood of recovery subsection when dealing with the approval of the Settlement Agreement. Notably, there were risks involved with whether or not the case would be certified in light of the *Jensen* decision. Furthermore, there were risks arising from the termination of the US DOJ's investigation.

[135] Unlike in *Lin*, however, Class Counsel here relied on the LAA to cover some of their disbursements. Therefore, they did not bear the risks entirely themselves. This will be discussed in more detail below. Despite the LAA, there were still significant risks taken in this case, which is a positive factor supporting the approval of the Class Counsel Fees.

(ii) Results achieved

[136] It is worth noting that the success or result achieved in any class action settlement is not an absolute figure but rather a relative one. The assessment of the results achieved asks what was the client's claim "worth" and what did they get for it; in asking this question, courts must have regard for the complexity and difficulty of the case (*Ainsley v Afexa Life Sciences Inc*, 2010 ONSC 4294 at para 40). In other words, the success or result achieved in any class action settlement needs to be assessed in relation to what the anticipated full recovery of the damages alleged to have been suffered by the class members in the class action was. This is an important element assisting the Court in its effort to measure the fairness and reasonableness of the expected compensation brought about to class counsel by a settlement agreement. Broadly speaking, the Court always needs to know what would have been the estimated full recovery of a class action in order to assess the recovery rate of a proposed settlement and to figure out the relative success achieved by the settlement. In this case, the benchmark available to the Court is the $1 billion in damages referred to by the Plaintiffs in the Statement of Claim. The Settlement

2024 FC 225 (CanLII)

Amount of $5,250,000 thus represents an abysmally low recovery rate for the Class Members, and what is ultimately contemplated for the Class Members themselves (namely, a little more than $2,360,000) is an even lower one.

[137] The results achieved are therefore more than modest, and lie at the low end of the spectrum for Class Members. In fact, the parties who will benefit the most from the results achieved are Class Counsel, the Funder, and the largest Qualifying Settlement Class Members. The smaller Qualifying Settlement Class Members stand to gain very little from this agreement given the *pro rata* distribution protocol, and the consumer Class Members receive no direct material benefit — with the exception of the negligible *cy-près* contribution of $250,000.

[138] The results achieved are well less than exemplary. Class Counsel acknowledges as much in their submissions, where they state that "the settlement is not ideal or perfect". However, they submit that "it represents a reasonable compromise to achieve a reasonable level of compensation to direct purchasers, compared to nothing". This conclusion is questionable. A success in class action proceedings cannot boil down to achieving anything better than nothing.

[139] In light of the foregoing, the results achieved in this Settlement Agreement are nowhere near a level at which they would be a positive factor for the approval of Class Counsel Fees. In fact, the results achieved are quite the contrary, and represent a negative factor militating against the approval of Class Counsel Fees. When the results achieved in a given case are so low, it calls into question whether class counsel should be entitled to a full recovery of their requested legal fees.

2024 FC 225 (CanLII)

(iii) The impact of litigation funding fees

[140] In my view, it goes without saying that the existence of third-party funding is an additional relevant factor in analyzing the risks incurred and the fees requested by class counsel, and in determining whether the overall amount is fair, reasonable, and proportionate in any given case (*Baroch v Canada Cartage*, 2021 ONSC 7376 at paras 31–32 [*Baroch*]; *MacDonald at al v BMO Trust Company et al*, 2021 ONSC 3726 at paras 43–44 [*BMO Trust*]). In other words, litigation funding and class counsel fees are not separate and independent compartments, since the financial support obtained from litigation funding agreements lowers the degree of risk assumed by class counsel in taking up class actions on a contingency basis and in providing representation.

[141] It is not a question of penalizing class counsel for seeking out the contribution of litigation funders. But third party funding is certainly a factor that comes into the equation when assessing the reasonableness of class counsel fees. More specifically, the courts need to look at the combined impact of both class counsel fees and litigation funding fees, and it is not for class members to absorb those additional financing costs — which contribute to lower the risk faced by class counsel — when the overall amount of counsel fees and funding fees exceed certain limits.

[142] In their further submissions, the Plaintiffs acknowledged that courts in Ontario have determined that "it should be "self-evident … that third-party funding should be a relevant factor in the 'risks incurred' analysis'" (*Baroch* at para 31, citing *BMO Trust*). Indeed, as the court noted in that case, the amended *Ontario Class Proceedings Act*, SO 1992, c 6 [OCPA] now

2024 FC 225 (CanLII)

expressly requires the consideration of funding arrangements that affected the degree of risk assumed in providing representation (OCPA at subsection 32(2.2)).

[143] The LAA in this case definitely affected the level of risk undertaken by Class Counsel. However, since I do not approve the LAA, this will not be a negative factor in determining the quantum of Class Counsel Fees.

(iv) Time and effort expended by class counsel

[144] The time expended by class counsel can also be a helpful factor in the approval of class counsel fees, even in cases where the class counsel fees are contingency fees.

[145] Over the years, the courts have expressed a preference for utilizing percentage-based fees in class actions (see, for example, *Mancinelli v Royal Bank of Canada*, 2017 ONSC 2324 at para 52). A percentage-based fee is paid based on a percentage of the amounts recovered and should be awarded at a level that appropriately incentivizes and rewards class counsel (*Condon* at para 84). Contingency fees help to promote access to justice in that they allow class counsel, rather than the plaintiff, to finance the litigation. Contingency fees also promote judicial economy, encourage efficiency in the litigation, discourage unnecessary work that might otherwise be done simply to increase the lawyers' fees based on time incurred, properly emphasize the quality of the representation and the results achieved, ensure that counsel are not penalized for efficiency, and reflect the considerable costs and risks undertaken by class counsel (*Condon* at paras 90–91). This Court and courts across Canada have recognized that the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases, and that class counsel's compensation consequently must reflect this reality (*Condon* at paras 90–91).

2024 FC 225 (CanLII)

[146] However, situations where the class counsel fees are not commensurate with the gains of class members or are not aligned with the terms of the underlying retainer agreement with the representative plaintiff qualify as “principled reasons” where the courts may be justified in revisiting a percentage-based contingency fee agreement (*Lin* at para 95). Importantly, the proposed class counsel fees need to be considered in relation to the actual result achieved for the class members, especially when the retainer agreement provides for the possibility of a range or margin of appreciation for the effective percentage-based fees to be paid.

2024 FC 225 (CanLII)

[147] I pause to make one remark. While the courts have acknowledged the need to recognize entrepreneurial lawyers who are willing to take some risks in class actin proceedings and deserve to be rewarded accordingly, risk-taking has its limits. A distinction needs to be made between situations where taking measured risks reflects an entrepreneurial spirit and others where the chances of success are so low and so remote, and the risks so high, that a proposed class action falls into speculative territory. The class action regime was not created to reward the latter.

[148] Here, the evidence makes it clear that Class Counsel have done extensive work in this matter. According to the affidavits filed, as of November 17, 2023, lawyers, students, and clerks from Class Counsel had collectively devoted 2,296.88 hours to this matter, with a fee value of $1,297,421. Consequently, I am satisfied that the time and effort expended by Class Counsel is a positive factor supporting the approval of Class Counsel Fees.

(v) Complexity and difficulty of the matter

[149] For the reasons discussed above, this Class Action proceeding raised complex and difficult issues surrounding Part VI of the Competition Act that multiple major global

competition law regulators have been investigating. This is a positive factor for the approval of Class Counsel Fees.

(vi) Degree of responsibility assumed by class counsel

[150] Class Counsel, consisting of three firms, took on a lot of the responsibility for the management of this Class Action, and they are also assuming the responsibility for administering the disbursement protocol. However, unlike in *Lin*, these firms were doing so with the backing of the LAA. Despite the LAA funding, I am satisfied that Class Counsel still did significant work managing the file. As such, this is a positive factor in the assessment of Class Counsel Fees.

(vii) Fees in similar cases

[151] Looking at the issue of fees in comparable cases, the reduced 25% contingency fee seems to fit in to the mid-to-high range of fees sought by class counsel. Indeed, in *Lin*, this Court reified a finding of the British Columbia Supreme Court, that the typical range for contingency fees has been recently described as being "15% to 33% of the award or settlement" in British Columbia (*Lin* at para 102, citing *Kett v Kobe Steel, Ltd*, 2020 BCSC 1977 at para 54 [*Kobe Steel*]). Furthermore, the Court pointed to multiple instances where this Court has determined that a 30% contingency fee was within the "top range" of what might be reasonable (*Lin* at para 102, citing *Condon* at paras 92, 111). I add that, in the settlement of both the US Direct Purchaser Action and the US Indirect Purchaser Action, class counsel received a 30% contingency fee.

[152] The issue to be determined is whether the requested Class Counsel Fees are fair and reasonable in the circumstances (*Lin* at para 103). In this case, the Settlement Agreement brings about a very limited success for the Class Members, and Class Counsel themselves

2024 FC 225 (CanLII)

acknowledged the “modest” outcome when they reduced their contingency from 33% to 25% (taking into account the Funder Fees). Given the quantum is so low that the majority of Class Members will not be able to access the Settlement Fund — save for the *Cy-près* Payment —, it appears difficult to justify a high percentage-based contingency fee which would reside at the high end of the spectrum observed in comparable cases.

[153] Furthermore, based on what is being presented to the Court, once Class Counsel have recuperated their fees and disbursements, and the LAA Funder is paid, there would be less than half of the Settlement Amount left for the Class Members, more specifically 45%. In those circumstances, it does not seem reasonable to award such a large proportion of the Settlement Amount to Class Counsel. Seeking a contingency fee in the mid-to-high range of typical fee awards is therefore a negative factor in assessing the fairness and reasonableness of the Class Counsel Fees.

(viii) Expectations of the class

[154] Another factor to consider is the expectation of the Class Members as to the amount of counsel fees (*Lin* at para 104). As pointed out by the Plaintiffs, the Notice included the precise amount of fees requested by counsel and the amounts due. The Notices were directly distributed by email or letter mail to all eligible direct purchaser Class Members, and indirectly distributed to all indirect Class Members. Class Counsel further note that there were no objections to the fees claimed or to the amounts due to the litigation Funder. In light of the foregoing, this is a positive factor in assessing the Class Counsel Fees.

2024 FC 225 (CanLII)

[155] As was stated in *Lin*, in situations where the likely or expected recovery to class members is limited and resides at the low end of the spectrum, notices to class members should clearly set out the total amount of the class counsel fees and the percentage that class counsel are seeking to receive from a settlement agreement, so that class members can have a full understanding of the agreement presented to them for approval. Communications between class counsel and class members need to be transparent, so that class members can be in a position to make a well-informed decision on their approval and support of both the proposed settlement agreement and class counsel fees. Especially in situations where, as here, Class Counsel Fees eat up an important portion of the net Settlement Funds available to Class Members. This was the case here and, even though they were well informed of the legal fees to be paid, Class Members did not voice objections to the proposed Class Counsel Fees. This is a positive factor in assessing the fairness and reasonableness of the Class Counsel Fees.

[156] There is, however, one important caveat, again related to the LAA and the Funder Fees. As discussed above, I find no compelling evidence in this case that the Class Members were fully informed of the terms and conditions agreed to by Class Counsel in the LAA and underlying the payment of the Funder Fees. I am therefore not persuaded that, in the circumstances, the Class Members can be deemed to have expected that the Funder Fees and the "payment of interest" referred to in the Retainer Agreement could be of the excessive magnitude agreed to by Class Counsel in the LAA to obtain disbursements funding. This is a negative factor in the determination of the overall fairness and reasonableness of the Class Counsel Fees.

2024 FC 225 (CanLII)

(ix) Experience and expertise of class counsel

[157] There is no doubt as to Class Counsel's standing in the class action legal community and in the areas of law relevant to this litigation. Evidence was provided that Class Counsel have practised in class actions for many years. They have a breadth of experience in litigating class actions and have collectively negotiated settlements of several class actions. This is, of course, a positive factor favouring the approval of the Class Counsel Fees.

(x) Ability of the class to pay

[158] While it is obvious that the consumer Class Members did not and do not have the ability to pay for the services of Class Counsel, the same may not be as clear for many of the Qualifying Settlement Class Members — who are the only members of the Class that stand to receive any direct financial benefit from the Settlement Agreement. This is therefore a neutral factor in the Court's assessment of the Class Counsel Fees.

(xi) Importance of the litigation to the plaintiff

[159] Finally, as was the case in *Lin*, this Class Action is of limited importance to the Plaintiffs, Mr. Sills and Ms. Breckon, and is therefore a neutral factor in the determination of the fairness and reasonableness of Class Counsel Fees. This case is of no outstanding importance to the Class Members, in the sense that it does not involve human rights violations or personal injury. It has an impact for consumer protection and the deterrence of potential anti-competitive behaviour, but nothing allows the Court to conclude that this matter would qualify as being a "litigation of importance" (*Lin* at para 110).

2024 FC 225 (CanLII)

(c) *Conclusion on the Class Counsel Fees*

[160] Looking at all the above-mentioned factors cumulatively, I have to determine whether the Class Counsel Fees requested to be approved in this case can be qualified as fair and reasonable in the circumstances. Two important points must be emphasized: the very modest results achieved for the Class Members — particularly the consumer Class Members —, and the substantial portion of the Settlement Amount earmarked for the Funder on top of Class Counsel Fees, leaving very little for the Class Members under the current proposal. Indeed, if the Court were to approve the distribution presented by the Plaintiffs, the Class Members would end up receiving a meagre 45% of the Settlement Amount. Ultimately, with Class Counsel's current proposal, more than half of the Settlement Amount would be gone before any Class Member even has an opportunity to access the Settlement Fund. Put differently, while the success achieved for Class Members is very modest at best, the fees and expenses effectively requested by Class Counsel are anything but modest.

[161] This is unjustifiable. In my view, what is being presented to the Court in terms of counsel fee approval does not fit the definition of being "fair and reasonable in the circumstances". By comparison, in *Lin*, the Court ultimately approved a total amount of expenses deducted from the settlement proceeds that still left 60% of the recovery proceeds for the class members.

[162] As the Court noted in *Lin*, there is no magic formula to determine what should be the appropriate percentage-based fees of class counsel in a class action settlement (*Lin* at para 115). It is a matter of judgment, based on the particular circumstances of any given case and the interests of the class (*Lin* at para 115). Here, Class Counsel did not bear the risk of this Class Action fully, having relied on the LAA. However, Class Counsel entered into an LAA that the

2024 FC 225 (CanLII)

Court had not approved, and does not approve, and which contains terms and conditions clearly detrimental to the interests of Class Members. Class Counsel took the risk of agreeing to this LAA without the Court's approval. It was a choice made by experienced counsel, and they have to bear the burden of that risk. Furthermore, the results of their work were incredibly modest, with most Class Members not gaining anything from the Settlement Fund. Finally, the 25% to 33% contingency fee contemplated by Class Counsel remains within the mid-to-top range of most retainer fees, despite the fact that Class Counsel did not deliver a mid-to-top range Settlement Agreement.

2024 FC 225 (CanLII)

[163] These are all important "principled reasons" for revisiting the Class Counsel Fees being claimed. As was explained in *Lin*, at paragraph 116,

> As the British Columbia Supreme Court recently stated in *Kobe Steel*, "[t]he integrity of the profession is a consideration when approving legal fees in the class action context" (*Kobe Steel* at para 58, referring to *Plimmer v Google, Inc*, 2013 BCSC 681 and *Endean v The Canadian Red Cross Society*; *Mitchell v CRCS*, 2000 BCSC 971, aff'd 2000 BCCA 638, leave to appeal dismissed, [2001] SCCA No 27 [QL]). Sometimes, substantial rewards to class counsel can create the wrong impression or perception that the ultimate beneficiaries of class actions are class counsel, rather than the class members. Where, as here, the settlement amount likely or expected to be received by class members is minimal – and in fact abysmal when compared to the legal fees claimed by Class Counsel –, there could be such a perception. In such cases, it is the Court's duty to attempt to rectify this perception and to ensure that counsel do not leave the impression that the class action process serves "to obtain a result in which [class counsel] are the only or major beneficiaries" (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2018 BCSC 2091 at para 53). As the court reminded in *Kobe Steel*, "[t]he ultimate purpose of the class action vehicle is to benefit the class, not their lawyers"
>
> [Emphasis added.]

[164] That being said, I am also mindful of the fact that, since I do not approve the LAA, Class Counsel will have to pay the amount of $750,000 currently owed to the Funder out of their own pockets. I also note that Class Counsel have incurred actual fees of nearly $1,300,000 in this Class Action, and that they have paid substantial disbursements. Consequently, and taking all these factors into consideration, I am of the view that Class Counsel Fees of $1,575,000 representing 30% of the Settlement Amount, plus applicable taxes, are a fair and reasonable amount to be awarded to Class Counsel in the circumstances. To that must be added disbursements in the total amount of $644,231.64 (representing $144,231.64 plus the $500,000 payment made by the Funder), inclusive of taxes. I also agree to add an amount of $75,000 to Class Counsel Fees to cover in part the fees to be incurred for the distribution of the Settlement Funds that Class Counsel have accepted to absorb. This will mean that a total of approximately $2,741,269 (namely, $5,250,000 minus about $1,864,500 for Class Counsel Fees inclusive of taxes and $644,231.64 for disbursements inclusive of taxes) will be left for distribution to Class Members, representing a more acceptable proportion of 52.2% of the Settlement Amount.

[165] I underline that, at $1,575,000 plus $75,000, the Class Counsel Fees exceed the actual amount of time spent by class counsel in litigating this Class Action so far, based on the evidence presented by the Plaintiffs in their motion materials. This represents a modest multiplier of approximately 1.2, in line with the modesty of the actual settlement. Of course, a non-negligible portion of the total amount granted by the Court for Class Counsel Fees will effectively be reduced for Class Counsel because of the Commission that will have to be paid to the Funder under the LAA. But the decision to enter into this agreement was made by Class Counsel, independently of the Court and of the Class Members, and the Class Members should not have to

2024 FC 225 (CanLII)

pay the price of what were unacceptable and unreasonable terms and conditions for a financing agreement divorced from the results of this Class Action.

(3) Honorarium

2024 FC 225 (CanLII)

[166] Finally, Class Counsel request that the Court award a $500 honorarium to each of Mr. Sills and Ms. Breckon, the Plaintiffs, for a total of $1,000. This Honorarium would be paid from the Settlement Amount. The Defendants have indicated that they are prepared to make that payment if ordered by the Court.

[167] According to Class Counsel, both Mr. Sills and Ms. Breckon have meaningfully contributed to the Class Members' pursuit of access to justice by stepping forward to fill the role of representative plaintiffs. In so doing, it is argued, they have also expended substantial amounts of time to become familiar with all aspects of the litigation to effectively instruct Class Counsel and act in the best interests of the Class. Mr. Sills has sacrificed much of his personal time to be involved in the litigation, including taking time out of his workday occasionally to engage with the litigation. In a similar vein, Ms. Breckon has given up her personal time to be involved in the litigation. Both representative Plaintiffs were also instrumental in insisting that the *Cy-près* Payment should be increased to $250,000.

(a) The test for the approval of an honorarium

[168] As was noted by the Court in *Lin*, no specific Rule provides for the payment of an honorarium to a representative plaintiff in class actions. However, this Court has the discretion to award honoraria to representative plaintiffs, and it has indeed done so on numerous occasions (see for example, *Lin*; *Wenham*; *McLean 2*; *Condon*; *Manuge*). Furthermore, this Court has

reiterated that honoraria to representative plaintiffs are to be awarded sparingly, "as representative plaintiffs are not to benefit from the class proceeding more than other class members" (*McLean 2* at para 57, referring to *Eidoo v Infineon Technologies AG*, 2015 ONSC 2675 at paras 13–22). To be awarded, it "requires an exceptional contribution that has resulted in success for the class" (*Lin* at para 118). In other words, an honorarium is not to be awarded as a routine matter but is rather "a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice" (*Lin* at para 119, citing *Condon* at para 115).

2024 FC 225 (CanLII)

[169] In determining whether the circumstances are exceptional, the Court may consider several factors, including: i) active involvement in the initiation of the litigation and retainer of counsel; ii) exposure to a real risk of costs; iii) significant personal hardship or inconvenience in connection with the prosecution of the litigation; iv) time spent and activities undertaken in advancing the litigation; v) communication and interaction with other class members; and vi) participation at various stages in the litigation, including discovery, settlement negotiations and trial (*Shah* at para 50). A review of the case law also indicates that the courts have approved the payment of an honorarium to a representative plaintiff when he or she rendered active and necessary assistance in the preparation or presentation of the case, and such assistance resulted in monetary success for the class. The Court must also ensure that any separate payment to a representative plaintiff must not be disproportionate to the benefit derived by the class members.

(b) *Application to this case*

[170] For the reasons that follow, I am not persuaded that the payment of the requested $500 Honorarium to Mr. Sills and Ms. Breckon is justified in this case.

[171] There are two reasons for that. First, there is no exceptional contribution here. Second, in light of the highly modest benefits provided by the Settlement Agreement, granting an Honorarium would grant an unjustified advantage to the representative plaintiffs.

2024 FC 225 (CanLII)

[172] While the affidavits of Mr. Sills and Ms. Breckon mention they both spent many hours discussing the case with Class Counsel and voicing their opinions to Class Counsel, I am not satisfied that they demonstrate an "exceptional contribution that has resulted in success for the class" (*Lin* at para 118). As was the case in *Lin*, Mr. Sills and Ms. Breckon were not intimately involved in the Class Action. Indeed, like in *Lin*, this case is not a high profile litigation nor a situation where Mr. Sills and Ms. Breckon's names were widely publicized, where they had exposure to the media, or where their privacy was invaded through the recitation of their personal story to advance the case (*Lin* at para 125). There is also no evidence of any community outreach nor of public representations made by Mr. Sills or Ms. Breckon about the case; and, Mr. Sills and Ms. Breckon did not have to prepare for nor attend a cross-examination on their affidavits filed in support of any of the motions in this Class Action.

[173] It is not sufficient for Class Counsel to argue the exceptional work done by the Plaintiffs. There needs to be evidence, from the representative plaintiffs, at a convincing level of particularity, allowing the Court to assess and measure the nature and the involvement of the class representatives. No matter how eloquent arguments from counsel may be, they cannot replace the need for the representative plaintiffs to provide clear, convincing, and non-speculative evidence supporting the extent and exceptional nature of their involvement. I find no such evidence in this case.

2024 FC 225 (CanLII)

[174] To avoid any misunderstanding, Mr. Sills' and Ms. Breckon's contribution or commitment to the Class Action are not in question, and they both certainly deserve acknowledgement for their role in the conduct of the proceeding. However, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives (*Lin* at para 126).

[175] Furthermore, it bears reminding that "representative plaintiffs are not to benefit from the class proceeding more than other class members" (*McLean 2* at para 57). Mr. Sills and Ms. Breckon are not direct purchasers, and therefore would not themselves be eligible to access the Settlement Fund as Qualifying Settlement Class Members, and would simply have the indirect benefit of the *Cy-Près* Payment. Consequently, if an Honorarium were allowed, Mr. Sills and Ms. Breckon would benefit from the class proceeding more than other similarly placed Class Members.

[176] In this case, as discussed above, the indirect purchaser Class Members will receive no direct financial benefit from the Settlement Agreement, and I see no reason why, through an Honorarium, the representative plaintiffs should be entitled to one. It would be manifestly disproportionate to the lack of financial benefit derived by the vast majority of Class Members.

[177] Finally, I pause to note the recent conclusions of Justice Perell in the matter of *Doucet v The Royal Winnipeg Ballet*, 2022 ONSC 976 [*Doucet*], where the request for an honorarium caused the court to reconsider the matter of the court's extraordinary discretion to pay a litigant a stipend for prosecuting a civil claim. Justice Perell outlines nine reasons culminating in the conclusion that, as a matter of legal principle, honorariums should no longer be granted in class proceedings (*Doucet* at para 58):

1. Awarding a litigant on a *quantum meruit* basis for active and necessary assistance in the preparation or presentation of a case is contrary to the policy of the administration of justice that represented litigants are not paid for providing legal services. Lawyers not litigants are paid for providing legal services.

2. *A fortiori* awarding a represented litigant on a *quantum meruit* basis for active and necessary assistance in the preparation or presentation of a case is contrary to the policy of the administration of justice that self-represented litigants are not paid for providing legal services. Lawyers not litigants are paid for providing legal services.

3. Awarding a litigant for such matters as being a witness on examinations for discovery or for trial is for obvious reasons contrary to the administration of justice.

4. In a class action regime based on entrepreneurial Class Counsel, the major responsibility of a Representative Plaintiff is to oversee and instruct Class Counsel on such matters as settling the action. The court relies on the Representative Plaintiff to give instructions that are not tainted by the self-interest of the Representative Plaintiff receiving benefits not received by the Class Members he or she represents.

5. Awarding a Representative Plaintiff a portion of the funds that belong to the Class Members creates a conflict of interest. Class Members should have no reason to believe that their representative may be motivated by self-interest and personal gain in giving instructions to Class Counsel to negotiate and reach a settlement.

6. Practically speaking, there is no means to testing the genuineness and the value of the Representative Plaintiff's or Class Member's contribution. Class Counsel have no reason not to ask for the stipend for their client being paid by the class members. The affidavits in support of the request have become *pro forma*. There is no cross-examination. There is no one to test the truth of the praise of the Representative Plaintiff. Class Members may not wish to appear to be ungrateful and ungenerous and it is disturbing and sometimes a revictimization for the court to scrutinize and doubt the evidence of the apparently brave and resolute Representative Plaintiff.

7. The practice of awarding an honourarium for being a Representative Plaintiff in a class action is tawdry. Using the immediate case as an example, awarding Class Counsel $2.25

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

> million of the class member's compensation for prosecuting the action, makes repugnant awarding Ms. Doucet $30,000 of the class member's compensation for her contribution to prosecuting the action. The tawdriness of the practice of awarding a honourarium dishonours more than honours the bravery and contribution of the Representative Plaintiff.
>
> 8. As revealed by the unprecedented request made in the immediate case, the practice of awarding a honourarium to a Representative Plaintiff in one case is to create a repugnant competition and grading of the contribution of the Representative Plaintiff in other class actions.
>
> 9. The practice of awarding a honourarium in one case may be an insult to Representative Plaintiffs in other cases where lesser awards were made. For instance, in the immediate case, I cannot rationalize awarding Ms. Doucet $30,000 for her inestimably valuable contribution to this institutional abuse class action with the $10,000 that was awarded to the Representative Plaintiffs who brought access to justice to inmates in federal penitentiaries and who themselves experienced the torture of solitary confinement. I cannot rationalize awarding any honourarium at all when I recall that the Representative Plaintiff in the Indian Residential Schools institutional abuse class action did not ask for a honourarium and he did not even make a personal claim to the settlement fund. Having to put a price tag to be paid by class members on heroism is repugnant.
>
> [*Doucet* at para 61.]

[178] I agree with those comments and with this jurisprudence surrounding the practice of awarding honoraria in class actions. This militates against awarding the Honorarium in this case.

(c) *Conclusion on the Honorarium*

[179] Considering that representative plaintiffs should not receive additional compensation for simply doing their job as class representatives, that representative plaintiffs are not to benefit from the class proceeding more than other class members, and in light of the conclusions of

Justice Perell above, the requested Honorarium is unreasonable and unjustified in the circumstances. No Honorarium will therefore be awarded in this Class Action.

IV. Conclusion

[180] For the above-mentioned reasons, the Settlement Agreement is approved as I find it fair, reasonable, and in the best interests of the class as a whole.

[181] However, I find that the requested Class Counsel Fees and Funder Fees are not fair and reasonable, that no Funder Fees shall be specifically granted by the Court, and that Class Counsel Fees shall be fixed at a total of $1,650,000 plus applicable taxes (representing 30% of the Settlement Amount plus $75,000), with an additional amount of $644,231.64 for disbursements (inclusive of taxes). Any Commission to be paid by Class Counsel to the Funder pursuant to the LAA shall be made separately by Class Counsel.

[182] With respect to the LAA, considering that it has not been brought to the Court’s attention on a timely basis and that it provides for disproportionate returns to the Funder, it is not approved.

[183] Finally, regarding the Honorarium, in light of the jurisprudence and the roles played by Mr. Sills and Ms. Breckon in this Class Action, which do not extend beyond simply doing their job as class representatives, no Honorarium will be awarded.

[184] An order will issue giving effect to these findings and substantially incorporating the language proposed by both parties in the draft orders submitted to the Court as part of the motion materials.

2024 FC 225 (CanLII)

[185] No costs will be awarded.

2024 FC 225 (CanLII)

ORDER in T-1664-19

THIS COURT ORDERS that:

A. General Terms

1. In addition to the definitions used elsewhere in these Reasons, for the purposes of this Order, the definitions set out in the Settlement Agreement attached as Annex "A" to this Order apply to and are incorporated into this Order.

2. In the event of a conflict between the terms of this Order and the Settlement Agreement, the terms of this Order shall prevail.

B. Settlement Agreement

3. The Settlement Agreement is fair, reasonable, and in the best interests of the Settlement Class.

4. The Settlement Agreement is hereby approved pursuant to Rule 334.29 and shall be implemented and enforced in accordance with its terms.

5. All provisions of the Settlement Agreement (including its Recitals and Definitions) are incorporated by reference into and form part of this Order, and this Order, including the Settlement Agreement, is binding upon each member of the Settlement Class, including those Persons who are minors or mentally incapable, and the requirements of Rule 115 are dispensed with.

2024 FC 225 (CanLII)

6. Upon the Effective Date, each Releasor shall not now or hereafter institute, continue, maintain, intervene in, nor assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any proceeding, cause of action, claim or demand against any Releasee, or any other Person who may claim contribution or indemnity, or other claims over relief, from any Releasee, whether pursuant to any provincial or federal negligence acts or similar legislation or at common law or equity, in respect of any Released Claim, and are permanently barred and enjoined from doing so.

7. Upon the Effective Date, each Settlement Class member shall be deemed to have consented to the dismissal as against the Releasees of any Other Actions he, she, or it has commenced, without costs and with prejudice.

8. Upon the Effective Date, each Other Action commenced by any Settlement Class member shall be and is hereby dismissed against the Releasees, without costs and with prejudice.

9. Upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever and absolutely released the Releasees from the Released Claims.

10. Except as provided herein, this Order does not affect any claims nor causes of action that Settlement Class members have or may have against any Person other than the Releasees.

2024 FC 225 (CanLII)

11. No Releasee shall have any responsibility or liability whatsoever relating to the administration of the Settlement Agreement; to administration, investment, or distribution of the Trust Account; or to the Distribution Protocol.

12. This Order shall be declared null and void on subsequent motion made on notice in the event that the Settlement Agreement is terminated in accordance with its terms.

13. For purposes of administration and enforcement of the Settlement Agreement and this Order, this Court will retain an ongoing supervisory role and the Settling Defendants attorn to the jurisdiction of this Court solely for the purpose of implementing, administering, and enforcing the Settlement Agreement and this Order, and subject to the terms and conditions set out in the Settlement Agreement and this Order.

14. This Action, as well as the action commenced in Court file no. T-8-20, which has been consolidated with this Action, are hereby dismissed, with prejudice and without costs. Once this Order is signed, a copy shall be entered in this Action, as well as in the action commenced in Court file no. T-8-20.

C. Distribution Protocol

15. The Distribution Protocol is fair, reasonable, and in the best interests of the Settlement Class.

2024 FC 225 (CanLII)

16. Subject to the terms of this Order, the Distribution Protocol attached to this Order as Annex "B" is hereby approved pursuant to Rule 334.29.

17. Class Counsel is appointed to administer the Distribution Protocol.

18. All information received from Defendants or Settlement Class members collected, used, and retained by the Class Counsel for the purpose of administering the Distribution Protocol, including evaluating the Settlement Class members' eligibility status under the Distribution Protocol is protected under the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The information provided by the Settlement Class members is strictly private and confidential and will not be disclosed without the express written consent of the relevant Settlement Class member, except in accordance with the Settlement Agreement, orders of this Court, and/or the Distribution Protocol.

19. The Notice Plan attached to this Order as Annex "C" is hereby approved.

20. The Notice of Settlement Approval attached to this Order as Annex "D" is hereby approved substantially in the form attached thereto (with the required adjustments to the quantum of the amounts to be distributed) and shall be disseminated in accordance with the Notice Plan.

21. The Parties may bring motions to the Court for directions as may be required.

2024 FC 225 (CanLII)

D. Litigation Advance Agreement

22. The litigation advance agreement between the Funder and Class Counsel executed on August 17, 2020 is not approved.

2024 FC 225 (CanLII)

E. Class Counsel Fees

23. The contingency fee retainer agreement made between Irene Breckon and Gregory Sills, and Class Counsel and executed on June 24, 2020, is fair and reasonable, and is hereby approved pursuant to Rule 334.4, subject to the amount specified hereafter.

24. Legal fees of Class Counsel, in the amount of $1,650,000 plus applicable taxes, as well as disbursements of Class Counsel totalling $644,231.64 inclusive of taxes, are fair and reasonable, and are hereby approved.

25. The legal fees, disbursements, and applicable taxes payable to Class Counsel shall be paid from the Settlement Amount.

26. Any payment to be made by Class Counsel to the Funder pursuant to the August 17, 2020 litigation advance agreement mentioned above shall <u>not</u> be paid from the Settlement Amount.

F. Honorarium

27. No Honorarium is awarded to the Plaintiffs.

G. Costs

28. No costs are awarded on the motions for settlement approval and fee approval.

"Denis Gascon"
Judge

2024 FC 225 (CanLII)

ANNEX "A"

SCHEDULE A

FARMED ATLANTIC SALMON CLASS ACTIONS
SETTLEMENT AGREEMENT

Made as of September 22, 2023

(the "**Execution Date**")

Between

IRENE BRECKON, GREGORY SILLS, CLIFFORD CHIN,
GEORGES LANGIS AND GENEVIEVE CHABOT

(the "**Plaintiffs**")

and

CERMAQ CANADA LTD., CERMAQ GROUP AS, CERMAQ NORWAY AS, CERMAQ US LLC, GRIEG SEAFOOD ASA, GRIEG SEAFOOD BC LTD., GRIEG SEAFOOD SALES NORTH AMERICA INCORPORATED (FORMERLY KNOWN AS OCEAN QUALITY NORTH AMERICA INC.), GRIEG SEAFOOD SALES PREMIUM BRANDS INC. (FORMERLY KNOWN AS OCEAN QUALITY PREMIUM BRANDS INC.), GRIEG SEAFOOD SALES USA INC. (FORMERLY KNOWN AS OCEAN QUALITY USA INC.), LERØY SEAFOOD AS, LERØY SEAFOOD USA INC., MARINE HARVEST ATLANTIC CANADA INC., MOWI ASA, MOWI CANADA WEST INC., MOWI DUCKTRAP, LLC, MOWI USA, LLC, NOVA SEA AS, and SALMAR ASA, and SJÓR AS (FORMERLY KNOWN AS OCEAN QUALITY AS)

(the "**Settling Defendants**")

2024 FC 225 (CanLII)

FARMED ATLANTIC SALMON CLASS ACTIONS
SETTLEMENT AGREEMENT

TABLE OF CONTENTS

RECITALS 4
SECTION 1 – DEFINITIONS 5
SECTION 2 - SETTLEMENT APPROVAL 10
2.1 Best Efforts 10
2.2 Motions for Approval 10
2.3 Pre-Motion Confidentiality 10
SECTION 3 – SETTLEMENT CONSIDERATION 11
3.1 Payment of Settlement Amount 11
3.2 Taxes and Interest 11
SECTION 4 – OPTING OUT 12
4.1 Procedure 12
SECTION 5 – NON-APPROVAL OR TERMINATION OF SETTLEMENT AGREEMENT 13
5.1 Right of Termination 13
5.2 If Settlement Agreement is Terminated 14
5.3 Survival of Provisions After Termination 14
SECTION 6 – RELEASES AND DISMISSALS 15
6.1 Release of Releasees 15
6.2 Release by Releasees 15
6.3 No Further Claims 15
6.4 Dismissals and Discontinuances 15
6.5 Material Terms 16
SECTION 7 – EFFECT OF SETTLEMENT 16
7.1 No Admission of Liability 16
7.2 Agreement Not Evidence 16
7.3 No Further Litigation 16
SECTION 8 – CERTIFICATION FOR SETTLEMENT ONLY 17
8.1 Settlement Class and Common Issue 17
SECTION 9 – NOTICE TO CLASS 17
9.1 Notices Required 17
9.2 Form and Distribution of Notices 17

2024 FC 225 (CanLII)

9.3 Notice Costs ... 18
SECTION 10 – ADMINISTRATION AND IMPLEMENTATION ... 18
10.1 Mechanics of Administration ... 18
10.2 Distribution Protocol ... 18
10.3 Information and Assistance ... 18
SECTION 11 – CLASS COUNSEL FEES, DISBURSEMENTS AND ADMINISTRATION EXPENSES ... 19
11.1 Court Approval for Class Counsel Fees and Disbursements ... 19
11.2 Responsibility for Fees, Disbursements and Taxes ... 19
11.3 Administration Expenses ... 20
SECTION 12 – MISCELLANEOUS ... 20
12.1 Motions for Directions ... 20
12.2 Headings, etc. ... 20
12.3 Computation of Time ... 20
12.4 Ongoing Jurisdiction ... 21
12.5 Governing Law ... 21
12.6 Entire Agreement ... 21
12.7 Amendments ... 21
12.8 Binding Effect ... 21
12.9 Counterparts ... 21
12.10 Negotiated Agreement ... 21
12.11 Transaction ... 22
12.12 Language ... 22
12.13 Recitals ... 22
12.14 Schedules ... 22
12.15 Acknowledgements ... 22
12.16 Authorized Signatures ... 23
12.17 Notice ... 23
12.18 Date of Execution ... 25

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

FARMED ATLANTIC SALMON CLASS ACTIONS
SETTLEMENT AGREEMENT

RECITALS

A. WHEREAS the Proceedings have been commenced by the Plaintiffs;

B. AND WHEREAS the Proceedings allege (or formerly alleged) that the Defendants and unnamed co-conspirators participated in an unlawful conspiracy to fix, maintain, increase or control the price of Salmon from April 10, 2013 to the date of certification, contrary to Part VI of the *Competition Act* and the common law and/or the civil law;

C. AND WHEREAS the Federal Court Action has been discontinued against the Defendants Bremnes Seashore AS, Scottish Sea Farms Ltd., Nordlaks Holding AS, Nordlaks Oppdrett AS, Leroy Seafood Group ASA, Alsaker AS and Alsaker Fjordbruk AS;

D. AND WHEREAS the BC Action has been discontinued against the Defendants Bremnes Seashore AS, Alsaker AS and Alsaker Fjordbruk AS;

E. AND WHEREAS the Quebec Action has been discontinued against the Defendant Scottish Sea Farms Ltd.;

F. AND WHEREAS the Settling Defendants and Releasees do not admit, through the execution of this Settlement Agreement or otherwise, any allegation of unlawful conduct alleged in the Proceedings and deny all liability and assert that they have complete defences in respect of the merits of the Proceedings or otherwise;

G. AND WHEREAS despite their belief that they are not liable in respect of the claims as alleged or previously alleged in the Proceedings, and have good and reasonable defences in respect of jurisdiction and the merits, the Settling Defendants are entering into this Settlement Agreement in order to achieve a final and nation-wide resolution of all claims which have been asserted or which could have been asserted against the Releasees by the Plaintiffs and the Settlement Class in the Proceedings, and to avoid further expense, inconvenience, the distraction of burdensome and protracted litigation, and the risks associated with trials and appeals;

H. AND WHEREAS Counsel for the Settling Defendants and Class Counsel have engaged in arm's-length settlement discussions and negotiations, resulting in this Settlement Agreement with respect to the Proceedings;

I. AND WHEREAS the Plaintiffs and Class Counsel have reviewed and fully understand the terms of this Settlement Agreement and, based on their analyses of the facts and law applicable to the Plaintiffs' claims, and having regard to the burdens and expense in prosecuting the Proceedings, including the risks and uncertainties associated with trials and appeals, and having regard to the value of the Settlement Agreement, the Plaintiffs and Class Counsel have concluded that this Settlement Agreement is fair, reasonable and in the best interests of the Plaintiffs and the Settlement Class they seek to represent;

J. AND WHEREAS the Plaintiffs, Class Counsel and the Settling Defendants agree that neither this Settlement Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an admission by or evidence against the Releasees or evidence of the truth of any of the Plaintiffs' allegations against the Releasees, which allegations are expressly denied by the Releasees;

K. AND WHEREAS the Parties therefore wish to, and hereby do, finally resolve on a national basis, without admission of liability, all of the Proceedings as against the Releasees;

L. AND WHEREAS the Plaintiffs assert that they are adequate class representatives for the Settlement Class and will seek to be appointed representative plaintiffs;

M. AND WHEREAS the Settling Defendants do not hereby attorn to the jurisdiction of Federal Court or any other court or tribunal in respect of any civil, criminal or administrative process except to the extent they have previously done so in the Proceedings and as is expressly provided in this Settlement Agreement with respect to the Proceedings;

N. AND WHEREAS the Parties consent to certification of the Federal Court Action for the sole purpose of implementing this Settlement Agreement, as provided for in this Settlement Agreement, on the express understanding that such certification shall not derogate from the respective rights of the Parties in the event that this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason;

O. AND WHEREAS as a result of their settlement discussions and negotiations, the Settling Defendants and the Plaintiffs have entered into this Settlement Agreement, which embodies all of the terms and conditions of the settlement between the Settling Defendants and the Plaintiffs, both individually and on behalf of the Settlement Class the Plaintiffs seek to represent;

NOW THEREFORE, in consideration of the covenants, agreements and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that the Federal Court Action be settled and dismissed with prejudice as against the Settling Defendants and Releasees and that the BC Action and Quebec Action be discontinued, all without costs as to the Plaintiffs, the Settlement Class they seek to represent and the Settling Defendants, subject to the approval of the Federal Court, on the following terms and conditions:

SECTION 1 – DEFINITIONS

For the purpose of this Settlement Agreement only, including the recitals and schedules

(1) ***Administration Expenses*** means all fees, disbursements, expenses, costs, taxes and any other amounts incurred or payable by the Plaintiffs, Class Counsel or otherwise for the approval, implementation and operation of this Settlement Agreement, including the costs of notices and the costs of claims administration, but excluding Class Counsel Fees and Class Counsel Disbursements.

(2) ***Affiliates***, with respect to a company, includes all other entities which, whether directly or indirectly, (i) are controlled by that company, (ii) are under common control with that company or

2024 FC 225 (CanLII)

(iii) control that company. The term "control" as used in this definition means the power to individually or jointly with another entity direct or cause the direction of the management and the policies of an entity, whether through the ownership of a majority of the outstanding voting rights or otherwise.

(3) ***Approval Hearing*** means the hearing brought by Class Counsel for the Federal Court's approval of the settlement provided for in this Settlement Agreement.

(4) ***BC Action*** means the proceeding filed in the BC Supreme Court listed in Schedule "A" to this Settlement Agreement.

(5) ***BC Plaintiff*** means Clifford Chin.

(6) ***Claims Administrator*** means the firm proposed by the Plaintiffs and appointed by the Federal Court to administer the Settlement Amount in accordance with the provisions of this Settlement Agreement and the Distribution Protocol, and any employees of such firm. Alternatively, if Class Counsel determines that it would be more cost-effective to administer the Settlement Amount themselves, Claims Administrator means Class Counsel.

(7) ***Class Counsel*** means Siskinds LLP, Siskinds Desmeules s.e.n.c.r.l., Sotos LLP and Koskie Minsky LLP.

(8) ***Class Counsel Disbursements*** include the disbursements and applicable taxes incurred by Class Counsel in the prosecution of the Proceedings, as well as any adverse costs awards issued against the Plaintiffs in any of the Proceedings.

(9) ***Class Counsel Fees*** means the fees of Class Counsel, and any applicable taxes or charges thereon, including any amounts payable as a result of the Settlement Agreement by Class Counsel or the Settlement Class to any other body or Person, in relation to legal fees.

(10) ***Class Period*** means April 10, 2013 to the date of the order certifying the Federal Court Action against the Settling Defendants for settlement purposes.

(11) ***Common Issue*** means: Did the Settling Defendants conspire to fix, maintain, increase or control the price of Salmon directly or indirectly during the Class Period? If so, what damages, if any, did Settlement Class members suffer?

(12) ***Counsel for the Settling Defendants*** means the counsel listed for the Defendants in section 12.17 of the Settlement Agreement.

(13) ***Defendants*** means the entities currently or formerly named as defendants in the Proceedings as set out in Schedule "A" to this Settlement Agreement. For greater certainty, Defendants includes, without limitation, the Settling Defendants, the other Releasees who are named as Defendants, and Defendants in respect of whom one or more of the Proceedings has been discontinued.

(14) ***Distribution Protocol*** means the plan for distributing the Settlement Amount and accrued interest, in whole or in part, as proposed by Class Counsel and as approved by the Federal Court.

2024 FC 225 (CanLII)

(15) ***Effective Date*** means the date when the Settlement Approval Order has become a Final Order and the discontinuances have been entered by Class Counsel with the BC Supreme Court in the BC Action and the Quebec Superior Court in the Quebec Action.

(16) ***Execution Date*** means the date on the cover page as of which the Parties have executed this Settlement Agreement.

(17) ***Excluded Person*** means each Defendant, the directors and officers of each Defendant, the subsidiaries or Affiliates of each Defendant, the entities in which each Defendant or any of that Defendant's subsidiaries or Affiliates have a controlling interest and the legal representatives, heirs, successors and assigns of each of the foregoing.

(18) ***Federal Court Action*** means the two actions commenced in the Federal Court and eventually consolidated in Court File T-1664-19, as listed in Schedule "A" to this Settlement Agreement.

(19) ***Federal Court Plaintiffs*** means Irene Breckon and Gregory Sills.

(20) ***Final Order*** means the Settlement Approval Order that either (i) has not been appealed before the time to appeal such order has expired, if an appeal lies, or (ii) has been affirmed upon a final disposition of all appeals. For further certainty, any order made by the Federal Court approving this Settlement Agreement will not become a Final Order until the time to appeal such an order has expired without any appeal having been taken or until the order has been affirmed upon a final disposition of all appeals.

(21) ***Fonds d'aide*** means the Fonds d'aide aux actions collectives in Quebec which is entitled to receive the value in dollars of a percentage of the share of any cy pres distribution that would otherwise be allocated to the Quebec class members pursuant to the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives.*

(22) ***Notice of Certification and Settlement Approval Hearing*** means the form of notice attached to the Notice Plan at **Schedule "D"** to this Settlement Agreement and as approved by the Federal Court, to inform the Settlement Class of: (i) certification for settlement purposes of the Federal Court Action; (ii) the process by which Settlement Class members may opt-out of the Settlement Agreement; (iii) the date and location of the Approval Hearing; (iv) the principal elements of the Settlement Agreement; and (v) the process by which Settlement Class members may object to the Settlement Agreement.

(23) ***Notice of Settlement Approval*** means the form of notice agreed to by the Plaintiffs and the Settling Defendants, or such other forms of notice as may be approved by the Federal Court, which informs the Settlement Class of: (i) the approval of this Settlement Agreement; and (ii) the process by which Settlement Class members may apply to obtain compensation from the Settlement Amount.

(24) ***Opt-Out*** means a prospective Settlement Class member who has submitted a valid written election to opt-out of the Settlement Agreement by the Opt-Out Deadline.

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

(25) ***Opt-Out Deadline*** means thirty (30) days from the dissemination of the Notice of Certification and Settlement Approval Hearing.

(26) ***Other Actions*** means actions or proceedings, excluding the Proceedings, relating to the Released Claims, commenced by a Settlement Class member either before or after the Effective Date.

(27) ***Party or Parties*** means the Plaintiffs, Settlement Class members (where appropriate) or the Settling Defendants.

(28) ***Person*** means an individual, corporation, partnership, limited partnership, limited liability company, association, joint stock company, estate, legal representative, trust, trustee, executor, beneficiary, unincorporated association, government or any political subdivision or agency thereof, and any other business or legal entity and their heirs, predecessors, successors, representatives, or assignees.

(29) ***Plaintiffs*** means the BC Plaintiff, Federal Court Plaintiffs and Quebec Plaintiffs.

(30) ***Proceedings*** means the BC Action, Federal Court Action and the Quebec Action.

(31) ***Purchase Price*** means the sale price paid by direct purchaser Settlement Class members for Salmon purchased in Canada during the Class Period, less any rebates, delivery or shipping charges, taxes and any other form of discounts.

(32) ***Quebec Action*** means the proceeding filed in the Quebec Superior Court listed in Schedule "A" to this Settlement Agreement.

(33) ***Quebec Plaintiffs*** means Georges Langis and Geneviève Chabot.

(34) ***Released Claims*** means any and all manner of claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature (whether or not any Settlement Class member has objected to this Settlement Agreement or makes a claim upon or received a payment from the Settlement Amount, whether directly, representatively, derivatively or in any other capacity), whether personal or subrogated, damages of any kind (including compensatory, punitive or other damages) whenever incurred, liabilities of any nature whatsoever, including interest, costs, expenses, class administration expenses (including Administration Expenses), penalties, and lawyers' fees (including Class Counsel Fees and Class Counsel Disbursements), known or unknown, suspected or unsuspected, actual or contingent, and liquidated or unliquidated, in law, under statute or in equity, that any of the Releasors ever had, now have or hereafter can, shall or may have on account of, or in any way related to the purchase, sale, pricing, discounting, producing, marketing, offering or distributing of Salmon, including all claims for consequential, subsequent or follow-on harm that arises after the date hereof in respect of any agreement, combination, conspiracy or conduct that occurred prior to the date hereof, including the conduct alleged (or which was previously or could have been alleged) in the Proceedings. However, nothing herein shall be construed to release any claims of direct purchasers involving direct purchases of farmed Atlantic salmon outside Canada, any claims of indirect purchasers involving indirect purchases of farmed Atlantic salmon outside of Canada, or any claims involving negligence, personal injury, failure to deliver goods, damaged or delayed goods, product defect,

securities, or other similar claim relating to Salmon but not relating to alleged anticompetitive conduct.

(35) ***Releasees*** means, jointly and severally, solidarily, individually and collectively, the Defendants, their Affiliates, and any named or unnamed co-conspirators, and each of their respective past and present, direct and indirect, parents, subsidiaries, partners, insurers, divisions, branches, associates, joint ventures, franchisees, dealers, and all other Persons, partnerships or corporations with whom any of the foregoing have been, or are now, affiliated, and all of their respective past, present and future officers, directors, employees, agents, mandataries, shareholders, attorneys, trustees, insurers, servants and representatives, members and managers, and the predecessors, successors, purchasers, heirs, executors, administrators and assigns of each of the foregoing.

(36) ***Releasors*** means, jointly and severally, solidarily, individually and collectively, the Plaintiffs and the Settlement Class on behalf of themselves and any Person or entity claiming by or through them including a parent, subsidiary, affiliate, predecessor, successor, shareholder, partner, director, owner of any kind, agent, principal, employee, contractor, attorney, heir, executor, administrator, insurer, devisee, assignee, or representative of any kind, other than any Opt-Out.

(37) ***Salmon*** means farmed Atlantic salmon and products containing or derived from farmed Atlantic salmon purchased or sold in Canada during the Class Period.

(38) ***Settlement Agreement*** means this agreement, including the recitals and schedules.

(39) ***Settlement Amount*** means the sum of five million two hundred fifty thousand Canadian dollars (CAD $5,250,000).

(40) ***Settlement Approval Order*** means the form of order approving the Settlement Agreement at **Schedule "C"** to this Settlement Agreement.

(41) ***Settlement Class*** means all persons in Canada who purchased Salmon during the Class Period except the Excluded Persons and any Opt-Out.

(42) ***Settling Defendants*** means Cermaq Canada Ltd., Cermaq Group AS, Cermaq Norway AS, Cermaq US LLC (the "**Cermaq Defendants**"); Grieg Seafood ASA, Grieg Seafood BC Ltd., Grieg Seafood Sales North America Incorporated (formerly known as Ocean Quality North America Inc.), Grieg Seafood Sales Premium Brands, Inc. (formerly known as Ocean Quality Premium Brands Inc.), and Grieg Seafood Sales USA Inc. (formerly known as Ocean Quality USA Inc.) (the "**Grieg Defendants**"), Lerøy Seafood AS, Lerøy Seafood USA Inc. the ("**Lerøy Defendants**"), Marine Harvest Atlantic Canada Inc., Mowi ASA, Mowi Canada West Inc., Mowi Ducktrap, LLC, Mowi USA, LLC (the "**Mowi Defendants**"), Nova Sea AS (the "**Nova Sea Defendant**"), SalMar ASA (the "**SalMar Defendant**"), and Sjór AS (formerly known as Ocean Quality AS) (the "**Sjór Defendant**").

(43) ***Trust Account*** means a guaranteed investment vehicle, liquid money market account or equivalent security with a rating equivalent to or better than that of a Canadian Schedule I bank (a bank listed in Schedule I of the *Bank Act,* SC 1991, c 46) held at a Canadian financial institution

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

under the control of Siskinds LLP or the Claims Administrator, once appointed, for the benefit of the Settlement Class or the Settling Defendants, as provided for in this Settlement Agreement.

SECTION 2 - SETTLEMENT APPROVAL

2.1 Best Efforts

(1) The Parties shall use their best efforts to implement this Settlement Agreement, to secure the prompt, complete and final dismissal with prejudice of the Federal Court Action, and to obtain discontinuances in the BC Action and the Quebec Action.

2.2 Motions for Approval

(1) As soon as practical after the Settlement Agreement is executed, the Federal Court Plaintiffs shall file a motion before the Federal Court for an order certifying the Federal Court Action as a class proceeding for settlement purposes and approving the Notice Plan attached as **Schedule "D"** and the Notice of Certification and Settlement Approval Hearing attached to the Notice Plan as Schedule "A1". The order shall be substantially in the form attached as **Schedule "B".**

(2) The Federal Court Plaintiffs shall file a motion before the Federal Court for an order approving this Settlement Agreement as soon as practicable after:

(a) the order referred to in section 2.2(1) has been granted; and

(b) the Notice of Certification and Settlement Approval Hearing has been published.

The order approving this Settlement Agreement shall be substantially in the form attached as Schedule "C".

(3) As soon as practical after the Execution Date, the Quebec Plaintiffs will move to discontinue the Quebec Action and the BC Plaintiff will file a discontinuance in the BC Action.

(4) This Settlement Agreement shall only become final on the Effective Date.

2.3 Pre-Motion Confidentiality

(1) Until the motion required by section 2.2(1) is brought, the Parties shall keep all of the terms of the Settlement Agreement confidential and shall not disclose them without the prior consent of Counsel for the Settling Defendants or Class Counsel, as the case may be, except as required for the purposes of financial reporting or the preparation of financial records (including tax returns and financial statements), as otherwise required by law, or as otherwise required to give effect to the terms of this Settlement Agreement.

2024 FC 225 (CanLII)

SECTION 3 – SETTLEMENT CONSIDERATION

3.1 Payment of Settlement Amount

(1) Within thirty (30) days following the Execution Date, or the date of receipt of the wire transfer information from Class Counsel, whichever is later, the Settling Defendants shall pay the Settlement Amount to Siskinds LLP for deposit into the Trust Account.

(2) The Settling Defendants shall pay the Settlement Amount by wire transfer. Siskinds LLP shall provide the necessary wire transfer information to Counsel for the Settling Defendants in writing within ten (10) days following the Execution Date.

(3) The Settlement Amount and other consideration to be provided in accordance with the terms of this Settlement Agreement shall be provided in full satisfaction of the Released Claims against the Releasees.

(4) The Settlement Amount represents the full amount to be paid pursuant to this Settlement Agreement and shall be all-inclusive of all amounts, including without limitation, Class Counsel Fees, Class Counsel Disbursements, any honoraria for the Plaintiffs, any distributed amounts to the Settlement Class, any cy pres donations, and Administration Expenses.

(5) The Settling Defendants and other Releasees shall have no obligation to pay any amount in addition to the Settlement Amount to be paid by the Settling Defendants, for any reason, pursuant to or in furtherance of this Settlement Agreement, the Proceedings or any Other Actions.

(6) Once a Claims Administrator has been appointed, Class Counsel shall transfer control of the related portion of the Trust Account to the Claims Administrator.

(7) Class Counsel and/or the Claims Administrator shall maintain the Trust Account as provided for in this Settlement Agreement. While in control of the Trust Account, Class Counsel and/or the Claims Administrator shall not pay out all or part of the monies in the Trust Account, except in accordance with this Settlement Agreement, or in accordance with an order of the Federal Court obtained after notice to the Parties.

3.2 Taxes and Interest

(1) Except as hereinafter provided, all interest earned on the Settlement Amount in the Trust Account shall accrue to the benefit of the Settlement Class and shall become and remain part of the Trust Account.

(2) All taxes payable on any interest which accrues on the Settlement Amount in the Trust Account or otherwise in relation to the Settlement Amount shall be paid from the Trust Account. Class Counsel and/or the Claims Administrator shall be solely responsible to fulfill all tax reporting and payment requirements arising from the Settlement Amount in the Trust Account, including any obligation to report taxable income and make tax payments. All taxes (including interest and penalties) due with respect to the income earned by the Settlement Amount shall be paid from the Trust Account.

2024 FC 225 (CanLII)

(3) The Settling Defendants shall have no responsibility to make any filings relating to the Trust Account and will have no responsibility to pay tax on any income earned on the Settlement Amount or pay any taxes on the monies in the Trust Account, unless this Settlement Agreement is not approved, is terminated, or otherwise fails to take effect for any reason, in which case the interest earned on the Settlement Amount in the Trust Account or otherwise shall be paid to the Settling Defendants who, in such case, shall be responsible for the payment of all taxes on such interest not previously paid by Class Counsel or the Claims Administrator.

SECTION 4 – OPTING OUT

4.1 Procedure

(1) Class Counsel will seek approval from the Federal Court of the following opt-out process as part of the order certifying the Federal Court Action as a class proceeding for settlement purposes:

(a) Persons seeking to opt-out of the Federal Court Action must do so by sending a written election to opt-out, signed by the Person or the Person's designee, by pre-paid mail, courier, or email to Class Counsel at an address to be identified in the notice described in the Notice Plan at Schedule "D".

(b) An election to opt-out sent by mail or courier will only be valid if it is postmarked on or before the Opt-Out Deadline to the designated address in the notice described in the Notice Plan at Schedule "D". Where the postmark is not visible or legible, the election to opt-out shall be deemed to have been postmarked seven (7) business days prior to the date that it is received by Class Counsel.

(c) The written election to opt-out must contain the following information in order to be valid:

(A) the Person's full name, current mailing and email address, and telephone number;

(B) if the Person seeking to opt-out is a corporation, the name of the corporation and the position of the Person submitting the request to opt-out on behalf of the corporation; and

(C) a statement to the effect that the Person wishes to be excluded from the Federal Court Action.

(d) Any putative Settlement Class member who validly opts-out of the Federal Court Action shall be excluded from the Federal Court Action and the Class and will not have the opportunity to benefit from the Settlement Agreement.

(e) Any putative Settlement Class member who does not validly opt-out of the Federal Court Action in the manner and time prescribed above, shall be deemed to have elected to participate in the Federal Court Action, including this Settlement Agreement.

(f) Within thirty (30) days of the Opt-Out Deadline, Class Counsel shall provide to the Settling Defendants a report containing the names of each Person who has validly and timely opted out of the Federal Court Action, the reasons for the opt-out, if known, and a summary of the information delivered by such Persons pursuant to this Section 4.1

(2) The Parties will not, directly or indirectly, encourage or cause any Person to opt out of the Federal Court Action.

SECTION 5 – NON-APPROVAL OR TERMINATION OF SETTLEMENT AGREEMENT

5.1 Right of Termination

(1) In the event that:

(a) the Federal Court declines to certify the Federal Court Action for settlement purposes as against the Settling Defendants or does so in a materially modified form;

(b) the Federal Court declines to dismiss the Federal Court Action;

(c) the Federal Court declines to approve this Settlement Agreement or any material part hereof;

(d) the Federal Court approves this Settlement Agreement in a materially modified form;

(e) the Federal Court issues a settlement approval order that is materially inconsistent with the terms of the Settlement Agreement or not substantially in the form attached to this Settlement Agreement as Schedule "C";

(f) the order approving this Settlement Agreement made by the Federal Court does not become a Final Order;

(g) the BC Plaintiff does not obtain a filed discontinuance of the BC Action; and/or

(h) the Quebec Plaintiffs do not obtain a filed order discontinuing the Quebec Action,

the Plaintiffs and the Settling Defendants shall each have the right to terminate this Settlement Agreement on the grounds above (except that only the Settling Defendants shall have the right to terminate under subsections (b), (g) and (h)) by delivering a written notice pursuant to section 12.17, within thirty (30) days following an event described above.

(2) In addition, if the Settlement Amount is not paid in accordance with section 3.1(1), the Plaintiffs shall have the right to terminate this Settlement Agreement by delivering a written notice pursuant to section 12.17, within thirty (30) days after such non-payment, or move before the Federal Court to enforce the terms of this Settlement Agreement.

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

(3) Any order, ruling or determination made (or rejected) by the Federal Court with respect to the Distribution Protocol and/or Class Counsel Fees or Class Counsel Disbursements shall not be deemed to be a material modification of all, or a part, of this Settlement Agreement and shall not provide any basis for the termination of this Settlement Agreement.

5.2 If Settlement Agreement is Terminated

(1) If this Settlement Agreement is not approved, is terminated in accordance with its terms or otherwise fails to take effect for any reason:

(a) no motion to certify the Federal Court Action as a class proceeding on the basis of this Settlement Agreement, or to approve this Settlement Agreement, which has not been decided, shall proceed;

(b) the Parties will cooperate in seeking to have any issued order certifying the Federal Court Action as a class proceeding on the basis of the Settlement Agreement or approving this Settlement Agreement set aside and declared null and void and of no force or effect, and any Party (including the Settlement Class) shall be estopped from asserting otherwise; and

(c) any prior certification of the Federal Court Action as a class proceeding on the basis of this Settlement Agreement, including the definitions of the Settlement Class and the Common Issue pursuant to this Settlement Agreement, shall be without prejudice to any position that any of the Parties or Releasees may later take on any issue in the Proceedings or Other Actions or other litigation.

(2) If the Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason, Class Counsel shall, within thirty (30) business days of the written notice advising that the Settlement Agreement has been terminated in accordance with its terms, return to the Settling Defendants the Settlement Amount, plus all accrued interest thereon, less taxes paid on interest, and less any notice costs already incurred with respect to the notices described in section 9.1(1) and any costs already incurred with respect to translating the Settlement Agreement. The Settling Defendants will allocate the remaining Settlement Amount amongst themselves.

(3) Except as provided for in section 5.3, if the Settling Defendants or the Plaintiffs exercise their right to terminate, the Settlement Agreement shall be null and void and have no further force or effect, shall not be binding on the Parties, and shall not be used as evidence or otherwise in any litigation or in any other way for any reason.

5.3 Survival of Provisions After Termination

(1) If this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason, the provisions of sections 3.2(3), 5.2, 5.3, 7.1, 7.2, 9.1, 10.3(5), and 12.4, and the definitions and schedules applicable thereto shall survive the termination and continue in full force and effect. The definitions and schedules shall survive only for the limited purpose of the interpretation of sections 3.2(3), 5.2(3), 5.3, 7.1, 7.2, 9.1, 10.3(5), and 12.4 within the meaning of this Settlement Agreement, but for no other purposes. All other provisions of this Settlement

Agreement and all other obligations pursuant to this Settlement Agreement shall cease immediately.

SECTION 6 – RELEASES AND DISMISSALS

6.1 Release of Releasees

(1) Upon the Effective Date, and in consideration of payment of the Settlement Amount, and for other valuable consideration set forth in the Settlement Agreement, the Releasors: (a) shall have forever and absolutely released the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have; (b) shall forever be enjoined from prosecuting in any forum any Released Claim against any of the Releasees; and (c) agree and covenant not to sue any of the Releasees on the basis of any Released Claims or to assist any third party in commencing or maintaining any suit against any Releasees related in any way to Released Claims.

(2) The Plaintiffs and Settlement Class acknowledge that they may hereafter discover facts in addition to, or different from, those facts which they know or believe to be true regarding the subject matter of the Proceedings and the Settlement Agreement, and it is their intention to release fully, finally and forever all Released Claims and, in furtherance of such intention, this release shall be and remain in effect notwithstanding the discovery or existence of additional or different facts.

6.2 Release by Releasees

(1) Upon the Effective Date, each Releasee forever and absolutely releases each of the other Releasees from any and all claims for contribution or indemnity with respect to the Released Claims.

6.3 No Further Claims

(1) Upon the Effective Date, each Releasor shall not institute, prosecute, continue, maintain, intervene in or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any proceeding, cause of action, claim, suit, complaint or demand against any Releasee or any other Person who may claim contribution or indemnity or other claims over relief from any Releasee, whether pursuant to any provincial or federal negligence acts or similar legislation or at common law or equity, in respect of any Released Claim, and are permanently barred and enjoined from doing so. For greater certainty and without limiting the generality of the foregoing, the Releasors shall not assert or pursue a Released Claim against any Releasee under the laws of any foreign jurisdiction.

6.4 Dismissals and Discontinuances

(1) Upon the Effective Date, the Federal Court Action shall be dismissed with prejudice and without costs as against the Defendants named in that action.

(2) As soon as practical after the Execution Date, the Quebec Plaintiffs will move to discontinue Quebec Action and the BC Plaintiff will file a discontinuance in the BC Action.

2024 FC 225 (CanLII)

(3) Upon the Effective Date, each Settlement Class member shall be deemed to irrevocably consent to the dismissal, without costs, with prejudice and without reservation, of his, her or its Other Actions against the Releasees.

(4) Upon the Effective Date, all Other Actions commenced by any Settlement Class member shall be dismissed as against the Releasees, without costs, with prejudice and without reservation.

6.5 Material Terms

(1) For the avoidance of doubt and without in any way limiting the ability of the Parties to assert that other terms in this Settlement Agreement are material terms (subject to section 5.1(3)), the releases, covenants, dismissals and discontinuances in this section 6 shall be considered material terms of the Settlement Agreement and the failure of the Federal Court to approve the releases, covenants and dismissals or the failure to obtain discontinuances of the BC Action and the Quebec Action contemplated herein shall give rise to a right of termination pursuant to section 5.1 of the Settlement Agreement.

SECTION 7 – EFFECT OF SETTLEMENT

7.1 No Admission of Liability

(1) The Plaintiffs and the Releasees expressly reserve all of their rights if this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason. Further, whether or not this Settlement Agreement is finally approved, is terminated, or otherwise fails to take effect for any reason, this Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions and proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement, shall not be deemed, construed or interpreted to be an admission of any violation of any statute or law, or of any wrongdoing or liability by the Releasees, or of the truth of any of the claims or allegations contained in the Proceedings or any other actions against the Releasees.

7.2 Agreement Not Evidence

(1) The Parties agree that, whether or not it is finally approved, is terminated, or otherwise fails to take effect for any reason, this Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions and proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement, shall not be referred to, offered or received as evidence in any pending or future civil, criminal or administrative action or proceeding, except in a proceeding to approve and/or enforce this Settlement Agreement, or to defend against the assertion of Released Claims, as necessary in any insurance-related proceeding, or as otherwise required by law or as provided in this Settlement Agreement.

7.3 No Further Litigation

(1) No Class Counsel, nor anyone currently or hereafter employed by, or a partner of Class Counsel, may directly or indirectly participate or be involved in or in any way assist with respect to any claim made or action commenced by any Person against the Settling Defendants or the Releasees that relates to or arises from the Released Claims. Moreover, neither Class Counsel, nor

2024 FC 225 (CanLII)

anyone currently or hereafter employed by, or a partner of Class Counsel, may divulge to anyone for any purpose, or use for any purpose, any information obtained in the course of the Proceedings or the negotiation and preparation of this Settlement Agreement, except to the extent that such information was, is or becomes otherwise publicly available or unless ordered to do so by a court in Canada.

(2) Section 7.3(1) shall be inoperative to (and only to) the extent that it is inconsistent with Class Counsel's obligations under Rule 3.2-10 of the Code of Professional Conduct for British Columbia.

2024 FC 225 (CanLII)

SECTION 8 – CERTIFICATION FOR SETTLEMENT ONLY

8.1 Settlement Class and Common Issue

(1) The Parties agree that the Federal Court Action shall be certified as a class proceeding as against the Settling Defendants solely for purposes of settlement of the Proceedings and the approval of this Settlement Agreement by the Federal Court.

(2) The Plaintiffs agree that, in the motion for certification of the Federal Court Action as a class proceeding for settlement purposes and for the approval of this Settlement Agreement, the only common issue that they will seek to define is the Common Issue and the only class that they will assert is on behalf of the Settlement Class.

SECTION 9 – NOTICE TO CLASS

9.1 Notices Required

(1) The Settlement Class shall be given the following notices: (i) Notice of Certification and Settlement Approval Hearing; (ii) Notice of Settlement Approval; and (iii) notice of termination, if this Settlement Agreement is not approved, is terminated, or otherwise fails to take effect; and (iv) such further notice as may be directed by the Federal Court.

9.2 Form and Distribution of Notices

(1) The manner in which the Notice of Certification and Settlement Approval Hearing will be disseminated is described in the Notice Plan in **Schedule "D"** and as approved by the Federal Court.

(2) The Notice of Certification and Settlement Approval Hearing shall be substantially in the form attached to the Notice Plan as Schedule "A1" and as approved by the Federal Court.

(3) The Notice of Settlement Approval and the manner in which the Notice of Settlement Approval will be disseminated shall be agreed to by the Parties and as approved by the Federal Court, of if the Parties cannot agree, then such form or manner as approved by the Federal Court.

(4) The Parties will cooperate in the preparation of any communications to the press in relation to the Settlement Agreement or the Proceedings.

9.3 Notice Costs

(1) All notice costs shall be paid from the Settlement Amount.

SECTION 10 – ADMINISTRATION AND IMPLEMENTATION

10.1 Mechanics of Administration

(1) Except to the extent provided for in this Settlement Agreement, the mechanics of the implementation and administration of this Settlement Agreement and the Distribution Protocol shall be determined by the Federal Court on motions brought by Class Counsel.

(2) The Releasees shall not have any responsibility, financial obligations or liability whatsoever with respect to the investment, distribution or administration of monies in the Trust Account including, but not limited to, Administration Expenses and Class Counsel Fees.

10.2 Distribution Protocol

(1) On notice to the Settling Defendants, Class Counsel will make an application seeking an order from the Federal Court approving the Distribution Protocol. The motion can be brought before the Effective Date, but the order approving the Distribution Protocol shall be conditional on the Effective Date occurring.

(2) The Distribution Protocol will address the timelines and process for making and approving eligible claims, distributing settlement funds to approved claimants, and allocating any undistributed settlement funds, including any required distributions to the Fonds d'aide, a Class Proceedings Fund, and/or a Law Foundation in Canada.

10.3 Information and Assistance

(1) The Settling Defendants will make reasonable efforts to provide Class Counsel with a list of the available names and addresses for their direct purchaser Settlement Class members in Canada from 2014 to 2021, together with information regarding the Purchase Price paid by each such Settlement Class member.

(2) The Settling Defendants shall provide the list of the available names and addresses referenced in 10.3(1) to Class Counsel and/or any Court-appointed notice provider and/or the Claims Administrator within thirty (30) days after the Execution Date. The Settling Defendants shall provide the Purchase Price information referenced in 10.3(1) to Class Counsel and/or any Court-appointed notice provider and/or the Claims Administrator within thirty (30) days after the Effective Date.

(3) The information shall be delivered by the Settling Defendants to Class Counsel and/or any Court-appointed notice provider and/or the Claims Administrator in the form it currently exists via secure file transfer, or such other format as may be agreed upon by Counsel for the Settling Defendants and Class Counsel.

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

(4) The available names and contact information referenced in 10.3(1) shall be collected, used and retained pursuant to privacy laws in Canada for the purposes of administering the Settlement Agreement, disseminating the notices required in section 9.1(1), and evaluating eligibility status under the Settlement Agreement.

(5) All information provided pursuant to section 10.3(1) shall be treated as private and confidential by Class Counsel or any Court-appointed notice provider and/or the Claims Administrator and shall not be disclosed except in accordance with the Settlement Agreement, the Distribution Protocol and orders of the Federal Court. If this Settlement Agreement is terminated, all information provided by a Settling Defendant shall be returned to it and no record of the information so provided shall be retained by Class Counsel or any Court-appointed notice provider and/or the Claims Administrator in any form whatsoever.

(6) The Settling Defendants will make themselves reasonably available to respond to questions respecting the information provided pursuant to section 10.3(1) from Class Counsel or any Court-appointed notice provider and/or the Claims Administrator. The Settling Defendants' obligations to make themselves reasonably available to respond to questions as particularized in this section shall not be affected by the release provisions contained in section 6 of this Settlement Agreement. Unless this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason, the Settling Defendants' obligations to cooperate pursuant to this section 10.3 shall cease when all settlement funds have been distributed.

(7) The Settling Defendants shall bear no liability with respect to the completeness or accuracy of the information provided pursuant to this section 10.3 and make no representation or admission that the persons listed are Settlement Class members.

SECTION 11 – CLASS COUNSEL FEES, DISBURSEMENTS AND ADMINISTRATION EXPENSES

11.1 Court Approval for Class Counsel Fees and Disbursements

(1) Class Counsel may seek the Federal Court's approval to pay Class Counsel Disbursements and Class Counsel Fees contemporaneous with seeking approval of this Settlement Agreement. Class Counsel Disbursements and Class Counsel Fees shall be reimbursed and paid solely out of the Trust Account after the Effective Date.

(2) Class Counsel reserve the right to bring motions to the Federal Court for reimbursement out of the Trust Account for any future Class Counsel Disbursements.

11.2 Responsibility for Fees, Disbursements and Taxes

(1) The Releasees shall not be liable for any Class Counsel Fees, Class Counsel Disbursements or taxes of any of the lawyers, experts, advisors, agents, or representatives retained by Class Counsel, the Plaintiffs or the Settlement Class, any amounts to which a Class Proceedings Fund, Law Foundation or the Fonds d'aide in Quebec may be entitled, or any lien of any Person on any payment to any Settlement Class member from the Settlement Amount.

2024 FC 225 (CanLII)

11.3 Administration Expenses

(1) Except as provided herein, Administration Expenses may only be paid out of the Trust Account after the Effective Date.

(2) Class Counsel shall pay the costs of the notices required by section 9.1(1) and translation costs, if any, from the Trust Account, as they become due. Subject to section 5.2(2), the Releasees shall not have any responsibility for the costs of the notices or administration of the Settlement Agreement.

SECTION 12 – MISCELLANEOUS

12.1 Motions for Directions

(1) Class Counsel or the Settling Defendants may apply to the Federal Court as may be required for directions in respect of the interpretation, implementation and administration of this Settlement Agreement.

(2) All motions contemplated by this Settlement Agreement shall be on notice to the Parties.

12.2 Headings, etc.

(1) In this Settlement Agreement:

(a) the division of the Settlement Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Settlement Agreement; and

(b) the terms this Settlement Agreement", "hereof", "hereunder", "herein", and similar expressions refer to this Settlement Agreement and not to any particular section or other portion of this Settlement Agreement.

12.3 Computation of Time

(1) In the computation of time in this Settlement Agreement, except where a contrary intention appears,

(a) where there is a reference to a number of days between two events, the number of days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, including all calendar days; and

(b) only in the case where the time for doing an act expires on a holiday as "holiday" is defined in the *Federal Courts Rules*, the act may be done on the next day that is not a holiday.

2024 FC 225 (CanLII)

12.4 Ongoing Jurisdiction

(1) The Federal Court shall exercise jurisdiction with respect to implementation, administration, interpretation and enforcement of the terms of this Settlement Agreement, and the Plaintiffs, Settlement Class, Settling Defendants, and Releasees named as Defendants attorn to the jurisdiction of the Federal Court for such purposes and no other purpose. Issues related to the administration of the Settlement Agreement, and the Trust Account shall be determined by the Federal Court.

12.5 Governing Law

(1) This Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

12.6 Entire Agreement

(1) This Settlement Agreement constitutes the entire agreement among the Parties, and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements, agreements in principle and memoranda of understanding in connection herewith. None of the Parties will be bound by any prior obligations, conditions or representations with respect to the subject matter of this Settlement Agreement, unless expressly incorporated herein.

12.7 Amendments

(1) This Settlement Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment must be approved by the Federal Court.

12.8 Binding Effect

(1) This Settlement Agreement shall be binding upon, and enure to the benefit of, the Plaintiffs, the Settling Defendants, the Settlement Class, the Releasors, the Releasees and all of their successors and assigns. Without limiting the generality of the foregoing, each and every covenant and agreement made herein by the Plaintiffs shall be binding upon all Releasors and each and every covenant and agreement made herein by the Settling Defendants shall be binding upon all of the Releasees.

12.9 Counterparts

(1) This Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one of the same agreement, and an electronic/PDF signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

12.10 Negotiated Agreement

(1) This Settlement Agreement has been the subject of negotiations and discussions among the undersigned, each of which has been represented and advised by competent counsel, so that any

2024 FC 225 (CanLII)

statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Settlement Agreement shall have no force and effect. The Parties further agree that the language contained in or not contained in previous drafts of this Settlement Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of this Settlement Agreement.

12.11 Transaction

(1) This Settlement Agreement constitutes a transaction in accordance with Articles 2631 and following of the *Civil Code of Quebec*, and the Parties are hereby renouncing to any errors of fact, of law and/or of calculation.

12.12 Language

(1) The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English; les parties reconnaissent avoir exigé et consenti à ce que la présente entente de règlement et tous les documents connexes soient rédigés en anglais. Nevertheless, Class Counsel and/or a translation firm selected by Class Counsel may prepare a French translation of the Settlement Agreement and all related documents, the cost of which shall be paid from the Settlement Amount. In the event of any dispute as to the interpretation or application of this Settlement Agreement, only the English version shall govern.

12.13 Recitals

(1) The recitals to this Settlement Agreement are true and form part of the Settlement Agreement.

12.14 Schedules

(1) The schedules annexed hereto form part of this Settlement Agreement.

12.15 Acknowledgements

(1) Each of the Parties hereby affirms and acknowledges that:

(a) he, she or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has read and understood the Settlement Agreement;

(b) the terms of this Settlement Agreement and the effects thereof have been fully explained to him, her or the Party's representative by his, her or its counsel;

(c) he, she or the Party's representative fully understands each term of the Settlement Agreement and its effect; and

(d) no Party has relied upon any statement, representation or inducement (whether material, false, negligently made or otherwise) of any other Party, beyond the terms

of this Settlement Agreement, with respect to the first Party's decision to execute this Settlement Agreement.

12.16 Authorized Signatures

(1) Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement on behalf of the Parties identified above their respective signatures and their law firms.

12.17 Notice

(1) Where this Settlement Agreement requires a Party to provide notice or any other communication or document to another, such notice, communication or document shall be provided by email or letter by overnight delivery to the representatives for the Party to whom notice is being provided, as identified below:

For the Plaintiffs and for Class Counsel in the Proceedings:

Linda Visser and Bridget Moran
Siskinds LLP
275 Dundas Street, Unit 1
P.O. Box 2520, London ON N6B 3L1

Telephone: 519-660-7700
519-660-7842
Email: linda.visser@siskinds.com
bridget.moran@siskinds.com

Jean Marc Leclerc and Mohsen Seddigh
Sotos LLP
180 Dundas Street West, Suite 1200
Toronto, ON M5G 1Z8

Telephone: 416-977-6857
416-572-7320
Email: jleclerc@sostosllp.com
mseddigh@sotos.ca

James Sayce and Adam Tanel
Koskie Minsky LLP
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

Telephone: 416-542-6298
416-595-2072
Email: jsayce@kmlaw.ca
atanel@kmlaw.ca

For the Cermaq Defendants:

Andrew Borrell and Alexandra Mitretodis
Fasken Martineau DuMoulin LLP
2900-550 Burrard Street
Vancouver, BC V6C 0A3

Telephone: 604-631-3195
604-631-3211

For the Grieg Defendants:

Nikiforos Iatrou, Gillian Kerr and Akiva Stern
McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto, ON M5K 1E6

2024 FC 225 (CanLII)

Email: aborrell@fasken.com
amitretodis@fasken.com

Telephone: 416-601-7642
416-601-8226
416-601-8910
Email: niatrou@mccarthy.ca
gkerr@mccarthy.ca
astern@mccarthy.ca

For the Lerøy Defendants:

Sandra A. Forbes and Alisa McMaster
Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Telephone: 416-863-5574
416-367-7466
Email: sforbes@dwpv.com
Amcmaster@dwpv.com

For the Mowi Defendants:

Robert Kwinter, Kevin MacDonald and Joe McGrade
Blake, Cassels & Graydon LLP
199 Bay Street, Suite 400
Toronto, ON M5L 1A9

Telephone: 416-863-3283
416-863-4023
416-863-4182
Email: Robert.kwinter@blakes.com
kevin.macdonald@blakes.com
joe.mcgrade@blakes.com

For the Nova Sea Defendant:

Subrata Bhattacharjee, Caitlin R. Sainsbury and Pierre N. Gemson
Borden Ladner Gervais LLP
22 Adelaide Street West, Suite 3400
Toronto, ON M5H 4E3

Telephone: 416-367-6371
416-367-6438
416-367-6324
Email: sbhattacharjee@blg.com
csainsbury@blg.com
pgemson@blg.com

For the SalMar Defendant:

Michael Eizenga and Ilan Ishai
Bennett Jones LLP
3400 One First Canadian Place
Toronto, ON M5X 1A4

Telephone: 416-777-4879
604-631-3211
Email: Eizengam@bennettjones.com
ishaii@bennettjones.com

2024 FC 225 (CanLII)

For the Sjór Defendant:

David W. Kent, Samantha Gordon and
Guneev Bhinder
McMillan LLP
Brookfield Place, 181 Bay St., Suite 4400
Toronto, ON M5J 2T3

Telephone: 416-865-7143
416-865-7251
416-307-4067
Email: david.kent@mcmillan.ca
samantha.gordon@mcmillan.ca
guneev.bhinder@mcmillan.ca

12.18 Date of Execution

(1) The Parties have executed this Settlement Agreement as of the date on the cover page.

IRENE BRECKON, GREGORY SILLS, CLIFFORD CHIN, GEORGES LANGIS AND GENEVIEVE CHABOT on their own behalf and on behalf of the Class, by Class Counsel:

Name of Authorized Signatory: Linda Visser

Signature of Authorized Signatory:

Siskinds LLP

Name of Authorized Signatory: Jean-Marc Leclerc

Signature of Authorized Signatory:

Sotos LLP

Name of Authorized Signatory: James Sayce

Signature of Authorized Signatory:

Koskie Minsky LLP

CERMAQ CANADA LTD., CERMAQ GROUP AS, CERMAQ NORWAY AS, CERMAQ US LLC, by their counsel

Name of Authorized Signatory: ________________

Signature of Authorized Signatory: ________________

Fasken Martineau DuMoulin LLP

2024 FC 225 (CanLII)

For the Sjór Defendant:

David W. Kent, Samantha Gordon and
Guneev Bhinder
McMillan LLP
Brookfield Place, 181 Bay St., Suite 4400
Toronto, ON M5J 2T3

Telephone: 416-865-7143
416-865-7251
416-307-4067
Email: david.kent@mcmillan.ca
samantha.gordon@mcmillan.ca
guneev.bhinder@mcmillan.ca

12.18 Date of Execution

(1) The Parties have executed this Settlement Agreement as of the date on the cover page.

IRENE BRECKON, GREGORY SILLS, CLIFFORD CHIN, GEORGES LANGIS AND GENEVIEVE CHABOT on their own behalf and on behalf of the Class, by Class Counsel:

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Siskinds LLP

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Sotos LLP

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Koskie Minsky LLP

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Siskinds Desmeules s.e.n.c.r.l.

CERMAQ CANADA LTD., CERMAQ GROUP AS, CERMAQ NORWAY AS, CERMAQ US LLC, by their counsel

Name of Authorized Signatory: Andrew Borrell

2024 FC 225 (CanLII)

Signature of Authorized Signatory: ____________________
Fasken Martineau DuMoulin LLP

GRIEG SEAFOOD ASA, GRIEG SEAFOOD BC LTD., GRIEG SEAFOOD SALES NORTH AMERICA INCORPORATED (FORMERLY KNOWN AS OCEAN QUALITY NORTH AMERICA INC.), GRIEG SEAFOOD SALES PREMIUM BRANDS INC. (FORMERLY KNOWN AS OCEAN QUALITY PREMIUM BRANDS INC.), GRIEG SEAFOOD SALES USA INC. (FORMERLY KNOWN AS OCEAN QUALITY USA INC. by their counsel

Name of Authorized Signatory: ____________________

Signature of Authorized Signatory: ____________________
McCarthy Tétrault LLP

LERØY SEAFOOD AS, LERØY SEAFOOD USA INC., by their counsel

Name of Authorized Signatory: ____________________

Signature of Authorized Signatory: ____________________
Davies Ward Phillips & Vineberg LLP

MARINE HARVEST ATLANTIC CANADA INC., MOWI ASA, MOWI CANADA WEST INC., MOWI DUCKTRAP, LLC, MOWI USA, LLC, by their counsel

Name of Authorized Signatory: ____________________

Signature of Authorized Signatory: ____________________
Blake, Cassels & Graydon LLP

NOVA SEA AS, by its counsel

Name of Authorized Signatory: ____________________

Signature of Authorized Signatory: ____________________
Borden Ladner Gervais LLP

SALMAR ASA, by its counsel

Name of Authorized Signatory: ____________________

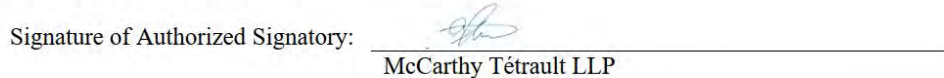
Signature of Authorized Signatory: ____________________

2024 FC 225 (CanLII)

Signature of Authorized Signatory: ______________________________
Fasken Martineau DuMoulin LLP

GRIEG SEAFOOD ASA, GRIEG SEAFOOD BC LTD., GRIEG SEAFOOD SALES NORTH AMERICA INCORPORATED (FORMERLY KNOWN AS OCEAN QUALITY NORTH AMERICA INC.), GRIEG SEAFOOD SALES PREMIUM BRANDS INC. (FORMERLY KNOWN AS OCEAN QUALITY PREMIUM BRANDS INC.), GRIEG SEAFOOD SALES USA INC. (FORMERLY KNOWN AS OCEAN QUALITY USA INC. by their counsel

Name of Authorized Signatory: Akiva Stern

Signature of Authorized Signatory: 
McCarthy Tétrault LLP

LERØY SEAFOOD AS, LERØY SEAFOOD USA INC., by their counsel

Name of Authorized Signatory: ______________________________

Signature of Authorized Signatory: ______________________________
Davies Ward Phillips & Vineberg LLP

MARINE HARVEST ATLANTIC CANADA INC., MOWI ASA, MOWI CANADA WEST INC., MOWI DUCKTRAP, LLC, MOWI USA, LLC, by their counsel

Name of Authorized Signatory: ______________________________

Signature of Authorized Signatory: ______________________________
Blake, Cassels & Graydon LLP

NOVA SEA AS, by its counsel

Name of Authorized Signatory: ______________________________

Signature of Authorized Signatory: ______________________________
Borden Ladner Gervais LLP

SALMAR ASA, by its counsel

Name of Authorized Signatory: ______________________________

Signature of Authorized Signatory: ______________________________

2024 FC 225 (CanLII)

Signature of Authorized Signatory: ____________________
Fasken Martineau DuMoulin LLP

2024 FC 225 (CanLII)

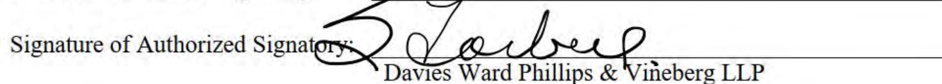
GRIEG SEAFOOD ASA, GRIEG SEAFOOD BC LTD., GRIEG SEAFOOD SALES NORTH AMERICA INCORPORATED (FORMERLY KNOWN AS OCEAN QUALITY NORTH AMERICA INC.), GRIEG SEAFOOD SALES PREMIUM BRANDS INC. (FORMERLY KNOWN AS OCEAN QUALITY PREMIUM BRANDS INC.), GRIEG SEAFOOD SALES USA INC. (FORMERLY KNOWN AS OCEAN QUALITY USA INC. by their counsel

Name of Authorized Signatory: ____________________

Signature of Authorized Signatory: ____________________
McCarthy Tétrault LLP

LERØY SEAFOOD AS, LERØY SEAFOOD USA INC., by their counsel

Name of Authorized Signatory: Sandra A. Forbes

Signature of Authorized Signatory:

Davies Ward Phillips & Vineberg LLP

MARINE HARVEST ATLANTIC CANADA INC., MOWI ASA, MOWI CANADA WEST INC., MOWI DUCKTRAP, LLC, MOWI USA, LLC, by their counsel

Name of Authorized Signatory: ____________________

Signature of Authorized Signatory: ____________________
Blake, Cassels & Graydon LLP

NOVA SEA AS, by its counsel

Name of Authorized Signatory: ____________________

Signature of Authorized Signatory: ____________________
Borden Ladner Gervais LLP

SALMAR ASA, by its counsel

Name of Authorized Signatory: ____________________

Signature of Authorized Signatory: ____________________

Signature of Authorized Signatory: ______________________
Fasken Martineau DuMoulin LLP

GRIEG SEAFOOD ASA, GRIEG SEAFOOD BC LTD., GRIEG SEAFOOD SALES NORTH AMERICA INCORPORATED (FORMERLY KNOWN AS OCEAN QUALITY NORTH AMERICA INC.), GRIEG SEAFOOD SALES PREMIUM BRANDS INC. (FORMERLY KNOWN AS OCEAN QUALITY PREMIUM BRANDS INC.), GRIEG SEAFOOD SALES USA INC. (FORMERLY KNOWN AS OCEAN QUALITY USA INC. by their counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
McCarthy Tétrault LLP

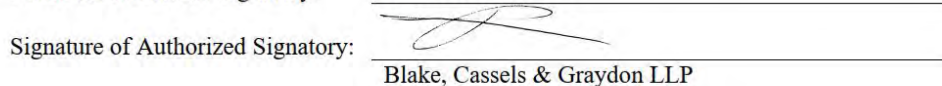
LERØY SEAFOOD AS, LERØY SEAFOOD USA INC., by their counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Davies Ward Phillips & Vineberg LLP

MARINE HARVEST ATLANTIC CANADA INC., MOWI ASA, MOWI CANADA WEST INC., MOWI DUCKTRAP, LLC, MOWI USA, LLC, by their counsel

Name of Authorized Signatory: Kevin MacDonald



Signature of Authorized Signatory: ______________________
Blake, Cassels & Graydon LLP

NOVA SEA AS, by its counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Borden Ladner Gervais LLP

SALMAR ASA, by its counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________

2024 FC 225 (CanLII)

Signature of Authorized Signatory: ______________________
Fasken Martineau DuMoulin LLP

GRIEG SEAFOOD ASA, GRIEG SEAFOOD BC LTD., GRIEG SEAFOOD SALES NORTH AMERICA INCORPORATED (FORMERLY KNOWN AS OCEAN QUALITY NORTH AMERICA INC.), GRIEG SEAFOOD SALES PREMIUM BRANDS INC. (FORMERLY KNOWN AS OCEAN QUALITY PREMIUM BRANDS INC.), GRIEG SEAFOOD SALES USA INC. (FORMERLY KNOWN AS OCEAN QUALITY USA INC. by their counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
McCarthy Tétrault LLP

LERØY SEAFOOD AS, LERØY SEAFOOD USA INC., by their counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Davies Ward Phillips & Vineberg LLP

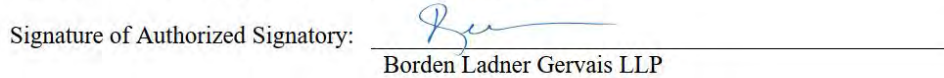
MARINE HARVEST ATLANTIC CANADA INC., MOWI ASA, MOWI CANADA WEST INC., MOWI DUCKTRAP, LLC, MOWI USA, LLC, by their counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Blake, Cassels & Graydon LLP

NOVA SEA AS, by its counsel

Name of Authorized Signatory: Pierre N. Gemson

Signature of Authorized Signatory: 
Borden Ladner Gervais LLP

SALMAR ASA, by its counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________

2024 FC 225 (CanLII)

Signature of Authorized Signatory: ______________________
Fasken Martineau DuMoulin LLP

GRIEG SEAFOOD ASA, GRIEG SEAFOOD BC LTD., GRIEG SEAFOOD SALES NORTH AMERICA INCORPORATED (FORMERLY KNOWN AS OCEAN QUALITY NORTH AMERICA INC.), GRIEG SEAFOOD SALES PREMIUM BRANDS INC. (FORMERLY KNOWN AS OCEAN QUALITY PREMIUM BRANDS INC.), GRIEG SEAFOOD SALES USA INC. (FORMERLY KNOWN AS OCEAN QUALITY USA INC. by their counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
McCarthy Tétrault LLP

LERØY SEAFOOD AS, LERØY SEAFOOD USA INC., by their counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Davies Ward Phillips & Vineberg LLP

MARINE HARVEST ATLANTIC CANADA INC., MOWI ASA, MOWI CANADA WEST INC., MOWI DUCKTRAP, LLC, MOWI USA, LLC, by their counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Blake, Cassels & Graydon LLP

NOVA SEA AS, by its counsel

Name of Authorized Signatory: ______________________

Signature of Authorized Signatory: ______________________
Borden Ladner Gervais LLP

SALMAR ASA, by its counsel

Name of Authorized Signatory: Ilan Ishai

Signature of Authorized Signatory:

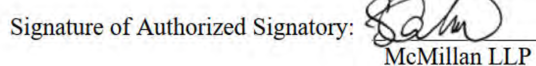
321325.00001/301446938.2

2024 FC 225 (CanLII)

Bennett Jones LLP

SJÓR AS (FORMERLY KNOWN AS OCEAN QUALITY AS), by its counsel

Name of Authorized Signatory: Samantha Gordon, McMillan LLP

Signature of Authorized Signatory: 

McMillan LLP

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

SCHEDULE "A"

PROCEEDINGS

Proceeding	Plaintiffs	Defendants (Current and Former)
Federal Court File No. T-1664-19 (Federal Court File No. T-8-20 was consolidated with Federal Court File No. T-1664-19 on January 26, 2021)	Gregory Sills	Mowi ASA (FKA Marine Harvest ASA), Mowi USA, LLC (FKA Marine Harvest USA, LLC), Marine Harvest Canada Inc., Mowi Ducktrap, LLC, Grieg Seafood ASA, Grieg Seafood B.C. Ltd., Bremnes Seashore AS, Ocean Quality AS, Ocean Quality North America Incorporated, Ocean Quality USA Inc., Ocean Quality Premium Brands, Inc., SalMar ASA, Leroy Seafood Group ASA, Leroy Seafood AS, Leroy Seafood USA Inc., Scottish Sea Farms Ltd., Cermaq Group ASA, Cermaq Norway AS, Cermaq Canada Ltd., Nordlaks Holding AS, Nordlaks Oppdrett AS, Nova Sea AS, Alsaker AS and Alsaker Fjordbruk AS
Federal Court File No. T-8-20 (Federal Court File No. T-8-20 was consolidated with Federal Court File No. T-1664-19 on January 26, 2021)	Irene Breckon	Grieg Seafood ASA, Grieg Seafood BC Ltd., Lerøy Seafood Group ASA, Lerøy Seafood AS, Lerøy Seafood USA Inc., Marine Harvest Atlantic Canada Inc., Mowi ASA, Mowi Canada West Inc., Mowi Ducktrap, LLC, Mowi USA LLC, Ocean Quality AS, Ocean Quality North America Incorporated, Ocean Quality Premium Brands, Inc., Ocean Quality USA Inc., SalMar ASA and Scottish Sea Farms Ltd.
Supreme Court of British Columbia Vancouver Registry No. 211995	Clifford Chin	Alsaker AS, Alsaker Fjordbruk AS, Bremnes Seashore AS, Cermaq Canada Ltd., Cermaq Group AS, Cermaq Norway AS, Cermaq US LLC, Greig Seafood ASA, Grieg Seafood BC Ltd., Lerøy Seafood AS, Lerøy Seafood USA Inc., Marine Harvest Atlantic Canada Inc., Mowi ASA, Mowi Canada West Inc., Mowi Ducktrap, LLC, Mowi USA, LLC, Nordlaks Holding AS, Nordlaks Oppdrett AS, Nova Sea AS, Ocean Quality AS, Ocean Quality North America Incorporated, Ocean Quality Premium Brands, Inc., Ocean Quality USA

Proceeding	Plaintiffs	Defendants (Current and Former)
		Inc., SalMar ASA and Scottish Sea Farms Ltd.
Court Supérieure du Québec District de Québec No: 200-06-000245-202	Georges Langis et Geneviève Chabot	Grieg Seafood ASA, Grieg Seafood BC Ltd., Lerøy Seafood Group ASA, Lerøy Seafood USA, Inc., Marine Harvest Atlantic Canada Inc., Mowi ASA, Mowi Canada West Inc., Mowi Ducktrap, LLC, Mowi USA, LLC, Ocean Quality AS, Ocean Quality North America Incorporated, Ocean Quality Premium Brands Inc., Ocean Quality USA, Inc., SalMar ASA and Scottish Sea Farms, Ltd.

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

SCHEDULE "B"

FEDERAL COURT

Court File No.: T-1664-19

Toronto, Ontario, [●]

PRESENT: The Honourable Justice Gascon

PROPOSED CLASS PROCEEDING

BETWEEN:

IRENE BRECKON and GREGORY SILLS

Plaintiffs

and

CERMAQ CANADA LTD., CERMAQ GROUP AS, CERMAQ NORWAY AS, CERMAQ US LLC, GRIEG SEAFOOD ASA, GRIEG SEAFOOD BC LTD., LERØY SEAFOOD AS, LERØY SEAFOOD USA INC., MARINE HARVEST ATLANTIC CANADA INC., MOWI ASA, MOWI CANADA WEST INC., MOWI DUCKTRAP, LLC, MOWI USA, LLC, NORDLAKS HOLDING AS, NORDLAKS OPPDRETT AS, NOVA SEA AS, OCEAN QUALITY AS, OCEAN QUALITY NORTH AMERICA INCORPORATED, OCEAN QUALITY PREMIUM BRANDS, INC., OCEAN QUALITY USA INC., and SALMAR ASA

Defendants

ORDER
Certification and Notice Approval

UPON MOTION made by the Plaintiffs for an Order approving the notices of settlement approval hearing ("**Notice of Certification and Settlement Approval Hearing**"), the plan of dissemination of said notices (the "**Notice Plan**") and certifying this Action as a class proceeding for settlement purposes only was heard by videoconference this day at [●].

AND UPON having reviewed the materials filed, including the settlement agreement dated [●] attached to this Order as **Schedule "A"** (the "Settlement Agreement"), and on hearing the submissions of counsel for the Parties;

AND UPON BEING ADVISED that the Plaintiffs and Settling Defendants (who comprise all of the defendants named in this Action) consent to this Order;

THIS COURT ORDERS that:

1. For the purposes of this Order, except to the extent that they are modified in this Order, the definitions set out in the Settlement Agreement apply to and are incorporated into this Order.

2. This Action is certified as a class proceeding as against the Settling Defendants for settlement purposes only.

3. The class of "Settlement Class" is certified as follows:

   All Persons in Canada who purchased farmed Atlantic salmon and products containing or derived from farmed Atlantic salmon purchased or sold in Canada from April 10, 2013 to the date of this Order, except the Excluded Persons and any Opt-Out.

4. Irene Breckon and Gregory Sills are appointed as representative plaintiffs for the Settlement Class.

5. The following issue is common to the Settlement Class:

   Did the Settling Defendants conspire to fix, maintain, increase or control the price of Salmon directly or indirectly during the Class Period? If so, what damages, if any, did Settlement Class member suffer?

6. Putative Settlement Class members may opt-out of this Action by sending a written request to opt-out to Class Counsel on or before the Opt-Out Deadline. The written election to opt out must be signed by the Person or the Person's designee and must include the following information:

   (a) the Person's full name, current mailing and email address and telephone number;

   (b) if the Person seeking to opt out is a corporation, the name of the corporation and the position of the Person submitting the request to opt out on behalf of the corporation; and

   (c) a statement to the effect that the Person wishes to be excluded from the Action.

7. Where the postmark is not visible or legible, the request to opt out shall be deemed to have been postmarked seven (7) business days prior to the date that it is received by Class Counsel.

8. Any putative Settlement Class member who validly opts out of this Action shall have no further right to participate in the Action or to share in the distribution of any funds received as a result of the Settlement Agreement.

9. No further right to opt out of this Action will be provided.

10. Within thirty (30) days of the Opt-Out Deadline, Class Counsel shall provide to the Settling Defendants a report containing the names of each Person who has validly and timely opted

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

out of this Action and a summary of the information delivered by such Persons pursuant to paragraph 6 above.

11. This Order and any reasons given by the Court in connection with it and the certification of this Action for settlement purposes are without prejudice to the Settling Defendants' rights to contest certification or jurisdiction and/or to defend on the merits in respect of any other actions or proceedings, whether related or unrelated.

12. The Notice of Certification and Settlement Approval Hearing is hereby approved substantially in the form attached hereto as **Schedule "B"**.

13. The Notice Plan is hereby approved in the form attached hereto as **Schedule "C"**.

14. The Notice of Certification and Settlement Approval Hearing shall be disseminated in accordance with the Notice Plan.

15. This Order shall be set aside, declared null and void and of no force and effect in respect of the Settling Defendants on subsequent motion made on notice in the event that the Settlement Agreement is terminated in accordance with its terms.

____
The Honourable Justice Gascon

2024 FC 225 (CanLII)

SCHEDULE "C"

FEDERAL COURT

Court File No.: T-1664-19

Toronto, Ontario, [●]

PRESENT: The Honourable Justice Gascon

PROPOSED CLASS PROCEEDING

BETWEEN:

IRENE BRECKON and GREGORY SILLS

Plaintiffs

and

CERMAQ CANADA LTD., CERMAQ GROUP AS, CERMAQ NORWAY AS, CERMAQ US LLC, GRIEG SEAFOOD ASA, GRIEG SEAFOOD BC LTD., LERØY SEAFOOD AS, LERØY SEAFOOD USA INC., MARINE HARVEST ATLANTIC CANADA INC., MOWI ASA, MOWI CANADA WEST INC., MOWI DUCKTRAP, LLC, MOWI USA, LLC, NORDLAKS HOLDING AS, NORDLAKS OPPDRETT AS, NOVA SEA AS, OCEAN QUALITY AS, OCEAN QUALITY NORTH AMERICA INCORPORATED, OCEAN QUALITY PREMIUM BRANDS, INC., OCEAN QUALITY USA INC., and SALMAR ASA

Defendants

ORDER
Settlement Approval

UPON MOTION made by the Plaintiffs for an Order approving the Settlement Agreement entered into with the Settling Defendants, and dismissing this action was heard this day at [●].

AND UPON being advised that the deadline for opting out of this Action has passed, and that there were [●] opt-outs;

AND UPON being advised that the deadline for objecting to the Settlement Agreement has passed and there have been [●] objections to the Settlement Agreement;

AND UPON being advised that the Parties consent to this Order;

AND UPON having reviewed the materials filed, including the settlement agreement dated [●] attached to this Order as **Schedule "A"** (the "**Settlement Agreement**"), and on hearing the submissions of counsel for the Parties;

2024 FC 225 (CanLII)

THIS COURT ORDERS that:

16. For the purposes of this Order, except to the extent that they are modified in this Order, the definitions set out in the Settlement Agreement apply to and are incorporated into this Order.

17. In the event of a conflict between this Order and the Settlement Agreement, this Order shall prevail.

18. The Settlement Agreement is fair, reasonable and in the best interests of the Settlement Class.

19. The Settlement Agreement is hereby approved pursuant to the *Federal Court Rules*, SOR/98-106, Rule 334.29 and shall be implemented and enforced in accordance with its terms.

20. This Order, including the Settlement Agreement, is binding upon each Settlement Class member, including those Persons who are minors or mentally incapable.

21. Upon the Effective Date, each Releasor shall not now or hereafter institute, prosecute, continue, maintain, intervene in or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any proceeding, cause of action, claim, suit, complaint or demand against any Releasee or any other Person who may claim contribution or indemnity or other claims over relief from any Releasee, whether pursuant to any provincial or federal negligence acts or similar legislation or at common law or equity, in respect of any Released Claim, and are permanently barred and enjoined from doing so.

22. Upon the Effective Date, each Settlement Class member shall be deemed to have consented to the dismissal as against the Releasees of any Other Actions he, she or it has commenced, without costs and with prejudice.

23. Upon the Effective Date, each Other Action commenced by any Settlement Class member shall be and is hereby dismissed against the Releasees, without costs and with prejudice.

24. Upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever and absolutely released the Releasees from the Released Claims.

25. Except as provided herein, this Order does not affect any claims or causes of action that Settlement Class members have or may have against any Person other than the Releasees.

26. No Releasee shall have any responsibility or liability whatsoever relating to the administration of the Settlement Agreement; to administration, investment, or distribution of the Trust Account; or to the Distribution Protocol.

27. This Order shall be declared null and void on subsequent motion made on notice in the event that the Settlement Agreement is terminated in accordance with its terms.

28. For purposes of administration and enforcement of the Settlement Agreement and this Order, this Court will retain an ongoing supervisory role and the Settling Defendants attorn to the jurisdiction of this Court solely for the purpose of implementing, administering and enforcing the Settlement Agreement and this Order, and subject to the terms and conditions set out in the Settlement Agreement and this Order.

29. This Action, as well as the action commenced in Federal Court File No. T-8-20, which has been consolidated with this Action, are hereby dismissed, with prejudice and without costs. Once this Order is signed, a copy shall be entered in this Action, as well as in the action commenced in Federal Court File No. T-8-20.

30. The Parties may bring motions to the Federal Court for directions as may be required.

____

The Honourable Justice Gascon

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

SCHEDULE "D"

FARMED ATLANTIC SALMON CLASS ACTIONS

CANADIAN NOTICE PLAN – NOTICE OF CERTIFICATION AND SETTLEMENT APPROVAL HEARING

1. For the purposes of this Notice Plan, the definitions set out in the Settlement Agreement apply to and are incorporated into this Notice Plan.

2. The proposed Notice Plan has been designed to provide the best notice practicable.

3. The Notice of Certification and Settlement Approval Hearing is attached as **Schedule "A1"**.

4. There will no other forms of notice other than what is provided for herein, except as agreed to by the Parties or as ordered by the Federal Court.

Direct Notice

4. Class Counsel and/or the Court-appointed notice provider will effectuate direct individual notice to the Persons listed below. Where an email address is available, the notice will be sent by email (in English and French). Where an email address is not available, the notice will be sent by direct mail. Where the address is in Quebec, the notice will be sent in English and French:

   (a) the direct purchaser customers of the Settled Defendants, to the extent such information was provided to Class Counsel and/or the Court-appointed notice provider in accordance with the terms of the Settlement Agreement;

   (b) anyone who has registered with Class Counsel to receive updates on the status of the litigation; and

   (c) 1,067 companies located in Canada and identified by Data Axle[1] as having corporate locations with 50 or more employees and/or individual locations with 100 or more employees and operating in the following business sectors: fish smoking & curing (manufacturers), fish packers (manufacturers), food-canned (manufacturers), canned & cured fish & seafoods (manufacturers), seafood packers (manufacturers), seafood – wholesale, fish and seafood brokers (wholesalers), food service distributors (wholesalers), foods-carryout, restaurants, caterers, restaurant management, and grocers (retail), but excluding irrelevant categories such as pizza chains, bars or pubs, fast food chains, etc.

[1] Data Axle maintains a database of business records in Canada and the United States.

2024 FC 225 (CanLII)

5. Prior to mailing, Class Counsel and/or the Court-appointed notice provider will update the addresses provided by the Settled Defendants using the Canada Post National Change of Address database.

6. Class Counsel and/or the Court-appointed notice provider Administrator will track any returned undeliverable emails and will promptly send the notice by direct mail (where a mailing address is available).

7. Class Counsel and/or the Court-appointed notice provider Administrator will track any returned undeliverable mail by Canada Post and will promptly re-mail any returned with a forward address.

Indirect Notice

8. A press release will be jointly drafted and agreed to by the Parties and distributed (in English and French) nationwide to media outlets and publications through publication on Canada Newswire. A copy of the press release will also be sent directly to IntraFish. The press release will direct readers to Class Counsel's websites for additional information.

9. Class Counsel and/or the Court-appointed notice provider will provide a copy of the Notice of Certification and Settlement Approval Hearing to the following industry associations, in English and/of French, as appropriate, requesting voluntary distribution to their membership:

   (a) Canadian Federation of Independent Grocers;

   (b) Food, Health and Consumer Products of Canada;

   (c) Restaurants Canada; and

   (d) Food Processors of Canada.

10. Class Counsel will post a copy of the Notice of Certification and Settlement Approval Hearing (in English and French) on their respective websites and share the post through their social media accounts.

11. Online advertisements will be jointly drafted and agreed to by the Parties and posted online (in English and French) through advertisements posted over a two-month period on Facebook and Instagram.

2024 FC 225 (CanLII)

SCHEDULE “A1”

FARMED ATLANTIC SALMON CLASS ACTIONS

NOTICE OF CERTIFICATION AND SETTLEMENT APPROVAL HEARING

Read this Notice carefully, as it may affect your legal rights.

THIS NOTICE IS DIRECTED TO:

All persons in Canada who purchased farmed Atlantic salmon and products containing or derived from farmed Atlantic salmon purchased or sold in Canada from April 10, 2013 to [●] (“Settlement Class”).

A. Nature of the Class Action

The plaintiffs commenced a proposed class proceeding in the Federal Court alleging that the Cermaq, Grieg, Lerøy, Mowi, Nova Sea, SalMar and Sjór defendants and unnamed co-conspirators participated in an unlawful conspiracy to fix, maintain, increase or control the price of farmed Atlantic salmon and products containing or derived from farmed Atlantic salmon from April 10, 2013 onwards contrary to the *Competition Act*. The defendants have denied all liability for this conduct and asserted that their conduct was lawful. The Federal Court has not decided who is right. The plaintiffs and defendants have reached a proposed settlement to avoid the uncertainties, risks, and costs of further litigation. The representative plaintiffs and class counsel believe this settlement is in the best interests of the Settlement Class.

The class action was certified on behalf of the Settlement Class by the Federal Court by consent order of the Honourable Justice Gascon on [●], 2023. The certification is conditional on the settlement approval being granted by the Federal Court. Irene Breckon and Gregory Sills have been appointed as representative plaintiffs for the Settlement Class.

The Federal Court still has to decide whether to finally approve the settlement. Payments to eligible Settlement Class members will be made only after the Federal Court approves the Settlement and after any appeals are resolved, and after the Federal Court approves a distribution plan to distribute the settlement funds.

B. Proposed Settlement

A proposed settlement has been reached with all defendants in this action. If the proposed settlement is approved, the defendants will pay a total settlement amount of CAD $5,250,000 into a settlement fund. After deductions for administration expenses, class counsel fees and disbursements, and the amount owing to the Funder (see Section F below), the balance will be distributed to eligible Settlement Class members.

If the proposed settlement is approved, the settlement will resolve the class action for all Settlement Class members as against the defendants and a full release of all claims in the class

2024 FC 225 (CanLII)

action will be granted to the defendants. The settlement represents a resolution of disputed claims and the defendants do not admit any wrongdoing or liability.

C. Proposed Distribution of Settlement Funds

As part of the settlement approval hearing, the Federal Court will be asked to approve a protocol for the distribution of the settlement funds, plus interest, less Court-approved fees and expenses.

Recognizing that not all Settlement Class members are eligible to submit a claim, the proposed distribution protocol provides that a *cy pres* distribution in the amount of $250,000 will be made to Food Banks Canada.

The remaining settlement funds will be distributed to eligible claimants *pro rata* (proportionally), based on the value of their eligible purchases.

Only Settlement Class members who purchased more than $1 million of Salmon in Canada between April 10, 2013 and February 20, 2019 will be eligible to submit a claim. The value of a Settlement Class member's eligible purchases will be determined based on sales information provided by the defendants pursuant to the terms of the Settlement Agreement and/or information provided by the Settlement Class member as part of the claims process.

See the proposed distribution protocol online at www.siskinds.com/salmon for more information.

After the settlement and distribution protocol are approved, a further notice will be issued that will describe the process and deadline for applying to receive a payment.

D. Settlement Approval Hearing and Objecting to the Settlement

The settlement remains subject to approval by the Federal Court. The application for approval of the settlement will be heard by the Federal Court in the City of Toronto on **[•]** at **[•]**. At this hearing, the Federal Court will determine whether the settlement is fair, reasonable and in the best interests of the Settlement Class. The Federal Court will also be asked to determine whether the proposed distribution protocol is fair, reasonable and in the best interests of the Settlement Class.

Settlement Class members who do not oppose the settlement, the proposed distribution protocol and/or Class Counsel fees are not required to appear at the settlement approval hearing or take any other action at this time. Settlement Class members who consider it desirable or necessary to seek the advice and guidance of their own lawyers may do so at their own expense.

At the settlement approval hearing, the Federal Court will consider objections to the Settlement, the proposed distribution protocol and/or Class Counsel fees by individual Settlement Class members if the objections are submitted in writing, by prepaid mail to Siskinds LLP, Attn: Linda Visser 275 Dundas Street, Unit 1, P.O. Box 2520, London ON N6B 3L1 or email to salmon@siskinds.com postmarked **no later than [date - 10 days before the settlement approval hearing]**.

A written objection should include the following information:

a) the objector's name, current mailing address, telephone number, and email address;

b) the reason why the objector believes that they are a Settlement Class member;

c) a brief statement of the nature of and reasons for the objection; and

d) whether the objector intends to appear at the hearing in person or by counsel, and, if by counsel, the name, address, telephone number, and email address of counsel.

E. Excluding Yourself from the Settlement

If you do not want to participate in the Class Action, you must send a written request to opt-out by [●] (the "**Opt-Out Deadline**") to Siskinds LLP, Attn: Linda Visser 275 Dundas Street, Unit 1, P.O. Box 2520, London ON N6B 3L1 or email to salmon@siskinds.com. The written request to opt-out must be signed by you (or your designee) and contain the following information:

a) your full name, current mailing and email address, and telephone number;

b) if the opt-out is a corporation, the name of the corporation and the position of the person submitting the request to opt-out on behalf of the corporation; and

c) a statement to the effect that you wish to be excluded from the Federal Court Action.

If you opt-out by the Opt-Out Deadline, you may be able to bring your own lawsuit against the defendants, but you will not be entitled to participate in the Settlement.

All Settlement Class members will be bound by the terms of the Settlement, unless they opt-out of this class action.

You can only object to the Settlement if you do not exclude yourself from the Settlement. If you exclude yourself from the Settlement, you have no standing to object because the Settlement no longer affects you.

F. The Lawyers Representing You

The law firms Siskinds LLP, Sotos LLP, Koskie Minsky LLP and Siskinds Desmeules represent the Settlement Class. They can be reached at:

Linda Visser and Bridget Moran
Siskinds LLP, 275 Dundas Street, Unit 1
P.O. Box 2520, London ON N6B 3L1
1-800-461-6166
linda.visser@siskinds.com
bridget.moran@siskinds.com

Jean Marc Leclerc and Mohsen Seddigh
Sotos LLP, 180 Dundas Street West, Suite 1200, Toronto, ON M5G 1Z8
416-977-6857
416-572-7320
jleclerc@sostosllp.com
mseddigh@sotos.ca

James Sayce and Adam Tanel
Koskie Minsky LLP, 20 Queen Street West, Suite 900, Box 52, Toronto, ON M5H 3R3
416-542-6298
416-595-2072
jsayce@kmlaw.ca
atanel@kmlaw.ca

Chloe Fraucher-Lafrance
Siskinds Desmeules s.e.n.c.r.l.
43 Rue Buade, Bur 320
Quebec City, QC G1R 4A2
1 (877) 735-3842
chloe.faucher-lafrance@siskinds.com

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

If you wish to remain a Settlement Class member, you do not need to hire your own lawyer because Class Counsel is working on your behalf. You do not have to pay Class Counsel out-of-pocket. Class Counsel will collectively be asking that the Federal Court approve legal fees up to 25% of the settlement funds, plus disbursements and applicable taxes. Any approved legal fees and disbursements will be paid out of the settlement fund.

The Plaintiff and Claims Funding Australia Pty Ltd as trustee for the Claims Funding Australia Discretionary Trust ("Funder") entered an agreement pursuant to which the Funder paid the disbursements in this action. If approved by the Court, the amount owing to the Funder ($1,312,500) will be deducted from the amounts to be distributed to Settlement Class members.

Class Counsel will also be asking that the Federal Court approve an honorarium for the two representative plaintiffs in the amount of $500 each. Any approved honorarium will be paid out of the settlement fund.

If you wish to pursue your own case separate from this one, or if you exclude yourself from the class, these lawyers will no longer represent you. You may need to hire your own lawyer if you wish to pursue your own lawsuit against the defendants.

G. More Information

This notice is given to you on the basis that you may be a Settlement Class member whose rights could be affected by the class action. This notice should not be understood as an expression of any opinion of the Federal Court as to the merits of any claim or defences asserted in the class action. Its sole purpose is to inform you of the class action so that you may decide what steps to take in relation to it.

This notice contains a summary of the class action and the settlement. Further details regarding the class action and the settlement can be found on the following website: [•].

If you have questions that are not answered online, please contact the appropriate class counsel identified above.

This notice contains a summary of some of the terms of the settlement agreement. If there is a conflict between the provisions of this notice and the settlement agreement, including the schedules to the settlement agreement, the terms of the settlement agreement and/or the Court orders shall prevail.

DO NOT CONTACT THE COURT FOR INFORMATION.

THIS NOTICE HAS BEEN APPROVED BY
THE FEDERAL COURT OF CANADA

ANNEX "B"

SCHEDULE B

DISTRIBUTION PROTOCOL
IN THE MATTER OF THE SALMON PRICE FIXING CLASS ACTION

INDEX

DEFINITIONS....2

GENERAL PRINCIPLES OF THE ADMINISTRATION....3

DISTRIBUTION OF NET SETTLEMENT FUNDS....4
- *Cy Près* Distribution....4
- Direct Settlement Benefits Available to Settlement Class Members....4
- Directions from the Federal Court....5

THE CLAIMS PROCESS....5
- Online Claims Portal....5
- The Claim Form....5
- Assistance in Filing a Claim....7
- Deficiencies....8
- Adjustments to Claims Process and Extension of the Claims Filing Deadline....8
- Class Counsel's Decision....8
- Payment of Settlement Benefits....9

CLASS COUNSEL'S DUTIES AND RESPONSIBILITIES AS CLAIMS ADMINISTRATOR10
- Supervisory Powers of the Federal Court....10
- Investment of Settlement Funds....10
- Communication, Languages and Translation....10
- Undeliverable Mail....10
- Settlement Expenses....11
- Fraudulent Claims....11
- Taxes11
- Reporting....11
- Preservation and Disposition of Claim Submissions....11
- Assistance to Class Counsel....12
- Confidentiality....12

Schedule "A" – Template Authorization for Claims Filed by Related Entities on behalf of a Settlement Class Member....13

Schedule "B" - Template Authorization for Claims Filed by a Representative (including a third-party claims service or lawyer of their own choosing) on behalf of a Settlement Class member.14

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

DEFINITIONS

1. Unless otherwise defined in this distribution process protocol ("Distribution Protocol"), all other capitalized terms used herein shall have the same meaning as in the Settlement Agreement executed between the parties dated _____ ("Settlement Agreement").

2. For the purpose of this Distribution Protocol:

   (a) ***Claim Form*** means the online form that a Settlement Class member must complete and submit before the Claims Filing Deadline in order to be considered for settlement benefits under this Distribution Protocol.

   (b) ***Claims Filing Deadline*** means the date by which Claim Forms must be submitted online in order for Settlement Class members to be considered for settlement benefits under this Distribution Protocol, which date shall be four (4) months after the Notice of Settlement Approval is disseminated.

   (c) ***Direct Settlement Benefits*** means the Net Settlement Amount, after deduction of the *cy-pres* allocation, available for distribution to eligible Settlement Class Members as described in paragraph 9.

   (d) ***Net Settlement Amount*** mean the aggregate of the Settlement Amount recovered pursuant to the Settlement Agreement, plus any accrued interest, less:

      (i) Class Counsel Fees and Class Counsel Disbursements as approved by the Federal Court;

      (ii) Administration Expenses;

      (iii) the entitlements of the litigation funder, Claims Funding Australia Pty Ltd.;

      (iv) all taxes (including interest and penalties) accruable with respect to the income earned by the Settlement Amount; and

(v) any other deductions approved by the Federal Court.

(e) ***Salmon Purchases*** means the sale price paid by a Settlement Class member for farmed Atlantic salmon and products containing or derived from farmed Atlantic salmon purchased in Canada between April 10, 2013 and February 20, 2019, less any rebates or discounts, delivery or shipping charges, and taxes.

GENERAL PRINCIPLES OF THE ADMINISTRATION

3. The procedures set forth herein are intended to govern the administration of the Settlement Agreement. The procedures are intended to be expeditious, cost effective and "user-friendly", and to minimize Administration Expenses and the burden on Settlement Class members.

4. The administration shall:

(a) be carried out by Class Counsel acting as the claims administrator;

(b) implement and conform to the Settlement Agreement, orders of the Courts and this Distribution Protocol;

(c) employ secure, paperless, web-based systems with electronic filing and record-keeping wherever possible; and

(d) rely on the sales information provided by the Defendants wherever possible.

5. Settlement Class members seeking compensation must disclose and give credit for any compensation received through other proceedings or private out-of-class settlements in relation to their purchases of Salmon, unless by such proceedings or private out-of-class settlements the Settlement Class member’s claim was released in its entirety, in which case the Settlement Class member shall be deemed ineligible for any further compensation.

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

DISTRIBUTION OF NET SETTLEMENT FUNDS

***Cy Près* Distribution**

6. Subject to paragraph 7, indirect compensation in the amount of $250,000 will be provided for the benefit of those Settlement Class members who are not eligible for direct payment through a *cy près* payment to Food Banks Canada. The $250,000 *cy près* payment shall be made from the Net Settlement Amount.

7. The *cy pres* payment shall be less any amounts payable to the Fonds d'aide aux actions collectives, pursuant to section 42 of the *Act respecting the Fonds d'aide aux actions collectives*, CQLR c. F-3.2.0.1.1 and calculated in accordance with Article 1. (2°) of the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*, R.S.Q. c. F-3.2.0.1.1, r. 2. For the purposes of calculating the amount payable to the Fonds d'aide aux actions collectives, 23% of the *cy pres* payment will be notionally allocated to Quebec.[1]

8. The *cy près* funds must be used for the purposes disclosed in the proposal submitted to Class Counsel, and Food Banks Canada must report to Class Counsel on how the monies have been used.

Direct Settlement Benefits Available to Settlement Class Members

9. The Direct Settlement Benefits will be distributed to qualifying Settlement Class members *pro rata* (proportionally) based on the volume of the qualifying Settlement Class member's Salmon Purchases as against the total volume of all qualifying Settlement Class members' Salmon Purchases.

---

[1] 23% represents that portion of the Canadian population that resides in Quebec based on information from Statistics Canada's website.

2024 FC 225 (CanLII)

10. The amount of Settlement Class members' Salmon Purchases will be finally determined by Class Counsel, with no right of appeal or review, based on purchase information submitted by the Settlement Class member, or where available, sales data provided by the Defendants pursuant to the terms of the Settlement Agreement.

11. In order to apply for Direct Settlement Benefits, Settlement Class members must prove Salmon Purchases of at least CAD$1,000,000.

12. The value of a Settlement Class Member's Salmon Purchases will be converted from the original currency to CAD, at the average Bank of Canada rate for that currency between April 10, 2013 and February 20, 2019.

Directions from the Federal Court

13. Class Counsel can seek directions from the Federal Court with respect to the distribution of the Net Settlement Funds to ensure a fair and cost-effective distribution of the Net Settlement Funds.

THE CLAIMS PROCESS

Online Claims Portal

14. Class Counsel shall create an online claims process that Settlement Class Members can access in order to file a Claim.

15. The online claims process shall contain a link to the Claim Form, in accordance with paragraph 16 below.

The Claim Form

16. The Claim Form shall require Settlement Class members to provide:

    (a) the Settlement Class member's name and contact information;

(b) where the Defendants have provided intelligible purchase information in respect of a Settlement Class member, no further information is required in respect of those purchases;

(c) where the Defendants have not provided intelligible purchase information in respect of a Settlement Class member and/or the Settlement Class member is claiming for additional purchases not disclosed in the Defendants' purchase information, the Settlement Class member must: (1) disclose the value of its Salmon Purchases in Canadian dollars; and (2) provide electronic transactional data between April 10, 2013 to February 20, 2019 that discloses: (i) the date of purchase; (ii) the dollar value of the purchase, excluding any delivery or shipping charges and taxes; (iii) the currency in which the purchase was made; (iv) any rebates or discounts; and (v) product description in sufficient detail to readily identify the product being purchased. If electronic transactional data is not available, the Settlement Class member should contact Class Counsel for alternative forms of proof of purchase;

(d) disclosure about whether the Settlement Class member or any entity related to the Settlement Class member has received compensation through other proceedings or private out-of-class settlements and/or provided a release in respect of any of the Settlement Class member's Salmon Purchases, and provide details of the compensation received and the claims released;

(e) if the Claim is submitted by a related entity (i.e., a parent company claiming on behalf of a subsidiary or affiliate), the related party must provide a signed authorization in the form attached hereto as Schedule "A" from that Settlement Class member at the time the Claim is filed;

2024 FC 225 (CanLII)

(f) if the Claim is submitted by a third-party on behalf of a Settlement Class member (i.e., a third-party claims services or a lawyer of their own choosing), the third-party must provide a signed authorization in the form attached hereto as Schedule "B" from that Settlement Class member at the time the Claim is filed;

(g) authorization for the Class Counsel to contact the Settlement Class member or its representative, as Class Counsel deems appropriate, for more information; and

(h) a declaration that the information submitted in the Claim Form is true and correct.

17. For the purposes of paragraph 16(b) and (c), Settlement Class Members for whom the Defendants have provided purchase information will receive a letter setting out the Settlement Class member's purchase information and/or indicating that the Defendants have not provided intelligible purchase information with respect to the Settlement Class member. Settlement Class Members will have the option to confirm the purchase information submitted or submit additional information as required by paragraph 16(b).

Assistance in Filing a Claim

18. Settlement Class members can contact Class Counsel, at no charge, with questions about how to complete a Claim Form.

19. Settlement Class members may utilize third-party claims services, a lawyer of their own choosing, or similar services to file Claim Form. If a Settlement Class member chooses to use a third-party claims service, a lawyer of their own choosing, or similar services, the Settlement Class member will be responsible for any and all expenses incurred in doing so.

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

Deficiencies

20. Where a Claim Form contains minor omissions or errors, Class Counsel shall correct such omissions or error if the information necessary to correct the error or omission is readily available to Class Counsel.

21. Class Counsel may make inquiries of the Settlement Class member or its representative in the event of any concerns, ambiguities, or inconsistencies in the Claim Form, and shall provide the Settlement Class member an opportunity to make such corrections as necessary.

22. Settlement Class members shall have fourteen (14) days from the day upon which Class Counsel notifies the Settlement Class member of concerns, ambiguities or inconsistencies in the Claim Form to make the necessary corrections to their Claim Form.

Adjustments to Claims Process and Extension of the Claims Filing Deadline

23. Class Counsel may extend the Claims Filing Deadline and/or the deadline for responding to deficiencies, or otherwise adjust the claims process. Class Counsel may extend the Claims Filing Deadline and/or the deadline for responding to deficiencies and/or adjust the claims process if, in their opinions, doing so will not adversely affect the fair and efficient administration of the Net Settlement Funds and it is in the best interests of the Settlement Class members to do so.

Class Counsel's Decision

24. In respect of each Settlement Class member who has filed a Claim Form in accordance with this Distribution Protocol, Class Counsel shall:

    (a) determine whether the Settlement Class member is eligible to receive settlement benefits payable out of the Net Settlement Amount in accordance with the Settlement Agreement, orders of the Federal Court and this Distribution Protocol;

(b) determine the total quantum of the Settlement Class member's Salmon Purchases, based on Settlement Class members' submitted purchase information and sales data received from the Defendants; and

(c) determine the Settlement Class member's *pro rata* entitlement to the Net Settlement Funds.

25. Class Counsel's decision will be final and binding upon the Settlement Class member and shall not be subject to any right of appeal or review.

Payment of Settlement Benefits

26. As soon as practicable after the claims evaluations are completed (and prior to the distribution of the Decision Notices), Class Counsel shall determine the particulars of the proposed distribution to each eligible Settlement Class Member.

27. Class Counsel shall pay approved claims as expeditiously as possible. Payments will be issued by cheque.

28. Along with the cheque, Class Counsel shall send a Decision Notice to the Settlement Class Member. The Decision Notice will advise the Settlement Class Member of Class Counsel's decision on the proposed distribution to that Settlement Class Member. There is no appeal or review of Class Counsel's decision, which is final and binding.

29. To the extent that the full Net Settlement Amounts are not paid out due to uncashed cheques, residual interest or otherwise:

(a) Subject to paragraph 30, if the amount is equal to or less than $20,000, such monies shall be paid *cy pres* to Food Banks Canada.

(b) If the amount is greater than $20,000, further direction of the Federal Court will be sought.

2024 FC 225 (CanLII)

30. The *cy pres* payment shall be less any amounts payable to the Fonds d'aide aux actions collectives, pursuant to section 42 of the *Act respecting the Fonds d'aide aux actions collectives*, CQLR c. F-3.2.0.1.1 and calculated in accordance with Article 1. (2°) of the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*, R.S.Q. c. F-3.2.0.1.1, r. 2. For the purposes of calculating the amount payable to the Fonds d'aide aux actions collectives, 23% of the *cy pres* payment will be notionally allocated to Quebec.[2]

CLASS COUNSEL'S DUTIES AND RESPONSIBILITIES AS CLAIMS ADMINISTRATOR

Supervisory Powers of the Federal Court

31. Class Counsel shall administer the Settlement Agreement and this Distribution Protocol under the ongoing authority and supervision of the Federal Court.

Investment of Settlement Funds

32. The Settlement Amounts shall be held in a guaranteed investment vehicle, liquid money market account or equivalent security with a rating equivalent to or better than that of a Canadian Schedule I bank (a bank listed in Schedule I of the *Bank Act*, SC 1991, c 46) held at a Canadian financial institution.

Communication, Languages and Translation

33. All communications from Class Counsel to a Settlement Class Member shall be transmitted via email if an email address has been provided, or if an email address has not been provided, by regular mail.

Undeliverable Mail

34. Class Counsel shall have no responsibility for locating Settlement Class Members for any mail returned to Class Counsel as undeliverable.

---

[2] 23% represents that portion of the Canadian population that resides in Quebec based on information from Statistics Canada's website.

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

35. Class Counsel shall have the discretion, but is not required to reissue a payment to a Settlement Class Member that was returned as undeliverable, under such policies and procedures as Class Counsel deems appropriate. Any costs associated with locating current address information for the Settlement Class Member or reissuing payment shall be deducted from that Settlement Class Member's settlement benefits.

Settlement Expenses

36. Class Counsel will be entitled to charge the Settlement Fund expenses associated with administering the Settlement Fund, including but not limited to expenses such as postage and cheque expenses, but not for their time or any staff time spent on administration.

Fraudulent Claims

37. Class Counsel shall take reasonable steps to detect possible fraudulent conduct in respect of claims made under the Settlement Agreement. Class Counsel can reject a claim, in whole or in part, where, in Class Counsel's view, the Settlement Class Member has submitted false information or has otherwise engaged in fraudulent conduct.

Taxes

38. Class Counsel shall take all reasonable steps to minimize the imposition of taxes upon the Net Settlement Funds and shall pay any taxes imposed on such monies out of the Net Settlement Funds.

Reporting

39. Class Counsel shall provide any reports regarding the administration of the Settlement requested by the Federal Court.

Preservation and Disposition of Claim Submissions

40. Class Counsel shall preserve, in hard copy or electronic form, as the Class Counsel deems appropriate, Claim Forms, documents relating to the Claim Forms, and documents relating to the claims administration, including customer and sales information provided

by the Defendants, until three (3) years after all settlement monies or court awards have been paid out to Settlement Class Members, and at such time shall destroy such documents by shredding, deleting, or such other means as will render the materials permanently illegible, except to the extent that such documentation is required for tax or regulatory purposes.

Assistance to Class Counsel

41. Class Counsel shall have the discretion to enter into such contracts and obtain financial, accounting, and other expert assistance as are reasonably necessary in the implementation of the Settlement Agreement and this Distribution Protocol, provided that related expenses are approved by the Federal Court in advance.

Confidentiality

42. All information received from the Defendants or the Settlement Class Members is collected, used, and retained by the Class Counsel pursuant to the *Personal Information Protection and Electronic Documents Act*, SC 2000 c 5 for the purposes of administering the Settlement Agreement, including evaluating the Settlement Class Member's eligibility status under the Settlement Agreement. The information provided by the Defendants or Settlement Class Members is strictly private and confidential and will not be disclosed without the express written consent of the Defendant or Settlement Class Member, as the case may be, except in accordance with the Settlement Agreement, orders of the Federal Court and/or this Distribution Protocol.

2024 FC 225 (CanLII)

Schedule "A" – Template Authorization for Claims Filed by Related Entities on behalf of a Settlement Class Member

This Schedule is to be completed <u>only</u> if the Claim is being submitted by a parent company claiming on behalf of a subsidiary or affiliate.

Contact Information for individual completing this authorization:

Name:	
Title/Position:	
Address:	
Email:	
Phone:	

I ____ [*name of Settlement Class member*] authorize ____[*name of representative*] to file a claim in the Canadian Farmed Atlantic Salmon Class Action Distribution on my behalf.

I understand that all communications relating to the claim will be directed towards my representative and that any resulting payment will be issued to my representative.

DATED at ___________________________________ [*name of city*], in the Province of ____________________, this ____day of ______________________, 2024.

____
Name

____
Signature

I have the authority to bind the corporation

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

Schedule "B" - Template Authorization for Claims Filed by a Representative (including a third-party claims service or lawyer of their own choosing) on behalf of a Settlement Class member

Contact Information for individual completing this authorization:

Name:	
Title/Position:	
Address:	
Email:	
Phone:	

I, ____ [*name of Settlement Class Member*] authorize __________________________________[*name of representative*] to file a Claim in the Farmed Atlantic Salmon Class Action Distribution on my behalf.

I understand that the claims filing process was designed to enable Settlement Class members to file claims without the assistance of an agent and that the Settlement Class member can contact the Class Counsel at no charge to ask questions about the claims filing process.

I have reviewed the information to be submitted by my representative as part of the claim Form, including the value of my Salmon Purchases. I understand that my representative will be claiming for Salmon Purchases in the amount of $____________________. I can attest based on personal knowledge that the information to be submitted by the representative, including the amount claimed for Salmon Purchases, accurately reflects my business records.

I understand that all communications relating to the claim will be directed towards my representative and that any resulting payment will be issued to my representative.

DATED at _______________________ [*name of city*], in the Province of __________, this _________day of ___________________, 2024.

____
Name

____
Signature

I have the authority to bind the corporation

ANNEX "C"

SCHEDULE C

FARMED ATLANTIC SALMON CLASS ACTIONS

NOTICE PLAN – NOTICE OF SETTLEMENT APPROVAL & CLAIMS PROCESS

1. For the purposes of this Notice Plan, the definitions set out in the Settlement Agreement apply to and are incorporated into this Notice Plan.
2. The proposed Notice Plan has been designed to provide the best notice practicable.
3. The Notice of Settlement Approval is attached as **Schedule "A"**.
4. There will no other forms of notice other than what is provided for herein, except as agreed to by the Parties or as ordered by the Federal Court.

Direct Notice

5. Class Counsel will effectuate direct individual notice to the Persons listed below. Where an email address is available, the notice will be sent by email (in English and French). Where an email address is not available, the notice will be sent by direct mail. Where the address is in Quebec, the notice will be sent in English and French:

   (a) the direct purchaser customers of the Settled Defendants, to the extent such information was provided to Class Counsel in accordance with the terms of the Settlement Agreement;

   (b) anyone who has registered with Class Counsel to receive updates on the status of the litigation; and

   (c) 1,067 companies located in Canada and identified by Data Axle[1] as having corporate locations with 50 or more employees and/or individual locations with 100 or more employees and operating in the following business sectors: fish smoking & curing (manufacturers), fish packers (manufacturers), food-canned (manufacturers), canned & cured fish & seafoods (manufacturers), seafood packers (manufacturers), seafood – wholesale, fish and seafood brokers (wholesalers), food service distributors (wholesalers), foods-carryout, restaurants, caterers, restaurant management, and grocers (retail), but excluding irrelevant categories such as pizza chains, bars or pubs, fast food chains, etc.

6. Class Counsel will track any returned undeliverable emails and will promptly send the notice by direct mail (where a mailing address is available).
7. Class Counsel will track any returned undeliverable mail by Canada Post and will promptly re-mail any returned with a forward address.

[1] Data Axle maintains a database of business records in Canada and the United States.

2024 FC 225 (CanLII)

2024 FC 225 (CanLII)

Indirect Notice

8. A press release will be jointly drafted and agreed to by the Parties and distributed (in English and French) nationwide to media outlets and publications through publication on Canada Newswire. A copy of the press release will also be sent directly to IntraFish. The press release will direct readers to Class Counsel's websites for additional information.

9. Class Counsel will provide a copy of the Notice of Settlement Approval to the following industry associations, in English and/of French, as appropriate, requesting voluntary distribution to their membership:

   (a) Canadian Federation of Independent Grocers;

   (b) Food, Health and Consumer Products of Canada;

   (c) Restaurants Canada; and

   (d) Food Processors of Canada.

10. Class Counsel will post a copy of the Notice of Settlement Approval (in English and French) on their respective websites and share the post through their social media accounts.

ANNEX "D"

SCHEDULE D

FARMED ATLANTIC SALMON CLASS ACTIONS

NOTICE OF SETTLEMENT APPROVAL & CLAIMS PROCESS

Read this Notice carefully, as it may affect your legal rights.

THIS NOTICE IS DIRECTED TO:

All persons in Canada who purchased farmed Atlantic salmon and products containing or derived from farmed Atlantic salmon purchased or sold in Canada from April 10, 2013 to February 20, 2019, except for any persons who has validly opted-out of the class action (the "Settlement Class").

This notice relates to the approval of the Settlement Agreement and the process for applying for settlement funds.

A. SETTLEMENT APPROVAL

A settlement has been reached with all defendants in this action. The action raised allegations that the defendants and unnamed co-conspirators participated in an unlawful conspiracy to fix, maintain, increase or control the price of farmed Atlantic salmon and products containing or derived from farmed Atlantic salmon from April 10, 2013 onwards contrary to the *Competition Act.*

On ● [DATE], the Federal Court of Canada ("Federal Court") approved the Settlement Agreement as being fair, reasonable and in the best interest of class members. The Federal Court also approved payment of Class Counsel fees and disbursements.

The settlement resolves the class action for all Settlement Class members as against the defendants and fully releases the defendants of all claims in the class action. The settlement represents a resolution of disputed claims and the defendants do not admit any wrongdoing or liability.

After deducting Court-approved fees and other expenses, there is approximately CAD $2.36 million will be distributed to eligible Settlement Class members either directly, or indirectly, through a *cy pres* distribution to Food Banks Canada.

B. DISTRIBUTION OF SETTLEMENT FUNDS

As part of the settlement approval hearing, the Federal Court approved the protocol for the distribution of the net settlement fund (i.e., the remaining settlement funds after deductions of the above-mentioned items in Section A).

Only Settlement Class members who purchased more than CAD $1 million of Salmon in Canada between April 10, 2013 and February 20, 2019 will be eligible to submit a claim. The value of a Settlement Class member's eligible purchases will be determined based on sales information provided by the defendants pursuant to the terms of the Settlement Agreement and/or information provided by the Settlement Class member as part of the claims process.

2024 FC 225 (CanLII)

Recognizing that not all Settlement Class members are eligible to submit a claim, the proposed distribution protocol provides that a *cy-pres* distribution in the amount of CAD $250,000 will be made to Food Banks Canada.

The remaining net settlement funds of approximately CAD $2.11 million will be distributed to eligible claimants *pro rata* (proportionally), based on the value of their eligible purchase.

The compensation amount payable to individual Settlement Class members cannot be reliably estimated at this time because this will depend on the number and value of claims filed. Notices will be sent directly to over 1,000 companies that may qualify for settlement funds.

The distribution protocol is posted online at www.siskinds.com/salmon.

C. SUBMITTING A CLAIM

To be entitled to payment pursuant to the Settlement, Settlement Class members must file a claim on or before the Claims Deadline of ● [DATE]. The Claims Form, along with detailed instructions on how to complete the form can be found here: ● [LINK TO ONLINE CLAIMS PORTAL].

You may also request a Claim Form by emailing salmonclassaction@kmlaw.ca.

You may also contact Class Counsel at salmonclassaction@kmlaw.ca if you require assistance with completing the claim documentation.

D. WHO REPRESENTS ME

The law firms Siskinds LLP, Sotos LLP, Koskie Minsky LLP and Siskinds Desmeules represent the Settlement Class. They can be reached at:

Linda Visser and Bridget Moran

Siskinds LLP, 275 Dundas Street, Unit 1, P.O. Box 2520, London ON N6B 3L1

1-800-461-6166
linda.visser@siskinds.com
bridget.moran@siskinds.com

Jean Marc Leclerc and Mohsen Seddigh

Sotos LLP, 180 Dundas Street West, Suite 1200, Toronto, ON M5G 1Z8

416-977-6857
416-572-7320
jleclerc@sostosllp.com
mseddigh@sotos.ca

James Sayce, Sue Tan & Judith Manger

Koskie Minsky LLP, 20 Queen Street West, Suite 900, Box 52, Toronto, ON M5H 3R3

416-542-6298
416-595-2072

salmonclassaction@kmlaw.ca

Caroline Perrault

Siskinds Desmeules s.e.n.c.r.l. 43 de Buade Street, unit 320, Quebec City, QC G1R 4A2

418-694-2009
1-877-735-3842

recours@siskinds.com

E. MORE INFORMATION

This notice contains a summary of the class action, the settlement and distribution protocol. Further details can be found on the following websites: https://www.siskinds.com/class-action/salmon/;

2024 FC 225 (CanLII)

https://www.sotosclassactions.com/cases/farmed-atlantic-salmon/ or
https://kmlaw.ca/cases/farmed-atlantic-salmon-price-fixing-class-action/

If there is a conflict between the provisions of this notice and the Settlement Agreement or distribution protocol, the terms of the Settlement Agreement, distribution protocol, and/or the Court orders shall prevail.

DO NOT CONTACT THE COURT FOR INFORMATION.

**THIS NOTICE HAS BEEN APPROVED BY
THE FEDERAL COURT OF CANADA**

2024 FC 225 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1664-19
STYLE OF CAUSE:	IRENE BRECKON ET AL. v CERMAQ CANADA LTD. ET AL.
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN TORONTO, ONTARIO AND MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 30, 2023
ORDER AND REASONS:	GASCON J.
DATED:	FEBRUARY 9, 2024

APPEARANCES:

Jean-Marc Leclerc Sue Tan Judith Manger	FOR THE PLAINTIFFS
Alexandra Mitretodis Andrew Borrell	FOR THE DEFENDANTS CERMAQ GROUP ASA, CERMAQ NORWAY AS, CERMAQ CANADA LTD.
Akiva Stern Nikiforos Iatrou	FOR THE DEFENDANTS GRIEG SEAFOOD ASA, GRIEG SEAFOOD B.C. LTD., OCEAN QUALITY AS, OCEAN QUALITY USA INC., OCEAN QUALITY NORTH AMERICA, OCEAN QUALITY PREMIUM BRANDS, INC.
Sandra Forbes Alisa McMaster	FOR THE DEFENDANTS LEROY SEAFOOD GROUP ASA, LEROY SEAFOOD USA, INC.
Robert Kwinter	FOR THE DEFENDANTS MOWI ASA, MOWI USA, LLC, MOWI DUCKTRAP, LLC, MARINE HARVEST CANADA

2024 FC 225 (CanLII)

Caitlin Sansbury	FOR THE DEFENDANT NOVA SEA AS
Samantha Gordon Guneev Bhinder	FOR THE DEFENDANT SOJOR AS
Michael Eizenga Mehak Kawatra	FOR THE DEFENDANTS SALMAR ASA, SCOTTISH SEA FARMS LTD.

2024 FC 225 (CanLII)

SOLICITORS OF RECORD:

KOSKIE MINSKY LLP Toronto, Ontario	FOR THE PLAINTIFFS
SOTOS LLP Toronto, Ontario	FOR THE PLAINTIFFS
SISKINDS LLP London, Ontario	FOR THE PLAINTIFFS
FASKEN MARTINEAU DUMOULIN LLP Vancouver, British Columbia	FOR THE DEFENDANTS CERMAQ GROUP ASA, CERMAQ NORWAY AS, CERMAQ CANADA LTD.
MCCARTHY TETRAULT LLP Toronto, Ontario	FOR THE DEFENDANTS GRIEG SEAFOOD ASA, GRIEG SEAFOOD B.C. LTD., OCEAN QUALITY AS, OCEAN QUALITY USA INC., OCEAN QUALITY NORTH AMERICA, OCEAN QUALITY PREMIUM BRANDS, INC.
DAVIES WARD PHILLIPS & VINEBERG LLP Toronto, Ontario	FOR THE DEFENDANTS LEROY SEAFOOD GROUP ASA, LEROY SEAFOOD USA, INC.
BLAKE, CASSELS & GRAYDON LLP Toronto, Ontario	FOR THE DEFENDANTS MOWI ASA, MOWI USA, LLC, MOWI DUCKTRAP, LLC, MARINE HARVEST CANADA
BORDEN LADNER GERVAIS LLP Toronto, Ontario	FOR THE DEFENDANT NOVA SEA AS
MCMILLAN LLP Toronto, Ontario	FOR THE DEFENDANT SOJOR AS

BENNETT JONES LLP Toronto, Ontario	FOR THE DEFENDANTS SALMAR ASA, SCOTTISH SEA FARMS LTD.

2024 FC 225 (CanLII)

TAB 2

Federal Court Decisions

Châteauneuf v. Canada

Court (s) Database:	Federal Court Decisions
Date:	2006-03-06
Neutral citation:	2006 FC 286
File numbers:	T-2728-96
Notes:	Digest

Date: 20060306

Docket: T-2728-96

Citation: 2006 FC 286

BETWEEN:

ROBERT CHÂTEAUNEUF, personally

and his capacity as representative of all the natural persons,

employees of the Singer company, who are registered

in group pension contract G-522 and who

on December 12, 1966 or after have acquired and retained

the right to receive from the

Pensions Branch of the Canadian federal government

an annuity consisting of their contributions

and those of their employer, and any

beneficiaries who may have succeeded to the

said natural persons on account of their death.

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER

TREMBLAY-LAMER J.:

[1] This is a motion by Robert Châteauneuf, representative of the class, in agreement with the defendant, with a view to obtaining this Court's approval of a class action settlement in accordance with section 299.31 of the *Federal Court Rules, 1998*, SOR/98-106.

[2] The plaintiff brought a class action on December 12, 1996, and Robert Châteauneuf was appointed as representative of the group made up of the following individuals:

All the natural persons, employees of the Singer company, who are registered in group pension contract G-522 and who on December 12, 1966 or after have acquired and retained the right to receive from the Pensions Branch of the Canadian federal government an annuity consisting of their contributions and those of their employer, and any beneficiaries who may have succeeded to the said natural persons on account of their death.

[3] The facts that gave rise to the litigation took place between 1947 and 1986. In essence, the issue was whether the "repayments", "surplus" or "experience ratings" from group annuity policy G-522 of the Canadian Government Annuities service should or should not have been allocated to the class members in such a way that their annuities increased.

[4] I granted the motion for approval of the settlement taking into account the submissions by the parties' counsel, in light of the tests established by the case law and the overall circumstances of this matter.

[5] In *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Ct. J. (Gen. Div.)(QL)), Sharpe J., relying on an American text, Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, 3rd ed. (St. Paul, Minn.: West Publishing, 1992), proposed the following elements which may be considered:

1. Likelihood of recovery, or likelihood of success;

2. Amount and nature of discovery evidence;

3. Settlement terms and conditions;

4. Recommendation and experience of counsel;

5. Future expense and likely duration of litigation;

6. Recommendation of neutral parties if any;

7. Number of objectors and nature of objections;

8. The presence of good faith and the absence of collusion.

[6] Winkler J. in *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. Sup. Ct. J.)(QL) added two elements to consider in approving the settlement of a class action: (i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and (ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. In *Ontario New Home Warranty Program v. Chevron Chemical Co.*(1999), 46 O.R. (3d) 130 (Ont. Sup. Ct. J.), Winkler J. also noted the value of an expedited recovery.

[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.

[8] With respect to the first element, i.e. the likelihood of success, the representative's action covered two periods. For the first period (1947-1964), the major problem was with the text of group annuity policy G-522 , which did not explicitly provide that the repayments had to go into the individual accounts of the participants <u>for the purposes of increasing their annuities</u>. With respect to the second period, the representative alleged that Government Annuities did not have the contractual right to pay the annuities of another retirement plan-i.e the cash fund of the Singer company established in 1964-with the repayments under policy G-522. Further, the facts giving rise to this litigation took place from 1947 to 1986. The representative's counsel acknowledge the risk *per se* of a trial since there were not many witnesses because of the time gone by and the advanced age of the participants. There was also a risk in terms of establishing the quantum since it was uncertain whether the representative could claim all of the interest against the Crown in Right of Canada.

[9] With respect to the defendant, she argued that the recourse was prescribed, that the repayments had indeed been paid into the participants' accounts, that the participants are only entitled to their annuities and nothing more in this regime and that Government Annuities had respected the contract in acting on the employer's instructions. It is certain that in such circumstances, the result of the trial would be uncertain and that it would be impossible for the Court to anticipate the result at this stage.

[10] As for the amount of evidence, counsel had to analyze all of the retirement plan documents dating back to its creation in 1945, and all of the relevant evidence. They proceeded to research the law, the doctrine and the case law. They submit that they spent about 1820 working hours on the case.

[11] As for the negotiations, they were drawn out (from November 2004 to December 2005). Since the terms of the settlement are confidential, I am not allowed to elaborate on this issue. However, I can confirm that the proposed settlement is fair and reasonable considering the risks of a trial and the quantum sought. The compensation and distribution scheme was developed jointly between counsel for both parties and the defendant's actuaries. On a positive note, I see that the allocations vary to take into account the fees paid by each eligible member as well as the years of participation. I am satisfied that the distribution is logically connected to the interest of each member.

[12] I also note that representative's counsel are very experienced professionals specializing in retirement plans since 1988 and that they have recommended that the settlement be accepted.

[13] As for other expenses, the trial was divided into two steps (first liability, then quantum) and there was always the risk of an appeal. Given that the action was brought 10 years ago and given the advanced age of the retirees, it was advantageous for the members to benefit from a settlement in view of the delays and the uncertainty involved in litigation. Further, there is no doubt that the settlement will be less expensive for the members than a disputed action which could have taken many more years if we consider the possibility of an appeal. The settlement is a favourable resolution of the claim which will enable class members as well as Government Annuities to resolve the matter quickly and definitively.

[14] As for the number of objectors and nature of the objections, since the contents of the settlement are confidential, this test is not applicable in this case.

[15] Finally, with respect to the final element, there is no reason for me to doubt the good faith of the parties or the good faith of their counsel.

[16] Considering the foregoing, the Court recognized the reasonableness and fairness of the settlement signed by the representative on January 31, 2006. It grants the motion for approval of the transaction dated

March 1, 2006.

"Danièle Tremblay-Lamer"

Judge

Ottawa, Ontario

March 6, 2006

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2728-96

STYLE OF CAUSE: Robert Châteauneuf

and

Her Majesty the Queen

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: March 1, 2006

REASONS FOR ORDER:

THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER

DATE OF REASONS: March 6, 2006

APPEARANCES:

Marcel Rivest FOR THE PLAINTIFF

Guy Desautels

Carole Bureau FOR THE DEFENDANT

Linda Mercier

SOLICITORS OF RECORD:

Rivest Schmidt FOR THE PLAINTIFF

Montréal, Quebec

John H. Sims, Q.C. FOR THE DEFENDANT

Deputy Attorney General of Canada

Ottawa, Ontario

TAB 3

CITATION: Dufault v. The Toronto-Dominion Bank, 2024 ONSC 961
COURT FILE NO.: CV-21-656203-00CP
DATE: 20240215

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Tyler Dufault

AND:

The Toronto-Dominion Bank and The Canada Trust Company

BEFORE: J.T. Akbarali J.

COUNSEL: *Celeste Poltak, Adam Tanel and Elie Waitzer*, for the plaintiff

Christine Lonsdale and Adriana Forest, for the defendants February 13,

HEARD: February 13, 2024

Proceeding under the *Class Proceedings Act*, 1992

2024 ONSC 961 (CanLII)

ENDORSEMENT

Overview

[1] The plaintiff moves for an order approving the settlement of this class action, approving counsel's fees, and approving an honoraria for the representative plaintiff.

Brief Background

[2] This action concerns the practice of the defendants ("TD") charging fees to customers who have insufficient funds to clear payments they have attempted to make from their accounts ("NSF fees"). More particularly, the claim concerns pre-authorized debits ("PADs") that TD declines by reason of insufficient funds in a class member's account, resulting in an NSF fee to the class member, and which PADs are then re-presented for payment by the payee a second time and again declined for insufficient funds, for which TD charges the class member a second NSF fee.

[3] The plaintiff alleges that the NSF fee charged on the re-presentment of a PAD (in other words, the second NSF fee charged on the same PAD) is in violation of TD's standard form contract with the class, and contrary to consumer protection legislation.

[4] This claim was commenced on February 2, 2021. Since then, a sequencing motion has been heard, the result of which was to allow TD to bring a summary judgment motion seeking dismissal of the plaintiff's claims in their entirety before hearing the certification motion. The summary judgment motion was heard and dismissed. The judge hearing the motion, Belobaba J., also

declined to award summary judgment in favour of the plaintiff. A motion for leave to appeal the summary judgment motion was dismissed in May 2022.

[5] Thereafter, the parties delivered their records on the plaintiff's certification motion, and eventually negotiated a consent certification. Following that, the parties resumed settlement discussions that had begun earlier, but stalled. At the same time, the plaintiffs brought a motion for summary judgment. The parties exchanged productions and the plaintiff was examined for discovery. As the parties moved towards the adjudication of the plaintiff's summary judgment motion, they also continued settlement negotiations, including holding a two-day mediation. After the mediation, they continued to work with the mediator as they conducted additional negotiations.

[6] By August 2023, the parties had reached an agreement in principle, and by November 2023, the parties signed a settlement agreement. Notice of the proposed settlement has been given, and on this motion, I am asked to approve the settlement. I am also asked to approve counsel's fees and disbursements, the payment to the third-party funder, and an honorarium for the representative plaintiff.

2024 ONSC 961 (CanLII)

Issues

[7] The issues raised on these motions are:

a. Is the proposed settlement fair, reasonable, and in the best interests of the class?

b. Should class counsel's requested fees and disbursements, including the third-party funder fees, be approved?

c. Should an honorarium of $10,000 for the representative plaintiff be approved?

The Settlement Agreement

[8] The settlement agreement provides for the payment of an all-inclusive amount of $15,900,000, from which will be paid (i) compensation estimated to be $88 to eligible class members; (ii) any *cy-près* donation; (iii) class counsel fees and disbursements; (iv) third-party funder litigation fees; and (v) an honorarium of $10,000 to the representative plaintiff.

[9] A *cy-près* donation is contemplated in the event there are any residual funds following the *pro rata* distribution of funds to eligible class members. The donation is intended to be made on behalf of the class to ACORN Canada, a national community organization that advocates on behalf of low- and moderate-income Canadians in respect of issues that include unfair banking fees. The donation is expected to be low, as most if not all of the settlement funds are expected to be distributed to eligible class members.

[10] In addition, the settlement agreement provides for the following:

a. TD will bear the expenses associated with delivering direct notice of certification, the settlement, and the fee approval hearing (all of which has been done), and the

settlement approval order to the class members who continue to have active accounts with TD;

b. TD will bear the expenses associated with distributing the settlement fund *pro rata* to qualifying class members by crediting individual compensation directly into the qualifying class members' TD accounts without the need for any claims process;

c. TD intends to amend the NSF fee disclosure provision in its standard form agreements to clarify the scope of the existing NSF fee; and

d. TD has changed its NSF fee reversal policy such that it now provides for discretion to permit a 100% reversal of the NSF for a first-time issue raised by a customer.

[11] The certification order defines the class as:

> Every person resident in Canada who is or was a personal deposit account holder with TD Bank and whose personal deposit account has been charged a non-sufficient funds fee by TD Bank on a re-presented pre-authorized debit transaction between February 2, 2019 and November 27, 2023.

[12] Under the settlement, not all class members are eligible to participate in the settlement funds. Eligible class members are those who are part of what the parties refer to as the "Active Group", which consists of each class member who is a TD customer and whose account is able to accept deposits as of the distribution date, and who TD's records show may have been charged an NSF fee on a PAD transaction from the same merchant and in the same amount as a previous PAD transaction within 30 days with respect to which an NSF fee was charged during the class period.

[13] Thus, those class members who no longer have an open TD account are ineligible to participate in the settlement. The evidence before me indicates that a meaningful portion of the closed accounts are likely to have belonged to people who are now deceased. The record before me suggests that, given the fact that there is no claims process, and funds can be directly distributed to the eligible class members, close to 90% of living class members will receive funds under the settlement.

The Principles Governing Settlement Approval

[14] Under s. 27.1(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"), a proceeding brought under the *CPA* may only be settled with court approval. The court shall not approve a settlement unless it determines that the settlement is fair, reasonable, and in the best interests of the class: s. 27.1(5) of the *CPA*; *Sheridan Chevrolet Cadillac v. T. Rad Co.,* 2018 ONSC 3786, at para. 6; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324, at para. 36.

[15] There is a strong presumption of fairness when a proposed settlement, which was negotiated at arms-length, is presented for court approval on the recommendation of experienced Class Counsel: *Loewenthal v. Sirius XM Holdings, Inc. et al.,* 2021 ONSC 4482, at para. 11. In *Serhan v. Johnson & Johnson*, 2011 ONSC 128, at para. 55, the court held:

2024 ONSC 961 (CanLII)

> Where the parties are represented – as they are in this case – by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[16] The key question is whether the settlement falls within a zone of reasonableness: *Sheridan*, at para. 6; *Yeo v. Ontario*, 2021 ONSC 4534, at para. 13. The burden lies on the party seeking approval: *Nunes v. Air Transat A.T. Inc.,* [2005] O.J. No. 2527 (S.C.) at para. 7.

[17] Settlements need not be perfect; they are compromises: *Bancroft-Snell v. Visa Canada Corporation*, 2015 ONSC 7275, at para. 48; *Lozanski v. The Home Depot, Inc.*, 2016 ONSC 5447, at para. 71; *Patel v. Groupon Inc.*, 2013 ONSC 6679, at para. 14. To find that a settlement is not fair and reasonable, it must fall outside a range of reasonable outcomes: *Nunes*, at para. 7; *Loewenthal*, at para. 11; *Haney Iron Works v. Manufacturers Life Insurance*, (1998), 169 D.L.R. (4th) 565 (Ont. S.C.), at para. 44.

[18] In assessing whether a settlement agreement is fair and reasonable, it is not the court's function to substitute its judgment for that of the parties or attempt to renegotiate a proposed settlement. Neither is it the court's function to litigate the merits of the action, nor to rubber-stamp a settlement: *Loewenthal*, at para. 12; *Nunes*, at para. 7.

[19] An objective and rational assessment of the pros and cons of a settlement is required: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 2014 ONSC 5812, at para. 33.

[20] In *Doucet v. The Royal Winnipeg Ballet*, 2022 ONSC 976 at para. 48, Perell J. summarized the factors that may be considered in determining whether a settlement is reasonable and in the best interests of the class:

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.

Is the proposed settlement fair, reasonable, and in the best interests of the class?

2024 ONSC 961 (CanLII)

[21] Applying the legal framework above, I note the following.

[22] First, by the time this action settled, it had been very well developed. The plaintiff had succeeded in resisting TD's summary judgment motion, and had obtained favourable findings from the motion judge with respect to TD's liability for breach of contract. However, the motion judge did not go so far as to grant summary judgment in the plaintiff's favour.

[23] Moreover, those findings were incomplete, and in particular, did not address TD's defence premised on a verification clause in the standard form contract, which TD maintained operated to bar all class members who had not notified TD of the allegedly improper NSF fees within the timeline prescribed by the verification clause.

[24] Thus, at the time of settlement, given the steps that had occurred in the action, counsel were in an excellent position to assess the risks of litigation, and while on certain matters, the plaintiff's claim appeared strong, risk remained, particularly with respect to the verification defence.

[25] Second, in the course of negotiations, TD disclosed significant confidential information that both parties provided to their experts for purposes of preparing damages calculations. Thus, the parties' theories on damages, like their theories on liability, were well-developed and well-understood.

[26] Third, had a settlement not been reached, the steps remaining to litigate the action would have taken time. The plaintiff's summary judgment motion had to be argued, and may or may not have been successful, and may or may not have been appealed. If the motion were not successful, a trial would have had to occur. The ongoing costs would have increased class counsel's claim to fees, and resulted in delay before the action could be concluded. In addition, even if the plaintiff succeeded at trial or on summary judgment motion, it was possible that the plaintiff's claim of aggregate damages could not be established, and individual damages assessments would have had to be held, adding cost, complexity and delay.

[27] Fourth, the terms of the settlement itself are, in my view, excellent. I reach this conclusion because:

a. The direct distribution aspect of the settlement means that almost 90% of living class members will benefit from the settlement without having to do anything. This is an almost-unheard-of take-up rate;

b. The quantum of the settlement that each eligible class member is estimated to receive is almost twice the value of an NSF fee, an amount that is reasonable in the circumstances;

c. The value of the settlement fund is not depleted by administrative costs, since the settlement will be effected by direct distribution;

2024 ONSC 961 (CanLII)

d. TD has borne most of the costs of the notice program by delivering direct notice to most of the class members, which has preserved the value of the settlement fund further;

e. By reason of the factors listed above, the settlement advances the goal of the *CPA* of promoting access to justice. Individual class members would not have suffered losses in an amount sufficient to justify taking individual action, and would not have achieved any access to justice without this proceeding;

f. On the other hand, were class members to bring individual actions, the result would be a strain on scarce judicial resources;

g. The non-monetary aspects of the settlement, including TD's intended change to its standard form contract, and its change to its policy regarding reversals of NSF fees, suggest that this litigation has prompted TD to modify its behaviour (while not admitting liability). These changes are likely to benefit TD's customers who are low- or moderate-income Canadians, who are most likely to be charged multiple NSF fees, and who likely include many of the class members.

[28] Fifth, the record includes an affidavit from the experienced mediator the parties retained to assist with their negotiations. His evidence confirms that the settlement negotiations were hard-fought, lengthy, conducted at arms-length, and in good faith.

[29] Sixth, plaintiff's counsel is experienced and deservedly well-respected. Their support of the settlement is a factor militating in favour of approving it.

[30] Seventh, there were five objectors in total, of whom a maximum of three are class members, which is well less than 1% of the class. One objector raises concerns outside the scope of this litigation. One raises concerns with the quantum, and suggests that each class member ought to receive the equivalent of three NSF fees. On a gross basis, the settlement is roughly three NSF fees per eligible class member, but will be reduced by the need to pay fees and disbursements.

[31] One class member objects on the basis that the settlement excludes those class members who have closed their accounts with TD. This is a valid objection, and goes to the root of what makes this settlement imperfect: it does not reach all class members, but only those who remain TD customers.

[32] In effect, this objection could only be dealt with by running a claims process, either in parallel to, or instead of, the direct distribution. The results of such a process would be to increase the cost to the class of implementing the settlement (in a parallel process) and both increasing costs and decreasing take-up of the settlement (in an alternative process), in view of the historical take-up rates in consumer protection class action settlements, which can range in the single digits at the low end. Generally, settlements with a take-up rate of 30-40% are considered reasonable.

2024 ONSC 961 (CanLII)

[33] Thus, there will be people who will be excluded for the settlement. While not ideal, the question must be whether the settlement is in the best interests of the class as a whole, not the small segment of the class that will be ineligible under the settlement.

[34] For the reasons I express above, I conclude that this settlement, overall, is excellent, and in the best interests of the class.

Class Counsel Fees

[35] Section 32 of the *CPA* provides that class counsel's fees must be approved by the court. Section 33 of the *CPA* allows class counsel to enter into a contingency fee arrangement for payment of its fees for a class proceeding.

[36] The basic test is whether class counsel's proposed fees are fair and reasonable in all of the circumstances. Fair and reasonable fees may include a premium for the risk undertaken and the result achieved, but 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 as a whole: *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 1222, at para. 32.

[37] As the court held in *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537, 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."

[38] As Morgan J. noted in *Austin v. Bell Canada*, 2021 ONSC 5068, at para. 10, generally speaking, when considering whether to approve class counsel fees, "the amount payable under the contract is the starting point for the application of the court's judgment." If approving a fee pursuant to a contingency agreement, the court must consider all the relevant factors and circumstances to determine whether the fee is reasonable and maintains the integrity of the profession: *Hodge v. Neinstein*, 2019 ONSC 439, at para. 46.

[39] A contingency fee of up to 33% is presumptively valid and enforceable provided that the arrangement is fully understood and accepted by the representative plaintiff, the contingency amount is not excessive, and the contingency fee is not so large as to be unseemly or otherwise unreasonable: *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at paras. 8-10.

[40] The general principles to apply to the assessment of class counsel's fees were set out by Juriansz J.A. in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37 (C.A.), at para. 80:

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;

2024 ONSC 961 (CanLII)

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.

2024 ONSC 961 (CanLII)

[41] In this case, the retainer agreement provides for a fee of 30% of the recovery, less the fee portion of any costs already paid to class counsel, plus HST. "Recovery" is defined as "the amount actually recovered by award, judgment, settlement or otherwise, including any amounts awarded or paid in any assessment of damages or other process ordered by the court, excluding any amount separately identified or specified as costs and/or disbursements."

[42] Despite the fact that the retainer agreement would allow class counsel to seek 30% of the recovery, class counsel seeks 27.5% on this motion, plus disbursements and the third-party funder's fee, which I address below.

[43] Class counsel's dockets reveal that they have spent time valued at over $1.5 million in fees to investigate, organize and prosecute this action. Before taking into account time that they must still spend, the fee sought, $4,252,500 before taxes, represents a multiplier of approximately 2.8.

[44] Class counsel also incurred disbursements totaling $389,732.44, plus taxes. The third-party funder covered $376,046.86 of that amount. Counsel expects to incur another approximately $2,000 in disbursements relating to the implementation of the settlement.

[45] In my view, the fees sought by class counsel are fair and reasonable in the circumstances of this settlement:

a. The litigation was complex, hard-fought, and litigated to an advanced stage;

b. The terms of the settlement are excellent for almost all members of the class. In particular, the direct distribution aspect, and direct notice aspect, of the settlement has ensured that (i) the value of the settlement is preserved for the class, and (ii) the take-up of the settlement will be extraordinarily high;

c. Moreover, from a behaviour modification standpoint, the non-monetary aspects of the settlement are also excellent results to arise from the litigation;

d. Class counsel assumed a significant degree of responsibility. Before a third-party funder was located, class counsel indemnified the representative plaintiff for disbursements and adverse costs awards. Even once the funder was located, class counsel continued to indemnify the representative plaintiff for adverse costs awards exceeding the amount for which the third-party funder had agreed to indemnify the plaintiff;

e. Class counsel devoted significant time to the litigation, resulting in a significant opportunity cost that had no certainty of providing any return;

f. While Belobaba J.'s summary judgment motion decision reduced the risk in the litigation, the question of the risk assumed by counsel must be measured from the outset, when counsel agreed to act. At that time, the risks were much greater, and counsel was faced with a well-resourced and motivated defendant, which availed itself of its litigation options, as one would expect it to;

g. The value of the litigation and the settlement is significant, and provides the class with the ability to pay the fees sought while still preserving a meaningful recovery for the eligible class members. Given that the class is likely made up in substantial measure of low- and moderate-income Canadians, many members of the class would not have had the ability to pursue litigation with respect to the second NSF fee without a class action in which counsel agreed to be compensated on a contingency fee basis;

h. Finally, the fees sought are in the expectation of the class; the certification notice set out the fees that class counsel would seek. No objection to class counsel's proposed fee was raised. The representative plaintiff supports class counsel's claim to fees.

[46] The disbursements sought by class counsel are also reasonable. The most significant component of the disbursements are the expert fees which were reasonably incurred to assist counsel in developing the plaintiff's damages case and proved important in settlement negotiations.

[47] The retainer agreement also provides that class counsel will apply on the plaintiff's behalf for financial support and an indemnity from a private third-party funder. Counsel did so, and was able to engage a third-party funder on better terms than those available through the Class Proceedings Fund.

[48] Under the terms of the agreement with the third-party funder, which was approved by Belobaba J. on August 20, 2021, the funder's return is calculated at 8% of the "Net Recovery Amount", which is defined as the gross settlement amount, less any court-approved legal fees, disbursements, honorarium, claims administration fees, and applicable taxes. The funder is also entitled to a repayment of a funder administration fee of $97,500, and a repayment of the disbursements it funded. If the counsel fees and the honorarium sought are approved, the total

2024 ONSC 961 (CanLII)

payable to the funder is $1,328,982.26. I am satisfied that the funder is entitled to payment in accordance with the terms of the agreement.

Honorarium

[49] The plaintiff seeks an honorarium in the amount of $10,000 to recognize his contribution to the proceedings.

[50] In *Doucette v. Royal Winnipeg Ballet Company*, 2023 ONSC 2323, the Divisional Court considered the circumstances under which a representative plaintiff may be entitled to an honorarium. The Divisional Court found that a modest payment to the representative plaintiff could be made in exceptional circumstances. In considering whether to approve or disapprove a request for an honorarium, the court should consider the following factors (*Doucette*, at para. 92):

a. The nature of the case, including whether the representative plaintiff brings forward a claim (such as for sexual abuse) in which they expose themselves to re-traumatization for the benefit of the class.

b. The nature of the remedies available for the cause of action asserted, particularly cases where even complete success would lead to only a tiny monetary remedy for each class member or none at all.

c. The steps taken by the representative plaintiff, who must do more than taking an active role and fulfilling the normal steps required in class proceedings, [in] achieving a settlement. Exceptional circumstances include enduring significant additional personal or financial hardship in connection with the prosecution of the class proceeding.

d. The rationale for the requested payment, which must not be added compensation for losses or damages that fall within the potential remedies available for the causes of action asserted in the claim itself or for the necessary steps to fulfill the responsibilities of a representative plaintiff.

e. The exposure to a real risk of an adverse costs award.

f. The quantum of the requested payment, which must be modest both in general terms and in relation to the remedies available to the class members in the settlement.

[51] In this case, I am satisfied that the circumstances are extraordinary and warrant an honorarium of $10,000 paid to the plaintiff:

a. The results of the settlement achieved are excellent, with an almost-unheard-of take-up rate;

2024 ONSC 961 (CanLII)

b. Without the litigation, in view of the small amount of loss suffered by each class member, the remedies available to them would have been impractical;

c. The representative plaintiff was actively involved in the litigation. This in itself is not an exceptional circumstance, but is relevant in the context of all the circumstances;

d. The representative plaintiff is employed in security, earning $18/hour. At times, he was required to take unpaid time off work to meet the obligations of a representative plaintiff that would not have been required were he an individual litigant. He is out of pocket for those losses that were incurred wholly to advance the interests of the class, and not his personal interests;

e. The quantum of payment requested is in line with other honoraria awarded to representative plaintiffs;

f. In view of the excellent results of the settlement, and the hard-fought negotiation process, the honorarium cannot be said to create a conflict of interest or an appearance of a conflict of interest.

2024 ONSC 961 (CanLII)

Conclusion

[52] In summary, I make the following orders:

a. The settlement is approved;

b. Class counsel fees of $4,252,500 plus HST of $552,825 are approved;

c. Payment of disbursements totaling $391,732.44, inclusive of taxes, are approved and shall be distributed as follows:

   i. $15,675.58 to class counsel;

   ii. $376,056.86 to the third-party funder;

d. In addition to the disbursements payable to the third-party funder and approved at para. (c) above, the payment to the third-party funder of $952,935.40 is approved;

e. Payment of a $10,000 honorarium to the representative plaintiff is approved.

[53] Counsel has provided me with two draft orders: one dealing with the settlement and one dealing with the fee and honorarium approval. I have signed the orders, and they shall go in that form.

[54] I draw counsel’s attention to the fact that I located an error on the first page of the proposed long-form notice notifying class members of the approval of the settlement. I have corrected the document on its face in the schedule attached to the order.

J.T. Akbarali J.

Date: February 15, 2024

2024 ONSC 961 (CanLII)

TAB 4

CITATION: Eidoo v. Infineon Technologies AG, 2014 ONSC 6082
COURT FILE NO.: 05-CV-4340
COURT FILE NO.: 10-CV-15178CP
DATE: 20141020

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
KHALID EIDOO and CYGNUS ELECTRONICS CORPORATION	)	*Jonathan J. Foreman* and *Rob Gain* for the Plaintiffs
Plaintiffs	)	
– and –	)	
INFINEON TECHNOLOGIES AG, INFINEON TECHNOLOGIES CORPORATION, INFINEON TECHNOLOGIES NORTH AMERICA CORPORATION, HYNIX SEMICONDUCTOR INC., HYNIX SEMICONDUCTOR AMERICA INC., HYNIX SEMICONDUCTOR MANUFACTURING AMERICA, INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG SEMICONDUCTOR, INC., SAMSUNG ELECTRONICS AMERICA, INC. SAMSUNG ELECTRONICS CANADA INC., MICRON TECHNOLOGY, INC. MICRON SEMICONDUCTOR PRODUCTS, INC. o/a CRUCIAL TECHNOLOGIES, MOSEL VITELIC CORP., MOSEL VITELIC INC. and ELPIDA MEMORY, INC.	)	*Eliot Kolers* for the Defendants Infineon Technologies AG, Infineon Technologies Corporation and Infineon Technologies North America Corporation
Defendants	)	
AND BETWEEN:	)	
KHALID EIDOO and CYGNUS ELECTRONICS CORPORATION	)	
Plaintiffs	)	
– and –	)	
HITACHI LTD., HITACHI AMERICA, HITACHI ELECTRONIC DEVICES (USA), HITACHI CANADA LTD., MITSUBISHI ELECTRONIC CORPORATION, MITSUBISHI ELECTRIC SALES CANADA INC., MITSUBISHI ELECTRIC &	)	*Linda Plumpton* and *Jonathan Roth* for the Defendants Mitsubishi Electronic Corporation, Mitsubishi Electric Sales Canada, Inc., and Mitsubishi Electric & Electronics USA, Inc.

2014 ONSC 6082 (CanLII)

ELECTRONICS USA, INC., NANYA TECHNOLOGY CORPORATION, NANYA TECHNOLOGY CORPORATION USA, NEC CORPORATION, NEC CORPORATION OF AMERICA, NEC CANADA, RENESAS ELECTRONICS CORPORATION fka NEC ELECTRONICS CORPORATION, RENESAS ELECTRONICS AMERICA, INC. fka NEC ELECTRONICS AMERICA, INC., RENESAS ELECTRONICS CANADA LTD., TOSHIBA CORPORATION, TOSHIBA AMERICA ELECTRONICS COMPONENTS INC., TOSHIBA OF CANADA LIMITED, WINBOND ELECTRONICS CORPORATION AND WINBOND ELECTRONICS CORPORATION AMERICA	)	*Laura F. Cooper* and *Zohaib Maladwala* for the Defendants Toshiba Corporation, Toshiba America Electronics Components Inc. and Toshiba of Canada Limited *Anna Tombs* for the Defendants Winbond Electronics Corporation and Winbond Electronics Corporation America
Defendants	)	**HEARD**: September 19, 2014
Proceeding under the *Class Proceedings Act, 1992*	)	

2014 ONSC 6082 (CanLII)

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Khalid Eidoo and Cygnus Electronics Corporation are the Representative Plaintiffs in two actions in Ontario certified under the *Class Proceedings Act*. There are parallel proceedings in British Columbia and Québec. The actions across the country have been ongoing for almost a decade, and progressive settlements have been reached with all of the Defendants save one.

[2] Mr. Eidoo and Cygnus Electronics now bring a motion for: (a) approval of the final four settlement agreements; (b) leave to discontinue the actions against the Defendants Mosel Vitelic Corp. and Mosel Vitelic Inc.; (c) approval of the Distribution Protocol and the Administration Protocol that will distribute the settlement proceeds to Class Members; (d) the appointment of NPT RicePoint Class Action Services Inc. as Claims Administrator and Laura Bruneau as Arbitrator; (e) approval of the penultimate fee request of the Class Counsel group of $16,851,367.64 plus applicable taxes; (f) approval of the disbursements incurred by Class Counsel of $178,245.64 and US$2,218.93, plus applicable taxes; and (g) directions concerning a budget for notice to class members in respect of the claims process.

[3] Subject to a holdback of $1 million on account of the current request for fees, for the reasons set out below, I grant Mr. Eidoo's and Cygnus Electronics' motion.

[4] I note that before reaching the above decision, with the permission of the parties, I conferred with Justice Masuhara of the British Columbia and Justice Gagnon of the Superior

Court of Québec. I was also provided with a videotape of the oral evidence from the Québec settlement approval hearing.

[5] The following decision is my own for the two actions in Ontario.

B. FACTUAL AND PROCEDURAL BACKGROUND

1. Litigation History

[6] In 2005, pursuant to the *Class Proceedings Act, 1992,* Khalid Eidoo and Cygnus Electronics Corporation sued: Infineon Technologies AG, Infineon Technologies Corporation, Infineon Technologies North America Corporation, Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor Manufacturing America, Inc. Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Micron Semiconductor Products, Inc. o/a Crucial Technologies, Mosel Vitelic Corp., Mosel Vitelic Inc. and Elpida Memory, Inc.

[7] In 2010, in a second proposed class action, Mr. Eidoo and Cygnus Electronics sued: Hitachi Ltd., Hitachi America, Hitachi Electronic Devices (USA), Hitachi Canada Ltd., Mitsubishi Electronic Corporation, Mitsubishi Electronic Sales Canada Inc., Mitsubishi Electric & Electronics USA, Inc., Nanya Technology Corporation, Nanya Technology Corporation USA, NEC Corporation, NEC Corporation of America, NEC Canada, Renesas Electronics Corporation fka NEC Electronics Corporation, Renesas Electronics America, Inc. fka NEC Electronics American Inc., Renesas Electronics Canada Ltd., Toshiba Corporation, Toshiba America Electronics Components Inc., Toshiba of Canada Limited, Winbond Electronics Corporation and Winbond Electronics Corporation America.

[8] There is a companion action in British Columbia in which Pro-Sys Consultants Ltd. is the representative plaintiff. The British Columbia action is known as *Pro-Sys Consultants Ltd. v. Infineon Technologies Inc.* There is a companion action in Québec in which Option Consommateurs and Claudette Cloutier are the representatives. The Québec action is known as *Option Consommateurs* c. *Infineon Technologies AG*. There were parallel proceedings in the United States.

[9] All the actions concern allegations that the Defendants conspired to fix prices in DRAM (dynamic random access memory) devices. The 2010 action in Ontario was the means to add defendants as co-conspirators to the conspiracy alleged in the 2005 class action. The claims in the various actions are for: (a) breach of Part IV of the *Competition Act*, R.S.C. 1985, c. C-34; (b) civil conspiracy; and (c) tortious interference with economic interests.

[10] In Ontario, the Plaintiffs are represented by Harrison Pensa LLP and Sutts, Strosberg LLP. In British Columbia, the Plaintiff is represented by Camp Fiorante Matthews Mogerman. In Québec, the Plaintiffs are represented by the law firm Belleau Lapointe LLP. Class Counsel have been working together in all three jurisdictions.

[11] The actions have been very vigorously contested. Certification motions were initially unsuccessful in both British Columbia and Québec. Certification was granted, however, by the British Columbia Court of Appeal and the Québec Court of Appeal.

[12] In the B.C. Action, the Defendants, other than Elpida Memory Inc., sought and were denied leave to appeal to the Supreme Court of Canada. A second attempt at leave to the

2014 ONSC 6082 (CanLII)

Supreme Court of Canada was also sought on a reconsideration motion in the B.C. Action. However, leave to appeal to the Supreme Court of Canada was granted in the Québec Action. The hearing before the Supreme Court of Canada was heard on October 17, 2012. On October 31, 2013, the Supreme Court of Canada upheld the authorization of the Québec Action. The Supreme Court of Canada also found that indirect purchasers have a cause of action.

[13] During the course of the litigation, the predominate focus of attention has been on the B.C. Action, where the parties proceeded through discoveries and prepared for a trial that was scheduled and then rescheduled.

[14] While advancing on the litigation track in British Columbia, the Plaintiffs in Ontario, British Columbia, and Québec have from time to time negotiated settlements with some of the Defendants and then sought court approvals for those settlements. In Ontario, consent certification orders for the purposes of the settlements were also obtained.

[15] The following chart sets out the previous settlements that have been approved by the Courts in Ontario, British Columbia, and Québec.

Defendant Group	Date of Agreement	Settlement Amount
Elpida	November 15, 2011	$5,750,000
Nanya	July 24, 2012	$325,000
Micron	October 16, 2012	$17,500,000
NEC	November 28, 2012	$2,750,000
Hitachi	December 18, 2012	$2,750,000
Samsung	April 5, 2013	$22,600,000
Hynix	April 30, 2013	$15,600,000
TOTAL		**$67,275,000**

[16] The plaintiffs are seeking the approval of the following four settlements:

Defendant Group	Date of Agreement	Settlement Amount
Toshiba	June 16, 2014	$1,495,000
Winbond	June 16, 2014	$450,000
Infineon	June 18, 2014	$9,000,000
Mitsubishi	June 24, 2014	$1,250,000
TOTAL		**$12,195,000**

2014 ONSC 6082 (CanLII)

[17] With the addition of the settlement funds from the final four settlements, the aggregate recovery for the Class Members will be $79.5 million.

[18] The courts in all three jurisdictions approved the long and short form Notice of Settlement Approval Hearing and the plan of dissemination of the Notices in June and July, 2014.

[19] The deadline for objecting to the Settlement Agreements and Class Counsel fees was August 25, 2014, and no objections to the settlements or the fee request were received.

2. Discontinuance against Mosel Vitelic Corp. and Mosel Vitelic Inc.

[20] The Plaintiffs request that the Court grant leave to discontinue the action against Mosel Vitelic Corp. and Mosel Vitelic Inc., which are the only remaining Defendants who have not signed settlement agreements.

[21] Continued litigation against Mosel has unique challenges and, even if those challenges could be overcome, it is not likely that Mosel could pay any settlement or judgment. In the U.S. DRAM indirect purchaser proceedings, Mosel agreed to pay a relatively small settlement amount and has been unable to do so even after the payment schedules were extended by the court more than once and after the settlement terms were restructured.

[22] Mosel's financial condition is precarious. It is deeply in debt to creditors including 11 banks who are participating in the government-sponsored workout that has kept Mosel in business. Mosel continues to suffer losses every year.

[23] The Representative Plaintiffs support Class Counsel's recommendation to discontinue the action against Mosel.

3. Distribution Protocol

[24] As the Settlement Fund has accumulated from the various settlements (apart from Counsel Fees and Disbursements), the funds were not distributed to Class Members in order to save the expense of multiple distributions and to formulate a fair distribution protocol.

[25] Developing a fair protocol has been a challenge because Class Members are diverse and not similarly situated on the DRAM distribution chain, and it is a contentious matter about the amount of the overcharge absorbed at each level of the distribution chain.

[26] Further, the anticipated take up rates are likely to be different between different categories of Class Members. Some Class Members have very small claims and will have much less incentive to submit their decade old claims than other Class Members, including public authorities, who suffered significant DRAM cost overcharges and who will be highly motivated to participate in the claims distribution process.

[27] Under the proposed Distribution Protocol, the amount for distribution to the class will be the total of all settlement funds received in the proceedings, plus accrued interest, less Class Counsel's approved fees and disbursements and approved administration and notice costs.

[28] A great deal of time and effort was expended in formulating a distribution plan. In creating the Distribution Protocol, Class Counsel have: (a) adopted adversarial roles representing different levels of the DRAM distribution chain; (b) reviewed the substantial expert evidence

2014 ONSC 6082 (CanLII)

filed and the plan of allocation approved in the parallel U.S. Action for indirect purchasers; (c) consulted with the Representative Plaintiffs and many other Class Members; (d) interviewed industry participants knowledgeable about various aspects of DRAM distribution; (e) retained an independent economist to opine on the distribution of loss and in particular where the overcharge came to rest in the chain of distribution; and, (f) retained retired Supreme Court Justice Ian Binnie who participated in communication and dissemination of information to Class Members, convened hearings to establish the Distribution Protocol and consider the expert evidence. The Honourable Mr. Binnie delivered a report on his findings.

2014 ONSC 6082 (CanLII)

[29] Class Counsel submit that the proposed Distribution Protocol reflects a balance of economic, practical and legal principles and contains a number of features which permit reasonable flexibility to adapt and respond to the needs of Class Members in the execution of the claims process. The Protocol also allows for further judicial review in the event that unfairness or inequity emerges in the implementation of the plan.

[30] The Distribution Protocol divides the Settlement Fund into three Funds: (1) the End Consumer Fund: 50% of Settlement Fund; (2) the EMS (Electronic Manufacturing Services) Fund: 30% of Settlement Fund; and (3) the Other DRAM Purchaser Fund: 20% of Settlement Fund.

[31] The End Consumer Fund applies to class members who purchased DRAM for their own use and not for resale in the same or modified form. This category includes a wide range of consumers from individuals, through small and medium-sized businesses, all the way up to the largest Canadian businesses and Canadian governmental entities at the municipal, provincial and federal levels.

[32] The EMS Fund applies to claims by a class member for purchases of DRAM “in support of the manufacturing or assembly” of particular electronics products “by contract manufacturers or electronics manufacturing services firms pursuant to contracts with computer and/or non-computer original equipment manufacturers and/or other computer parts manufacturers for commercial resale in a modified form”. Claims for the purchase of DRAM to construct or assemble DRAM modules for commercial resale to end consumers are excluded from claims on the EMS Fund.

[33] The Other DRAM Purchaser Fund addresses claims by any class members which do not fall into the End Consumer or EMS Funds. The class members whose purchases fall within the Other DRAM Purchaser Fund are a varied group including resellers, contract manufacturers who are not EMS manufacturers, and many others. Because the purchases of class members that fall in this category will vary substantially, three sub-categories have been created in the Other DRAM Purchaser Fund.

[34] A class member may claim in any Fund for which they have purchases of DRAM which qualify, and may claim in more than one Fund.

[35] Because DRAM is used in a wide variety of electronics, claims will be based on a common unit of measure, the “Computer Equivalency Unit” (“CEU”). One CEU is equivalent to the average amount of DRAM in a computer during the class period. Other products containing DRAM are then assigned a CEU value based on their average DRAM content as compared to DRAM content of an average computer. For Class Members who purchased raw DRAM or

DRAM in large quantities, there is an additional grid for assigning a CEU value to those purchases.

[36] Each of the Funds has a dollar value assigned to it for each CEU. For End Consumers, each CEU is valued at $5. For EMS and Other DRAM Purchasers, each CEU is valued at $1.25. Among Other DRAM Purchasers Claims, this value will be further weighted according to whether the purchases are low, medium or high absorption.

[37] Claims will be calculated by multiplying a Class Member's purchases of DRAM by the CEU value for the product purchased and the dollar value per CEU for those purchases. End Consumers will receive a minimum payment of $20, and have a simplified claims process for small claims.

[38] The Funds are designed to be self-contained, unless there is an unjust result after all claims are submitted. That is, absent an unjust result, even if one Fund is undersubscribed and another oversubscribed, the monies in the undersubscribed Fund will not be used to compensate the class members in the oversubscribed Fund. If any Fund is oversubscribed, the payouts to class members will be pro-rated down to the total amount in that Fund.

[39] If a Fund is undersubscribed, Class Counsel may implement a pro-rata increase in the compensation payable to claimants entitled to compensation from that Fund, unless a pro-rata increase is determined to be inappropriate. If a pro-rata increase is inappropriate, Class Counsel will prepare a proposal for the Courts in respect of any excess monies remaining in an undersubscribed Fund prior to payouts on that Fund occurring. In such a case, excess monies may be employed to implement a pro-rata increase up to a level at which it is appropriate, or may be distributed *cy près*, or may be used in part for each of those purposes.

[40] Mr. Binnie, the Representative Plaintiffs and Class Counsel all recommend the approval of the Distribution Protocol as fair, reasonable and in the best interest of the class.

4. Approval of Administration Protocol and Appointment of Claims Administrator

[41] Class Counsel have developed the Administration Protocol, which is a set of rules which will guide the administrative implementation of the claims process and Distribution Protocol. The Administration Protocol was designed to retain flexibility to deal with the claims process as it unfolds. The Administration Protocol provides for Class Counsel to play a continuing role in overseeing its implementation and the administration.

[42] The Administration Protocol contemplates two routes within the claims process: (1) a simplified process for End Consumers who elect to claim the $20 minimum; and (2) a more in-depth process for all other claimants and for End Consumers who purchased sufficient amounts of DRAM to claim more than $20.

[43] In both instances, claims will be filed via an online claims portal unless a Class Member does not have Internet access.

[44] The Administration Protocol does not set out a claims form or list what will be accepted as proof, but rather provides principles for the submission of claims. This provides the Claims Administrator with the flexibility to adjust the claims forms if it becomes apparent that Class Members are having difficulty, and to accept differing forms of proof as appropriate.

2014 ONSC 6082 (CanLII)

[45] An End Consumer who completes a simplified claim will not be required to provide any proof of their purchases beyond a declaration that they purchased at least one product containing DRAM during the class period.

[46] Class Counsel propose that the claims period be 90 days, with flexibility for Class Counsel and the Claims Administrator to extend the claims period if they consider the extension to be necessary and reasonable for the fair administration of the Distribution Protocol.

[47] The Administration Protocol provides for the appointment of an arbitrator to hear appeals from the Claims Administrator's decisions. Class Counsel propose that Laura Bruneau be appointed as arbitrator. Ms. Bruneau has experience both as an arbitrator for appeals from claims administrators and in the administration of claims. She is a lawyer and fully bilingual.

[48] Class Counsel are recommending that NPT RicePoint Class Action Services Inc. be appointed as Claims Administrator. NPT RicePoint Class Action Services Inc. has bilingual capabilities and has been appointed claims administrator in other Canadian class actions, including other price-fixing conspiracy cases.

[49] The Representative Plaintiffs support the approval of the Administration Protocol and appointment of Claims Administrator and Arbitrator.

5. Notice Program

[50] Class Counsel are seeking direction from the Courts as to the nature and size of the notice plan to be developed to provide information about the claims process to class members and to encourage them to make claims. To effectively achieve communications reach to the class members for the purposes of triggering the desired response in the claims process, a substantial notice program will have to be implemented.

[51] Class Counsel have sought advice from Brad, a marketing and public relations agency with its head office in Québec. Class Counsel have received from Brad four marketing proposals for the Courts' consideration, with budgets of $1 million, $2 million, $3 million and $4 million.

[52] For present purposes, it is not necessary to describe the details of the various budgets, and I will return to this topic further below.

6. Class Counsel Fees

[53] Harrison Pensa LLP and Sutts Strosberg LLP each entered into a contingency fee agreement with their respective Ontario Representative Plaintiff client (the "Ontario Fee Agreements"). Under the Ontario Fee Agreements, the fee payable is up to 30% of the value of any settlement plus disbursements and applicable taxes. This Court approved the fee agreement on July 25, 2012.

[54] Camp Fiorante Matthews Mogerman entered into a contingency fee agreement with the B.C. Representative Plaintiff (the "B.C. Fee Agreement"). The B.C. Fee Agreement provides for a legal fee of up to 33⅓% on any settlement or compensation pertaining to the case plus disbursements and applicable taxes. The B.C. Court approved the B.C. Fee Agreement on July 27, 2012.

2014 ONSC 6082 (CanLII)

[55] Belleau Lapointe entered into a contingency fee agreement with the Québec Representative Plaintiff (the "Québec Fee Agreement"). The Québec Fee Agreement provides that the fee payable is up to 30% of the value of any settlement plus disbursements and applicable taxes. The Québec Court approved the Québec Fee Agreement on July 26, 2012.

[56] All of the settlement amounts except the second tranche of the Infineon settlement amount have been paid by the Defendants and are being held in trust for the benefit of the settlement classes. As a result, Class Counsel, collectively are seeking a fee of 30% of the total settlement funds (except for the Infineon second payment) including accrued interest to August 15, 2014, less previous fee awards.

[57] The combined fee sought by Class Counsel at this time is $16,851,367.64, plus applicable taxes. Class Counsel intend to bring a final fee application after the second Infineon payment is made, for $1,350,000, representing 30% of the remaining unpaid settlement amount.

[58] The fee sought is less than that permitted under the B.C. Fee Agreement and consistent with the terms of the Ontario and Québec Fee Agreements.

[59] The following chart outlines the time docketed by Class Counsel at their usual hourly rates:

LAW FIRM	DOCKETED TIME (Dec 16, 2012 – Aug 15, 2014)	TOTAL DOCKETED TIME
Camp Fiorante Matthews Mogerman	$1,643,700.50	$4,504,111.75
Sutts, Strosberg LLP	$275,246.50	$537,322.55
Harrison Pensa LLP	$609,192.00	$871,273.50
Belleau Lapointe, LLP	$797,926.25	$1,845,838.55
Siskinds LLP	$0	$100,285.50
TOTAL	**$3,326,065.25**	**$7,858,831.85**

[60] Four rounds of notice have now been published and disseminated to Class Members. In all of those notices (with the sole exception of the short form of notice regarding approval of the Samsung and Hynix settlements, Class Counsel have advised that they would collectively be requesting legal fees of up to 30% of the settlement funds, plus disbursements and applicable taxes to be approved by the courts and paid out of the settlement funds.

[61] The notice with regard to this settlement approval hearing was published on July 31, 2014. To date, over four rounds of notice, there has only been one objection, received in regards to the prior approvals of the Micron, Nanya, Hitachi and NEC settlement agreements and the fees sought at that time, from Mr. W.S. McMullen. That objection was brought to the attention of the Courts at that time. Class Counsel paid attention to this objection when crafting the

2014 ONSC 6082 (CanLII)

distribution and claims process. It is Class Counsel's belief that the Distribution Protocol and Administration Protocol meet all of the substantive concerns voiced by Mr. McMullen.

[62] No objections have been submitted by settlement Class Members in relation to the Current Settlement Agreements, including in relation to the fee request of Class Counsel.

2014 ONSC 6082 (CanLII)

7. Disbursements

[63] The combined disbursements being sought are $178,245.64 (representing current disbursements) and US$2,218.93 (representing current disbursements plus a small exchange rate difference on previously approved disbursements), plus applicable taxes.

[64] The most significant disbursement is in respect of expert fees.

C. DISCUSSION AND ANALYSIS

1. Discontinuance against Mosel Vitelic Corp. and Mosel Vitelic Inc.

[65] Under s. 29 (1) of the *Class Proceedings Act, 1992,* court approval is required if a proposed class action is converted into an individual action or if a class action is discontinued: *Chopik v. Mitsubishi Paper Mills Ltd.*, [2003] O.J. No. 192 (S.C.J.); *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 (S.C.J.); *Vennell v. Barnado's* (2004), 73 O.R. (3d) 13 (S.C.J.).

[66] The central question on a motion for a discontinuance is whether the Class Members will be prejudiced: *Durling v. Sunrise Propane Energy Group Inc*. (2009), 98 C.P.C. (6th) 48 at paras. 14-29; *Sollen v. Pfizer*, 2008 ONCA 803, aff'g (2008), 290 DLR (4th) 603 (S.C.J.). The abandonment or discontinuance does not have to be beneficial or in the best interests of the putative class members: *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 (S.C.J.) at paras. 30-39.

[67] In the immediate case, the Class Members will not be prejudiced by the discontinuance, which should be granted.

2. Settlement Approval, Distribution Protocol, and Approval of Administration Protocol, and Appointment of Claims Administrator

[68] 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 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[69] 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, 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. See: *Fantl v. Transamerica Life Canada*, *supra* at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra,* at para. 45; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

2014 ONSC 6082 (CanLII)

[70] 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 (S.C.J.) at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[71] 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: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada*, *supra*. A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd*. (2002), 24 CPC (5th) 396 at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

[72] In my opinion, having regard to the various factors used to determine whether to approve a settlement, the Settlement Agreements in the immediate case should be approved.

[73] My view is that the settlements are an excellent result in a very difficult and very risky class action.

[74] Similarly, the Distribution Protocol, which had to take into account very difficult economic and damage assessment issues in the marketplace for DRAM, is a fair and reasonable result for all Class Members. Courts use the same test to approve a distribution plan as to approve a settlement, and thus a plan of distribution will be appropriate if in all the circumstances, the plan of distribution is fair, reasonable and in the best interest of the class: *Zaniewicz v. Zungui Haixi Corp.*, 2013 ONSC 5490 at para. 59.

[75] In the case at bar, the Distribution Protocol should be approved.

[76] With one adjustment, the Administration Protocol and the appointment of the Claims Administrator should also be approved. The adjustment is that the claims period should be for a fixed 120 day period. I only see problems with administering a 90 day period that can be adjusted to a longer period.

3. Notice Program

[77] Relying on anecdotal evidence, one of the problems of modern class action regimes is that too often the take up by class members of a settlement is poor. From a policy perspective, particularly, when the undistributed settlement proceeds are refunded to the Defendants (not a concern in the immediate case), a poor take up has bad optics and can leave the impression that

the major beneficiary of the class action was class counsel and not the class members who receive no or little compensation for their injuries.

[78] If the access to justice goal of a class proceeding is to be achieved, then class members should be encouraged to take up the settlement proceeds and thus an effective and robust notice program is money well spent.

[79] In the case at bar, it is not clear to me that of the four budgets for a notice plan, the maximum budget of $4 million is necessary to achieve an appropriately robust notice plan to encourage a strong take up. On the other hand, it appears to me that the $1 million and $2 million plans are inadequate to achieve a respectable take up.

[80] Having reviewed the plans, I would approve an expenditure of up to $3 million for the notice plan.

[81] I direct Class Counsel to carefully monitor the take up rate.

[82] The above approval is made without prejudice to returning to court for approval of additional expenditures to boost the notice plan and to encourage the take up particularly from the End Consumer Fund (50% of Settlement Fund).

4. Class Counsel Fees & Disbursements

[83] 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 (S.C.J.) at para. 13; *Smith v. National Money Mart,* [2010] O.J. No. 873 (S.C.J.), at paras. 19-20; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.), at para. 25.

[84] 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: *Smith v. National Money Mart, supra*, at paras. 19-20; *Fischer v. I.G. Investment Management Ltd., supra*, at para. 28.

[85] In my opinion, subject to a holdback of $1 million that along with the fee request for the second tranche of the Infineon settlement shall be subject to further court order, Class Counsel's fee request should be approved. Put simply, the fee is well earned in the circumstances of this particular class action.

[86] The reason for the $1 million holdback is that there is considerable work yet to be done by Class Counsel and this work is as important as the work they have done to date. There is no reason that this work should be paid for in advance and without regard to the actual performance and the actual take up.

[87] The disbursements are approved.

2014 ONSC 6082 (CanLII)

D. CONCLUSION

[88] For the above reasons, the motions of Khalid Eidoo and Cygnus Electronics Corporation are granted.

____
Perell, J.

Released: October 20, 2014

2014 ONSC 6082 (CanLII)

CITATION: Eidoo v. Infineon Technologies AG, 2014 ONSC 6082
COURT FILE NO.: 05-CV-4340
COURT FILE NO.: 10-CV-15178CP
DATE: 20141020

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KHALID EIDOO and CYGNUS ELECTRONICS CORPORATION

Plaintiffs

– and –

INFINEON TECHNOLOGIES AG, INFINEON TECHNOLOGIES CORPORATION, INFINEON TECHNOLOGIES NORTH AMERICA CORPORATION, HYNIX SEMICONDUCTOR INC., HYNIX SEMICONDUCTOR AMERICA INC., HYNIX SEMICONDUCTOR MANUFACTURING AMERICA, INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG SEMICONDUCTOR, INC., SAMSUNG ELECTRONICS AMERICA, INC. SAMSUNG ELECTRONICS CANADA INC., MICRON TECHNOLOGY, INC. MICRON SEMICONDUCTOR PRODUCTS, INC. o/a CRUCIAL TECHNOLOGIES, MOSEL VITELIC CORP., MOSEL VITELIC INC. and ELPIDA MEMORY, INC.

Defendants

AND BETWEEN:

KHALID EIDOO and CYGNUS ELECTRONICS CORPORATION

Plaintiffs

– and –

HITACHI LTD., HITACHI AMERICA, HITACHI ELECTRONIC DEVICES (USA), HITACHI CANADA LTD., MITSUBISHI ELECTRONIC CORPORATION, MITSUBISHI ELECTRIC SALES CANADA INC., MITSUBISHI ELECTRIC & ELECTRONICS USA, INC., NANYA TECHNOLOGY CORPORATION, NANYA TECHNOLOGY CORPORATION USA, NEC CORPORATION, NEC CORPORATION OF AMERICA, NEC CANADA, RENESAS ELECTRONICS CORPORATION fka NEC ELECTRONICS CORPORATION, RENESAS ELECTRONICS AMERICA, INC. fka NEC ELECTRONICS AMERICA, INC., RENESAS ELECTRONICS CANADA LTD., TOSHIBA CORPORATION, TOSHIBA AMERICA ELECTRONICS COMPONENTS INC., TOSHIBA OF CANADA LIMITED, WINBOND ELECTRONICS CORPORATION AND WINBOND ELECTRONICS CORPORATION AMERICA

Defendants

REASONS FOR DECISION

PERELL J.

Released: October 20, 2014

2014 ONSC 6082 (CanLII)

TAB 5

Fontaine et al. v. The Attorney General of Canada et al.
[Indexed as: Fontaine v. Canada (Attorney General)]

Ontario Reports

Ontario Superior Court of Justice,

Goudge J.A. (ad hoc)

January 30, 2013

114 O.R. (3d) 263 | 2013 ONSC 684

2013 ONSC 684 (CanLII)

Case Summary

Aboriginal peoples — Residential schools — Canada required to provide documents archived at Library and Archives Canada to Truth and Reconciliation Commission established by settlement agreement in Indian Residential Schools class actions — Commission's mandate not including evaluation of adequacy of Canada's responses to Indian Residential Schools experience — Canada not required to provide documents relating to its responses.

Crown — Proceedings by and against Crown — Settlement agreement in Indian Residential Schools ("IRS") class actions establishing Truth and Reconciliation Commission and charging it with compiling historical record of IRS system — Canada refusing to provide documents archived at Library and Archives Canada to commission — Commission seeking court's directions on Canada's obligations under settlement agreement with respect to archived documents and in relation to commission's legacy mandate — Commission not having been established as department of Government of Canada for all purposes — Commission not lacking capacity to bring proceedings because of Department of Justice Act — Department of Justice Act, R.S.C. 1985, c. J-2.

A number of class actions arising out of the Indian Residential School ("IRS") experience were settled, and the settlement agreement was approved by the court. The settlement agreement established the Truth and Reconciliation Commission ("TRC"). The TRC's mandate included identifying sources and creating as complete a historical record as possible of the IRS system and legacy, and producing and submitting to the parties a report including recommendations to the Government of Canada concerning the IRS system and experience. The TRC sought the court's directions on Canada's obligations under the settlement agreement with respect to archived documents at Library and Archives Canada ("LAC") and Canada's obligations under the settlement agreement in relation to the TRC's legacy mandate. A notice of application raising those same two questions was filed by the TRC as a separate proceeding in the Superior Court. Canada moved to strike four affidavits filed by the TRC, the Assembly of First Nations ("AFN") and the Inuit Representatives. It also sought to strike out the TRC's request for direction on the basis that the TRC did not have legal capacity to seek a judicial determination with respect to the settlement agreement as the TRC was created a federal department for all purposes by Order-in-Council, and all powers with respect to the conduct of litigation for or against the

2013 ONSC 684 (CanLII)

federal [page264] Crown were vested solely in the Attorney General of Canada because of s. 5(d) of the Department of Justice Act. Canada also argued that the TRC did not have standing to bring proceedings seeking an interpretation of the settlement agreement as it was not a party to the agreement and because a Schedule to the agreement set out an alternate dispute resolution mechanism, which the TRC had not followed.

Held, one affidavit should be struck out; the TRC had the capacity to bring the proceedings; the request for directions should be answered.

One of the impugned affidavits did not speak at all to the factual matrix relevant to the settlement agreement and should be struck out. The other affidavits should not be struck out.

The TRC had not been made a federal department for all purposes. Accordingly, it did not lack capacity to bring the proceedings because of the Department of Justice Act. Canada's challenge to the TRC's standing was now a moot question because the AFN and the Inuit Representatives, which were signatories and parties to the settlement agreement, had both sought answers to the same two questions that the TRC raised in its request for direction.

The settlement agreement clearly provided that Canada was to provide all relevant documents to the TRC. The obligation was expressed in unqualified language, unlimited by where the documents were located within the Government of Canada. Canada's obligation to provide all relevant documents to the TRC extended to documents archived at LAC. The importance of Canada's documents archived at LAC to two of the TRC's essential tasks, the comparative expertise of LAC's staff in identifying archived documents relevant to those tasks, and other significant aspects of the mandate that the TRC had simultaneously to accomplish in a fixed time-frame with a fixed budget were all part of the context in which the settlement agreement came about. All were inconsistent with excluding documents archived at LAC from Canada's obligation to provide relevant documents to and for the use of the TRC. Relevant documents were those that were reasonably required to assist the TRC to discharge its mandate.

The TRC's mandate does not include examinations of the responses Canada has made to address the IRS experience. Accordingly, Canada's obligation to provide documents to the TRC relevant to its legacy mandate does not extend to documents dealing with Canada's responses.

Cases referred to

Wernikowski v. Kirkland, Murphy & Ain (1999), 50 O.R. (3d) 124, [1999] O.J. No. 4812, 181 D.L.R. (4th) 625, 128 O.A.C. 33, 141 C.C.C. (3d) 403, 48 C.C.L.T. (2d) 233, 41 C.P.C. (4th) 261, 31 C.R. (5th) 99, 93 A.C.W.S. (3d) 473, 44 W.C.B. (2d) 505 (C.A.)

Statutes referred to

Department of Justice Act, R.S.C. 1985, c. J-2, s. 5(d)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 25.11, (b), (c)

Authorities referred to

Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples (Ottawa: Royal Commission on Aboriginal Peoples, 1996) [page265]

2013 ONSC 684 (CanLII)

REQUEST for directions.

Julian Falconer, Julian Roy and Meaghan Daniel, for TRC.

Catherine Coughlan, Paul Vickery and Kim McCarthy, for Canada.

Stuart Wuttke, for intervenor Assembly of First Nations.

Hugo Prud'homme, for intervenor Inuit Representatives.

GOUDGE J.A. (ad hoc): —

The Genesis of the Proceedings

[1] On May 8, 2006, the Government of Canada ("Canada") concluded the Indian Residential Schools Settlement Agreement (the "Settlement Agreement") with the Assembly of First Nations (the "AFN"), the Inuit Representatives, counsel on behalf of former Indian Residential Schools ("IRS") students and a number of other parties. The Settlement Agreement settled the individual and class actions that had been brought by former students against Canada and others.

[2] Because the settlement of class actions was involved, identical court approvals of the Settlement Agreement were sought in all 13 provincial and territorial jurisdictions, pursuant to the applicable class proceedings legislation. On December 15, 2006, the Ontario Superior Court of Justice approved the Settlement Agreement, made it a part of its judgment of that date, and ordered its implementation in accordance with the judgment and any further order of the court.

[3] On March 8, 2007, the court issued an implementation order for the effective implementation and administration of the Settlement Agreement. That order provides that any matter arising from the Settlement Agreement that requires direction from the court will be commenced by the filing of a request for direction with the court. The supervising judge is then to determine how the matter will proceed.

[4] The Truth and Reconciliation Commission (the "TRC"), which was established by the Settlement Agreement, filed a request for direction on April 5, 2012, seeking the court's direction on a number of matters concerning Canada's obligations under the Settlement Agreement. The supervising judge, Chief Justice Winkler, directed that the TRC and Canada first participate in a judicial mediation of these matters before me.

[5] Two legal issues emerged from the mediation as matters requiring the court's direction. The TRC therefore revised its request for direction accordingly on October 15, 2012. [page266]

[6] The two issues on which it now requests the court's direction are:

(a) What are Canada's obligations under the Settlement Agreement with respect to archived documents at Library and Archives Canada ("LAC")?

(b) What are Canada's obligations under the Settlement Agreement in relation to the TRC's legacy mandate?

[7] Chief Justice Winkler has directed that the TRC's revised request for direction be heard by me sitting as a judge of the Ontario Superior Court of Justice, since it is a hearing at first instance, with the usual rights of appeal. He also directed that, at the same time, I hear the amended notice of application raising the same two questions that was filed by the TRC as a separate proceeding in the Ontario Superior Court of Justice. Finally, he directed that the preliminary objections to the TRC's right to bring these proceedings raised by Canada be heard by me as well.

[8] Participants in these proceedings in addition to the TRC and Canada included the AFN and the Inuit Representatives, to whom I granted intervenor status. All four have filed affidavit material. I have also received written submissions from the University of Manitoba, the National Consortium and Independent Counsel. Canada has moved to strike the affidavits of Kent Roach and Ryan Bresser filed by the TRC, and the affidavits of Shawn Atleo and Nellie Cournoyea filed by the AFN and the Inuit Representatives respectively.

[9] There are therefore four matters before me:

(1) Canada's preliminary request for direction to strike four affidavits;

(2) Canada's preliminary request for direction to strike both the TRC's revised request for direction and its amended notice of application;

(3) the TRC's revised request for direction and amended notice of application concerning Canada's obligations with respect to LAC documents; [and]

(4) the TRC's revised request for direction and amended notice of application concerning Canada's obligations in relation to the TRC's legacy mandate. [page267]

The Background

[10] Starting in the 1880s, Canada undertook responsibility for the creation of the IRS system for the education of Aboriginal children. The schools were nearly all operated jointly by Canada and various religious organizations. By the time the last residential school closed in 1996, more than 150,000 Aboriginal, Inuit and Métis children had been taken from their homes and communities and required to attend these institutions. The sternly assimilationist vision embodied in the IRS system was described in the Report of the Royal Commission on Aboriginal Peoples (Ottawa: Royal Commission on Aboriginal Peoples, 1996), at p. 337, as follows:

2013 ONSC 684 (CanLII)

2013 ONSC 684 (CanLII)

> The tragic legacy of residential education began in the late nineteenth century with a three-part vision of education in the service of assimilation. It included, first, a justification of removing children from their communities and disrupting Aboriginal families; second, a precise pedagogy for re-socializing children in the schools; and third, schemes for integrating graduates into the non-Aboriginal world.

[11] The injustices and harms experienced by Aboriginal people as a result of this tragic episode in Canadian history caused many Aboriginal groups, particularly the AFN, to seek a response that would address both compensation and the need for continued healing. In addition, by the 1990s, litigation over the alleged abuse of students attending the schools began in earnest.

[12] It was in this context that Canada appointed the Honourable Frank Iacobucci on May 30, 2005 as federal representative to lead discussions with interested parties towards the resolution of the legacy of Indian Residential Schools. The shared objective was a fair and lasting resolution of the painful negative experiences of former students, the enduring impacts of these experiences, and the resolution of all individual and class actions.

[13] The result of the lengthy and detailed negotiations that ensued was, first, the agreement in principle, concluded by the parties on November 20, 2005, and approved by the previous Government of Canada. That was followed on May 8, 2006 by the conclusion of the Settlement Agreement, which was approved by the present Government of Canada and signed by Canada, the AFN and other leading Aboriginal organizations, some 50 religious organizations and some 79 law firms conducting the relevant litigation. [page268]

[14] In its fourth recital, the Settlement Agreement describes the objectives of the agreement in principle which clearly set the course for what followed:

> D. The Parties entered into an Agreement in Principle on November 20, 2005 for the resolution of the legacy of Indian Residential Schools:
>
> (i) to settle the Class Actions and the Cloud Class Action, in accordance with and as provided in this Agreement;
>
> (ii) to provide for payment by Canada of the Designated Amount to the Trustee for the Common Experience Payment;
>
> (iii) to provide for the Independent Assessment Process;
>
> (iv) to establish a Truth and Reconciliation Commission;
>
> (v) to provide for an endowment to the Aboriginal Healing Foundation to fund healing programmes addressing the legacy of harms suffered at Indian Residential Schools including the intergenerational effects; and
>
> (vi) to provide funding for commemoration of the legacy of Indian Residential Schools.

[15] To accomplish this broad agenda, the Settlement Agreement, which itself ran to almost 100 pages, incorporated 25 additional schedules. Each addresses in detail a different aspect of the Settlement Agreement.

[16] In s. 3.03 of the Settlement Agreement, Canada agreed to provide $60 million for the establishment and work of the TRC. Schedule N established its mandate.

[17] The parties open Sch. N with these compelling words:

> There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation.

2013 ONSC 684 (CanLII)

(Emphasis in original)

[18] In s. 1 of Sch. N, the parties describe the goals of the TRC. For the particular purposes of this proceeding, (e) and (f) are of particular importance:

The goals of the Commission shall be to:

(a) Acknowledge Residential School experiences, impacts and consequences;

(b) Provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission; [page269]

(c) Witness,[1] support, promote and facilitate truth and reconciliation events at both the national and community levels;

(d) Promote awareness and public education of Canadians about the IRS system and its impacts;

(e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;

(f) Produce and submit to the Parties of the Agreement[2] a report including recommendations[3] to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of the IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools;

(g) Support commemoration of former Indian Residential School students and their families in accordance with the Commemoration Policy Directive (Schedule "X" of the Agreement).

[19] Section 2 describes the powers, duties and procedures of the TRC and provides for its establishment by the appointment of the commissioners by Order-in-Council.

[20] Sections 3 and 4 set out the responsibilities of the TRC and how it is to exercise its duties. Section 8 requires that it report within the first two years of its launch and that it conclude all its work within a five-year time frame, which ends on July 1, 2014.

[21] Section 10 charges the TRC with funding and hosting seven national events across the country to engage the Canadian public and provide education about the IRS episode in Canadian history together with its legacies. The TRC is also required to assist communities in conducting similar but more local events, to gather personal statements from former students and to hold a closing ceremony to recognize the significance of all the events over the life of its work.

[22] Throughout Sch. N, the importance for the TRC of truth-telling and of recording, preserving and making available to the public the history of the IRS experience is unmistakable. Section 11 provides for the TRC's access to relevant information. Section 12 [page270] requires the TRC to establish a national research centre to the extent that its budget permits. It is to be accessible to former students, their families and communities and future researchers.

[23] It is in this broad context that the four issues in this proceeding arise for decision.

First issue: Canada's request for direction to strike four affidavits

[24] Canada seeks to strike out four affidavits pursuant to rule 25.11(b) and (c) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Rule 25.11 reads as follows:

> 25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the court.

[25] Canada argues that the affidavits of Kent Roach and Ryan Bresser filed by the TRC, the affidavit of Shawn Atleo filed by the AFN and the affidavit of Nellie Cournoyea filed by the Inuit Representatives should all be struck out in whole or in part. It says these affidavits are irrelevant and therefore scandalous, frivolous or vexatious. Alternatively, it says they contain opinions and argument and are therefore an abuse of process. Canada does not assert prejudice arising from these affidavits.

[26] As the Court of Appeal for Ontario said in Wernikowski v. Kirkland, Murphy & Ain (1999), 50 O.R. (3d) 124, [1999] O.J. No. 4812 (C.A.), at p. 126 O.R., because the exercise of the power in rule 25.11 can deny a litigant a full hearing of its claim, it must be exercised only in the clearest of cases.

[27] Canada's complaint about the Roach affidavit is not that it is irrelevant, but that it expresses opinions and conclusions about the definition of "legacy" used by the TRC.

[28] I do not read it that narrowly. While some of the affidavit might be viewed as advocacy, large parts of it are fact-specific and speak to the kinds of documents that Canada has that are relevant to the TRC's legacy mandate.

2013 ONSC 684 (CanLII)

[29] While its scope is disputed, the legacy mandate of the TRC is clearly an important part of its work. Hence the importance of the second substantive question before me. Much of the Roach affidavit contains factual descriptions of the kinds [page271] of documents that would likely have existed when the Settlement Agreement was concluded that would fall within or outside certain definitions of "legacy". This may be relevant to the factual matrix from which the Settlement Agreement emerged and therefore to my task of interpretation.

[30] Thus, I do not think that the Roach affidavit should be struck out. Nor do I think parts of it should be struck out. Unlike a pleading which sets out claims or defences, an affidavit like this is a narrative. In this case, parsing it to determine what might or might not be acceptable is an artificial exercise that I do not propose to engage in.

[31] Canada's complaint about the Bresser affidavit is that it speaks only to the TRC's efforts to establish the national research centre called for in the Settlement Agreement. As such, it is completely irrelevant, says Canada, to the questions before me and should be struck out.

[32] I agree. The Bresser affidavit does not speak at all to the factual matrix relevant to the Settlement Agreement. Indeed, the interpretation of s. 12 of Sch. N is not a matter of dispute in these proceedings. This affidavit is struck out.

[33] Canada challenges the Atleo affidavit on the basis of relevance. Its main complaint is that the affidavit addresses the AFN's subjective intention in entering the Settlement Agreement and contains facts that post-date its signing.

[34] I read the affidavit as about considerably more than that. The context from which the Settlement Agreement emerged was one which evolved over a number of years. It is not a commercial agreement that arose after a short sharp negotiating session between two corporate entities. Its context should not be arbitrarily limited as if it were.

[35] While neither the subjective intention of the AFN in entering the Settlement Agreement nor Mr. Atleo's opinion about its meaning are helpful to my task, I do not propose to try to disentangle specific paragraphs which may be to this effect from the narrative of the lengthy and difficult historical context which made Indian Residential Schools a matter of national importance and gave rise to this historic agreement. Understanding this broad context does not drive interpretation, but is helpful to my task of giving the Settlement Agreement meaning. I therefore decline to strike the Atleo affidavit.

[36] Canada's challenge to the Cournoyea affidavit is to much the same effect. It is said to contain opinion, the subjective intention of a party to the negotiations and post-agreement efforts undertaken by the Inuit Representatives to locate documents. [page272]

[37] I acknowledge that there is some of that in the Cournoyea affidavit. But in the main, it describes the context of how the Inuit came to be a part of the Settlement Agreement. As with the Atleo affidavit, in light of the nature of the Settlement Agreement, I am of the view that this context may be helpful to my task. I therefore decline to strike this affidavit as well.

Second issue: Canada's request for direction to strike out the TRC's request for direction

[38] Canada argues that the TRC has neither the legal capacity nor the standing to seek a judicial determination with respect to the Settlement Agreement. It therefore seeks to strike out

2013 ONSC 684 (CanLII)

the TRC's request for direction. Based on the same arguments, it seeks the same order with respect to the TRC's parallel application in the Ontario Superior Court of Justice.

[39] Canada's argument that the TRC lacks legal capacity to bring both these proceedings is quite simple. It says that all powers with respect to the conduct of litigation for or against the federal Crown are vested solely in the Attorney General of Canada because of s. 5(d) of the Department of Justice Act, R.S.C. 1985, c. J-2:

5. The Attorney General of Canada

. . . . .

(d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada[.]

[40] Canada argues that to give effect to the Settlement Agreement, the TRC was created a federal department for all purposes by Order-in-Council. The Attorney General of Canada therefore has the exclusive conduct of any and all TRC litigation and since the Attorney General opposes the proceedings brought by the TRC, they cannot proceed.

[41] There is no doubt that the TRC is a unique creation. The only reference to its establishment in the Settlement Agreement is s. 2 of Sch. N. That section says nothing about the TRC being a department of the Government of Canada:

2. Establishment, Powers, Duties and Procedures of the Commission

The Truth and Reconciliation Commission shall be established by the appointment of "the Commissioners" by the Federal Government through an Order in Council, pursuant to special appointment regulations.

[42] Following the signing of the Settlement Agreement, it became clear that there was a need to further clarify the structure of the TRC as outlined in the Settlement Agreement as [page273] approved by the court. Further discussions resulted, which culminated in a letter of April 24, 2007 from Mr. Iacobucci to the interim executive director of the TRC. Canada acknowledges that, as the letter says, it documents the agreement of all parties about how the TRC would be legally established. Two paragraphs are particularly important:

> While all parties at the table agreed that separateness and independence of the Commission was a core working assumption and, consequently, that the Commission would need to be institutionally independent from IRSRC or any other existing government department, there were differences of opinion about how best to achieve that goal. It was, however, agreed by all parties that independence (real and perceived) and impartiality were critical to the Commission's credibility and its ability to fulfill its mandate.
>
> Consequently, it was agreed by all the parties that the TRC would be established as its own entity by Order in Council, pursuant to the Royal Prerogative power, independent from existing government departments, but forming part of the federal public administration for

2013 ONSC 684 (CanLII)

purposes of financial accountability, and to ensure that it would be subject to federal privacy and access to information legislation.

[43] The letter also detailed the specific Orders-in-Council that the parties agreed would be needed:

> An Order (or Orders) establishing the Commission (and its mandate) and appointing the Commissioners, made pursuant to the Royal Prerogative Power;
>
> An Order amending Schedule I of the Financial Administration Act, to add (designate) the Commission as a "Department" and identifying a Minister as "appropriate minister" for the purposes of the Act. It was left unstated in the Settlement Agreement as to who would be the reporting Minister for the Commission;
>
> Orders amending the respective schedules of the Privacy Act and the Access to Information Act, to add the Commission as a government institution (body or office) and Orders designating a person as "head" of the institution for purposes of those Acts; and
> An Order under the Public Service Employment Act, designating the Commission as a "department" and identifying a person as the "deputy head" for the purposes of the Act.

[44] The first of these was effective June 1, 2008. It established the TRC and gave it the mandate set out in Sch. N of the Settlement Agreement. It makes no mention of the TRC being a department of the Government of Canada. This Order-in-Council gave the TRC its legal existence. In due course, the additional Orders-in-Council were passed. None purport to create the TRC a department of the Government of Canada for all purposes.

[45] In light of these considerations, I cannot agree with Canada that the TRC was established as a department of the [page274] Government of Canada for all purposes and therefore lacks the capacity to bring these proceedings because of the Department of Justice Act.

[46] I say this for a number of reasons. None of the Orders-in-Council make it a department for all purposes. As is made clear in the April 27, 2007 letter, Canada agreed that the required Orders-in-Council would be for the purposes of a specific Act in each case, not for all purposes and certainly not for the purposes of the Department of Justice Act. Rather, Canada agreed that the TRC needed to be institutionally independent from all other existing government departments. In the face of this agreement, it is not open to Canada to argue that the TRC is a department of government for all purposes, and in particular that it is not independent of the Department of Justice. Nor would such an arrangement have made any sense, given the understanding on all sides that the independence and impartiality of the TRC were critical to its ability to fulfill its mandate.

[47] Thus, I conclude that the TRC is not rendered without legal capacity to bring these proceedings because of the Department Justice Act and the opposition of the Attorney General of Canada to the proceedings.

[48] However, Canada also argues that the TRC has no standing to bring these proceedings. It says that, consequently, the TRC's request for direction and its amended notice of application should be struck out.

2013 ONSC 684 (CanLII)

[49] Canada makes two arguments. First, it says that both proceedings seek an interpretation of the Settlement Agreement to which the TRC is not a party. It argues that privity of contract prevents the TRC from seeking the enforcement of the agreement.

[50] Second, Canada points to s. 2(1) of Sch. N. It says that the TRC may refer disputes involving document production to the National Administration Committee (the "NAC") for decision. The NAC is set up by s. 4.11 of the Settlement Agreement. It is composed of representatives of seven parties to the agreement, including Canada, the AFN and Inuit Representatives. Section 4.11(9) provides that if the NAC cannot reach a decision on a dispute referred to it, the dispute may be referred by four of its members to the appropriate court for resolution. Canada points out that the TRC has not availed itself of this dispute resolution mechanism, which the parties have agreed may be used to resolve the very kind of dispute that the TRC seeks to bring to this court. Moreover, says Canada, nothing in the Settlement Agreement gives the TRC standing to come directly to the court to seek resolution of such a dispute. [page275]

[51] The TRC offers several answers. Its primary response is that Canada's challenge to its standing is now effectively a moot question because the AFN and the Inuit Representatives have both sought answers to the same two questions that the TRC raises in its revised request for direction.

[52] In oral submissions in this court, both made the same request for direction that the TRC makes, and for the same reasons. Both appear to have advised Canada previously of their intention to do so. Canada raises no objection concerning the lateness of these requests nor does it claim that it is prejudiced by them. Indeed, it is hard to see how that could be, given that the questions and the materials relevant to them are exactly those in the TRC's revised request for direction. Nor can Canada raise privity of contract against the AFN and the Inuit Representatives. They are signatories and parties to the Settlement Agreement.

[53] Canada's only remaining argument is that neither the AFN nor the Inuit Representatives have availed themselves of the dispute resolution mechanism provided by the NAC. Without having done so, Canada says they cannot seek the court's assistance on the two questions concerning the extent of Canada's obligations under the Settlement Agreement.

[54] I do not agree with this argument. The mandate of the NAC is defined in the Settlement Agreement and gives the NAC a variety of specific tasks. The only one related to document production is to review and determine references involving document production that the TRC may refer to it. The NAC has no mandate to resolve disputes that arise between Canada and the AFN or the Inuit Representatives involving the obligations of Canada to provide documents under the Settlement Agreement. It is not therefore a precondition to the AFN and the Inuit Representatives seeking direction from the court concerning the extent of those obligations that they first take the dispute to the NAC.

[55] In my opinion, there is no reason why I should not hear the requests for direction brought by the AFN and Inuit Representatives. They raise two legal issues relating to document production. These are the same two issues that the TRC raises in its revised request for direction and its amended notice of application. They are issues that must be addressed whether or not the TRC has standing to bring its two proceedings. It is thus unnecessary to decide the question of the TRC's standing.

2013 ONSC 684 (CanLII)

[56] While I do not therefore propose to address that question, were I to do so, I do have some concern about the applicability of the doctrine of privity of contract to the TRC's standing to seek [page276] direction on the meaning of the Settlement Agreement. I am not sure that the Settlement Agreement can be said to be simply a private contract that should be governed only by private law concepts like privity. There are arguably aspects of the Settlement Agreement that seek to structure relationships between Canada and Aboriginal people. The preamble of Sch. N says as much. Moreover, the TRC itself, while a product of the Settlement Agreement is established by an Order-in-Council which sets out its mandate. These two considerations raise the possibility that the Settlement Agreement can be viewed through the lens of public law as well as private law.

[57] However, it is unnecessary to resolve this issue, given the conclusion I have reached on the challenge to the TRC's standing. The two questions raised by the TRC, the AFN and the Inuit Representatives must be addressed in any event and to these I now turn.

Third issue: Canada's obligations under the Settlement Agreement with respect to archived documents at LAC

[58] This issue requires a determination of whether the Settlement Agreement imposes any obligation on Canada to provide documents from LAC to the TRC and if it does the extent of that obligation. The answers require a careful reading of the relevant provisions of the Settlement Agreement.

[59] Schedule N makes clear that two tasks of fundamental importance to the TRC's mandate are the compiling of a historical record of the IRS system and its legacy and the preparation of a report that includes the history of the IRS system. It is helpful to repeat paras. (e) and (f) of s. 1 of Sch. N setting out these two goals:

(e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;

(f) Produce and submit to the Parties of the Agreement[4] a report including recommendations[5] to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of the IRS (including systemic harms, intergenerational consequences and [page277] the impact on human dignity) and the ongoing legacy of the residential schools[.]

[60] The importance of the historical record being available for the future use of former students, their families and communities and the public is set out in s. 12 of Sch. N:

12. A research centre shall be established, in a manner and to the extent that the Commission's budget makes possible. It shall be accessible to former students, their families and communities, the general public, researchers and educators who wish to include this historic material in curricula.

2013 ONSC 684 (CanLII)

> For the duration of the term of its mandate, the Commission shall ensure that all materials created or received pursuant to this mandate shall be preserved and archived with a purpose and tradition in keeping with the objectives and spirit of the Commission's work.
> The Commission shall use such methods and engage in such partnerships with experts, such as Library and Archives Canada, as are necessary to preserve and maintain the materials and documents. To the extent feasible and taking into account the relevant law and any recommendations by the Commission concerning the continued confidentiality of records, all materials collected through this process should be accessible to the public.

2013 ONSC 684 (CanLII)

[61] Access by the TRC to the information needed to prepare a historical record and a report is obviously a critical precondition for the TRC to discharge these parts of its mandate. Section 11 of Sch. N addresses this. The critical question is what obligations Canada has under that section with respect to archived documents at LAC. The first and third paragraphs of s. 11 are of particular importance:

> 11. Access to Relevant Information
> In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.
>
> . . . . .
>
> Canada and the churches are not required to give up possession of their original documents to the Commission. They are required to compile all relevant documents in an organized manner for review by the Commission and to provide access to their archives for the Commission to carry out its mandate. Provision of documents does not require provision of original documents. Original or true copies may be provided or originals may be provided temporarily for copying purposes if the original documents are not to be housed with the Commission. [page278]

[62] The TRC, the AFN and the Inuit Representatives focus on the first of these two paragraphs. They say Canada has an unqualified obligation to produce all relevant documents in its possession or control. The third paragraph imposes a separate obligation to provide access to LAC for the TRC to do its own research.

[63] On the other hand, Canada's position is that s. 11 is specific in the obligation it places on Canada concerning LAC. That obligation is found only in the third paragraph and is limited to providing access to the TRC. Canada says its obligation to search its files and provide relevant documents to the TRC applies only to the active and semi-active files of the departments of the Government of Canada, where those files have not yet been archived at LAC.

[64] Before turning to the resolution of these competing interpretations, several matters can be disposed of that are not in dispute.

[65] First, it is not in dispute that documents archived at LAC are in the possession and control of Canada. It is, after all, the archives of the government of Canada.

[66] Second, it is not contested that LAC is a source of documents that are relevant to the mandate of the TRC. As of November 26, 2012, the Department of Aboriginal Affairs and Northern Development ("AANDC") has disclosed some 982,000 documents to the TRC. Of these, some 550,000 came from LAC. As explained by counsel, these were retrieved from LAC by AANDC in part as a part of the production required by the various actions and class actions brought against Canada. Beyond this number however, Canada advises that there was no estimate of the total number of relevant documents archived at LAC when the settlement was signed, nor is there one today.

2013 ONSC 684 (CanLII)

[67] Third, it is not an issue that any obligation of Canada to provide documents from LAC is subject to the privacy interests of individuals, solicitor-client privilege and cabinet confidentiality.

[68] The principles of interpretation applicable to the Settlement Agreement are straightforward. The text of the agreement must be read as a whole. The plain meaning of the words used will be important as will the context provided by the circumstances existing at the time the Settlement Agreement was created. A consideration of both is necessary to reach a proper conclusion about the meaning of the contested provisions.

[69] In my view, the first paragraph of s. 11 sets out Canada's basic obligation concerning documents in its possession or control. The plain meaning of the language is straightforward. It is [page279] to provide all relevant documents to the TRC. The obligation is in unqualified language unlimited by where the documents are located within the Government of Canada. Nor is the obligation limited to the documents assembled by Canada for production in the underlying litigation.

[70] The third paragraph of s. 11 is equally clear. While Canada is not obliged to turn over its originals, it is required to compile all relevant documents in an organized manner for review by the TRC. It is in that context that Canada is obliged to provide access for the TRC to LAC to review these documents and to carry out its mandate. If originals are not turned over, access is necessary for the TRC to review them.

[71] I therefore conclude that given their plain meaning, the language in s. 11 of Sch. N does not exclude documents archived at LAC from Canada's obligation to the TRC. The context in which the Settlement Agreement was created provides further important support for that conclusion in several ways.

[72] First, telling the history of Indian Residential Schools was clearly seen as a central aspect of the mandate of the TRC when the Settlement Agreement was made. Since Canada played a vital role in the IRS system, Canada's documents, wherever they were held, would have been understood as a very important historical resource for this purpose.

[73] Second, the Settlement Agreement charged the TRC with compiling a historical record of the IRS system to be accessible to the public in the future. Here too, Canada's documents, wherever housed, would have been seen as vital to this task.

[74] Third, the story of the history and the historical record to be compiled cover over 100 years and dates back to the 19th century. In light of this time span, it would have been understood at the time of the Settlement Agreement that much of the relevant documentary

record in Canada's possession would be archived in LAC and would no longer be in the active or semi-active files of the departments of the Government of Canada.

[75] Fourth, it would have been obvious that the experienced staff at LAC would have vastly more ability to identify and organize the relevant documents at LAC than would the newly hired staff of the newly formed TRC. It would have made little sense to give that task to the latter rather than the former, particularly given its importance to the TRC's mandate.

[76] Finally, this differential is compounded by the reality that the Settlement Agreement gave the TRC a time limit, a limited budget and a number of important tasks in addition to preparing its report and the historical record. This too would have been obvious to those creating the Settlement Agreement [page280] and points to Canada having the obligation concerning LAC rather than the TRC.

[77] To summarize, the importance of Canada's documents archived at LAC to two of the TRC's essential tasks, the comparative expertise of LAC's staff in identifying archived document relevant to these tasks and other significant aspects of the mandate that the TRC had simultaneously to accomplish in a fixed time-frame with a fixed budget were all part of the context in which the Settlement Agreement came about. All are inconsistent with excluding documents archived at LAC from Canada's obligation to provide relevant documents to and for the use of the TRC, compiled in an organized manner. None suggest that the TRC would be left on its own with LAC documents. This simply adds weight to the plain meaning of the words used, that Canada's obligation to provide all relevant documents includes those housed at LAC.

[78] This frames Canada's obligation concerning documents archived at LAC and resolves the difference between Canada and the TRC that gave rise to these requests for direction. It would be both impossible and unwise to try to determine the full extent of this obligation in advance of a further particular dispute about its scope. However, some detail can usefully be added.

[79] As applied to LAC, Canada's obligation is to provide relevant documents which all agree means documents relevant to the TRC's mandate. As the change to the Ontario Rules of Civil Procedure made on January 1, 2010 demonstrates, this is a less expansive and more targeted obligation than one requiring provision of documents "related to" or "possibly relevant to" the TRC's mandate. Just because an archived document mentions an Indian Residential School, does not mean that it must be provided.

[80] In my view, relevant documents are those that are reasonably required to assist the TRC to discharge its mandate. Viewing the obligation through the lens of reasonableness is important, as counsel for the TRC acknowledged in argument. It is akin to the modulating concept of proportionality that now applies to document production in civil actions in Ontario, which recognizes that exhaustive production is antithetical to just outcomes.

[81] Equally important in giving meaning to the obligation is a careful examination of the mandate itself. There is no doubt about the centrality of both telling the history of the IRS experience and compiling a historical record about it for future generations. Both are fundamental to the work of the TRC. [page281] Documents archived at LAC are obviously vital to these aspects of the TRC's mandate.

[82] However, there are several provisions of the Settlement Agreement that would appear to be relevant to fixing the extent of this obligation. For example, s. 1(e) charges the TRC with the

2013 ONSC 684 (CanLII)

goal of creating "as complete an historical record as possible of the IRS system and legacy". This may suggest that something short of perfection is the objective. A second example is s. 2(h). Its prohibition on the TRC making use of personal information may also affect the extent of Canada's obligation.

[83] In summary, Canada's obligation to provide documents to the TRC extends to the documents archived at LAC. Further definition of the precise extent of this obligation is best left for resolution in specific contexts that may require it.

Fourth issue: Canada's obligations under the Settlement Agreement in relation to the TRC's legacy mandate

[84] The TRC and Canada have joined issue over the extent of Canada's obligation under the Settlement Agreement to provide documents to the TRC relevant to its legacy mandate. While they differ over the extent of that mandate, they both acknowledge that it is properly described in s. 1(f) as ". . . the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools". This is the legacy mandate on which s. 1(f) obliges the TRC to report.

[85] It is true that "legacy of Indian Residential Schools" is a defined term in the funding agreement that constitutes Sch. M of the Settlement Agreement. That definition is in slightly different language than s. 1(f) of Sch. N and is, as Sch. M makes clear, only for the purposes of the funding agreement. For TRC purposes, it is the language in Sch. N that matters.

[86] The dispute here is not so much over whether documents are "relevant to" the TRC's legacy mandate but over the extent of the mandate itself. Thus, while applicable here, it is not necessary to repeat what I have said concerning the meaning to be given to "relevant to". Suffice it to say that Canada's obligation in connection with this aspect of the TRC's work is to provide the documents in its possession or control that are reasonably required to assist the TRC to tell the story of the legacy of Indian Residential Schools.

[87] Defining the full extent of the TRC's legacy mandate is a task that ought not to be attempted in the abstract. It can reasonably be undertaken only in the context of specific differences that arise over what is and what is not within the [page282] mandate. The TRC and Canada have raised four such differences in the proceeding.

[88] First, there is some suggestion in the TRC's materials that Canada proposes an arbitrary cut-off date for its obligation. For example, it is said that Canada proposes not to provide any documents concerning a particular school created after the school closed.

[89] I do not take that to be Canada's position. Nor would it be one that is sustainable. An arbitrary cut-off date would be incompatible with the mandate extending to "the ongoing legacy" of the residential schools.

[90] Second, Canada suggests that because health is addressed in a separate component of the Settlement Agreement on healing, health does not fall within the TRC's legacy mandate.

[91] I do not agree. It is true that s. 4 of Sch. N provides that the TRC is not to make recommendations on matters already covered in the Settlement Agreement. It is also true that Sch. M addresses a healing strategy to deal with the healing needs of Aboriginal people affected by the legacy of Indian Residential Schools. However, the adverse health effects on former

2013 ONSC 684 (CanLII)

students, their families and communities that have been suffered due to the IRS experience are not the same thing as a healing strategy for the future. Nor is reporting on those health effects the same as making recommendations for the future to address those effects. In my view, Canada is obliged to provide to the TRC the documents it has that are reasonably required to tell the story of the IRS legacy, including its health aspect.

[92] Third, there is a suggestion in Canada's materials that its obligation is limited only to documents that concern policy or operations of the IRS system. In my view, that is not a useful pair of categories. It is too limited a rule of thumb. One can easily imagine documents such as historical descriptions of harms caused by residential schools that would not fit easily into either category, but would clearly be important to tell the story of the legacy of the IRS system.

[93] Lastly, the TRC and Canada differ over whether the TRC's legacy mandate extends to an examination and evaluation of Canada's responses to the impacts of the Indian Residential Schools experience. The TRC says its legacy mandate extends to its evaluation of the adequacy of those responses, including what policies were considered, which ones were implemented and which were not, and Canada's rationales for each. On the other hand, Canada says that the TRC's mandate does not include [page283] examinations of the responses Canada has made to address the Indian Residential Schools experience.

[94] In my view, Canada's position is correct. I say this for several reasons.

[95] The Settlement Agreement describes the TRC's legacy mandate in s. 1(f). To reiterate, the TRC is to report on "the effect and consequences of IRS (including systemic harm, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools". This requires the TRC to describe for Canadians the terrible harms caused in so many ways past and present to Aboriginal people due to the IRS system.

[96] In my view, however, the plain meaning of this language does not extend to Canada's responses to these harms or an evaluation of their adequacy. I do not think that, for example, the prime minister's apology in June 2008 can be described as a harm caused by the IRS system.

[97] In addition, as Canada points out, s. 4 of Sch. N prohibits the TRC from making recommendations on matters covered in the Settlement Agreement. Much of the Settlement Agreement covers responses by Canada to the IRS experiences of Aboriginal people. The compensation scheme set up for former students and their families is but one example. The TRC would appear to be precluded from evaluating the adequacy of those responses by s. 4 of Sch. N.

[98] Finally, the evaluation of the adequacy or inadequacy of the policy responses of the Government of Canada would seem to be the natural mandate for a public inquiry. While the legacy mandate of the TRC could have been clearly written to encompass this task, the fact that the parties agreed in s. 2(b) of Sch. N that the TRC was not to act as a public inquiry is suggestive of the exclusion of this task from the TRC's work.

[99] In short, in my view, the legacy mandate of the TRC does not extend to Canada's responses to the IRS experience or an evaluation of their adequacy. Thus, Canada's obligation to provide documents to the TRC relevant to its legacy mandate does not extend this far either.

2013 ONSC 684 (CanLII)

[100] This completes the directions I propose to give in response to these requests for direction. In my view, this is not an appropriate proceeding to consider an award of costs and I decline to do so.

Order accordingly.

2013 ONSC 684 (CanLII)

Notes

1 This refers to the Aboriginal principle of "witnessing".

2 The Government of Canada undertakes to provide for wider dissemination of the report pursuant to the recommendations of the commissioners.

3 The commission may make recommendations for such further measures as it considers necessary for the fulfillment of the truth and reconciliation mandate and goals.

4 The Government of Canada undertakes to provide for wider dissemination of the report pursuant to the recommendations of the commissioners.

5 The commission may make recommendations for such further measures as it considers necessary for the fulfillment of the truth and reconciliation mandate and goals.

End of Document

TAB 6

CITATION: *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283
COURT FILE NO.: 00-CV-129059
DATE: January 14, 2014

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF

2014 ONSC 283 (CanLII)

QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTREAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITE DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC.-LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON – THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES – GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE –ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER – THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE-FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL

2014 ONSC 283 (CanLII)

CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- *Fay Brunning* for the Applicants
- *Catherine Coughlan* for the Attorney General of Canada
- *Norman W. Feaver* for the Ontario Provincial Police
- *Tina Hobday* for the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat (Canada)
- *Julian N. Falconer, Julian K. Roy,* and *Junaid K. Subhan* for the Truth and Reconciliation Commission of Canada
- *Stuart Wuttke* and *Valerie Richer* for the Assembly of First Nations
- *Pierre Champagne* and *Michael Sabet* for Les Soeurs de la Charité d'Ottawa

HEARING DATE: December 17 and 18, 2013

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

1. Introduction

[1] The Truth and Reconciliation Commission of Canada, which was constituted by The Indian Residential Schools Settlement Agreement ("the IRSSA"), brings a Request for Direction ("RFD") to require the Government of Canada ("Canada") to produce records of a 1992-96 criminal investigation by the Ontario Provincial Police ("the OPP") of assaults and other crimes perpetrated on students at St. Anne's Indian Residential School in Fort Albany, Ontario ("St. Anne's").

[2] Canada, which was a defendant in the litigation leading up to the IRSSA, brings a RFD as to whether under the Independent Assessment Process ("the IAP") of the IRSSA, it must seek to have the OPP, which is a non-party, provide its documents about the 1992-96 criminal investigation of what happened at St. Anne's to the Applicants, who are IAP Claimants.

[3] The Applicants, who are 60 St. Anne's Claimants for compensation under the IAP, bring a Request for Direction with a variety of heads of relief.

[4] The Applicants, by their RFD, seek a direction: (a) requiring Canada to provide an affidavit listing all documents currently in Canada's possession or control that are relevant to abuse at St. Anne's and to make the affiant available for cross-examination; (b) requiring Canada to produce the listed documents; (c) requiring Canada to obtain and produce the OPP documents about the St Anne's Criminal Investigation; (d) requiring Canada to amend the historical Narrative (a disclosure obligation under the IRSSA) for St. Anne's; (e) declaring the manner in

2014 ONSC 283 (CanLII)

which transcripts, expert medical evidence, signed witness statements, etc. may be used in evidence in the IAP; and (f) ordering costs on a substantial indemnity basis to the Applicants' Counsel and also costs paid to Mushkegowuk Council and to the affiants who delivered affidavits for this Request for Directions.

[5] It should be noted that the pursuant to their RFD, the Applicants' request for disclosure goes beyond the OPP documents and reaches to other documents about what occurred at St. Anne's, such as transcripts of criminal and civil proceedings.

[6] The Assembly of First Nations ("AFN") seeks to intervene in both Canada's and the Applicants' RFPs. The intervention requests were unopposed, and they are granted. The Assembly supports the RFDs of the Commission and of the Applicants.

[7] The OPP appeared as a responding party to the various RFDs.

[8] The Chief Adjudicator of the Indian Residential Schools Adjudication appeared at the hearing of the various RFDs to protect the jurisdictional integrity of the IAP from some of the requests for relief sought by the Applicants.

[9] Les Soeurs de la Charité d'Ottawa, a religious and charitable organization that was one of three Catholic entities that administered St. Anne's, appeared to oppose any RFD that requires Canada to produce information beyond what is required by the IRSSA.

2. Overview

[10] By way of overview, I shall consider the Commission's RFD separately from the RFDs of Canada and the Applicants.

[11] Although the factual background for the various RFDs arise out of the same circumstances, and although there is an overlap in the law about the court's jurisdiction to respond to the various RFDs, and although the oral and written argument of the parties seemed to be aimed at fashioning a single response for all the RFDs, as I will explain below, it is helpful to analyze the Commission's RFD, which does not affect the IAP, separately from the RFDs of Canada and the Applicants, which do affect the IAP.

[12] With respect to the Commission's RFD, the court has the jurisdiction to order Canada to produce the copies of any OPP documents that Canada has in its possession to the Commission. I shall exercise this jurisdiction to order Canada to produce its copies of OPP documents to the Commission. Below, I shall explain that the deemed undertaking does not apply with respect to the OPP documents, but, in any event, the court has the jurisdiction to abrogate the deemed undertaking, and, thus, there is no impediment to Canada producing these documents to the Commission.

[13] Still dealing with the Commission's RFD, as I will explain below, notwithstanding that the OPP is not a party to the IRSSA, the court has the jurisdiction to order the OPP to produce its documents directly to the Commission in the same manner that Canada is obliged to produce documents to the Commission under the IRSSA. I will exercise this jurisdiction to order the OPP to produce its documents to the Commission.

[14] Turning to Canada's and the Applicant's RFDs, as I will explain below, the court has the jurisdiction to supervise and implement the disclosure process of the IAP and to make remedial orders against Canada for non-disclosure, but the court does not have the jurisdiction to direct the

2014 ONSC 283 (CanLII)

evidentiary, or substantive decisions of the IAP adjudicators as to what use may be made of the evidence presented in the IAP. I, therefore, shall not being making any orders or directions that interfere with the adjudicative autonomy of the adjudicators under the IAP.

[15] Rather, pursuant to the Applicants' RFD, I shall exercise the court's jurisdiction to order Canada to produce its copies of OPP documents and transcripts in its possession as part of the IAP. I will also exercise the court's jurisdiction to implement the disclosure process of the IAP and I shall order Canada to revise its Narratives and Person of Interest ("POI") Reports for St. Anne's.

[16] By way of a RFD, I direct that if Canada breaches its disclosure obligations under the IAP, the court has the jurisdiction to re-open decided cases of the IAP and to remit them to the adjudicator for re-adjudication. Apart from deciding that the court has the jurisdiction to re-open decided cases, I will not exercise that jurisdiction, which must be exercised on a case-by-case basis.

[17] Still dealing with Canada's and the Applicants' RFD, as I will explain below, notwithstanding that the OPP is not a party to the IRSSA, the court has the jurisdiction to order the OPP to produce its documents for the purposes of the IAP. Subject to a procedure to protect privacy rights and claims for privilege, I will exercise this jurisdiction to order the OPP to produce its documents to Canada for use in the IAP.

[18] Further, as I will explain below, the court also has the jurisdiction to order Canada to pay costs if it breaches its disclosure obligations under the IRSSA, and in the circumstances of the case at bar, it is appropriate to exercise that jurisdiction in favour of the Commission and the Applicants.

[19] The court also has jurisdiction to order costs with respect to a RFD, and I shall ask for the parties for their submissions in writing about any costs award.

B. POSITION OF THE PARTIES TO THE REQUESTS FOR DIRECTIONS

1. The Position of the Ontario Provincial Police ("the OPP")

[20] The Ontario Provincial Police ("OPP") states that it cannot produce its St. Anne's documents without a court order. The OPP, however, does not oppose an order that it produce its documents provided that: (a) the court is satisfied that it has the jurisdiction to make an order that the OPP produce its records to the Commission or for the IAP; (b) the OPP's own claims for privilege are protected; (c) the claims of others for privilege or privacy are protected; and (d) it does not have to bear the costs associated with protecting any privacy and privilege claims.

[21] The OPP's main concern seems to be that if ordered to produce its records, there needs to be a process to redact the documents to protect legitimate public interests, including evidentiary privilege, third party privacy, and law enforcement interests. The OPP says that it may have claims of privilege including: (1) investigative privilege; (2) solicitor and client privilege; and (3) Crown work product privilege. It submits that any court order should address the process for redactions and who should bear the expense of producing the documents.

2014 ONSC 283 (CanLII)

2. The Position of the Truth and Reconciliation Commission

[22] The Truth and Reconciliation Commission submits that the OPP investigation documents are relevant to the Commission's mandate of identifying sources and creating as complete a record as possible of the IRS system and legacy and the OPP documents should be obtained and produced by Canada.

[23] The Commission disputes that Canada is bound by the deemed undertaking rule not to produce the OPP documents, and, in any event, the Commission submits that the court can abrogate the undertaking in the interests of justice. The Commission submits that the privacy interests of the former students or of the OPP are protected because the Commission is subject to federal privacy legislation and the National Research Centre, which would be the repository for the documents, is subject to provincial privacy legislation.

3. Canada's Position

[24] Canada submits that it has been and continues to be in full compliance with its obligations under the IRSSA in respect of document disclosure to the Commission and for the IAP. Canada submits that its disclosure obligations do not extend beyond disclosing documents in its possession and control; i.e. it says that it has no obligation to obtain documents from third parties, like the OPP. Further, Canada resists the production of the OPP records in its possession on the grounds that to do so would violate the deemed undertaking rule. Canada takes a more or less neutral position as to whether the OPP can or should be directly ordered to produce its investigative records, but Canada requests that its right to argue issues of relevance and admissibility at each IAP hearing be protected.

[25] In response to the Applicant's RFD, Canada submits that this court does not have the jurisdiction: (a) to impose upon Canada an obligation to seek and disclose third party documents; (b) to make a determination in respect of evidentiary matters in the IAP; (c) to appoint an individual to review settled St. Anne's IAP claims to determine if previous Claimants have been prejudiced by the alleged non-disclosure of documents; and (d) to set aside the fees structure for Claimants' counsel under the IRSSA and make an additional award of costs or fees to the Applicants.

4. The Position of Les Soeurs de la Charité d'Ottawa

[26] Les Soeurs de la Charité d'Ottawa submits that production requests being made by the Applicants and the Commission cannot be read into the IRSSA. Les Soeurs de la Charité d'Ottawa opposes the disclosure of the OPP documents on the grounds that the test for production from a third party has not been satisfied and to the extent the documents are already in the possession of Canada, the documents are subject to the deemed undertaking. It says that notwithstanding the privacy safeguards built into the IRSSA, the production of documents that refer to Les Soeurs de la Charité d'Ottawa are not sufficient to make the production of the OPP documents harmless.

2014 ONSC 283 (CanLII)

5. The Applicants' Position

[27] The Applicants (and the AFN) submit that it is Canada's obligation to produce all documents it has in its possession in relation to the criminal investigation and proceedings, and that Canada should amend the Narrative for St. Anne's and the POIs for St. Anne's to provide more details and documentation. The Applicants seek what amounts to a further and better affidavit of documents from Canada. They seek orders as to how the OPP documents may be used at the IAP and they seek costs or fee awards against Canada for breaching its disclosure obligations under the IRSSA.

[28] The Applicants submit that the OPP documents are relevant to the fulfilment of the IAP and that Canada has breached its production obligations. The Applicants dispute that Canada is bound by the deemed undertaking rule not to produce the OPP documents, and, in any event, the Applicants submit that the court can abrogate the undertaking in the interests of justice. They submit that Canada's failure to produce the OPP documents about St. Anne's has compromised the IAP and denied the Claimants access to justice.

6. The Position of the Assembly of First Nations

[29] The Assembly of First Nations requests that this court grant an order that Canada be ordered to disclose all relevant material, which would include police reports, signed statements by former students, expert evidence reports, and transcripts for any criminal or civil trials concerning alleged abuse at all Indian Residential Schools that are a party to the IRSSA. The AFN submits that Canada should be updating all Narratives at all Indian Residential Schools and that Canada has an obligation to add documents that mention sexual abuse whether a conviction was attained or not.

[30] The AFN submits that the deemed undertaking rule does not prevent Canada from producing the records to either potential IAP claimants or the Truth and Reconciliation Commission because the IAP process and record compilation mandate are all components of the IRSSA and in any event the court can abrogate the undertaking in the interests of justice.

7. The Position of the Chief Adjudicator for the IAP

[31] The Chief Adjudicator takes no position with respect to the various RFDs about the production of the records of the OPP criminal investigative other than it requests that if the court orders the production of documents it does so in a way that protects the confidentiality of the IAP and privacy interests.

[32] The Chief Adjudicator opposes any direction as requested by the Applicants that would purport to direct how evidence is obtained, admitted, or used in the IAP. It also opposes the Applicants' requested directions with respect to the legal fees and costs.

[33] The Chief Adjudicator submits that the Applicants' RFD would be tantamount to amending the IRSSA without the approval of its signatories, would fundamentally alter the IAP and create a special system just for the Applicants, and would, if applied generally, disturb settled matters, mire thousands of unresolved cases in procedural disputes and have the potential of overwhelming the courts across the country and significantly delay access to justice for the remaining claimants.

2014 ONSC 283 (CanLII)

C. FACTUAL, PROCEDURAL, AND JURISDICTIONAL BACKGROUND

1. The Indian Residential Schools Settlement Agreement ("IRSSA")

[34] Between the 1860s and 1990s more than 150,000 First Nations, Inuit, and Métis children were required to attend Indian Residential Schools, institutions operated by religious organizations under the funding of the Federal Government. It is to the disgrace and shame of the religious organizations and Canada that the children who attended the Indian Residential Schools were the victims of brutal mistreatment.

[35] Canada has acknowledged that its policy in supporting the residential schools was misguided. On June 11, 2008, the Prime Minister made an apology in Parliament (www.aadnc-aandc.gc.ca/eng). He stated:

> For more than a century, Indian Residential Schools separated over 150,000 Aboriginal children from their families and communities. In the 1870's, the federal government, partly in order to meet its obligation to educate Aboriginal children, began to play a role in the development and administration of these schools. Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.
>
> One hundred and thirty-two federally-supported schools were located in every province and territory, except Newfoundland, New Brunswick and Prince Edward Island. Most schools were operated as "joint ventures" with Anglican, Catholic, Presbyterian or United Churches. The Government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities. Many were inadequately fed, clothed and housed. All were deprived of the care and nurturing of their parents, grandparents and communities. First Nations, Inuit and Métis languages and cultural practices were prohibited in these schools. Tragically, some of these children died while attending residential schools and others never returned home.
>
> The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.
>
> The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.
>
> It has taken extraordinary courage for the thousands of survivors that have come forward to speak publicly about the abuse they suffered. It is a testament to their resilience as individuals and to the strength of their cultures. Regrettably, many former students are not with us today and died never having received a full apology from the Government of Canada.
>
> The government recognizes that the absence of an apology has been an impediment to healing and reconciliation. Therefore, on behalf of the Government of Canada and all Canadians, I stand before you, in this Chamber so central to our life as a country, to apologize to Aboriginal peoples for Canada's role in the Indian Residential Schools system.
>
> To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate

2014 ONSC 283 (CanLII)

> children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.
>
> The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a Government, and as a country. There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again. You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey. The Government of Canada sincerely apologizes and asks the forgiveness of the Aboriginal peoples of this country for failing them so profoundly.
>
> Nous le regrettons
We are sorry
Nimitataynan
Niminchinowesamin
Mamiattugut
>
> Beginning in the mid-1990s, former students of Indian Residential Schools operated by Canada and various religious organizations brought individual and class actions seeking compensation for injuries suffered while at the schools, including loss of language and culture.
>
> In moving towards healing, reconciliation and resolution of the sad legacy of Indian Residential Schools, implementation of the Indian Residential Schools Settlement Agreement began on September 19, 2007. Years of work by survivors, communities, and Aboriginal organizations culminated in an agreement that gives us a new beginning and an opportunity to move forward together in partnership.
>
> A cornerstone of the Settlement Agreement is the Indian Residential Schools Truth and Reconciliation Commission. This Commission presents a unique opportunity to educate all Canadians on the Indian Residential Schools system. It will be a positive step in forging a new relationship between Aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward together with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.
>
> On behalf of the Government of Canada
>
> The Right Honourable Stephen Harper, Prime Minister of Canada

[36] In 2000, eight years before this apology, about 154 former students represented by one law firm filed civil claims in connection with their mistreatment at St. Anne's. The actions were defended by Canada. None of these claims ever proceeded to trial. It will be important to note that under Article 11.01 of the IRSSA, actions not otherwise dismissed were deemed to be dismissed pursuant to the IRSSA. The plaintiffs in the dismissed actions were allowed to make claims under the IRSSA. This is important to note because it supports the argument that the deemed undertaking does not apply to the OPP documents because the IAP is the same proceeding as the 154 actions in which the OPP documents were used.

[37] Following the launch of the 154 actions and other individual and class actions across the country by former students of the residential schools, in November 2003, Canada established a National Resolutions Framework, which included a compensation process called the Alternative Dispute Resolution ("ADR") Process. (The ADR Process is the predecessor of the IAP in the

2014 ONSC 283 (CanLII)

IRSSA, discussed below.) As part of this ADR process, Canada prepared Narratives or histories about what had occurred at the various residential schools.

[38] In November 2004, the Assembly of First Nations ("the AFN") published a report entitled, *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*. In this report, it was stressed that compensation, alone, would not achieve the goals of reconciliation and healing. Rather, a two-pronged approach would be required: (1) compensation; and (2) truth-telling, healing, and public education.

[39] After the launch of the numerous court proceedings, there were extensive negotiations to settle the individual actions and the class actions. These negotiations ultimately led to the multiple-court approved settlement of the individual and class actions known as the Indian Residential Schools Settlement ("IRSSA).

[40] The IRSSA was signed on May 8, 2006. The parties to the IRSSA included: Canada, as represented by the Honourable Frank Iacobucci; various Plaintiffs, as represented by a National Consortium of lawyers, the Merchant Law Group, and Independent Counsel; the Assembly of First Nations; Inuit Representatives; the General Synod of the Anglican Church of Canada; the Presbyterian Church of Canada; the United Church of Canada; and Roman Catholic Church entities.

[41] Under the IRSSA, Canada and the other defendants obtained releases. In their practical effect, the releases re-directed plaintiffs and class members in actions against Canada to the IAP as a legal recourse for their claims. The IRSSA provides at Article 4.06 (g) as follows:

> [...] that the obligations assumed by the defendants under this Agreement are in full and final satisfaction of all claims arising from or in relation to an Indian Residential School or the operation of Indian Residential Schools of the Class Members and that the Approval Orders are the sole recourse on account of any and all claims referred to therein.

[42] Between December 2006 and January 2007, each of nine courts, representing Class Members from across Canada issued judgments certifying the class actions and approving the terms of settlement as being fair, reasonable, and in the best interests of the Class Members. Justice Winkler as he then was, certified the action in Ontario in reasons reported as *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.), of which I will have more to say below.

[43] In *Fontaine v. Canada (Attorney General)*, 2006 YKSC 63, in approving the settlement for the Yukon Territory Supreme Court, Justice Veale stated at paras. 6-8 of his judgment:

> *Have You Ever Heard a Whole Village Cry?*
>
> 6. This question was asked by a First Nation woman who spoke in court. It captures in one sentence the horror and pain experienced by the parents and children in aboriginal communities when government and church representatives appeared in cars, trucks, vans and planes, to take the children away to institutions. It is not possible to do justice to the stories of 79,000 aboriginal people in this judgment. Suffice it to say that although there were some benefits, the majority of the survivors found it to be a devastating experience. It was all the more so for those who suffered physical assaults, sexual assaults and psychological harm.
>
> 7. The Royal Commission of Aboriginal Peoples concluded that the Residential School system was a blatant attempt to re-socialize aboriginal children with the values of European culture and obliterate aboriginal languages, traditions and beliefs. The inferior education, mistreatment,

2014 ONSC 283 (CanLII)

> neglect and abuse that resulted are a concern to all Canadians. The Assembly of First Nations and National Chief Phil Fontaine have pursued a Canada wide settlement since 1990.
>
> 8. The settlement provides compensation for individual survivors as well as healing programs and benefits for their families and communities. It is a compensation package that is beyond the jurisdiction of any court to create. It is much more than the settlement of a tort-based class action; it is a Political Agreement.

2014 ONSC 283 (CanLII)

[44] It is to be noted that the approval judgments incorporate by reference all the terms of the IRSSA, and the judgments provide that the applicable class proceedings laws shall apply in their entirety to the supervision, operation, and implementation of the IRSSA. For present purposes, the following terms of the Approval Orders should be noted:

> 12. THIS COURT ORDERS that the Agreement, which is attached hereto as Schedule "A", and which is expressly incorporated by reference into this judgment, including the definitions included therein, is hereby approved and shall be implemented, in accordance with this judgment and any further order of this Court.
>
> 13. THIS COURT ORDERS AND DECLARES that this Court shall supervise the implementation of the Agreement and this judgment and, without limiting the generality of the foregoing, may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment.
>
> 31. THIS COURTS DECLARES that the Representative Plaintiffs, Defendants, Released Church Organizations, Class Counsel, the National Administration Committee, or the Trustee, or such other person or entity as this Court may allow, after fully exhausting the dispute resolution mechanisms contemplated in the Agreement, may apply to the Court for directions in respect of the implementation, administration or amendment of the Agreement or the implementation of this judgment on notice to all affected parties, all in conformity with the terms of the Agreement.
>
> 36. THIS COURT DECLARES that the provisions of the applicable class proceedings law shall apply in their entirety to the supervision, operation and implementation of the Agreement and this judgment.

[45] In March 2007, on consent of the parties, the nine courts issued identical Approval Orders and Implementation Orders. Both the judgments of the courts and the Approval Orders provide that that the respective courts shall supervise the implementation of the IRSSA and the judgment and may issue such orders as are necessary to implement and enforce the provisions of the agreement and the judgment. For present purposes, the following terms of the Implementation Order should be noted:

> *Chief Adjudicator*
>
> 7. THIS COURT ORDERS that in addition to any other reporting requirements, the Chief Adjudicator shall report directly to the Courts through the Monitor not less than quarterly on all aspects of the implementation and operation of the IAP. The Courts may provide the Chief Adjudicator with directions regarding the form and content of such reports.
>
> *Court Counsel*
>
> 12. THIS COURT ORDERS that Randy Bennett of Rueter Scargall Bennett LLP [now Brian Gover of Stockwoods LLP] ("Court Counsel") is hereby appointed legal counsel to and for the Courts to assist the Courts in their supervision over the implementation and administration of the Agreement.
>
> 13. THIS COURT ORDERS that Court Counsel's duties shall be as determined by the Courts. Communications between Court Counsel and the Courts shall be privileged.

> 23. THIS COURT ORDERS that the Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement, the judgment dated December 15, 2006 and this order.

[46] Under the IRSSA, the judges of the nine courts that approved the settlement are designated as "Supervising Judges". Two of the Supervising Judges are the "Administrative Judges." The Administrative Judges receive and evaluate "Requests for Direction" in relation to the administration of the IRSSA. The Administrative Judges decide whether a hearing is necessary, and if so, in which jurisdiction, in accordance with guidelines set out in the Court Administration Protocol.

[47] At this time, I and Justice Brown of the British Columbia Supreme Court are the designated Supervising Judges. Until recently, Chief Justice Winkler was a Supervising Judge.

[48] Under the IRSSA, Crawford Class Action Services is the "Monitor." On behalf of the Supervising Courts, the Monitor receives information about the implementation or administration of the Common Experience Payment ("CEP") and the Independent Assessment Process ("IAP"). The Monitor reports to the courts and takes directions from them about the implementation and administration of the IRSSA.

[49] The courts are also assisted by "Court Counsel" with whom the Supervising Judges have a lawyer-and-client confidential relationship.

[50] There is an elaborate supervisory structure for the IRSSA, which for present purposes I need not describe, involving the the National Administration Committee, and the Indian Residential School Adjudication Secretariat, the Chief Adjudicator, and the Oversight Committee.

2. Interpretation of the IRSSA

[51] The IRSSA is a contract and as a contract its interpretation is subject to the norms of the law of contract interpretation.

[52] The IRSSA contains two principles of construction and interpretation. Article 1.04 states that the *contra proferentem* rule does not apply, and Article 18.06 provides that the Settlement Agreement is the entire agreement between the parties. These articles provide as follows:

> *1.04 No Contra Proferentem*
>
> The parties acknowledge that they have reviewed and participated in settling the terms of this Agreement and they agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting parties is not applicable in interpreting this Agreement.
>
> *18.06 Entire Agreement*
>
> This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and cancels and supersedes any prior or other understandings and agreements between the Parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement. [emphasis added]

2014 ONSC 283 (CanLII)

[53] In *Fontaine v. The Attorney General of Canada.*, 2013 ONSC 684, Justice Goudge discussed the principles of interpretation applicable to the IRSSA. He stated at para. 68:

> The principles of interpretation applicable to the Settlement Agreement are straightforward. The text of the agreement must be read as a whole. The plain meaning of the words used will be important as will the context provided by the circumstances existing at the time the Settlement Agreement was created. A consideration of both is necessary to reach a proper conclusion about the meaning of the contested provisions.

2014 ONSC 283 (CanLII)

3. The IRSSA and the Mandate of the Truth and Reconciliation Commission

(a) The Mandate of the Truth and Reconciliation Commission

[54] An important aspect of the IRSSA was the establishment of a Truth and Reconciliation Commission.

[55] Article 7.01 of the IRSSA provided for the establishment of the Commission and specified that its process and mandate was set out in Schedule "N". The Commission is subject to federal and provincial privacy and access to information legislation.

[56] Schedule "N" establishes the mandate of the Commission of contributing "to truth, healing and reconciliation." The Commission is directed to identify sources and create as complete a historical record as possible of the Indian Residential School system and legacy for the purposes of future study and use by the public.

[57] The Commission is also mandated to produce a report as well as recommendations to Canada concerning the Indian Residential School system and, in particular "the history, purpose, operation and supervision of the IRS system, the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools."

[58] Under the IRSSA, the National Research Centre will hold the documents collected by the Commission. The Centre is subject to provincial privacy legislation.

(b) Canada's Disclosure Obligations to the Truth and Reconciliation Commission

[59] Schedule "N" of the IRSSA imposes obligations on Canada and the Church defendants to provide all relevant documents in their possession or control to the Truth and Reconciliation Commission.

[60] With emphasis added, Schedule "N" provides as follows:

> In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.
>
> In cases where privacy interests of an individual exist, and subject to and in compliance with applicable privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected. In cases where solicitor-client privilege is asserted, the asserting party will provide a list of all documents for which the privilege is claimed. [emphasis added]

[61] I pause here to foreshadow that I shall be ordering Canada to honour the above disclosure obligation to the Commission. I shall also be ordering the OPP to produce its St. Anne's documents in the same manner as Canada is obliged to do so.

4. Compensation under the IRSSA

2014 ONSC 283 (CanLII)

[62] The IRSSA prescribes two forms of compensation. The first is the Common Experience Payment ("CEP"), which is available pursuant to Article 5 of the Agreement to all eligible former students who resided at Indian Residential Schools. Canada funded a trust for the payment of CEP. Canada's liability, however, is uncapped and the IRSSA provides for the trust fund to be augmented if it is deficient. Eligible recipients receive $10,000.00 for at least part of a school year, and $3,000.00 for each subsequent year or part year. Article 5.09 of the IRSSA provides that unsatisfied CEP Claimants may first appeal to the National Administration Committee, which is charged with oversight of the IRSSA, and then to the courts.

[63] The second type of compensation is a product of the Independent Assessment Process ("the IAP"), which pursuant to Article 6 of the IRSSA allows Claimants to seek compensation from a panel of adjudicators lead by the Chief Adjudicator.

[64] Although there is a deadline for making IAP claims and there are ranges for categories of compensation, Canada's ultimate liability under the IAP is not capped. The Claimants may apply for defined categories of compensable serious physical and sexual abuse, or other wrongful acts, through an inquisitorial process designed to adjudicate claims and to award compensation.

[65] In *Baxter v. Canada (Attorney General)*, *supra* at para. 7 Justice Winkler described the compensatory elements and the other benefits of the IRSSA as follows:

> 7. Under the proposed settlement, all members of the Survivor class will receive a cash payment, with the amount varying according to the length of time each individual spent as a student in the residential schools system. This class-wide compensatory payment, which is referred to as the Common Experience Payment ("CEP"), is one of five key elements of the settlement before the court. In addition, there is an Independent Assessment Process ("IAP"), which will facilitate the expedited resolution of claims for serious physical abuse, sexual assaults and other abuse resulting in serious psychological injury. The foregoing elements are aimed at personal compensation for the students who attended the schools. The other three elements of the settlement are designed to provide more general, indirect benefits to the former students and their families. These elements are the establishment of a Truth and Reconciliation Commission, with a mandate to make a public and permanent record of the legacy of the schools, in conjunction with the earmarking of a significant portion of the settlement fund for healing and commemoration programs.

[66] The IAP, which it is to be noted Justice Winkler felt would facilitate the expedited resolution of claims for serious claims, is administered by the Indian Residential Schools Adjudication Secretariat under the supervision of the Chief Adjudicator.

[67] In an inquisitorial system, adjudicators determine the appropriate level of compensation, if any, to be awarded. The IAP provides for compensation to a maximum of $275,000.00 plus actual income loss, if proved, of another $250,000.00. An unsatisfied IAP claimant may appeal to the Chief Adjudicator or his designate. There is no express right of appeal to the courts from an IAP hearing decision. However, I foreshadow to say that in the analysis later in these Reasons for Decision, I point out that there is access to the courts through Requests for Directions and through the court's jurisdiction to administer and implement the IRSSA.

[68] Under the express terms of the IRSSA, the only instances where the court would have a right to make a determination in respect of the IAP arises where an IAP Claimant has sought the approval of the Chief Adjudicator to resolve an exceptional matter with the court, such as in instances where a claim for actual income loss may exceed the maximum quantum of the IAP. These exceptional matters are addressed by the courts according to their own standards, rules and processes.

[69] Over 17,000 IAP claims with compensation in excess of $2 billion have been resolved to date with thousands more to be resolved in the coming years. Of the resolved claims, 1,578 claimants received no award, which is approximately 9 percent of the total number of claims.

[70] A total of 166 IAP claims alleging compensable abuse at St. Anne's IRS have been resolved. Of those, 151 St. Anne's Claimants have been compensated, 3 Claimants received no compensation, and 12 Claimants withdrew from the IAP.

2014 ONSC 283 (CanLII)

5. The Procedure for the Independent Assessment Process ("the IAP")

(a) A Claims and Inquisitorial Adjudicative Process

[71] In the various arguments made in the RFDs before the court, there was considerable debate about the nature of the IAP and whether it was a continuation of litigation or a non-litigious compensation distribution system. The outcome of this debate was thought to bear on such issues as the application of the deemed undertaking and the question of the court's jurisdiction to impose and enforce disclosure obligations on Canada in accordance with normative rules of natural justice and for civil procedure.

[72] As the discussion that follows will indicate, there are many elements of the procedure for the IAP that denote or connote litigation and civil procedure. The procedure contains directions with respect to what amounts to pleadings of a case, the production of evidence, onus of proof, standard of proof, hearings, testimony, credibility, examinations, cross-examinations, etc. While there are also elements that are unique so that the IAP might be regarded as *sui generis,* it is undoubtedly a form of litigation.

[73] That the IAP is a type of litigation was clear to Justice Winkler in his judgment in *Baxter v. Canada*, *supra* where he addressed the deficiency of the IRSSA as it was originally proposed. Justice Winkler noted "the potential for conflict for Canada between its proposed role as administrator and its role <u>as a continuing litigant</u>" (para. 38). Earlier in his judgement (at para. 29), he described the IAP as "an opportunity to litigate their claims in an extra-judicial process." Justice Winkler stated that "the administrative function must be completely isolated from the litigation function."

[74] Justice Winkler's answer to Canada's conflict of interest in the administration of the IRSSA was to require that authority over the administrative side of the settlement ultimately rest with persons who would report and take direction from the court. At para. 39 of his judgment, he stated:

> The administration of the settlement will be under the direction of the courts and they will be the final authority. Otherwise, the neutrality and independence of the administrator will be suspect and the supervisory authority of the courts compromised.

[75] The procedure for the IAP is set out in Schedule D of the IRSSA. In *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839 at paras. 29-30, Justice Brown described the IAP as follows:

> 29. The purpose of the IAP is to provide a modified adjudicative proceeding for the resolution of claims of serious physical or sexual abuse suffered while at a residential school. The hearings are to be inquisitorial in nature and the process is designed to minimize further harm to claimants. The adjudicator presiding over the hearing is charged with asking questions to elicit the testimony of claimants. Counsel for the parties may suggest questions or areas to explore to the adjudicator but they do not question claimants directly.
>
> 30. The hearings are meant to be considerate of the claimant's comfort and well-being but they also serve an adjudicative purpose where evidence and credibility are tested to ensure that legitimate claims are compensated and false claims are weeded out. It is strongly recommended that claimants retain legal counsel to advance their claims within the IAP.

[76] The IAP begins with an application that appears to serve functions similar to a statement of claim. In the application form, the Claimant provides details of the wrongdoing with dates, places, times, and the Claimant provides information to identify the alleged perpetrator. In the application, the Claimant provides a Narrative in the first person and outlines his or her request for compensation in accordance with the IRSSA. Depending on the nature of the claim for compensation, certain documents must be provided by a Claimant with the application.

[77] If the Claimant's claim is not settled, there is a hearing before an adjudicator supervised by the Chief Adjudicator of the Indian Residential Schools Independent Assessment Process.

[78] The parties to an IAP hearing are the Claimant, Canada, and any Church entity affiliated with the particular Residential School where the assault occurred. The parties may have counsel. The IAP hearing serves two purposes: testing the credibility of the claimant, and assessing the harm suffered by him or her: *Fontaine v. Canada (Attorney General)*, 2012 BCSC 1671 at para. 38.

[79] The IRSSA does not preclude a Claimant from producing documents in support of his or her claim beyond those articulated as mandatory in the application process. The relevance and admissibility of documents is determined by the adjudicator on a case-by-case basis.

[80] In the IAP, Canada or the defendant Church entity must attempt to locate the alleged perpetrator and invite him or her to the hearing, but the alleged perpetrator is not a party and has no right of confrontation. The alleged perpetrator is not compelled to attend an IAP hearing, but he or she may give evidence as of right. Notably, the alleged perpetrator bears no financial risk or liability in the IAP. The liability to pay compensation rests with Canada

[81] An alleged perpetrator may provide a witness statement should he or she elect to participate in the hearing. If the alleged perpetrator refuses to provide such a statement, counsel for any party may interview the alleged perpetrator, but the alleged perpetrator will not be permitted to participate in the hearing if there is no witness statement or interview provided in advance.

[82] The IAP is private and confidential. Hearings are closed to the public and participants are required to agree to keep information confidential or as required by law. The adjudicator prepares a decision with reasons. Decisions are redacted to remove identifying information about Claimants and perpetrators. While the documentation and information provided to Claimants and

2014 ONSC 283 (CanLII)

adjudicators may include allegations of abuse by individuals other than those named in the complaint at issue, names of other students or persons are redacted.

[83] At an IAP hearing, the adjudicator manages the hearing, questions the witnesses other than experts retained by the adjudicator. The parties may suggest questions for the adjudicator to ask. The parties question experts, who may include psychologists or psychiatrists.

[84] Only the adjudicator may order that an expert conduct an assessment of the Claimant. Unless the parties consent, the assessment may only be conducted after the adjudicator has heard the evidence of the other witnesses and made findings of credibility.

[85] In order to receive compensation in the IAP, the onus is on the Claimant to prove on a balance of probabilities the alleged compensable abuse, any loss of opportunity, aggravating factors, and the need for future care. Schedule D of the IRSSA states:

> Except as otherwise provided in this IAP, the standard of proof is the standard used by the civil courts for matters of like seriousness. Although this means that as the alleged acts become more serious, adjudicators may require more cogent evidence before being satisfied that the Claimant has met their burden of proof, the standard of proof remains the balance of probabilities in all matters.

[86] For standard track claims, such as physical abuse, once compensable abuse and harms have been proven on a balance of probabilities, the Claimant must also establish a "plausible link" ("PL") between the abuse and the harms. A plausible link is the surrogate for proof of causation.

[87] In the complex track, "the standard for proof of causation and the assessment of compensation within the Compensation Rules is the standard applied by the courts in like matters. For example, in order to advance a claim for serious physical abuse by a former IRS employee, a Claimant would be required to provide credible and reliable evidence that the alleged assault met the "PL" threshold; namely:

> One or more physical assaults causing a physical injury that led to or should have led to hospitalization or serious medical treatment by a physician; permanent or demonstrated long-term physical injury, impairment or disfigurement; loss of consciousness; broken bones; or a serious but temporary incapacitation such that bed rest or infirmary care of several days duration was required. Examples include severe beating,, whipping, and second-degree burning.

[88] Assaults as recognized in civil or criminal litigation are not synonymous with the plausible link between the abuse and the harm under the IAP. Under the IAP standards proof of physical injury is required and not all forms of physical assault may be compensable. Schedule D provides adjudicators with special instructions for physical assaults as follows:

> *C. Additional Instructions re Physical Assaults*
>
> 1. Since a physical injury is required to establish a compensable physical assault in this IAP, a need for medical attention or hospitalization to determine whether there was an injury does not establish that the threshold had been met.
>
> 2. "Serious medical treatment by a physician" does not include the application of salves or ointment or bandages or other similar non-invasive interventions.
>
> 3. Loss of consciousness must have been directly caused by a blow or blows and does not include momentary blackouts or fainting.

2014 ONSC 283 (CanLII)

> 4. Compensation for physical abuse may be awarded in this IAP only where physical force is applied to the person of the Claimant. This test may be deemed to have been met where: the Claimant is required by an employee to strike a hard object such as a wall or post, such that the effect of the force to the Claimant's person is the same as if they had been struck by a staff member; provided that the remaining standards for compensation within this IAP have been met.

[89] With regard to claims of one student being abused by another, the Claimant bears the onus of proving that:

> an adult employee of the government or church entity which operated the IRS in question had or should reasonably have had knowledge that abuse of the kind alleged was occurring at the IRS in question during the time period of the alleged abuse, and did not take reasonable steps to prevent such abuse.

(b) Legal Fees under the IRSSA and the IAP

[90] There are no awards of costs for Claimants' counsel in an IAP proceeding. Rather, Canada makes a contribution towards fees and disbursements.

[91] The IRSSA provides that where compensation is awarded, Canada makes a contribution of 15 percent of a Claimant's IAP award towards the Claimant's legal fees plus legal disbursements. With respect to those fees, claimants may also pay their counsel for services rendered, on the terms of their retainer, but paragraph 17 of the Implementation Order caps counsel fees at 30 percent of the award inclusive of Canada's 15 percent contribution.

[92] Paragraph 17 provides for a review of the legal fees. It states:

> *Review of IAP Legal Fees*
>
> 17. THIS COURT ORDERS that all legal fees charged by legal counsel to claimants pursuing claims through the IAP shall not exceed 30% of compensation awarded to the client. This 30% cap shall be inclusive of and not in addition to Canada's 15% contribution to legal fees, but exclusive of GST and any other applicable taxes. The 30% cap shall also be exclusive of Canada's contribution to disbursements. Upon the conclusion of an IAP hearing legal counsel shall provide the presiding Adjudicator (the "Adjudicator") with a copy of their retainer agreement and the Adjudicator shall make such order or direction as may be required to ensure compliance with the said limit on legal fees.

[93] Paragraph 18 of the Implementation Orders sets out the procedure for a review of the fairness and reasonableness of Claimant counsel's fees at the request of the Claimant or on the Adjudicator's own motion. Paragraph 18 sets out the principles for the assessment of accounts. The factors for determining the reasonableness of the fees are similar to the factors commonly used in the assessment of fees under a *Solicitors Act* assessment.

[94] Paragraph 19 provides that Claimants or their legal counsel may request the Chief Adjudicator or his designate review a ruling by an Adjudicator on the fairness and reasonableness of legal fees. No other review or appeal is provided for in either the IRSSA or the approval and implementation Orders.

[95] Outside of the IAP and its treatment of lawyer's fees, in *Fontaine v. Canada (Attorney General)*, 2012 BCSC 313 at para. 40, Justice Brown stated that the costs incurred in a Request for Directions may be dealt with under the regular costs rules applicable to court proceedings.

[96] I shall have more to say about the court's jurisdiction to award costs later in these Reasons for Decision.

2014 ONSC 283 (CanLII)

(c) Canada's IAP Disclosure Obligations

[97] Canada's document disclosure obligations under the IRSSA with respect to the IAP are set out in Schedule D, Appendix VIII "Government Document Disclosure." Canada has detailed disclosure obligations with respect to providing information about: IAP Claimants, the residential school attended by the Claimant; documents mentioning sexual abuse at the school; and alleged perpetrators of assaults (Persons of Interest or POIs).

[98] As will be seen these obligations include the preparation of reports about POIs and also reports known as Narratives. These are histories about the residential schools. The Narratives and the POIs are prepared by Aboriginal Affairs and Northern Development Canada ("AANDC"), the department of Canada with responsibility for policies relating to Aboriginal peoples in Canada.

[99] In particular, Appendix VIII provides (with my emphasis added):

> The government will search for, collect and provide a report setting out the dates a Claimant attended a residential school. ….
>
> The government [Canada] will also search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant, including information about those persons' jobs at the residential school and the dates they worked or were there, as well as any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student. ["Person of Interest Report" or "POI Report"]
>
> Upon request, the Claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person's personal information, as required by the *Privacy Act*.
>
> The government will also gather documents about the residential school the Claimant attended, and will write a report summarizing those documents. The report and, upon request, the documents will be available for the Claimant or their lawyer to review. ["IRS School Narrative"]
>
> In researching various residential schools to date, some documents have been, and may continue to be, found that mention sexual abuse by individuals other than those named in an application as having abused the Claimant. The information from these documents will be added to the residential school report. Again, the names of other students or persons at the school (other than alleged perpetrators of abuse) will be blacked out to protect their personal information. [emphasis added]
>
> The following documents will be given to the adjudicator who will assess a claim:
>
> - documents confirming the Claimant's attendance at the school(s);
> - documents about the person(s) named as abusers, including the persons' jobs at the residential school, the dates that worked or were there, and any sexual or physical abuse allegations concerning them;
> - the report about the residential school(s) [the Narrative] in question and the background documents; and,
> - any documents mentioning sexual abuse at the residential schools in question.
>
> With respect to student-on-student abuse obligations, the governments will work with the parties to develop admissions from completed examinations for discovery, witness or alleged perpetrator interviews, or previous DR [dispute resolution] or IAP decisions relevant to the Claimant's allegations.

2014 ONSC 283 (CanLII)

[100] It is necessary to note that Under Appendix VIII, in addition to preparing POI reports, Canada must gather documents about the residential school the Claimant attended and write a report summarizing those documents; i.e. Canada must prepare a Narrative for each school. This is a continuing obligation as documents are found that mention sexual abuse by individuals other than those named in an application.

[101] Under the IRSSA Adjudicators, Claimants and their counsel are provided with Canada's document collection for each IRS named on a given IAP claim, and an Adjudicator may use this disclosure as a basis for a finding of fact or credibility.

[102] The IRSSA also states that once a document has been identified that the Claimant or their lawyer can request the document and Canada is obliged to provide a copy, however, ensuring that the privacy rights of others will be protected through redacting. Section D, Appendix VIII, of the IRSSA states:

> Upon request, the Claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person's personal information, as required by the Privacy Act.

[103] Section D, at pg. 13, allows Adjudicators to take into consideration previous criminal or civil trials. It states that "Relevant findings in previous criminal or civil trials, where not subject to appeal, may be accepted without further proof."

[104] As described below, Canada has prepared several Narratives for St. Anne's.

6. Abuse at St. Anne's Residential School and the Ontario Provincial Police Investigation

[105] St Anne's Indian Residential School is located in Fort Albany, Ontario on James Bay. St. Anne's was the site of some of the most egregious incidents of abuse within the Indian Residential School system. It is known, for example, that an electric chair was used to shock students as young as six years old. It is known that the staff at St Anne's residential school would force ill students to eat their own vomit.

[106] St. Anne's operated from 1902 to 1970 within a Roman Catholic mission, which included a Residential School Program from 1904. From 1970 to 1976, St. Anne's was operated by the Federal government. It closed in 1976.

[107] The students who attended St. Anne's were drawn from the Fort Albany, Attawapiskat, Weenusk, Constance Lake, Moose Fort, and Fort Severn reserves. Children were required to attend residential schools for approximately 8 years, starting as early as age 5 or 6, living apart from their parents during most of the year.

[108] The process for justice for the children who were abused at St. Anne's started with the 1992 Keykaywin Conference, which sought to bring the abuse to light and promote healing among St. Anne's survivors. The Conference triggered an investigation by the OPP.

[109] The Ontario Provincial Police began its investigation of St. Anne's residential school in 1992 and completed it in 1996. The OPP were given approximately 992 signed statements from about 700-750 people. In 1997, the OPP laid charges against seven former employees of St.

2014 ONSC 283 (CanLII)

Anne's: Marcel Blais, Claude Chernier, J.C., Jane Kakeychewan, Claude Lambert, Anna Wesley, and John Rodrigue. All but J.C. were convicted of some charges.

[110] Over the course of its investigation, the OPP obtained and created a voluminous collection of documents regarding St. Anne's and the abuses that took place there. The records include statements of former residential school students, and over 7,000 documents seized from, several church organizations. The OPP provided the following categorization of its documents:

- Civilian Statements (approximately 1,000)
- Police statements
- Correspondence
- Crown Briefs (18)
- Exhibit Reports
- Judicial authorizations, search warrants, search plans
- Information to Obtain
- Police statements
- Police summaries of civilian statements
- Forensic summaries/reports
- Press releases and media reports
- Tip Register (for police tips)
- Victim backgrounds
- Victim Impact Statements
- Persons of interest
- Accused background/statements
- Civil litigation materials in Shisheesh claim
- Details of Ste. Anne's Residential School (maps, school staff register, architectural drawings, and other historical school documents)
- Indian Affairs quarterly returns
- Ste. Anne's Residential School reunion and conference materials
- Miscellaneous documents representing the fruits of the OPP investigation
- Crown/Police legal advice (solicitor-client privilege)
- Police work product (investigative privilege)

7. Canada's Possession of OPP Documents of the St. Anne's Investigation and Other Records of the Events at St. Anne's

[111] As mentioned above, in the 2000s, Canada defended the numerous civil actions brought by the students of St. Anne's. Included among those actions were the collection of 156 actions, mentioned above, brought by one law firm against Canada and others. Although the Applicants and the Assembly of First Nations did not know about it until 2013, in 2003, Canada brought a motion to the Superior Court to obtain possession of the OPP records for those 156 actions on the basis that the records were "relevant and necessary" to the adjudication of the pending civil trials and that it would be "unfair" to require Canada to proceed to trial without production of the records.

[112] On August 1, 2003, Justice Trainor issued an order regarding the production of the OPP records to Canada. The Order was based on the motion by Canada, the consent of the plaintiffs,

2014 ONSC 283 (CanLII)

the church defendants not opposing, and counsel for the OPP not attending. A schedule to the Order indicates that it applied for 154 actions.

[113] Justice Trainor ordered that counsel for the parties have an opportunity to inspect and copy the contents of the OPP files. With respect to the OPP files that relate to non-plaintiffs, he ordered that a mutually convenient date and means of obtaining copies of the documentation relating to non-plaintiffs was to be arranged between Canada and the OPP.

[114] Justice Trainor's Order stated:

> THIS COURT ORDERS that counsel for the parties may inspect and copy the contents of the Ontario Provincial file of the investigation of St. Anne's Residential School, relating to the Plaintiffs set out in Exhibit "A" of the motion record, any perpetrators, and to any further plaintiffs added to the action or any further perpetrators which become known.
>
> THIS COURT ORDERS the remainder of the Defendant's motion as it relates to information in the Ontario Provincial Police file, of non-plaintiffs, is hereby adjourned sine die". … This order pertains to all of the actions listed in the Motion Record and to any further actions which may be heretofore brought by Plaintiffs' counsel.

[115] Pursuant to Justice Trainor's order, Canada came to be in the possession of copies of some, but perhaps not all of the OPP documents.

[116] Independent of Justice Trainor's order, in the context of defending civil cases and or by participating in the ADR pilot project, Canada purchased transcripts of some (if not all) of the criminal proceedings against former employees of St. Anne's.

[117] The OPP Documents and the transcripts have been stored at Canada's offices, more precisely at the offices of the Department of Justice in Toronto.

[118] The OPP documents and the transcripts have not been provided to the persons at Aboriginal Affairs and Northern Development Canada ("AANDC") who prepare the Narratives for the IAP.

8. Canada's Disclosure for St. Anne's IAP Claims and Non-Production of the OPP Documents

[119] Although there is a serious question about whether Canada has adequately honoured its disclosure obligations under the IRSSA, Canada did produce documents to the Truth and Reconciliation Commission. And Canada did produce documents for the St. Anne's IAP Claimants. Canada has produced several versions of the factual Narrative that it is required to prepare under the IRSSA. Canada, however, did not produce its copies of the OPP documents, and until recently, Canada did not reveal that it had OPP documents in its possession.

[120] Subject to its own assessment of relevancy, which I foreshadow to say, in my opinion has been inadequate, Canada has disclosed information for each St. Anne's IRS claimant file. The information will be different for each school and Canada may provide the following types of information: (a) a report about the Claimant's attendance at the residential school; (b) report(s) with respect to Persons of Interest named as having abused the Claimant ("POI Report"); (c) transcript(s) from previous civil litigation or the ADR Program in which Canada was named as a Defendant; (d) documentation with respect to criminal convictions; and (e) report(s) on the residential school named by the Claimant ("IRS Narrative").

2014 ONSC 283 (CanLII)

[121] Although, as noted above, Canada has had copies of some OPP Documents and copies of some of the transcripts of proceedings against Persons of Interest, these documents have not been provided to the persons at Aboriginal Affairs and Northern Development Canada ("AANDC") who prepare Narrative and POI Reports.

[122] It is Canada's position that it is not obliged to provide documents about Persons of Interest that were created after the POI left a residential school. However, on an *ex gratis* basis it will disclose known criminal convictions that post-date the POI's term at a residential school where such information has come to Canada's attention and it is available in the public domain. It is Canada's position that this information may be relevant if a particular IAP claimant was the complainant in the criminal proceeding. Thus, Canada has disclosed conviction information on a majority of claims where an IAP Claimant has named a former employee of St. Anne's IRS with a known conviction.

[123] Three versions of the St. Anne's Narratives have been disclosed through the course of the IAP to date, and in the first and the third (and most recent) version criminal charges and convictions of former employees of St. Anne's were referenced.

[124] Canada acknowledges that it obtained the transcripts of some criminal proceedings and remains in possession of these transcripts in respect of former employees of St. Anne's. However, it states that these transcripts have not been disclosed as they are both irrelevant and inadmissible to the individual assessment of claims and outside of the scope of Canada's disclosure obligations under the IRSSA. Thus, the Narrative for St. Anne's does not include the transcripts of the criminal proceedings involving the former employees of St. Anne's.

[125] Canada first completed a Narrative for St. Anne's on November 12, 2008. This Narrative was a revision of the Narrative that Canada had prepared for the ADR project in 2004, but unlike the 2004 Narrative, which referred to criminal charges and convictions, the 2008 Narrative makes no mention of the charges and convictions.

[126] Under the heading "Documents Referring to School Incidents", the 2008 Narrative incorrect states that four incidents of physical abuse comprise all known identifiable complaints and/or allegations received by government officials and all available information regarding the follow-up and outcome. The four incidents do not relate to the OPP investigation or the criminal prosecutions. Having regard to what is now known to be OPP documents in the possession of Canada, the 2008 Narrative also incorrectly states that there were no known incidents found in documents regarding sexual abuse.

[127] Canada now concedes that these are mistakes in the 2008 Narrative, which it says it has corrected, but it has no explanation as to why mistakes were made in the 2008 Narrative. Canada does not concede that the omissions from the 2008 were of any moment or consequence.

[128] On August 20, 2012, Canada produced a list of documents in connection with its document production obligations. In this document, Canada indicated that it possessed documents relating to ongoing litigation regarding St. Anne's and asserted privilege with respect to these documents without identifying the particular documents. Canada did not identify and disclose that it was in possession of and was asserting privilege over the OPP documents.

[129] On October 1, 2013, a new Narrative report for St. Anne's was produced at a hearing. Canada submits that this Narrative satisfies its disclosure obligations under the IRSSA for the IAP. The 2013 Narrative includes references to the OPP investigation and the criminal charges

2014 ONSC 283 (CanLII)

and convictions that stemmed from it, but does not rely upon the transcripts from the criminal trials and does not refer to any documents from the OPP investigation.

[130] The transcripts in the possession of Canada have never been reviewed for the purpose of preparing the Narrative or the POI reports. The transcripts among other things disclose evidence of the abuse that occurred at the school and include expert medical evidence led by the Crown that assaulting a child for becoming ill or forcing a child to eat vomit caused physical and psychological harm. Not all criminal proceedings are listed in the 2013 Narrative.

[131] None of the POI Reports for St. Anne's disclose the existence of the OPP Documents or to transcripts of criminal or civil proceedings that are in the possession of Canada. The POI Reports only contain records of conviction. For example, the POI for Anna Wesley contains no reference to the evidence about physical abuse of children at St. Anne's presented at the trial or of her practice of forcing students to eat their own vomit in the dining room at the school, in front of their peers.

[132] For another example, IAP claimants who name John Rodrique as a perpetrator have been given a POI report with records of convictions for a number of sexual assaults, but no transcripts. Had the transcripts been referred to they would have disclosed that Mr. Rodrique plead guilty plea for sexually abusing 6 boys at St. Anne's. The transcripts contain details of the nature of the assaults. Canada has had this transcript since 2003.

[133] For yet another example of a transcript available since 2003, IAP Claimants who identify J.C. as a perpetrator were given a POI report that made no reference to any allegations of sexual abuse against J.C., although he was subject to a preliminary hearing and trial on allegations of sexual abuse of a student at St. Anne's. J.C. was acquitted, but the transcripts available to Canada include "allegations" of abuse and the trial judge's reasons indicate that the acquittal was based on the prosecution's failure to meet the criminal standard of proof.

[134] Here, it may be recalled that Appendix VIII provides that Canada "search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant … as well as any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student."

9. The Discovery of the Alleged Non-Disclosure of OPP Documents and Transcripts

[135] Starting in January 2012, Fay Brunning, who is Applicants lawyer, and Suzanne Desrosiers, a lawyer from Timmins, traveled to communities along the James Bay coast to provide independent legal advice to former residential school students in the region.

[136] By May 2012, some former students who became clients advised they had testified in court against Anna Wesley and John Rodrigue.

[137] Ms. Brunning contacted Detective Constable Delguidice of the Cochrane OPP, and after that contact, on June 3, 2012, Norm Feaver, counsel for the OPP, wrote that the OPP could not legally disclose investigation records without the consent of the people whose information may be found in the records. He suggested a motion or a Freedom of Information (FOI) request was possible for individuals who spoke to the police for disclosure of their own statements.

[138] On July 30, 2012, Ms. Brunning sent an email to Canada (the Department of Justice) and advised that there had been an OPP investigation into abuse at St. Anne's, which investigation

2014 ONSC 283 (CanLII)

had involved around 1,000 interviews. She asked Canada to gather and view all this evidence now known to exist, for the purpose of relevance to IAP claimants.

[139] On August 7, 2012, the Department of Justice replied and referred to Appendices VII and VIII as setting out the production obligations of Claimants and Canada.

[140] The same day, Ms. Brunning sent an email and asked Canada government to obtain the OPP documentation at its own expense.

[141] Also on August 7, 2012, Canada' counsel replied that Canada adheres to Appendix VIII of Schedule 'D' to the IRSSA. The email stated: "[A]s as you advise that some of your clients made allegations to the OPP in the 1990s (well after St. Anne's closure in 1976), then these allegations are not captured by the IAP's government disclosure requirements."

[142] Around December 2012, at IAP hearings, counsel for the Applicants took the position that the Narrative for St. Anne's was incomplete. The Applicants' Counsel argued that the Narrative was missing crucial information about the OPP investigation and criminal proceedings.

[143] In February 2013, the Claimant in W-10876 sought to introduce some documents that confirmed criminal convictions of Anna Wesley pertaining to St. Anne's students being forced to eat vomit or being assaulted by her. Canada objected to the admissibility of any statements given to the OPP or any evidence about the OPP investigation, on the basis that this evidence could only be admitted through live testimony and, in any event, the evidence was not relevant to credibility, liability, or compensation, including aggravating factors. The Claimant persisted and asked that Canada obtain and produce transcripts of the criminal trials of Anna Wesley to see the details of those convictions and her *modus operandi*. This request was refused and the hearing went ahead without the transcripts.

[144] In June 2013, Canada acknowledged for the first time that it was in possession of the OPP records in an email to counsel for the Applicants. On June 25, 2013, Canada's counsel wrote to "clarify that [she had] not state[d] that Canada has 'not previously sought' the transcripts of criminal proceedings". Rather, she wrote:

> In the course of the litigation in about 2003, transcripts were purchased of some of the criminal proceedings relating to St. Anne's former employees, including [Anna Wesley]. In the IAP, these transcripts are not referred to by Canada as they are not probative of issues in this process. It should be noted that [Anna Wesley] is deceased.

[145] In correspondence dated August 27, 2013, counsel to the Commission, requested that Canada produce the OPP records or advise the Commission as to the basis upon which Canada refused to produce the records.

[146] In correspondence dated September 12, 2013, Canada's counsel advised that Canada would not produce the OPP records because they were subject to an implied undertaking not to use the documents for any purpose other than the litigation or pursuant to the express terms of the third party production order of the Ontario Superior Court of Justice.

[147] On September 27, 2013, the Applicants counsel brought a motion for four claimants, who had pending IAP claims, for an order that Canada produce transcripts of the proceedings in *R. v. Wesley* and *R. v. Rodrique.*

[148] I granted the order without prejudice to Canada's right to argue at the hearing of this Request for Directions whether it is is obligated to provide a copy of the transcripts in the IAP

2014 ONSC 283 (CanLII)

and without deciding whether there was an obligation to pay for the copies of the transcripts. This was the first time that a transcript was produced by Canada in the St. Anne's IAPs.

10. The Truth and Reconciliation Commission's Attempts to Obtain the OPP Documents

[149] As noted above, in correspondence dated August 27, 2013, counsel to the Truth and Reconciliation Commission, requested Canada produce the OPP records or advise why it refused to produce the records.

[150] The Truth and Reconciliation Commission attempted to obtain the OPP records directly from the OPP. In correspondence dated October 31, 2013, The Honourable Justice Murray Sinclair, Chair of the Commission, wrote to Chris D. Lewis, the Commissioner of the OPP, requesting that the records be provided to the Commission in the spirit of reconciliation.

[151] As noted above, the OPP has taken the position that provided that there is a court order and provided that appropriate protections of privilege and privacy claims, it does not oppose producing its documents about the St. Anne's investigation to the Truth and Reconciliation Commission or in the IAP.

D. DISCUSSION AND ANALYSIS OF THE REQUEST FOR DIRECTIONS BY THE TRUTH AND RECONCILIATION COMMISSION

1. Introduction

[152] The RFD by the Truth and Reconciliation Commission raises six issues. The first issue is: Does this court have the jurisdiction to order Canada to produce the OPP documents in its possession to the Commission? The second issue is: If the court has jurisdiction to order Canada to produce the OPP documents to the Commission, ought the court exercise that jurisdiction? The third issue is: Does the deemed undertaking apply to preclude Canada from producing the OPP documents in its possession to the Commission? The fourth issue is: If the deemed undertaking applies, ought the court abrogate the undertaking? The fifth issue is: Does the court have the jurisdiction to order directly the OPP to produce its St. Anne's documents to the Commission? The sixth issue is: How should the court order the production of the OPP documents to the Commission?

2. Does this Court Have the Jurisdiction to Order Canada to Produce the OPP Documents in its Possession to the Truth and Reconciliation Committee?

[153] Under the IRSSA, Canada and the churches are obliged to provide all relevant documents in their possession or control to and for the use of the Commission. In cases where solicitor-client privilege is asserted, Canada is obliged to provide a list of all documents for which the privilege is claimed.

[154] Although some sources of jurisdiction are perhaps more pertinent to the IAP process discussed in the next major section of these Reasons for Decision, the court has several sources of jurisdiction over the performance of the terms of the the IRSSA, and this jurisdiction extends to the governance of Canada's disclosure obligations to the Truth and Reconciliation

2014 ONSC 283 (CanLII)

Commission. Indeed, the court has at least three sources of jurisdiction over the performance of the IRSSA. First, there is the court's jurisdiction over the administration of a class action settlement. Second, there is the court's plenary jurisdiction from s. 12 of the *Class Proceedings Act, 1992*; S.O. 1992, c. 6. Third, there is the court's jurisdiction derived from the IRSSA, which includes its jurisdiction to interpret and enforce contracts and its own orders, including its approval and implementation orders of the IRSSA.

2014 ONSC 283 (CanLII)

[155] The first source of jurisdiction to order Canada to produce the OPP documents for the Commission is the court's power over the administration of class action settlements. The court's inherent jurisdiction, the applicable class proceedings law, and the approval and implementation order provide the court with the powers to make orders and impose such terms as necessary to ensure that the conduct of the IAP, which implements the settlement, is fair and expeditious: *Fontaine v. Canada (Attorney General)*, 2013 BCSC 1955 at para. 21.

[156] The court has an ongoing obligation to oversee the implementation of the settlement and to ensure that the interests of the class members are protected. Where there are vulnerable claimants, the court's supervisory jurisdiction will permit the court to fashion such terms as are necessary to protect the interests of that group: *Fontaine v. Attorney General (Canada)*, 2012 BCSC 839 at para. 120. In *Baxter v. Canada (Attorney General)*, *supra*, Justice Winkler stated at para. 12:

> 12. …. The court has an obligation under the *Class Proceedings Act* ("CPA") to protect the interests of the absent class members, both in determining whether the settlement meets the test for approval and in ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members. In seeking the approval of the court, the plaintiffs and defendants essentially seek the benefits of having the court sanction the settlement. Such approval cannot be divorced from the obligation it entails. Once the court is engaged, it cannot abdicate its responsibilities under the CPA.

[157] The supervisory jurisdiction of the Court is to be exercised to ensure that claimants obtain the intended benefits of the IRSSA and to ensure that the integrity of the implementation and administration of the agreement and related processes are maintained: *Fontaine v. Attorney General (Canada)*, 2012 BCSC 1671 at para. 50. In *Fontaine v. Canada (Attorney General)*, 2006 YKSC 63 at para. 54, Justice Veale stated that any deficiencies in the administration of the IAP can be remedied under the court's supervisory jurisdiction. The court's supervisory jurisdiction over class action settlements includes the jurisdiction to remedy any mechanical or administrative problems with the settlement: *Bodnar v Cash Store Inc., supra* at paras. 117-130.

[158] The court has administrative jurisdiction over a class action settlement independent of any conferral of jurisdiction by the settlement agreement: *Fantl v Transamerica Life Canada*, 2009 ONCA 377 at para. 39; *Spavier v Canada (Attorney General)*, 2006 SKQB 4999 at para. 13; *Lavier v MyTravel Canada Holidays Inc.*, 2011 ONSC 3149; *Bodnar v Cash Store Inc.*, 2011 BCSC 667 at paras. 96-130. Under the IRSSA, the parties agreed to involve the court in the administration of the settlement, but in any event, the court retains jurisdiction over the implementation of a settlement it has approved: *Kelman v Goodyear Tire and Rubber Co.* (2005), 5 CPC (6th) 161 at para. 25 (Ont. SCJ).

[159] There are, however, limits to the court's administrative jurisdiction. After the settlement has been approved, the court's administrative and implementation jurisdiction does not include power to vary the settlement reached by the parties: *Lavier v. MyTravel Canada Holidays Inc.*, supra.

[160] The court does not have the jurisdiction to impose burdens on the defendant that the defendant did not agree to assume: *Lavier v. MyTravel Canada Holidays Inc., supra; Stewart v. General Motors*, (SCJ) unreported, September 15, 2009, per Justice Cullity at pp. 8-9. For example, recently in *Fontaine v. Canada (Attorney General),* unreported November 20, 2013 (BCSC), Justice Brown ruled that the administrative power of the courts did not extend so far as to allow an extension of time for IAP claims that under the IRSSA have a firm deadline of September 19, 2012 without any provision in the agreement for extension or for relief from the deadline.

[161] I foreshadow to say that in my opinion the directions that I shall make later in this judgment, like the changes suggested by Justice Winkler in *Baxter v. Canada (Attorney General)*, *supra,* are not amendments to the IRSSA and do not impose burdens on Canada that Canada did not agree to assume.

[162] The second source of jurisdiction to order Canada to produce the OPP documents for the Commission is the plenary jurisdiction provided by s. 12 of the *Class Proceedings Act, 1992* and comparable provisions in the class actions statutes from across the country. Section 12 states:

> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[163] The court has broad powers under s. 12 of the *Class Proceedings Act, 1992* to ensure that a class action proceeds in both an efficient and fair manner: *Guglietti v. Toronto Area Transit Operating Authority (c.o.b. Go Transit)*, [2000] O.J. No. 2144 (S.C.J.) at para. 6; *Peter v. Medtronic Inc.*, [2008] O.J. No. 4378 (S.C.J.) at paras. 21-23.

[164] In a class proceeding, the court is empowered to make any order it considers necessary to ensure the fair and expeditious determination of the proceedings on such terms as it considers appropriate: *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2000), 48 O.R. (3d) 21 (S.C.J.) at para. 50; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.) at pp. 141 and 148, paras. 41 and 73. *Fenn v. Ontario*, [2004] O.J. No. 2736 (S.C.J.) at paras. 13-17; *Vitelli v. Villa Giardino Homes Ltd.* (2001), 54 O.R. (3d) 334 (S.C.J.); *Lewis v. Shell Canada Ltd.* (2000), 48 O.R. (3d) 612 (S.C.J.); *Fantl v. Transamerica Life Canada* 2009 ONCA 377.

[165] The third source of jurisdiction to order Canada to produce the OPP documents for the Commission is the authority derived from the IRSSA, the approval order and the court's implementation order. It is to be recalled that under the approval orders, the courts are authorized "to issue such orders as are necessary to implement and enforce the provisions of the Agreement and this [approval] judgment."

[166] It should be noted that the power to implement and enforce an agreement would include the court's normal jurisdiction under the law of contract and the law of civil procedure to interpret documents and to enforce contracts and court orders.

[167] Pausing here in the discussion of the court's three sources of jurisdiction, it is necessary to return to Justice Goudge's decision in *Fontaine v. The Attorney General of Canada*, 2013 ONSC 684, which alluded to a public law basis for the court jurisdiction over the IRSSA. And, it is necessary to discuss the Court of Appeal's decision in in *Fontaine v. Duboff, Edwards Haight*

2014 ONSC 283 (CanLII)

& Schacter, 2012 ONCA 471 that holds that the decisions made pursuant to IRSSA are not amenable to public law judicial review. This is necessary because but for the Court of Appeal decision in *Fontaine v. Duboff, Edwards Haight & Schacter,* discussed below, there is an argument that there is a fourth source of jurisdiction to order Canada (or the OPP) to produce documents under the IRSSA.

[168] This public law source of jurisdiction was alluded to by Justice Goudge in *Fontaine v. The Attorney General of Canada*, 2013 ONSC 684 where Canada made the argument that since the Truth and Reconciliation Commission was not a party under the IRSSA with privity of contract, the Commission did not have the standing to make a RFD for an interpretation of the agreement. Justice Goudge did not have to answer this objection to the Commissions' standing, because genuine parties to the IRSSA were also seeking an interpretation of the agreement (which is also the situation in the case at bar), but he observed that the IRSSA was not just a contract but was a matter of public law as well as private law. He stated at para. 56:

> While I do not therefore propose to address that question, were I to do so, I do have some concern about the applicability of the doctrine of privity of contract to the TRC's standing to seek [page276] direction on the meaning of the Settlement Agreement. I am not sure that the Settlement Agreement can be said to be simply a private contract that should be governed only by private law concepts like privity. There are arguably aspects of the Settlement Agreement that seek to structure relationships between Canada and Aboriginal people. The preamble of Sch. N says as much. Moreover, the TRC itself, while a product of the Settlement Agreement is established by an Order-in-Council which sets out its mandate. These two considerations raise the possibility that the Settlement Agreement can be viewed through the lens of public law as well as private law.

[169] But for *Fontaine v. Duboff, Edwards Haight & Schacter,* I would have agreed with Justice Goudge's *obiter* observations that there is a public law aspect to the IRSSA. This notion, however, was rebuffed by the Court of Appeal in *Fontaine v. Duboff, Edwards Haight & Schacter*. Nevertheless, as will be seen below, the Court's decision in that case also demonstrates that, practically speaking, a judicial review power would be superfluous having regard to the three existing sources of jurisdiction discussed above.

[170] The facts of *Fontaine v. Duboff, Edwards Haight & Schacter* were that the Duboff law firm represented IAP claimants, and pursuant to the IRSSA, an adjudicator reviewed and reduced their fees. The law firm appealed the adjudicator's decision to the Chief Adjudicator, who upheld the original decision. The law firm and the Chief Adjudicator then jointly brought a RFD to Chief Justice Winkler in his capacity as an Administrative Judge under the IRSSA. Chief Justice Winkler ruled that there was no right of appeal from the Chief Adjudicator's decision and no right to seek judicial review of the decision. He noted that the fee review process was part of the IRSSA and that the agreement did not provide for further appeals. As for judicial review, the Chief Justice explained that the adjudicator and the Chief Adjudicator were acting pursuant to the IRSSA and they were not exercising a statutory power of decision subject to judicial review.

[171] The Court of Appeal affirmed the Chief Justice's decision. Justice Rouleau, writing for the Court explained at paras. 52-57 that although judicial review was not available, there were, nevertheless, means to review the decisions of the Chief Adjudicator. He stated:

> 52. … The office of the Chief Adjudicator was created by order of the courts in approving the negotiated terms of settlement of class action litigation. The authority of that office is exercised in relation to those class members who have elected to advance claims through the IAP and their counsel. The terms of the S.A. and the implementation orders set out the process for reviewing

2014 ONSC 283 (CanLII)

> decisions of the IAP Adjudicators. Recourse to the courts is only available if it is provided for in the S.A. or the implementation orders.
>
> 53. I turn now to whether a process, other than an appeal or judicial review, is available to review a decision by the Chief Adjudicator. The Administrative Judge properly confirmed that the IAP Adjudicators "cannot ignore" the provisions of the implementation orders and that "it remains necessary for Adjudicators to apply the required factors" when conducting a legal fee review at first instance. In the perhaps unlikely event that the final decision of the Chief Adjudicator reflects a failure to consider the terms of the S.A. and implementation orders, including the factors set out in para.18 of the implementation orders, then, in my view, the parties to the S.A. intended that there be some judicial recourse. Having said that, I emphasize my agreement with the Administrative Judge's comment, at para. 22 of his reasons, that "there is no implicit right to appeal each determination made within the context of the claims administration or assessment process as an incident of the judicial oversight function." As I will go on to explain, the right to seek judicial recourse is limited to very exceptional circumstances.
>
> 54. The parties intended that implementation of the S.A. be expeditious and not mired in delay and procedural disputes. As noted by the Chief Adjudicator, there are already many checks and balances in place to ensure that the process is administered fairly and in accordance with the terms of the S.A. The Chief Adjudicator is granted broad discretion by the terms of the S.A.
>
> 55. The implementation orders speak to the principles that are to be applied by the Adjudicator in carrying out a fee review at first instance. The parties provided for an ongoing right to seek the assistance of the courts to require compliance with the terms of the implementation orders. As noted, the implementation orders provide, at para. 23:
>
> > [T]he Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement, the judgment dated December 15, 2006 and this or-der.
>
> 56. The CAP specifies that recourse to the courts may be obtained by way of a Request for Direction that is to be brought to one of the two Administrative Judges, as designated by the courts.
>
> 57. Thus, in the very limited circumstances where the final decision of the Chief Adjudicator reflects a failure to comply with the terms of the S.A. or the implementation orders, the aggrieved party may apply to the Administrative Judges for directions. …. By providing for recourse to an Administrative Judge in these limited circumstances, the parties will be able to ensure that the bar-gain to which they consented is respected.

[172] Thus, Justice Rouleau confirmed that where there is failure to comply with the terms of the IRSSA or the implementation orders, the aggrieved party may apply to the court by an RFD to ensure that the terms of the IRSSA are respected. That is precisely what has occurred in the case at bar in defining the court’s authority to order Canada (or the OPP) to produce documents.

[173] Returning to the three sources of jurisdiction, the court’s administrative authority and its authority to interpret the IRSSA has been exercised in a variety of cases; visualize:

- In *Fontaine v. Canada (Attorney General)*, 2007 BCSC 1841, affd. 2008 BCCA 329, the court ruled that a direction by a claimant to pay his or her compensation from the IRSSA was unenforceable as barred by the IRSSA and by s. 68 of the *Financial Administration Act,* R.S.C. 1985, c. F-11.
- In *Fontaine v. Canada (Attorney General)*, 2010 BCSC 1208, the court interpreted how the provisions in the Implementation Order about how the Chief Adjudicator’s authority

2014 ONSC 283 (CanLII)

to review legal fees applied to fees that were subject to Articles 13.06 to 13.09 of the IRSSA.

- In *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839 certain lawyers and other parties were prohibited from acting for or assisting claimants in IAP proceedings.
- In *Fontaine v. Canada (Attorney General),* 2012 BCSC 1671, the court declared that the Chief Adjudicator had the jurisdiction to formulate rules of professional conduct for lawyers acting in IAP proceedings and to provide for penalties or other disciplinary measures where there is non-compliance but the Chief Adjudicator did not have the authority to remove or suspend lawyers from participation in the IAP. The court stated that the Chief Adjudicator could adjourn any hearings involving counsel in respect of whom a Request for Direction has been brought seeking suspension or removal from the IAP by court order.
- In *Fontaine v. Canada (Attorney General),* 2012 BCSC 1671, the court stated that it had the jurisdiction to order costs against a lawyer who had undermined the proper administration of the IRSSA.
- In *Fontaine v. Canada (Attorney General)*, 2013 MBQB 272, where a claimant was granted leave by an adjudicator to have a lost income claim of over $250,000 determined by a regular action, the court interpreted the IRSSA to allow the balance of the IAP claim to proceed before an adjudicator.
- In *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684, the court interpreted Canada's obligation to provide documents to the Truth and Reconciliation Commission to include relevant documents at Library and Archives Canada. The court defined relevant documents as those that are reasonably necessary for the Commission to discharge its mandate. Relevant documents, however, did not include documents about Canada's remedial response to the aftermath of the residential schools experience and to the adequacy of that response.
- In *Fontaine v. Canada (Attorney General)*, 2013 BCSC 757, the court interpreted the list of residential schools included in the IRSSA by a schedule to not include certain schools that were successor schools with names that differed slightly from the schools listed in the schedule.
- In *Fontaine v. Canada (Attorney General),* 2013 BCSC 1888, the court ordered a lawyer and law firm to produce certain documents in an investigation by the monitor into the activities of the lawyer and his law firm in providing services and to extending loans to IAP clients.
- In *Fontaine v. Canada (Attorney General),* 2013 BCSC 1955, the court ordered a publication ban in IAP proceedings.

[174] In *Fontaine v. Canada (Attorney General),* 2012 BCSC 313, the court was asked to exercise its jurisdiction over the production of documents. In this case, an individual claimant brought a Request for Directions for, among other things, an interpretation of the IRSSA as to whether students of the school who were billeted and did not live in residence were eligible to CEP compensation under the IRSSA. It was Canada's position that the IRSSA could not be interpreted to make billeted students eligible for compensation and that compensation would

2014 ONSC 283 (CanLII)

only be possible if the billeted students place of residence was designated a residential school pursuant to Article 12 of the IRSSA or if the IRSSA was amended. In support of its request for an interpretation, the individual claimant sought the production of certain documents in the possession of Canada relating to its role in billeting students in private homes.

[175] Canada resisted the production request in In *Fontaine v. Canada (Attorney General),* 2012 BCSC 313. Justice Brown stated that she was not - at present - prepared to order Canada to produce documents, apparently because a procedure had been agreed to obtain documents from other sources. However, and this is the point that is important for present purposes, she stated at paras. 35 and 36 that she was not foreclosing an order for production if an Article 12 application were properly made and that she would revisit the request for production and disclosure after the actual application for interpretation was filed. She stated that there may be at that time, depending on the position taken and the grounds relied upon in support, a basis for ordering additional documentary production.

[176] To conclude this section, put shortly, provided that the court does not amend the IRSSA, it has ample powers to require Canada to honour its disclosure and production obligations to the Commission.

3. If the Court Has Jurisdiction to Order Canada to Produce the OPP Documents to the Commission, Ought the Court to Exercise that Jurisdiction?

[177] As just discussed, in my opinion, the court does have the jurisdiction to order Canada to produce the OPP documents in its possession to the Commission. It is further my opinion that the court ought to exercise this jurisdiction to order Canada to produce the OPP documents. (In the next section of these reasons, I shall conclude that the deemed undertaking does not prevent the production of the documents to the Commission, and, in any event, if the deemed undertaking applies, then the court should abrogate the deemed undertaking in the circumstances of this case.)

[178] The court's jurisdiction to enforce performance of the IRSSA ought to be exercised in the circumstances of this case. Canada has OPP documents in its possession, and it was not disputed that those documents are relevant to the mandate of the Commission.

[179] Indeed, the relevance of the documents to the work of the Commission was not seriously challenged. The OPP documents relate to "the effect and consequences of residential schools (including systemic harms, intergenerational consequences and the impact on human dignity)." In particular, the documents speak to the sexual and physical abuse suffered by students at St Anne's Residential School. The documents shed light on an important aspect of the history of residential schools in Canada.

[180] Therefore, I order Canada to produce the OPP documents in its possession to the Truth and Reconciliation Commission in accordance with the provisions of the IRSSA.

4. Does the Deemed Undertaking Apply to Preclude Canada from Producing the OPP Documents in its Possession to the Commission?

[181] I turn now to the matter of the application of the deemed undertaking rule and to explain why, in my opinion, the Rule does not interfere with the order to produce just made.

2014 ONSC 283 (CanLII)

[182] Rule 30.1 is the deemed undertaking rule. It states:

RULE 30.1 DEEMED UNDERTAKING

Application

30.1.01 (1) This Rule applies to,

(a) evidence obtained under,

(i) Rule 30 (documentary discovery),

(ii) Rule 31 (examination for discovery),

(iii) Rule 32 (inspection of property),

(iv) Rule 33 (medical examination),

(v) Rule 35 (examination for discovery by written questions); and

(b) information obtained from evidence referred to in clause (a).

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained

Exceptions ….

Order that Undertaking does not Apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

[183] The Commission argues that by its express language, the deemed undertaking rule only applies to proceedings other than the proceeding in which the evidence was obtained. It argues that the undertaking does not preclude the use of evidence obtained in a proceeding being used in that same proceeding. Then, relying on Article 11.01 of the IRSSA, the Commission submits that the proceedings that culminated in the IRSSA include or are the same as the 156 proceedings associated with Justice Trainor's order, and, therefore, the Commission argues that the production of the OPP documents to the Commission is not precluded by the deemed undertaking.

[184] I agree with the Commission's argument. Unless they opted out of the class action, of which there is no evidence, and which is unlikely, the purposes of the plaintiffs in the 156 actions in which the OPP documents were obtained, were overtaken by the purposes of their participating in the IRSSA as IAP Claimants.

[185] Those purposes of participating in the IAP include the IAP being the means to provide access to justice and compensation and those purposes include facilitating the project of the Truth and Reconciliation Commission, which provides a different but equally important route to access to justice. From the perspective of the 156 individual plaintiffs, the documents obtained

2014 ONSC 283 (CanLII)

for the 156 actions are being used for what does appear to be the same proceeding or a transformation of it.

[186] I, therefore, conclude that Canada was wrong in thinking that the deemed undertaking applied to the use of the documents it had obtained pursuant to Justice Trainor's order.

[187] I conclude that the deemed undertaking is no obstacle to Canada producing the OPP documents to the Truth and Reconciliation Commission.

2014 ONSC 283 (CanLII)

5. If the Deemed Undertaking Applies, Ought the Court to Abrogate the Undertaking?

[188] If I am wrong and Canada was correct in taking the position that its possession of copies of the OPP documents was subject to the deemed undertaking, then, pursuant to rule 30.1, I would, in any event, and I do rule that the undertaking does not apply to the OPP documents.

[189] The court is empowered to order that the deemed undertaking does not apply if the court is satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed the evidence: Rule 30.1.01(8); *Browne v. McNeilly*, [1999] O.J. No. 1919 (Ont. S.C.J.), affd [2000] O.J. No. 1805 (Ont. C.A.).

[190] An application to modify or relieve against the deemed undertaking requires the applicant to show on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely, privacy and the efficient conduct of civil litigation; *Juman v. Doucette*, [2008] S.C.J. No. 8.

[191] In my opinion, the public interest in disclosing the OPP documents to facilitate the important mission of the Commission and the fulfillment of its mandate outweighs the public interest in the efficient conduct of civil litigation and any privacy interest of the parties to the litigation.

6. Does the Court have the Jurisdiction to Order the OPP to Produce its St. Anne's Documents to the Commission?

[192] In my opinion, notwithstanding that the OPP is a non-party to the IRSSA, the court has the jurisdiction to order the OPP to produce its St. Anne's documents to the Truth and Reconciliation Commission.

[193] The sources of jurisdiction are discussed above. In my opinion, the court's jurisdiction over the administration of a class action settlement, the court's plenary jurisdiction from s. 12 of the *Class Proceedings Act, 1992,* and the court's jurisdiction derived from the IRSSA and from the court's approval and implementation orders, all support the court's authority to make a direct order that the OPP produce the documents listed above.

[194] For the purposes of the case at bar, it is not necessary to discuss what tests should be used to determine when the court should make an order against a non-party to the IRSSA, because the OPP does not oppose the order being made. It is necessary to discuss only how privilege and privacy concerns should be addressed.

7. How Should the Court Order the Production of the OPP Documents to the Commission?

[195] As will be discussed below, for the production of the OPP documents for the IAP, a procedure must be designed to protect privilege claims and privacy claims. In my opinion, however, it is not necessary to design a procedure for the production of documents to the Truth and Reconciliation Commission because a procedure is already in place under the IRSSA and associated federal and provincial privacy statutes that govern the documents collected by the Commission. In other words, the IRSSA already provides the means to address these concerns.

[196] For convenience, I set out again that Schedule "N" provides as follows:

> In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.
>
> In cases where privacy interests of an individual exist, and subject to and in compliance with applicable privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected. In cases where solicitor-client privilege is asserted, the asserting party will provide a list of all documents for which the privilege is claimed.

[197] Under the IRSSA, Canada collects documents and delivers them to the Commission in accordance with the terms and conditions set out in the agreement. The OPP should deliver its St. Anne's documents to the Commission in the same manner that Canada does.

[198] Having considered the Commission's RFD, I turn now to the matter of the RFDs of Canada and of the Applicants.

E. DISCUSSION AND ANALYSIS OF THE REQUESTS FOR DIRECTION BY CANADA AND BY THE APPLICANTS

1. Introduction

[199] The RFDs by Canada and by the Applicants raise seven issues. The first issue is: Does the court have jurisdiction to order Canada to produce the OPP Documents and other documents for the IAP? The second issue is: Has Canada breached its disclosure obligations in the IAP with respect to St. Anne's? The third issue is: If the court has jurisdiction to order Canada to produce the OPP Documents for the IAP, how, if at all, should that jurisdiction be exercised? The fourth issue is: May the court direct the re-opening of settled IAP claims on the grounds of Canada's breach of its disclosure obligations? The fifth issue is: Does the court have jurisdiction to order the OPP directly to produce its St. Anne's documents for the IAP? The fifth issue is: If the court has jurisdiction to order the OPP to produce its St. Anne's documents for the IAP, how, if at all, should that jurisdiction be exercised? The seventh issue is: May the court give directions as to how documentary evidence and transcripts from criminal and civil proceedings should be utilized in the IAP?

2014 ONSC 283 (CanLII)

2014 ONSC 283 (CanLII)

2. Does the Court have Jurisdiction to Order Canada to Produce the OPP Documents and other Documents for the IAP?

[200] My discussion of whether the court has jurisdiction to order Canada to produce the OPP Documents and other Documents for the IAP can be relatively brief because, in my opinion, the three sources of jurisdiction, discussed above, with respect to the Commission's RFD, apply not only to Canada's disclosure obligations to the Commission but also to its disclosure obligations for the IAP. I need only add that there is a fourth source of jurisdiction to order the production of documents; namely, the court's jurisdiction from the *Rules of Civil Procedure* also provides authority to order the production of the documents in the possession of Canada.

[201] The IAP is part of a settlement agreement in a class action, and s. 35 of the *Class Proceedings Act, 1992* provides that the rules of court; i.e. *the Rules of Civil Procedure* apply to class proceedings. *The Rules of Civil Procedure* apply to class proceedings, but the court has a discretion to limit, vary, or alter the operation of them: *Segnitz v. Royal & Sun Alliance Insurance Co. of Canada,* [2003] O.J. No. 78 (S.C.J.) at para. 28; *Wilson v. Servier Canada Inc.*, [2003] O.J. No. 156 (S.C.J.) at para. 11. Thus, I, disagree with Canada's argument that the *Rules of Civil Procedure* of Ontario are not engaged with respect to the IAP.

[202] I further disagree with Canada's arguments that Schedule D is a complete code of all procedural rights and that the procedural rights that might be available in regular litigation are not available under the IRSSA for the IAP.

[203] In this last regard, I also disagree with any argument that resort to the *Rules of Civil Procedure* is not available because the IAP is non-litigious. I share Justice Winkler's view noted in *Baxter v. Canada (Attorney General)*, *supra* that the IAP is designed to be expedient litigation to resolve what may be significant claims for compensation.

[204] I do agree that resort to the *Rules of Civil Procedure* cannot override to expand or diminish the procedures of the IAP to the extent of amending the IRSSA, which is to say that any resort to the rules of court will have to fit with the IRSSA and this tailoring may be more or less difficult. Nevertheless, in my opinion, Schedule D is not the complete code of procedural rights under the IRSSA, and Schedule D also must fit with the court's administrative jurisdiction, its jurisdiction under the approval order and the implementation order, and its general jurisdiction to enforce contracts and its own orders.

[205] It is interesting to note that consistent with the Court of Appeal's views expressed in *Fontaine v. Duboff, Edwards Haight & Schacter,* discussed in the previous section of these Reasons, the Chief Adjudicator is also of the view that the court has the jurisdiction to oversee Canada's disclosure obligations under the IAP. In *Re-Review Decision E5442-10-A-12390* (August 27, 2012) then Chief Adjudicator Ish stated at para. 46:

> Schedule "D" of the Settlement Agreement (the IAP) in Appendix VIII sets out Canada's obligations with respect to document disclosure. Noticeably absent in Appendix VIII is any vesting of authority to adjudicators, including the Chief Adjudicator, to order production of documents in a way that meaningfully ensures natural justice. There is little doubt that the drafters of the IAP did not want to provide the parties with access to the full panoply of substantive and procedural safeguards provided by the judicial system, such as examination for discovery, affidavit evidence, cross-examination on affidavits and certified document production. Presumably the fear was that this would be a significant drag on the IAP since it would likely result in numerous applications to adjudicators for an order for document production. Of course,

> the issue goes well beyond the "years of operation" cases and if, as submitted by the Claimant in the present case, an order for production was granted the implications would be significant and have the potential for fundamentally changing the IAP and the nature of the working responsibilities of adjudicators. Even though the issue is very significant and potentially impacts the rights of numerous claimants, I do not believe the IAP contemplates that orders for the production of documents by Canada are part of the authority of adjudicators and as such I cannot grant the relief or remedy requested by the Claimant in this case. While adjudicators do not have this authority, there is no doubt that the obligation on Canada to produce all relevant documents, and not be selective, was intended to be carried out in good faith. Canada would be running a very significant risk in being selective or less than completely forthcoming in disclosing all potentially relevant documents, whether supportive of its position or otherwise. Decisions based on incomplete or inadequate disclosure are not apt to withstand judicial scrutiny and would lend themselves to very serious consequences, not only for that particular case but for others decided before it, if so found by the courts. Indeed, one can easily envisage a possible referral to the courts in cases where the parties are unable to agree on the extent of Canada's duty of disclosure since the ability to deal with the situation is not within the purview of adjudicators.

[206] The case at bar shows that Chief Adjudicator Ish was prescient. In my opinion, the Chief Adjudicator was also correct. Under the IAP, adjudicators do not have the authority to make orders for the production of the documents because the parties to the IRSSA did not wish a discovery procedure to delay an expedient litigation.

[207] However, the court through its RFD jurisdiction can scrutinize whether Canada has honoured its obligations under the IRSSA to disclose relevant documents and whether the IAP is advancing in accordance with the requirements of the IRSSA. I agree that by a RFD procedure, Canada runs a risk in being selective or less than completely forthcoming in performing its disclosure obligations under the IRSSA because of the possibility of court scrutiny.

3. Has Canada Breached its Obligations in the IAP with respect to St. Anne's?

[208] It is Canada's position that in the IAP it has produced all relevant documents in its possession and control to claimants as required by the IRSSA. It submits that Appendix VIII of the IRSSA purposefully do not reference or encompass disclosure obligations imposed in civil litigation. Canada submits that there is no obligation to search for and disclose information regarding allegations and criminal convictions of alleged POIs where the allegations were made after the POI's term at the residential school was completed. Canada states that the IRSSA does not make Canada responsible for seeking out and obtaining third party documents. It submits that statements to police and any transcript of testimony at criminal trials are not mandatory documents but if claimants wish to produce these documents they are free to do so if tendered through a witness.

[209] Canada submits that its document disclosure obligations under the Appendix VIII of the IRSSA are clear and unambiguous, and that Canada has honoured those obligations. It submits that no basis for this court to add new and ongoing obligations to disclose third party documents in the IAP process and that the imposition of such an obligation would amount to a material amendment to the terms of the IRSSA that would be both unnecessary and also onerous. Canada submits that by seeking to impose upon Canada the obligations of procuring and disclosing transcripts of criminal proceedings and third party documents, including documents arising from criminal investigations of former IRS employees, the Applicants seek to unilaterally impose upon Canada new, ongoing and unnecessary disclosure obligations. It imputes the motive that

2014 ONSC 283 (CanLII)

the Applicants by seeking these documents are seeking to modify the nature of the harms compensable under the IAP.

[210] In my opinion, Canada's arguments are all misdirected because the Applicants are not seeking to impose new obligations into the IRSSA and for the purpose of deciding their RFD, it is not necessary for Canada to seek out and obtain third party documents. It already has the documents and transcripts that the Applicants are seeking. It is false to suggest that the Applicants are seeking to make Canada become an investigator to locate relevant documents from third parties who might have information about former residential school employees who may have been the subject of a criminal investigation. It happens that Canada has material from third parties but based on its own narrow interpretation of the IAP, it has decided that it need not produce those documents and transcripts.

[211] As I see it, for the purpose of the RFDs, the court need only concern itself with the OPP documents and the transcripts already in Canada's possession and information about convictions that should be available from civil and criminal courts that are public courts of record.

[212] As I see the matter, Canada has already gone down the road of compliance with its IAP disclosure obligations, but it has not gone far enough to reach the destination prescribed by the IRSSA. I do not see the request that Canada honour its disclosure obligations as a means to change the harms compensable under the IAP; rather it is a means of ensuring that the IAP facilitates the expeditious resolution of serious claims in the manner agreed to by the signatories of the IRSSA.

[213] Canada has too narrowly interpreted its disclosure obligations. I do not need to decide whether Canada did this in bad faith, and I rather assume that its officials mistakenly misconstrued their obligations and misread the scope of their obligations. That said, in my opinion, there has been non-compliance, and Canada can and must do more in producing documents about the events at St. Anne's.

[214] It appears to me that the major problem has been Canada's misinterpretation of its obligation under the following provision from Appendix VIII:

> The government [Canada] will also search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant, including information about those persons' jobs at the residential school and the dates they worked or were there, as well as any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student. ["Person of Interest Report" or "POI Report"]

[215] Unfortunately, this provision is not well written. For example, the opening phrase, "The government [Canada] will also search for, collect and provide a report," reads grammatically as if Canada must search for and collect a report. The phrase obviously should be read to say that Canada will search for and collect information and then provide a report.

[216] In particular, the phrase "where such allegations were made while the person was an employee or student" is a misplaced and maladroit attempt to convey the meaning that the investigation is to focus on the perpetrator's acts of abuse while an employee or student is at the school. Canada has interpreted this provision to exclude information about misconduct after the perpetrator was no longer associated with the school, which is fine, however, Canada has also interpreted this provision to exclude information of abuse that occurred while the perpetrator was at the school but the allegation of abuse was made after the perpetrator left the school. To quote from its factum, Canada says that: "Canada is under no current or ongoing obligation to search

2014 ONSC 283 (CanLII)

for and disclose information regarding allegations and criminal convictions of alleged POIs where the allegations were made after the POI's term at the IRS concluded."

[217] That narrow interpretation makes little sense and is contrary to the reading of the letter and spirit of the IAP provisions of the IRSSA read all together. In particular, it is inconsistent with the provision in Appendix VIII that states that the Adjudicator will be given "any documents mentioning sexual abuse at the residential school in question." The awkward phrase "where such allegations were made while the person was an employee or student" should be read as saying "where the alleged abuse occurred while the person was an employee or student," and Canada should produce documents accordingly.

[218] The above interpretation of Canada's disclosure obligation imposes no new burden. Indeed, the records that Canada has already produced are unlikely to have been based just on allegations made while either the perpetrator or the victim was at the school. In other words, Canada has likely already produced documents that it says that it is not obliged to provide by its narrow and incorrect reading of Appendix VIII. And there is obviously little burden on Canada to produce its copies of the OPP documents and the transcripts already in its possession. In its factum, Canada notes that it where it had notice of a criminal conviction in respect of a former employee of St. Anne's it has searched for information about the criminal conviction and has disclosed conviction information on many (it says a majority) of claims.

[219] In my opinion, the factual record for this RFD shows that based on its unduly narrow interpretation of its obligations, Canada has not adequately complied with its disclosure obligations with respect to the St. Anne's Narrative and with respect to the POI Reports for St. Anne's.

4. If the Court has Jurisdiction to Order Canada to Produce the OPP Documents and other Documents for the IAP, How, if at all, Should that Jurisdiction be Exercised?

[220] As explained above, the court has the jurisdiction to remedy Canada's non-compliance with the IRSSA. There are four sources of jurisdiction and all are ample to enforce the IRSSA without amending the agreement or imposing new burdens on the parties.

[221] The court should exercise its jurisdiction to fix the problems raised by the Applicants RFD.

[222] I, therefore, order Canada to produce the OPP documents in its possession, the transcripts concerning incidents of abuse at St. Anne's and such other documents that do comply with the proper reading and interpretation of Canada's disclosure obligations under Appendix VIII to those preparing the Narratives and the POI Reports.

[223] To be clear, the order of the court is to produce documents, including transcripts, already in the possession of Canada and to continue to produce other documents in the same manner as it has in the past; i.e., it should continue to provide records of convictions, etc. as it has in the past. The documents may then be disclosed to Claimants at no expense to them in accordance with the directives of the IAP.

2014 ONSC 283 (CanLII)

5. May the Court Direct the Re-opening of Settled IAP Claims on the Grounds of Canada's Breach of its Disclosure Obligations?

[224] The above orders should resolve any problems associated with Canada's failure to comply with its disclosure obligations concerning the Narratives and POI Reports for St. Anne's, but the Applicants' RFD raises the question of whether the court may direct the re-opening of settled IAP claims on the grounds of Canada's breach of its disclosure obligations.

[225] In my opinion, the answer to this question is yes. The court does have the jurisdiction to re-open settled claims but that jurisdiction must be exercised on a case-by-case basis.

[226] If truth and reconciliation is to be achieved and if nous le regrettons, we are sorry, nimitataynan, niminchinowesamin, mamiattugut, is to be a genuine expression of Canada's request for forgiveness for failing our Aboriginal peoples so profoundly, the justness of the system for the compensation for the victims must be protected. The substantive and procedural access to justice of the IRSSA, like any class action, must also be protected and vouched safe. The court has the jurisdiction to ensure that the IRSSA provides both procedural and substantive access to justice.

[227] This is not to say that Canada is not entitled to put the Claimants to the proof of their claims under the IAP, it is rather to say that Canada must comply with the requirements of the IAP and if it does not do so, the court has the jurisdiction to have the IAP done right both procedurally and substantively.

[228] This is also not to say that any breach of Canada's disclosure obligations will necessarily lead to a re-opening of a settled claim. Each case will have to be decided on its own merits and a variety of factors may have to be considered in any given case including some demonstration that the prejudice from non-disclosure was more than a theoretical miscarriage of justice. The court's jurisdiction to re-open a claim will be a rare or extraordinary jurisdiction.

[229] For all the parties and participants in the IAP, there obviously was a great deal of angst associated with the Applicants' asking whether settled claims can be re-opened with the threat of setting back the progress made and being made to complete the IAP.

[230] I think the fears are likely overblown because the Narratives and the POI Reports as they have already been produced may have been adequate for the purposes of the particular Claimant or the Claimant may have been properly compensated in any event. Better Narratives and better POI Reports may have made it easier for Claimants to prove their claims, but the Claimants may have persuaded the adjudicator to the correct result in any event. It needs to be recalled that the IAP was never intended to have the amount of disclosure of court proceedings and was designed to be an inquisitorial system to facilitate the expedited resolution of the claims. It is to be noted that the court's jurisdiction to re-open claims will be an extraordinary jurisdiction.

[231] However, be that as it may be, as Justice Winkler noted at para. 12 in *Baxter v. Canada (Attorney General) supra,* that once the court is engaged it cannot abdicate its responsibilities to ensure that the IRSSA operates in the way it was intended by the parties to operate. The parties to the IRSSA intended the IAP to provide genuine access to justice for the Claimants.

[232] Thus, I conclude that the court does have the jurisdiction to re-open a settled IAP claim but whether a claim should be re-opened will depend upon the circumstances of each particular case.

2014 ONSC 283 (CanLII)

6. Does the Court have Jurisdiction to Order the OPP to Produce its St. Anne's Documents for the IAP?

[233] The production order made above was an order only against Canada. The next question is does the court also have the jurisdiction to make an order directly against the OPP.

[234] Although the OPP is not a party to the IRSSA, in my opinion, the court has the same four sources of jurisdiction to order the OPP to produce its St. Anne's documents for the IAP.

[235] Outside of the context of the IRSSA, in Ontario, when the OPP is a non-party to a proceeding and a party to the action or application wishes production of documents from the OPP, the normal course for the party is to bring a motion under rule 30.10, which rule specifically addresses production from a non-party. In addition, where Crown Briefs are part of the documents in the possession of the OPP, the procedure out in *D.P. v. Wagg* (2002), 61 O.R. (3d) 746 (Div. Ct.) at 753-4; aff'd (2004), 71 O.R. (3d) 229 (C.A.) must be followed. Under the *Wagg* procedure, in order to preserve Crown privilege or public interest immunity, the documents in the Crown brief are not produced unless the prosecutor and police investigators consent or the court determines when and whether any or all of the contents of the brief should be produced: *P. (D.) v. Wagg*; *G. (N.) v. Upper Canada College,* supra; *College of Physicians and Surgeons of Ontario v. Peel Regional Police* (2009), 98 O.R. (3d) 301 (Div. Ct.).

[236] Thus, in the context of the IRSSA, with the above four sources of jurisdiction, in my opinion, the court has the jurisdiction to make an order directly against the OPP to produce the documents in its possession.

7. If the Court has Jurisdiction to Order the OPP to Produce its St. Anne's Documents for the IAP, How, if at all, Should that Jurisdiction Be Exercised?

[237] Since I have already ordered Canada to produce the OPP documents in its possession for the purpose of preparing Narratives and POI Reports, it may seem redundant to ask whether the court should exercise its jurisdiction against the OPP, a non-party. However, the question is not redundant because it seems that Canada does not have all of the OPP's documents that would be relevant to the preparation of the IAP Narratives and POI Reports.

[238] Thus, the court's jurisdiction should be exercised to obtain these relevant documents and the question becomes how should the court's jurisdiction be exercised?

[239] For the purposes of the RFDs before the court, it is not necessary to describe what test should be applied to determine whether the court should exercise its jurisdiction to make an order against a non-party. As noted earlier in this decision, describing a test is not necessary, because there is no doubt about the relevance of the documents, and, in any event, the OPP does not oppose the production of the documents in its possession provided that its privilege and privacy concerns are addressed.

[240] Therefore, subject to the procedure that I shall describe next, I order the OPP to produce its St. Anne's documents to Canada as part of Canada's obligation to search for and collect documents and to prepare POI reports and narratives. It will then be for Canada to disclose the documents to Claimants in accordance with the directives of the IAP.

2014 ONSC 283 (CanLII)

[241] As for a procedure to protect privacy and privilege, any concerns can be addressed by the OPP providing a list of the documents for which it makes claims or privilege or immunity from production. Canada or an Applicant can then request that the court - or to be more precise, the court's lawyer under the IRSSA – to review the documents and determine the merits of the claim of privilege or immunity from production. In this last regard, it should be recalled that under the Implementation Orders, the Court Counsel's duties shall be as determined by the Courts.

[242] In other words, if they arise, the court's lawyer will assume the role of a master of the court and determine the claims of privilege in accordance with the established jurisprudence. The court lawyer's decision may be appealed to an administrative judge under the IRSSA.

8. May the Court Give Directions as to How Documentary Evidence and Transcripts from Criminal and Civil Proceedings Should Be Utilized in the IAP?

[243] As described above, the Applicants' Request for Directions asks that the court give directions as to how the documentary evidence and transcripts from criminal and civil proceedings should be utilized in the IAP.

[244] In my opinion, these parts of the Applicants' RFD go too far, and the court does not have the jurisdiction to, in effect, interfere with or appropriate how the adjudicators carry out their adjudicative assignment under the IRSSA.

[245] What the Applicants are seeking is for the court to take back and claim as its own the role of the adjudicators. What the Applicants seek goes beyond administering or implementing the IAP and amounts to rewriting the agreement to have the court and not the adjudicator determine what can be done with the evidence presented to the adjudicator.

[246] As I explain earlier in these Reasons for Decision, the court's jurisdiction is constrained and has its limits. I agree with Canada's and the Chief Adjudicator's arguments that the Applicants' RFD requests would disrupt and impede the IAP and replace it with something that the parties did not bargain for. I conclude that the Applicants' requests for evidentiary rulings go far beyond what the court has the jurisdiction to do.

[247] Accordingly, I shall not make the requested evidentiary directions.

F. THE APPLICANTS' REQUEST FOR COSTS FOR LEGAL FEES

[248] The last matter to consider is the Applicants' request for costs on a substantial indemnity basis to the Applicants' Counsel and also costs paid to Mushkegowuk Council and to the affiants who delivered affidavits for this Request for Directions.

[249] In my opinion, the court's jurisdiction to award costs in a RFD proceeding is a plenary discretion and includes awarding costs on a substantial indemnity basis. I say that the court's costs jurisdiction under the IRSSA is a plenary jurisdiction because, in my opinion, in administering the IRSSA, the court would be guided but not governed by the jurisprudence that regards a partial indemnity as normative and a substantial indemnity award as punitive. In other words, under the IRSSA, there may be other reasons to justify an award of substantial or full indemnity costs.

2014 ONSC 283 (CanLII)

[250] The court's jurisdiction to award costs in a RFD is separate and apart from the provisions of the IRSSA that govern legal fees for the IAP and is not a way to circumvent those provisions.

[251] In the case at bar, the Commission and the Applicants properly resorted to the RFD procedure to ensure compliance with the IRSSA. Subject to the details of the services provided and disbursements incurred, I conclude that the court has the jurisdiction to award the Commission and the RFD costs as part of the RFD procedure and this jurisdiction can and should be exercised in the circumstances of this case to indemnify the Applicants and the Commission for the legal expenses and disbursements associated with bringing forward their RFDs.

[252] To be more precise, the Applicants and the Commission are entitled to claim costs for the legal services that identified that there was a problem associated with the operation of the IRSSA and also for the legal services associated with the RFD designed to find a solution for the problem. This award of costs is not a way to circumvent the regime for costs for the IAP; rather, it is an award made to implement and to enforce the IRSSA.

G. CONCLUSION

[253] My conclusions about the Requests for Directions are set out above. Orders should be issued accordingly.

[254] As noted above, there is jurisdiction to award costs for the RFDs and I shall be awarding costs to at least the Commission and the Applicants. I will consider making awards with respect to the others who participated in the RFDs.

[255] If the parties cannot agree with respect to costs, they may make submissions in writing all of which are to be exchanged and delivered within 60 days of the release of these Reasons for Decision.

____

Perell, J.

Released: January 14, 2014

2014 ONSC 283 (CanLII)

CITATION: *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283
COURT FILE NO.: 00-CV-129059

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, et al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, et al.

Defendants

REASONS FOR DECISION

Perell, J.

Released: January 14, 2014

2014 ONSC 283 (CanLII)

TAB 7

Fontaine et al. v. The Attorney General of Canada et al.
[Indexed as: Fontaine v. Canada (Attorney General)]

Ontario Reports

Ontario Superior Court of Justice,

Perell J.

August 6, 2014

122 O.R. (3d) 1 | 2014 ONSC 4585

2014 ONSC 4585 (CanLII)

Case Summary

Civil procedure — Class proceedings — Settlement — Administration — Chief adjudicator of Independent Assessment Process ("IAP") under Indian Residential Schools Settlement Agreement and Truth and Reconciliation Commission ("TRC") bringing requests for directions about fate of documents produced and prepared for IAP which contained narratives about what happened at residential schools — TRC and chief adjudicator having standing — Requests not premature — Court having jurisdiction to hear requests and to direct how IAP documents were to be retained, archived or destroyed — IAP documents confidential and subject to implied undertaking — Court ordering that documents be destroyed after retention period of 15 years and that claimants be notified of their right to choose to have redacted documents transferred to National Research Centre for Truth and Reconciliation.

Class actions by Aboriginals who attended Indian residential schools led to the Indian Residential Schools Settlement Agreement ("IRSSA"). The parties agreed to establish an Independent Assessment Process ("IAP") to pay claimants compensation for claims of sexual abuse, serious physical abuse and other wrongful acts suffered by them when they were students at residential schools. Claimants were required to disclose private and intimate personal information, and were assured that the personal information provided was confidential, although it could be provided to the authorities for certain purposes, such as criminal prosecutions and child welfare cases. The parties also agreed to establish a Truth and Reconciliation Commission ("TRC") to create a historical record of the residential school system. The chief adjudicator of the IAP and the TRC each brought a request for directions about what was to happen to documents produced and prepared for the IAP which contained narratives about what happened at the residential schools.

Held, the documents should be destroyed after a 15-year retention period.

The order approving the IRSSA provided that the parties, class counsel, certain named individuals and groups, and "such other . . . entity as this Court may allow" could apply for directions in respect of the implementation, administration or amendment of the IRSSA. The chief adjudicator and the TRC had standing to bring the requests as "such other . . . entity as this Court may allow" to apply for directions. The requests were not premature. The court had

jurisdiction to hear the requests and to direct how the IAP documents were to be retained, archived or destroyed. The IAP documents were not court records or government records. [page2]The court's jurisdiction extended over Canada's possession of the IAP documents even if they were government records. The court could order the destruction of the documents for three reasons. First, as a matter of contractual interpretation, destruction was what the parties agreed to, and the court could enforce in rem the parties' bargain. Second, the IAP documents were subject to the implied undertaking. It would be a breach of the implied undertaking for Canada as a party to the IRSSA to provide the IAP documents to the TRC, the National Research Centre for Truth and Reconciliation ("NCTR"), or Library and Archives Canada. The court could enforce the implied undertaking by requiring the destruction of the documents. Third, the IAP documents were subject to the law governing a breach of confidence, and in the circumstances, the appropriate remedy to prevent a breach of confidence was to destroy the documents. The destruction order should be subject to a 15-year retention period, during which residential school survivors would be notified of their right to choose to transfer redacted documents to the NCTR instead of having them destroyed.

2014 ONSC 4585 (CanLII)

Cases referred to

Andersen Consulting v. Canada, [2001] F.C.J. No. 57, [2001] 2 F.C. 324, 199 F.T.R. 150, 9 C.P.C. (5th) 245, 102 A.C.W.S. (3d) 1052 (T.D.); Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, [2006] O.J. No. 4968, 40 C.P.C. (6th) 129, 153 A.C.W.S. (3d) 1044 (S.C.J.); Canada (Information Commissioner) v. Canada (Minister of National Defence), [2011] 2 S.C.R. 306, [2011] S.C.J. No. 25, 2011 SCC 25, 416 N.R. 105, 2011EXP-1524, J.E. 2011-834, 331 D.L.R. (4th) 513, 201 A.C.W.S. (3d) 425; Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission), [2007] F.C.J. No. 1113, 2007 FCA 272, 283 D.L.R. (4th) 513, 367 N.R. 307, 60 C.C.E.L. (3d) 178, [2008] 2 F.C.R. 509, 70 Admin. L.R. (4th) 62, 160 A.C.W.S. (3d) 202; Fontaine v. Canada (Attorney General) (2013), 114 O.R. (3d) 263, [2013] O.J. No. 406, 2013 ONSC 684, [2013] 2 C.N.L.R. 172, 50 Admin. L.R. (5th) 283, 225 A.C.W.S. (3d) 962 (S.C.J.), consd

Other cases referred to

Aita v. Silverstone Towers Ltd. (1978), 19 O.R. (2d) 681, [1978] O.J. No. 3362, 86 D.L.R. (3d) 439, 4 B.L.R. 92, [1978] 2 A.C.W.S. 97 (C.A.); Apotex Fermentation Inc. v. Novopharm Ltd., [1998] M.J. No. 297, 162 D.L.R. (4th) 111, [1998] 10 W.W.R. 455, 129 Man. R. (2d) 161, 42 C.C.L.T. (2d) 133, 80 C.P.R. (3d) 449, 80 A.C.W.S. (3d) 1062 (C.A.); Attorney General of Belize v. Belize Telecom Ltd., [2009] UKPC 10 (P.C.); Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142, [1999] S.C.J. No. 6, 167 D.L.R. (4th) 577, 235 N.R. 30, [1999] 5 W.W.R. 751, J.E. 99-317, 117 B.C.A.C. 161, 59 B.C.L.R. (3d) 1, 42 B.L.R. (2d) 159, 83 C.P.R. (3d) 289, 85 A.C.W.S. (3d) 166, varg [1996] B.C.J. No. 1813, 138 D.L.R. (4th) 682, [1996] 9 W.W.R. 609, 79 B.C.A.C. 56, 23 B.C.L.R. (3d) 326, 29 B.L.R. (2d) 14, 69 C.P.R. (3d) 22, 65 A.C.W.S. (3d) 78 (C.A.), varg [1994] B.C.J. No. 1191, [1994] 8 W.W.R. 727, 93 B.C.L.R. (2d) 318, 48 A.C.W.S. (3d) 161 (S.C.); Canada (Information Commissioner) v. Canada (Immigration and Refugee Board), [1997] F.C.J. No. 1812, 140 F.T.R. 140, 4 Admin. L.R. (3d) 96, 82 C.P.R. (3d) 290, 76 A.C.W.S. (3d) 880 (T.D.); Canada Post Corp. v. Canada (Minister of Public Works), [1995]

F.C.J. No. 241, [1995] 2 F.C. 110, 179 N.R. 350, 30 Admin. L.R. (2d) 242, 60 C.P.R. (3d) 441, 53 A.C.W.S. (3d) 695 (C.A.); Canada Square Corp. v. VS Services Ltd. (1981), 34 O.R. (2d) 250, [1981] O.J. No. 3125, 130 D.L.R. (3d) 205, 15 B.L.R. 89, 11 A.C.W.S. (2d) 443 (C.A.); Canadian Pacific Hotels Ltd. v. Bank of Montreal, [1987] 1 S.C.R. 711, [1987] S.C.J. No. 29, 40 D.L.R. (4th) 385, 77 N.R. 161, 21 O.A.C. 321, 41 C.C.L.T. 1, 4 A.C.W.S. (3d) 299; Coco v. A.N. Clark (Engineers) Ltd., [1969] R.P.C. 41, [1968] F.S.R. 415 (Ch.); Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133, 112 D.L.R. (3d) 49, 32 N.R. 488, [1980] I.L.R. Â1-1176 at 595, 1 A.C.W.S. (2d) 169; [page3][cf2]Dynamic Transport Ltd. v. O.K. Detailing Ltd., [1978] 2 S.C.R. 1072, [1978] S.C.J. No. 52, 85 D.L.R. (3d) 19, 20 N.R. 500, 6 Alta. L.R. (2d) 156, 9 A.R. 308, 4 R.P.R. 208, [1978] 2 A.C.W.S. 72; Fontaine v. Canada (Attorney General), [2014] O.J. No. 195, 2014 ONSC 283, [2014] 2 C.N.L.R. 86 (S.C.J.); Fontaine v. Canada (Attorney General), [2014] M.J. No. 159, 2014 MBQB 113, 305 Man. R. (2d) 242; Fontaine v. Canada (Attorney General), [2012] B.C.J. No. 2351, 2012 BCSC 1671; Fontaine v. Duboff Edwards Haight & Schachter (2012), 111 O.R. (3d) 461, [2012] O.J. No. 3019, 2012 ONCA 471, 295 O.A.C. 127; Frenette v. Metropolitan Life Insurance Co., [1992] 1 S.C.R. 647, [1992] S.C.J. No. 24, 89 D.L.R. (4th) 653, 134 N.R. 169, J.E. 92-453, 46 Q.A.C. 161, 4 C.C.L.I. (2d) 1, [1992] I.L.R. Â1-2823 at 1778, 31 A.C.W.S. (3d) 1256; G. Ford Homes Ltd. v. Draft Masonry (York) Co. (1983), 43 O.R. (2d) 401, [1983] O.J. No. 3181, 1 D.L.R. (4th) 262, 2 O.A.C. 231, 2 C.L.R. 210, 22 A.C.W.S. (2d) 232 (C.A.); Goodman v. Rossi (1995), 24 O.R. (3d) 359, [1995] O.J. No. 1906, 125 D.L.R. (4th) 613, 83 O.A.C. 38, 12 C.C.E.L. (2d) 105, 37 C.P.C. (3d) 181, 56 A.C.W.S. (3d) 267 (C.A.); Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, [2004] S.C.J. No. 70, 2004 SCC 73, 245 D.L.R. (4th) 33, 327 N.R. 53, [2005] 3 W.W.R. 419, J.E. 2004-2156, 206 B.C.A.C. 52, 36 B.C.L.R. (4th) 282, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 135 A.C.W.S. (3d) 2; Hillis Oil and Sales Ltd. v. Wynn's Canada Ltd., [1986] 1 S.C.R. 57, [1986] S.C.J. No. 9, 25 D.L.R. (4th) 649, 65 N.R. 23, J.E. 86-281, 71 N.S.R. (2d) 353, 36 A.C.W.S. (2d) 3; Indian Molybdenum Ltd. v. Canada, [1951] C.C.S. No. 773, [1951] 3 D.L.R. 497 (S.C.C.); International Tools Ltd. v. Kollar, [1968] 1 O.R. 669, [1968] O.J. No. 1071, 67 D.L.R. (2d) 386, 54 C.P.R. 171 (C.A.); Juman v. Doucette, [2008] 1 S.C.R. 157, [2008] S.C.J. No. 8, 2008 SCC 8, 75 B.C.L.R. (4th) 1, [2008] 4 W.W.R. 1, 50 C.P.C. (6th) 207, EYB 2008-130634, J.E. 2008-501, 290 D.L.R. (4th) 193, 372 N.R. 95, 164 A.C.W.S. (3d) 765; Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc., [2001] 2 S.C.R. 743, [2001] S.C.J. No. 49, 2001 SCC 51, 204 D.L.R. (4th) 331, 274 N.R. 201, J.E. 2001-1735, 14 C.P.C. (5th) 189, REJB 2001-25653, 108 A.C.W.S. (3d) 44; Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83, 61 D.L.R. (4th) 14, 101 N.R. 239, J.E. 89-1204, 36 O.A.C. 57, 44 B.L.R. 1, 26 C.P.R. (3d) 97, 35 E.T.R. 1, 6 R.P.R. (2d) 1, 16 A.C.W.S. (3d) 345; Lavier v. MyTravel Canada Holidays Inc., [2011] O.J. No. 2340, 2011 ONSC 3149, 38 C.P.C. (7th) 65, 204 A.C.W.S. (3d) 718 (S.C.J.); Lax Kw'alaams Indian Band v. Canada (Attorney General), [2011] 3 S.C.R. 535, [2011] S.C.J. No. 56, 2011 SCC 56, 423 N.R. 3, EYB 2011-198020, 2011EXP-3407, J.E. 2011-1898, [2011] 4 C.N.L.R. 346, 62 C.E.L.R. (3d) 1, 338 D.L.R. (4th) 193, [2011] 12 W.W.R. 209, 23 B.C.L.R. (5th) 217, 313 B.C.A.C. 3, 207 A.C.W.S. (3d) 180; Lefebvre v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, 91 D.L.R. (4th) 491, 136 N.R. 40, J.E. 92-783, 53 O.A.C. 200, 40 C.C.E.L. 1, 92 CLLC Â14,022 at 12108 , 33 A.C.W.S. (3d) 256; Liverpool City Council v. Irwin, [1977] A.C. 239, [1976] 2 All E.R. 39, [1976] 2 W.L.R. 562, 32 P. & C.R. 43, 74 L.G.R. 392, [1976] R.V.R. 267, [1976] J.P.L. 427, 13

2014 ONSC 4585 (CanLII)

H.L.R. 38, 238 E.G. 879, [1976] E.G.D. 282 (H.L.); Luxor (Eastbourne) Ltd. v. Cooper, [1941] 1 All E.R. 33, [1941] A.C. 108 (H.L.); McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada, [1981] 2 S.C.R. 6, [1981] S.C.J. No. 60, 125 D.L.R. (3d) 257 at 258, 37 N.R. 190, [1981] I.L.R. Â1-1393 at 321, 9 A.C.W.S. (2d) 264; Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, [2005] S.C.J. No. 71, 2005 SCC 69, 259 D.L.R. (4th) 610, 342 N.R. 82, J.E. 2005-2156, 37 Admin. L.R. (4th) 223, [2006] 1 C.N.L.R. 78, 21 C.P.C. (6th) 205, EYB 2005-97906, 143 A.C.W.S. (3d) 957; M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619, [1999] S.C.J. No. 17, 170 D.L.R. (4th) 577, 237 N.R. 334, [1999] 7 W.W.R. 681, J.E. 99-859, 69 Alta. L.R. (3d) 341, 232 A.R. 360, 49 B.L.R. (2d) 1, 44 C.L.R. (2d) 163, 3 M.P.L.R. (3d) 165, REJB 1999-11937, 87 A.C.W.S. (3d) 681; [page4][cf2]Pigott Construction Co. v. W.J. Crowe Ltd., [1963] S.C.R. 238, [1963] S.C.J. No. 18, 38 D.L.R. (2d) 9, affg [1961] O.R. 305, [1961] O.J. No. 537, 27 D.L.R. (2d) 258 (C.A.); Polyresins Ltd. v. Stein-Hall Ltd., [1972] 2 O.R. 188, [1971] O.J. No. 1887, 25 D.L.R. (3d) 152, 5 C.P.R. (2d) 183 (H.C.J.); Prenn v. Simmonds, [1971] 3 All E.R. 237, [1971] 1 W.L.R. 1381 (H.L.); R. v. Marshall, [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55, 177 D.L.R. (4th) 513, 246 N.R. 83, J.E. 99-1800, 178 N.S.R. (2d) 201, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 43 W.C.B. (2d) 383; R. v. Simon, [1985] 2 S.C.R. 387, [1985] S.C.J. No. 67, 24 D.L.R. (4th) 390, 62 N.R. 366, 71 N.S.R. (2d) 15, 23 C.C.C. (3d) 238, [1986] 1 C.N.L.R. 153, 15 W.C.B. 350; R. v. Sundown, [1999] 1 S.C.R. 393, [1999] S.C.J. No. 13, 170 D.L.R. (4th) 385, 236 N.R. 251, [1999] 6 W.W.R. 278, J.E. 99-696, 177 Sask. R. 1, 132 C.C.C. (3d) 353, [1999] 2 C.N.L.R. 289, 86 A.C.W.S. (3d) 1006, 41 W.C.B. (2d) 323; Reardon Smith Line Ltd. v. Hansen-Tangen, [1976] 3 All E.R. 570 (H.L.); Scanlon v. Castlepoint Development Corp. (1992), 11 O.R. (3d) 744, [1992] O.J. No. 2692, 99 D.L.R. (4th) 153, 59 O.A.C. 191, 29 R.P.R. (2d) 60, 37 A.C.W.S. (3d) 563 (C.A.); Seager v. Copydex, Ltd., [1967] 2 All E.R. 415, [1967] 1 W.L.R. 923, [1967] R.P.C. 349, 2 K.I.R. 828, [1967] F.S.R. 211 (C.A.); Skye Properties Ltd. v. Wu (2010), 101 O.R. (3d) 401, [2010] O.J. No. 2933, 2010 ONCA 499, 264 O.A.C. 368, 70 B.L.R. (4th) 16; Slavutych v. Baker, [1976] 1 S.C.R. 254, [1975] S.C.J. No. 29, 55 D.L.R. (3d) 224, 3 N.R. 587, [1975] 4 W.W.R. 620, 75 CLLC Â14,263 at 497, 38 C.R.N.S. 306; Tenatronics Ltd. v. Hauf, [1972] 1 O.R. 329, [1971] O.J. No. 1774, 23 D.L.R. (3d) 60, 4 C.P.R. (2d) 72 (H.C.J.); Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd., [1960] R.P.C. 128, 174 E.G. 1033 (C.A.); Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd., [1967] R.P.C. 375, 174 E.G. 433 (Ch.); Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust (2007), 85 O.R. (3d) 254, [2007] O.J. No. 1083, 2007 ONCA 205, 222 O.A.C. 102, 29 B.L.R. (4th) 312, 56 R.P.R. (4th) 163, 156 A.C.W.S. (3d) 95; Visagie v. TVX Gold Inc. (2000), 49 O.R. (3d) 198, [2000] O.J. No. 1992, 187 D.L.R. (4th) 193, 132 O.A.C. 231, 6 B.L.R. (3d) 1, 97 A.C.W.S. (3d) 124 (C.A.), affg [1998] O.J. No. 4032, 78 O.T.C. 1, 42 B.L.R. (2d) 53, 83 A.C.W.S. (3d) 100 (Gen. Div.); Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, [1997] S.C.J. No. 94, 152 D.L.R. (4th) 1, 219 N.R. 161, [1999] 4 W.W.R. 86, J.E. 97-2111, 123 Man. R. (2d) 1, 3 C.B.R. (4th) 1, 36 C.C.E.L. (2d) 1, 97 CLLC Â210-029, 74 A.C.W.S. (3d) 788

Statutes referred to

Access to Information Act, R.S.C. 1985, c. A-1 [as am.], s. 19

Charter of Human Rights and Freedoms, CQLR, c. C-12, ss. 4, 9

2014 ONSC 4585 (CanLII)

2014 ONSC 4585 (CanLII)

Civil Code of Quebec, C.C.Q.-1991, ss. 3, 35, 36

Class Proceedings Act, 1992, S.O. 1992, c. 6 [as am.]

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 74 [as am.]

Criminal Code, R.S.C. 1985, c. C-46

Library and Archives Canada Act, S.C. 2004, c. 11 [as am.], s. 12, (1)

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B [as am.]

National Archives of Canada Act, R.S.C. 1985, c. 1 (3rd Supp.) [rep. by S.C. 2004, c. 11, s. 55]

Privacy Act, R.S.C. 1985, c. P-21, s. 8(3) [as am.]

Authorities referred to

Assembly of First Nations, Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools (Ottawa: Assembly of First Nations, 2004)

Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, Social Sciences and Humanities Research Council of Canada, Tri-Council Policy Statement: Ethical Conduct of Research Involving Humans (Ottawa: Interagency Secretariat on Research Ethics, 2010) [page5]

Morden, John, The Law of Civil Procedure in Ontario, 2nd ed. (Markham, Ont.: LexisNexis, 2014)

REQUESTS for directions.

Julian N. Falconer, Julian K. Roy and Junaid K. Subhan, for Truth and Reconciliation Commission.

Joanna Birenbaum, for National Centre for Truth and Reconciliation.

William C. McDowell, Jonathan E. Laxer and Susan E. Ross, for chief adjudicator of the Indian Residential Schools Adjudication Secretariat (Canada).

Paul Vickery, Catherine Coughlan and Brent Thompson, for Attorney General of Canada.

Charles M. Gibson and Ian Houle, for Sisters of St. Joseph of Sault Ste. Marie.

Stuart Wuttke, for the Assembly of First Nations (in writing).

W.R. Donlevy, Q.C., and Janine L. Harding, for twenty-four Catholic entities.

Pierre-L. Baribeau, for nine Catholic entities.

Peter R. Grant, Diane Soroka and Sandra Staats, for independent counsel.

2014 ONSC 4585 (CanLII)

PERELL J.: —

A. Introduction

[1] Can and should this court order that documents that contain information about what happened at the Indian residential schools be destroyed?

[2] My answer to this question is: yes, destruction, but only after a 15-year retention period, during which the survivors of the Indian residential schools may choose to spare some of their documents from destruction and instead have the documents with redactions to protect the personal information of others transferred to the National Research Centre for Truth and Reconciliation ("NCTR").

[3] During the 15-year retention period, there shall be a court-approved notice program to advise the survivors of their choice to transfer some of the documents instead of having the documents destroyed.

B. Overview

[4] Under the Indian Residential Schools Settlement Agreement ("IRSSA"), the parties agreed to establish an Independent Assessment Process ("IAP") to pay claimants compensation for claims of sexual abuse, serious physical abuse and other [page6]wrongful acts suffered by them when they were students at Indian residential schools.

[5] Under the IRSSA, the parties also agreed to establish a Truth and Reconciliation Commission ("TRC") to create a historical record of the residential school system and ensure its legacy is preserved and made accessible to the public for future study and use.

[6] The chief adjudicator of the IAP and the TRC each bring a request for directions ("RFD") about what is to happen to documents produced and prepared for the IAP ("IAP documents"), which contain narratives about what happened at the schools.

[7] The chief adjudicator seeks an order that the IAP documents be destroyed. In the other RFD, although it was not its initial request, the TRC seeks an order that the IAP documents, which it regards as an irreplaceable historical record of the Indian residential school experience, be archived at Library and Archives Canada ("LAC"), which is a part of the Government of Canada.

[8] The chief adjudicator and the TRC both seek a direction that a notice program be developed to inform claimants that some of their IAP documents, particularly redacted memorialization transcripts of the IAP hearing, may be archived at the National Research Centre for Truth and Reconciliation ("NCTR"), if the claimant consents.

[9] The NCTR, another invention of the IRSSA, submitted that it is well positioned to protect the privacy interests of all affected parties and able to ensure that the perspectives of Aboriginal peoples are brought to bear on the preservation of the documents.

[10] The Sisters of St. Joseph of Sault Ste. Marie (the "Sisters of St. Joseph") bring a motion to quash the RFDs on the grounds that the TRC and the chief adjudicator do not have standing to bring the RFDs.

[11] Further, the Sisters of St. Joseph submit that it is the responsibility of the National Administration Committee ("NAC"), another agency of the IRSSA, to determine disputes involving document production, disposal and archiving, and, thus, the RFDs are premature and the RFDs should be redirected to the NAC. The chair of the NAC stated, however, that the court should decide the RFDs.

[12] The Assembly of First Nations ("AFN"), twenty-four Catholic entities (the "twenty-four Catholic entities"), nine Catholic entities (the "nine Catholic entities"), the Sisters of St. Joseph, and "independent counsel", lawyers who acted for IAP claimants, support a court order for destruction of the IAP documents. [page7]

[13] The Government of Canada ("Canada"), which possesses a complete set of the IAP documents, opposes the destruction of the IAP documents which it says it possesses and, without interference, controls as government records.

[14] Canada's plan for the IAP documents is to have Aboriginal Affairs and Northern Development Canada ("AANDC"), a government department, retain the documents for a retention period and then after the retention period, AANDC will transfer to LAC those IAP documents identified as having "historical or archival value". The transfer will include the adjudicators' decisions and perhaps the transcripts of the IAP hearings. Under Canada's plan, the remaining IAP documents will remain under the control of AANDC, but these documents eventually will be destroyed at a time of Canada's choosing.

[15] I pause here to note that it is a matter of concern raised by AFN and several others that pursuant to the Access to Information Act, R.S.C. 1985, c. A-1 and the Privacy Act, R.S.C. 1985, c. P-21, LAC would be able to release information to third parties in specific circumstances, for example, for research for statistical purposes, for native claims or in the public interest. Further, the regulations to the Privacy Act provide that an individual's personal information that is transferred to LAC by a government institution may be disclosed for research purposes 110 years after the birth of the individual. This concerns the AFN because many IAP claimants are elderly and although personal information would not be disclosed while they are alive, personal information about them would be disclosed during the lifetimes of their children and grandchildren.

[16] Canada supports the idea that a notice program be developed to inform claimants that their IAP documents may be archived at the NCTR if the claimant consents. To facilitate obtaining consents, Canada is prepared to undertake a court-approved program. However, Canada says that the court has no jurisdiction to order a notice program. Canada's undertaking is entirely gratuitous.

[17] For the reasons that follow, I grant the chief adjudicator's request that the IAP documents be destroyed. I make in rem -- against the world -- the following order. It is ordered that (a) with

2014 ONSC 4585 (CanLII)

the redaction of personal information about alleged perpetrators or affected parties and with the consent of the claimant, his or her IAP application form, hearing transcript, hearing audio recording and adjudicator's decision may be archived at the NCTR; (b) Canada shall retain all IAP documents for 15 years after the completion of the IAP hearings; (c) after the retention period, Canada shall destroy all IAP [page8]documents; (d) any other person or entity in possession of IAP documents shall destroy them after the completion of the IAP hearings.

[18] Further, I direct that the TRC or the NCTR may give claimants notice that with the claimant's consent his or her IAP application, hearing transcript, hearing audio recording and adjudicator's decision may be archived at the NCTR. The archiving of the document would be conditional on any personal information about alleged perpetrators or affected parties being redacted from the IAP document. The court will settle the terms of the notice program at another RFD hearing that may be brought by the TRC or the NCTR.

[19] By way of overview, my conclusions are as follows:

- The TRC and the chief adjudicator have standing, and the court has the jurisdiction to hear the two RFDs.
- The IAP documents are governed by the IRSSA, the Class Proceedings Act, 1992, S.O. 1992, c. 6, the court's jurisdiction as a superior court to fashion remedies, the implied undertaking, and the common law and equity.
- The IAP documents are neither court records nor government records.
- The court's jurisdiction extends over Canada's possession of the IAP documents even if they are government records.
- The IAP documents are confidential and private documents both as a matter of contract and as matter of the common law and equity.
- Although the court does not have the jurisdiction to determine how the IAP documents may be used by the IAP adjudicators, the court has the in rem (against the world) jurisdiction to direct how the IAP documents may be retained, archived or destroyed after the IAP is completed. This jurisdiction exists regardless of whom has the custody or possession of the IAP documents.
- The court's jurisdiction to control the disposition of the IAP documents arises from three complementary sources, namely (1) the court's jurisdiction to interpret, to enforce and to administer the IRSSA; (2) the court's jurisdiction with respect to the implied undertaking not to use documents produced in a litigious proceeding for a collateral purpose; and (3) the court's jurisdiction to remedy a breach of confidence. [page9]
- As a matter of contract interpretation, the IRSSA promises the destruction of the IAP documents after a retention period during which the confidentiality of the documents can be abrogated only by court order for such matters as criminal proceedings or child protection proceedings. The court has the jurisdiction to determine a reasonable retention period which in this case would be 15 years.

2014 ONSC 4585 (CanLII)

2014 ONSC 4585 (CanLII)

- The court can and should exercise its jurisdiction to make a destruction order subject to a retention period of 15 years.

- Further, the court should order that a notice program be developed to notify claimants that provided that the personal information about alleged perpetrators or affected parties is redacted, the claimant's IAP documents may be archived at the NCTR.

- The destruction order is not an amendment to the IRSSA and would safeguard against a breach of the agreement and against breaches of confidence.

- The destruction order is necessary (a) to protect the confidentiality and privacy of the information contained in the IAP documents; and (b) to prevent a serious risk to the administration of the IAP and the IRSSA.

- A notice plan to encourage voluntary delivery by claimants of IAP documents to the TRC and the NCTR with redactions to protect the personal information of others is an excellent idea, but involuntary disclosure of the IAP documents would be a grievous betrayal of trust, a breach of the IRSSA, and it would foster enmity and new harms, not reconciliation.

- Destroying the IAP documents is more likely to foster reconciliation, one of the goals of the IRSSA, but more to the point, destruction of the IAP documents is what the parties contracted for under the IRSSA and destruction of the IAP documents is what the common law and equity require.

- The destruction of the documents, however, should not come too soon because a survivor of the Indian residential schools may change his or her mind about the destruction of the IAP documents. It is the survivor's story to tell or not tell and it is the survivor's individual decision that must be respected. [page10]

C. Methodology

[20] The two RFDs, the motion to quash, the competing plans and proposals for the IAP documents raise a labyrinth of profound issues, some legal, some ethical, some political, some collective, and some intensely private and personal. The court's jurisdiction to respond to the RFDs is limited to its legal sphere. The court has no plenary jurisdiction to make a different settlement for the parties.

[21] By way of methodology, I will in these reasons for decision chart a route through the labyrinth of legal issues to the conclusion-exit that the court may and should direct the destruction of the IAP documents, some immediately after the completion of the IAP, and the others after a 15-year retention period.

[22] It is in the nature of a labyrinth that its pathways meander, and it is in the nature of a labyrinth that it is difficult to find one's way out or to reach the exit. The route that I will chart has the following major guideposts or headings:

-- Introduction

-- Overview

-- Methodology

- Dramatis Personae, the Infrastructure of the IRSSA and Canada's Roles
-

-- The Arguments of the IRSSA Parties and Participants

-- Evidentiary Background

- Principles of Contractual Interpretation Applicable to the IRSSA
-

-- Factual Background

-- The IRSSA

-- The TRC

-- The NCTR

-- The IAP procedure

-- Nature, categorization and the confidentiality of the IAP documents

-- Canada's custody and control of the IAP documents and its plan for them [page11]

-- The historical value and reliability of the IAP documents

-- The history of the RFDs

-- Discussion and Analysis

-- Introduction

-- The TRC's and the chief adjudicator's standing

-- What can and should happen to the IAP documents?

-- Conclusion

[23] Before getting underway, it is helpful to explain why several topics, some legal and some factual, must be explored in the discussion that follows, and it is helpful to say something about the reasons behind the ordering of the topic headings.

2014 ONSC 4585 (CanLII)

[24] In the case at bar, a better understanding of what is important in the factual account and to the eventual analysis is achieved by outlining the parties' legal arguments, the sources of their evidence, and the principles of contract interpretation before describing the facts and before undertaking the legal analysis.

[25] A fundamental component of the discussion and analysis will involve an interpretation of the IRSSA. As is normal in contract interpretation cases, it is necessary to understand the contractual nexus. It is a canon of contract interpretation that while evidence of negotiations and of the parties' subjective intent is not admissible to interpret the contract, in interpreting a contract, the court may have regard to the surrounding circumstances, that is, the factual background and the purpose of the contract: Canada Square Corp. v. VS Services Ltd. (1981), 34 O.R. (2d) 250, [1981] O.J. No. 3125 (C.A.); Prenn v. Simmonds, [1971] 3 All E.R. 237, [1971] 1 W.L.R. 1381 (H.L.); Reardon Smith Line Ltd. v. Hansen-Tangen, [1976] 3 All E.R. 570 (H.L.).

2014 ONSC 4585 (CanLII)

[26] In the case at bar, the factual nexus involves understanding the circumstances that led to the signing of the IRSSA, and the factual nexus includes the purposes of the negotiations, the subjective aspirations and needs of the negotiating parties and what they respectively had to sacrifice in order to achieve a settlement.

[27] All the parties to the RFDs, several of whom were not in existence at the time of the negotiations, led evidence about what the negotiators intended to achieve and what they had to sacrifice in signing the IRSSA. I have considered this evidence for the purpose of understanding the factual nexus of the IRSSA and also to understand the factual nexus of the various court [page12]orders that followed the parties' agreement. I have used the evidence solely for the purpose of understanding the surrounding circumstances and the goals to be achieved by the IRSSA.

[28] I do not use the evidence of the subjective intentions of the parties to supersede the language finally adopted by the parties.

[29] In these reasons for decision, before describing the complex factual background, it is necessary and helpful to identify and to describe the dramatis personae of the IRSSA, some of whom are creatures of the IRSSA itself, and to describe the elaborate infrastructure of the IRSSA.

[30] Particularly important to understanding these reasons for decision are the multifarious emanations of Canada and the different roles played by Canada. This is important because some of the parties' arguments focus or pivot on the nature of Canada's custody and control of the IAP documents. For instance, Canada's argument relies on its own nature as a governing institution and on the nature of its possession of the IAP documents. Metaphorically speaking, Canada views its handling of the IAP documents as its right hand (AANDC) handing the documents to its left hand (LAC) and it says that it always has control over its government records.

[31] In a few instances, as I proceed through the sections of these reasons for decision, it shall be convenient to decide a legal issue before the analysis and discussion portion of these reasons for decision. For example, I shall discuss the principles of contract interpretation applicable to the IRSSA before I discuss the factual background and before I explain the analysis of the RFDs.

D. Dramatis Personae, the Infrastructure of the IRSSA and Canada's Roles

1. Dramatis Personae and the infrastructure of the IRSSA

[32] There are four major components to the IRSSA. First, Canada placed $1.9 billion into a trust fund to fund payments of the "Common Experience Payment" ("CEP") to class members who resided at an Indian residential school during the class period. Based on residence eligibility, a class member receives $10,000 for the first year and $3,000 for each additional year at any acknowledged residential school. Second, the IRSSA established the Independent Assessment Process ("IAP") under which class members who suffered physical or sexual abuse at an Indian residential school may claim compensation commensurate with the seriousness of their injuries. Third, the IRSSA [page13]established the Truth and Reconciliation Commission ("TRC") with a mandate to create an historical record of the residential school system to be preserved and made accessible to the public for future study. The fourth component is that the class members released their legal claims in exchange for the benefits of the IRSSA. The releases extended to Canada and the church entities who were the named defendants. The releases also extended to the defendants' employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns.

[33] Nine provincial and territorial superior courts certified the class action and approved the IRSSA. The judges of the nine courts are designated as supervising judges. Supervising judges can hear applications to add institutions to the list of Indian residential schools for the purpose of CEP and IAP claims. Among other things, supervising judges hear appeals from decisions of the NAC with respect to eligibility for the CEP. Supervising judges hear RFDs, and the judges have administrative and supervisory jurisdiction over the IRSSA.

[34] Two of the supervising judges are administrative judges. Under the court administration protocol, the two administrative judges receive and evaluate RFDs and determine whether a hearing is necessary, and if so, in which jurisdiction.

[35] The judges, however, cannot amend the IRSSA in the guise of administrating it. See Fontaine v. Canada (Attorney General), [2014] O.J. No. 195, 2014 ONSC 283 (S.C.J.); Lavier v. MyTravel Canada Holidays Inc., [2011] O.J. No. 2340, 2011 ONSC 3149 (S.C.J.).

[36] Pursuant to the implementation order, court counsel was appointed as legal counsel to assist the courts in their supervision over the implementation and administration of the agreement. Court counsel's duties are determined by the courts. A solicitor-client relationship exists between the supervising judges and court counsel.

[37] Pursuant to the IRSSA implementation order, Crawford Class Action Services was appointed monitor of the IRSSA. The role of the monitor is to receive, on behalf of the supervising courts, all information relating to the implementation or administration of the CEP and the IAP. The monitor is required to take directions from and report to the supervising courts about the implementation and administration of the IRSSA, as directed by the courts.

[38] The National Administration Committee ("NAC") supervises the implementation of the IRSSA. The NAC is comprised of [page14]seven representative members, including Canada, the AFN, Inuit entities, church entities and three representatives of plaintiffs' counsel.

2014 ONSC 4585 (CanLII)

[39] The NAC prepares policy protocols and standard operating procedures. The NAC hears appeals with respect to CEP eligibility. It also determines references from the TRC. To be adopted, NAC decisions require five votes in favour. If five votes are not reached, four NAC members may refer the dispute to the court in the jurisdiction where the dispute arose by way of a reference. Subsection 4.11(14) of the IRSSA stipulates that the unanimous consent of the NAC is required for an amendment to the IRSSA to be considered by the court.

[40] The oversight committee ("OC") is responsible for supervising the IAP. It is comprised of an independent chair (Professor Mayo Moran, who until recently was dean of the University of Toronto's Faculty of Law); and eight other members consisting of two former students, two class counsel representatives, two church representatives and two representatives for Canada. OC decisions require seven votes in favour (with the chair voting) to be adopted. The OC is responsible for the recruitment and oversight of the chief adjudicator, recruitment and appointment of adjudicators, approval of adjudicator training programs, recruitment and appointment of experts for psychological assessments, instructions about the interpretation and application of the IAP, monitoring the implementation of the IAP and making recommendations to the NAC on changes to the IAP as necessary to ensure its effectiveness.

[41] Canada, which is defined in the IRSSA to mean the Government of Canada, was a party defendant to the class actions and individual actions that were settled by the IRSSA. Canada signed the IRSSA. CEP applications are administered and adjudicated at first instance by Canada, as are the applications for reconsideration of CEP eligibility determinations. Canada is a member of the NAC and a member of the OC. Canada is a party to applications to add to the list of Indian residential schools. Canada is the responding party to challenge the claims of IAP claimants through the Settlement Agreement Operations branch ("SAO"), described below, which is another branch of AANDC. Canada, through its department, the AANDC, provides the human resources for the secretariat and the SAO. Canada includes LAC, which is a branch of Canada's public administration. Lawyers from Canada's Department of Justice are sometimes engaged as legal counsel for Canada's various roles under the IRSSA. [page15]

[42] The chief adjudicator, who is appointed pursuant to court Order under the IRSSA, supervises the IAP and the adjudicators that decide IAP applications. The chief adjudicator's decisions are not subject to judicial review since he is an officer of the court and is not exercising a statutory power of decision: Fontaine v. Duboff Edwards Haight & Schachter (2012), 111 O.R. (3d) 461, [2012] O.J. No. 3019, 2012 ONCA 471.

[43] The IAP is administered by the Indian Residential Schools Adjudication Secretariat (the "secretariat"). The secretariat provides secretarial and administrative support for the chief adjudicator. Its mandate is to implement and administer the IAP under the direction of the chief adjudicator.

[44] The secretariat is a branch of AANDC, which is a department of Canada. However, save for specific financial, funding, auditing and human resource matters, the Secretariat is under the direction of the chief adjudicator and independent from the AANDC. The secretariat's employees work in separate office space with separately keyed entrances. The secretariat does utilize AANDC's electronic records system, but it maintains separate paper files from AANDC.

2014 ONSC 4585 (CanLII)

2014 ONSC 4585 (CanLII)

[45] The secretariat began in 2007 as a branch of The Office of Indian Residential Schools Resolution Canada, a government department that, in 2008, integrated with the Department of Indian Affairs and Northern Development which changed its name to AANDC in 2011.

[46] Aboriginal Affairs and Northern Development Canada ("AANDC") is a department of the federal government, i.e., of Canada. As a department of Canada, AANDC is subject to the Library and Archives of Canada Act, S.C. 2004, c. 11 (the "Act"). As noted above, the secretariat is a branch of AANDC but also autonomous with respect to its day-to-day administration of the IAP. As noted immediately below, "SAO" is another branch of AANDC.

[47] The Settlement Agreement Operations Branch ("SAO") is a branch of a section of the AANDC known as the Resolution and Individual Affairs Section ("RIAS"). SAO has possession and control of the IAP documents. It has a complete set of IAP documents. Its possession overlaps with the secretariat's possession and control.

[48] SAO is responsible for representing Canada at IAP hearings, performing and providing Canada's document disclosure obligations to the TRC and in respect to individual IAP claims. RIAS is responsible for paying out compensation for settlements reached under the IAP. [page16]

[49] Library and Archives Canada ("LAC"): Under the Library and Archives Canada Act, LAC is a branch of the federal public administration presided over by a minister and under the direction of the librarian and archivist. Under the Act, "government records" may only be destroyed with the written consent of the librarian and archivist. Government records with historical or archival value as determined by the librarian and archivist must be transferred to LAC.

[50] One of the non-compensatory aspects of the IRSSA was the creation of a Truth and Reconciliation Commission ("TRC"), whose mandate is, in part, to identify sources and create as complete an historical record as possible of the residential school system and its legacy to be preserved and made accessible to the public for future study and use.

[51] To assist the TRC in fulfilling its mandate, the IRSSA provides that Canada and the churches will provide all relevant documents in their possession or control to and for the use of the TRC.

[52] The National Centre for Truth and Reconciliation ("NCTR") was constituted pursuant to art. 12 of Schedule "N" to the IRSSA. The NCTR is mandated to archive and store all records collected by the TRC and other records relating to Indian residential schools. The collections are to be accessible to former students, their families and communities, the general public, researchers and educators.

[53] The Assembly of First Nations ("AFN") plays a political role in advocating on behalf of First Nations. It is a signatory of the IRSSA. It was largely responsible for the creation of the alternative dispute resolution ("ADR"), which was a predecessor or model for the IAP. The AFN is member of the NAC. It has an ongoing interest in protecting the interests of all of the residential school survivors, especially to ensure that the overarching principles of healing and reconciliation are at the forefront of the IRSSA.

[54] The Sisters of St. Joseph of Sault Ste. Marie (the "Sisters of St. Joseph") is a party to the IRSSA. The Sisters of St. Joseph was formed in 1936, and its mission has been charitable

works caring for women and children, the poor, the sick and the elderly, the disabled, and disadvantaged in Northern Ontario. From 1937 to 1968, the Sisters of St. Joseph owned and operated St. Joseph's Boarding School at Fort William, Ontario, which for a time was an Indian residential school.

[55] The twenty-foour Catholic entities, who are parties to the IRSSA, are Les Oeuvres Oblates de l' Ontario; Les Residences Oblates du Quebec; Soeurs Grises de Montreal/Grey Nuns of [page17]Montreal; Sisters of Charity (Grey Nuns) of Alberta; Les Soeurs de La Charite des T.N.O.; Hotel-Dieu de Nicolet; the Grey Nuns of Manitoba Inc.- Les Soeurs Grises du Manitoba Inc.; the Sisters of Saint Ann; Sisters of Instruction of the Child Jesus; the Sisters of Charity of Providence of Western Canada; Immaculate Heart Community of Los Angeles CA; Missionary Oblates- Grand in Province; Les Oblates de Marie Immaculee du Manitoba; Oblates of Mary Immaculate- St. Peter's Province; Order of the Oblates of Mary Immaculate in the Province of British Columbia; La Corporation Episcopale Catholique Romaine de Grouard; Roman Catholic Episcopal Corporation of Keewatin; the Catholic Episcopale Corporation of Mackenzie; Roman Catholic Episcopal Corporation of Prince Rupert; Sisters of Charity Halifax; the Roman Catholic Bishop of Kamloops Corporation Sole; Roman Catholic Episcopal Corporation of Halifax; Sisters of the Presentation; and Roman Catholic Archiepiscopal Corporation of Winnipeg.

[56] The nine Catholic entities, who are parties to the IRSSA, are Les S[pounds]urs de Notre-Dame Auxiliatrice, Les S[pounds]urs de Saint-François d'Assise, L'Institut des S[pounds]urs du Bon-Conseil, also known as Les S[pounds]urs de Notre-Dame du Bon-Conseil de Chicoutimi, Les S[pounds]urs de Saint-Joseph de SaintHyacinthe, Les S[pounds]urs de JésusMarie, Les S[pounds]urs de l'Assomption de la Sainte-Vierge, Les S[pounds]urs de l'Assomption de la Sainte-Vierge de l'Alberta, Les S[pounds]urs Missionnaires du Christ-Roi and Les S[pounds]urs de la Charité de Saint-Hyacinthe. The nine Catholic entities are all private corporations established by an act of the Quebec National Assembly or, with the exception of the defendant Les S[pounds]urs de l'Assomption de la Sainte-Vierge de l'Alberta, which was established by an act adopted by the Legislative Assembly of Alberta.

[57] Under the IRSSA, independent counsel are plaintiffs' lawyers who signed the IRSSA agreement, excluding legal counsel who signed in their capacity as counsel for the AFN or for the Inuit representatives or counsel and excluding members of the Merchant Law Group or members of any of the firms of the National Consortium.

2. Canada's roles under the IRRSA

[58] The parties to these RFDs have made the nature of Canada's possession of the IAP documents a critical factor in their arguments, and it is, therefore, necessary to have an understanding of Canada's multifarious roles under the IRSSA and its position with respect to its custody and control of the IAP documents.

[59] By way of analogy, Canada's role in the IAP seems to be that of some sort of trinity where there are three emanations [page18]from one omnipotent unity. In the context of the IAP, first, Canada has possession of the IAP documents through SAO, which is the branch of AANDC that is defending its interests in the IAP and challenging the claimants. Simultaneously, second and third, Canada has possession of the IAP documents through the split personality of the

2014 ONSC 4585 (CanLII)

secretariat, another branch of AANDC but also autonomous of Canada for the purposes of the IAP's adjudication function, where the secretariat is under the command of the chief adjudicator, who is a court-appointed official recruited by the OC.

[60] Perhaps the kabbalah, which has ten emanations of the godhead, is a better analogy than the trinity because Canada's emanations, sometimes conflicting emanations, are present throughout the IRSSA. As discussed further in the discussion of the facts below, it was a fact of life of the negotiations and of their outcome, the IRSSA, that Canada, which was providing billions of dollars of funding for the settlement, would have a role in administering the settlement funds and providing the infrastructure for the CEP and IAP while at the same time having a right to challenge entitlements.

[61] For example, Canada administers the CEP, but it is the first level of appeals for CEP claimants, and it is a member of the NAC, which hears the second level of appeals. The CEP and IAP payments depend upon a person attending an Indian Residential School, and Canada can oppose applications to have a school added to the list of Indian residential schools. Canada has an obligation to provide documents for IAP claims, but Canada has a right to challenge the claimants. Canada has an obligation to provide documents for the TRC, but it has a right to challenge the scope of that obligation. Canada seeks to archive the IAP documents at LAC, which is another emanation of Canada.

[62] I foreshadow here to say, as discussed again in the analysis and discussion part of these reasons for decision, in my opinion, the fact that Canada happens to have in its various emanations and for various purposes physical possession of the IAP documents does not oust the court's jurisdiction over the IAP documents.

[63] Justice Winkler made it clear that something special and unique was engaged by Canada's role under the IRSSA when he emphasized that ultimately the court would control the administration of the IAP and the IRSSA. In Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, [2006] O.J. No. 4968 (S.C.J.), Justice Winkler stated, at paras. 37 and 38 of his judgment, which approved the IRSSA: [page19]

> I preface my comments with a caution that the court has a general concern whenever a defendant proposes to change roles and become the administrator of a settlement. There must be a clear line of demarcation between the defendant as litigant and the defendant as neutral administrator. Further, there must be an express recognition by the defendant proposed as administrator that the settlement is being implemented and administered in a court supervised process and not subject to the direction of the defendant either directly or indirectly. The difficulty in drawing the distinction, and adhering to the underlying concept, is the reason why the court must be especially circumspect when considering the approval of a defendant as administrator. The line is even more blurred in this case where Canada, as defendant, will still be an instructing respondent in respect of individual claims made under the IAP.
> . . . In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government from unfounded conflict of

2014 ONSC 4585 (CanLII)

> interest claims. . . . Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government.

[64] In Fontaine v. Canada (Attorney General) (2013), 114 O.R. (3d) 263, [2013] O.J. No. 406, 2013 ONSC 684 (S.C.J.), a RFD brought by the TRC, Justice Goudge held that the TRC is a unique creation and while a federal government department with respect to the application of federal privacy legislation, it was not a federal department for all purposes.

2014 ONSC 4585 (CanLII)

[65] Canada is obviously not a creation of the IRSSA but, in my opinion, its role in the IRSSA and the IAP is a creation of the IRSSA and subject to the court's jurisdiction over the administration of a class action settlement. The court's jurisdiction extends to government records if that is what the IAP documents also happen to be.

[66] I will return to these topics later in these reasons for decision.

E. Principles of Contractual Interpretation Applicable to the IRSSA

[67] The IRSSA is a contract, and as a contract, its interpretation is subject to the norms of the law of contract interpretation.

[68] The primary goal of contract interpretation is to give effect to the intentions of the parties at the time the contract was made: Skye Properties Ltd. v. Wu (2010), 101 O.R. (3d) 401, [2010] O.J. No. 2933, 2010 ONCA 499, at para. 79. The rules of contract interpretation direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement: [page20] Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133.

[69] In searching for the intent of the parties at the time when they negotiated their contract, the court should give particular consideration to the terms used by the parties, the context in which they are used and the purpose sought by the parties in using those terms: Frenette v. Metropolitan Life Insurance Co., [1992] 1 S.C.R. 647, [1992] S.C.J. No. 24. Provisions should not be read in isolation but in harmony with the agreement as a whole: McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada, [1981] 2 S.C.R. 6, [1981] S.C.J. No. 60; Hillis Oil and Sales Ltd. v. Wynn's Canada Ltd., [1986] 1 S.C.R. 57, [1986] S.C.J. No. 9; Scanlon v. Castlepoint Development Corp. (1992), 11 O.R. (3d) 744, [1992] O.J. No. 2692 (C.A.).

[70] Generally, words should be given their ordinary and literal meaning: Indian Molybdenum Ltd. v. Canada, [1951] C.C.S. No. 773, [1951] 3 D.L.R. 497 (S.C.C.). However, if there are alternatives, the court should reject an interpretation or a literal meaning that would make the provision or the agreement ineffective, superfluous, absurd, unjust, commercially unreasonable or destructive of the commercial objective of the agreement: Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., supra; Scanlon v. Castlepoint Development Corp., supra; Aita v. Silverstone Towers Ltd. (1978), 19 O.R. (2d) 681, [1978] O.J. No. 3362 (C.A.); Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust (2007), 85 O.R. (3d) 254, [2007] O.J. No. 1083, 2007 ONCA 205, at para. 24.

[71] As noted earlier in these reasons for decision, it is a canon of contract interpretation that while evidence of negotiations and of the parties' subjective intent is not admissible to interpret the contract, in interpreting a contract, the court may have regard to the surrounding

2014 ONSC 4585 (CanLII)

circumstances, that is, the factual background and the purpose of the contract: Canada Square Corp. v. VS Services Ltd., supra; Prenn v. Simmonds, supra; Reardon Smith Line v. Hansen-Tangen, supra.

[72] After a careful review of the background to the contract, a court will imply terms to a contract based on the presumed intention of the parties and to give the contract business efficacy: Canadian Pacific Hotels Ltd. v. Bank of Montreal, [1987] 1 S.C.R. 711, [1987] S.C.J. No. 29; M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619, [1999] S.C.J. No. 17; Dynamic Transport. Ltd. v. O.K. Detailing Ltd., [1978] 2 S.C.R. 1072, [1978] S.C.J. No. 52; G. Ford Homes Ltd. v. Draft Masonry (York) Co. (1983), 43 O.R. (2d) 401, [1983] O.J. No. 3181 (C.A.); [page21]Pigott Construction Co. v. W.J. Crowe Ltd., [1961] O.R. 305, [1961] O.J. No. 537 (C.A.), affd [1963] S.C.R. 238, [1963] S.C.J. No. 18; Luxor (Eastbourne) Ltd. v. Cooper, [1941] 1 All E.R. 33, [1941] A.C. 108 (H.L.).

[73] In Canadian Pacific Hotels Ltd. v. Bank of Montreal, supra, the Supreme Court identified three situations where terms will be implied. See, also, M.J.B. Enterprises Ltd. v. Defence Construction, supra; Lefebvre v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, 91 D.L.R. (4th) 491; and Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, [1997] S.C.J. No. 94, at para. 137.

[74] In the first situation, which is not pertinent to the case at bar, a term is implied as a matter of an established custom or usage.

[75] In the second situation, which is pertinent, a term is implied as a matter of presumed intention; i.e., the court adds what the parties know and would, if asked, unhesitatingly agree to be part of the bargain. A term is implied as a matter of presumed intention because it is necessary to give business efficacy to a contract. The test of the implication is one of necessity. As to a test of necessity, Lord Wilberforce said in Liverpool City Council v. Irwin, [1977] A.C. 239, [1976] 2 All E.R. 39 (H.L.), at p. 254 A.C.: "such obligation should be read into the contract as the nature of the contract itself requires, no more, no less: a test, in other words, of necessity".

[76] In the third situation, which is not pertinent to the case at bar, a term is implied as an incident of particular class of relationship. The implication in this third situation does not depend upon any presumed intention, but the implication still must meet the test of necessity.

[77] In determining whether the parties would have intended an unexpressed term to be a part of their contract, the court must be careful not to impose its own view of what reasonable parties would or ought to have intended to give their contract business efficacy. In this regard, in M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., supra, at para. 29, Justice Iacobucci stated for the Supreme Court:

> A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in The Law of Contract in Canada (3rd ed. 1994), at p. 476:
>
> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in

> with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied. [page22]

[78] An important point that I take from this passage is that in the process of determining whether to imply a term to a contract, the court is involved in a process of interpreting the contract that the parties actually signed; it is not determining the presumed intent of what either party acting reasonably ought to have intended when he or she signed the contract. Thus, as Justice Iacobucci notes, if there is evidence of a contrary intention in the actual contract on the part of either party, an implied term may not be found.

[79] In deciding whether to imply a contract term, the court does not look for an objective intent of what a reasonable contracting party ought to have intended. The court is not engaged in an exercise of making a better contract for one or both of the parties. The court remains engaged in an exercise of interpreting the actual contract signed by the parties. As Lord Hoffman explained in Attorney General of Belize v. Belize Telecom Ltd., [2009] UKPC 10 P.C.), at para. 21: "There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

[80] Earlier in his judgment, Lord Hoffman explained how the implication of terms can form part of the interpretative act of determining the meaning of the parties' contract. He stated, at paras. 16-18:

> The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed . . . It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.
>
> The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the [page23]court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

2014 ONSC 4585 (CanLII)

[81] The IRSSA itself contains two principles of construction and interpretation. Article 1.04 states that the contra proferentem rule does not apply, and art. 18.06 provides that the settlement agreement is the entire agreement between the parties. These articles provide as follows:

> 1.04 No Contra Proferentem
>
> The parties acknowledge that they have reviewed and participated in settling the terms of this Agreement and they agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting parties is not applicable in interpreting this Agreement.
>
> 18.06 Entire Agreement
> This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and cancels and supersedes any prior or other understandings and agreements between the Parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement.

[82] In Fontaine v. Canada (Attorney General), supra, Justice Goudge discussed the principles of interpretation applicable to the IRSSA. He stated, at para. 68:

> The principles of interpretation applicable to the Settlement Agreement are straightforward. The text of the agreement must be read as a whole. The plain meaning of the words used will be important as will the context provided by the circumstances existing at the time the Settlement Agreement was created. A consideration of both is necessary to reach a proper conclusion about the meaning of the contested provisions.

[83] During the argument of the RFDs, the chief adjudicator submitted that the honour of the Crown was an interpretative principle in interpreting the IRSSA notwithstanding that the IRSSA was not a treaty between Canada and its Aboriginal peoples and notwithstanding that parties not bound by the honour of the Crown; i.e., the church entities were signatories of the IRSSA.

[84] I agree with the chief adjudicator's submission, but it is necessary to make it very clear that the honour of the Crown is only operative in the case at bar, as an interpretative principle; it is not operative as a source of obligations independent of the IRSSA. The honour of the Crown principle is helpful in interpreting the IRSSA, but it cannot add or subtract or change the promises made by the parties as expressed by the IRSSA. [page24]

[85] The honour of the Crown is a fundamental concept that exists as a source of obligations independent of fiduciary duties and treaty obligations: Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 51. The honour of the Crown is a general principle that underlies all of the Crown's dealings with Aboriginal peoples, but it cannot be used to call into existence undertakings that were never given: Lax Kw'alaams Indian Band v. Canada (Attorney General), [2011] 3 S.C.R. 535, [2011] S.C.J. No.56, 2011 SCC 56, at para. 13.

[86] The honour of the Crown infuses the processes of treaty making and treaty interpretation, and in making and applying treaties, the Crown must act with honour and integrity, avoiding

2014 ONSC 4585 (CanLII)

even the appearance of sharp dealing: Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, [2004] S.C.J. No. 70, 2004 SCC 73, at paras. 19 and 35. Interpretations of treaties and statutory provisions which have an impact upon treaty or Aboriginal rights are approached in a manner which maintains the integrity of the Crown, which is assumed to honour its promises without any sharp dealing: R. v. Simon, [1985] 2 S.C.R. 387, [1985] S.C.J. No. 67, at para. 41; R. v. Marshall, [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55, at paras. 49-51.

2014 ONSC 4585 (CanLII)

[87] In interpreting the terms of a treaty, the honour of the Crown is always at stake, and the court's approach is to assume that the Crown was acting honourably, and the court will imply terms to make honourable sense of the treaty arrangement to produce a result that accords with the intent of both parties although unexpressed: R. v. Simon, supra; R. v. Sundown, [1999] 1 S.C.R. 393, [1999] S.C.J. No. 13; R. v. Marshall, supra, at paras. 14, 43-44.

[88] The IRSSA is not a treaty between Canada and its Aboriginal peoples, but it is at least as important as a treaty.

[89] During argument, Canada submitted that the honour of the Crown had nothing to do with the negotiation and interpretation of the IRSSA. I agree that the honour of the Crown is not an operative principle in the IRSSA, but I disagree that it is not an interpretative principle for an agreement in which Canada makes an attempt to make peace with its Aboriginal peoples.

[90] If an honourable interpretation and a dishonourable interpretation are both available, obviously it would be wrong to interpret the IRSSA in a way that does dishonor to Canada. As an interpretative principle, the honour of the Crown would also apply as an interpretative principle to the other signatories of the IRSSA, who can be taken to have intended an honourable interpretation over a dishonourable one. [page25]

F. The Arguments of the IRSSA Parties and Participants

1. Introduction

[91] In this section of my reasons for decision, I shall summarize the arguments of the parties. As noted above in the methodology, I shall continue to postpone the description of the facts, to first describe the arguments of the parties that arise from those facts. I think this is helpful because it makes for a better understanding about what facts are important and why they are important.

[92] The essential subject of the two RFDs is the question of what is to happen to the IAP documents. Although the positions morphed during the course of argument, generally speaking, the IRSSA parties and participants provide two answers to that question.

[93] One group answers that with some exceptions, the IAP documents be destroyed. In this group are the chief adjudicator, the AFN, the twenty-four Catholic entities, the nine Catholic entities, the Sisters of St. Joseph and independent counsel.

[94] A second group answers that the IAP documents belong to Canada as government records and after a period of retention, some IAP documents will be destroyed and some will be archived at LAC. In the second group are Canada, the TRC and the NCTR.

[95] In the sections that follow, I shall summarize the arguments that the parties rely on for their competing answers to the fundamental question of what is to happen to the IAP documents.

2. Canada's argument

[96] Canada submits that the IAP documents are in its possession and control because the secretariat and the SAO of RIAS are branches of AANDC and these branches have actual possession of the documents, which are government records. Canada submits that since the IAP documents were collected and created by AANDC, they are government records and subject to government regulation. Canada submits that no provisions of the IRSSA entitle anybody else to decide the manner of the retention or disposition of its IAP documents.

[97] More to the point, Canada submits that the plain meaning of the IRSSA is that Canada controls the disposition of the IAP documents and that the parties knew at the time of negotiating and agreed and the claimants were subsequently told (when they applied for IAP payments) that some of the IAP documents would be archived at LAC. [page26]

[98] Canada says that the IAP documents are "government records" and, as such, they are governed by the Library and Archives Canada Act, supra, which stipulates that government records cannot be destroyed without the consent of LAC. Canada notes that the librarian and archivist has identified certain IAP documents as having historical or archival value and pursuant to the Act, these documents must be transferred to LAC.

3. The argument of the chief adjudicator

[99] The chief adjudicator says that it has the standing to bring its RFD.

[100] Relying on Canada (Information Commissioner) v. Canada (Minister of National Defence), [2011] 2 S.C.R. 306, [2011] S.C.J. No. 25, 2011 SCC 25 and Andersen Consulting v. Canada, [2001] F.C.J. No. 57, [2001] 2 F.C. 324 (T.D.), the chief adjudicator submits that the IAP documents are not "government records".

[101] The chief adjudicator submits that the IAP documents are court records and that the court has the jurisdiction to order how they should be dealt with after the completion of the IAP.

[102] The chief adjudicator submits that the IAP documents are confidential and that the interpretation of the IRSSA is that after a retention period, the IAP documents should be destroyed. The chief adjudicator also submits that the IAP documents are subject to the implied undertaking and to the principles about breach of confidence that empower the court to order the destruction of the IAP documents.

[103] The chief adjudicator argues that the redacted transcripts may be archived at the NCTR only with the claimant's informed consent and otherwise the IAP documents should be destroyed. He submits that the IRSSA does not provide authority for either Canada or the TRC to archive the highly sensitive and confidential materials that were gathered in the IAP.

4. The argument of the AFN

2014 ONSC 4585 (CanLII)

[104] The AFN argues that the IRSSA is more than a private agreement; it is a resolution of a complex political, cultural and collective dispute and courts should not second-guess the accord reached by the parties. It submits that the IAP documents are deemed to be in the custody of the court, although Canada also has possession and control of the IAP documents.

[105] Relying on Fontaine v. Canada (Attorney General), [2014] M.J. No. 159, 2014 MBQB 113, at paras. 54-55, AFN submits that Canada's agreement with LAC pursuant to the Library and Archives of Canada Act, supra, which would see documents transferred to LAC, is not enforceable because the [page27]consent of claimants was not obtained. AFN asserts that privacy legislation that would apply at LAC falls short of the promises of confidentiality made to claimants and persons of interest under the IRSSA.

[106] AFN notes that to the extent that documents are not transferred to the LAC, then the standard practice is that the documents would be destroyed. The AFN argues that given the standard practice, the IRSSA would need to contain very clear language to authorize the archiving of IAP documents at LAC.

5. The argument of the Sisters of St. Joseph

[107] The Sisters of St. Joseph bring a motion to quash the RFDs of the TRC and the chief adjudicator on the grounds that both lack standing to bring the RFDs, or alternatively, the RFDs are premature because the TRC and the chief adjudicator have not exhausted the dispute resolution mechanisms mandated by the IRSSA.

[108] The Sisters of St. Joseph submit that the RFDs involve document production, disposal and archiving, and thus must be considered first by the NAC. The Sisters of St. Joseph request a declaration that any dispute regarding documents be referred to the NAC.

[109] The Sisters of St. Joseph submit that it was always the intention of the parties to the IRSSA that the IAP documents be kept confidential and that it was the intention of the parties that the IAP documents be destroyed upon the completion of the IAP and that under the IRSSA, the IAP documents do not form part of TRC's mandate.

[110] The Sisters of St. Joseph submit that to change the rules at the end of the game would result in a breach of the IRSSA and the terms of the IAP, be a breach of trust and a breach of confidence and a violation of the procedural rights and natural justice of all parties to the IRSSA. It submits that if the IAP documents were made available to the public, even in the future, great harm would be caused to the religious orders and to the claimants, all of whom participated in or chose not to participate in the IAP on the basis of confidentiality.

6. The argument of twenty-four Catholic entities

[111] The twenty-four Catholic entities submit that the IAP documents are subject to the law of absolute privilege, the implied undertaking and the law of confidential communications, all which should prevent disclosure of the documents.

[112] The twenty-four Catholic entities submit that the proposed archiving of IAP documents at LAC (or NCTR) would [page28]be a grave breach of confidence and a violation of quasi-constitutional privacy rights that would cause harm not only to the former students and the

2014 ONSC 4585 (CanLII)

alleged perpetrators but also to the reputations of the organizations that negotiated the IRSSA and it would undermine the IAP.

[113] The twenty-four Catholic entities submit that as a matter of contract interpretation, the IRSSA does not authorize the IAP documents, which contain highly confidential and private information to be unilaterally distributed for archival. They submit that ordering the documents to the NCTR would require an amendment to the IRSSA. The twenty-four Catholic entities oppose any notice plan to claimants and assert that a notice plan is beyond what was contracted for in the IRSSA.

[114] Given the significance of the privacy considerations, the twenty-four Catholic entities submit that the only way to ensure that there will be no privacy breaches is to destroy the entire collection of the IAP documents in accordance with the IRSSA.

2014 ONSC 4585 (CanLII)

7. The argument of nine Catholic entities

[115] The nine Catholic entities submit that they provided sensitive personal information believing that its confidentiality would be protected and that they never would have agreed to the IRSSA without the assurances of confidentially. The nine Catholic entities submit that the proper interpretation of the IRSSA is that IAP documents be destroyed after the completion of the IAP.

[116] The nine Catholic entities submit that anything but the destruction of the IAP documents would contravene the IRSSA and that the communication of any information about the Nine Catholic Entities' members or former members to the TRC would be a breach of contract, a breach of confidence, a breach of faith and a violation of civil law and privacy legislation.

8. The argument of independent counsel

[117] Independent counsel submits that the IAP documents are in the court's possession, but to the extent that the IAP documents are in Canada's possession, Canada is bound by the IRSSA, confidentiality agreements and the implied undertaking pursuant to which Canada may not use the IAP documents for any purpose other than for the IAP.

[118] Independent counsel submits that Canada's plans for the documents would be contrary to the IRSSA and the court cannot authorize those plans because to do so would be to amend the IRSSA which the court cannot do. [page29]

[119] Independent counsel submits that the IRSSA was designed to assure claimants that they controlled their own stories about their experiences at the Indian residential schools. The IRSSA protects the confidentiality of the IAP documents and that confidentiality is essential, because without it, claimants would not feel comfortable enough to make claims for the wrongs they suffered. The involuntary transfer of IAP documents to any archive would be a gross betrayal of trust and devastatingly harmful to the claimant, his or her family, his or her descendants, and his or her community.

9. The argument of the TRC

[120] The TRC originally submitted that the IAP documents are in the possession and control of Canada and Canada is obliged by the production provisions of the IRSSA to produce the IAP

documents, which are "relevant documents" to the TRC. It originally submitted that the production of the IAP documents to the TRC is mandated by the IRSSA. The TRC abandoned this argument during the hearing of the RFDs.

[121] The TRC's argument, at the hearing of the RFDs, aimed at preserving some of the IAP documents from destruction.

[122] The TRC was interested in the IAP documents because it is charged with creating as complete an historical record as possible of the IRS system and legacy and the IAP documents are allegedly the most complete and detailed set of documents in existence that describe the IRS system and legacy.

[123] The TRC submits that the IAP documents are an essential resource to ensure that challenges to truth and memory can be met, and that the experiences of residential school survivors can never be denied or forgotten. It submits that it is only by preserving this history that Canadian society can ensure that the tragedy of the Indian residential schools will never be repeated.

[124] The TRC argued that the IAP documents should be retained by Canada for a 30-year period and that a notice plan be developed to advise claimants of their rights to preserve their stories at the NCTR.

10. The argument of the NCTR

[125] The NCTR adopted the TRC's submissions and was both eager and anxious that a notice program be developed to preserve IAP documents and the claimants' stories.

[126] It was anxious to preserve IAP documents because it regarded them as an invaluable and irreplaceable history of the Indian residential schools. [page30]

G. Evidentiary Background

[127] The evidentiary background to these RFDs was provided by the following affiants:

- Amy Abrahamson, a paralegal for Peter Grant who is counsel for independent counsel.
-

- Rev. Robert J. Britton, chancellor for the Archdiocese of Halifax--Yarmouth.
-

- G.C., a former student of an Indian residential school and an IAP claimant.
-

-- Peter Dinsdale, the chief executive officer of the AFN.

2014 ONSC 4585 (CanLII)

- Jane Doe, a former student of an Indian residential school and an ADR claimant and then an IAP claimant.
- Tim Eryou, the chief information officer for AANDC and with a few intervals away has been at what is now AANDC in various capacities since 1990.
- David Flaherty, professor emeritus of history and law at the University of Western Ontario and a privacy consultant. He is a member of the External Advisory Committee to the Privacy Commissioner of Canada and a member of the External Advisory Committee to the Information and Privacy Commissioner of British Columbia.
- Larry Phillip Fontaine, O.C., the primary named representative plaintiff in the class action that was settled by the IRSSA and who was instrumental in the negotiations of the settlement. He is a former national chief of the AFN.
- Percy Gordon, a former student of an Indian residential school who has received a CEP and an IAP payment.
- N.B.H., a former student of an Indian residential school and an IAP claimant.
- Daniel Ish, the former chief adjudicator of the IAP (September 2007--July 2013).
- Gregory Juliano, the general counsel and director of fair practices and legal affairs at the University of Manitoba with oversight of university's Access and Privacy Office. He was the university's chief negotiator of the agreements that established the NCTR. [page31]
- E.K., a former student of an Indian residential school and an IAP claimant.
- Fred Kelly, a former student of an Indian residential school and an IAP claimant.
- Sister Bonnie MacLellan, a member of the Sisters of St. Joseph and an eyewitness to the negotiations that led to the IRSSA. From 2002 to 2012, she was the general superior of the congregation.
- Tom McMahon, general counsel to the TRC and formerly its executive director. Mr. McMahon was cross-examined.
- F. Mark Rowan, a lawyer who has acted for persons of interest or alleged perpetrators in connection with the IAP and the dispute resolution process that the IAP replaced.
- David Russell, the director of SAO (West) and former director of the National Research and Analysis Directorate within RIAS of AANDC and before that he worked within Indian Residential Schools Resolution Canada.
- Daniel Shapiro, the current chief adjudicator of the IAP and a former deputy chief adjudicator.

2014 ONSC 4585 (CanLII)

- John Trueman, the senior policy and strategic advisor of the secretariat. Before joining the secretariat, from 2003 to 2006, he worked on the alternative dispute resolution that pre-dated the IAP. He reports to the executive director, who reports to the chief adjudicator. Mr. Trueman was cross-examined.
-

- D.W., a former student of an Indian residential school and an IAP claimant.
-

-- Eric Wagner, a lawyer who represents claimants.

2014 ONSC 4585 (CanLII)

H. Factual Background

1. The Indian Residential Schools Settlement Agreement ("IRSSA")

[128] Between the 1860s and 1990s, more than 150,000 First Nations, Inuit and Métis children were required to attend Indian residential schools operated by religious organizations with the funding of Canada. Approximately half of the students of the Indian residential schools are no longer living to tell their stories. [page32]

[129] In 1999, the Sisters of St. Joseph were given notice that approximately 110 former students at the St. Joseph's Boarding School alleged that they had been victims of psychological, physical and sexual abuse while attending the school.

[130] In 2000, about 154 former students represented by one law firm filed civil claims in connection with their mistreatment at St. Anne's Indian Residential School against Canada and others.

[131] Following the launch of other individual and class actions across the country by former students of the Indian residential schools, in November 2003, Canada established a National Resolutions Framework, which included a compensation process called the alternative dispute resolution process. The ADR process was the predecessor or the model for the IAP in the IRSSA.

[132] After the launch of the numerous court proceedings, there were extensive negotiations to settle the individual actions and the class actions.

[133] In November 2004, the AFN published a report entitled, Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools (Ottawa: Assembly of First Nations, 2004). In this report, it was stressed that compensation, alone, would not achieve the goals of reconciliation and healing. A two-pronged approach would be required: (1) compensation; and (2) truth telling, healing and public education.

[134] In May 2005, a political agreement was signed between Canada and AFN that a settlement would be negotiated that would include compensation, healing, and a truth and reconciliation process. A few months later, the AFN became a plaintiff by launching a class action against Canada, and Mr. Fontaine, a former national chief was named as proposed Representative plaintiff.

[135] For the plaintiffs and representative plaintiffs, one of the purposes of the negotiations was to achieve compensation for the students of the Indian residential schools and their families. In this regard, it should not be lost sight of that the plaintiffs and representative plaintiffs were advancing claims for compensation for wrongs beyond physical and psychological harms.

Certain claims were being brought for the collective interests of the Aboriginal peoples, who alleged that they had lost language and cultural and spiritual identity.

[136] In achieving the goal of compensation, a problem for plaintiffs and representative plaintiffs was that the claims were intensely private and difficult for the claimants to describe in public. Further, unfortunately some claimants had been [page33]victimized by other students at the Indian residential schools. Moreover, some claimants were both victims and perpetrators of child abuse in the toxic environment of the Indian residential schools. Thus, privacy and confidentiality concerns were an extremely important part of the factual nexus of the negotiations.

[137] Mr. Fontaine, who it may be noted has not himself publically described his personal experiences at the Indian residential schools, explained why confidentiality and privacy were essential elements in the IRSSA, especially in claims involving student-on-student abuse (32 per cent of the claims). He deposed:

> During the course of those negotiations, I argued that the names of the children who abused other children should not be disclosed to the adjudicators in the IAP process. The reason I argued this was because I knew myself from my own community and other aboriginal communities across Canada that both abusers and abused lived in the same communities and that there would be ongoing trauma within an entire community if these individuals were identified by name.
> The solution to this and other problems was the confidentiality of the IAP process to ensure that no person could identify a perpetrator by name outside of the IAP process and everybody had to agree to that at the beginning of the IAP process. Furthermore, nobody except the survivor would have access to the story of the survivor. The IAP hearings were to be held in the strictest confidence.

[138] Privacy and confidentiality was also extremely important to the defendants. If true, the allegations against the church entities that had managed the Indian residential schools for Canada would show their members and employees to be criminals, sinners and moral degenerates, and if untrue, the allegations were grave slanders.

[139] Further, privacy and confidentiality were essential to the defendants negotiating the IRSSA, because they were being asked to give up the right to test the allegations made against them in court. As explained in the affidavit of Sister MacLellan:

> When entering into the Settlement Agreement, the Congregation and its members gave up a number of their fundamental rights which would normally be used to test the veracity of abuse claims in a court of law. These rights included the right to face the accusers, the right to cross-examine the accusers and other witnesses, and the right to appeal.
> In consideration for the loss of said fundamental rights, the Settlement Agreement contemplates that the Independent Assessment Process . . . , and the documents arising from the IAP, will remain confidential, which confidentiality would only be breached with the consent of all interested parties/ persons.

[140] Sister MacLellan deposed that because many of the persons who worked at the Indian residential schools were deceased, elderly or sick, it would not be easy or possible for them to

2014 ONSC 4585 (CanLII)

defend [page34]themselves. For this reason, the Sisters of St. Joseph and other religious entities were steadfast in ensuring that the terms of the IRSSA about the IAP provided for the confidentiality of all information.

[141] Sister MacLellan deposed that if the Sisters of St. Joseph, none of whose members had ever been charged criminally, had been told that there was any possibility that the information collected for the IAP would become available to the public, it would not have signed the IRSSA.

[142] The evidence of the twenty-four Catholic entities was that they agreed that the IAP would be a private and confidential process in exchange for abandoning their ordinary procedural rights to test the veracity of the abuse claims in a court of law. They said that they agreed to give up the rights to face their accuser, to challenge the allegations, to appeal, and to give full answer and defence to the serious allegations that besmirched the alleged perpetrator's reputation and the historical reputation of the church group.

[143] In the bringing of individual court actions and in particular in the bringing of the class actions, there, however, was a countervailing and collective purpose that went against the goal of achieving privacy and confidentiality for individual claimants and for defendants.

[144] Mr. Dinsdale, the chief executive officer of AFN, deposed:

> Further, a truth commission would address the fact that the Indian Residential School system was a systemic violation of human rights that had a significant impact on the collective rights of Aboriginal peoples. It was not a matter to be adjudicated through individual claims litigated on an individual basis or through an alternative dispute resolution process. No amount of money could compensate for the magnitude and systemic nature of the effects of the Residential School system. Truth telling was sought to be achieved through the TRC.

[145] As explained by Mr. Fontaine, the plaintiffs, and particularly the representative plaintiffs, desired that the history of the residential schools tragedy be known and preserved for future generations and never repeated. Mr. Fontaine testified, however, that the negotiators understood that some balance needed to be achieved between individual privacy and public awareness. The balance would be achieved by making the disclosure of personal information consensual. Mr. Fontaine deposed:

> In negotiating the TRC it was always understood that the individual stories of survivors would only become part of that record if survivors themselves decided to speak to the TRC and advise that they wished their story to be made public. [page35]

[146] As noted above in the discussion of the infrastructure of the IRSSA, another and different factor in the negotiations was the reality that Canada wished to have a role in administering the billions of dollars of settlement funds it was contributing, but there was a need to establish an independent tribunal to adjudicate claims for compensation and to allow Canada to challenge claimants. The outcome was that with certain safeguards, Canada was allowed both an administrative role and also an adversarial one. There was an obvious conflict of interest that had to be managed.

[147] As deposed by the former chief adjudicator, Daniel Ish, to preserve the independence of adjudicators in their role as neutral administrators of the IAP and arbiters of compensation, it

2014 ONSC 4585 (CanLII)

was important to establish the secretariat as an autonomous branch, especially because Canada, represented by AANDC, was a defendant in every IAP claim.

[148] Thus, both the administrative and the adversarial roles were assumed by branches of Canada's AANDC, and as will have been apparent from the discussion above and as will be seen again in the discussion below, this situation was problematic from the outset and has continued to be problematic.

[149] With these various countervailing forces at work, the negotiations ultimately led to the multiple-court approved settlement of the individual and class actions known as the IRSSA. The IRSSA was signed on May 8, 2006.

[150] The signing parties to the IRSSA were Canada, as represented by the Honourable Mr. Frank Iacobucci; various plaintiffs, as represented by a National Consortium of lawyers, the Merchant Law Group and independent counsel; the AFN; Inuit representatives; the General Synod of the Anglican Church of Canada; the Presbyterian Church of Canada; the United Church of Canada; and 50 Roman Catholic Church entities, including the Sisters of St. Joseph, the nine Catholic entities and the twenty-four church entities.

[151] Under the IRSSA, Canada and the other defendants obtained releases. The IRSSA provides at art. 4.06(g) as follows:

> . . . that the obligations assumed by the defendants under this Agreement are in full and final satisfaction of all claims arising from or in relation to an Indian Residential School or the operation of Indian Residential Schools of the Class Members and that the Approval Orders are the sole recourse on account of any and all claims referred to therein.

[152] The specification of those who were to be released was defined very broadly. "Releasees" was defined as follows:

> "Releasees" means, jointly and severally, individually and collectively, the defendants in the Class Actions and the defendants in the Cloud Class [page36]Action and each of their respective past and present parents, subsidiaries and related or affiliated entities and their respective employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns the definition and also the entities listed in Schedules "B", "C", "G" and "H" of this Agreement.

[153] The ambit of the release was also very broad. Article 11 of the IRSSA stated as follows:

ARTICLE ELEVEN

RELEASES

11.01 Class Member and Cloud Class Member Releases

(1) The Approval Orders will declare that in the case of Class Members and Cloud Class Members:

2014 ONSC 4585 (CanLII)

(a) Each Class Member and Cloud Class Member has fully, finally and forever released each of the Releasees from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including damages, contribution, indemnity, costs, expenses and interest which any such Class Member or Cloud Class Member ever had, now has, or may hereafter have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to an Indian Residential School or the operation of Indian Residential Schools and this release includes any such claim made or that could have been made in any proceeding including the Class Actions or the Cloud Class Action whether asserted directly by the Class Member or Cloud Class Member or by any other person, group or legal entity on behalf of or as representative for the Class Member or Cloud Class Member.

2014 ONSC 4585 (CanLII)

. . . . .

(c) Canada's, the Church Organizations' and the Other Released Church Organizations' obligations and liabilities under this Agreement constitute the consideration for the releases and other matters referred to in Section 11.01(a) and (b) inclusive and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Class Members or and Cloud Class Members are limited to the benefits provided and compensation payable pursuant to this Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims and demands[.]

[154] In their practical effect, the releases redirected plaintiffs and class members in actions against Canada and others to resort to the CEP and IAP as the recourse for their compensatory claims and it directed the survivors to the TRC and NCTR for their collective claims and grievances which would be memorialized in the historical account of their experiences. [page37]

[155] The nine Catholic entities state that they decided to sign the IRSSA for two reasons: (1) to obtain a release from civil liability; and (2) to protect the privacy of their members or former members.

[156] Between December 2006 and January 2007, each of nine courts, representing class members from across Canada issued judgments certifying the class actions and approving the terms of settlement as being fair, reasonable and in the best interests of the class members. Justice Winkler, as he then was, certified the action in Ontario and approved the settlement in reasons reported as Baxter v. Canada (Attorney General), supra.

[157] The approval orders incorporate by reference all the terms of the IRSSA, and the orders provide that the applicable class proceedings laws shall apply in their entirety to the supervision, operation and implementation of the IRSSA. For present purposes, the following terms of the approval orders should be noted:

12. THIS COURT ORDERS that the Agreement, which is attached hereto as Schedule "A", and which is expressly incorporated by reference into this judgment, including the

definitions included therein, is hereby approved and shall be implemented, in accordance with this judgment and any further order of this Court.

13. THIS COURT ORDERS AND DECLARES that this Court shall supervise the implementation of the Agreement and this judgment and, without limiting the generality of the foregoing, may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment.

. . . . .

30. THIS COURT ORDERS AND DECLARES that no person may bring any action or take any proceedings against the Trustee, the Chief Adjudicator, the IAP Oversight Committee, the National Certification Committee, the National Administration Committee, the Chief Adjudicator's Reference Group, the Regional Administration Committees, as defined in the Agreement, or the members of such bodies, the adjudicators, or any employees, agents, partners, associates, representatives, successors or assigns, of any of the aforementioned, for any matter in any way relating to the Agreement, the administration of the Agreement or the implementation of this judgment, except with leave of this court on notice to all affected parties.

31. THIS COURTS DECLARES that the Representative Plaintiffs, Defendants, Released Church Organizations, Class Counsel, the National Administration Committee, or the Trustee, or such other person or entity as this Court may allow, after fully exhausting the dispute resolution mechanisms contemplated in the Agreement, may apply to the Court for directions in respect of the implementation, administration or amendment of the Agreement or the implementation of this judgment on notice to all affected parties, all in conformity with the terms of the Agreement.

. . . . . [page38]

36. THIS COURT DECLARES that the provisions of the applicable class proceedings law shall apply in their entirety to the supervision, operation and implementation of the Agreement and this judgment.

[158] In March 2007, on consent of the parties, the nine courts issued identical approval orders and implementation orders. Both the judgments of the courts and the approval orders provide that the respective courts shall supervise the implementation of the IRSSA and the judgment and may issue such orders as are necessary to implement and enforce the provisions of the agreement and the judgment.

[159] For present purposes, the following term of the implementation order should be noted:

23. THIS COURT ORDERS that the Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement, the judgment dated December 15, 2006 and this order.

2014 ONSC 4585 (CanLII)

[160] In a point that is relevant to the Sisters of St. Joseph's motion to quash the RFDs, the IRSSA provides for dispute resolution mechanisms, and under the IRSSA, the parties agreed to exhaust those mechanisms before making an application for a RFD. Section 18.04 of the IRSSA states:

> Dispute Resolution
>
> 18.04 The parties agree that they will fully exhaust the dispute resolution mechanism contemplated in the Agreement before making any application to the Courts for directions in respect of the implementation, administration or amendment of this Agreement or the implementation of the Approval Orders. Application to the Court will be made with leave of the Courts, on notice to all affected parties, or otherwise in conformity with the terms of the Agreement.

2. The TRC

[161] In order to resolve the arguments of the parties and the RFDs, it is necessary to understand the role of the TRC and to understand its responsibilities with respect to gathering documents and its relationship with the IAP. As will become apparent, the IRSSA's provisions about the TRC are relevant to the interpretation problem of what should happen to the IAP documents.

[162] An important aspect of the IRSSA was the establishment of the TRC. Article 7.01 of the IRSSA stated:

> 7.01 Truth and Reconciliation
>
> (1) A Truth and Reconciliation process will be established as set out in Schedule "N" of this Agreement. [page39]
>
> (2) The Truth and Reconciliation Commission may refer to the NAC for determination of disputes involving document production, document disposal and archiving, contents of the Commission's Report and Recommendations and Commission decisions regarding the scope of its research and issues to be examined. The Commission shall make best efforts to resolve the matter itself before referring it to the NAC.
>
> (3) Where the NAC makes a decision in respect of a dispute or disagreement that arises in respect of the Truth and Reconciliation Commission as contemplated in Section 7.01(2), either or both the Church Organization and Canada may apply to any one of the Courts for a hearing de novo.

[163] Thus, art. 7.01 of the IRSSA provided for the establishment of the TRC and specified that its process and mandate was set out in Schedule "N". For present purposes, the relevant provisions of Schedule "N" are set out in Schedule "A" to these reasons for decision. I have emphasized certain portions that are particularly relevant to resolving the interpretative issues.

3. The NCTR

[164] In order to resolve the arguments of the parties and the RFDs, it is also necessary to understand the role of the NCTR.

2014 ONSC 4585 (CanLII)

[165] The NCTR's mandate, pursuant to Schedule "N" of the IRSSA and the trust and administrative agreements between the TRC and the University of Manitoba, commits the NCTR to continuing the spirit and work of truth and reconciliation.

[166] The NCTR came into being on National Aboriginal Day, June 21, 2013. The NCTR is hosted by the University of Manitoba in partnership with other entities across Canada, including Aboriginal organizations, universities and colleges.

[167] On June 21, 2013, there was a ceremony to mark the signing of the agreement to establish the NCTR. At that time, the Honourable Justice Murray Sinclair, in his remarks, stated:

> The importance of the National Research Centre that is being established here today . . . is that it will be a constant reminder to all Canadians. . . . It will be a reminder to all future Canadians that indeed what we have heard from Survivors in the past ten years or so did happen. We are creating a national memory here. . . . Because we know, if we do not do that, then it will be just a matter of two or three generations from now that most Canadians will not only be able to forget that this occurred, but they will be able to deny that it occurred. And that can never happen, that must never happen, because this is part of what Canada is all about.

[168] Under the administrative agreement, the NCTR's governance structure includes a Governing Circle comprised of a majority of persons who identify as Aboriginal, with specified positions for First Nations, Inuit and Métis representation. The NCTR's governance structure includes a Survivor's Circle comprised of survivors of the residential school system, their [page40]families or their ancestors. The Survivor's Circle provides advice to the Governing Circle, university and partners.

[169] The NCTR is governed in accordance with national and international ethical research and archiving principles, protocols, guidelines and best practices for indigenous and human rights research and archiving, including aboriginal principles of ownership, control, access and possession, protocols for Native American archival materials and the Tri-Council Policy Statement: Ethical Conduct of Research Involving Humans (Ottawa: Interagency Secretariat on Research Ethics, 2010) (particularly the chapter on First Nations, Inuit and Métis peoples of Canada).

[170] In its factum, the NCTR sought to show that it can and will honour and respect the sensitive and private nature of the IAP documents and would protect their confidentiality. It submitted that it has the technological and administrative capacity and expertise to safeguard the IAP documents in compliance with all applicable access and privacy legislation and University of Manitoba standards and NCTR-specific privacy policies, procedures and protocols, as well as any orders made by this court.

[171] The NCTR submitted that it was founded on Aboriginal control and governance and is the most culturally appropriate archive of the IAP documents and its archiving of them would be consistent with the spirit and intent, as well as express terms, of the IRSSA and would ensure that these records were archived in accordance with best practices for indigenous, human rights and truth and reconciliation archiving.

4. The IAP procedure

2014 ONSC 4585 (CanLII)

[172] In order to resolve the arguments of the parties and the RFDs, it is necessary to understand in detail the operation of the IAP with particular attention on how the procedure addresses confidentiality and privacy concerns. Indeed, understanding the IAP process is fundamental to resolving the RFDs now before the court.

[173] The procedure for the IAP is set out in Schedule "D" of the IRSSA. In Fontaine v. Canada (Attorney General), 2012 BCSC 839, at paras. 29-30, Justice Brown described the IAP as follows:

> The IAP begins with an application that appears to serve functions similar to a statement of claim. In the application form, the Claimant provides details of the wrongdoing with dates, places, times, and the Claimant provides information to identify the alleged perpetrator. In the application, the Claimant provides a Narrative in the first person and outlines his or her request for compensation in accordance with the IRSSA. Depending on the nature of the claim for compensation, certain documents must be provided by a Claimant with the application. [page41]

[174] The procedure begins with an application. Appendix I of Schedule "D" explains the application; the appendix states:

APPENDIX I: THE APPLICATION

(a) In applying to the IAP, the Claimant is asked to:

i. List points of claim: indicate by reference to the standards for this IAP each alleged wrong with dates, places, times and information about the alleged perpetrator for each incident sufficient to identify the alleged perpetrator or in the case of adult employees permit the identification of the individual or their role at the school.

ii. Provide a narrative as part of the application. The narrative must be in the first person and be signed by the Claimant and can be both a basis for and a subject of questioning at a hearing.

iii. Indicate by reference to the Compensation Rules established for this IAP the categories under which compensation will be sought and, where appropriate, indicate that compensation will be sought for consequential harm and/or opportunity loss above level 3, or for actual income loss.

iv. Include authorizations so that the defendants may produce their records as set out in Appendix VIII.

v. Safety mechanisms will be provided in consultation with Health Canada. Where Claimants are proceeding as a group, they may negotiate to have the group administer the available safety resources.

[175] Schedule "D" of the IRSSA lists the mandatory documents that must be submitted by claimants if they are claiming certain levels of consequential harm, loss of opportunity or need for future care. Claimants may be required to submit records related to their treatment and health (medical), workers' compensation, correctional history, education, income tax, Canada Pension Plan and employment insurance.

2014 ONSC 4585 (CanLII)

[176] As is readily apparent, for a claimant to complete the application form, he or she will disclose the most private and most intimate personal information, including a first-person narrative outlining his or her request for compensation. Express privacy and confidentiality assurances for this personal information are found in the application form, which comes with a guide.

[177] Every page of the application form and guide in its header states: "Protected B document when completed." Under the Privacy Act, supra, and the Access to Information Act, supra, this designation identifies the document as having information that if compromised "could result in grave injury, such as loss of reputation". Every page of the application form and guide states in its footer: "24 hour IRS Crisis Line is available at 1-866-925-4419". [page42]

[178] Appendix II of Schedule "D" outlines the procedure for the acceptance and use of the application form. The relevant parts of Appendix II are set out below with some emphasis added:

APPENDIX II: ACCEPTANCE OF APPLICATION

i. The Secretariat will admit claims to the IAP as of right where the application is complete and sets out allegations which if proven would constitute one or more continuing claims, and where the Claimant has signed the Declaration set out in the Application Form, including the confidentiality provisions in the Declaration.

. . . . .

iii. On admitting the claim to the IAP, the Secretariat shall forward s copy of the application to the Government and to a church entity which is party to the Class Action Judgments and was involved in the IRS from which the claim arises.

. . . . .

iv. The following conditions apply to the provision of the application to the Government or a church entity:

-- The application will only be shared with those who need to see it to assist the Government with its defence, or to assist the church entities with their ability to defend the claim or in connection with their insurance coverage;

-- If information from the application is to be shared with an alleged perpetrator, only relevant information about allegations of abuse by that person will be shared, and the individual will not be provided with the Claimant's address or the address of any witness named in the Application Form, nor with any information from the form concerning the effects of the alleged abuse on the Claimant, unless the Claimant asks that this be provided to the alleged perpetrator;

-- Each person with whom the application is shared, including counsel for any party, must agree to respect its confidentiality. Church entities will use their best efforts to secure the same commitment from any insurer with whom it is obliged to share the application;

2014 ONSC 4585 (CanLII)

-- Copies will be made only where absolutely necessary, and all copies other than those held by the Government will be destroyed on the conclusion of the matter, unless the Claimant asks that others retain a copy, or unless counsel for a party is required to retain such copy to comply with his or her professional obligations.

[179] Appendix B to the guide explains that the personal information being provided is protected information. Appendix B to the guide states with some emphasis added:

APPENDIX B: PROTECTION OF YOUR PERSONAL INFORMATION

Definition of personal information

Personal information means information about an identifiable person that is recorded in some way. Some examples of personal information include name, age, income, medical records and school attendance. [page43]

How your personal information is treated:

Level of security

Your Application Form will be treated with care and confidentiality. This means that security rules are in place to make sure that your Application Form is protected. "Protected B" is the level of security used by government for sensitive and personal information. Once completed, your Application Form will be treated as a "Protected B" document.

Privacy and information laws

-- The Privacy Act is the federal law that controls the way the government collects, uses, shares and keeps your personal information. The Privacy Act also allows individuals to access personal information about themselves.

-- The Access to Information Act is the federal law that provides access to government information, but protects certain kinds of information, including personal information.

-- Subject to the Access to Information Act, the Privacy Act and any other applicable law, or where your consent to share information has been obtained, personal information about you and other individuals identified in your claim will be dealt with in a private and confidential manner. In certain situations, the government may have to provide personal information to certain authorities. For example, in a criminal case before the courts, the government may have to provide information to the police if they have a search warrant. Another example is where the government has to provide information to child welfare authorities or the police if it becomes aware that a child is currently in need of protection. The government will also share this personal information with those involved in the resolution of your claim, as set out in the section "Sharing your personal information with others" on the next page.

-- You can find more information about these laws on the Internet at: www.privcom.gc.ca and www.infocom.gc.ca.

Collection of personal information

2014 ONSC 4585 (CanLII)

2014 ONSC 4585 (CanLII)

Personal information in your Application Form, and all documents gathered for your claim are collected only for the purpose of operating and administering this Independent Assessment Process, and for resolving your residential school claim.

Use of your personal information

The personal information you provide in your Application Form, and all documents gathered for your claim, will be reviewed to assess whether your claim can be processed in this Independent Assessment Process. If your application is accepted, the information will be used as the basis of research to check your attendance at the residential school(s) and to find documents relevant to you and your claim.

Sharing your personal information with others

If a church organization is participating in the resolution of your claim, some of your personal information will be shared with church representatives on a confidential basis.

If you decide to ask for counselling support and give your permission, Health Canada will be provided with information about your participation [page44]in this Independent Assessment Process so that you can receive counselling support.

If the person you claim abused you is found, some of the personal information you have provided will be shared with him or her, including details of any claims made against them.

This needs to be done so the person is given a chance to answer to your claim. Some of your personal information will also be shared with witnesses participating in the resolution of your claim. Only information needed to answer to your claim will be provided to witnesses or the person(s) you claim abused you, unless you ask that it be shared. Information that identifies your address will not be shared.

The decision-maker will be provided with your personal information before the hearing, so he or she can learn about your claim, question you and other witnesses, and decide whether to award you compensation and, if so, how much.

Keeping your records
The Privacy Act requires that the government keep your personal information for at least two years. Currently, government practice is to keep this information in the National Archives for 30 years, but this practice can change at any time. Only the National Archivist can destroy government records.

[180] The application form in s. 7 includes a declaration to be signed by the claimant: The declaration states:

I give my permission to Library and Archives of Canada, Indian and Northern Affairs Canada, and any other federal, provincial or territorial government having records relevant to my claim to share them with Indian Residential Schools Resolution Canada. This permission will allow the government to research my claim.

I understand that my personal information, including the details of any claim of abuse, may be shared with the government, the decision-maker, any participating church organizations, person(s) I identify as having abused me, and witnesses. Information provided to the

> person(s) I identify as having abused me and witnesses will not include my contact details or other information not relevant to their role in the claim, unless I want it to be shared.
>
> I agree to respect the private nature of any hearing I may have in this process. I will not disclose any witness statement I receive or anything said at the hearing by any participant, except what I say myself.
> I confirm that the statements in this Application, whether made by me or on my behalf, are true. Where someone helped me with the Application, they have read to me everything they wrote and confirm that it is true. I know that signing this Application has the same effect as if I made it under oath in court.

[181] As noted above, to make an acceptable application, claimants must sign the declaration set out in the application form, including the confidentiality provisions in the declaration. I will discuss again the confidentiality of the IAP process in the next section of these reasons for decision. [page45]

[182] As noted above, alleged perpetrators are provided only with extracts of the application outlining the allegations made against them, and these extracts must be returned at the end of the process. The alleged perpetrator is not provided with the claimant's contact information, or information regarding the impacts of the alleged abuse.

[183] If the claimant's claim is not settled, there is a hearing before an adjudicator supervised by the chief adjudicator.

[184] The secretariat's website promises confidentiality within the IAP. It reads:

> The hearing is held in private. The public and the media are not allowed to attend. Each person who attends the hearing must sign a confidentiality agreement. This means that what is said at the hearing stays private.

[185] As noted above, the participants at an IAP hearing must sign a confidentiality agreement. There is a standard form confidentiality agreement for claimants and a standard form confidentiality agreement for participants.

[186] The standard form confidentiality agreement for claimants is set out below:

INDIAN RESIDENTIAL SCHOOS ADJUDICATION

SECRETARIAT

INDEPENDENT ASSESSMENT PROCESS

IN THE MATTER OF ____________:

CONFIDENTIALITY AGREEMENT

> I understand that:
>
> [name] has made a claim in the Independent Assessment Process, a process established to resolve claims of sexual abuse, serious physical abuse, and certain other wrongful acts

2014 ONSC 4585 (CanLII)

which caused serious psychological consequences for the individual arising from the operation of Indian residential schools.

-- Hearings in the IAP Process are closed to the public

-- I am a claimant I this hearing and will observe or participate in all or part of the proceedings

I_________________, agree that I will keep confidential and not disclose to any person or entity, whether in writing or orally, any information that is presented in this hearing or disclosed in relation to this hearing, except my own evidence or as required within the IAP or otherwise by law. I understand that I may discuss the outcome of the hearing, including the amount of any compensation awarded to me.

_______________ _____________________

CLAIMANT WITNESS
DATED [page46]

[187] The standard form confidentiality agreement for other participants in the IAP hearing is set out below:

INDIAN RESIDENTIAL SCHOOS ADJUDICATION

SECRETARIAT

INDEPENDENT ASSESSMENT PROCESS

IN THE MATTER OF ____________:

CONFIDENTIALITY AGREEMENT

I understand that:

[name] has made a claim in the Independent Assessment Process (IAP), a process established, a process established to resolve claims of sexual abuse, serious physical abuse, and certain other wrongful acts which caused serious psychological consequences for the individual arising from the operation of Indian residential schools.

-- Hearings into claims in the Independent Assessment Process are closed to the public;

-- I will observe or participate in all or part of the proceedings.

I agree that

-- I will keep confidential and not disclose to anyone, whether in writing or orally, any information that is presented in the hearing or disclosed in relation to this hearing, except my own evidence or as required with the Independent Assessment Process or otherwise by law.

This is the official record of attendance, so everyone present at all or part of the Hearing, except Legal Counsel, must sign this form. If your name does not appear, please add it.

2014 ONSC 4585 (CanLII)

Name of Attendee	Signature	Address (Town and Province Only
Support		
Claimant's Legal Counsel		
Adjudicator		
Canada's Representative		
Church Representative		
RHSW		
Other		

DATED:

[188] I note that the form has an inconsistency in that it indicates that legal counsel need not sign the form, which must be an error, because the form then has a place for counsel's signature. In any event, the evidence is that all participants sign a confidentiality agreement. [page47]

[189] The parties to an IAP hearing are the claimant, Canada and any church entity affiliated with the particular residential school where the assault occurred. The parties may have counsel. The IAP hearing serves two purposes: testing the credibility of the claimant, and assessing the harm suffered by him or her: Fontaine v. Canada (Attorney General), [2012] B.C.J. No. 2351, 2012 BCSC 1671, at para. 38.

[190] Canada is required to search for and report the dates that the claimant attended a residential school. Canada must also search for documents relating to the alleged perpetrators named in the application form, and is required to provide the secretariat with the following documents: (a) documents confirming the claimant's attendance at the school(s); (b) documents about the person(s) named as abusers, including those persons' jobs at the residential school, the dates they worked or were there, and any sexual or physical abuse allegations concerning them; (c) a report about the residential school(s) in question and the background documents; and (d) any documents mentioning sexual abuse at the residential school(s) in question.

[191] The IRSSA does not preclude a claimant from producing documents in support of his or her claim beyond those articulated as mandatory in the application process. The relevance and admissibility of documents is determined by the adjudicator on a case-by-case basis.

[192] As noted above, IAP hearings are closed to the public, and participants are required to agree to keep information confidential, except their own evidence or as required within the IAP or otherwise by law. At the hearings, the adjudicators assure the claimants and persons of interest that the evidence will be treated as confidential. Section "o" of Schedule "D" of the IRSSA explains the privacy of the IAP hearings; it states:

o. Privacy

2014 ONSC 4585 (CanLII)

i. Hearings are closed to the public. Parties, an alleged perpetrator and other witnesses are required to sign agreements to keep information disclosed at a hearing confidential, except their own evidence, or as required within this process or otherwise by law. Claimants will receive a copy of the decision, redacted to remove identifying information about any alleged perpetrators, and are free to discuss the outcome of their hearing, including the amount of any compensation they are awarded.

ii. Adjudicators may require a transcript to facilitate report writing, especially since they are conducting questioning. A transcript will also be needed for a review, if requested. Proceedings will be recorded and will be transcribed for these purposes, as well as if a Claimant requests a copy of their own evidence for memorialization. Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose. [page48]

[193] For present purposes, it is important to note that section "o" provides that a claimant may request a copy of their own evidence for memorialization and that claimants are given the option of having the transcript deposited in an archive developed for the purpose, i.e., at the NCTR.

[194] On April 5, 2012, Daniel Ish, then the chief adjudicator, sent a direction to all IAP adjudicators advising them that verbal assurances of confidentiality to IAP claimants must be revised. The direction stated:

> I think the best that can be done is rely on Paragraph III, o, I (at page 15) of the IAP [Schedule D to the Settlement Agreement] which essentially says that information will be kept confidential except "as required within this process or otherwise by law" . . . In short, I ask adjudicators not to give iron-clad assurances about confidentiality but to advise claimants and other participants that the information is protected by law, will be handled securely and seen by those who have a legitimate need to see it.

[195] At the IAP hearing, there is no questioning by counsel for Canada. The lawyers for claimants and for Canada caucus with the adjudicator to propose questions or lines or inquiry and make brief oral submissions but counsel do not control the questioning, which is left to the adjudicator.

[196] Before the IAP hearing, Canada or the defendant church entity must attempt to locate the alleged perpetrator and invite him or her to the hearing, but the alleged perpetrator is not a party and has no right of confrontation at the IAP hearing. The alleged perpetrator is not compelled to attend an IAP hearing, but he or she may give evidence as of right.

[197] If the alleged perpetrator does give evidence, he or she may be accompanied by counsel, but the alleged perpetrator cannot attend or be represented during the evidence of the claimant without the advance consent of the parties. In contrast, the claimant is entitled to attend to hear the evidence of the alleged perpetrator.

[198] An alleged perpetrator may provide a witness statement should he or she elect to participate in the hearing. If the alleged perpetrator refuses to provide such a statement, counsel for any party may interview the alleged perpetrator, but the alleged perpetrator will not be permitted to participate in the hearing if there is no witness statement or interview provided in advance.

2014 ONSC 4585 (CanLII)

[199] A medical assessment is required for an adjudicator to make a finding of a physical injury. Only the adjudicator may order that an expert conduct an assessment of the claimant. Unless the parties consent, an expert assessment is required in order to make a finding that the claimant has suffered the most [page49]severe levels of consequential harms or consequential loss of opportunity (levels 4 and 5).

[200] If the claimant establishes that he or she was abused in a manner covered by Schedule "D" of the IRSSA, the adjudicator then determines whether the claimant suffered consequential harm as a result. There are five gradations of consequential harm provided for in Schedule "D". At the lowest end is a "Modest Detrimental Impact", which is evidenced by:

> Occasional short-term, one of: anxiety, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem.

[201] The most severe consequential harm is level 5, entitled "Continued harm resulting in serious dysfunction", which is evidenced by:

> Psychotic disorganization, loss of ego boundaries, personality disorders, pregnancy resulting from a defined sexual assault or the forced termination of such pregnancy or being required to place for adoption a child resulting therefrom, self-injury, suicidal tendencies, inability to form or maintain personal relationships, chronic post-traumatic state, sexual dysfunction, or eating disorders.

[202] The adjudicator is required to produce a decision outlining the key factual findings, and, except in cases resulting in a short-form decision, the adjudicator must outline the rationale for finding or not finding that the claimant is entitled to compensation.

[203] Decisions are redacted to remove identifying information about claimants and perpetrators. While the documentation and information provided to claimants and adjudicators may include allegations of abuse by individuals other than those named in the complaint at issue, names of other students or persons are redacted.

[204] The IRSSA provides that the claimants will receive a copy of the decision, "redacted to remove identifying information about any alleged perpetrators". The balance of the decision provided to claimants is not redacted and contains extensive personal information. Claimants are free to discuss the outcome of their hearing, including the amount of any compensation they are awarded. Alleged perpetrators are entitled to know the result of the hearings insofar as the allegations against them are concerned, but not the amount of compensation awarded.

[205] The IRA thus produces a large number of documents of different types. The documents generally fall into seven categories: (1) applications submitted by the claimants; (2) mandatory documents containing private personal information; (3) witness statements; (4) documentary evidence produced by the parties; (5) transcripts and audio recordings of the hearings; (6) expert [page50]and medical reports; and (7) decisions of the adjudicators and any appeals.

[206] Subject to limited exceptions, the deadline for applying to the IAP was September 19, 2012.

2014 ONSC 4585 (CanLII)

[207] As of March 31, 2013, the secretariat received 37,716 applications and has held 16,700 hearings.

[208] As of June 2014, 25,800 claims have been resolved.

4. Nature and the confidentiality of the IAP documents

[209] Crucial to resolving the competing RFDs is the nature of the IAP Documents. For the facts and reasons that follow, in my opinion, they are confidential and private documents subject to the law providing remedies for breach of confidence. See Slavutych v. Baker, [1976] 1 S.C.R. 254, [1975] S.C.J. No. 29; Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142, [1999] S.C.J. No. 6; Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, [1989] S.C.J. No. 83; Visagie v. TVX Gold Inc. (2000), 49 O.R. (3d) 198, [2000] O.J. No. 1992 (C.A.); Seager v. Copydex, Ltd., [1967] 2 All E.R. 415, [1967] 1 W.L.R. 923 (C.A.); Coco v. A.N. Clark (Engineers) Ltd., [1969] R.P.C. 41, [1968] F.S.R. 415 (Ch.); Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd., [1960] R.P.C. 128, 174 E.G. 1033 (C.A.).

2014 ONSC 4585 (CanLII)

[210] As explained later, I also agree with the arguments of the chief adjudicator and independent counsel that the IAP documents are subject to the implied undertaking.

[211] As the above details reveal, under the IRSSA, the IAP is a private and confidential process. Claimants are assured of confidentiality expressly by various provisions and statements in the IRSSA, by express assurances or promises of confidentiality in forms and documents prepared to implement the IAP, in website information and by oral assurances of confidentiality expressed by adjudicators at IAP hearings.

[212] Although there is some dispute about the truth and reliability of the information, there is no dispute between the parties that the IAP documents capture very sensitive personal information about the claimants and the alleged perpetrators of wrongdoing at the Indian residential schools. There are allegations of sexual abuse, serious physical abuse and atrocious acts committed against children. There are accounts of the suffering and the harm inflicted on the children and the consequences to their physical, mental and spiritual health.

[213] The details are found in IAP application forms, transcripts and audio recordings of hearings, and in the decisions of the adjudicators, and there is no doubt that atrocities occurred. [page51]As the prime minister acknowledged in Canada's apology on June 11, 2008:

> The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities. . . . It has taken extraordinary courage for the thousands of survivors that have come forward to speak publicly about the abuse they suffered. It is a testament to their resilience as individuals and to the strength of their cultures. Regrettably, many former students are not with us today and died never having received a full apology from the Government of Canada.

[214] The prospect that IAP documents may be archived and potentially disclosed to the public has caused severe stress and anxiety to claimants who fear identification and the

revelation of intensely private experiences and their feelings to members of their family, community and the public at large. The claimants are distressed by this prospect, and having regard to the various assurances of confidentiality, they regard disclosure as a betrayal and an egregious breach of confidence and contrary to the IRSSA.

[215] Mr. Fontaine testified that the disclosure of the information would perpetuate the harm to the Aboriginal communities if the names of alleged perpetrators of student-on-student abuse ever became public knowledge. He stated:

> If any of this information is placed into an archive, even if it is sealed for ten years, fifty years, a hundred years or longer, the identities of these perpetrators and their victims will someday become available to their descendants or researchers who may publish information. Within our communities, such knowledge even in future generations would continue the legacy of dysfunction and trauma that was created by the Residential Schools.

[216] Fred Kelly and Percy Gordon, both of whom are former students at the Indian residential schools, strongly oppose the archiving of their IAP documents. G.C., Jane Doe, Mr. Fontaine, N.B.H., E.K. and D.W., and other former students stated that they did not consent to the release of their personal information to anyone. Mr. Gordon deposed:

> I have a personal sense of the past and the future. Culturally, I believe that First Nations people have that similar sense. We continue to honour hereditary Chiefs in many First Nations. As National Chief Atleo puts it, this is "through the pride of our culture and the strength of our ancestors". I do not want my grandchildren or my grandchildren's grandchildren to be able to study and read about the wrongdoing done to me. Some within our community may take a different view but that is their individual choice. But I rely [page52]on the promises that were made to me and believe a judge may not undo a promise made to me and reverse that promise.

[217] Jane Doe, another claimant, deposed:

> What happened to me at the IRS is tragic and personal. I would never have entered into the IAP process if I thought that the abuse that I disclosed at my NSP [Negotiated Settlement Process] would ever have been revealed to anyone or any entity outside of the IAP process. If this information is ever disclosed outside of my IAP file, it would re-victimize and destroy me. I did not nor do I consent to my IAP NSP transcript, fee review, recording, documents, application or any other information disclosed by me or made available about me for the purpose of completing my IAP claim to be released to the TRC of NCTR for any purpose.

[218] D.W., another claimant, deposed:

> I oppose that my file be provided to any organization regardless of the measures that could be taken to protect my identity. I did not give any consent to this effect and I always understood that my application, the mandatory documents, and the recording and transcripts of my testimony would not serve any purposes other than those of the IAP. I particularly fear the possibility of being identified by mistake, negligence or a leak of information and therefore permitting individuals to learn facts that concern only me. I am equally concerned by the fact that the family of the person who abused me could one day learn what I suffered

2014 ONSC 4585 (CanLII)

at IRS. I still travel in certain native communities in Ontario where members of that family reside.

[219] E.K., another claimant, deposed:

Any other use or disclosure of IAP records about me further violates my dignity, integrity and autonomy and taken away my trust in the confidentiality of the IAP. The risk or prospect of any other use or disclosure, during my lifetime or even only to my descendants after my death, is deeply distressing for me and compounds my suffering from residential school. I want, and believe I should have the right, to live secure and at peace in the knowledge that IAP records about me will not be used or disclosed for other purposes, and they will be securely and permanently destroyed at the conclusion of the IAP.

[220] G.C., another claimant, deposed:

I deliberately choose not to give a statement to the TRC or the NCTR. My story belongs to me. I was told on more than one occasion that the information I provided at my IAP hearing would be held in the strictest of confidentiality. Absolutely no one would have access to my IAP information. I was the only one who could tell my story. The information disclosed at my IAP belongs to me and it contains information that I have lived my entire life trying to forget.

[221] N.B.H, another claimant, deposed:
I deliberately did not attend any of the TRC's events because what happened to me at the IRS was so painful and devastating that I could not participate in any type of public gathering that focused on any aspect regarding an IRS. I deliberately chose not to provide a statement to the TRC . . . I would be devastated if anyone else, other than those that were at my IAP hearing, ever learned of this information. [page53]

[222] The Merchant Law Group received 66 responses to a letter asking claimants if they objected to the disclosure of their personal information to the TRC. Of the 66 responses, only nine claimants stated that they did not object.

[223] Mr. Shapiro, the current chief adjudicator, expressed serious concern about the consequences of any court order that resulted in the unilateral archiving of IAP documents. He deposed as follows:

As Chief Adjudicator, I am greatly concerned that any direction issued by this Honourable Court regarding the disposition of IAP Records may result in deterring Claimants or alleged perpetrators from coming forwards to testify in the many cases remaining to be decided. The IAP provides rights of participation to Alleged Perpetrators, who have also expressed serious concern at their hearings about allegations made against them becoming known. Such allegations can be among the most serious possible, including pedophilia, sadism and racism. Again, adjudicators have provided assurances of confidentiality and explained the confidentiality agreements.

[224] Dr. Flaherty, a historian and consultant with respect to the regulation of privacy and access to information, who was a witness for the chief adjudicator, deposed that it would be inappropriate to archive IAP documents. He deposed:

2014 ONSC 4585 (CanLII)

> The sensitivity of the contents of the IAP claimant files is so great that it would be completely inappropriate to collect, use, disclose, or retain them for archival purposes, or for any other administrative purposes affecting specific individuals, beyond the specific IAP process of determining results in individual cases. . . . [The] notion of archiving all IAP claimant records contradicts at least five of the ten privacy commandments/fair information practices enshrined in Canadian federal, provincial, and territorial legislation during the past fifty years.

2014 ONSC 4585 (CanLII)

[225] The evidence on these RFDs establishes that the negotiators of the IRSSA intended that the IAP be a confidential and private process. As I shall explain below, that subjective intent is manifested in the objective interpretation of the IRSSA.

[226] The evidence establishes that the claimants and the alleged perpetrators relied on the confidentially assurances expressed in the IRSSA and that they relied on the reiteration and expressions of confidentiality and privacy made as the IAP applications got underway and that reliance on confidentiality and privacy continues to this day.

[227] The evidence also establishes that without assurances of confidentiality, the IAP would not have functioned and the IRSSA would not have achieved the goal of providing compensation to the victims of the Indian residential schools. To employ the idiom of class actions, the class members would not have taken up the benefits of the settlement of their claims without a confidential, private and sensitive claims process. [page54]

[228] In my opinion, the IAP documents are confidential documents as a matter of contract and as a matter of the law of confidentiality communications; i.e., they are subject to the law about breach of confidence. They are also subject to various statutory provisions about privacy, some of those provisions mentioned in the IRSSA.

[229] In this last regard, the nine Catholic entities rely on the right to privacy under the Civil Code of Québec, C.C.Q.-1991 (the "Code") and the Quebec Charter of Human Rights and Freedoms, CQLR, c. C-12. The relevant sections of the Code are ss. 3, 35 and 36, which state:

> 3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.
> These rights are inalienable.
>
> . . . . .
>
> 35. Every person has a right to the respect of his reputation and privacy.
>
> No one may invade the privacy of a person without the consent of the person unless authorized by law.
> 36. The following acts, in particular, may be considered as invasions of the privacy of a person:
>
> . . . . .
>
> (6) using his correspondence, manuscripts or other personal documents.

[230] The relevant sections of the Quebec Charter of Human Rights and Freedoms are ss. 4 and 9, which state:

> 4. Every person has a right to the safeguard of his dignity, honour and reputation.
>
> . . . . .
>
> 9. Every person has a right to non-disclosure of confidential information.
> No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

2014 ONSC 4585 (CanLII)

[231] I will discuss the legal consequences of the above findings later in these reasons for decision.

5. The historical value and the reliability of the IAP documents

[232] There is a dispute about the historical value of the IAP documents and their utility for the purposes of the mission of [page55]the TRC and the NCTR. This dispute is yet another factor in resolving the request that the IAP documents be destroyed, but the dispute is also relevant to the issue of whether there should be a notice plan to inform claimants of their option of providing personal information about their stories to the NCTR.

[233] The dispute is that the parties disagree about the value of the IAP documents to composing an historical account of what occurred at the Indian residential schools.

[234] LAC performed a preliminary assessment of the records in the possession of the AANDC and determined that very few of the documents were of enduring value. LAC did assess some IAP material relating to strategy, policy and adjudication and the overall management of the IAP and the ADR processes as of enduring value. LAC considered the recordings and transcripts of the IAP hearings to be of enduring historical value and it requested copies of each decision for the IAP and ADR.

[235] LAC advised that all other information resources related to the IAP are not to be transferred to the library and archives. The contents of the Single Access to Dispute Resolutions Enterprise ("SADRE") database will not be transferred.

[236] Canada submits that the IAP decisions have both legal and historical components that militate against their destruction and favour their preservation at LAC. Canada says that the IAP decisions form a record of Canada's fulfillment of its obligations under the IRSSA and establish issue estoppels confirming the releases provided by the IRSSA. Canada says that the decisions contain information of historical significance memorializing the IRS system and its legacy. Conversely, Canada submits that holding the decisions at LAC would be consistent with LAC's role as the national repository of records with historical or archival value.

[237] I pause here to say that Canada is simply wrong that it needs the IAP decisions to protect itself from relitigation of released claims. The releases provided by the IRSSA operate whether or not a claimant made an IAP claim, and it appears that with more than 150,000 First

Nations, Inuit and Métis children required to attend Indian residential schools, about 25 per cent (37,716) made IAP claims. I also rather doubt that IAP documents are the only way that Canada can document that it honoured its obligation to pay successful IAP claimants.

[238] For its part, the TRC submits that the IAP documents are the single most comprehensive collection of documents that evidence the harms suffered by residential school survivors. The TRC submits that the IAP documents contain a unique aggregation of items, which taken as a whole provide the most [page56]comprehensive understanding of the abuses that took place in the Indian residential school system. The TRC and the NCTR submit that the IAP documents are essential to the creation of "as complete an historical record as possible of the IRS system and legacy".

2014 ONSC 4585 (CanLII)

[239] In correspondence dated October 25, 2010 to Dean Moran, the chair of OC, Justice Murray, the chair of the TRC, expressed his opinion as to the importance of the IAP documents; he wrote:

> The preservation of IAP records is fundamental to maintaining a full and complete record of Residential Schools. Future generations will never know what went on in the schools if the records are lost. It will be easy to dismiss second and third hand accounts of that history without the first-hand accounts to add their weight of truth.

[240] Dean Moran acknowledged the importance of the IAP documents gathered with the consent of the claimants. In her reply letter dated January 11, 2011, she wrote:

> The specific individual information gathered with claimants' consent, together with the systemic information provided by the Adjudication Secretariat, would provide the TRC with an excellent qualitative and quantitative research base. The ultimate product would be comprised of a rich foundation of firsthand accounts married with broad based information resulting in a detailed portrayal of the nature and extent of the deplorable abuse perpetrated upon the students of Canada's Indian Residential Schools.

[241] I observe that Dean Moran does not suggest that all of the IAP documents are necessary for an excellent qualitative and quantitative research base.

[242] The TRC reports that as of November 6, 2013, the TRC had gathered approximately 6,200 oral statements from residential school survivors, but by contrast, there were 37,847 IAP applications.

[243] The TRC also submits that unlike the statements it has collected, the claimant's IAP testimony is given under oath and subjected to questioning by the adjudicator to ascertain its reliability.

[244] In contrast, the chief adjudicator relied on Dr. Flaherty's opinion that IAP documents are not required for the TRC to achieve its mandate. Dr. Flaherty noted that journalists, historians, political scientists and other scholars write about the legacy of residential schools in Canada without access to claimant files. It was also noted that the TRC may obtain statements from claimants on a voluntary basis and that it has obtained 7,000 such statements from survivors of whom 40 per cent have chosen to remain anonymous. [page57]

[245] The twenty-four Catholic entities weighed into the debate by submitting that the nature of the IAP procedure reduces the reliability of the IAP documents as a record of the truth of the allegations.

[246] The twenty-four Catholic entities point out that the alleged perpetrator is not a party and sometimes not a participant at the IAP because of death, unavailability or choice. They note that when a participant, the alleged perpetrator has no right of confrontation and his or her right to defend the allegations of wrongdoing are attenuated. The twenty-four Catholic entities suggest that some of the claimants' allegations are false allegations and made against persons who can be shown not to have been at the Indian residential school at the time of the alleged wrongdoing. The twenty-four entities submit that the outcome of the IAP should be treated as no more than a confidential claims process and not a reliable or a complete historical record.

[247] The Sisters of St. Joseph also weighed in and it submitted that the IAP was a flawed process that could and did lead to biased and inaccurate outcomes. It noted that of the approximately 20,000 IAP claims which have been completed, the overwhelming vast majority were not defended by a religious order and that meant that IAP documents produced and collected for those IAP claims would reflect a one-sided record of what allegedly happened.

[248] The Sisters of St. Joseph submitted that there is no historical value of the IAP documents because they were not created for the purpose of recording history; rather, the Sisters of St. Joseph submitted that the IAP documents were created in the context of a private and confidential adjudicative process where if certain allegations were made and told a certain way, the teller would receive significant amounts of money.

[249] For their part, independent counsel acknowledged the importance of maintaining an historical record of the residential schools; however, independent counsel submitted that the TRC and the NRC do not require the IAP documents in order to fulfill their mandates.

6. Canada's custody and control of the IAP documents and its plan for them

[250] I return to the matter of Canada's custody and control of the IAP documents because how Canada treats government records is a part of the factual nexus for interpreting the IRSSA, and how Canada treats government records is also part of the factual nexus for determining the competing RFDs. [page58]

[251] As a department of Canada, AANDC is subject to the Library and Archives of Canada Act, the Privacy Act, supra, and the Access to Information Act, supra. Canada submits that both SAO and the secretariat, which are branches of AANDC, are subject to this statutory regime.

[252] During the time when AANDC is using government records and until the documents or records have no operational value, AANDC retains its documents. While it is retaining the documents, in accordance with the exemption in s. 19 of the Access to Information Act, AANDC protects the privacy of individuals with respect to whom personal information has been collected by preventing public distribution of that information, while also providing individuals with a right of access to their own information as provided in the federal Privacy Act, supra.

[253] The secretariat and SAO both have digital and hard copies of IAP documents.

2014 ONSC 4585 (CanLII)

[254] The digital documents are stored on the SADRE. This database contains approximately 45,000 pages of material. SADRE functions with an asymmetrical access system that permits employees of SAO and the secretariat to access different, but overlapping, sets of electronic records. Employees from either the secretariat and/or SAO may effectively transfer documents through SADRE by granting access permissions.

[255] In addition, the secretariat maintains a secure server that contains transcripts of all IAP hearings held before mid-2011, the audio recordings of all the hearings held since mid-2011 and electronic copies of transcripts for every hearing that was transcribed since mid-2011.

[256] As of February 3, 2014, there were 795,038 unique documents in SADRE. Of these, medical, workers' compensation, income tax, employment insurance, Canada Pension Plan, corrections and education documents constituted 272,547 of the documents (34.3 per cent).

[257] The hard copies of IAP documents are in offices in Regina and Ottawa. The Regina office possesses approximately 21,000 IAP files and approximately 1,540 hearing transcript files. It also holds 5,380 ADR files (the predecessor to the IAP) and 110 boxes of closed financial files.

[258] Between September 19, 2007 and August 25, 2013, approximately 1,924 ADR decisions and approximately 14,744 IAP decisions were rendered. These decisions are only minimally redacted to remove the name of the alleged perpetrator from the claimant's copy of the decision. Unredacted versions, which are provided to counsel for the parties, are also kept by the secretariat. [page59]

[259] Upon the expiry of the retention period, the issue will become how to dispose of the documents. Pursuant to s. 12 of the Library and Archives of Canada Act, disposition of any records held by AANDC may occur only with the written consent of the librarian and archivist. LAC has the authority to destroy government records. Subsection 12(1) of the Library and Archives Canada Act states:

> 12(1) No government or ministerial record, whether or not it is surplus property of a government institution, shall be disposed of, including by being destroyed, without the written consent of the Librarian and Archivist or of a person to whom the Librarian and Archivist has, in writing, delegated the power to give such consents.

[260] With regards to IAP records, LAC issued a Records Disposition Authority No. 2011/010, dated February 26, 2013. A Records Disposition Authority ("RDA") is the official instrument used to direct the disposition of government records.

> [261] RDA No. 2011/010 stated:
> The Deputy Head and Librarian and Archivist of Canada, pursuant to subsections 12(1) and 13(1) of the Library and Archives of Canada Act, is of the opinion that records described in the attached Agreement are of historic or archival importance. The Librarian and Archivist, therefore, requires their transfer to the care and control of Library and Archives Canada in accordance with the Terms and Conditions set out in the Appendix to the Agreement, and consents to the disposal of all other records, when the Aboriginal Affairs and Northern Development Canada decides that it is no longer necessary to preserve these information resources to satisfy operational or legal requirements.

2014 ONSC 4585 (CanLII)

2014 ONSC 4585 (CanLII)

[262] Under a RDA, records identified as having historical or archival value by the librarian and archivist are transferred to LAC after the expiry of the retention period in accordance with a transfer agreement between LAC and AANDC. After transfer, the transferred records fall under the care and control of LAC. The non-transferred documents remain under the custody and control of their custodian, in this case AANDC.

[263] On August 7, 2012, AANDC and LAC signed an agreement for the transfer of archival records. A substantive appendix to the AANDC-LAC agreement provides that "[all] electronic copies of the Notice of Decision document and Settlement Package for each IAP and ADR case" must be transferred to LAC when they are no longer required by AANDC.

[264] Under the agreement for the transfer of archival records, the balance of the IAP documents could be disposed of by AANDC at its discretion and in accordance with law.

[265] Records transferred to LAC are registered into LAC's collection management system, where they are identified as Code 32, meaning that they are restricted by law, until a [page60]determination has been made otherwise. Access restrictions on records at LAC may be re-evaluated upon an access to information and privacy request.

[266] Of the IAP documents, the appendix specifies that only electronic copies of the notice of decision for each IAP case are to be transferred to LAC: the appendix also requires the transfer of certain other records that do not qualify as IAP records, including settlement packages, strategic documents relating to the IAP and ADR pilot project case files.

[267] The appendix further specifies certain documents that are not to be transferred to LAC, including IAP paper case files, other electronic case documentation related to the IAP, working files related to the IAP, persons of interest files (relating to alleged perpetrators) and tombstone information contained in SADRE. Such documents may be destroyed by AANDC in accordance with the RDA 2011/010 after the expiry of applicable retention periods.

[268] Dr. Flaherty, who was a deponent for the chief adjudicator, predicted that most of the IAP documents not sent to LAC would be destroyed. He deposed:

> It is important to remember that most of the administrative records produced about IAP claimants on a mandatory basis would normally be destroyed by the original custodians -- and not archived by them -- because such routine records are not "of enduring value." This would be true for individual health records, welfare records, social work records, unemployment records, and income tax records. Criminal and correctional records would likely be stored in a manner comparable to court records. Juvenile court records might be preserved but are not normally available to researchers except under very strict controls.

[269] Dr. Flaherty, who is an expert about the regulation of privacy and access to information, recommended the destruction of the documents to protect the privacy interests of claimants. In his affidavit, at paras. 13 and 62, he deposed as follows:

> It is not normal in Canada to collate, compile, and link such administrative records about such a large group of specific victims. Having served their administrative purposes to settle claims, there is a strong argument to destroy all of the claimant records to protect the current and historical reputations and privacy interests of the claimants and any third parties

identified in the claims records. . . . The accumulation of so much sensitive information on a stigmatized population is truly extraordinary. My primary recommendation is destruction.

7. The history of the RFDs

[270] Before moving on to the discussion and analysis, the last factual matter to discuss is the circumstances that prompted the RFDs. [page61]

2014 ONSC 4585 (CanLII)

[271] The ADR process, which was the precursor to the IAP, opened in November 6, 2003, and continued to accept applications until the approval date of the IRSSA agreement, March 19, 2007. Under the ADR, claimants were given the option of having the transcript of their hearing deposited in an archive developed for the purpose. As noted above, this option was continued as part of the IAP. However, the option was an arid option because no work was done during the life of the ADR process or for the first few years of the IAP to develop an archive for the transcripts or to promote the option.

[272] In mid-2010, then executive director of the secretariat Jeffery Hutchinson asked John Trueman of the secretariat to develop a consent form to enable claimants to share information from their IAP claims with the TRC. Mr. Trueman drafted a form and communicated with Tom McMahon, TRC's executive director and with Ry Moran, TRC's director of statement gathering.

[273] There seems to have some progress in developing a form, and in October 2010, the OC met with the TRC and there was a direction to go forward with a consent form for claimants who wished to share their information with the TRC. However, on October 25, 2010, Justice Murray Sinclair, chair of the TRC, wrote Dean Moran, chair of the OC, and requested that the IAP provide all of its records to the TRC. He also requested that the IAP recognize the TRC as an archive developed for the purpose of receiving claimant transcripts.

[274] On January 11, 2011, Dean Moran replied that the OC was unanimously of the view that the disclosure of IAP documents would be a profound breach of trust to the claimants who had been promised confidentiality, but the OC was ready to assist those claimants who choose to share their testimony and was prepared to make a vigorous effort to obtain consents to the release of transcripts and other information. She said that the OC would work with the TRC to develop a consent form that could be given to IAP claimants. She said, however, that the fundamental principle that must be respected was that the personal information contained in the IAP documents belonged to each claimant, who had the right to choose whether it would be disclosed.

[275] After this exchange, the secretariat resumed a dialogue with the TRC to develop a consent form, but the problem appears to be that the TRC never abandoned its wish to obtain the IAP documents, even if the claimant did not sign a consent.

[276] The TRC was also of the view that it was the secretariat's responsibility to develop and implement a consent program [page62]and that it had failed to do so. The TRC was prepared to be helpful, but it was not its responsibility to develop the program. Nevertheless, the communications between the secretariat and the TRC about developing a consent form continued until around May 2011, and then the dialogue stopped.

[277] Meanwhile, discussions began between the secretariat and LAC about the eventual disposition of the IAP documents. These discussions engaged the interest of the OC, which

formed a working group to examine the question of disposition of records and make recommendations.

[278] In October 2011, the working group reported, and the OC decided as an interim measure to create a transcript archive to be housed within the secretariat for later transfer to a permanent home. With the claimant's consent, transcripts could be delivered to an archive with names of persons materially implicated in the claim redacted but the claimant's own information preserved. The secretariat was directed to redraft the consent form for review by the OC and then the plan was that following approval of the draft, the chair would write to the TRC to advise that the IAP planned to implement the transcript archive.

[279] In December 2011, the OC met to review the revised draft of the consent form and discussed how the form should address the TRC's desire to obtain the documents. The committee members were generally of the view that court intervention would likely be in cases where the claimant did not consent, and the TRC would likely be involved. The OC decided to contact the TRC to determine whether they would be open to a structured discussion of these issues with the possible assistance of the Hon. Frank Iacobucci.

[280] On February 2, 2012, representatives of the secretariat met with Ms. Kim Murray, executive director of the TRC, and she indicated that the TRC was not interested in the assistance of the Honourable Frank Iacobucci, who was Canada's negotiator in the process that led to the settlement. Instead, she asked if the TRC could meet with the OC.

[281] On February 28, 2012, the TRC's Justice Sinclair, Executive Director Kim Murray, and legal counsel Julian Falconer attended a meeting of the OC. Justice Sinclair indicated that the TRC wished to put into place a plan to obtain the IAP documents because the IAP had the bulk of IRS survivors' stories of abuses and the TRC was concerned that if these stories were not reflected in its report, it would lack a full picture.

[282] Justice Sinclair raised the TRC's view that the confidentiality assurances given to claimants were not compatible with the IRSSA. Justice Sinclair explained that the TRC would be [page63]bringing a request for directions on the document disclosure obligations of Canada and the churches to the courts and would, if the OC wished, include a question about the IAP's obligations.

[283] Dean Moran thanked Justice Sinclair and his colleagues for coming to the OC meeting. After the meeting, although there was supposed to be a follow-up, no work resumed to develop a consent form.

[284] On August 14, 2013, the TRC delivered its RFD.

[285] On October 11, 2013, the secretariat delivered its RFD.

I. Discussion and Analysis

1. Introduction

[286] At the most general level, the two RFDs and the Sisters of St. Joseph's motion to quash raise four questions. The first question is whether the chief adjudicator and the TRC have standing to bring the RFDs. The second question is whether their RFDs are premature. The third question is what can and should the court direct with respect to the disposition of the IAP

2014 ONSC 4585 (CanLII)

documents. The fourth question arises from the answer to the third. The fourth question is what should be done with the documents and by whom before their final disposition, be that archiving the documents at LAC or NCTR or be that destroying the IAP documents.

[287] These four questions raise a myriad of particular questions some of which I have addressed and already answered above. In the discussion that follows, I will complete the analysis and answer the questions.

2014 ONSC 4585 (CanLII)

[288] By way of overview, I answer the first question yes. The chief adjudicator and the TRC have standing because they are entitled to bring RFDs as "such other entity as this court may allow [to] apply for a directions".

[289] My answer to the second question is that the RFDs are not premature. I have two explanations for this answer. First, the RFDs are not premature because the IRSSA does not provide a prior dispute resolution mechanism for the chief adjudicator's RFD and since the TRC's RFD raises the same questions, there is no point in postponing resolving the RFDs, particularly because it would be irresponsible for the court to do so where the issues are important to ensuring that the IRSSA is properly administered.

[290] Second, it would be triumph of form over substance to postpone making a decision and this is especially so because it is inconceivable that the NAC would be able to agree on a binding [page64]solution that, in any event, involves a determination of several legal issues within the domain of the court.

[291] I have outlined my answer to the third question in the introduction to these reasons for decision. My answer is that the court has and should exercise its jurisdiction to make a destruction order. More particularly, the order should provide that (a) with the redaction of personal information about alleged perpetrators or affected parties and with the consent of the claimant, his or her IAP application form, hearing transcript, hearing audio recording and adjudicator's decision may be archived at the NCTR; (b) Canada shall retain all IAP documents for 15 years after the completion of the IAP hearings; (c) after the retention period, Canada shall destroy all IAP documents; (d) any other person or entity in possession of IAP documents shall destroy them after the completion of the IAP hearings.

[292] There are three reasons for the answer that the court can order the destruction of the documents. First, as a matter of contract interpretation, destruction is what the parties agreed, and the court can enforce in rem the parties' bargain. Second, the IAP documents are subject to the implied undertaking, and the court can enforce the implied undertaking to require the destruction of the IAP documents. Third, the IAP documents are subject to the law governing a breach of confidence and in the circumstances of the IAP documents, the appropriate remedy to prevent a breach of confidence is to destroy the documents.

[293] My answer to the fourth question has also been foreshadowed. There should be a notice program to advise claimants of their option of providing personal information about their experiences at the Indian residential schools to the NCTR.

2. The TRC's and the chief adjudicator's standing

[294] The first question is whether the chief adjudicator and the TRC have standing to bring the RFDs. The second question is whether their RFDs are premature.

[295] The Sisters of St. Joseph bring a motion to quash the RFDs of the TRC and the chief adjudicator on the grounds that both lack standing, or alternatively, because the TRC and the chief adjudicator have not exhausted the dispute resolution mechanisms provided by the IRSSA.

[296] I disagree with the Sisters of St. Joseph's argument for two mutually distinct reasons.

[297] The first reason is that because the chief adjudicator's RFD is not premature, both he and the TRC have standing. [page65]

[298] Under para. 31 of the order approving the IRSSA, the court declared that "such other entity as this court may allow" may apply for directions in respect of the implementation or administration of the IRSSA. Both the TRC and the chief adjudicator are "such other entity as this court may allow". In other words, I grant them leave to bring their respective RFDs.

[299] Although its standing has not previously been challenged, the chief adjudicator has previously brought five RFDs. Indeed, the chief adjudicator brought a RFD jointly with the Sisters of St. Joseph regarding the procedure for dealing with allegations of bias on the part of an adjudicator during an IAP. Similarly, although it has not previously been challenged, the TRC has previously brought RFDs. In any event, I would grant standing to both entities.

[300] However, to be compliant with para. 31 of the approval order, "the other entity" may apply for directions only after fully exhausting the dispute resolution mechanisms mandated by the agreement. In the circumstances of the case at bar, there is no dispute resolution mechanism for the chief adjudicator to exhaust and, therefore, it has standing to bring its RFD and its RFD is not premature.

[301] I disagree with the argument of the Sisters of St. Joseph that there was a dispute resolution mechanism available to the chief adjudicator in the circumstances of its RFD request. The Sisters of St. Joseph posited that the chief adjudicator ought to have sought instructions from the OC, which, in turn, would seek directions from the NAC, which, in turn, would have a right to bring this matter to the court. I disagree with this proposition.

[302] While it undoubtedly would be exhausting, I do not see how following this serpentine route makes for a dispute resolution mechanism for the chief adjudicator. Ultimately, the chief adjudicator's dispute about the fate of the IAP documents is as much if not more of a dispute with Canada as it is dispute with the TRC. The dispute involves the autonomy of the secretariat and the administration of the IAP. The chief adjudicator's dispute with Canada goes to the enforcement of the confidentiality provisions of the IRSSA, and much more is involved than document production, disposal and archiving. The heart of the dispute is about the operative integrity and success of the missions of both the IAP and the TRC. It is much more about the confidentiality and privacy concerns of the parties to the IRSSA and it is about the tension in the agreement between providing compensation without further harming the victims and achieving truth and reconciliation so that the harms will not be repeated [page66]in the future. The IRSSA did not provide an alternative dispute resolution mechanism for this dispute.

[303] In my opinion, there was no dispute resolution mechanism available for the chief adjudicator to exhaust.

[304] Since the chief adjudicator has standing for its RFD, the TRC also has standing even if it did not avail itself of the dispute resolution mechanisms available to it. This conclusion follows

2014 ONSC 4585 (CanLII)

from the analysis of Justice Goudge in Fontaine v. Canada (Attorney General), 2013 ONSC 684, supra.

[305] In that case, Canada contested the standing of the TRC to bring a RFD on the exact same grounds relied on by the Sisters of St. Joseph in the immediate case. However, in the case before Justice Goudge, the AFN and the Inuit representatives -- who are both signatories to the agreement -- also had sought answers to the same questions as the TRC. Consequently, the issue of the TRC's standing was technically moot because others had standing. Thus, an RFD applicant without standing can coattail its RFD when there is a RFD applicant with standing before the court. Given the fact that the treatment of IAP documents impacts the work of both the TRC and the chief adjudicator, and given the broader importance of the issues to the legacy of residential schools, it would be a victory of form over substance to preclude the TRC from bringing forward matters important to the administration of the IRSSA. The court is, after all, charged with supervision of the proper implementation of the agreement.

[306] That last comment brings me to my second reason for concluding that the TRC and the chief adjudicator have standing to bring their RFDs and for concluding that the RFDs are not premature. The second reason is that, in my opinion, in appropriate cases, the court retains the jurisdiction to deem that a party or "other entity" has exhausted the dispute resolution mechanisms of the IRSSA. This extraordinary jurisdiction does not require an amendment to the IRSSA, and this jurisdiction exists because the court always has an obligation to oversee the administration of the IRSSA and always retains the attendant jurisdiction to do so.

[307] In the case at bar, it was a foregone conclusion that the NAC would not muster five votes in favour of the TRC's plan for the IAP documents. There are seven representatives on NAC, and it appears that Canada, AFN, likely the Inuit organizations, the church organizations and likely the three plaintiffs' counsel are opposed to the TRC's plans. The TRC's RFD request would inevitably have exhausted itself unfavourably, and thus it would inevitably be in the position to say that it had exhausted the [page67]dispute resolution mechanisms. As for the chief adjudicator's RFD request, it appears to be opposed by Canada, and, thus, even if approved by the NAC, a RFD would have inevitably followed. In any event, both the TRC and the chief adjudicator raised very serious issues that ultimately would require the court's attention. Thus, if necessary, I would deem any dispute resolution mechanisms to have been exhausted.

[308] I, therefore, conclude that the chief adjudicator and TRC have standing and that their respective RFDs are not premature.

3. What can and should happen to the IAP documents?

(a) The interpretation of the IAP confidentiality provisions in the IRSSA

[309] In essence, Canada argues that by the express references to the Access to Information Act and the Privacy Act, the plain meaning of the confidentiality provisions of the IRSSA expressly told the claimants that their IAP documents might be disclosed, and, therefore, whatever other express assurances of confidentiality the claimants might find in the IRSSA, they knew that their IAP documents were not confidential and could be retained by Canada and Canada could decide which documents would be destroyed and which documents would be archived at LAC. Further, Canada argues that given the express references to the Access to

2014 ONSC 4585 (CanLII)

Information Act and the Privacy Act, it would take an amendment to the IRSSA for the court to order the destruction of the IAP documents.

[310] Given Canada's argument, it is perhaps ironic that Appendix B to the guide, which was used by the secretariat (a branch of a government department of Canada) and endorsed or adopted by other emanations of Canada, comes closer to what I regard as the proper interpretation of the confidentiality provisions in the IRSSA.

[311] My interpretation is that before a necessary and promised destruction of the IAP documents, the documents will be retained by Canada, where, in the interim, the IAP documents would be governed by the Access to Information Act and the Privacy Act. The retention period was designed to allow the documents to be disclosed in very limited circumstances involving criminal and child protection proceedings. That is, in essence, the interpretation provided in Appendix B, which promotes confidentiality and provides the examples of the reasons why the documents might have to be disclosed in limited circumstances including current child protection proceedings. [page68]

[312] For convenience, I repeat the interpretation of the confidentially provisions that Canada had and continues to announce as set out in Appendix B; visualize:

> Subject to the Access to Information Act, the Privacy Act and any other applicable law, or where your consent to share information has been obtained, personal information about you and other individuals identified in your claim will be dealt with in a private and confidential manner. In certain situations, the government may have to provide personal information to certain authorities. For example, in a criminal case before the courts, the government may have to provide information to the police if they have a search warrant. Another example is where the government has to provide information to child welfare authorities or the police if it becomes aware that a child is currently in need of protection.

[313] Mr. Russell from SAO, who was a deponent for Canada, deposed that Canada complied with its statutory obligations to protect privacy and confidentiality. He stated that "consent from affected individuals remains the primary prerequisite for the release of IAP records outside the IAP Process, except where otherwise required by law, such as in criminal investigations or by court order".

[314] During argument, however, Canada relied on the provision in Section "o" of Schedule "D" that explains that information at a hearing will be kept confidential "except their own evidence, or as required within this process or otherwise by law". Canada submitted that this provision meant that the claimants were told that their documents would not be confidential because "or otherwise by law" meant the Access to Information Act and the Privacy Act, which entailed possible disclosure. I asked whether "or otherwise by law" might just be a reference to the needs of the Criminal Code, R.S.C. 1985, c. C-46. Notwithstanding the examples set out in Appendix B, Canada denied that "or otherwise by law" included the Criminal Code.

[315] In my opinion, the plain meaning of the confidentiality provisions of the IRSSA is different than the interpretation posited by Canada for these RFDs and closer to the interpretation set out in Appendix B. The parties to the IRSSA interested in confidentiality, most particularly the survivors of the Indian residential schools and the church entities obliged by law to protect the privacy of their members and interested in protecting their own reputations,

2014 ONSC 4585 (CanLII)

intended the highest possible degree of confidentiality and privacy during the IAP and most particularly during IAP hearings, which would be recorded sessions.

[316] That high degree of confidentiality is what the plain meaning of the IAP promises. But, by the plain meaning of the IRSSA, the claimants and the defendants, including Canada, also did not intend (nor could they reasonably have expected) [page69]that the IRSSA could be used to cover up criminal activity or to bury information that a child is currently in need of protection.

[317] There is certainly no express language in the IRSSA that told the claimants and defendants that in addition to necessary and predictable exceptions to confidentially for criminal proceedings and current, i.e., imminent, child welfare proceedings, their IAP documents would be archived at LAC, where pursuant to s. 8(3) of the Privacy Act their personal information may be disclosed in accordance with the regulations to any person or body for research or statistical purposes. That is not the high degree of confidentiality that the parties bargained for.

[318] In advancing its purported plain language interpretation of the confidentiality provisions, Canada relies on the interpretative fact that the confidentiality provisions for the IAP refer to the Privacy Act and the Access to Information Act. I regard these references as necessary to provide a mechanism during the retention period for the disclosure of the documents for the limited purposes of the prosecution of criminal or child protection proceedings. But for these provisions, the Privacy Act and the Access to Information Act would not apply to the IAP documents.

[319] In other words, I agree with the chief adjudicator's argument that these statutes would not apply because both statutes require that the information is "under the control of a government institution". A document is under the control of a government institution when (1) the contents of the document relate to a departmental matter; and (2) the government institution could reasonably expect to obtain a copy of the document upon request: Canada (Information Commissioner) v. Canada (Minister of National Defence), supra, at para. 50. In my opinion, the IAP documents are not under the control of a government institution; rather, they are under the control of various supervisory bodies, including ultimately the court under the IRSSA.

[320] I disagree, however, with the chief adjudicator's categorical submission that the Privacy Act and the Access to Information Act do not apply to the IAP documents. It was the contracting parties' intention that these Acts apply during the retention period.

[321] In advancing its purported plain language interpretation of the confidentiality provisions of the IRSSA, Canada relies on the interpretative fact that Appendix II (Acceptance of Application) of Schedule "D" expressly requires everybody but Canada to destroy the IAP application form. The appendix states that: "and all copies other than those held by the Government will be destroyed on the conclusion of the matter". However, it is [page70]precisely because there needs to be a retention period where the IAP documents would be available for criminal and child welfare proceedings that Canada needed to retain a copy of the application form. But, it does not follow that Canada could retain the application form and other IAP documents and then send some part of them to LAC, where the documents would be available for persons for research or statistical purposes. That is not what the parties bargained for.

[322] What the parties bargained for was that the IAP documents would be treated as highly confidential but subject to the very limited prospect of disclosure during a retention period and

2014 ONSC 4585 (CanLII)

then the documents, including Canada's copies, would be destroyed. That's more or less what Canada told the IAP claimants in the guide to the IAP application, omitting the point that eventually the documents would be destroyed. In interpreting the IRSSA, the court can now give the claimants the assurance that the IAP documents will eventually be destroyed and in the interim the documents will be kept confidential subject to very limited exceptions.

[323] I arrive at the above interpretation by the normal principles of contract interpretation and without relying on the implication of terms to the IRSSA.

[324] That said, if I am wrong and the express language of the IRSSA cannot be taken to specify what is to happen to the IAP documents after the completion of the IAP hearings, then I agree with the chief adjudicator's argument that it is an implied term of the IRSSA that the IAP documents will be destroyed.

[325] After a careful review of the background to the IRSSA, it can be presumed that the parties intended that the IAP documents would be destroyed after the completion of the IAP. That implied term arises as a matter of necessity and to give the agreement operative efficiency because otherwise the IAP's objective of compensating the survivors would fail, and failure is the worst kind of inefficiency.

[326] Near to absolute confidentiality was a necessary aspect of the IAP. Near to absolute confidentiality meant that the IAP documents would be used for the IAP only subject to very limited exceptions that necessitated that the documents be retained so that criminals and child abusers or those incapable of caring for their children would not escape the administration of justice. After these uses were completed, the confidentiality would become absolute and the IAP documents would be destroyed. This approach to confidentiality is necessary to make the IAP work and this treatment of the IAP documents is also necessary [page71]to not re-victimize the claimants and to promote healing and reconciliation between the claimants and Canada.

[327] The eventual destruction of the IAP documents after a retention period is the proper interpretation of the IRSSA. I can add that the retention period is also necessary so that the claimants could have a cooling down period to decide whether they might exercise their option to have the transcript of the IAP archived with redactions to protect the private information of others.

[328] I, therefore, conclude that as a matter of contract interpretation, this court can answer the RFDs by stating that the IAP documents be destroyed after a retention period.

(b) The implied undertaking and the court's control of the IAP documents

[329] The implied undertaking provides a second reason that the court has the jurisdiction to order that the IAP documents be destroyed after a retention period. However, before explaining why this is so, it is necessary to address again the matter of who controls the IAP documents.

[330] The chief adjudicator argues that the IAP documents are court records and that it then follows that the documents are not in the possession or control of Canada. The chief adjudicator makes this argument with the aim that the court exclusively have the authority to determine what is to happen to the IAP documents

2014 ONSC 4585 (CanLII)

2014 ONSC 4585 (CanLII)

[331] In my opinion, the IAP documents are in the possession of Canada, but ultimately nothing turns on that conclusion because having possession of IAP documents is not determinative. The pertinent question is whether the court has the jurisdiction to decide what should happen to these documents after the completion of the IAP and that question is not determined by the mere fact of who has possession or control over the documents.

[332] As I will explain, my answer is that the court has the jurisdiction to make an order in rem (against the world) that the IAP documents be destroyed subject to the right of the claimants to consent to certain IAP documents being archived at the NCTR. The destruction order would be binding on persons in possession of the IAP documents, be their possession pursuant to ownership, bailment, licence, statutory authority or even just finding the document.

[333] I can say immediately that the court's jurisdiction does not arise because the IAP documents are court records. In my opinion, the IAP documents are not court records; rather, they [page72]are documents that the court has the jurisdiction to control in rem, which does not make them court records.

[334] Court records would be subject to s. 74 of Ontario's Courts of Justice Act, R.S.O. 1990, c. C.43, which provides that court records are to be disposed of in accordance with the directions of the Deputy Attorney General subject to the approval of the chief justice of the relevant court. Canada submitted that the IAP documents could not be court records because if they were, then the IAP documents would be subject to the open court principle, and this would expose the IAP documents to the public, which was obviously not the intent of the parties to the IRSSA. I agree that the IAP documents were not intended to be subject to the open court principle, which they would be, if they were court records.

[335] The IAP documents are a product of an alternative dispute resolution mechanism, and one of the attractions of adjudication outside of the court is that the adjudication is private and the open court principle does not apply. Under an arbitration agreement, the parties can obtain privacy, something not available from the court system, which is public and invasive of privacy. The IAP is an alternative dispute resolution system, and the parties bargained for privacy and confidentiality.

[336] During argument, Canada conceded, however, that it would have been possible for the IRSSA parties to contract for absolute confidentiality as might be achieved by private arbitration. Canada argued, however, that in the IRSSA negotiations, the potential had not been actualized by the agreement signed by the parties. For the reasons set out above, I disagree with Canada's interpretation of the contract.

[337] This all said, as I will explain below, the open court principle is relevant to the analysis of what to do with the IAP documents after the work of the IAP is completed. The relevance is that in its exceptions, the open court principle has lessons about when and how to protect the confidentiality and the privacy of parties who might be injured by the disclosure of a court record.

[338] I can also say immediately that the court's jurisdiction over the IAP documents does not depend upon whether the secretariat is a branch of AANDC or a separate or semi-separate or autonomous or semi-autonomous entity independent of Canada and its branches. Insofar as the IRSSA is concerned, the court's jurisdiction extends to the signing parties, to the chief adjudicator, to the OC, the NAC, the TRC, the secretariat and to SAO, which undoubtedly is a branch of the AANDC. In some instances, the court's jurisdiction over the IAP documents is in

rem and would extend to non-parties such as the Ontario [page73]Provincial Police ("OPP"), which was the case in Fontaine v. Canada (Attorney General), 2014 ONSC 283, supra.

[339] In Fontaine v. Canada (Attorney General), 2014 ONSC 283, supra, I explained at length the sources of this court's jurisdiction over the production of documents in the IAP process. Although I rely on it, I will not repeat that discussion here, and I simply say that those sources of jurisdiction apply not only to deciding what documents should be produced for the IAP proceedings, which was the issue in Fontaine v. Canada (Attorney General), 2014 ONSC 283, supra, but also to deciding what should happen to IAP documents after the completion of the IAP hearings, which is the issue in the immediate case.

[340] In Fontaine v. Canada (Attorney General), 2014 ONSC 283, supra, after some analysis, which again I will not repeat here, I concluded that the IAP was a form of litigation that replaced or continued the individual and class actions that were settled by the IRSSA. I held that the implied or deemed undertaking that applied to the proceedings that came before the IAP did not preclude Canada from producing certain documents (the OPP documents) for the IAP and for the TRC because the deemed undertaking rule only applies to proceedings other than the proceeding in which the evidence was obtained. Provided that the disclosure was in accordance with the IRSSA, it was not a breach of the implied undertaking to transfer OPP documents to the TRC. It is a logical corollary of my analysis that the deemed or implied undertaking, however, would apply to the IAP documents should they be used outside of the IRSSA.

[341] Apart from being a logical extension of my analysis in Fontaine v. Canada (Attorney General), 2014 ONSC 283, supra, the disclosure of documents in the IAP is part of litigation, and it arises as a matter of the common law and the civil law as an incident of litigation. See Juman v. Doucette, [2008] 1 S.C.R. 157, [2008] S.C.J. No. 8; Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc., [2001] 2 S.C.R. 743, [2001] S.C.J. No. 49; Goodman v. Rossi (1995), 24 O.R. (3d) 359, [1995] O.J. No. 1906 (C.A.). The purpose of the implied undertaking is to protect a litigant in civil proceedings from having his or her discovery testimony used for collateral purposes.

[342] In Goodman v. Rossi, at pp. 363-64 O.R., the Ontario Court of Appeal stated:

> Where a party has obtained information by means of a court compelled production of documents or discovery, which information could not otherwise have been obtained by legitimate means independent of the litigation process, the receiving party impliedly undertakes to the court that the private information so obtained will not be used, vis-à-vis the producing party, for a purpose outside the scope of the litigation for which disclosure was made, [page74]absent consent of the producing party or with leave of the court; any failure to comply with the undertaking shall be a contempt of court.

[343] At p. 367 O.R., the court explained the rationale for the implied undertaking as follows:

> [The] principle is based on recognition of the general right of privacy which a person has with respect to his or her documents. The discovery process represents an intrusion on this right under the compulsory processes of the court. The necessary corollary is that this intrusion should not be allowed for any purposes other than that of securing justice in the proceeding in which the discovery takes place.

2014 ONSC 4585 (CanLII)

[344] In my opinion, the implied undertaking applies to the IAP and it would be a breach of the implied undertaking, for Canada as a party to the IRSSA to provide its IAP documents to the TRC or the NCTR or to LAC. Archiving IAP documents at LAC may have a commendable collateral purpose for preserving history, but it would constitute a breach of the implied undertaking, unless the court ordered that the undertaking does not apply. I would not make such an order in the circumstances of the administration of the IRSSA.

2014 ONSC 4585 (CanLII)

[345] The case at bar is similar to the situation in Andersen Consulting v. Canada, supra, where the Federal Court held that where Canada obtains materials subject to the implied undertakings rule, that material is not within the control of a government institution and must be returned or destroyed at the conclusion of the litigation.

[346] In Andersen, supra, Andersen Consulting and Canada settled a civil dispute, and the lawyers for Canada took the position that Canada would neither return nor destroy the documents it had obtained as a part of the discovery process and that Canada was obliged by law to retain them and in due course to deliver them to what is now LAC. Justice Hugessen ordered the documents destroyed. Justice Hugessen explained that the implied undertaking is not a matter of contract but is imposed by the court itself on a litigant. He disagreed that what is now the Library and Archives Canada Act, supra, and what was then the National Archives of Canada Act, R.S.C. 1985, c. 1 (3rd Supp.), stood in the way of imposing the implied undertaking. He stated, at paras. 16 and 17 of his judgment:

> It is a fair inference that Parliament's interest in creating the public archive was primarily in ensuring that the archives should contain those documents relating to the actual operations of government as such rather than to government in its incidental role as plaintiff or defendant in civil litigation.
> More important, the cases under the Access to Information Act do not deal with a situation where the law itself imposes a condition upon the [page75]government institution which receives a document. This is critical. Documents received by Justice in the discovery process are not subject to a merely voluntary condition. Lawyers for the Crown do not have the option of refusing to give the implied undertaking: by accepting the documents they are bound towards the court to deal with them only in the way permitted by the undertaking. That condition is imposed upon the solicitors and upon the department and the government they serve prior to the documents ever coming into their possession. Furthermore, the undertaking extends not only to the documents themselves but, much more significantly, to all information obtained as a result of the discovery process, e.g. through answers to oral questions. The court in extracting the undertaking is concerned not so much with the documents as pieces of paper but rather, and significantly, with the information they may contain. That information is to remain private unless and until it comes out in open court. While the point does not arise for decision herein, I seriously doubt that it could be called "government information". It is not in the government's control because the latter's possession of it is constrained and restricted by law.

[347] Relying on the Federal Court of Appeal's decision in Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission), [2007] F.C.J. No. 1113, 2007 FCA 272, Canada, however, submitted that Andersen Consulting v. Canada was distinguishable

and that Canada was entitled to have the IAP documents that it controlled archived at LAC without court interference.

[348] In Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission), pursuant to the Employment Equity Act, CIBC provided confidential commercially sensitive information to the Canadian Human Rights Commission. The commission subsequently received a request under the Access to Information Act for disclosure of the information, and the commission advised CIBC that it would disclose the confidential information. Reversing the lower court, the Federal Court of Appeal held that the Canadian Human Rights Commission controlled the information, which made the information subject to the Access to Information Act, but CIBC's information was covered by an exception to disclosure under the Access to Information Act. The outcome of CIBC's appeal was that the confidentiality of its information was protected, but Canada relies on the Federal Court's conclusion that the commission controlled CIBC's documents and thus the information was subject to the Access to Information Act. Canada uses that holding to argue that in the case at bar, Canada controlled the IAP documents subject to the Access to Information Act.

2014 ONSC 4585 (CanLII)

[349] Subject to its relevance to the law about the enforcement of the law about breach of confidence, which I discuss later, I do not see, however, how Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission) helps Canada [page76]in the case at bar. In that case, the Federal Court of Appeal did not overrule or even doubt Andersen Consulting, which it noted was not an Access to Information Act case. Further, Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission) did not involve the implied undertaking and did not engage the same policy concerns as the case at bar.

[350] I conclude that Canada's possession of the IAP documents is subject to the implied undertaking and that the court can order the IAP documents destroyed to enforce the implied undertaking.

(c) Privacy, confidentiality and the court's control of the IAP documents

[351] Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission), supra, and several other cases noted in Andersen Consulting v. Canada, supra, are authority that an expectation of confidentiality arising from the dealings and agreements between the source of the record and the government institution are not sufficient to withdraw a record from the control of the government institution within the meaning of the Access to Information Act. See Canada (Information Commissioner) v. Canada (Immigration and Refugee Board), [1997] F.C.J. No. 1812, 4 Admin. L.R. (3d) 96 (T.D.); Canada Post Corp. v. Canada (Minister of Public Works), [1995] F.C.J. No. 241, [1995] 2 F.C. 110 (C.A.).

[352] In my opinion, none of these cases have any application to the circumstances of the case at bar where Canada entered into an agreement that contained confidentiality provisions that settled class proceedings in nine jurisdictions and which agreement required court approval and which agreement was subject to the administrative and supervisory jurisdiction of the courts under class action statutes including Ontario's Class Proceedings Act, 1992. In such circumstances, Canada is bound by the class action settlement agreement including its confidentiality provisions. The IRSSA, a class action and court-approved settlement agreement, bound Canada to the terms of the settlement and bound Canada and the other parties to the

courts' administration of the agreement including its confidentiality provisions that are entrenched into the agreement and that were complemented by additional assurances from Canada and from the chief adjudicator, who is a court officer.

[353] The destruction order that I shall make does not require an amendment to the IRSSA and indeed is an express or implied term of the IRSSA. Conversely, the archiving of the IAP documents at LAC or at NCTR without the consent of the claimants [page77]would require an amendment to the IRSSA. Further, without the consent of the claimants, the archiving would be a breach of the implied undertaking and a breach of confidence.

[354] Earlier in these reasons for decision, I held that the IAP documents were not court records and as such were not subject to the open court principle that would provide the public with access to what would otherwise be private and in the case of IAP documents very private and very personal information. I also observed, however, that the open court principle has lessons about when and how to protect the confidentiality and the privacy of parties who might be injured by the disclosure of a court record.

[355] The point I now wish to make is that if the IAP documents had been court documents, they, without doubt, would have been sealed by court order. In my text with John Morden, The Law of Civil Procedure in Ontario, 2nd ed. (Markham, Ont.: LexisNexis, 2014), I discuss the open court principle, at paras. 3.735 and 3.738, as follows [footnotes omitted]:

> In Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522 which concerned a request for a sealing order in proceedings before the Federal Court, the Supreme Court of Canada formulated a test for when a sealing order should be granted. Justice Iacobucci stated that a sealing order should only be granted when: (1) the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings.
>
> While courts are reluctant to grant a sealing order, there are grounds that would justify a sealing order, and courts have been prepared to grant sealing orders in a variety of circumstances including:
>
> -- protecting the privacy of infants and parties under a disability, particularly a mental disability;
>
> -- protecting the safety of a child of a wealthy couple involved in a custody case from an appreciable risk of being kidnapped if information regarding the child was made public;
>
> -- protecting the identity of a police informant;
>
> -- protecting the privacy of personal medical information in a class action;
>
> -- protecting the privacy of victims of a sexual assault;
>
> -- protecting a genuine trade secret or confidential property;

2014 ONSC 4585 (CanLII)

-- preventing the disclosure of a non-parties' confidential information, especially where disclosure by a party would contravene a confidentiality agreement; [page78]

-- protecting the disclosure of information subject to the privilege for communications in furtherance of settling litigation (litigation settlement privilege);

-- preventing the subject matter of the litigation from being ruined by its disclosure; and

-- preventing the efficacy of proceedings under the Companies' Creditors Arrangement Act from being undermined.

[356] If a sealing order had been granted for the IAP documents, the sealed documents, practically speaking, would never be unsealed, and they certainly would not be unsealed so that Canada could deliver copies of IAP documents to LAC where, among other exceptions, an individual's personal information may be disclosed for research purposes 110 years after the birth of the individual.

2014 ONSC 4585 (CanLII)

[357] A breach of confidence occurs when a confider discloses confidential information to a confidant in circumstances in which there is an obligation of confidentiality and the confidant misuses the confidential information: Lac Minerals Ltd. v. International Corona Resources Ltd., supra; Coco v. A.N. Clark (Engineers) Ltd., supra.

[358] A confider and confidant relationship does not necessarily require that there be any contractual, fiduciary, or other direct relationship between the parties and confidential relationships may arise as a matter of the common law and equity. A confidant may include any direct recipient of confidential information from the confider and any third party who uses or discloses information that is actually or constructively known to have been used or disclosed by someone in breach of confidence or that is subsequently discovered to have been so used or disclosed. A confidant who receives confidential information, even if it later becomes public knowledge, may not use it to the detriment of the confider. Any use of confidential information other than for a permitted use is a breach of confidence. If a breach of confidence is established, the court has the jurisdiction to grant a wide range of both common law and equitable remedies. The general goal of the remedies is to put the confider into as good a position as it would be but for the breach.

[359] See Cadbury Schweppes Inc. v. FBI Foods Ltd., [1994] B.C.J. No. 1191, [1994] 8 W.W.R. 727 (S.C.), vard [1996] B.C.J. No. 1813, 138 D.L.R. (4th) 682 (C.A.), vard (S.C.C.), supra; Visagie v. TVX Gold Inc. (C.A.), supra, affg [1998] O.J. No. 4032, 42 B.L.R. (2d) 53 (Gen. Div.); Apotex Fermentation Inc. v. Novopharm Ltd., [1998] M.J. No. 297, 162 D.L.R. (4th) 111 (C.A.); International Tools Ltd. v. Kollar, [1968] 1 O.R. 669, [1968] O.J. No. 1071 (C.A.); [page79]Tenatronics Ltd. v. Hauf, [1972] 1 O.R. 329, [1971] O.J. No. 1774 (H.C.J.); Polyresins Ltd. v. Stein-Hall Ltd., [1972] 2 O.R. 188, [1971] O.J. No. 1887 (H.C.J.); Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd., [1967] R.P.C. 375, 174 E.G. 433 (Ch.).

[360] Canada's argument is that the parties to the IRSSA and the persons who signed the confidentiality agreements and who received assurances of confidentially contracted out of absolute confidentiality and absolute privacy for the claimants' personal information. I agree that the parties and participants contracted out of absolute confidentiality and privacy. There were to be exceptions but those exceptions did not include the imperatives of the Library and Archives Canada Act, supra. The August 7, 2012 agreement for the transfer of archival records between

AANDC and LAC is a breach of confidence. The appropriate remedy is to have the IAP documents destroyed after a 15-year retention period.

(d) What should be done with the IAP documents before their final disposition

[361] As discussed above, the IRSSA envisioned that IAP documents would be retained for a period of time during which they might be disclosed for very limited purposes associated with criminal or child protection proceedings. As discussed above, under the IAP, a claimant could request a copy of his or her own evidence for memorialization and had the option of having the transcript of the IAP deposited in an archive.

[362] The IRSSA does not specify the duration of the retention period, and in these circumstances a reasonable retention period would be an implied term of the IRSSA. In my opinion, a reasonable retention period is 15 years. Fifteen years is the duration of the absolute limitation period under Ontario's Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, and that duration provides a comparable public policy measure for a maximum retention period.

[363] The TRC is no longer pursuing a request to obtain IAP documents for the NCTR without the claimants' consent, but the TRC does wish to encourage claimants to exercise the option of having the transcript of the IAP deposited with the NCTR.

[364] The evidence establishes that to date, perhaps because of the trauma and stress of the retelling of their stories at the IAP hearings, few claimants have exercised their option to archive the IAP transcript.

[365] The evidence establishes that there has been a dialogue between the OC and the TRC about obtaining transcripts and [page80]that Canada is willing to facilitate a notice program to encourage claimants to archive their transcripts.

[366] The evidence establishes that the claimants were not advised of their option to archive a transcript during the early years of the IAP and the more recent practice of advising claimants of their rights is not working possibly because of the emotional turmoil of the IAP hearing. A cooling off period is required so that a reasoned decision may be made. After the cooling off period, the claimants can revisit their decision about the IAP documents with the knowledge that if they do not exercise their option the documents will be destroyed after the retention period.

[367] In my opinion, it would be a worthwhile project to develop a notice program to advise the IAP claimants of the rights they have under the IRSSA to tell their stories to the NCTR.

[368] The church entities oppose the development of a notice program, but provided that the program did not go beyond what is consistent with the IRSSA, I see no merit to their opposition.

[369] I do not regard ordering a program to encourage claimants to exercise a right or rights that they have under the IRSSA as requiring any amendment to the IRSSA, and, in my opinion, the order falls within the administrative or supervisory jurisdiction of the court.

[370] However, the precise terms of the notice program should be an evidence-based decision. Care needs to be taken that the notice program not inflict physiological harm and re-victimize the survivors of the Indian residential schools. Therefore, I direct that the TRC or the NCTR may give claimants notice that with the claimant's consent, his or her IAP application, hearing transcript, hearing audio recording and adjudicator's decision may be archived at the

2014 ONSC 4585 (CanLII)

NCTR. The archiving of the document would be conditional on any personal information about alleged perpetrators or affected parties being redacted from the IAP document. The court will settle the terms of the notice program at another RFD hearing that may be brought by the TRC or the NCTR.

[371] It may be noted that in arriving at the above decisions, it was not necessary to decide the issue of whether the IAP documents have historical value. The above decisions are based on (a) the promises made to the claimants under the IRSSA and during the IAP; (b) the claimants' right to control their personal information; and (c) the claimants' right to control the telling of their own stories; and (d) respect for the claimants' individual decisions. [page81]

[372] A notice program must be designed in a way that respects what is a very difficult, very private and very personal decision.

J. Conclusion

[373] An order should be issued in accordance with the above reasons for decision.

[374] The order will have to be carefully drawn, and it may be necessary to have a further attendance to settle the language and terms of the order.

[375] As I pointed out during argument, the definition of what is an IAP document may have to be specified with some precision in any court order and the manner of making redactions in any documents that make their way to the NCTR will require some attention.

[376] The court's destruction order should not be overbroad, and the destruction order should not apply to NAC, OC, chief adjudicator, AANDC, SAO and Department of Justice documents simply because they are related to the IAP.

[377] The IAP is itself now a part of the history of Canada, and the court's destruction order needs to focus on the personal information of the claimants and not be overbroad.

[378] I direct that the chief adjudicator whose RFD was largely successful to prepare and circulate the first draft of the order with the above observations in mind.

[379] If the parties cannot agree about the form of the order, they should contact court counsel to make arrangements for an attendance to settle the order.

[380] Finally, if the parties cannot agree about the matter of costs, they may make submissions in writing within 20 days of the release of these reasons for decision followed by a right of reply within a further 20 days.

Order accordingly.

SCHEDULE "A"

SCHEDULE "N"

2014 ONSC 4585 (CanLII)

2014 ONSC 4585 (CanLII)

MANDATE FOR THE TRUTH AND RECONCILIATION COMMISSION

There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to [page82]establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation.

Principles

Through the Agreement, the Parties have agreed that an historic Truth and Reconciliation Commission will be established to contribute to truth, healing and reconciliation.

The Truth and Reconciliation Commission will build upon the "Statement of Reconciliation" dated January 7, 1998 and the principles developed by the Working Group on Truth and Reconciliation and of the Exploratory Dialogues (1998-1999). These principles are as follows: accessible; victim-centered; confidentiality (if required by the former student); do no harm; health and safety of participants; representative; public/transparent; accountable; open and honourable process; comprehensive; inclusive, educational, holistic, just and fair; respectful; voluntary; flexible; and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians.

Reconciliation is an ongoing individual and collective process, and will require commitment from all those affected including First Nations, Inuit and Métis former Indian Residential School (IRS) students, their families, communities, religious entities, former school employees, government and the people of Canada. Reconciliation may occur between any of the above groups.

Terms of Reference

1. Goals

The goals of the Commission shall be to:

(a) Acknowledge Residential School experiences, impacts and consequences;

(b) Provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission;

(c) Witness support, promote and facilitate truth and reconciliation events at both the national and community levels;

(d) Promote awareness and public education of Canadians about the IRS system and its impacts;

(e) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;

(f) Produce and submit to the Parties of the Agreement a report including recommendations to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools;

(g) Support commemoration of former Indian Residential School students and their families in accordance with the Commemoration Policy Directive (Schedule "X" of the Agreement). [page83]

2. Establishment, Powers, Duties and Procedures of the Commission

The Truth and Reconciliation Commission shall be established by the appointment of "the Commissioners" by the Federal Government through an Order in Council, pursuant to special appointment regulations.

Pursuant to the Court-approved final settlement agreement and the class action judgments, the Commissioners:

(a) in fulfilling their Truth and Reconciliation Mandate, are authorized to receive statements and documents from former students, their families, community and all other interested participants, and, subject to (f), (g) and (h) below, make use of all documents and materials produced by the parties. Further, the Commissioners are authorized and required in the public interest to archive all such documents, materials, and transcripts or recordings of statements received, in a manner that will ensure their preservation and accessibility to the public and in accordance with access and privacy legislation, and any other applicable legislation;

(b) shall not hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process;

(c) shall not possess subpoena powers, and do not have powers to compel attendance or participation in any of its activities or events. Participation in all Commission events and activities is entirely voluntary;

(d) may adopt any informal procedures or methods they may consider expedient for the proper conduct of the Commission events and activities, so long as they remain consistent with the goals and provisions set out in the Commission's mandate statement;

(e) may, at its discretion, hold sessions in camera, or require that sessions be held in camera;

(f) shall perform their duties in holding events, in activities, in public meetings, in consultations, in making public statements, and in making their report and recommendations without making any findings or expressing any conclusion or recommendation, regarding the misconduct of any person, unless such findings or information has already been established through legal proceedings, by admission, or by public disclosure by the individual. Further, the Commission shall not make any reference in any of its activities or in its report or recommendations

2014 ONSC 4585 (CanLII)

to the possible civil or criminal liability of any person or organization, unless such findings or information about the individual or institution has already been established through legal proceedings;

(g) shall not, except as required by law, use or permit access to statements made by individuals during any of the Commissions events, activities or processes, except with the express consent of the individual and only for the sole purpose and extent for which the consent is granted;

(h) shall not name names in their events, activities, public statements, report or recommendations, or make use of personal information or of statements made which identify a person, without the express consent of that individual, unless that information and/or the identity of the person so identified has already been established through legal proceedings, by admission, or by public disclosure by that individual. [page84]Other information that could be used to identify individuals shall be anonymized to the extent possible;

(i) notwithstanding (e), shall require in camera proceedings for the taking of any statement that contains names or other identifying information of persons alleged by the person making the statement of some wrongdoing, unless the person named or identified has been convicted for the alleged wrong doing. The Commissioners shall not record the names of persons so identified, unless the person named or identified has been convicted for the alleged wrong doing. Other information that could be used to identify said individuals shall be anonymized to the extent possible;

(j) shall not, except as required by law, provide to any other proceeding, or for any other use, any personal information, statement made by the individual or any information identifying any person, without that individual's express consent;

(k) shall ensure that the conduct of the Commission and its activities do not jeopardize any legal proceeding;

(l) may refer to the NAC for determination of disputes involving document production, document disposal and archiving, contents of the Commission's Report and Recommendations and Commission decisions regarding the scope of its research and issues to be examined. The Commission shall make best efforts to resolve the matter itself before referring it to the NAC.

3. Responsibilities

In keeping with the powers and duties of the Commission, as enumerated in section 2 above, the Commission shall have the following responsibilities:

(a) to employ interdisciplinary, social sciences, historical, oral traditional and archival methodologies for statement-taking, historical fact-finding and analysis, report-writing, knowledge management and archiving;

(b) to adopt methods and procedures which it deems necessary to achieve its goals;

(c) to engage the services of such persons including experts, which it deems necessary to achieve its goals;

2014 ONSC 4585 (CanLII)

(d) to establish a research centre and ensure the preservation of its archives;

(e) to have available the use of such facilities and equipment as is required, within the limits of appropriate guidelines and rules;

(f) to hold such events and give such notices as appropriate. This shall include such significant ceremonies as the Commission sees fit during and at the conclusion of the 5 year process;

(g) to prepare a report;

(h) to have the report translated in the two official languages of Canada and all or parts of the report in such Aboriginal languages as determined by the Commissioners;

(i) to evaluate commemoration proposals in line with the Commemoration Policy Directive (Schedule "X" of the Agreement). [page85]

4. Exercise of Duties

As the Commission is not to act as a public inquiry or to conduct a formal legal process, it will, therefore, not duplicate in whole or in part the function of criminal investigations, the Independent Assessment Process, court actions, or make recommendations on matters already covered in the Agreement. In the exercise of its powers the Commission shall recognise:

(a) the unique experiences of First Nations, Inuit and Métis former IRS students, and will conduct its activities, hold its events, and prepare its Report and Recommendations in a manner that reflects and recognizes the unique experiences of all former IRS students;

(b) that the truth and reconciliation process is committed to the principle of voluntariness with respect to individuals' participation;

(c) that it will build upon the work of past and existing processes, archival records, resources and documentation, including the work and records of the Royal Commission on Aboriginal Peoples of 1996;

(d) the significance of Aboriginal oral and legal traditions in its activities;

(e) that as part of the overall holistic approach to reconciliation and healing, the Commission should reasonably coordinate with other initiatives under the Agreement and shall acknowledge links to other aspects of the Agreement such that the overall goals of reconciliation will be promoted;

(f) that all individual statements are of equal importance, even if these statements are delivered after the completion of the report;

(g) that there shall be an emphasis on both information collection/storage and information analysis.

. . . . .

2014 ONSC 4585 (CanLII)

11. Access to Relevant Information

In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.

In cases where privacy interests of an individual exist, and subject to and in compliance with applicable privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected. In cases where solicitor-client privilege is asserted, the asserting party will provide a list of all documents for which the privilege is claimed.

Canada and the churches are not required to give up possession of their original documents to the Commission. They are required to compile all relevant documents in an organized manner for review by the Commission and to provide access to their archives for the Commission to carry out its mandate. Provision of documents does not require provision of original documents. Originals or true copies may be provided or originals may be provided temporarily for copying purposes if the original documents are not to be housed with the Commission.

Insofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (IAP), [page86]existing litigation and Dispute Resolution processes may be transferred to the Commission for research and archiving purposes.

12. National Research Centre

A research centre shall be established, in a manner and to the extent that the Commission's budget makes possible. It shall be accessible to former students, their families and communities, the general public, researchers and educators who wish to include this historic material in curricula.

For the duration of the term of its mandate, the Commission shall ensure that all materials created or received pursuant to this mandate shall be preserved and archived with a purpose and tradition in keeping with the objectives and spirit of the Commission's work.

The Commission shall use such methods and engage in such partnerships with experts, such as Library and Archives Canada, as are necessary to preserve and maintain the materials and documents. To the extent feasible and taking into account the relevant law and any recommendations by the Commission concerning the continued confidentiality of records, all materials collected through this process should be accessible to the public.

13. Privacy

The Commission shall respect privacy laws, and the confidentiality concerns of participants. For greater certainty:

(a) any involvement in public events shall be voluntary;

2014 ONSC 4585 (CanLII)

(b) notwithstanding 2 (i), the national events shall be public or in special circumstances, at the discretion of the Commissioners, information may be taken in camera;

(c) the community events shall be private or public, depending upon the design provided by the community;

(d) if an individual requests that a statement be taken privately, the Commission shall accommodate;

(e) documents shall be archived in accordance with legislation.

End of Document

2014 ONSC 4585 (CanLII)

TAB 8

Federal Court Cour fédérale

Date: 20191125

Dockets: T-2111-16
T-460-17

Citation: 2019 FC 1477

Docket: T-2111-16

BETWEEN:

SHERRY HEYDER,
AMY GRAHAM AND
NADINE SCHULTZ-NIELSEN

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-460-17

AND BETWEEN:

LARRY BEATTIE

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDERS

FOTHERGILL J.

2019 FC 1477 (CanLII)

Table of Contents

I. Overview ... 3

II. Background ... 7

III. Issues ... 11

IV. Analysis ... 12

A. Should the proposed class proceedings be certified? ... 12

(1) *Reasonable causes of action* ... 14
(2) *Identifiable classes* ... 15
(3) *Common issues* ... 16
(4) *Preferable procedure* ... 17
(5) *Representative plaintiffs* ... 18
(6) *Conclusion on certification* ... 19

B. Should the Settlement Agreement be approved? ... 19

(1) *Overview of the Settlement Agreement* ... 19
(2) *General principles of settlement approval* ... 29
(3) *Considerations favouring settlement approval* ... 32
(4) *Objections to settlement approval* ... 38
(5) *Conclusion on settlement approval* ... 47

C. Should the payment of honoraria to the representative Plaintiffs be approved? ... 48

D. Should the fees and disbursements of class counsel be approved? ... 48

(1) *Risk, complexity, skill of counsel, and results achieved* ... 51
(2) *Expectations of the Plaintiffs* ... 53
(3) *Time expended* ... 54
(4) *Fees in similar cases* ... 55
(5) *Conclusion on legal fees* ... 57

V. Order ... 57

2019 FC 1477 (CanLII)

2019 FC 1477 (CanLII)

I. Overview

[1] The Plaintiffs have brought motions for an order: (a) consolidating these actions for settlement purposes; (b) certifying these actions as class proceedings for settlement purposes; (c) approving the Final Settlement Agreement [Settlement Agreement] between the parties; (d) approving notice of the Settlement Agreement and notice of the opt out and claims periods; and (e) addressing other ancillary matters.

[2] These proposed class proceedings were commenced following the External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces by former Supreme Court of Canada Justice Marie Deschamps. One of the key findings of the External Review was that:

> […] there is an underlying sexualized culture in the [Canadian Armed Forces] that is hostile to women and LGTBQ members, and conducive to more serious incidents of sexual harassment and assault. Cultural change is therefore key. It is not enough to simply revise policies or to repeat the mantra of "zero tolerance". Leaders must acknowledge that sexual misconduct is a real and serious problem for the organization, one that requires their own direct and sustained attention.

[3] The proceedings and Settlement Agreement encompass two classes consisting of women and men who experienced sexual misconduct while serving in the Canadian Armed Forces [CAF], the Department of National Defence [DND], and as Staff of the Non-Public Funds, Canadian Forces [SNPF]. The first class includes current and former CAF members [CAF Class], and the second includes both current and former DND and SNPF employees [DND/SNPF Class]. I will refer to members of both classes as Class Members.

[4] Six overlapping class proceedings were commenced in late 2016 and early 2017 in different jurisdictions throughout Canada. In September 2017, the Plaintiffs in these proceedings entered into a consortium agreement with the Plaintiffs in the four other related class actions [Consortium Agreement]. The four other actions subject to the Consortium Agreement are: *Graham et al v Attorney General of Canada* (Court File No 13-80853-CP) commenced in the Ontario Superior Court of Justice; *Rogers v The Attorney General of Canada* (Court File No 457658) commenced in the Supreme Court of Nova Scotia; *Alexandre Tessier c Procureur General du Canada* (Court File No 200-06-000209-174) commenced in the Superior Court of Quebec; and *Peffers v The Attorney General of Canada* (Court File No S165018) commenced in the Supreme Court of British Columbia [collectively, the Provincial Actions].

[5] The parties to the Consortium Agreement agreed that the proceedings in this Court would be pursued on behalf of national classes and the Provincial Actions would be held in abeyance.

[6] The Settlement Agreement provides financial compensation in an aggregate amount of up to $900 million through an efficient and non-adversarial claims process. The Settlement Agreement also contemplates numerous systemic changes and programs, specifically:

(a) a restorative engagement program to give interested Class Members an opportunity to communicate their experiences of sexual misconduct in the workplace to senior CAF or DND representatives, with the intention of restoring the relationship between Class Members and the military, and promoting culture change;

2019 FC 1477 (CanLII)

(b) a five-year external review to assess the progress made by the CAF in addressing sexual misconduct, policy effectiveness, sexual misconduct-related procedures and programs, and to provide objective, fair, and results-based recommendations and practical advice to the Chief of Defence Staff and Deputy Minister of Defence;

(c) amending the definition of "harassment" in the Defence Administrative Order and Directive 5012-0—the overarching order that applies to all CAF members and DND employees regarding harassment—with the intention of modernizing the CAF's approach to sexual misconduct;

(d) consultations with Class Members and subject matter experts concerning the CAF's plans to enhance its recourse and support programs for those who have experienced sexual misconduct;

(e) consultations with Class Members and subject matter experts about increasing gender representation and diversity in the CAF;

(f) operational changes to Veterans Affairs Canada [VAC], in particular:

   i. establishing a dedicated unit to receive and process applications for VAC disability benefits from those seeking compensation under Category "C" of the settlement compensation scheme, explained below;

2019 FC 1477 (CanLII)

ii. updated VAC policies governing eligibility for VAC disability benefits to clarify the revised approach to be taken when adjudicating applications involving claims of sexual assault and harassment;

iii. provision of notice to Class Members of updates to VAC policies;

iv. updated VAC policies in relation to review and reconsideration, as well as feedback to VAC on claims arising from sexual assault and sexual harassment; and

v. continued support training for VAC decision-makers.

2019 FC 1477 (CanLII)

[7] The certification and settlement approval motions took place in Ottawa on September 19 and 20, and October 3, 2019. The Court heard from approximately 50 Class Members, the vast majority of whom spoke in favour of the Settlement Agreement.

[8] The named Plaintiffs in the proposed class proceedings say that the Settlement Agreement, including both its monetary and non-monetary aspects, is fair, reasonable, and in the best interests of the class. The Attorney General agrees that the Settlement Agreement should be approved.

[9] For the reasons that follow, the proposed proceedings are certified as class actions, and the Settlement Agreement, including the fees and disbursements payable to class counsel, is approved.

II. Background

[10] The motions to certify the proposed class proceedings were served on May 12, 2017. On May 30, 2017, the Court set a timetable for completion of the steps leading to the motions for certification, and scheduled the motions for July 2018.

[11] The Attorney General served its responding Motion Records in December 2017. The Attorney General also moved to strike the proposed class proceedings.

[12] The Plaintiffs delivered their Reply Motion Records in February 2018. Cross-examinations on affidavits were scheduled to take place between February 9 and March 28, 2018.

[13] In early February 2018, reports appeared in the media of the Attorney General's motions to strike the proposed class proceedings. Criticism focused on the Attorney General's denial of a private law duty of care owed to members of the CAF and DND to provide a safe and harassment-free environment for military personnel, or to create policies to prevent sexual harassment or sexual assault. The Prime Minister of Canada was reported to say that these arguments did not align with his beliefs, or those of his government, and he had directed his Attorney General to intervene personally.

[14] Shortly after the Prime Minister's public comments, the Attorney General proposed to the Plaintiffs that the cross-examinations on affidavits be postponed to permit preliminary

2019 FC 1477 (CanLII)

discussions regarding the possibility of a negotiated resolution. The Attorney General also withdrew the motions to strike.

[15] On March 1, 2018, at the parties' request, the Court ordered a revised timetable and scheduled the certification motions for February 25 to March 1, 2019.

2019 FC 1477 (CanLII)

[16] Between April 2018 and March 2019, counsel for the parties participated in more than 30 meetings and conference calls to discuss the possibility of settlement. The topics of discussion included:

(a) existing CAF and DND initiatives to address sexual misconduct, such as Operation Honour, the Sexual Misconduct Response Centre, the integrated harassment process, and the military justice system;

(b) the definition of the classes;

(c) estimates of the classes' population size and incidence rates, including actuarial analysis;

(d) policy measures that could benefit Class Members, including reform of VAC policies, revisions to the CAF harassment policy, and improvements in gender representation and support measures;

(e) a restorative engagement program;

(f) a comprehensive external review to take place five years after the settlement;

(g) compensation to Class Members, eligibility for compensation, and the establishment of compensation thresholds;

(h) an aggregate cap and structure for making the funds available for individual compensation;

(i) VAC compensation and benefits under the *Pension Act*, RSC, 1985, c P-6 and *Veterans Well-being Act*, SC 2005, c 21 [VWA], and their availability to Class Members, as well as reconsideration of previous VAC decisions;

(j) the structure of a settlement;

(k) legal issues, including the pension bar found in s 9 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 [CLPA], limitations, and causation;

(l) claims advanced on behalf of estates of Class Members;

(m) the claims process and verification;

(n) funding for awareness and culture change initiatives; and

(o) notice, notice publication, assessment of claims, and administration of the settlement.

2019 FC 1477 (CanLII)

[17] The parties retained the Honourable George W. Adams as mediator. A mediation was conducted over five days in August and September 2018. Settlement discussions continued after the mediation, but no agreement was reached.

[18] The parties decided to proceed with the cross-examinations on the affidavits filed in the certification motions. The first cross-examination was scheduled to begin on March 1, 2019, but was abruptly halted when the Attorney General asked to resume settlement discussions.

[19] On March 15, 2019, the parties reached an Agreement in Principle [AIP]. The Court was advised of this development on April 3, 2019, and was asked to maintain the confidentiality of the AIP, pending motions to approve the form of notice of the proposed settlement to members of the class.

[20] Following the AIP's conclusion, counsel for the parties participated in more than 15 additional meetings and conference calls, and exchanged extensive correspondence, to refine the details of the topics previously discussed and negotiated, together with a number of additional matters. In particular:

(a) the inclusion of civilian DND and SNPF employees in the settlement, and related questions of jurisdiction, class size estimates, incidence rates, and union support;

(b) administration of the individual compensation process;

(c) verification of individual claims;

2019 FC 1477 (CanLII)

(d) terms of the release to be provided by the classes;

(e) notice and administration;

(f) policy measures to benefit Class Members; and

(g) the dispute resolution process.

2019 FC 1477 (CanLII)

[21] The parties concluded the Settlement Agreement on July 10, 2019. Motions to approve the form of notice of the Settlement Agreement to be provided to Class Members were heard on July 17, 2019, and granted the following day (*Heyder v Canada (Attorney General)*, 2019 FC 956).

[22] Notice was provided to the proposed classes in accordance with the plan approved by the Court. The deadline for filing objections was August 30, 2019. A compilation of all objections was submitted to the Court in advance of the settlement approval motions that were heard in September and October 2019.

III. Issues

[23] The relief sought is uncontentious insofar as it relates to consolidation, notice of the Settlement Agreement, notice of the opt out and claims periods, and ancillary matters. The issues addressed in these Reasons for Order are as follows:

A. Should the proposed class proceedings be certified?

B. Should the Settlement Agreement be approved?

C. Should the payment of honoraria to the representative Plaintiffs be approved?

D. Should the fees and disbursements of class counsel be approved?

2019 FC 1477 (CanLII)

IV. Analysis

A. Should the proposed class proceedings be certified?

[24] Where the parties have negotiated a settlement agreement in a proposed class action and jointly move to have the action certified and the agreement approved on consent, the threshold for certification is lower and the Court may apply a less rigorous approach (*Buote Estate v Canada*, 2014 FC 773 [*Buote*] at para 8; and *Merlo v Canada*, 2017 FC 51 [*Merlo*] at para 10).

[25] The focus of the analysis at the certification stage is not on the merits of the claims, but rather on whether the claims may appropriately be advanced as a class action. The criteria for certifying a class action are found in Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [Rules]:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if **(a)** the pleadings disclose a	**334.16 (1)** Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

reasonable cause of action;

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

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

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

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins deux personnes;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

e) il existe un représentant demandeur qui :

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

2019 FC 1477 (CanLII)

(1) Reasonable causes of action

[26] In determining whether a proposed class proceeding discloses reasonable causes of action, the Court assumes that the facts outlined in the statements of claim are true or capable of proof. For the purposes of this certification, the representative Plaintiffs rely only on the asserted claims of negligence, breach of fiduciary duty, and breach of ss 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2019 FC 1477 (CanLII)

[27] The Plaintiffs allege that the Crown negligently permitted an environment conducive to sexual assault, sexual harassment, and discrimination based on gender and sexual orientation, causing Class Members to suffer physical and psychological harm. A successful action in negligence requires a plaintiff to satisfy the following elements: (a) the defendant owed the plaintiff a duty of care; (b) the defendant's behaviour breached the standard of care; (c) the plaintiff sustained damage; and (d) the damage was caused, in fact and in law, by the defendant's breach (*Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para 3). The material facts in support of each of these elements are sufficiently pleaded in the Statements of Claim.

[28] The Plaintiffs also allege that the acts and omissions of the Crown constituted a breach of its fiduciary duty to Class Members. A successful action in breach of fiduciary duty requires a plaintiff to satisfy the following elements: (a) the fiduciary has scope for the exercise of some discretion or power; (b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (c) the beneficiary is peculiarly vulnerable

to or at the mercy of the fiduciary holding the discretion or power (*Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 27). The material facts in support of each of these elements are sufficiently pleaded in the Statements of Claim.

2019 FC 1477 (CanLII)

[29] In addition, the Plaintiffs allege that the acts and omissions of the Crown breached the *Charter* rights of Class Members. Section 7 of the *Charter* states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Subsection 15(1) of the *Charter* states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The Plaintiffs say that the breach of the Class Members' *Charter* rights is not "prescribed by law", and cannot be justified under s 1 of the *Charter*. The material facts in support of each of these allegations are sufficiently pleaded in the Statements of Claim.

(2) Identifiable classes

[30] The class description must provide a clear definition of those who may be entitled to relief as part of the class, and objective criteria to identify possible members of the class. Class members need not have identical claims, and it is unnecessary at the certification stage to be satisfied that each class member would succeed in establishing a claim.

[31] The Plaintiffs propose that the classes be defined as follows:

> CAF Class: All current or former CAF Members who experienced Sexual Misconduct up to and including the Approval Date, who have not Opted Out of the Heyder or Beattie Class Actions.
>
> DND/SNPF Class: All current and former employees of DND and of the Staff of the Non-Public Funds, Canadian Forces, who experienced Sexual Misconduct up to and including the Approval Date, who have not Opted Out of the Heyder or Beattie Class Actions.

2019 FC 1477 (CanLII)

[32] These classes are clearly identifiable based on objective criteria, and meet the requirement of Rule 334.16(1)(b).

(3) Common issues

[33] The common question must be a "substantial ingredient" of each class member's claim. It allows the claim to proceed as a representative one and avoids duplication of fact-finding or legal analysis. The common questions requirement constitutes a low bar (*Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 72). The Court should adopt a purposive approach in assessing common issues. Class members need not be identically situated *vis-a-vis* the defendant, nor is it necessary that the common issues predominate over non-common issues (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 108).

[34] The parties propose a simple common question: is the Defendant liable to the Class Members? They note that the same common issue was certified on consent in advance of settlement approval in *Merlo* (at paras 23-26), a class proceeding seeking damages on behalf of women in the Royal Canadian Mounted Police for sexual harassment and sexual assault.

[35] The question of the Defendant's liability is common to each Class Member with a claim arising from her or his treatment while working within the CAF, DND, or SNPF. This common question underlies each Class Member's claim. The answer to the question will avoid duplication of fact-finding and legal analysis, and meets the requirement of Rule 334.16(1)(c).

2019 FC 1477 (CanLII)

(4) Preferable procedure

[36] The question of whether a class action is the preferable procedure requires the Court to consider the principal goals of class proceedings, as described by Chief Justice Beverly McLachlin in *Hollick v Toronto (City)*, 2001 SCC 68:

> [15] First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

[37] Litigation of claims such as the ones raised in these proceedings is complex and expensive. Distributing the litigation costs across the classes may be the only mechanism for Class Members to achieve access to justice. A class proceeding also promotes judicial economy, avoids inconsistent findings on common issues, and promotes behaviour modification. These factors weigh strongly in favour of certification.

[38] Furthermore, certification of these proceedings is intended to implement a national settlement. It is a necessary precondition to resolving the claims in accordance with the Settlement Agreement.

(5) Representative plaintiffs

[39] The proposed representative Plaintiffs, Ms. Heyder, Ms. Schultz-Nielsen, Ms. Graham, and Mr. Beattie, fairly and adequately represent the Class Members' interests. They each provided evidence of sexual harassment or sexual assault that they personally experienced while serving in the CAF. They each swore affidavits confirming their willingness and availability to act in the best interests of the respective class. There is nothing to indicate that they have a conflict of interest on the common questions of law or fact with other Class Members, and they have provided details of their agreements with class counsel respecting fees and disbursements.

[40] The parties have jointly prepared a detailed and robust plan that outlines the steps whereby Class Members will be notified of the certification and proposed settlement of these actions. The notice plan contains all of the elements of the plan previously approved by the Court to provide notice of the certification and settlement approval hearing. In addition, the plan provides for insertions in newspapers and the inclusion of the notice in widely-circulated magazines such as *Maclean's*, *L'actualité*, and *Chatelaine* (English and French), and 2,400 radio spots on 24 radio stations across Canada.

2019 FC 1477 (CanLII)

(6) Conclusion on certification

[41] All of the requirements of Rule 334.16(1) are met. The proposed class proceedings should therefore be certified.

2019 FC 1477 (CanLII)

B. Should the Settlement Agreement be approved?

(1) Overview of the Settlement Agreement

[42] The Settlement Agreement provides for the following:

(a) combined aggregate individual compensation for CAF Class members and DND/SNPF Class members who experienced sexual misconduct in a total amount not exceeding $900 million, with the range of individual compensation for most Class Members between $5,000 and $50,000. Some Class Members who experienced exceptional harm such as post-traumatic stress disorder [PTSD] may be eligible for up to an additional $100,000;

(b) a claims process that is paper-based, non-adversarial, and intended to be restorative in nature, to the extent possible;

(c) the option of participating in a restorative engagement program for Class Members to share their experiences of sexual misconduct with senior CAF or DND representatives;

(d) changes to policies and other measures addressing sexual misconduct in the CAF, including consultation regarding increasing gender representation and diversity in the CAF, and enhancing resources and support programs for those who have experienced sexual misconduct;

(e) a comprehensive external review to assess the progress of Operation Honour and the Sexual Misconduct Response Centre, five years after the settlement is approved;

(f) improvements to VAC policies concerning eligibility for disability payments, and reconsideration of claims by a dedicated unit of employees established for this purpose;

(g) a comprehensive release of Canada from all proceedings, actions, and claims based on the matters asserted, or which could have been asserted, in relation to any aspect of the class actions;

(h) a written request by the Defendant to Employment and Social Development Canada and the Canada Revenue Agency that Class Members' entitlement to federal social benefits or social assistance not be negatively affected; and

(i) a written request by the Defendant to provincial and territorial governments that receipt of compensation under the Settlement Agreement not affect the receipt of social benefits.

2019 FC 1477 (CanLII)

[43] The Settlement Agreement encompasses two classes. As previously mentioned, the CAF Class is defined as follows:

> All current or former CAF Members who experienced Sexual Misconduct up to and including the Approval Date, who have not Opted Out of the Heyder or Beattie Class Actions.

[44] The DND/SNPF Class is defined as follows:

> All current and former employees of DND and of the Staff of the Non-Public Funds, Canadian Forces, who experienced Sexual Misconduct up to and including the Approval Date, who have not Opted Out of the Heyder or Beattie Class Actions.

[45] Compensation will be available for all Class Members who were alive on March 15, 2019, the date the AIP was signed, and who meet the eligibility criteria under the Settlement Agreement. The Settlement Agreement provides that eligible Class Members may receive compensation under Category A, Category B1 or B2, and Category C, provided they meet the criteria for each category:

<table>
<tr><th>Category</th><th colspan="2">Compensation Amount/ Harm Level</th></tr>
<tr><td>A. Sexual harassment, gender based or LGBTQ2+ based discrimination.</td><td colspan="2">$5,000.00</td></tr>
<tr><td rowspan="3">B1. Targeted or ongoing or severe sexual harassment and/or sexual assault in the form of unwanted sexual touching.</td><td>Low Harm</td><td>$5,000.00</td></tr>
<tr><td>Medium Harm</td><td>$10,000.00</td></tr>
<tr><td>High Harm</td><td>$20,000.00</td></tr>
<tr><td rowspan="3">B2. Sexual assault in the form of sexual attack or sexual activity where the Member did not consent or was unable to consent.</td><td>Low Harm</td><td>$30,000.00</td></tr>
<tr><td>Medium Harm</td><td>$40,000.00</td></tr>
<tr><td>High Harm</td><td>$50,000.00</td></tr>
<tr><td rowspan="3">C. Enhanced Payment — Class Members who suffer or suffered from PTSD or other diagnosed mental injuries, or physical injuries directly arising from sexual assault or sexual harassment.</td><td>Low Harm</td><td>$50,000.00</td></tr>
<tr><td>Medium Harm</td><td>$75,000.00</td></tr>
<tr><td>High Harm</td><td>$100,000.00</td></tr>
</table>

2019 FC 1477 (CanLII)

[46] Class Members cannot receive compensation under Category C unless they applied for VAC disability benefits for harm arising from sexual misconduct, and were denied on or after April 3, 2017, when VAC's polices regarding these kinds of applications changed. Claimants who are members of both the CAF Class and DND/SNPF Class may receive only one payment at the highest level to which they are entitled.

2019 FC 1477 (CanLII)

[47] The Settlement Agreement also contains terms to prevent double recovery where Class Members have been compensated for the same incident or injury in another proceeding, including those who have received or are eligible to receive compensation in the "LGBT Purge" Class Action (*Ross, Roy and Satalic v Her Majesty the Queen*, Federal Court No T-370-17). If a Class Member receives compensation under Category C and subsequently qualifies for a pension, award, or similar monetary benefit from VAC or under the *Government Employees Compensation Act*, RSC, 1985, c G-5 [GECA] in respect of the same incident or injury, an amount that is equivalent to the amount paid under Category C must be deducted from the pension or award.

[48] The Settlement Agreement provides for an aggregate cap for the compensation amounts for each class, as well as the circumstances in which unused funds may be redistributed to other class members. Any further residue, up to a maximum of $23 million, may be applied to a fund to promote awareness and cultural change in the CAF.

[49] The total amount payable in respect of the CAF Class cannot exceed $800 million, and the total amount payable in respect of the DND/SNPF Class cannot exceed $100 million. If the

amounts are insufficient to pay the prescribed compensation to each eligible Class Member, then all amounts payable shall be divided on a *pro rata* basis among eligible Class Members so that the total payments do not exceed these limits. The funds for one class may be redistributed to the other class if one exceeds the limit and the other does not.

2019 FC 1477 (CanLII)

[50] Canada will also provide $2 million towards awareness and culture change, regardless of whether or not the limits are exceeded for either class.

[51] The Settlement Agreement provides for a paper-based, non-adversarial, and confidential claims process. Class Members will not be required to undergo an interview. However, they may request an interview in certain circumstances. For example, an interview may be requested as a form of reasonable accommodation, in order to respond to a request for additional information from the claims administrator or assessor(s), or in connection with an application for reconsideration. No claimant is required to testify in a court or undergo cross-examination or any questioning by an adverse party.

[52] The claims process is intended to prevent re-traumatization of Class Members who experienced sexual misconduct, by forgoing the need for oral testimony or cross-examination. As Justice Warren Winkler stated in *Parsons v Canadian Red Cross Society*, [2000] OJ No 2374 (Ont SC), which concerned a proposed settlement of the "tainted blood" litigation:

> [17] 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 satisfactory settlement.

[53] To make a claim for compensation, a Class Member need only complete an application form with the following information:

2019 FC 1477 (CanLII)

(a) confirmation that the claimant is a current or former member of the CAF or employee of the DND or SNPF who experienced sexual assault, sexual harassment, or discrimination based on sex, gender, gender identity, or sexual orientation while serving or employed;

(b) basic biographical information (*e.g.*, name, date of birth, social insurance number, contact information, details of CAF membership or DND/SNPF employment);

(c) information regarding whether the claimant has already been compensated for any event or injury for which claims are made under the Settlement Agreement, including through VAC or a similar benefit program;

(d) for Compensation Category A, a short description of the harm sustained;

(e) for Compensation Category B, a description of the incidents and harm sustained;

(f) for Compensation Category C, copies of medical records demonstrating that the claimant suffered a diagnosed mental or physical injury, supported by additional information as needed; and

(g) certification and a witness signature.

[54] According to the Plaintiffs, Class Members often say they do not want to become involved in litigation because they fear the trauma associated with cross-examination and retribution from alleged perpetrators. They appreciate the confidential nature of the process, and would otherwise be very reluctant to describe their experiences.

2019 FC 1477 (CanLII)

[55] Amounts paid under the Settlement Agreement are intended to be structured as non-taxable income. The Defendant has agreed to write letters to Employment and Social Development Canada and the Canada Revenue Agency requesting that Class Members' entitlement to federal social benefits or social assistance not be adversely affected, and to provincial and territorial governments requesting that receipt of compensation under the Settlement Agreement not affect the receipt of social benefits.

[56] Key features of the claims administration process include the following:

(a) the claims process is meant to be non-adversarial and restorative, to the extent possible;

(b) claimants are presumed to be acting honestly and in good faith in completing their claim forms;

(c) claimants have 18 months to prepare and submit their claim forms, with a possible 60-day extension in exceptional circumstances;

(d) claimants are expected to provide details of their complaint and relevant biographical information, and are encouraged to provide all relevant documentation;

(e) claimants seeking compensation under Category C must provide medical records in support of the level of harm claimed, and indicate whether they have made claims under the GECA or to VAC in respect of the same incident or injury;

(f) claimants seeking compensation must certify that the information in their application is true;

(g) the administrator, assessor(s), and Canada shall establish service standards regarding the administration of claims that may be adjusted from time to time, with a view to deciding all claims no later than 14 months after the claims deadline;

(h) the administrator must initially verify the identity of the claimant, that the information provided is complete, and whether the claimant has opted out;

(i) Canada must verify a claimant's military service or employment, retrieve and review relevant records, and provide a response to the claim if it chooses;

(j) if Canada provides a response to the claim, the claimant will be notified and provided with access to the response and an opportunity to reply;

2019 FC 1477 (CanLII)

(k) the administrator and assessor(s) shall review the claim and information available, and render a decision on eligibility and level of compensation;

(l) the administrator shall then inform the claimant of the decision;

(m) the administrator shall pay $5,000 to each Class Member who is eligible for a Category A payment, as soon as reasonably practicable following verification that she or he qualifies for compensation;

(n) to request reconsideration by the lead assessor, claimants may submit a reconsideration form and any new relevant information;

(o) the administrator shall then provide Canada with access to any such new information, and Canada may provide any new relevant information;

(p) the lead assessor shall then issue a decision and inform the claimant;

(q) the decisions of the administrator and assessor(s) and any reconsideration decisions are final and binding without recourse to the Court or another tribunal;

(r) Canada shall have the right to randomly audit the claims process; and

(s) the administrator and the assessor(s) will provide monthly reports to counsel.

2019 FC 1477 (CanLII)

[57] The Settlement Agreement establishes an Oversight Committee that will identify and choose the measures to promote awareness and culture change. Those measures may be implemented by Canada and/or a third party. The Oversight Committee consists of seven members:

(a) a representative of the CAF Class;

(b) a representative of the DND/SNPF Class;

(c) a representative of class counsel who participated in the discussions preceding the Settlement Agreement;

(d) a representative of the CAF;

(e) a representative of the DND/SNPF;

(f) a representative of Canada's legal counsel who participated in the discussions preceding the Settlement Agreement; and

(g) the lead assessor.

[58] The role of the Oversight Committee is also to monitor the work of the notice provider, administrator, and assessor(s); consider and determine disputes relating to the interpretation of the Settlement Agreement, except in relation to sections 5, 6, and 8 and related Schedules;

2019 FC 1477 (CanLII)

provide guidance and direction on the interpretation and application of the Settlement; and consider and determine any matter not expressly addressed by the Settlement Agreement.

(2) General principles of settlement approval

[59] The test to be applied by the Court in approving settlement of a class proceeding is "whether the settlement is fair and reasonable and in the best interests of the class as a whole" (*Merlo* at para 16). The factors to be considered include, but are not limited to, the following (*Châteauneuf v Canada*, 2006 FC 286 [*Châteauneuf*] at para 5; *Parsons v Canada Red Cross Society*, [1999] OJ No 3572 (Ont SC) [*Parsons 1*] at para 71; and *Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962 at para 28):

(a) the likelihood of success or recovery with continued litigation;

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

(c) the settlement terms and conditions;

(d) the recommendations and experience of counsel involved;

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

(f) the number and nature of any objections;

2019 FC 1477 (CanLII)

(g) the presence of good faith and the absence of collusion;

(h) the dynamics of, and positions taken during, the negotiations; and

(i) the risks of not unconditionally approving the settlement.

2019 FC 1477 (CanLII)

[60] A settlement need not be perfect, but must fall within the “zone of reasonableness” (*Ford v F Hoffmann-La Roche Ltd*, [2005] OJ No 1118 (Ont SC) at para 115). As Justice Danièle Tremblay-Lamer stated in *Châteauneuf*:

> [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.

[61] The zone of reasonableness test acknowledges that a number of settlement possibilities may be in the best interests of the class when compared to the alternative of continued litigation (*Dabbs v Sun Life Assurance Co of Canada*, [1998] OJ No 2811 (Ont Gen Div) at para 30). The Court must show deference to the process underlying the negotiated settlement (*Fontaine v Canada (Attorney General)*, 2006 NUCJ 24 at para 38).

[62] The Court has no discretion to rewrite the substantive terms of the agreement. Nor is it permissible to place the interests of some class members over the interests of the class as a

whole. 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" (*Manuge v Canada*, 2013 FC 341 [*Manuge*] at para 19).

2019 FC 1477 (CanLII)

[63] The Court must be alive to the risk that, if a settlement is not accepted, the negotiations may unravel and the parties may return to litigation (*Manuge* at para 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.

[64] When the settlement is negotiated at arm's length and recommended by experienced counsel, there is a "strong initial presumption of fairness" (*Serhan v Johnson & Johnson*, 2011 ONSC 128 at para 55):

> Where the parties are represented – as they are in this case – by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[65] The Court must be sensitive to the risk that rejection of the Settlement Agreement may put Class Members back in the position of having to pursue novel, uncertain, and untimely remedies, *i.e.*, the position they were in before the Settlement Agreement was reached (*Semple v Canada*, 2006 MBQB 285, at para 3).

(3) Considerations favouring settlement approval

[66] The following factors militate in favour of approving the Settlement Agreement:

(a) the significant compensation fund with a simple paper-based claims process;

(b) the non-monetary benefits to the class, including restorative engagement, policy changes, and other systemic measures in the CAF;

(c) the litigation risks faced by the Plaintiffs in a common issues trial;

(d) the jurisdictional defences available to the Crown;

(e) the statutory defences available to the Crown; and

(f) the avoidance of individual assessments following a trial or motion for judgments respecting damages.

[67] Prosecuting the proposed class actions through certification, discoveries, motions, and eventually a common issues trial, followed by appeals, is fraught with risk:

(a) a national certification order may not be granted;

(b) the parties will engage in prolonged litigation;

2019 FC 1477 (CanLII)

(c) the Court may conclude that it lacks jurisdiction over some or all Class Members;

(d) the claims may be barred by s 9 of the CLPA, stayed under s 92 of the VWA, or barred by s 12 of the GECA;

(e) the asserted causes of action may be found not to be viable, including negligence, breach of fiduciary duty, and claims under the *Charter*;

(f) liability may not be established;

(g) statutory limitation periods may bar many of the Class Members' claims;

(h) an aggregate damages award may be denied by the Court, forcing Class Members through lengthy and protracted individual assessments;

(i) proven damages may be similar to or much less than the settlement amounts; and

(j) systemic change, reconciliation, commemorative, and healing initiatives are likely outside the jurisdiction of any court to order.

[68] The Plaintiffs estimate that all of the required litigation steps, including trial, judgment, and all appeals, could take another seven years. They note that the proceedings were commenced three years ago and relate to events that occurred, for some Class Members, decades ago.

2019 FC 1477 (CanLII)

[69] Many Class Members are of advanced age. Where historical events form part of the litigation, courts have recognized that timely settlement provides a uniquely important benefit (*McKillop and Bechard v HMQ*, 2014 ONSC 1282):

> [28] There is no doubt that without a settlement, the proceedings will be protracted, the outcome uncertain and (even if successful) the class members will not receive compensation for years. There is no assurance that at the end of this process they will receive any more than they will get under these Settlement Agreements. Given the advanced age of class members and the historical nature of this litigation, the benefits of an immediate and certain settlement cannot be overstated.

2019 FC 1477 (CanLII)

[70] In the absence of a settlement, a number of potentially strong defences are available to the Crown if these cases proceed to trial. The primary claims advanced on behalf of the Class Members are negligence and *Charter* breaches.

[71] In response to the negligence claim, the Crown could assert that:

(a) it did not owe a duty of care to individual Class Members to provide a safe and harassment-free environment, or to create policies to prevent sexual harassment or sexual assault which are already prohibited by the *Canadian Human Rights Act*, RSC, 1985, c H-6 [CHRA] and the *Criminal Code of Canada*, RSC, 1985, c C-46 (while the Crown withdrew its motion to strike following the Prime Minister's intervention, this would not prevent the Crown from asserting this defence at trial);

(b) the claims do not establish sufficient proximity between the Class Members and the Crown; and

(c) even if a duty of care existed, it was negated by policy considerations.

[72] With respect to the *Charter* claims, the Crown could argue that:

(a) the *Charter* came into force in 1982 (excepting s 15 which came into force in 1985), and the Plaintiffs therefore have no *Charter*-based cause of action for anything that occurred before its provisions came into force;

(b) section 7 of the *Charter* does not create a positive right or obligation to a particular program or policy within a workplace or the military; and

(c) the facts alleged in support of the claim under s 15 of the *Charter* do not establish or identify any particular government action or inaction that could constitute a distinction or result in differential treatment on the basis of the ground of sex, nor do they support a claim that the alleged action or inaction constitutes discrimination.

[73] For current and former CAF members, the Crown could argue that s 9 of the CLPA precludes all claims by Class Members to whom the provision applies. This provision bars a person from suing the Crown for an injury, damage, or loss if a pension has been paid or is payable for the same injury, damage, or loss.

[74] The Crown could also argue that any claim not covered by s 9 should nevertheless be stayed until an application for disability benefits pursuant to s 92 of the VWA has been made. Similarly, for current and former DND or SNPF employees, s 12 of the GECA precludes a

2019 FC 1477 (CanLII)

government employee who is entitled to compensation arising from an accident at work from pursuing a claim in court.

[75] These bars have previously been found to preclude actions for damages arising from sexual harassment and sexual assault against the Crown (*e.g.*, *Brownhall v Canada (Ministry of National Defence)*, [2007] OJ No 3035 (Ont Div Ct)). Given the individual analysis that may be required for the application of these provisions, the Crown could take the position that the proposed proceedings are incapable of being certified as class actions.

[76] The proposed proceedings could also encounter jurisdictional hurdles. The Crown could argue that this Court does not have jurisdiction over claims based on discrimination and harassment. In *Seneca College of Applied Arts & Technology v Bhadauria*, [1981] 2 SCR 18 (SCC) [*Bhadauria*], the Supreme Court of Canada rejected a common law cause of action for discrimination. *Bhadauria* has since been applied to civil claims involving allegations of sexual harassment, including in the context of class actions (*Rivers v Waterloo Regional Police Services Board*, 2018 ONSC 4307).

[77] In addition, the Crown could argue that the Court should decline jurisdiction over the claims of sexual harassment and discrimination in favour of the comprehensive internal resolution processes available to Class Members. The CAF, DND, and SNPF all have grievance and dispute resolution processes that may offer a complete and comprehensive code for individuals to report and seek redress and protection from sexual harassment and discrimination. The Crown could take the position that Class Members are required to submit grievances or

2019 FC 1477 (CanLII)

complaints under the CHRA and exhaust internal recourse processes, before seeking relief in the Courts.

[78] The Crown could argue that, for DND and SNPF employees, employment relations are governed by the grievance and adjudication regime under the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [FPSLRA]. This could serve as a complete bar to the claims advanced on behalf of the DND and SNPF Class members. A workplace dispute that falls within the prescribed grievance process cannot usually be litigated in the courts (*Weber v Ontario Hydro*, [1995] 2 SCR 929 (SCC) at para 63).

[79] Even if the Plaintiffs were to succeed on liability, an award of aggregate damages may prove elusive. Rule 334.27 states:

334.27 In the case of an action, if, after determining common questions of law or fact in favour of a class or subclass, a judge determines that the defendant’s liability to individual class members cannot be determined without proof by those individual class members, rule 334.26 applies to the determination of the defendant's liability to those class members.	**334.27** Dans une action, si le juge, après avoir statué sur les points de droit ou de fait communs en faveur du groupe ou d’un sous-groupe, estime que la responsabilité du défendeur à l’égard de membres du groupe ou du sous-groupe ne peut être déterminée sans que ceux-ci fournissent des éléments de preuve, la règle 334.26 s’applique pour établir la responsabilité du défendeur.

[80] The Plaintiffs could offer expert evidence that harm may be reasonably calculated on the basis of a common entitlement by all the Class Members. However, given the significant issues of causation and the unique nature of individual harms, an assessment of aggregate damages may not be feasible. The Court could find that the approach to damages quantification contemplated by the Settlement Agreement lacks a sufficient scientific or precedential basis. The Plaintiffs

2019 FC 1477 (CanLII)

would then have to engage in an individual assessment process, which would be cumbersome, intrusive, time-consuming, and expensive.

[81] Limitation periods present another potential obstacle if the proposed actions proceed to trial. While many provinces have eliminated limitation periods for claims of sexual misconduct, New Brunswick, Manitoba, Saskatchewan, Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut limit the exception to claims for sexual assault. Accordingly, the claims for sexual harassment and discrimination could be statute-barred. Quebec has a ten-year limitation period for claims of sexual assault, and a 30-year limitation period if the injury results from sexual aggression or violent behaviour. Prince Edward Island imposes a two-year limitation period after the cause of action arose.

[82] The fact that the Settlement Agreement was negotiated at arm's length and is recommended by experienced counsel also weighs heavily in favour of approval. Class counsel are recognized experts in their fields, and have successfully litigated numerous class actions across Canada. They have considerable experience in settlement mechanics and imperatives, damages methodologies, and the assessment of risks associated with complex and historic litigation.

(4) Objections to settlement approval

[83] A total of 709 Class members submitted Participation Forms in response to the notice of the certification and settlement hearing that was disseminated pursuant to the Court's order dated

2019 FC 1477 (CanLII)

July 18, 2019. Approximately 96% of participating Class Members (680 of 709) indicated their support for the Settlement Agreement, and approximately 97% (573 of 590) of those who commented on the fees and disbursements sought by class counsel expressed support for that aspect of the proposed settlement.

2019 FC 1477 (CanLII)

[84] Only 29 Class Members, roughly 5% of the total, objected to the Settlement Agreement in whole or in part.

[85] The Court heard from nearly 50 Class Members who expressed support for, and occasionally opposition to, the Settlement Agreement. Despite the Court's insistence that this was not necessary, many Class Members disclosed deeply personal and painful accounts of their experiences as members of the CAF or DND/SNPF. As Justice Michael Phelan explained in *McLean v Canada*, 2019 FC 1075 [*McLean*] at para 20, it is "not the function of the settlement hearing to delve into the personal 'truths' of Class Members". Ultimately, the Settlement Agreement and its claims process provides a better opportunity for Class Members to share their individual experiences in a confidential and supportive setting. Nevertheless, the personal accounts of Class Members provided the Court with valuable insight into their reasons for supporting or opposing the Settlement Agreement.

[86] The reasons for supporting the Settlement Agreement most frequently expressed by Class Members are the following:

(a) the settlement will help prevent future sexual misconduct;

(b) the settlement will help to heal Class Members' injuries, pain and suffering;

(c) the settlement will provide a voice to those who have lived in fear and silence for so long;

(d) the settlement will vindicate Class Members who are able to share their stories and experiences;

(e) the settlement will ensure a healthier work environment in the future;

(f) the settlement will provide help and support to those who have suffered trauma from sexual misconduct;

(g) the settlement will provide peace and closure to Class Members, allowing them to recover from the trauma of sexual misconduct; and

(h) the settlement will expedite changes to policies and the culture in the CAF.

[87] The Plaintiffs emphasize the following additional comments by Class Members in support of the Settlement Agreement:

(a) it gives those who are otherwise unable or unwilling to publicly come forward a sense of justice;

2019 FC 1477 (CanLII)

(b) the settlement terms are Class Member-focused;

(c) it acknowledges that there have been wrongdoings on a large scale;

(d) it sends a solid message to other institutions that sexual misconduct will not be tolerated;

(e) it acknowledges military sexual trauma as a unique problem;

(f) it allows Class Members to be a part of changing behaviour in the CAF;

(g) it allows for retribution and reconciliation of past wrongs;

(h) it allows Class Members to be part of a restorative process;

(i) the settlement provides for assistance to Class Members throughout the claims process;

(j) the compensation process is clear and is not intrusive for Class Members; and

(k) it sends the message that the Federal Government is dedicated to remediating sexual misconduct.

[88] In *Parsons 1*, Justice Winkler noted that class members have an enhanced element of control where a settlement is reached prior to the expiry of an opt-out period (at para 79):

2019 FC 1477 (CanLII)

> The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The [Ontario *Class Proceedings Act, 1992*, SO 1992, c 6] mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining settlement or judgment that is tailored more to the individual's circumstances.

[89] A settlement is inevitably a compromise, and is unlikely to give all parties precisely what they want. However, "objectors need not be bound by the perceived failings of the Settlement Agreement. They may opt out and pursue in the normal fashion the claims they assert, bearing in mind the obstacles" (*Bosum c Canada (Attorney General),* 2006 QCCS 5794 at para 13).

[90] In *Quatell v Attorney General of Canada*, 2006 BCSC 1840, Chief Justice Donald Brenner said the following regarding the proposed settlement of the Indian Residential Schools litigation:

> [6] Many of the objectors had concerns with the proposed settlement. Others supported it. Yet others spoke of being torn between the advantage of accepting the proposed settlement and their concerns with a number of the provisions of the Settlement Agreement.
>
> [7] This settlement represents a compromise of disputed claims. For that reason it is undoubtedly the case that claimants will not be happy with every provision of the settlement. Some might well choose to reject it. However, those members of the class who decide that the disadvantages of the Settlement Agreement outweigh its advantages are free to opt out of the provisions of the *Class Proceedings Act* and pursue their individual claims against the defendants. If they choose to opt out, nothing in this class proceeding will affect them or any actions they may choose to bring. In my view, the opt out right supports approval of the agreement.

2019 FC 1477 (CanLII)

[91] The principal objections to the Settlement Agreement, and the responses of class counsel, may be summarized as follows:

(a) Cadets are not included: The Cadets program is for youths aged 12 to 18. Cadets are not members of the CAF. The claims of cadets are therefore distinct, as are Canada's potential defences. Given the lack of commonality, it is not feasible to advance Cadets' claims together with those of Class Members.

(b) Compensation should be permitted for events that occurred prior to 1985: Compensation pursuant to Categories B and C is available for events that took place before 1985. While Category A is restricted to post-1985 events, this category is intended primarily to reflect a *Charter* claim, and s 15 of the *Charter* was not enacted until 1985.

(c) The settlement does not include dependants who were abused: Given that family members and other dependents were not employed by the CAF, DND, or SNPF, these claims necessarily fall outside the scope of the proposed class proceedings.

(d) Individual compensation is insufficient: The reasonableness of the compensation must be considered in light of the alternative of pursuing the litigation to trial. The Plaintiffs note that damages have never before been awarded to members of the CAF, DND, or SNPF for sexual misconduct in any contested litigation. The robust defences available to the Crown are described above. The Settlement Agreement provides individual compensation of up to $155,000, and also contemplates a range

2019 FC 1477 (CanLII)

of policy and systemic changes which will be costly to implement. Canada must also pay for the settlement's administration and legal fees, without any deduction from Class Members' compensation. The process is paper-based, non-adversarial, and expedited, which compares favourably to the protracted and traumatizing process of litigation.

(e) Compensation amounts for Category A are too low: This category provides compensation for harm of a modest nature arising from sexual jokes, inappropriate comments about the claimant's sex life, *etc*. These forms of offence may not be compensable in a civil action. If an individual has been subjected to more serious affronts, or has suffered more significant harm, then additional compensation is available pursuant to Categories B and C.

(f) The amounts of compensation are low when compared to the RCMP settlement: The claims process in the RCMP settlement is different. In that settlement, each claimant is interviewed and examined by the claims assessor, who is a former judge. Pursuant to the Settlement Agreement at issue here, the claims process is non-adversarial, paper-based, and restorative, and there is a presumption that claimants are acting honestly. The restorative aspects of the Settlement Agreement are also distinct. In the RCMP settlement, additional legal fees are deducted from the compensation paid to Class Members, thereby reducing the amount of total compensation.

(g) The settlement should be uncapped: The caps are based on expert evidence, supported by data regarding the prevalence of sexual misconduct in the military, and

2019 FC 1477 (CanLII)

the allotted funds should therefore be sufficient. Uncapped settlements typically involve an adversarial process with personal interviews or cross-examination and rigorous thresholds for proof (*e.g.*, the RCMP and Indian Residential Schools settlements). Here, claimants participate in a non-adversarial, paper-based process that is streamlined and intended to avoid further trauma.

(h) The Settlement Agreement's definition of sexual misconduct is not broad enough: The kinds of sexual misconduct that qualify for compensation are broader than the current definition of sexual harassment in CAF policies, which will be amended under the Settlement Agreement. The claims administrator and class counsel are available to guide Class Members in preparing their claims.

(i) Compensation should be independent of VAC benefits: Compensation under Categories A and B is independent of VAC payments or entitlements. While Category C is restricted to those who have been denied VAC benefits, the Settlement Agreement clarifies former VAC policies and the process governing eligibility for disability benefits arising from sexual misconduct. The VAC process also offers ongoing and flexible benefits and support.

(j) The settlement does not provide compensation for discrimination against women in the provision of healthcare in the CAF: It is possible that this form of discrimination will qualify for compensation under the Settlement Agreement. The claims administrator will interpret what is and is not included.

2019 FC 1477 (CanLII)

(k) The settlement does not protect ongoing VAC benefits: The Plaintiffs cannot fetter the discretion of future governments or the tribunal that adjudicates VAC applications. Nevertheless, the Settlement Agreement seeks to improve existing VAC policies governing eligibility for disability benefits arising from sexual misconduct.

(l) Class Members should be permitted to opt out of parts of the settlement: This would be contrary to the Rules, which permit class members to be included in a class action or to opt out, but not both. It is not feasible for Class Members to opt in to some aspects of the settlement, but not others.

(m) The claims period is too short: The claims period is 18 months, which should be sufficient time for claims to be made and processed. The claims period must have an end date to permit the calculation and payment of individual compensation amounts.

(n) Class Members should retain their rights to make complaints under the CHRA: Class Members who prefer to pursue individual human rights complaints or other civil claims may opt out of the settlement. The settlement preserves Class Members' rights to pursue internal harassment complaints.

(o) Canada should acknowledge liability and apologize: While the Settlement Agreement does not contain an acknowledgement of liability, it recognizes the harm caused by sexual misconduct and seeks systemic change to improve the culture of the CAF, DND, and SNPF. An apology cannot be obtained through litigation.

2019 FC 1477 (CanLII)

[92] A further objection was raised by the Attorney General of British Columbia [AGBC], who complained that no waiver had been sought of potential claims for health care costs incurred by provinces in relation to the claims advanced in these actions. Counsel for the parties subsequently requested the position of all provincial and territorial attorneys general regarding any potential claims for the recovery of health care costs. On October 21, 2019, class counsel submitted affidavit evidence that all provincial and territorial attorneys general, including the AGBC, had confirmed that they approve the Settlement Agreement, do not oppose the Settlement Agreement, will not pursue recovery, or waive any rights they may have with respect to these actions.

2019 FC 1477 (CanLII)

(5) Conclusion on settlement approval

[93] The overwhelming majority of Class Members who provided comments, either in Participation Forms or in oral submissions before the Court, support the Settlement Agreement and want it to be approved. Class counsel have provided reasonable responses to the few objections that Class Members raised. The potential objections of provincial and territorial attorneys general have been resolved.

[94] None of the objections, individually or collectively, are sufficient to take the proposed settlement outside the zone of reasonableness. If a Class Member does not want to participate in the settlement, he or she may opt out and pursue an individual action.

[95] For all of these reasons, the Settlement Agreement should be approved.

C. Should the payment of honoraria to the representative Plaintiffs be approved?

[96] The Settlement Agreement provides for honoraria in the amount of $10,000 to be paid to each of the representative Plaintiffs in these proceedings, and to the representative Plaintiffs in the Provincial Actions who were signatories to the Settlement Agreement.

[97] Honoraria are intended to recognize the additional contributions and sacrifices made by representative plaintiffs in advancing the litigation on behalf of the class. Representative plaintiffs may be asked to forfeit their privacy, and to participate in media events and community outreach (*Merlo* at paras 68-74). Nevertheless, honoraria are to be awarded sparingly, as representative plaintiffs should not benefit from class proceedings more than other class members (*McLean* at para 57).

[98] Ordinarily, honoraria may be paid only to representative plaintiffs in class proceedings that are included in the Court's certification order. However, exceptions may be made in unusual cases, such as these, where the named Plaintiffs in the related Provincial Actions also made significant contributions to advancing the claims across multiple jurisdictions (*McLean* at para 58).

[99] The honoraria have been agreed to by the Attorney General, and are relatively modest. There is no reason why they should not be approved.

D. Should the fees and disbursements of class counsel be approved?

2019 FC 1477 (CanLII)

[100] The Settlement Agreement provides for legal fees to be paid to class counsel in the amount of $26.56 million, plus disbursements and applicable taxes.

[101] According to class counsel, the proposed fees amount to approximately 2.95% of the total compensation payable to Class Members. If the total value of the settlement is taken into account, including compensation, administration, notice, policy measures, external reviews, and the restorative engagement program, then the legal fees represent approximately 2.5%.

[102] Class counsel assert that the proposed legal fees are considerably less than what was contemplated in their retainer agreements with the representative Plaintiffs (25%), or what has been awarded in other comparable class proceedings. The fees are to be paid by Canada directly, and will not reduce the compensation available to Class Members.

[103] Very few Class Members expressed a view on the legal fees sought by Class counsel. Of those who did, the vast majority support the proposed fees as fair compensation for the results achieved in complex and risky litigation.

[104] The fees sought by class counsel were negotiated as part of an arm's length, good faith negotiation separate from the Settlement Agreement. This may be an important factor in considering fee approval (*McLean* at paras 22-24).

[105] However, in response to questions from the Court, counsel representing the Attorney General were not prepared to say that their agreement to the proposed fees supports the inference

2019 FC 1477 (CanLII)

that the Crown considers them to be fair and reasonable. Counsel explained that many factors influence a settlement, including the need for certainty, finality, and timely resolution. While this is undoubtedly true, the refusal of the Attorney General to take any position regarding the fees sought by class counsel has made this Court's task more difficult.

2019 FC 1477 (CanLII)

[106] The fees payable to class counsel under the Settlement Agreement include the provision of future legal services to Class Members. No additional fees may be charged by other counsel without the prior approval of this Court:

> **17.03 Provision of Legal Services to the Class**
>
> Class Counsel further agree to provide reasonable assistance to Class Members throughout the claims process at no additional charge. […]
>
> **17.05 Pre-Approval of Fees Required**
>
> The Parties will request that the Court order that no fee may be charged to Class Members in relation to claims under this FSA by counsel not listed on Schedule "R" without prior approval of the Court.

[107] The prohibition against other counsel charging fees for providing assistance in the claims process is intended to alleviate concerns arising from the implementation of the Indian Residential Schools settlement, where some lawyers hired for the claims process were alleged to have charged exorbitant fees.

[108] The Court may consider a broad range of factors in determining whether the fees sought by class counsel are fair and reasonable. These include: risk undertaken, results achieved, complexity of the issues, quality and skill of counsel, expectations of the plaintiffs, time

expended, and fees in similar cases (*McLean* at para 25; *Condon v Canada*, 2018 FC 522 [*Condon*] at para 82; *Merlo* at paras 78-98; *Manuge* at para 28). The factors are not exhaustive and will be weighed differently in different cases. Risk and result remain the critical factors (*Condon* at para 83).

2019 FC 1477 (CanLII)

(1) *Risk, complexity, skill of counsel, and results achieved*

[109] The legal and practical risks incurred by class counsel in this litigation are described above. They are significant. The consortium of law firms representing the Class Members demonstrated considerable skill in preparing the pleadings, coordinating the proceedings in multiple jurisdictions, ensuring carriage of two national class actions in this Court while holding the Provincial Actions in abeyance, resisting the Crown's motion to strike, negotiating the numerous provisions of the complex Settlement Agreement, including the non-monetary aspects, and expanding the Class Members to include civilian employees of the DND and SNPF. Given the challenging legal and political context, the results obtained by class counsel may be fairly described as excellent.

[110] As Justice Phelan wrote in *McLean,* which concerned a class action brought on behalf of those who attended Indian Day Schools:

> When Class Counsel took on the mandate, they accepted it without any assurance that politically the case would settle and certainly not achieve this result. Cases with public policy elements have their own unique risk of being caught up in the political debates.

[111] Justice Phelan's observation is particularly apt in the present case, where political considerations were pivotal in bringing about the negotiations that eventually led to the

Settlement Agreement. Class counsel readily acknowledge that the Attorney General's denial of a "private law duty of care" owed to those serving in the military was, and continues to be, a defence to these actions. This well-established principle of law is frequently invoked in disputes relating to public sector employment. The Prime Minister's public disavowal of the Defendant's legal position was undoubtedly a turning point in these proceedings.

2019 FC 1477 (CanLII)

[112] Class counsel describe these actions as "true collective pioneer litigation, the first of their kind on behalf of members of the CAF anywhere in the country." When they were commenced, no court in Canada had adjudicated the merits of novel claims such as those advanced in these proceedings. The class action against the RCMP for sexual misconduct (*Merlo*) had not yet produced a settlement.

[113] But class counsel would certainly have been aware that they were advancing claims on behalf of representative Plaintiffs who were likely to win the sympathy of the media and the government. As similar proceedings against the Crown are commenced and prompt early settlement discussions, the question will inevitably arise whether class actions on behalf of public servants who have experienced sexual or other misconduct in the course of their employment may continue to be described as "high-risk" litigation.

[114] I am nevertheless satisfied that these proceedings may be fairly characterized as complex and risky, and the results achieved as impressive. The Settlement Agreement provides substantial compensation to those who experienced sexual misconduct in the CAF, DND, and SNPF through an efficient and non-adversarial claims process. It also provides programs to promote

reconciliation and systemic change. The combined aggregate compensation of up to $900 million compares very favourably to the risks of a contested motion for national certification, a motion for summary judgment, a trial of common issues, and attendant appeals or individual assessments.

2019 FC 1477 (CanLII)

[115] The non-monetary aspects of the Settlement Agreement advance a central policy objective of class proceedings, namely behaviour modification. It is doubtful that these initiatives could be achieved through contested litigation (*Rideout v Health Labrador Corp*, 2007 NLTD 150 at para 70). As this Court held in *Merlo*, these features and benefits go well beyond what the Plaintiffs may have been awarded after a trial (at para 2).

(2) *Expectations of the Plaintiffs*

[116] The Plaintiffs say that the Settlement Agreement as an important step in mending the relationship between those who experienced sexual misconduct and the Crown, and in bringing about systemic, lasting change. While it is possible for Class Members to pursue their claims individually, as some have opted or may opt to do, this is not a viable choice for most, who may lack the financial resources and stamina to pursue novel and untested claims to trial and beyond.

[117] The fees payable to class counsel under the Settlement Agreement are to be paid directly by Canada, and do not affect the compensation and other benefits available to Class Members. The fees compare very favourably to the 25% contingency arrangement contained in the retainer agreements between class counsel and the representative Plaintiffs.

(3) *Time expended*

[118] Class counsel report that, as of September 17, 2019, the consortium of law firms had expended 9,878.15 hours and recorded fees of $4,951,526.87. Their estimate of the fees incurred to the conclusion of the certification and approval is more than $5 million.

[119] In addition, class counsel will have to devote many hours over the next 12 to 18 months to implement the Settlement Agreement by:

(a) reviewing, revising, and approving notice materials;

(b) ensuring that notice is given in accordance with the approved plan;

(c) communicating with Class Members who contact class counsel with questions;

(d) communicating with the representative Plaintiffs;

(e) monitoring settlement implementation to ensure the processes are followed;

(f) addressing any questions or issues raised by the lead assessor or administrator in the administration of claims;

(g) reviewing updates from the lead assessor and administrator;

(h) reviewing the final distribution of compensation;

2019 FC 1477 (CanLII)

(i) participating in the Oversight Committee; and

(j) attending to any other matter that may be raised during settlement implementation that requires class counsel's attention.

2019 FC 1477 (CanLII)

[120] Class counsel estimate that in order to implement the settlement and assist Class Members through the claims process, they will expend between 4,000 and 5,000 hours with a value in the range of $2 million to $2.5 million. According to class counsel, the total time expended to date and the estimated future work amounts to between $7 million and $7.5 million in total fees.

[121] In *McLean*, Justice Phelan approved fees that represented a multiplier of five times the docketed time. However, Justice Phelan noted (at paras 36-37):

> […] the use of a multiplier as the basis for approving the fee is not appropriate. As commented upon in *Condon* and in *Manuge*, the multiplier may reward the inefficient and punish the efficient.
>
> Nevertheless, it serves as a useful check but nothing more – a factor but not a key one.

[122] In this case, the proposed fees of $26.56 million represent a multiplier of less than four times the estimated value of the time expended, including for future legal services. Like Justice Phelan, I consider this a useful check but nothing more; a factor but not a key one.

(4) *Fees in similar cases*

[123] The most common method of determining whether legal fees in high-value class actions are fair and reasonable is to assess the fees as a percentage of the total amount payable to the class. As Justice Kenneth Smith observed in *Endean v CRCS*; *Mitchell v CRCS*, 2000 BCSC 971 at paragraph 38, the use of percentage fees in "common fund" cases shifts the emphasis from the fair value of the time expended by counsel, or what one would refer to as a *quantum meruit* fee, to a fair percentage of the recovery. This approach tends to reward success and promote early settlement (*Manuge* at para 47).

2019 FC 1477 (CanLII)

[124] In *McLean*, Justice Phelan approved legal fees in the amount of $55 million, or 3% of the settlement fund:

> [54] In summary, the legal fees will be in the 3% range.
>
> [55] In my view, this range is consistent with other mega-fund type settlements such as "Hep C" (*Parsons* and related cases at $52.5 million on $1.5 billion settlement, approximately 3.5%), "Hep C – Pre/Post" (*Adrian* and related cases at $37.2 million on $1 billion settlement, approximately 3.7%), "IRRS" (*Baxter* and related cases at approximately 4.5%), "60's Scoop" (*Riddle v Canada*, 2018 FC 641, 296 ACWS (3d) 36, and *Brown v Canada (Attorney General)*, 2018 ONSC 5456, 298 ACWS (3d) 704, at $75 million on $625-875 million, at its lowest approximately 4.6%), and *Manuge* at 3.9% (paid by the Class).

[125] The legal fees sought by class counsel amount to approximately 2.95% of the total compensation payable to Class Members. If the total value of the settlement is taken into account, including compensation, administration, notice, policy measures, external reviews, and the restorative engagement program, then the legal fees represent approximately 2.5%. This compares favourably to the fees awarded in similar cases.

(5) *Conclusion on legal fees*

[126] Measured against the jurisprudence, and having regard to all of the pertinent factors discussed above, the legal fees sought by class counsel are fair and reasonable, and should be approved.

V. Order

[127] For the foregoing reasons, an Order shall issue: (a) consolidating these actions for settlement purposes; (b) certifying these actions as class proceedings for settlement purposes; (c) approving the Settlement Agreement; (d) approving notice of the Settlement Agreement and notice of the opt out and claims periods; and (e) addressing other ancillary matters.

"Simon Fothergill"
Judge

Ottawa, Ontario
November 25, 2019

2019 FC 1477 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2111-16 AND T-460-17
DOCKET:	T-2111-16
STYLE OF CAUSE:	SHERRY HEYDER, AMY GRAHAM AND NADINE SCHULTZ-NIELSEN v THE ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-460-17
STYLE OF CAUSE:	LARRY BEATTIE v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATES OF HEARING:	SEPTEMBER 19, 2019, SEPTEMBER 20, 2019, OCTOBER 3, 2019
REASONS FOR ORDERS:	FOTHERGILL J.
DATED:	NOVEMBER 25, 2019

APPEARANCES:

Jonathan Ptak Garth Myers Andrew Raven Andrew Astritis Amanda Montague-Reinholdt Madeleine Carter Raymond Wagner Jean-Daniel Quessy Simon St-Gelais Raj Sahota Patrick Dudding	FOR THE PLAINTIFFS

2019 FC 1477 (CanLII)

Christine Mohr Jeff Anderson Sharon Johnston Thomas Finlay Julie DeMarco Derek Allen	FOR THE DEFENDANT

<u>SOLICITORS OF RECORD</u>:

Koskie Minsky LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFFS
Raven Law LLP Barristers and Solicitors Ottawa, Ontario	
Wagners Barristers and Solicitors Halifax, Nova Scotia	
Quessy Henry St-Hilaire Avocats Barristers and Solicitors Quebec, Quebec	
Acheson Sweeney Foley Sahota LLP Barristers and Solicitors Victoria, British Columbia	
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT

2019 FC 1477 (CanLII)

TAB 10

Manulife Bank of Canada *Appellant*

v.

John Joseph Conlin *Respondent*

INDEXED AS: MANULIFE BANK OF CANADA *v.* CONLIN

File No.: 24499.

1996: May 30; 1996: October 31.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages — Guarantee — Renewal agreement — Release of guarantor from liability — Mortgagor's husband guaranteeing mortgage — Mortgage clause providing that guarantors liable "as principal debtors and not as sureties" — Guarantee to remain binding "notwithstanding the giving of time for payment . . . or the varying of the terms of payment" — Mortgagor renewing mortgage at different interest rate — Renewal agreement not signed by guarantor — Whether guarantor waived equitable right to be released when principal loan renewed.

Courts — Jurisdiction — Mortgagor defaulting on mortgage — Bank obtaining summary judgment against mortgagor and guarantor — Whether Court of Appeal exceeded its jurisdiction in setting aside judgment and dismissing action against guarantor.

The respondent guaranteed a mortgage for a three-year term with an interest rate of 11.5 percent per annum which his wife had provided as security for a loan from the appellant bank. In clause 34 of the mortgage agreement, the guarantors promised, as "principal debtors and not as sureties", to pay the money secured by the mortgage. The guarantee was to remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". Shortly before the mortgage was to mature, the mortgagor and the bank executed an agreement which renewed the mortgage for a further three-year term at a yearly interest rate of 13 percent. The renewal forms provided spaces for the signature of the "registered owner" and the "guarantor", but

Banque Manuvie du Canada *Appelante*

c.

John Joseph Conlin *Intimé*

RÉPERTORIÉ: BANQUE MANUVIE DU CANADA *c.* CONLIN

Nº du greffe: 24499.

1996: 30 mai; 1996: 31 octobre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Hypothèques — Cautionnement — Convention de renouvellement — Libération de la caution — Cautionnement de l'hypothèque par l'époux de la débitrice hypothécaire — Clause de l'hypothèque prévoyant que les cautions sont responsables «à titre de débiteurs principaux et non de cautions» — Cautionnement devant demeurer valide «nonobstant l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» — Débitrice hypothécaire renouvelant l'hypothèque à un taux d'intérêt différent — Convention de renouvellement non signée par la caution — La caution a-t-elle renoncé à son droit en equity d'être libérée lorsque le prêt principal a été renouvelé?

Tribunaux — Compétence — Défaut de paiement de l'hypothèque de la part de la débitrice hypothécaire — Banque obtenant un jugement sommaire contre la débitrice hypothécaire et la caution — La Cour d'appel a-t-elle excédé sa compétence en infirmant le jugement et en rejetant l'action intentée contre la caution?

L'intimé s'est porté garant d'une hypothèque de trois ans, portant intérêt au taux de 11,5 pour 100 par année, que sa femme avait offerte en garantie de remboursement d'un prêt obtenu auprès de la banque appelante. À la clause 34 de la convention hypothécaire, les cautions se sont engagées, «à titre de débiteurs principaux et non de cautions», à rembourser la somme garantie par l'hypothèque. Le cautionnement devait demeurer valide «nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt». Peu avant que l'hypothèque vienne à échéance, la débitrice hypothécaire et la banque ont signé une convention de renouvellement de l'hypothèque pour une autre période de trois ans, à un taux d'intérêt de 13 pour 100 par année.

1996 CanLII 182 (SCC)

the agreement was signed only by the mortgagor. The mortgagor defaulted on the mortgage, and the bank obtained a summary judgment against the mortgagor and the guarantors for the principal owing under the mortgage with interest at 13 percent per annum. The Court of Appeal, in a majority decision, set aside the judgment and dismissed the action against the respondent guarantor. This appeal is to determine (1) whether the Court of Appeal exceeded its jurisdiction in allowing the appeal and dismissing the action, rather than sending the matter back to trial, and (2) whether under the terms of the loan agreement, the respondent was released from his promise to pay the principal sum and other moneys secured by the mortgage when the term of the mortgage was extended and the rate of interest increased, without notice to him.

Held (L'Heureux-Dubé, Gonthier and Iacobucci JJ. dissenting): The appeal should be dismissed.

(1) *Jurisdiction*

The Court of Appeal has jurisdiction to make any order or decision that ought to or could have been made by the court or tribunal appealed from. Considered in light of Rule 1.04(1), which provides that the rules are to be liberally construed, Rules 20.04(2) and (4) of the *Rules of Civil Procedure* gave the motions court judge the jurisdiction to dismiss the action against the respondent. The judge could either have found that there was no genuine issue for trial or he could have found that the only genuine issue was an issue of law. In either case, it would have been within his jurisdiction and, by extension, within the jurisdiction of the Court of Appeal, to dispose of the matter by dismissing the appellant's claim. The appellant was not deprived of its right to have its case fully heard and to test all of the respondent's evidence. Under Rule 39.02(1), a party to a motion may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion. The appellant chose not to exercise this right and left the respondent's evidence unchallenged.

(2) *Release from liability*

Per La Forest, Sopinka, Cory and Major JJ.: It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor. A surety can contract out of the protection provided to a guarantor by the common

Les formules de renouvellement comportaient un espace pour la signature du «propriétaire enregistré» et de la «caution», mais la convention n'a été signée que par la débitrice hypothécaire. Il y a eu défaut de paiement de l'hypothèque de la part de la débitrice hypothécaire et la banque a obtenu un jugement sommaire contre la débitrice hypothécaire et les cautions pour le capital dû en vertu de l'hypothèque, avec intérêts au taux de 13 pour 100 par année. La Cour d'appel à la majorité a infirmé le jugement et rejeté l'action intentée contre la caution intimée. Le présent pourvoi vise à déterminer (1) si la Cour d'appel a excédé sa compétence en accueillant l'appel et en rejetant l'action, au lieu de renvoyer l'affaire au procès, et (2) si, en vertu des conditions de la convention de prêt, l'intimé a été libéré de sa promesse de payer le capital et les autres sommes garantis par l'hypothèque, lorsque l'hypothèque a été prorogée et le taux d'intérêt augmenté, sans qu'il en soit informé.

Arrêt (les juges L'Heureux-Dubé, Gonthier et Iacobucci sont dissidents): Le pourvoi est rejeté.

(1) *Compétence*

La Cour d'appel a compétence pour rendre l'ordonnance ou la décision que le tribunal dont il y a appel aurait dû ou pu rendre. À la lumière du par. 1.04(1) des Règles, qui prévoit que les règles doivent recevoir une interprétation large, les par. 20.04(2) et (4) des *Règles de procédure civile* conféraient au juge des requêtes compétence pour rejeter l'action intentée contre l'intimé. Le juge aurait pu conclure soit qu'il n'y avait pas de question litigieuse soit que la seule question litigieuse portait sur une question de droit. Dans un cas comme dans l'autre, lui-même et, par extension, la Cour d'appel auraient eu compétence pour trancher l'affaire en rejetant la demande de l'appelante. On n'a pas refusé à l'appelante le droit de faire entendre pleinement sa preuve et de vérifier l'exactitude de tout le témoignage de l'intimé. En vertu du par. 39.02(1) des Règles, une partie à une requête peut contre-interroger le déposant d'un affidavit signifié par une partie ayant des intérêts opposés relativement à cette requête. L'appelante a choisi de ne pas exercer ce droit et de ne pas contester le témoignage de l'intimé.

(2) *Libération de responsabilité*

Les juges La Forest, Sopinka, Cory et Major: Il est clair depuis longtemps que la caution est libérée de sa responsabilité en vertu du cautionnement lorsque le créancier et le débiteur principal conviennent d'apporter une modification importante aux conditions de la dette contractuelle sans son consentement. Une caution peut renoncer par contrat à la protection que lui accorde la

1996 CanLII 182 (SCC)

law or equity, but any contracting out of the equitable principle must be clear. The issue as to whether a surety remains liable will be determined by interpreting the contract between the parties and determining the intention of the parties as demonstrated by the words of the contract and the events and circumstances surrounding the transaction as a whole. If there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. As well, this Court has stated that the surety is a favoured creditor in the eyes of the law whose obligation should be strictly examined and strictly enforced. The guarantor in this case comes within the class of accommodation sureties, or those who enter into the guarantee in the expectation of little or no remuneration. The law has protected such guarantors by strictly construing their obligations and limiting them to the precise terms of the contract of surety.

Clause 34 and clause 7, dealing with renewal or extension of time, unambiguously indicate that the respondent was not bound by the renewal agreement. If the guarantor is to be treated as a principal debtor and not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal. Moreover, even if it were thought that the principal debtor clause does not convert the guarantor into a principal debtor, the equitable or common law rules relieving the surety from liability where the contract has been materially altered by the creditor and the principal debtor without notice to the surety would apply, in the absence of an express agreement to the contrary. Two aspects of the renewal agreement itself lead to the conclusion that the guarantor is not to be bound. First, the renewal agreement is once again a standard form prepared and used by the bank and it calls for the signature of the guarantor. Secondly, the renewal agreement states that the terms of the old mortgage will form part of the agreement, and by doing so indicates that this is a new agreement rather than merely an extension of an old agreement. Further, clause 7 of the original mortgage specifically distinguishes between extensions and renewals both in its heading and in its text. The failure to refer to a renewal agreement or even to a renewal in clause 34 strongly suggests that it has no application to a renewal. The words used in clauses 34 and 7 are sufficiently clear to conclude that the guarantor did not waive his equitable and common law rights either as a principal debtor or as a guarantor. If the wording of the two clauses should be found to be ambiguous, the *con-*

common law ou l'*equity*, mais toute renonciation par contrat au principe d'*equity* doit être claire. Pour savoir si la responsabilité de la caution subsiste, il faut interpréter le contrat liant les parties et déterminer leur intention eu égard aux mots qu'elles ont utilisés et aux circonstances de l'ensemble de l'opération. Il y a lieu d'appliquer la règle *contra proferentem* selon laquelle une clause de cautionnement ambiguë doit être interprétée au détriment de la partie qui l'a rédigée. De même, notre Cour a affirmé que la caution est, aux yeux de la common law, un créancier privilégié dont l'obligation devrait être interprétée et exécutée strictement. La caution, dans la présente affaire, tombe dans la catégorie des cautions de complaisance, ou de celles qui ont conclu le contrat de cautionnement en espérant peu de rétribution, si ce n'est aucune. La loi a protégé ces cautions en interprétant leurs obligations de façon stricte et en les limitant aux conditions précises du contrat de cautionnement.

La clause 34 et la clause 7, qui porte sur le renouvellement ou la prorogation de délai, indiquent nettement que l'intimé n'était pas lié par la convention de renouvellement. S'il faut traiter la caution comme un débiteur principal et non comme une caution, alors le défaut de la banque d'aviser l'intimé de la convention de renouvellement et des nouvelles conditions du contrat doit le libérer de ses obligations étant donné qu'il n'est pas partie au renouvellement. De plus, même si l'on pensait que la clause de débiteur principal ne transforme pas la caution en un débiteur principal, les règles d'*equity* et de common law qui libèrent la caution de sa responsabilité, lorsque le créancier et le débiteur principal ont modifié sensiblement le contrat sans l'aviser, s'appliqueraient, en l'absence d'un consentement explicite à ce qu'il en soit autrement. Deux aspects de la convention de renouvellement elle-même mènent à la conclusion que la caution ne doit pas être liée. Premièrement, la convention de renouvellement est une formule type préparée et utilisée par la banque, qui requiert la signature de la caution. Deuxièmement, la convention de renouvellement prévoit que les conditions de l'ancienne hypothèque feront partie de la convention, indiquant ainsi qu'il s'agit d'une nouvelle convention plutôt qu'une simple prorogation de l'ancienne. En outre, la clause 7 de l'hypothèque initiale distingue expressément les prorogations des renouvellements, tant dans sa rubrique que dans son texte même. L'absence de mention d'une convention de renouvellement ou même d'un renouvellement dans la clause 34 donne fortement à penser qu'elle ne s'applique pas à un renouvellement. Les mots utilisés dans les clauses 34 et 7 sont suffisamment clairs pour conclure que la caution n'a pas renoncé aux droits que

1996 CanLII 182 (SCC)

tra proferentem rule must be applied against the bank. The wording of clause 34 binding the guarantor to variations in the event of an extension of the mortgage should not be applied to bind the guarantor to a renewal without notice since there is ambiguity as to whether clause 34 applies to renewals at all. In these circumstances as well, the guarantor should be relieved of liability.

l'*equity* et la common law lui confèrent à titre de débiteur principal ou de caution. Si l'on conclut que le texte des deux clauses est ambigu, il faut appliquer la règle *contra proferentem* au détriment de la banque. Le texte de la clause 34 liant la caution aux modifications qui peuvent être apportées en cas de prorogation de l'hypothèque ne devrait pas être interprété de manière à lier la caution à un renouvellement effectué sans donner avis, étant donné qu'il y a ambiguïté quant à savoir si la clause 34 s'applique de quelque façon que ce soit aux renouvellements. Dans ces circonstances aussi, la caution devrait être libérée de sa responsabilité.

Per Gonthier and Iacobucci JJ. (dissenting): Clause 34 amounts to a waiver of the respondent's right to be discharged as a result of a material variation of the principal contract. Guarantee contracts are basically contracts, like any others, and should be construed according to the ordinary rules of contractual interpretation. The cardinal interpretive rule of contracts is that the court should give effect to the intentions of parties as expressed in their written document. The court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absurd result or to a result which is plainly repugnant to the intention of the parties. By clause 34, the guarantors agree to remain bound by the guarantee contract notwithstanding the giving of time for payment of the mortgage or the varying of the rate of interest. While clause 34 does not refer to "renewal" agreements by name, it does contain a clear waiver of the guarantors' right to be discharged in the event of an extension of time or an increase in the rate of interest. The plain ordinary meaning of the words "the giving of time for payment . . . or the varying of the terms of payment" encompasses the renewal agreement. While the parties used a renewal agreement, at bottom, that renewal agreement extended the time for payment and increased the interest rate, events that are expressly covered in clause 34. Under clause 34, the bank did not have to notify the guarantors of the renewal agreement. The language of the clause is clear, and it would be odd to infer a condition of notice when the undertaking is so clear and unambiguous. As "principal debtors", the guarantors would not be expected to sign the renewal agreement. The evident intention of the parties, in using this kind of language, was to preserve the liability of the surety even in circumstances where the principal obligation was no longer enforceable. The space for the guarantors' signature on the renewal agreement is not helpful in trying to interpret the guarantee contract, since the wording or form of another subsequent contract, entered into three years later, cannot change the meaning of the

Les juges Gonthier et Iacobucci (dissidents): La clause 34 équivaut à une renonciation par l'intimé au droit d'être libéré en raison d'une modification importante du contrat principal. Les contrats de cautionnement sont au fond des contrats comme les autres, qui devraient être interprétés selon les règles ordinaires d'interprétation des contrats. La principale règle d'interprétation des contrats veut que les tribunaux mettent à exécution les intentions que les parties ont exprimées dans leur document écrit. La cour ne s'écartera du sens ordinaire des mots que si une interprétation littérale des termes du contrat menait à un résultat absurde ou à un résultat nettement inconciliable avec l'intention des parties. À la clause 34, les cautions consentent à rester liées par le contrat de cautionnement nonobstant l'attribution d'un délai de paiement de l'hypothèque ou la modification du taux d'intérêt. Bien qu'elle ne mentionne pas expressément les conventions de «renouvellement», la clause 34 contient une renonciation claire au droit des cautions d'être libérées dans le cas d'une prorogation de délai ou d'une augmentation du taux d'intérêt. Le sens clair et ordinaire des mots «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» comprend la convention de renouvellement. Bien que les parties aient conclu une convention de renouvellement, au fond, cette convention de renouvellement prorogeait le délai de paiement et augmentait le taux d'intérêt, ce qui était expressément prévu à la clause 34. En vertu de la clause 34, la banque n'était pas tenue d'aviser les cautions de la convention de renouvellement. Le texte de cette clause est clair et il serait étrange de déduire l'existence d'une exigence d'avis en présence d'un engagement aussi clair et net. On ne s'attendrait pas à ce que, à titre de «débiteurs principaux», les cautions soient signataires de la convention de renouvellement. Les parties avaient manifestement l'intention, en utilisant cette terminologie, de maintenir la responsabilité de la caution même dans le cas où l'obligation principale ne pourrait plus être exécutée. L'espace prévu pour la signature de la caution dans la con-

1996 CanLII 182 (SCC)

original agreement. The respondent promised to guarantee the payment of the money secured by the original mortgage, and the terms of that mortgage thus determine the extent of his liability. The respondent is not liable for interest at the increased rate of 13 percent, but simply to repay the balance owing on the principal sum with interest charged at 11.5 percent per annum.

vention de renouvellement n'est d'aucune utilité pour tenter d'interpréter le contrat de cautionnement, puisque le texte ou la forme d'un autre contrat conclu trois ans plus tard ne saurait changer le sens de la convention initiale. L'intimé a promis de garantir le paiement des sommes garanties par l'hypothèque initiale, et les conditions de cette hypothèque déterminent donc l'étendue de sa responsabilité. L'intimé est responsable non pas des intérêts calculés au taux majoré de 13 pour 100 par année, mais simplement du remboursement du solde exigible du capital, avec intérêts calculés au taux de 11,5 pour 100 par année.

Per L'Heureux-Dubé J. (dissenting): Subject to the following comment, Iacobucci J.'s reasons are substantially agreed with. Courts should generally use the "modern contextual approach" as the standard, normative approach to judicial interpretation, and may exceptionally resort to the old "plain meaning" rule in appropriate circumstances. To determine the appropriate definition of the phrase "the giving of time for payment . . . or the varying of the terms of payment" in the present context, Iacobucci J. reviewed the provisions in their immediate context, the contract as a whole, the consequences of proposed interpretations, the applicable presumptions and rules of interpretation, and admissible external aids. This process is not an application of the "plain meaning" approach but rather an application of the "modern contextual approach" to judicial interpretation. The rules which govern the interpretation of deeds and contracts generally are essentially the same as the rules for statutory interpretation. The "modern contextual approach" for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation. Here, the resulting interpretation did not come from the "plain meaning" of the words, but from their "meaning in law", because they are "legal terms of art". Where an instrument uses a legal term of art, there is a presumption that the term of art is used in its correct legal sense, and this is the presumption that is resorted to by Iacobucci J. when he makes use of admissible external aids in determining the correct meaning of the phrase "to give time".

Le juge L'Heureux-Dubé (dissidente): Sous réserve du commentaire suivant, il y a accord, pour l'essentiel, avec les motifs du juge Iacobucci. Les tribunaux doivent généralement utiliser la «méthode contextuelle moderne» comme méthode normative standard d'interprétation judiciaire et ils peuvent exceptionnellement recourir à l'ancienne règle du «sens ordinaire» quand les circonstances s'y prêtent. Pour définir l'expression «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» dans le présent contexte, le juge Iacobucci a examiné les dispositions dans leur contexte immédiat, le contrat dans son ensemble, les conséquences des interprétations proposées, les présomptions et les règles d'interprétation applicables, ainsi que les sources acceptables d'aide extérieure. Cette démarche est une application non pas de la méthode du «sens ordinaire», mais plutôt de la «méthode contextuelle moderne» d'interprétation judiciaire. Les règles qui régissent l'interprétation des actes et des contrats en général sont essentiellement les mêmes que les règles d'interprétation des lois. La «méthode contextuelle moderne» d'interprétation des lois s'applique également, avec les adaptations nécessaires, à l'interprétation des contrats. L'interprétation des lois et l'interprétation des contrats ne sont que deux subdivisions de la grande catégorie de l'interprétation judiciaire. En l'espèce, l'interprétation qui a résulté découlait non pas du «sens ordinaire» des mots, mais plutôt de leur «sens en droit» parce que ce sont des «termes techniques propres au domaine juridique». Lorsqu'un instrument emploie un terme technique propre au domaine juridique, ce terme technique est présumé être employé dans son sens juridique exact, et c'est la présomption à laquelle recourt le juge Iacobucci lorsqu'il utilise une source acceptable d'aide extérieure pour déterminer le sens exact de l'expression «accorder un délai».

1996 CanLII 182 (SCC)

Cases Cited

By Cory J.

Referred to: *Holme v. Brunskill* (1878), 3 Q.B.D. 495; *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551; *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102; *First City Capital Ltd. v. Hall* (1993), 11 O.R. (3d) 792; *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165; *Alberta Opportunity Co. v. Schinnour*, [1991] 2 W.W.R. 624; *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513; *Canadian Imperial Bank of Commerce v. Patel* (1990), 72 O.R. (2d) 109; *Co-operative Trust Co. of Canada v. Kirkby*, [1986] 6 W.W.R. 90; *Royal Trust Corp. of Canada v. Reid* (1985), 40 R.P.R. 287; *Veteran Appliance Service Co. v. 109272 Development Ltd.* (1985), 67 A.R. 117.

By Iacobucci J. (dissenting)

Holme v. Brunskill (1878), 3 Q.B.D. 495; *Re Rotenberg and Borough of York (No. 2)* (1976), 13 O.R. (2d) 101; *Keltic Leasing Corp. v. Curtis* (1993), 133 N.B.R. (2d) 73; *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551; *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888; *Stevenson v. Reliance Petroleum Ltd.*, [1956] S.C.R. 936; *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453; *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513.

By L'Heureux-Dubé J. (dissenting)

River Wear Commissioners v. Adamson (1877), 2 App. Cas. 743; *Sydall v. Castings Ltd.*, [1967] 1 Q.B. 302; *Inland Revenue Commissioners v. Williams*, [1969] 1 W.L.R. 1197.

Statutes and Regulations Cited

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(1).
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 1.04(1), 20.04(2), (4), 39.02(1).

Authors Cited

Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing, 1979, "renewal", "extension".
Concise Oxford Dictionary of Current English, 9th ed. Oxford: Clarendon Press, 1995, "extend", "renew".
Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 2nd ed. Cowansville: Yvon Blais, 1991.

Jurisprudence

Citée par le juge Cory

Arrêts mentionnés: *Holme c. Brunskill* (1878), 3 Q.B.D. 495; *Banque de Montréal c. Wilder*, [1986] 2 R.C.S. 551; *Bauer c. Banque de Montréal*, [1980] 2 R.C.S. 102; *First City Capital Ltd. c. Hall* (1993), 11 O.R. (3d) 792; *Holland-Canada Mortgage Co. c. Hutchings*, [1936] R.C.S. 165; *Alberta Opportunity Co. c. Schinnour*, [1991] 2 W.W.R. 624; *Citadel General Assurance Co. c. Johns-Manville Canada Inc.*, [1983] 1 R.C.S. 513; *Canadian Imperial Bank of Commerce c. Patel* (1990), 72 O.R. (2d) 109; *Co-operative Trust Co. of Canada c. Kirkby*, [1986] 6 W.W.R. 90; *Royal Trust Corp. of Canada c. Reid* (1985), 40 R.P.R. 287; *Veteran Appliance Service Co. c. 109272 Development Ltd.* (1985), 67 A.R. 117.

Citée par le juge Iacobucci (dissident)

Holme c. Brunskill (1878), 3 Q.B.D. 495; *Re Rotenberg and Borough of York (No. 2)* (1976), 13 O.R. (2d) 101; *Keltic Leasing Corp. c. Curtis* (1993), 133 R. N.-B. (2e) 73; *Banque de Montréal c. Wilder*, [1986] 2 R.C.S. 551; *Bauer c. Banque de Montréal*, [1980] 2 R.C.S. 102; *Exportations Consolidated Bathurst Ltée c. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 R.C.S. 888; *Stevenson c. Reliance Petroleum Ltd.*, [1956] R.C.S. 936; *Cornish c. Accident Insurance Co.* (1889), 23 Q.B.D. 453; *Citadel General Assurance Co. c. Johns-Manville Canada Inc.*, [1983] 1 R.C.S. 513.

Citée par le juge L'Heureux-Dubé (dissidente)

River Wear Commissioners c. Adamson (1877), 2 App. Cas. 743; *Sydall c. Castings Ltd.*, [1967] 1 Q.B. 302; *Inland Revenue Commissioners c. Williams*, [1969] 1 W.L.R. 1197.

Lois et règlements cités

Loi sur les tribunaux judiciaires, L.R.O. 1990, ch. C.43, art. 134(1).
Règles de procédure civile, R.R.O. 1990, règl. 194, art. 1.04(1), 20.04(2), (4), 39.02(1).

Doctrine citée

Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing, 1979, «renewal», «extension».
Concise Oxford Dictionary of Current English, 9th ed. Oxford: Clarendon Press, 1995, «extend», «renew».
Côté, Pierre-André. *Interprétation des lois*, 2e éd. Cowansville: Yvon Blais, 1990.

1996 CanLII 182 (SCC)

Driedger on the Construction of Statutes, 3rd ed. By Ruth Sullivan. Toronto: Butterworths, 1994.
Fridman, G. H. L. *The Law of Contract in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 1994.
McGuinness, Kevin Patrick. *The Law of Guarantee*, 2nd ed. Scarborough, Ont.: Carswell, 1996.

Driedger on the Construction of Statutes, 3rd ed. By Ruth Sullivan. Toronto: Butterworths, 1994.
Fridman, G. H. L. *The Law of Contract in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 1994.
McGuinness, Kevin Patrick. *The Law of Guarantee*, 2nd ed. Scarborough, Ont.: Carswell, 1996.

APPEAL from a judgment of the Ontario Court of Appeal (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143, reversing a decision of the Ontario Court (General Division) finding the respondent liable to pay under a mortgage. Appeal dismissed, L'Heureux-Dubé, Gonthier and Iacobucci JJ. dissenting.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143, qui a infirmé une décision de la Cour de l'Ontario (Division générale) qui avait conclu que l'intimé était responsable du paiement d'une hypothèque. Pourvoi rejeté, les juges L'Heureux-Dubé, Gonthier et Iacobucci sont dissidents.

1996 CanLII 182 (SCC)

H. Stephen Lee, for the appellant.

H. Stephen Lee, pour l'appelante.

Raymond F. Leach and *Barbara F. Fischer*, for the respondent.

Raymond F. Leach et *Barbara F. Fischer*, pour l'intimé.

The judgment of La Forest, Sopinka, Cory and Major JJ. was delivered by

Version française du jugement des juges La Forest, Sopinka, Cory et Major rendu par

1

CORY J. — I have read with great interest the clear and concise reasons of Justice Iacobucci. I am in agreement with his finding that the Court of Appeal had jurisdiction to make the order dismissing the action against the respondent. However, I must differ with his conclusion that by the terms of the guarantee, the respondent waived the equitable right of a guarantor to be released upon renewal of the mortgage loan with a different term and interest rates to which the guarantor did not consent.

LE JUGE CORY — J'ai lu avec grand intérêt les motifs clairs et concis du juge Iacobucci. Je suis d'accord avec sa conclusion que la Cour d'appel avait compétence pour délivrer l'ordonnance rejetant l'action contre l'intimé. Toutefois, je dois exprimer mon désaccord avec sa conclusion qu'en vertu des conditions du cautionnement l'intimé a renoncé au droit qu'une caution possède en *equity* d'être libérée en cas de renouvellement du prêt hypothécaire où l'échéance et le taux d'intérêt sont modifiés sans son consentement.

The Position of a Guarantor as Defined by Equity and the Common Law

La situation de la caution en vertu de l'*equity* et de la common law

2

It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor. The principle was enunciated by Cotton L.J. in *Holme v. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), at pp. 505-6, in this way:

Il est clair depuis longtemps que la caution est libérée de sa responsabilité en vertu du cautionnement lorsque le créancier et le débiteur principal conviennent d'apporter une modification importante aux conditions de la dette contractuelle sans son consentement. Ce principe est énoncé ainsi par le lord juge Cotton dans l'arrêt *Holme c. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), aux pp. 505 et 506:

The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court . . . will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

[TRADUCTION] La véritable règle est, à mon avis, la suivante: s'il y a une convention entre les parties principales quant au contrat cautionné, la caution doit être consultée et, si elle n'a pas consenti à la modification, même dans le cas où il est parfaitement évident que la modification n'est pas importante ou qu'elle ne peut que lui être profitable, la caution ne peut être libérée; cependant, s'il n'est pas évident en soi que la modification n'est pas importante ou qu'elle n'est pas susceptible de porter préjudice à la caution, la cour [. . .] statuera alors qu'il revient à la caution elle-même de décider si elle consent à rester liée nonobstant la modification, et si elle ne donne pas ce consentement, elle sera libérée.

This rule has been adopted in a number of Canadian cases. See for example *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562.

Cette règle a été adoptée dans un certain nombre de décisions canadiennes. Voir, par exemple, l'arrêt *Banque de Montréal c. Wilder*, [1986] 2 R.C.S. 551, à la p. 562.

3 The basis for the rule is that any material alteration of the principal contract will result in a change of the terms upon which the surety was to become liable, which will, in turn, result in a change in the surety's risk. The rationale was set out in *The Law of Guarantee* (2nd ed. 1996) by Professor K. P. McGuinness in this way, at p. 534:

La règle est fondée sur le raisonnement selon lequel toute modification importante du contrat principal a pour résultat de modifier les conditions auxquelles la responsabilité de la caution devait être engagée, ce qui a pour effet de modifier le risque auquel la caution est exposée. Ce raisonnement a été formulé par le professeur K. P. McGuinness dans *The Law of Guarantee* (2e éd. 1996), à la p. 534:

The foundation of the rule in equity is certainly consistent with traditional thinking, but it is a fair question whether it is necessary to invoke the aid of equity at all in order to conclude that in a case where the principal contract is varied materially without the surety's consent, the surety is not liable for any subsequent default. Essentially, a specific or discrete guarantee (as opposed to an all accounts guarantee) is an undertaking by the surety against the risks arising from a particular contract with the principal. If that contract is varied so as to change the nature or extent of the risks arising under it, then the effect of the variation is not so much to cancel the liability of the surety as to remove the creditor from the scope of the protection that the guarantee affords. When so viewed, the foundation of the surety's defence appears in law rather than equity: it is not that the surety is no longer liable for the original contract as it is that the original contract for which the surety assumed liability has ceased to apply. In varying the principal contract without the consent of the surety, the creditor embarks upon a frolic of his own, and if misfortune occurs it occurs at the sole risk of the creditor. A law based

[TRADUCTION] Le fondement de la règle d'*equity* est certainement compatible avec le courant de pensée traditionnel, mais il est juste de se demander s'il est nécessaire d'invoquer de quelque façon l'*equity* pour conclure que, dans le cas où une modification importante est apportée au contrat principal sans le consentement de la caution, cette dernière ne verra pas sa responsabilité engagée en cas d'inexécution subséquente. Au fond, un cautionnement particulier ou distinct (par opposition à un cautionnement général) est un engagement par lequel la caution se porte garante des risques découlant d'un contrat particulier avec le débiteur principal. Si ce contrat est modifié de manière à changer la nature et l'ampleur des risques qui en découlent, la modification n'a pas tant pour effet d'annuler la responsabilité de la caution que de soustraire le créancier à la protection que le cautionnement accorde. Sous cet angle, la défense de la caution paraît reposer sur la common law plutôt que sur l'*equity*: ce n'est pas que la caution n'assume plus aucune responsabilité relativement au contrat initial, mais plutôt que le contrat initial pour lequel la caution a assumé une responsabilité ne s'applique plus. En modi-

1996 CanLII 182 (SCC)

approach to the defence is in certain respects attractive, because it moves the surety's right of defence in the case of material variation from the discretionary and therefore relatively unsettled realm of equity into the more absolute and certain realm of law. In any event, it is clear quite certainly in equity and quite probably in law as well, that the material variation of the principal contract without the surety's consent (unless subsequently ratified by the surety) will result in the discharge of the surety from liability under the guarantee.

fiant le contrat principal sans le consentement de la caution, le créancier le fait à ses risques et périls, et si une malchance survient, elle survient uniquement aux dépens du créancier. Une façon d'aborder la défense sous l'angle de la common law est attrayante à certains égards, parce que cela fait passer le droit de la caution de se défendre, dans le cas où il y a eu modification importante, du domaine discrétionnaire et donc relativement incertain de l'*equity* au domaine plus absolu et certain de la common law. De toute manière, il est clair, très certainement en *equity* et fort probablement en common law aussi, que la modification importante du contrat principal effectuée sans le consentement de la caution (à moins qu'elle ne l'ait ratifiée ultérieurement) aura pour résultat de libérer la caution de sa responsabilité aux termes du cautionnement.

1996 CanLII 182 (SCC)

And further at p. 541, he wrote:

Where the risk to which the surety is exposed is changed, the rationale for the complete release of the surety is easily explained. To change the principal contract is to change the basis upon which the surety agreed to become liable. A surety's liability extends only to the contract which he has agreed to guarantee. If the terms of that contract (and consequently the terms of the surety's risk) are varied then the creditor should no longer be entitled to hold the surety to his obligation under the guarantee. To require a surety to maintain a guarantee in such a situation would be to allow the creditor and the principal to impose a guarantee upon the surety in respect of a new transaction. Such a power in the hands of the principal and creditor would amount to a radical departure from the principles of consensus and voluntary assumption of duty that form the basis of the law of contract.

Il écrit ensuite, à la p. 541:

[TRADUCTION] Si le risque auquel la caution est exposée est modifié, la libération totale de la caution se justifie facilement. Modifier le contrat principal, c'est modifier le motif pour lequel la caution a convenu d'être responsable. La responsabilité de la caution se limite au contrat pour lequel elle s'est portée garante. Si les conditions de ce contrat (et donc les conditions du risque auquel est exposée la caution) sont modifiées, alors le créancier ne devrait plus avoir le droit d'exiger de la caution l'exécution de son obligation en vertu du cautionnement. Dans un tel cas, exiger d'une caution qu'elle maintienne son cautionnement équivaudrait à permettre au créancier et au débiteur principal de forcer la caution à se porter garante d'une nouvelle opération. Un tel pouvoir de la part du créancier et du débiteur principal représenterait une dérogation radicale aux principes de consensus et d'acceptation volontaire d'obligations sur lesquels repose le droit des contrats.

The Right of a Guarantor to Contract Out of the Protection Provided by the Common Law

Le droit de la caution de renoncer par contrat à la protection de la common law

4

Generally, it is open to parties to make their own arrangements. It follows that a surety can contract out of the protection provided to a guarantor by the common law or equity. See for example *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107. The Ontario Court of Appeal, correctly in my view, added that any contracting out of the equitable principle must be clear. See *First City Capital Ltd. v. Hall* (1993), 11 O.R. (3d) 792 (C.A.), at p. 796.

De façon générale, il est loisible aux parties de conclure leurs propres arrangements. Il s'ensuit qu'une caution peut renoncer par contrat à la protection que lui accorde la common law ou l'*equity*; voir, par exemple, l'arrêt *Bauer c. Banque de Montréal*, [1980] 2 R.C.S. 102, à la p. 107. La Cour d'appel de l'Ontario a ajouté, à juste titre selon moi, que toute renonciation par contrat au principe d'*equity* doit être claire. Voir *First City Capital Ltd. c. Hall* (1993), 11 O.R. (3d) 792 (C.A.), à la p. 796.

5 The principle was explained by Professor McGuinness in *The Law of Guarantee*, *supra*, at p. 546, in these words:

> There are certain types of amendment that may be made to the terms of a principal contract (or departures from the terms of the principal contract) that will not have the effect of discharging the surety under that contract, even though those changes may be of a material nature. For instance, where the changes that have been made to the principal contract were specifically authorized by the surety or were otherwise within the contemplation of the contract, the surety will not be discharged. Similarly, changes which are authorized within the guarantee will not relieve the surety from liability.
>
> It is a question of interpretation whether such changes are authorized or contemplated.

The author added at p. 547 the following sage advice to lending institutions:

> Since the courts have tended to give a narrow construction to provisions in standard form guarantees which authorize such changes, it would be most unwise for a creditor to agree to changes without first obtaining the consent of the surety, except where there is clear authorization for him to act solely upon his own initiative. Where the creditor seeks to show that the guarantee agreement provides a blanket authorization to make material alterations to the principal contract, the wording must be very clear that such a right was intended. [Emphasis added.]

6 The issue as to whether a surety remains liable will be determined by interpreting the contract between the parties and determining the intention of the parties as demonstrated by the words of the contract and the events and circumstances surrounding the transaction as a whole.

Principles of Interpretation

7 In many if not most cases of guarantees a contract of adhesion is involved. That is to say the document is drawn by the lending institution on a standard form. The borrower and the guarantor have little or no part in the negotiation of the agreement. They have no choice but to comply with its terms if the loan is to be granted. Often the guarantors are family members with limited com-

Dans *The Law of Guarantee*, *op. cit.*, le professeur McGuinness explique ainsi ce principe, à la p. 546:

> [TRADUCTION] Il y a certaines modifications des conditions d'un contrat principal (ou dérogations à ces conditions) qui n'auront pas pour effet de libérer la caution à l'égard de ce contrat, même si ces modifications peuvent être importantes. Par exemple, si les modifications du contrat principal ont été précisément autorisées par la caution ou si elles étaient par ailleurs prévues par le contrat, la caution ne sera pas libérée. De même, les modifications autorisées apportées au cautionnement ne libéreront pas la caution de sa responsabilité.
>
> La question de savoir si ces modifications sont autorisées ou prévues est une question d'interprétation.

À la page 547, l'auteur ajoute à l'intention des établissements de crédit le sage conseil suivant:

> [TRADUCTION] Étant donné que les tribunaux ont tendance à donner une interprétation restrictive aux dispositions des contrats types de cautionnement qui autorisent ces modifications, il serait extrêmement imprudent, de la part d'un créancier, de convenir de faire des modifications sans d'abord obtenir préalablement le consentement de la caution, sauf lorsqu'il est clairement autorisé à agir de son propre chef. Lorsque le créancier cherche à démontrer que la convention de cautionnement lui accorde une autorisation générale d'apporter des modifications importantes au contrat principal, il doit être écrit très clairement qu'on a voulu conférer ce droit. [Je souligne.]

Pour savoir si la responsabilité de la caution subsiste, il faut interpréter le contrat liant les parties et déterminer leur intention eu égard aux mots qu'elles ont utilisés et aux circonstances de l'ensemble de l'opération.

Principes d'interprétation

De nombreux cautionnements, voir la plupart, sont consentis au moyen d'un contrat d'adhésion. En d'autres termes, le document proposé par l'établissement de crédit est une formule type. L'emprunteur et la caution ne participent que peu ou pas du tout à la négociation de la convention. Ils ne peuvent rien faire d'autre que d'accepter les conditions du prêt, s'ils veulent qu'il leur soit

1996 CanLII 182 (SCC)

mercial experience. As a matter of accommodation for a family member or friend they sign the guarantee. Many guarantors are unsophisticated and vulnerable. Yet the guarantee extended as a favour may result in a financial tragedy for the guarantor. If the submissions of the bank are accepted, it will mean in effect that a guarantor, without the benefit of notice or any further consideration, will be bound indefinitely to further mortgages signed by the mortgagor at varying rates of interest and terms. The guarantor is without any control over the situation. The position adopted by the bank, if it is correct, could in the long run have serious consequences. Guarantors, once they become aware of the extent of their liability, will inevitably drop out of the picture with the result that many simple and straightforward loans will not proceed since they could not be secured by guarantors.

accordé. Souvent, les cautions sont des membres de la famille qui ont une expérience limitée des affaires. C'est par complaisance pour un membre de la famille ou un ami qu'elles souscrivent le cautionnement. Bien des cautions sont des personnes non averties et vulnérables. Pourtant le cautionnement accordé à titre de faveur peut engendrer une tragédie financière pour la caution. Si les arguments de la banque sont retenus, cela signifiera, en fait, que, sans avoir bénéficié d'un avis ou de quelque autre contrepartie, la caution sera liée indéfiniment par d'autres hypothèques souscrites par le débiteur hypothécaire à des conditions et à des taux d'intérêt variables. La caution n'a aucun contrôle sur la situation. La position adoptée par la banque, à supposer que ce soit la bonne, peut avoir de graves conséquences à long terme. Lorsqu'elles se seront rendu compte de l'ampleur de leur responsabilité, les cautions disparaîtront inévitablement du paysage de sorte que de nombreux prêts tout simples ne seront pas conclus faute de caution.

8

In my view, it is eminently fair that if there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. This is a sensible and satisfactory way of approaching the situation since the lending institutions that normally draft these agreements can readily amend their documents to ensure that they are free from ambiguity. The principle is supported by academic writers.

À mon avis, il est parfaitement juste d'appliquer la règle *contra proferentem* selon laquelle une clause de cautionnement ambiguë doit être interprétée au détriment de la partie qui l'a rédigée. C'est une façon raisonnable et satisfaisante d'aborder la situation étant donné que les établissements de crédit qui rédigent normalement ces conventions peuvent facilement modifier leurs documents de façon à ce qu'ils ne comportent aucune ambiguïté. La doctrine appuie ce principe.

9

G. H. L. Fridman, in his text *The Law of Contract in Canada* (3rd ed. 1994), at pp. 470-71, puts the position in this way:

The *contra proferentem* rule is of great importance, especially where the clause being construed creates an exemption, exclusion or limitation of liability. . . .

Where the contract is ambiguous, the application of the *contra proferentem* rule ensures that the meaning least favourable to the author of the document prevails.

Professor McGuinness, in his work *The Law of Guarantee*, *supra*, at pp. 612-13, explains the application of the rule as follows:

Dans *The Law of Contract in Canada* (3e éd. 1994), aux pp. 470 et 471, G. H. L. Fridman décrit ainsi la situation:

[TRADUCTION] La règle *contra proferentem* est d'une grande importance, particulièrement lorsque la clause interprétée crée une exonération totale ou partielle de responsabilité . . .

Lorsque le contrat est ambigu, l'application de la règle *contra proferentem* assure que l'interprétation la moins favorable à l'auteur du document sera retenue.

Dans *The Law of Guarantee*, *op. cit.*, aux pp. 612 et 613, le professeur McGuinness explique ainsi l'application de la règle:

1996 CanLII 182 (SCC)

. . . the *contra proferentum* rule of construction (under which the provisions of an agreement that were inserted by a party for his own protection are subjected to a strict interpretation) provides one method through which the courts can restrict the scope of extremely broad provisions which purport to eliminate the rights of the surety. The justification for giving such provisions a narrow construction is clear: it is one thing to say that a party may, if he so chooses, agree to assume an excessive burden, and to waive the rights which the law generally recognizes as existing for his protection. It is quite another thing to assume that parties necessarily intend to enter into such obligations. The more natural assumption is the exact opposite. Where the guarantee was drafted by the creditor, and there is any ambiguity or imprecision in the terms of a provision which purports to limit the rights of a surety, it is only fair that the ambiguity be resolved against the party who prepared the document. If the creditor wishes to take away a right belonging to the surety, he should use clear language in the document.

McGuinness further explains the principle and its justification in these words, at p. 244:

Where it is the creditor who drafted the terms of the contract, consistence of principle would call for the guarantee to be construed narrowly and thus in effect against the creditor. It is submitted that the correct rule is that where there is only one reasonable interpretation that the words used in a guarantee can bear, the guarantee should be given that interpretation. In such a case, the *contra proferentum* rule would not come into play. Where, however, the agreement is ambiguous in the sense that there are two or more interpretations that might reasonably be given to its terms, the guarantee should be construed against the party who prepared it or proposed its adoption, whether that be the creditor or the surety.

10 As well, this Court has stated that the surety is a favoured creditor in the eyes of the law whose obligation should be strictly examined and strictly enforced. This appears from the reasons of Davis J. in *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165, at p. 172:

A surety has always been a favoured creditor in the eyes of the law. His obligation is strictly examined and strictly enforced.

He goes on to say:

[TRADUCTION] . . . la règle d'interprétation *contra proferentem* (en vertu de laquelle les dispositions d'une convention qui y ont été incluses par une partie pour sa propre protection sont sujettes à une interprétation restrictive) offre aux tribunaux un moyen de restreindre la portée de dispositions extrêmement générales qui ont pour effet d'éliminer les droits de la caution. La justification d'une telle interprétation restrictive de ces dispositions est claire: c'est une chose que de dire qu'une partie peut, si elle le désire, consentir à assumer un fardeau excessif et renoncer aux droits que la common law lui reconnaît généralement pour sa protection. C'est une toute autre chose que de présumer que les parties veulent nécessairement souscrire à de telles obligations. Il est plus naturel de présumer le contraire. Lorsque le cautionnement a été rédigé par le créancier et qu'il y a une ambiguïté ou une imprécision dans une clause qui a pour effet de limiter les droits d'une caution, il n'est que juste que l'ambiguïté soit dissipée au détriment de la partie qui a préparé le document. Si le créancier désire retirer un droit à la caution, il doit le préciser clairement dans le document.

McGuinness explique, en outre, le principe et sa justification en ces termes, à la p. 244:

[TRADUCTION] Lorsque c'est le créancier qui a rédigé les conditions du contrat, il serait logique que le cautionnement soit interprété de façon restrictive et donc au détriment du créancier. On prétend que la règle à appliquer est la suivante: s'il n'y a qu'une façon raisonnable d'interpréter les termes d'un cautionnement, cette interprétation doit être donnée au cautionnement. Dans ce cas, la règle *contra proferentem* ne joue pas. Toutefois, si la convention est ambiguë en ce sens qu'il y a deux interprétations ou plus qui pourraient raisonnablement lui être données, le cautionnement doit être interprété au détriment de la partie qui l'a rédigé ou qui en a proposé l'adoption, que ce soit le créancier ou la caution.

De même, notre Cour a affirmé que la caution est, aux yeux de la common law, un créancier privilégié dont l'obligation devrait être interprétée et exécutée strictement. C'est ce qui ressort des motifs du juge Davis dans *Holland-Canada Mortgage Co. c. Hutchings*, [1936] R.C.S. 165, à la p. 172:

[TRADUCTION] La caution a toujours été un créancier privilégié aux yeux de la common law. Son obligation est interprétée et exécutée strictement.

Il ajoute:

1996 CanLII 182 (SCC)

"It must always be recollected," said Lord Westbury in *Blest v. Brown* (1862), 4 De G. F. & J. 367, at 376,

in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, "The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end."

Apart from any express stipulation to the contrary, where the change is in respect of a matter that cannot "plainly be seen without inquiry to be unsubstantial or necessarily beneficial to the surety," . . . the surety, if he has not consented to remain liable notwithstanding the alteration, will be discharged whether he is in fact prejudiced or not.

Those comments are as true today as they were at the time they were written.

The appellant contends that this principle of interpretation has been abandoned and for that proposition relies upon the reasons of this Court in *Bauer*, *supra*. I cannot agree with this submission. The issue in that case was whether a particular clause within the guarantee was an exemption clause and thus subject to the special rules of construction applying to those clauses. It was held that the clause in question was not, in fact, an exemption clause. The general question as to whether the scope of surety obligations should be construed strictly was not explicitly addressed by the Court. It is also significant that the Alberta Court of Appeal in *Alberta Opportunity Co. v. Schinnour*, [1991] 2 W.W.R. 624, found that the clause they were considering was analogous to that in issue in *Bauer*. Nonetheless they determined, correctly in my view, that it should be interpreted in accordance with the general rules of construction. Those rules should, in my view, include the *contra proferentem* rule and thus will be generally applicable to guarantee or surety clauses.

[TRADUCTION] «Il faut toujours se souvenir», a dit lord Westbury, dans *Blest c. Brown* (1862), 4 De G. F. & J. 367, à la p. 376,

de quelle façon la caution est liée. Vous l'obligez à respecter son engagement à la lettre. Au-delà de l'interprétation correcte de cet engagement, vous n'avez aucun pouvoir sur elle. Elle ne touche aucun avantage ni aucune contrepartie. Elle n'est donc liée qu'en vertu de l'interprétation et de l'effet réguliers de l'engagement écrit qu'elle a souscrit. Si la moindre modification est apportée à cet engagement, peu importe que ce soit à son avantage ou que la modification ait été faite innocemment, elle a le droit de dire: «Le contrat n'est plus celui que je me suis engagée à cautionner; vous avez mis fin au contrat dont je me suis portée garante et, par conséquent, mon obligation n'existe plus.»

Sauf stipulation expresse contraire, si la modification porte sur une question qui ne peut pas «de toute évidence et indéniablement être considérée comme non importante ou nécessairement profitable à la caution,» [. . .] la caution, si elle n'a pas consenti à demeurer responsable en dépit de la modification, sera libérée, peu importe que la modification lui soit préjudiciable ou pas.

Ces commentaires sont aussi vrais aujourd'hui qu'ils l'étaient à l'époque où ils ont été rédigés.

11

L'appelante soutient que ce principe d'interprétation a été abandonné et, à ce propos, elle invoque les motifs de notre Cour dans l'arrêt *Bauer*, précité. Je ne puis souscrire à cet argument. La question en litige dans cet arrêt était de savoir si une certaine clause du cautionnement était une clause d'exonération et si elle était, ainsi, assujettie aux règles spéciales d'interprétation applicables à ces clauses. On a statué que la clause en question n'était pas, en réalité, une clause d'exonération. La Cour n'a pas abordé expressément la question générale de savoir si l'étendue des obligations d'une caution devait être interprétée restrictivement. Il est également révélateur que la Cour d'appel de l'Alberta ait conclu, dans *Alberta Opportunity Co. c. Schinnour*, [1991] 2 W.W.R. 624, que la clause qu'elle examinait était analogue à celle en cause dans *Bauer*. Elle a néanmoins décidé, à juste titre selon moi, qu'elle devait être interprétée selon les règles générales d'interprétation. À mon sens, ces règles doivent comprendre la règle *contra proferentem* et seront ainsi généralement applicables aux clauses de cautionnement.

1996 CanLII 182 (SCC)

1996 CanLII 182 (SCC)

12 The position set out in *Holland-Canada Mortgage Co.*, *supra*, was confirmed in *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513. At p. 521 of that case, it was said that "accommodation sureties" are those who entered into the guarantee "in the expectation of little or no remuneration and for the purpose of accommodating others or of assisting others in the accomplishment of their plans". The protection offered to this class of guarantors was explained also at p. 521:

> In respect of them, the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety.

13 These sureties were contrasted with "compensated sureties" whose business consists of guaranteeing performance and payment in return for a premium. With respect to this latter class of sureties it was held at p. 524:

> . . . in the case of the compensated surety it cannot be every variation in the guaranteed contract, however minor, or every failure of a claimant to meet the conditions imposed by the bond, however trivial, which will enable the surety to escape liability.

Although the primary issue in the case was the distinction between accommodation sureties and those who receive compensation, these words nonetheless represent the considered opinion of the Court. In my view, they are correct.

14 I would note in passing that the guarantor in this case comes within the class of accommodation sureties.

15 It follows that if there is a doubt or ambiguity as to the construction or meaning of the clauses binding the guarantor in this case, they must be strictly interpreted and resolved in favour of the guarantor. Further, as a result of the favoured position of guarantors, the clauses binding them must be strictly construed.

16 Finally, when the guarantee clause is interpreted, it must be considered in the context of the entire transaction. This flows logically from the

Le point de vue énoncé dans *Holland-Canada Mortgage Co.*, précité, a été confirmé dans *Citadel General Assurance Co. c. Johns-Manville Canada Inc.*, [1983] 1 R.C.S. 513. À la page 521, la Cour affirme que les «cautions de complaisance» sont celles qui ont conclu le contrat de cautionnement «en espérant peu de rétribution, si ce n'est aucune, et dans le but de rendre service à d'autres personnes ou de les aider à réaliser leur projet». La protection accordée à cette catégorie de cautions est également expliquée, à la p. 521:

> En ce qui les concerne, la loi s'est avisée de les protéger en interprétant leurs obligations de façon stricte et en les limitant aux conditions précises du contrat de cautionnement.

Ces cautions ont été comparées aux «cautions rétribuées» qui garantissent l'exécution et le paiement moyennant une contrepartie. La Cour statue, au sujet de cette dernière catégorie de cautions, à la p. 524:

> . . . dans le cas de caution rétribuée il ne faut pas que toutes les dérogations au contrat de garantie, même mineures, ni toutes les omissions du réclamant de se conformer aux conditions du cautionnement, si minimes soient-elles, permettent à la caution d'échapper à sa responsabilité.

Bien que, dans cette affaire, le litige ait principalement porté sur la distinction entre les cautions de complaisance et les cautions rétribuées, ces propos représentent néanmoins l'opinion réfléchie de la Cour. Ils sont exacts quant à moi.

Je ferais remarquer en passant que la caution, dans la présente affaire, tombe dans la catégorie des cautions de complaisance.

Il s'ensuit que, s'il y a un doute ou une ambiguïté quant à l'interprétation ou au sens des clauses liant la caution en l'espèce, ces clauses doivent être interprétées de façon restrictive et en faveur de la caution. De plus, en raison de la situation privilégiée des cautions, les clauses qui les lient doivent être interprétées de façon restrictive.

Finalement, l'interprétation de la clause de cautionnement doit tenir compte du contexte de toute l'opération. Cela découle logiquement du point de

bank's position that the renewal agreement was an integral part of the original contract of guarantee. This position I believe is correct. It follows that fairness demands that the entire transaction be considered and this must include the terms and arrangements for the renewal agreement.

Application of the Principles of Interpretation to the Guarantee and Renewal Agreement Presented in this Case

It may be helpful to set out once again clauses 34 and 7 of the original guarantee agreement and recall that the renewal agreement called for the signature of the guarantor.

Clause 34: Guarantee and Indemnity

IT IS A CONDITION of the making of the loan secured by the within mortgage that the covenants set forth herein should be entered into by us, the Guarantors, namely John Joseph Conlin and Conlin Engineering & Planning Ltd. and now we the said Guarantors, and each of us, on behalf of ourselves, our respective heirs, executors, administrators and assigns, in consideration of the making of the said loan by the Mortgagee, do hereby jointly and severally covenant, promise and agree as principal debtors and not as sureties, that we and each of us shall and will well and truly pay or cause to be paid to the Mortgagee, the principal sum and all other moneys hereby secured, together with interest upon the same on the days and times and in the manner set forth in this mortgage, and will in all matters pertaining to this mortgage well and truly do, observe, fulfill and keep all and singular the covenants, provisos, conditions, agreements and stipulations contained in this mortgage, and do hereby agree to all the covenants, provisos, conditions, agreements and stipulations by this mortgage made binding upon the Mortgagor; and do further agree that this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon or the giving of a release or partial release or covenant not to sue to any of us; and we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us or any of us and without relieving us from our liability hereunder, which shall be a continuous liability and shall subsist until payment in

vue de la banque selon lequel la convention de renouvellement faisait partie intégrante du contrat de cautionnement initial. Je crois que ce point de vue est exact. Il s'ensuit que la justice exige que l'on examine toute l'opération, y compris les conditions et les arrangements relatifs à la convention de renouvellement.

Application des principes d'interprétation à la convention de cautionnement et de renouvellement en l'espèce

Il peut être utile de reproduire à nouveau les clauses 34 et 7 de la convention de cautionnement initiale et de se rappeler que la convention de renouvellement exigeait la signature de la caution.

Clause 34: Cautionnement et indemnité

[TRADUCTION] EST UNE CONDITION du prêt garanti par la présente hypothèque que nous, les cautions, à savoir John Joseph Conlin et Conlin Engineering & Planning Ltd., souscrivions aux engagements stipulés aux présentes, et que, par conséquent, nous, lesdites cautions, en notre propre nom, au nom de nos héritiers, exécuteurs, administrateurs et ayants droit respectifs, en contrepartie dudit prêt consenti par le créancier hypothécaire, convenions, promettions et acceptions solidairement, aux présentes, à titre de débiteurs principaux et non de cautions, ensemble ou individuellement, de payer ou de faire payer bel et bien au créancier hypothécaire le capital et toutes les autres sommes garantis par les présentes, de même que les intérêts sur ces sommes au moment et de la manière stipulés dans la présente hypothèque, et que, relativement à toute question concernant la présente hypothèque, nous observions, remplissions et respections bel et bien tous et chacun des engagements, réserves, conditions, conventions et stipulations de la présente hypothèque, et que, par les présentes, nous convenions de respecter tous les engagements, réserves, conditions, conventions et stipulations de la présente hypothèque qui lient le débiteur hypothécaire; et que nous convenions que cet engagement nous liera toutes, ensemble et individuellement, nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt, ou le fait que l'une ou l'autre de nous obtienne une libération complète ou partielle ou un engagement de ne pas faire l'objet de poursuites; et que nous convenions toutes et chacune que le créancier hypothécaire puisse renoncer au droit de résiliation pour violation et accepter d'autres

1996 CanLII 182 (SCC)

full of the principal sum and all other moneys hereby secured.

engagements, cautionnements ou sûretés sans nous donner avis à toutes ou à l'une ou l'autre de nous, et sans que cela nous libère de notre responsabilité continue aux termes des présentes, qui subsistera jusqu'au paiement complet du capital et de toutes les autres sommes garantis par les présentes.

Clause 7: Renewal or Extension of Time

PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or anyone claiming under it, or any other dealing by the Mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the monies hereby secured, and that this Mortgage may be renewed by an agreement in writing for any term with or without an increased rate of interest, or amended from time to time as to any of its terms including without limitation increasing the interest rate or principal amount notwithstanding that there may be subsequent encumbrances. And it shall not be necessary to register any such agreement in order to retain the priority of this Mortgage so altered over any instrument delivered or registered subsequent to this Mortgage.

Clause 7: Renouvellement ou prorogation de délai

POURVU qu'aucune prorogation de délai accordée par le créancier hypothécaire au débiteur hypothécaire, ou à toute personne cherchant à s'en prévaloir, ou qu'aucune autre négociation entre le créancier hypothécaire et le détenteur du droit de rachat desdits terrains n'affecte ou ne compromette de quelque façon que ce soit les droits que le créancier hypothécaire peut exercer contre le débiteur hypothécaire ou toute autre personne responsable du paiement des sommes garanties par les présentes, et que la présente hypothèque puisse être renouvelée par convention écrite pour quelque durée que ce soit, avec ou sans augmentation du taux d'intérêt, ou que l'une ou l'autre de ses conditions puisse être modifiée à l'occasion, notamment, sans limiter la portée de ce qui précède, que le taux d'intérêt ou le capital puisse être augmenté nonobstant toute charge ultérieure. Et il ne sera pas nécessaire d'enregistrer une telle convention pour conserver la priorité de rang de l'hypothèque ainsi modifiée par rapport à tout instrument délivré ou enregistré après la présente hypothèque.

18

Counsel for the appellant contended that there was no ambiguity in these clauses and that they made it clear that the respondent's obligations as guarantor continued in spite of the renewal agreement. Counsel for the respondent came to exactly the opposite conclusion. He submitted that on the plain meaning of the clauses, the guarantor was not bound. A somewhat cynical observer might conclude that it should not be unexpected that counsel for the opposing parties would take these positions. However, the same conclusion cannot possibly be reached with regard to the judges who have considered these clauses. The trial judge and the minority in the Court of Appeal came to the same conclusion as the appellant. The majority in the Court of Appeal came to the opposite conclusion. That skilled and experienced judges could come to opposite conclusions with regard to the clauses might well lead one to suspect that the meaning of the clauses is unclear; in a word, they are ambiguous. Of course, if that be the case, the *contra proferentem* rule should be applied. How-

L'avocat de l'appelante a soutenu qu'il n'y avait aucune ambiguïté dans ces clauses et qu'elles prévoyaient clairement que l'intimé continuait d'assumer ses obligations de caution malgré la convention de renouvellement. L'avocat de l'intimé est arrivé exactement à la conclusion contraire. Il a prétendu que, selon le sens ordinaire de ces clauses, la caution n'était pas liée. Un observateur quelque peu cynique pourrait conclure qu'il n'y a rien d'étonnant à ce que les avocats des parties opposées adoptent ces positions. Cependant, il n'est pas possible de tirer la même conclusion en ce qui concerne les juges qui ont examiné ces clauses. Le juge du procès et le juge dissident de la Cour d'appel sont arrivés à la même conclusion que l'appelante. La Cour d'appel à la majorité a conclu le contraire. Le fait que des juges compétents et expérimentés puissent être arrivés à des conclusions opposées en ce qui concerne les clauses en question pourrait bien nous amener à soupçonner que le sens de ces clauses n'est pas clair, somme toute, qu'elles sont ambiguës. Évidem-

1996 CanLII 182 (SCC)

ever, for the reasons set out above, my view is that the clauses unambiguously indicate that the respondent was not bound by the renewal agreement. If I am in error and if the *contra proferentem* rule were applied it would strengthen and support my conclusion as to the interpretation of the clauses.

The Effect of the "Principal Debtor Obligation" Set Out in Clause 34

19 In *Canadian Imperial Bank of Commerce v. Patel* (1990), 72 O.R. (2d) 109 (H.C.), at p. 119, it was held that a principal debtor clause converts a guarantor into a full-fledged principal debtor. I agree with this conclusion. If the guarantor is to be treated as a principal debtor and not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal. This conclusion does not require recourse to equitable rules regarding material variation of contracts of surety. It is simply apparent from the contract that a principal debtor must have notice of material changes and consent to them. Of course, a guarantor who, by virtue of a principal debtor clause, has a right to notice of material changes, may, by the terms of the contract, waive these rights. However, in the absence of a clear waiver of these rights, such a guarantor must be given notice of the material changes and, if he is to be bound, consent to them.

20 The appellant contended that the words in clause 34 which provide "the said Guarantors . . . covenant, promise and agree as principal debtors and not as sureties" indicate that the respondent is bound as a principal debtor yet without any of the usual rights and benefits of a principal debtor such as notice with regard to renewal, and the opportunity to negotiate and consent to its terms. To take this position seems to me to be unfair and unreasonable.

ment, si c'est le cas, il y a lieu d'appliquer la règle *contra proferentem*. Toutefois, pour les motifs exposés plus haut, je suis d'avis que les clauses indiquent nettement que l'intimé n'était pas lié par la convention de renouvellement. Si je me trompe, l'application éventuelle de la règle *contra proferentem* renforcerait et appuierait ma conclusion quant à l'interprétation de ses clauses.

L'effet de l'«obligation à titre de débiteur principal» énoncée à la clause 34

Dans *Canadian Imperial Bank of Commerce c. Patel* (1990), 72 O.R. (2d) 109 (H.C.), à la p. 119, on a statué qu'une clause de débiteur principal transformait une caution en un débiteur principal à part entière. Je suis d'accord avec cette conclusion. S'il faut traiter la caution comme un débiteur principal et non comme une caution, alors le défaut de la banque d'aviser l'intimé de la convention de renouvellement et des nouvelles conditions du contrat doit le libérer de ses obligations étant donné qu'il n'est pas partie au renouvellement. Cette conclusion n'exige pas que l'on recoure à des règles d'*equity* concernant la modification importante de contrats de cautionnement. Il ressort simplement du contrat que le débiteur principal doit être avisé des modifications importantes et y consentir. Il va sans dire qu'une caution qui, en vertu d'une clause de débiteur principal, a le droit d'être avisée des modifications importantes peut, aux termes du contrat, renoncer à ces droits. Cependant, en l'absence d'une renonciation claire à ces droits, une telle caution doit être avisée des modifications importantes et y consentir pour être liée par celles-ci.

L'appelante prétend que les mots de la clause 34 [TRADUCTION] «nous, lesdites cautions, [. . .] conven[ons], promett[ons] et accept[ons] [. . .], à titre de débiteurs principaux et non de cautions» indiquent que l'intimé est lié à titre de débiteur principal, sans cependant jouir des droits et avantages d'un débiteur principal, comme le droit d'être avisé d'un renouvellement et la possibilité de négocier et d'accepter les conditions de ce renouvellement. Adopter ce point de vue me semble injuste et déraisonnable.

1996 CanLII 182 (SCC)

21

The mortgagor as a principal debtor must be given notice of the renewal agreement. This is evident from the requirement that the mortgagor sign the renewal agreement. The principal debtor clause converts the guarantor into a full-fledged principal debtor with all the duties and obligations which that term implies. If the guarantor is to be responsible to the lending institution as a "full-fledged principal debtor" then he or she is entitled to the same notice of a renewal agreement as the principal debtor mortgagor. That is undoubtedly the reason the standard form of the renewal agreement provides a place for the guarantor to sign. Not just fairness and equity but the designation of the guarantor as a principal debtor leads to the conclusion that the guarantor must have notice of and agree to the renewal before he is bound by its terms. A guarantor reading clause 34 would be led to believe that as a principal debtor he would have the same notice of a renewal agreement as would the principal debtor mortgagor. If a lending institution wishes to have the guarantor obligated as a principal debtor, then the guarantor must be entitled to the same rights as the principal debtor which would include both notice and agreement as a party to a renewal.

Le débiteur hypothécaire doit, à titre de débiteur principal, être avisé de la convention de renouvellement. Cela ressort clairement de l'exigence que le débiteur hypothécaire signe la convention de renouvellement. La clause de débiteur principal transforme la caution en un débiteur principal à part entière qui assume toutes les responsabilités et les obligations que cette expression implique. Si la caution doit être responsable envers l'établissement de crédit à titre de «débiteur principal à part entière», elle a alors le droit d'être avisée de la convention de renouvellement au même titre que le débiteur principal qu'est le débiteur hypothécaire. C'est sans doute la raison pour laquelle la formule type de la convention de renouvellement comporte un espace pour la signature de la caution. Non seulement la justice et l'*equity*, mais aussi la désignation de la caution à titre de débiteur principal mènent à la conclusion que la caution doit être avisée du renouvellement et y consentir pour être liée par ses conditions. Une caution qui lirait la clause 34 serait amenée à croire qu'à titre de débiteur principal elle serait avisée du renouvellement de la convention au même titre que le débiteur principal qu'est le débiteur hypothécaire. Si un établissement de crédit souhaite que la caution soit liée à titre de débiteur principal, alors la caution doit avoir les mêmes droits que le débiteur principal, y compris celui d'être avisée d'un renouvellement et d'y consentir à titre de partie.

1996 CanLII 182 (SCC)

22

Even if it were thought that the principal debtor clause does not convert the guarantor into a principal debtor, the equitable or common law rules relieving the surety from liability where the contract has been materially altered by the creditor and the principal debtor without notice to the surety would apply, in the absence of an express agreement to the contrary. The question is whether in this case, either as principal debtor or as surety, the guarantor has expressly contracted out of the normal protections accorded to him. This question must be determined as a matter of interpretation of the clauses of the agreement, through consideration of the transaction as a whole, and the application of the appropriate rules of construction.

Même si l'on pensait que la clause de débiteur principal ne transforme pas la caution en un débiteur principal, les règles d'*equity* et de common law qui libèrent la caution de sa responsabilité, lorsque le créancier et le débiteur principal ont modifié sensiblement le contrat sans l'aviser, s'appliqueraient, en l'absence d'un consentement explicite à ce qu'il en soit autrement. En l'espèce, il s'agit de savoir si, soit à titre de débiteur principal, soit à titre de garant, la caution a expressément renoncé par contrat aux protections qui lui sont normalement accordées. Pour répondre à cette question, il faut interpréter les clauses de la convention en fonction de l'ensemble de l'opération, et appliquer les règles d'interprétation appropriées.

Effect of the Renewal Agreement

In my view, the renewal agreement must be considered an integral part of the transaction. There are two aspects of the renewal agreement itself which lead to the conclusion that the guarantor is not to be bound. First, the renewal agreement is once again a standard form prepared and used by the bank and it calls for the signature of the guarantor. It must be assumed that all these standard form agreements prepared by the bank as a lending institution were meant to mesh with and complement each other. The requirement by the standard form of a signature by the guarantor then supports the respondent's position that he was not, by the terms of the original loan agreement, deprived of the equitable and common law protection ordinarily extended to guarantors. Rather, he was expected to sign the renewal agreement. His signature would confirm his notice of the agreement and his consent to it.

The appellant submitted that the renewal agreement is simply an extension of the original mortgage which was contemplated by the terms of that mortgage. This submission should not be accepted. The original mortgage was for a period of three years, a term not uncommon in today's mortgage market. The renewal agreement provides for an agreement as to the term of a new mortgage and the new rate of interest. The document itself appears to indicate that the renewal agreement constitutes a new mortgage arrangement. This can be gathered from the provision which reads:

All the covenants, conditions, powers and matters in the said mortgage shall apply to and form part of *this* agreement, except those amended herein. [Emphasis added.]

The standard form indicates that many variations in the original mortgage are to be agreed upon. For example, the mortgagor can select the length of the term of the loan; the rate of interest is to be agreed upon between the mortgagor and the lending institution. If the renewal agreement is no

Effet de la convention de renouvellement

23 À mon avis, la convention de renouvellement doit être considérée comme une partie intégrante de l'opération. Deux aspects de la convention de renouvellement elle-même mènent à la conclusion que la caution ne doit pas être liée. Premièrement, je le répète, la convention de renouvellement est une formule type préparée et utilisée par la banque, qui requiert la signature de la caution. Il faut présumer que toutes ces conventions types préparées par la banque, à titre d'établissement de crédit, sont destinées à s'agencer et à se compléter mutuellement. Le fait que la formule type requiert la signature de la caution appuie alors la thèse de l'intimé selon laquelle, aux termes de la convention de prêt initiale, il n'a pas été dépouillé de la protection que l'*equity* et la common law accordent généralement aux cautions. Au contraire, on s'attendait à ce qu'il signe la convention de renouvellement. Sa signature confirmerait qu'il avait été avisé de la convention et qu'il y consentait.

24 L'appelante soutient que la convention de renouvellement est une simple prorogation de l'hypothèque initiale, prévue dans l'hypothèque même. Il n'y a pas lieu de retenir cet argument. L'hypothèque initiale était pour une durée de trois ans, ce qui n'est pas inhabituel dans le marché hypothécaire actuel. La convention de renouvellement comporte une entente sur la durée d'une nouvelle hypothèque et un nouveau taux d'intérêt. Le document même paraît indiquer que la convention de renouvellement constitue une nouvelle convention hypothécaire. Cela peut se déduire de la disposition qui prévoit:

[TRADUCTION] Tous les engagements, conditions, pouvoirs et questions inclus dans ladite hypothèque s'appliquent à la présente convention et *en* font partie, sauf dans la mesure des modifications apportées aux présentes. [Je souligne.]

25 La formule type indique que bien des modifications de l'hypothèque initiale doivent faire l'objet d'un consentement. Par exemple, le débiteur hypothécaire peut choisir l'échéance du prêt; le taux d'intérêt doit être fixé par convention entre le débiteur hypothécaire et l'établissement de crédit. Si la

1996 CanLII 182 (SCC)

more than the extension of the original mortgage, the mischief that that position creates becomes obvious. What if the renewal provided for an extension of the term to 25 years at a substantially increased rate of interest? What if the situation with regard to the security had changed remarkably as a result of new zoning regulations or a new building code or there had been a marked change of use in the surrounding lands? To say that despite the changed circumstances the guarantor is, beyond the strict terms of the agreement, bound without any notice to an indefinite guarantee of a mortgage containing substantial changes in the term of the loan and the interest rate is worrisome indeed.

convention de renouvellement n'est rien de plus qu'une prorogation de l'hypothèque initiale, le tort causé par cette position devient évident. Que penser d'un renouvellement qui prorogerait la durée de l'hypothèque à 25 ans, à un taux d'intérêt sensiblement supérieur? Que penser d'un changement marqué de la situation de la caution qui résulterait d'un nouveau règlement de zonage ou d'un nouveau code du bâtiment, ou d'une modification sensible de l'utilisation des terrains environnants? Affirmer que, malgré les nouvelles circonstances, la caution est, au-delà des conditions strictes de la convention et en l'absence d'avis, tenue de garantir de façon indéfinie une hypothèque sensiblement modifiée quant à la durée du prêt et quant au taux d'intérêt a de quoi inquiéter.

1996 CanLII 182 (SCC)

26 Further, it is significant that the renewal agreement states that the terms of the old mortgage will form part of the agreement. By doing so it indicates that this is a new agreement rather than merely an extension of an old agreement. This serves to strengthen my view that the respondent was no longer bound by the terms of the original guarantee upon the execution without notice to him of the renewal agreement.

Il est en outre significatif que la convention de renouvellement prévoie que les conditions de l'ancienne hypothèque feront partie de la convention. Elle indique ainsi qu'il s'agit d'une nouvelle convention plutôt qu'une simple prorogation de l'ancienne. Cela renforce mon opinion que l'intimé n'est plus lié par les conditions du cautionnement initial depuis que la convention de renouvellement a été signée sans qu'il en soit avisé.

Significance of Clause 7 of the Original Agreement

L'importance de la clause 7 dans la convention initiale

27 The reasons of Finlayson and Carthy JJ.A. forming the majority of this case in the Court of Appeal are in my view correct. Finlayson J.A. wrote ((1994), 20 O.R. (3d) 499, at p. 513):

> The reference in cl. 7 to the renewal agreement taking priority over subsequent encumbrancers indicates to me that the mortgagee was not directing its corporate mind to the guarantors when negotiating this document. . . . Certainly, there is no express reference to the renewal agreement in cl. 34. On balance, and keeping in mind that these documents were all drawn and presented by the mortgagee, I conclude that the renewal agreement was a material change to the original mortgage debt not contemplated by the language of the guarantee and has the effect of releasing the guarantors from their obligations as sureties.

À mon avis, les motifs que la Cour d'appel à la majorité, composée des juges Finlayson et Carthy, a exposés en l'espèce sont exacts. Le juge Finlayson écrit ((1994), 20 O.R. (3d) 499, à la p. 513):

> [TRADUCTION] Dans la clause 7, la mention que la convention de renouvellement a priorité sur toute charge ultérieure m'indique que la personne morale créancière hypothécaire ne songeait pas aux cautions en négociant le présent document [. . .] Certes, il n'y a aucune mention expresse de la convention de renouvellement dans la clause 34. Tout bien considéré et compte tenu du fait que ces documents ont tous été préparés et présentés par la créancière hypothécaire, je conclus que la convention de renouvellement constituait une modification importante de la dette hypothécaire initiale, qui n'était pas prévue par le libellé du cautionnement et qui a pour effet de libérer les cautions de leurs obligations à ce titre.

Carthy J.A.'s interpretation of the contract supports that of Finlayson J.A. but emphasizes different aspects. First, he stresses that clause 34 makes no reference to renewals. In his view, this is significant because it is a term commonly used with respect to mortgages and it is explicitly used in other clauses such as clause 7. Moreover, he found that clause 34 is perfectly capable of coherently referring to changes in the terms within the period of the original mortgage itself.

28 L'interprétation donnée au contrat par le juge Carthy appuie celle du juge Finlayson, mais elle met l'accent sur des aspects différents. Premièrement, le juge Carthy souligne que la clause 34 ne mentionne pas les renouvellements. À son avis, cela est révélateur parce que c'est une condition courante en matière d'hypothèque et qu'on y recourt expressément dans d'autres clauses comme la clause 7. De plus, il a conclu que la clause 34 est parfaitement susceptible de renvoyer de façon cohérente à des modifications des conditions pendant la durée de l'hypothèque initiale même.

It is, I think, noteworthy and telling that clause 7 specifically distinguishes between extensions and renewals both in its heading and its text. This leads me to conclude that these terms do not refer to the same eventuality. Since clause 7 so carefully distinguishes between extensions and renewals, they must be referring to different situations. Both *Black's* legal dictionary and *The Oxford Dictionary* give separate and distinct definitions of the terms extension and renewal. *Black's Law Dictionary* (5th ed. 1979) at p. 1165 defines "renewal" as "[t]he act of renewing or reviving. A revival or rehabilitation of an expiring subject; that which is made anew or re-established" while it defines "extension" at p. 523 as "[a]n increase in length of time (*e.g.* of expiration date of lease, or due date of note). The word 'extension' ordinarily implies the existence of something to be extended". This clearly indicates that an "extension" refers to extending an agreement which already exists, while a renewal refers to the revival of an agreement which has expired. This distinction is confirmed by *The Concise Oxford Dictionary of Current English* (9th ed. 1995) at p. 476, which defines "extend" as "lengthen or make larger in space or time" while "renew" is defined at p. 1164 as "revive; regenerate; make new again; restore to the original state". It follows that the failure to refer to a renewal agreement or even to a renewal in clause 34 strongly suggests that it has no application to a renewal. If the lending institutions wished to have clause 34 apply to renewals, it would be a simple matter to use the specific term

29 Il est, je pense, remarquable et révélateur que la clause 7 distingue expressément les prorogations des renouvellements, tant dans sa rubrique que dans son texte même. Cela m'amène a conclure que ces deux termes ne désignent pas la même chose. Étant donné que la clause 7 distingue avec tant de soin les prorogations des renouvellements, ces termes doivent désigner des choses différentes. Tant le dictionnaire juridique *Black's* que *The Oxford Dictionary* donnent des définitions différentes des termes *extension* (prorogation) et *renewal* (renouvellement). *Black's Law Dictionary* (5e éd. 1979), à la p. 1165, définit le terme «*renewal*» («renouvellement») comme [TRADUCTION] «[l]'action de renouveler ou de remettre en vigueur; la remise en état d'une chose qui vient à expiration; chose faite à nouveau ou rétablie», alors qu'il définit le terme «*extension*» («prorogation»), à la p. 523, comme étant [TRADUCTION] «[u]n accroissement de la durée (par exemple, de l'échéance d'un bail ou d'un billet). Le mot «*extension*» («prorogation») implique ordinairement l'existence d'une chose qui doit être prorogée». Cela indique clairement qu'une «prorogation» désigne la prolongation d'une convention qui existe déjà, alors que le renouvellement désigne la remise en vigueur d'une convention expirée. *The Concise Oxford Dictionary of Current English* (9e éd. 1995), à la p. 476, confirme cette distinction en définissant «*extend*» par [TRADUCTION] «allonger ou accroître dans l'espace ou dans le temps» alors que «*renew*» est défini à la p. 1164 comme [TRADUCTION] «remettre en vigueur; régénérer; rénover; rétablir dans l'état original». Il s'ensuit que l'absence de mention d'une convention de renouvelle-

1996 CanLII 182 (SCC)

which is well known in the commercial world of mortgages.

ment ou même d'un renouvellement dans la clause 34 donne fortement à penser qu'elle ne s'applique pas à un renouvellement. Si les établissements de crédit souhaitaient que la clause 34 s'applique aux renouvellements, il leur suffirait d'utiliser ce terme spécifique bien connu dans le milieu des prêts hypothécaires.

30 Finally, the renewal agreement refers to incorporating the mortgage terms into the agreement. Clause 3 of the renewal agreement provides that:

All the covenants, conditions, powers and matters in the said mortgage shall apply to and form part of this agreement, except those amended herein. [Emphasis added.]

This, too, suggests that the renewal agreement is a new agreement and not an extension, since the original mortgage terms are only incorporated to the extent that they are not altered by the renewal. Although clause 34 contemplates a change in the interest rate, an extension would not ordinarily involve an alteration of the original terms, but rather a continuation of the same terms over a longer time period.

Finalement, la convention de renouvellement mentionne l'incorporation des conditions de l'hypothèque dans la convention. La clause 3 de la convention de renouvellement prévoit:

[TRADUCTION] Tous les engagements, conditions, pouvoirs et questions inclus dans ladite hypothèque s'appliquent à la présente convention et en font partie, sauf dans la mesure des modifications apportées aux présentes. [Je souligne.]

Cela aussi donne à penser que la convention de renouvellement est une nouvelle convention et non une prorogation, étant donné que les conditions de l'hypothèque initiale sont incorporées seulement dans la mesure où elles ne sont pas modifiées par le renouvellement. Bien que la clause 34 envisage une modification du taux d'intérêt, une prorogation comporte normalement non pas une modification des conditions initiales, mais plutôt le maintien des mêmes conditions pour une période plus longue.

31 The appellant sought comfort from *Co-operative Trust Co. of Canada v. Kirkby*, [1986] 6 W.W.R. 90 (Sask. Q.B.). In that case, Armstrong J. noted that in some cases, a mortgage extension or renewal agreement could have exactly the same effect as a new mortgage. However, he concluded, correctly I believe, that on the facts of that case, there was no evidence to support the contention that the mortgage extension agreement was in fact a new mortgage. In my view, such a determination will involve a review of the particular guarantee clause and the whole transaction between the parties. The appellant also referred to the decisions in *Royal Trust Corp. of Canada v. Reid* (1985), 40 R.P.R. 287 (P.E.I. C.A.), and *Veteran Appliance Service Co. v. 109272 Development Ltd.* (1985), 67 A.R. 117 (Q.B.). In both those decisions, the terms renewal and extension agreement were used interchangeably. Yet I think that it becomes clear in reading both these decisions that this was not a

L'appelante a invoqué la décision *Co-operative Trust Co. of Canada c. Kirkby*, [1986] 6 W.W.R. 90 (B.R. Sask.). Dans cette décision, le juge Armstrong a fait remarquer que, dans certains cas, une prorogation d'hypothèque ou une convention de renouvellement peuvent avoir exactement le même effet qu'une nouvelle hypothèque. Il a toutefois conclu, à juste titre selon moi, que, d'après les faits de cette affaire, il n'y avait aucune preuve à l'appui de l'argument selon lequel la convention de prorogation de l'hypothèque était, en fait, une nouvelle hypothèque. À mon avis, pour décider cela, il faut examiner la clause de cautionnement en question et l'ensemble de l'opération conclue par les parties. L'appelante a aussi mentionné les décisions *Royal Trust Corp. of Canada. c. Reid* (1985), 40 R.P.R. 287 (C.A. Î.-P.-É.), et *Veteran Appliance Service Co. c. 109272 Development Ltd.* (1985), 67 A.R. 117 (B.R). Dans ces deux affaires, les expressions «convention de renouvellement» et

1996 CanLII 182 (SCC)

central or major issue in the case. To repeat, it will be a question of fact to be determined on the particular transaction, agreement and circumstances presented in each case whether a renewal agreement is a new contract or simply an extension of the existing agreement.

«convention de prorogation» ont été utilisées indifféremment. Je pense cependant qu'il devient évident, à la lecture de ces deux décisions, que ce n'était pas alors une question majeure ou importante. Je le répète, la question de savoir si une convention de renouvellement est un nouveau contrat ou une simple prorogation de la convention existante est une question de fait qui doit être tranchée en fonction de l'opération, de la convention et des circonstances en cause dans chaque affaire.

1996 CanLII 182 (SCC)

32

It follows I find that the words used in clauses 34 and 7 are sufficiently clear to conclude that the guarantor did not waive his equitable and common law rights either as a principal debtor or as a guarantor. The renewal agreement which was entered into without notice to, or the agreement of, the guarantor materially altered the provisions of the original loan agreement. The guarantor was thereby relieved of his obligation.

Je conclus donc que les mots utilisés dans les clauses 34 et 7 sont suffisamment clairs pour conclure que la caution n'a pas renoncé aux droits que l'*equity* et la common law lui confèrent à titre de débiteur principal ou de caution. La convention de renouvellement qui a été conclue sans qu'avis ne soit donné à la caution, ou sans le consentement de cette dernière, a modifié sensiblement les dispositions de la convention de prêt initiale. La caution a ainsi été libérée de son obligation.

33

If the wording of the two clauses should be found to be ambiguous, the *contra proferentem* rule must be applied against the bank. The wording of clause 34 binding the guarantor to variations in the event of an extension of the mortgage should not be applied to bind the guarantor to a renewal without notice since there is ambiguity as to whether clause 34 applies to renewals at all. In these circumstances as well, the guarantor should be relieved of liability.

Si l'on conclut que le texte des deux clauses est ambigu, il faut appliquer la règle *contra proferentem* au détriment de la banque. Le texte de la clause 34 liant la caution aux modifications qui peuvent être apportées en cas de prorogation de l'hypothèque ne devrait pas être interprété de manière à lier la caution à un renouvellement effectué sans donner avis, étant donné qu'il y a ambiguïté quant à savoir si la clause 34 s'applique de quelque façon que ce soit aux renouvellements. Dans ces circonstances aussi, la caution devrait être libérée de sa responsabilité.

Disposition

Dispositif

34

I would dismiss the appeal with costs.

Je suis d'avis de rejeter le pourvoi avec dépens.

The following are the reasons delivered by

Les motifs suivants ont été rendus par

35

L'HEUREUX-DUBÉ J. (dissenting) — I substantially agree with my colleague Justice Iacobucci's reasons and the result he reaches. I have only one comment which relates to the judicial interpretation methodology relied upon by my colleague.

LE JUGE L'HEUREUX-DUBÉ (dissidente) — Je suis substantiellement d'accord avec les motifs de mon collègue le juge Iacobucci et le résultat auquel il arrive. Mon seul commentaire portera sur la méthode d'interprétation judiciaire utilisée par mon collègue.

36 The "modern contextual approach" is, in my view, the standard, normative approach to judicial interpretation, and one may exceptionally resort to the old "plain meaning" rule in appropriate circumstances. One example of the latter is statutory interpretation in the area of taxation, where the words and expressions used in legislative provisions quite often have a well-defined "plain meaning" within the business community.

La «méthode contextuelle moderne» est, à mon avis, la méthode normative standard d'interprétation judiciaire même s'il y a lieu, exceptionnellement, de recourir à l'ancienne règle du «sens ordinaire» lorsque les circonstances s'y prêtent. Par exemple, il y a l'interprétation des lois en matière fiscale, dans lesquelles on utilise des mots et expressions qui ont bien souvent un «sens ordinaire» bien défini dans le monde des affaires.

1996 CanLII 182 (SCC)

37 In the case at bar, our Court is called upon to determine the appropriate definition of the phrase "the giving of time for payment . . . or the varying of the terms of payment", in the context and factual situation of the instant case.

En l'espèce, notre Cour est appelée à définir l'expression [TRADUCTION] «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement», selon le contexte et les faits de la présente affaire.

38 My colleague decides the issue by going through a contractual interpretation exercise as follows. Firstly, the impugned contractual provisions are reviewed in the context of the whole contract. Secondly, the issue of the *contra proferentem* rule is addressed. Thirdly, the issue of the difference between "accommodating" and "compensated" sureties is examined. Fourthly, an authoritative academic text is relied upon: K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996).

Mon collègue tranche la question en adoptant la démarche suivante en matière d'interprétation des contrats. Premièrement, les dispositions contractuelles attaquées sont examinées dans le contexte du contrat dans son ensemble. Deuxièmement, la question de la règle *contra proferentem* est abordée. Troisièmement, la question de la différence entre la caution «de complaisance» et la caution «rétribuée» est analysée. Quatrièmement, un texte de doctrine faisant autorité est invoqué: K. P. McGuinness, *The Law of Guarantee* (2e éd. 1996).

39 Thus, after reviewing the provisions in their immediate context, the contract as a whole, the consequences of proposed interpretations, the applicable presumptions and rules of interpretation, and admissible external aids, my colleague comes to a contextual interpretation of the impugned phrase. I fully agree with both the process used and the conclusions he arrived at. However, with respect, that process is not an application of the "plain meaning" approach: in fact, the "modern contextual approach" to judicial interpretation is the one that is actually used in the instant case.

Ainsi, après avoir examiné les dispositions dans leur contexte immédiat, le contrat dans son ensemble, les conséquences des interprétations proposées, les présomptions et les règles d'interprétation applicables, ainsi que les sources acceptables d'aide extérieure, mon collègue arrive à une interprétation contextuelle de l'expression contestée. Je suis entièrement d'accord avec la démarche adoptée et les conclusions auxquelles il est arrivé. En toute déférence, cependant, cette démarche ne constitue pas une application de la méthode du «sens ordinaire»: en fait, c'est la «méthode contextuelle moderne» d'interprétation judiciaire qui est utilisée en l'espèce.

40 I agree with my colleague that "[t]he rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally". But the rules which govern the interpretation of deeds and contracts generally are essentially the

Je conviens avec mon collègue que «[l]es règles applicables à l'interprétation des cautionnements sont essentiellement les mêmes que celles qui régissent l'interprétation des actes et des contrats en général». Mais les règles qui régissent l'interprétation des actes et des contrats en général sont

same as the rules for statutory interpretation. As Lord Blackburn stated in *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743 (H.L.), at pp. 763-65:

> . . . I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. . . .
>
> In construing written instruments I think the same principle applies. In the cases of wills the testator is speaking of and concerning all his affairs; . . .
>
> In the case of a contract, the two parties are speaking of certain things only. . . . [In both cases] the Court . . . declares what the intention, indicated by the words used under such circumstances, really is.
>
> And this, as applied to the construction of statutes, is no new doctrine. . . . My Lords, *mutatis mutandis*, I think this is applicable to the construction of statutes as much as of wills. And I think it is correct. [Emphasis added.]

Therefore, the "modern contextual approach" for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation. In the instant case, the methodological reference provided by R. Sullivan in *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 131, applies equally to contractual interpretation:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of [that which is to be judicially interpreted] in its total context, having regard to [its] purpose . . ., the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of [. . .] meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the [. . .] text; (b) its efficacy, that is, its promotion of the [. . .] purpose; and (c) its acceptability,

essentiellement les mêmes que les règles d'interprétation des lois. Comme lord Blackburn l'affirme dans *River Wear Commissioners c. Adamson* (1877), 2 App. Cas. 743 (H.L.), aux pp. 763 à 765:

> [TRADUCTION] . . . j'exposerai donc de façon aussi précise que possible quels sont, d'après moi, les principes établis dans la jurisprudence, sur lesquels les cours de justice se fondent pour interpréter un instrument. Dans tous les cas il s'agit de découvrir quelle est l'intention exprimée par les mots employés. . . .
>
> Je pense que le même principe s'applique à l'interprétation des instruments. Dans le cas d'un testament, le testateur parle de toutes ses affaires; . . .
>
> Dans le cas d'un contrat, les deux parties parlent de certaines choses seulement, [. . .] [Dans les deux cas] la cour [. . .] énonce quelle est réellement l'intention indiquée par les mots employés dans ces circonstances.
>
> Et cela n'est pas un principe nouveau en matière d'interprétation des lois. [. . .] Vos Seigneuries, je pense que cela s'applique *mutatis mutandis* à l'interprétation des lois autant qu'à celle des testaments. Et je pense qu'il est bien qu'il en soit ainsi. [Je souligne.]

41 Par conséquent, la «méthode contextuelle moderne» d'interprétation des lois s'applique également, avec les adaptations nécessaires, à l'interprétation des contrats. L'interprétation des lois et l'interprétation des contrats ne sont que deux subdivisions de la grande catégorie de l'interprétation judiciaire. En l'espèce, la méthodologie exposée par R. Sullivan dans *Driedger on the Construction of Statutes* (3ᵉ éd. 1994), à la p. 131, s'applique également à l'interprétation des contrats:

> [TRADUCTION] Il n'existe qu'une seule règle d'interprétation moderne: les tribunaux sont tenus de déterminer le sens de [ce qui doit être interprété judiciairement] dans son contexte global, en tenant compte de [son] objet [. . .], des conséquences des interprétations proposées, des présomptions et des règles spéciales d'interprétation, ainsi que des sources acceptables d'aide extérieure. Autrement dit, les tribunaux doivent tenir compte de tous les indices pertinents et acceptables du sens d'un texte [. . .]. Cela fait, ils doivent ensuite adopter l'interprétation qui est appropriée. L'interprétation appropriée est celle qui peut être justifiée en raison a) de sa plausibilité, c'est-à-dire sa conformité avec le texte [. . .], b) de son efficacité, dans le sens où elle favorise la réalisa-

1996 CanLII 182 (SCC)

that is, the outcome is reasonable and just. [Emphasis added.]

tion de l'objet du texte [. . .], et c) de son acceptabilité, dans le sens où le résultat est raisonnable et juste. [Je souligne.]

42 This methodology was indeed the one followed by my colleague. In the case at bar, however, the resulting interpretation did not really come from the "plain meaning" of the words, but from their "meaning in law", because they are "legal terms of art". As Lord Diplock explained in *Sydall v. Castings Ltd.*, [1967] 1 Q.B. 302, at pp. 313-14:

> Documents which are intended to give rise to legally enforceable rights and duties contemplate enforcement by due process of law which involves their being interpreted by courts composed of judges, each one of whom has his personal idiosyncrasies of sentiment and upbringing, not to speak of age. Such documents would fail in their object if the rights and duties which could be enforced depended on the personal idiosyncrasies of the individual judge or judges upon whom the task of construing them chanced to fall. It is to avoid this that lawyers, whose profession it is to draft and to construe such documents, have been compelled to evolve an English language, of which the constituent words and phrases are more precise in their meaning than they are in the language of Shakespeare or of any of the passengers on the Clapham omnibus this morning. These words and phrases to which a more precise meaning is so ascribed are called by lawyers "terms of art" but are in popular parlance known as "legal jargon". [Emphasis added.]

En réalité, c'est cette méthode que mon collègue a suivie. En l'espèce, cependant, l'interprétation qui en a résulté ne découlait pas vraiment du «sens ordinaire» des mots, mais plutôt de leur «sens en droit» parce que ce sont des «termes techniques propres au domaine juridique». Comme lord Diplock l'a expliqué dans *Sydall c. Castings Ltd.*, [1967] 1 Q.B. 302, aux pp. 313 et 314:

> [TRADUCTION] Les documents qui visent à donner naissance à des droits et à des obligations exécutoires sur le plan juridique envisagent leur mise à exécution par application régulière de la loi, ce qui comprend leur interprétation par des tribunaux composés de juges dont chacun a son propre tempérament issu de ses sentiments, de son éducation, et évidemment de son âge. Ces documents n'atteindraient pas leur objectif si les droits et obligations qui pourraient être mis à exécution dépendaient du tempérament personnel du ou des juges qui seraient appelés à les interpréter. C'est pour éviter cela que les avocats, dont c'est la profession de rédiger et d'interpréter ces documents, ont dû mettre au point une langue anglaise composée de mots et d'expressions ayant un sens plus précis que ceux utilisés par Shakespeare ou par n'importe quel usager du transport en commun de Clapham, ce matin. Ces mots et expressions auxquels est ainsi attribué un sens plus précis sont qualifiés de «termes techniques» par les avocats, mais dans le langage populaire, ils sont connus sous le nom de «jargon juridique». [Je souligne.]

43 After having specified the nature of "legal terms of art", Lord Diplock stated the basic rule of judicial interpretation, as well as the methodology, that are applicable in that context (at p. 314):

> The words and phrases . . . which are "terms of art" must therefore be given the meaning which attaches to them as terms of art; . . .
>
> The lexicon of terms of art is to be found in the decided cases and in the textbooks consulted by legal practitioners.

Après avoir précisé la nature des «termes techniques propres au domaine juridique», lord Diplock a formulé la règle fondamentale d'interprétation judiciaire et la méthode applicables dans ce contexte (à la p. 314):

> [TRADUCTION] Les mots et expressions [. . .] qui sont des «termes techniques» doivent donc recevoir le sens qui leur est propre en tant que termes techniques; . . .
>
> Le lexique des termes techniques se trouve dans la jurisprudence et les ouvrages consultés par les praticiens du droit.

44 It is quite obvious that where courts expound judicial interpretations of "legal terms of art" using such external aids as legal textbooks, the resulting

Il est tout à fait évident que, lorsque les tribunaux interprètent un «terme technique propre au domaine juridique» en recourant à des sources

1996 CanLII 182 (SCC)

outcome cannot appropriately be labelled a "plain meaning" definition.

d'aide extérieure comme des ouvrages juridiques, on ne peut, à juste titre, dire que la définition ainsi obtenue repose sur le «sens ordinaire» du terme en cause.

Where an instrument uses a legal term of art, there is a presumption that the term of art is used in its correct legal sense: *Inland Revenue Commissioners v. Williams*, [1969] 1 W.L.R. 1197 (Ch.; Megarry J.).

45 Lorsqu'un instrument emploie un terme technique propre au domaine juridique, ce terme technique est présumé être employé dans son sens juridique exact: *Inland Revenue Commissioners c. Williams*, [1969] 1 W.L.R. 1197 (Ch., le juge Megarry).

This is the presumption that is resorted to by my colleague Iacobucci J. when he makes use of admissible external aids — i.e.: McGuinness, *supra*, — in determining the correct meaning of the phrase "to give time". As McGuinness reviews extensive case-law authority that establishes the generally accepted "meaning in law" of these "legal terms of art", it is an admissible external aid to judicial interpretation: see *Driedger, supra*, at pp. 428, 468 and 474; see also P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 449-53 and 457-58.

46 C'est la présomption à laquelle recourt mon collègue le juge Iacobucci lorsqu'il utilise une source acceptable d'aide extérieure, soit l'ouvrage de McGuinness, *op. cit.*, pour déterminer le sens exact de l'expression [TRADUCTION] «accorder un délai». Comme McGuinness passe en revue une jurisprudence abondante qui établit le «sens en droit» généralement accepté de ces «termes techniques propres au domaine juridique», il s'agit d'une source d'aide extérieure acceptable en matière d'interprétation judiciaire: voir *Driedger*, *op. cit.*, aux pp. 428, 468 et 474; voir également P.-A. Côté, *Interprétation des lois* (2e éd. 1990), aux pp. 516 à 520, de même qu'à la p. 526.

Subject to the above considerations, I concur with my colleague's disposition of the appeal.

47 Sous réserve de ces considérations, je souscris à la façon dont mon collègue tranche le pourvoi.

The reasons of Gonthier and Iacobucci JJ. were delivered by

Version française des motifs des juges Gonthier et Iacobucci rendus par

IACOBUCCI J. (dissenting) — This appeal raises questions regarding the proper method for interpreting guarantees. Specifically, we are asked to determine whether the wording of the contract in issue was clear enough to waive the guarantors' equitable right to be released when the principal loan was renewed.

48 LE JUGE IACOBUCCI (dissident) — Le présent pourvoi soulève des questions concernant la bonne façon d'interpréter les contrats de cautionnement. Plus précisément, on nous demande de déterminer si le libellé du contrat en cause était suffisamment clair pour constituer une renonciation du droit en *equity* des cautions d'être libérées de leur obligation lorsque le prêt principal a été renouvelé.

I. Background

I. Le contexte

On February 20, 1987, the appellant Manulife Bank of Canada (at the time known as The Regional Trust Company) made a loan of $275,000 to Dina Conlin. The loan was for a term of three years and bore interest at the rate of 11.5 percent

49 Le 20 février 1987, l'appelante, la Banque Manuvie du Canada (à l'époque connue sous le nom de «La Compagnie de Fiducie Régionale») a accordé un prêt de 275 000 $ à Dina Conlin. Le prêt était consenti pour une période de trois ans et

1996 CanLII 182 (SCC)

per annum. Dina Conlin provided security for the loan in the form of a first mortgage against lands located in Welland, Ontario.

il portait intérêt au taux de 11,5 pour 100 par année. Dina Conlin a offert en garantie de remboursement une première hypothèque sur des terrains situés à Welland (Ontario).

50 The terms of the loan required the signature of two guarantors: the respondent John Joseph Conlin, who was the mortgagor's husband; and Conlin Engineering and Planning Limited, an Ontario corporation. In clause 34 of the mortgage agreement, the two promised, "as principal debtors and not as sureties", to pay the money secured by the mortgage. They further agreed to all of the particular conditions and stipulations of the mortgage which were binding upon the mortgagor.

Les conditions du prêt exigeaient la signature de deux cautions: l'intimé John Joseph Conlin, qui était l'époux de la débitrice hypothécaire, et Conlin Engineering and Planning Limited, une société ontarienne. À la clause 34 de la convention hypothécaire, les deux se sont engagés, [TRADUCTION] «à titre de débiteurs principaux et non de cautions», à rembourser la somme garantie par l'hypothèque. Ils ont aussi accepté toutes les autres conditions et stipulations de l'hypothèque qui liaient la débitrice hypothécaire.

1996 CanLII 182 (SCC)

51 The guarantee was to remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". The liability of the guarantors was stated to be continuous, subsisting "until payment in full of the principal sum and all other moneys hereby secured".

Le cautionnement devait demeurer valide [TRADUCTION] «nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt». La responsabilité des cautions était qualifiée de continue et elle devait subsister [TRADUCTION] «jusqu'au paiement complet du capital et de toutes les autres sommes garantis par les présentes».

52 In 1989, the respondent and Dina Conlin separated.

En 1989, l'intimé et Dina Conlin se sont séparés.

53 In 1990, shortly before the mortgage was to mature, Dina Conlin and the appellant executed an agreement which renewed the mortgage for a further three-year term at a yearly interest rate of 13 percent. The renewal forms provided spaces for the signature of the "registered owner" and the "guarantor", but the agreement was signed only by Dina Conlin. The respondent had no notice or knowledge of the renewal.

En 1990, peu avant que l'hypothèque vienne à échéance, Dina Conlin et l'appelante ont signé une convention de renouvellement de l'hypothèque pour une autre période de trois ans, à un taux d'intérêt de 13 pour 100 par année. Les formules de renouvellement comportaient un espace pour la signature du [TRADUCTION] «propriétaire enregistré» et de la «caution», mais la convention n'a été signée que par Dina Conlin. L'intimé n'a reçu aucun avis et n'a pas eu connaissance du renouvellement.

54 In March of 1992, Dina Conlin defaulted on the mortgage.

En mars 1992, il y a eu défaut de paiement de l'hypothèque de la part de Dina Conlin.

55 After fruitless efforts to sell the Welland lands, the bank initiated proceedings for summary judgment against Dina Conlin and the guarantors. The bank claimed the principal owing under the mort-

Après avoir vainement tenté de vendre les terrains de Welland, la banque a engagé des procédures pour obtenir un jugement sommaire contre Dina Conlin et les cautions. La banque réclamait le

gage with interest at the rate of 13 percent per annum. Judgment was obtained on the motion. However, a majority of the Court of Appeal set aside the judgment and dismissed the action against the respondent: (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143.

II. Relevant Contractual Provisions

(7) RENEWAL OR EXTENSION OF TIME

PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or anyone claiming under it, or any other dealing by the Mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the monies hereby secured, and that this Mortgage may be renewed by an agreement in writing for any term with or without an increased rate of interest, or amended from time to time as to any of its terms including without limitation increasing the interest rate or principal amount notwithstanding that there may be subsequent encumbrances. And it shall not be necessary to register any such agreement in order to retain the priority of this Mortgage so altered over any instrument delivered or registered subsequent to this Mortgage.

(34) GUARANTEE AND INDEMNITY

IT IS A CONDITION of the making of the loan secured by the within mortgage that the covenants set forth herein should be entered into by us, the Guarantors, namely John Joseph Conlin and Conlin Engineering & Planning Ltd. and now we the said Guarantors, and each of us, on behalf of ourselves, our respective heirs, executors, administrators and assigns, in consideration of the making of the said loan by the Mortgagee, do hereby jointly and severally covenant, promise and agree as principal debtors and not as sureties, that we and each of us shall and will well and truly pay or cause to be paid to the Mortgagee, the principal sum and all other moneys hereby secured, together with interest upon the same on the days and times and in the manner set forth in this mortgage, and will in all matters pertain-

capital dû en vertu de l'hypothèque, avec intérêts au taux de 13 pour 100 par année. La banque a obtenu gain de cause relativement à cette requête. Cependant, la Cour d'appel à la majorité a infirmé ce jugement et rejeté l'action intentée contre l'intimé: (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143.

II. Dispositions contractuelles pertinentes

[TRADUCTION]

(7) RENOUVELLEMENT OU PROROGATION DE DÉLAI

POURVU qu'aucune prorogation de délai accordée par le créancier hypothécaire au débiteur hypothécaire, ou à toute personne cherchant à s'en prévaloir, ou qu'aucune autre négociation entre le créancier hypothécaire et le détenteur du droit de rachat desdits terrains n'affecte ou ne compromette de quelque façon que ce soit les droits que le créancier hypothécaire peut exercer contre le débiteur hypothécaire ou toute autre personne responsable du paiement des sommes garanties par les présentes, et que la présente hypothèque puisse être renouvelée par convention écrite pour quelque durée que ce soit, avec ou sans augmentation du taux d'intérêt, ou que l'une ou l'autre de ses conditions puisse être modifiée à l'occasion, notamment, sans limiter la portée de ce qui précède, que le taux d'intérêt ou le capital puisse être augmenté nonobstant toute charge ultérieure. Et il ne sera pas nécessaire d'enregistrer une telle convention pour conserver la priorité de rang de l'hypothèque ainsi modifiée par rapport à tout instrument délivré ou enregistré après la présente hypothèque.

(34) CAUTIONNEMENT ET INDEMNITÉ

EST UNE CONDITION du prêt garanti par la présente hypothèque que nous, les cautions, à savoir John Joseph Conlin et Conlin Engineering & Planning Ltd., souscrivions aux engagements stipulés aux présentes, et que, par conséquent, nous, lesdites cautions, en notre propre nom, au nom de nos héritiers, exécuteurs, administrateurs et ayants droit respectifs, en contrepartie dudit prêt consenti par le créancier hypothécaire, convenions, promettions et acceptions solidairement, aux présentes, à titre de débiteurs principaux et non de cautions, ensemble ou individuellement, de payer ou de faire payer bel et bien au créancier hypothécaire le capital et toutes les autres sommes garantis par les présentes, de même que les intérêts sur ces sommes au moment et de la manière stipulés dans la présente hypothèque, et que,

56

1996 CanLII 182 (SCC)

ing to this mortgage well and truly do, observe, fulfill and keep all and singular the covenants, provisos, conditions, agreements and stipulations contained in this mortgage, and do hereby agree to all the covenants, provisos, conditions, agreements and stipulations by this mortgage made binding upon the Mortgagor; and do further agree that this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon or the giving of a release or partial release or covenant not to sue to any of us; and we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us or any of us and without relieving us from our liability hereunder, which shall be a continuous liability and shall subsist until payment in full of the principal sum and all other moneys hereby secured.

relativement à toute question concernant la présente hypothèque, nous observions, remplissions et respections bel et bien tous et chacun des engagements, réserves, conditions, conventions et stipulations de la présente hypothèque, et que, par les présentes, nous convenions de respecter tous les engagements, réserves, conditions, conventions et stipulations de la présente hypothèque qui lient le débiteur hypothécaire; et que nous convenions que cet engagement nous liera toutes, ensemble et individuellement, nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt, ou le fait que l'une ou l'autre de nous obtienne une libération complète ou partielle ou un engagement de ne pas faire l'objet de poursuites; et que nous convenions toutes et chacune que le créancier hypothécaire puisse renoncer au droit de résiliation pour violation et accepter d'autres engagements, cautionnements ou sûretés sans nous donner avis à toutes ou à l'une ou l'autre de nous, et sans que cela nous libère de notre responsabilité continue aux termes des présentes, qui subsistera jusqu'au paiement complet du capital et de toutes les autres sommes garantis par les présentes.

1996 CanLII 182 (SCC)

III. Judgments Appealed From

A. *Ontario Court (General Division)*

57 In a very succinct judgment, Killeen J. granted the bank's motion for summary judgment against both Dina Conlin and the respondent. He found that, according to the "clear and unequivocal language" of clauses 7 and 34, the respondent was liable under his guarantee despite the renewal of the mortgage and despite the increase in the rate of interest: "In my view, there is no escape for the guarantor".

B. *Ontario Court of Appeal* (1994), 20 O.R. (3d) 499

(a) Finlayson J.A.

58 Finlayson J.A. first considered the following language in clause 34: "the said guarantors . . . covenant, promise and agree as principal debtors and not as sureties . . ." (emphasis added). He found an apparent inconsistency between this last phrase and the fact that, on the face of the contract, the respondent appeared to be signing as a surety and not as a principal debtor. Having briefly discussed the difference between contracts of

III. Juridictions inférieures

A. *Cour de l'Ontario (Division générale)*

Dans un jugement très succinct, le juge Killeen a fait droit à la requête de la banque visant à obtenir un jugement sommaire contre Dina Conlin et l'intimé. Il a conclu que, selon le [TRADUCTION] «texte clair et net» des clauses 7 et 34, l'intimé était responsable en vertu de son cautionnement malgré le renouvellement de l'hypothèque et l'augmentation du taux d'intérêt: [TRADUCTION] «À mon avis, la caution n'a aucune échappatoire»

B. *Cour d'appel de l'Ontario* (1994), 20 O.R. (3d) 499

a) Le juge Finlayson

Le juge Finlayson a d'abord examiné le passage suivant de la clause 34: «nous, lesdites cautions [. . .] conven[ons], promett[ons] et accept[ons] [. . .] à titre de débiteurs principaux et non de cautions» (je souligne). Il a conclu que ce passage semblait incompatible avec le fait qu'à la lecture du contrat l'intimé paraissait signer à titre de caution et non de débiteur principal. Après avoir brièvement analysé la différence entre les contrats

indemnity and contracts of guarantee, Finlayson J.A. concluded that it was unnecessary to resolve the exact nature of the guarantor's status, stating: "the reference to the guarantor as principal debtor can be disregarded for the purposes of this appeal" (p. 511).

d'indemnité et les contrats de cautionnement, le juge Finlayson a conclu qu'il n'était pas nécessaire de déterminer le statut exact de la caution, affirmant qu'[TRADUCTION] «aux fins du présent appel, il est possible de ne pas tenir compte de la mention de la caution en tant que débiteur principal» (p. 511).

59

Finlayson J.A. then turned to the main issue of whether the renewal agreement extinguished the respondent's liability under his guarantee. He noted that, in equity, either an increase of the interest rate or an extension of the mortgage's term constitutes a material change of the original contract which will extinguish a guarantor's liability.

Le juge Finlayson a ensuite examiné la question principale de savoir si la convention de renouvellement avait mis fin à la responsabilité qui incombait à l'intimé en vertu du cautionnement qu'il avait consenti. Il a fait remarquer qu'en *equity* une augmentation du taux d'intérêt ou une prorogation de l'hypothèque constituent une modification importante du contrat initial, qui met fin à la responsabilité d'une caution.

60

Therefore, it was necessary to determine whether clause 34 constituted a waiver, on the part of the sureties, of these equitable rights. After reviewing several cases where the language of a particular guarantee was held to embrace a renewal agreement, Finlayson J.A. stated that "each of these cases must be confined to its own wording" (pp. 511-12). Furthermore, the language of the Manulife guarantee clause did not, in the opinion of Finlayson J.A., clearly contemplate the renewal agreement. Accordingly, the material change to the loan, effected through the renewal agreement, released the guarantors from their respective obligations.

Il était donc nécessaire de déterminer si la clause 34 constituait une renonciation, de la part des cautions, à ces droits en *equity*. Après avoir examiné plusieurs affaires où on a jugé que le texte d'un cautionnement englobait une convention de renouvellement, le juge Finlayson a affirmé que [TRADUCTION] «chacune de ces affaires doit se limiter à son propre libellé» (pp. 511 et 512). En outre, le texte de la clause de cautionnement de Manuvie ne prévoyait pas clairement, selon le juge Finlayson, la convention de renouvellement. Par conséquent, la modification importante apportée au contrat de prêt au moyen de la convention de renouvellement libérait les cautions de leurs obligations respectives.

(b) <u>Carthy J.A. (concurring with Finlayson J.A. in the result)</u>

b) <u>Le juge Carthy (souscrivant à l'opinion du juge Finlayson quant au résultat)</u>

61

Carthy J.A. began by stating that the law has always treated sureties as "favoured" creditors. While a surety can contract out of his legal rights, the language used to do so must be clear.

Le juge Carthy a commencé par affirmer que le droit a toujours considéré les cautions comme des créanciers «privilégiés». Une caution peut renoncer par contrat aux droits que lui confère la loi, mais cela doit être fait en termes clairs.

62

Applying a "strict" interpretation to the loan agreement, Carthy J.A. concluded that the guarantee agreement was not "explicit enough to embrace a renewal" (p. 515). Furthermore, he found that the wording of clause 7 did not stipulate clearly that the loan could be renewed by an agreement which

Interprétant «restrictivement» la convention de prêt, le juge Carthy a conclu que la convention de cautionnement n'était pas [TRADUCTION] «suffisamment explicite pour comprendre un renouvellement» (p. 515). Il a, en outre, conclu que le texte de la clause 7 ne stipulait pas clairement que le

1996 CanLII 182 (SCC)

was not signed by the guarantors. The guarantors had not waived their equitable rights and, accordingly, the renewal agreement extinguished their liability.

prêt pourrait être renouvelé au moyen d'une convention non signée par les cautions. Les cautions n'avaient pas renoncé à leurs droits en *equity* et, par conséquent, la convention de renouvellement mettait fin à leur responsabilité.

(c) Robins J.A. (dissenting)

c) Le juge Robins (dissident)

63 Robins J.A. first reviewed the rule in *Holme v. Brunskill* (1878), 3 Q.B.D. 495 (C.A.) which states that any material variation of the principal contract without the surety's consent will discharge the surety. He went on to note that a guarantor can contract out of this equitable protection.

Le juge Robins a d'abord examiné la règle établie dans l'arrêt *Holme c. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), selon laquelle toute modification importante du contrat principal sans le consentement de la caution libère cette dernière. Puis, il a fait remarquer qu'une caution peut renoncer par contrat à cette protection dont il bénéficie en *equity*.

1996 CanLII 182 (SCC)

64 Robins J.A. then looked at the terms of clause 34 which stated that the guarantee would remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". He concluded that these words clearly contemplated both the extension of the mortgage's term and the increase in the interest rate, as implemented by the renewal agreement. In other words, by clause 34, the guarantors waived their equitable rights to be released from their obligations in the event of these particular changes to the loan contract.

Le juge Robins a ensuite examiné le texte de la clause 34 qui prévoit que le cautionnement demeure valide [TRADUCTION] «nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt». Il a conclu que ces mots prévoyaient clairement à la fois la prorogation de l'hypothèque et l'augmentation du taux d'intérêt effectuées par la convention de renouvellement. Autrement dit, à la clause 34, les cautions avaient renoncé à leur droit en *equity* d'être libérées de leurs obligations dans le cas où de telles modifications seraient apportées au contrat de prêt.

65 Having decided that the respondent was liable as a guarantor, Robins J.A. did not find it necessary to consider whether the guarantors were, in fact, "principal debtors".

Ayant décidé que l'intimé était responsable à titre de caution, le juge Robins n'a pas considéré nécessaire de déterminer si les cautions étaient, en fait, des «débiteurs principaux».

66 However, while he found the respondent to be liable under the guarantee, Robins J.A. would have varied the order of the motions court judge such that Conlin would only be liable for the principal amount secured under the mortgage and interest thereon calculated at 11.5 percent per annum. He based this variation on the finding that the guarantors agreed to be liable for the moneys secured under the original mortgage. In his view, although they agreed to be liable notwithstanding any

Toutefois, bien qu'il ait conclu que l'intimé était responsable en vertu du cautionnement consenti, le juge Robins aurait modifié l'ordonnance du juge des requêtes, de manière à ce que Conlin ne soit responsable que du capital garanti en vertu de l'hypothèque et des intérêts sur ce montant calculés au taux de 11,5 pour 100 par année. Il a fondé cette modification sur la conclusion que les cautions avaient convenu d'être responsables des sommes garanties en vertu de l'hypothèque initiale. À son avis, bien qu'elles aient convenu d'être responsables nonobstant toute modification du taux d'in-

change in the interest rate, they did not agree to be liable for that higher rate of interest.

IV. Issues

Before our Court, the appellant raised a threshold issue of jurisdiction. It claimed that the Court of Appeal had erred in dismissing the action when that order was not requested by either party at the motion for summary judgment or on appeal and when neither counsel nor the courts ever discussed this form of relief. Accordingly, there are two major issues before us:

1. Did the majority of the Ontario Court of Appeal exceed its jurisdiction in allowing the appeal and dismissing the action, rather than sending the matter back to trial?
2. Under the terms of the loan agreement, was the respondent John Joseph Conlin released from his promise to pay the principal sum and other moneys secured by the mortgage, when the term of the mortgage was extended and the rate of interest increased, without notice to the respondent?

V. Analysis

A. *Did the Court of Appeal have jurisdiction to dismiss the action as against the respondent*?

Section 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, states as follows:

134. — (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just.

The order originally appealed from was granted on a motion for summary judgment brought by the bank. The respondent Conlin had brought no cross-motion for summary judgment dismissing the action. There had been no examination for discovery and no trial. Given that an appeal court may not make an order which the trial judge would not

térêt, elles n'avaient pas convenu d'être responsables relativement à ce taux d'intérêt majoré.

IV. Questions en litige

67 Devant notre Cour, l'appelante a soulevé une question de compétence préliminaire. Elle a allégué que la Cour d'appel avait commis une erreur en rejetant l'action alors que cela ne lui avait été demandé ni par l'une ou l'autre des parties à la requête en obtention d'un jugement sommaire, ni en appel, et alors que ni les avocats ni les cours n'avaient parlé de cette forme de réparation. Par conséquent, deux questions principales se posent devant nous:

1. La Cour d'appel de l'Ontario, à la majorité, a-t-elle excédé sa compétence en accueillant l'appel et en rejetant l'action, au lieu de renvoyer l'affaire au procès?
2. En vertu des conditions de la convention de prêt, l'intimé John Joseph Conlin a-t-il été libéré de sa promesse de payer le capital et les autres sommes garantis par l'hypothèque, lorsque l'hypothèque a été prorogée et le taux d'intérêt augmenté, sans qu'il en soit informé?

V. Analyse

A. *La Cour d'appel avait-elle compétence pour rejeter l'action intentée contre l'intimé*?

68 Le paragraphe 134(1) de la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, se lit ainsi:

134 (1) Sauf disposition contraire, le tribunal saisi d'un appel peut:

a) rendre l'ordonnance ou la décision que le tribunal dont il y a appel aurait dû ou pu rendre;

b) ordonner un nouveau procès;

c) rendre toute ordonnance ou toute décision qu'il estime juste.

69 L'ordonnance qui a fait l'objet d'un appel au départ a été accordée à la suite de la requête de la banque visant à obtenir un jugement sommaire. L'intimé Conlin n'avait déposé aucune requête incidente pour faire rejeter l'action par jugement sommaire. Il n'y avait eu ni interrogatoire préalable ni procès. L'appelante a soutenu devant nous

1996 CanLII 182 (SCC)

have had the jurisdiction to make (*Re Rotenberg and Borough of York (No. 2)* (1976), 13 O.R. (2d) 101 (C.A.), at p. 110), the appellant argued before us that the Court of Appeal had jurisdiction only to set aside the order for summary judgment and send the matter back for trial. The question to be answered, therefore, is whether the motions court judge had the jurisdiction to dismiss the action against the respondent.

que la Cour d'appel n'avait compétence que pour annuler l'ordonnance de jugement sommaire et renvoyer l'affaire au procès, étant donné qu'une cour d'appel ne peut pas délivrer une ordonnance que le juge du procès n'aurait pas eu le pouvoir de rendre (*Re Rotenberg and Borough of York (No. 2)* (1976), 13 O.R. (2d) 101 (C.A.), à la p. 110). Il s'agit donc de savoir si le juge des requêtes avait compétence pour rejeter l'action intentée contre l'intimé.

1996 CanLII 182 (SCC)

70 The original motion for summary judgment was brought pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 20.04(2) states:

> Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

Rule 20.04(4) states:

> Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, . . .

The interpretive guide to the Rules is set out in Rule 1.04(1):

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

La requête initiale en obtention d'un jugement sommaire était fondée sur l'art. 20 des *Règles de procédure civile*, R.R.O. 1990, règl. 194. Le paragraphe 20.04(2) se lit ainsi:

> Le tribunal, s'il est convaincu qu'une demande ou une défense ne soulève pas de question litigieuse, rend un jugement sommaire en conséquence.

Le paragraphe 20.04(4) prévoit ceci:

> Le tribunal, s'il est convaincu que la seule question litigieuse porte sur une question de droit, peut trancher cette question et rendre un jugement en conséquence. . . .

Le paragraphe 1.04(1) énonce la façon d'interpréter les Règles:

> Les présentes règles doivent recevoir une interprétation large afin d'assurer la résolution équitable sur le fond de chaque instance civile, de la façon la plus expéditive et la moins onéreuse.

71 Considered in light of Rule 1.04(1), in my opinion, Rules 20.04(2) and (4) gave Killeen J. the jurisdiction to dismiss the action against the respondent. The motions court judge could either have found that there was no genuine issue for trial or he could have found that the only genuine issue was an issue of law. In either case, it would have been within his jurisdiction and, by extension, within the jurisdiction of the Court of Appeal, to dispose of the matter by dismissing Manulife's claim.

J'estime qu'à la lumière du par. 1.04(1) les par. 20.04(2) et (4) conféraient au juge Killeen compétence pour rejeter l'action intentée contre l'intimé. Le juge des requêtes aurait pu conclure soit qu'il n'y avait pas de question litigieuse soit que la seule question litigieuse portait sur une question de droit. Dans un cas comme dans l'autre, lui-même et, par extension, la Cour d'appel auraient eu compétence pour trancher l'affaire en rejetant la demande de Manuvie.

72 However, the appellant further argues that Finlayson and Carthy JJ.A. erred in basing their decisions on the unproven assertion that Conlin had never consented to the 1990 renewal agreement. The appellant claims that it had no opportunity to

Toutefois, l'appelante prétend, en outre, que les juges Finlayson et Carthy de la Cour d'appel ont commis une erreur en fondant leurs décisions sur l'affirmation non prouvée que Conlin n'avait jamais consenti à la convention de renouvellement

fully test Conlin's affidavit evidence with regard to consent and that, therefore, it was denied the right to have its case fully heard.

de 1990. L'appelante fait valoir qu'elle n'a pas eu l'occasion de vérifier pleinement l'exactitude du témoignage par affidavit de Conlin concernant le consentement et que, par conséquent, on lui a refusé le droit de faire entendre pleinement sa preuve.

I do not agree with this assertion. The appellant did, in fact, have the opportunity to test Conlin's evidence. Rule 39.02(1) of the *Rules of Civil Procedure* says that a party to a motion may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion. However, the bank chose not to exercise this right and left Conlin's evidence unchallenged. Therefore, in my opinion, the appellant was not deprived of its right to have its case fully heard and to test all of the respondent's evidence.

73

Je ne suis pas de cet avis. L'appelante a bel et bien eu la possibilité de vérifier l'exactitude du témoignage de Conlin. Le paragraphe 39.02(1) des *Règles de procédure civile* prévoit qu'une partie à une requête peut contre-interroger le déposant d'un affidavit signifié par une partie ayant des intérêts opposés relativement à cette requête. Toutefois, la banque a choisi de ne pas exercer ce droit et de ne pas contester le témoignage de Conlin. Par conséquent, je suis d'avis qu'on n'a pas refusé à l'appelante le droit de faire entendre pleinement sa preuve et de vérifier l'exactitude de tout le témoignage de l'intimé.

1996 CanLII 182 (SCC)

This case is far from the circumstances that arose in *Keltic Leasing Corp. v. Curtis* (1993), 133 N.B.R. (2d) 73 (C.A.). In that case, the trial judge erred in making a finding of fact on a question which had not been addressed at all by the parties. The Court of Appeal found that this deprived the plaintiff of its right to adduce evidence in support of its position. However, in the case before us, the question of Conlin's consent, or lack thereof, to the renewal agreement was addressed before Killeen J. and, as discussed above, the appellant had full opportunity to counter this with evidence to the contrary.

74

Les circonstances de la présente affaire sont loin de ressembler à celles dont il était question dans l'arrêt *Keltic Leasing Corp. c. Curtis* (1993), 133 R. N.-B. (2e) 73 (C.A.). Dans cette affaire, le juge du procès avait erronément tiré une conclusion de fait sur une question qui n'avait pas été abordée par les parties. La Cour d'appel a conclu que cela avait privé la demanderesse de son droit de présenter des éléments de preuve à l'appui de sa thèse. Cependant, dans l'affaire qui nous est soumise, la question du consentement ou de l'absence de consentement de Conlin à la convention de renouvellement a été abordée devant le juge Killeen et, comme nous l'avons vu précédemment, l'appelante a eu pleinement l'occasion de répliquer à cela au moyen d'une preuve contraire.

For these reasons, it is my view that there is no reason to interfere with the Court of Appeal's procedural handling of this case.

75

Pour ces motifs, je suis d'avis qu'il n'y a aucune raison d'intervenir dans la façon dont la Cour d'appel a procédé en l'espèce.

B. *Under the terms of the loan agreement, was the respondent released from his promise to pay the principal sum and other moneys secured by the mortgage when the term of the mortgage was extended and the rate of interest increased without the respondent's consent?*

B. *En vertu des conditions de la convention de prêt, l'intimé a-t-il été libéré de sa promesse de payer le capital et les autres sommes garantis par l'hypothèque, lorsque l'hypothèque a été prorogée et le taux d'intérêt augmenté, sans son consentement?*

76 It is well accepted that any material variation of the terms of a contract between debtor and creditor, which is prejudicial to the guarantor and which is made without the guarantor's consent, will discharge the guarantor: *Holme v. Brunskill*, *supra*, at pp. 505-6; *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562. An increase in the rate of interest and an extension of the time for payment are both material changes to the loan agreement sufficient to discharge a surety: K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996), at ¶¶ 10.23 and 10.51.

Il est bien reconnu que toute modification importante des conditions d'un contrat entre un débiteur et un créancier qui est préjudiciable à la caution et qui est faite sans son consentement, libère cette dernière: *Holme c. Brunskill*, précité, aux pp. 505 et 506; *Banque de Montréal c. Wilder*, [1986] 2 R.C.S. 551, à la p. 562. Une augmentation du taux d'intérêt et une prorogation du délai de paiement sont toutes deux des modifications importantes de la convention de prêt qui sont suffisantes pour libérer une caution: K. P. McGuinness, *The Law of Guarantee* (2e éd. 1996), aux ¶¶ 10.23 et 10.51.

77 However, this right to be discharged as a result of a material variation of the principal contract can be waived by the surety. As McIntyre J. said in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107, "it is open to the parties to make their own arrangements, and a surety is competent to contract himself out of the protection of the equitable rule". The question to be resolved, therefore, is whether clause 34 amounts to a waiver of the respondent's equitable rights. Before dealing with this question, I believe it would be helpful to discuss briefly some of the interpretive principles relating to guarantees.

Cependant, la caution peut renoncer à ce droit d'être libérée en raison d'une modification importante du contrat principal. Comme le juge McIntyre l'a dit dans *Bauer c. Banque de Montréal*, [1980] 2 R.C.S. 102, à la p. 107: «les parties peuvent conclure leur propre entente, et une caution peut renoncer à la protection de la règle d'*equity*». Il s'agit donc de savoir si la clause 34 équivaut à une renonciation par l'intimé aux droits qui lui sont reconnus en *equity*. Avant d'examiner cette question, je crois qu'il serait utile d'analyser brièvement certains principes d'interprétation en matière de cautionnement.

(a) Interpretive principles relating to guarantees

a) Principes d'interprétation en matière de cautionnement

78 In my opinion, there is no special rule of construction for guarantees. Guarantee contracts are basically contracts, like any others, and should be construed according to the ordinary rules of contractual interpretation. As McGuinness states, *supra*, at p. 238, "The rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally."

À mon avis, il n'existe aucune règle particulière d'interprétation des cautionnements. Les contrats de cautionnement sont au fond des contrats comme les autres, qui devraient être interprétés selon les règles ordinaires d'interprétation des contrats. Comme McGuinness l'affirme, *op. cit.*, à la p. 238: [TRADUCTION] «Les règles applicables à l'interprétation des cautionnements sont essentiellement les mêmes que celles qui régissent l'interprétation des actes et des contrats en général».

79 The cardinal interpretive rule of contracts is that the court should give effect to the intentions of parties as expressed in their written document. As Estey J. said in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 899, quoting Meredith J.A. in *Pense v. Northern Life Assurance Co.*

La principale règle d'interprétation des contrats veut que les tribunaux mettent à exécution les intentions que les parties ont exprimées dans leur document écrit. Comme le juge Estey l'a dit dans l'arrêt *Exportations Consolidated Bathurst Ltée c. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 R.C.S. 888, à la p. 899, en citant les pro-

1996 CanLII 182 (SCC)

(1907), 15 O.L.R. 131, at p. 137: "[In all contracts], effect must be given to the intention of the parties, to be gathered from the words they have used." The court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absurd result or to a result which is "plainly repugnant to the intention of the parties": McGuinness, *supra*, at p. 239; and see the reasons of Estey J. in *Consolidated-Bathurst*, *supra*, at p. 901.

pos tenus par le juge Meredith dans *Pense c. Northern Life Assurance Co.* (1907), 15 O.L.R. 131, à la p. 137: «[Dans tous les contrats], il faut donner effet à l'intention des parties qui se dégage des mots qu'elles ont employés.» La cour ne s'écartera du sens ordinaire des mots que si une interprétation littérale des termes du contrat menait à un résultat absurde ou à un résultat [TRADUCTION] «nettement inconciliable avec l'intention des parties»: McGuinness, *op. cit.*, à la p. 239; voir aussi les motifs du juge Estey dans l'arrêt *Consolidated Bathurst*, précité, à la p. 901.

80

When interpreting guarantees, like other contracts, the court may apply the *contra proferentem* rule where the wording of the guarantee supports more than one meaning. According to this rule, the ambiguity will be resolved in favour of the party who did not draft the contract. This is an interpretive rule of last resort, to be used only when all other means of ascertaining the intentions of the parties, as expressed by their written contract, have failed. See the words of Cartwright J. in *Stevenson v. Reliance Petroleum Ltd.*, [1956] S.C.R. 936, at p. 953. As Lindley L.J. said in *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453, at p. 456:

> . . . this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.

Pour interpréter un cautionnement, la cour peut, comme pour les autres contrats, appliquer la règle *contra proferentem* lorsqu'il est possible d'attribuer plus d'un sens au texte du cautionnement. Selon cette règle, l'ambiguïté doit être dissipée en faveur de la partie qui n'a pas rédigé le contrat. Il s'agit d'une règle d'interprétation de dernier recours, qui ne doit être utilisée que lorsque tous les autres moyens de vérifier les intentions des parties, exprimées par écrit dans leur contrat, ont échoué. Voir les propos du juge Cartwright dans l'arrêt *Stevenson c. Reliance Petroleum Ltd.*, [1956] R.C.S. 936, à la p. 953. Comme le lord juge Lindley l'a affirmé dans *Cornish c. Accident Insurance Co.* (1889), 23 Q.B.D. 453, à la p. 456:

> [TRADUCTION] . . . ce principe ne devrait être appliqué que pour dissiper un doute, et non pour créer un doute ou amplifier une ambiguïté, quand les circonstances de l'affaire ne posent aucune difficulté réelle.

81

There is some suggestion in the case law that guarantee agreements entered into by an "uncompensated" or "accommodating" surety will be interpreted more strictly than those entered into by a compensated surety. In this respect, most notable is the decision of the Court in *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513.

La jurisprudence laisse entendre jusqu'à un certain point qu'une convention de cautionnement souscrite par une caution «non rétribuée» ou «de complaisance» sera interprétée d'une façon plus restrictive que celle souscrite par une caution rétribuée. À cet égard, l'arrêt de notre Cour *Citadel General Assurance Co. c. Johns-Manville Canada Inc.*, [1983] 1 R.C.S. 513, est des plus remarquables.

82

In that case, the respondent, Johns-Manville, had entered into a contract with a supplier. That supplier had entered into a payment bond which named the appellant, Citadel, as guarantor of the supply contract. A condition of the bond was that

Dans cette affaire, l'intimée, Johns-Manville, avait conclu un contrat avec un fournisseur. Ce fournisseur avait souscrit un cautionnement qui désignait l'appelante, Citadel, comme caution du contrat d'approvisionnement. Une condition du

1996 CanLII 182 (SCC)

no suit could be commenced under the bond without proper notice being given to the appellant surety and to the supplier. The supplier defaulted and the respondent commenced an action against the guarantor, Citadel. The respondent gave proper notice to the guarantor. However, while notice was given to the supplier, it did not strictly comply with the requirements of the bonding agreement. The guarantor denied liability under the bond on the basis that the notice provisions of the bond had not been complied with.

cautionnement était qu'aucune poursuite ne pouvait être engagée en vertu du cautionnement sans qu'un avis approprié n'en soit donné à la caution appelante et au fournisseur. Le fournisseur a manqué à ses obligations et l'intimée a intenté une action contre la caution Citadel. L'intimée a donné un avis approprié à la caution. Toutefois, bien qu'un avis ait été donné au fournisseur, il ne satisfaisait pas strictement aux exigences de la convention de cautionnement. La caution a affirmé qu'elle n'était pas responsable en vertu du cautionnement, pour le motif que les dispositions du cautionnement relatives à l'avis n'avaient pas été respectées.

1996 CanLII 182 (SCC)

83 The Court rejected this argument and held that the guarantor was liable under the bonding agreement despite the respondent's failure to comply strictly with the terms of the contract. The basis for the decision was that guarantee agreements entered into for valuable consideration should be interpreted according to the ordinary rules of contractual construction. In *obiter*, McIntyre J., at pp. 521 and 523, went on to suggest that a different, stricter rule would apply to guarantors who had not received compensation:

> In respect of them [i.e., uncompensated sureties], the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety. Any material variation in the terms of the guaranteed indebtedness and any extension of time or postponement of the debtor's obligation, or any discharge or relinquishment of any security for the debt without the consent of the surety will discharge him. In other words, courts have adopted the *strictissimi juris* construction of the surety contract.
>
> . . . surety contracts should be more liberally construed in favour of claimants in the case of compensated sureties than in the case of accommodation sureties.

La Cour a rejeté cet argument et a statué que la caution était responsable en vertu de la convention de cautionnement malgré le défaut de l'intimée de respecter strictement les conditions du contrat. La raison de cette décision était que les conventions de cautionnement souscrites à titre onéreux devraient être interprétées selon les règles ordinaires d'interprétation des contrats. Dans une opinion incidente, aux pp. 521 et 523, le juge McIntyre a laissé entendre qu'une règle différente plus stricte s'appliquerait aux cautions non rétribuées:

> En ce qui les concerne [les cautions non rétribuées], la loi s'est avisée de les protéger en interprétant leurs obligations de façon stricte et en les limitant aux conditions précises du contrat de cautionnement. Toute modification substantielle des conditions de la dette garantie, toute prorogation de délai ou tout délai accordé au débiteur, toute remise ou abandon de sûreté à l'égard de la dette sans le consentement de la caution libérait cette dernière. En d'autres termes, les cours ont adopté une interprétation *strictissimi juris* du contrat de cautionnement.
>
> . . . il faut interpréter les contrats de cautionnement plus libéralement en faveur des réclamants s'il s'agit de cautions rétribuées plutôt que de cautions de complaisance.

84 In my opinion, the above statement should be understood in the context in which it was made. In *Citadel General Assurance*, the issue was not one of contractual interpretation. Rather, it was a question of what consequences were to flow from a clear breach of the contract. For these reasons, it is my view that the comments in *Citadel General Assurance* are not a sufficient basis for holding

À mon avis, l'énoncé qui précède doit être interprété dans son contexte. Dans l'arrêt *Citadel General Assurance*, le litige ne portait pas sur une interprétation de contrat. Il s'agissait plutôt de déterminer quelles conséquences découleraient d'une violation claire du contrat. Pour ces motifs, je suis d'avis que les commentaires faits dans *Citadel General Assurance* ne sont pas suffisants pour

generally that guarantee contracts should be subject to special, stricter rules of interpretation if the guarantor has not received compensation.

(b) Application of the rules of interpretation to the contract between Conlin and Manulife

In applying the above principles to this case, a number of sub-questions arise from the arguments of the parties which I now will address.

(i) *Does clause 34 amount to a waiver of the respondent's equitable rights?*

By clause 34, the guarantors agree to remain bound by the guarantee contract notwithstanding the giving of time for payment of the mortgage or the varying of the rate of interest.

The respondent argued that clause 34 does not include a waiver of the guarantors' right to be discharged in the event of a renewal of the mortgage. According to this argument, since the renewal agreement constituted a material change, it discharged the guarantors.

It is true, as the respondent contends, that clause 34 does not refer to "renewal" agreements by name. However, the clause does contain a clear waiver of the guarantors' right to be discharged in the event of an extension of time or an increase in the rate of interest:

> . . . this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon . . .

The respondent maintained that a renewal was not the same thing as the giving of time for payment. He pointed out that clause 7 uses the term "renewal" while clause 34 does not. According to this line of argument, if the parties had intended the guarantee agreement to include a waiver of the right of discharge in the event of a renewal of the

conclure, de manière générale, que les contrats de cautionnement devraient être sujets à des règles d'interprétation spéciales plus strictes dans le cas d'une caution non rétribuée.

b) Application des règles d'interprétation au contrat conclu par Conlin et Manuvie

85 Si on applique les principes susmentionnés à la présente affaire, les arguments des parties soulèvent un certain nombre de questions que je vais maintenant aborder.

(i) *La clause 34 équivaut-elle à une renonciation par l'intimé à ses droits en equity?*

86 À la clause 34, les cautions consentent à rester liées par le contrat de cautionnement nonobstant l'attribution d'un délai de paiement de l'hypothèque ou la modification du taux d'intérêt.

87 L'intimé fait valoir que la clause 34 ne comprend pas une renonciation au droit des cautions d'être libérées en cas de renouvellement de l'hypothèque. Selon cet argument, puisque la convention de renouvellement constituait une modification importante, elle a libéré les cautions.

88 Il est vrai, comme le prétend l'intimé, que la clause 34 ne mentionne pas expressément les conventions de «renouvellement». La clause contient, cependant, une renonciation claire au droit des cautions d'être libérées dans le cas d'une prorogation de délai ou d'une augmentation du taux d'intérêt:

> [TRADUCTION] . . . cet engagement nous liera toutes, ensemble et individuellement, nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt . . .

89 L'intimé a soutenu qu'un renouvellement n'était pas la même chose que l'attribution d'un délai de paiement. Il a fait remarquer que la clause 7 utilise le mot «renouvellement» alors que la clause 34 ne le fait pas. Selon ce raisonnement, si les parties avaient voulu inclure dans la convention de cautionnement une renonciation au droit à la libération

1996 CanLII 182 (SCC)

mortgage, they would have said so explicitly in clause 34.

en cas de renouvellement de l'hypothèque, elles l'auraient fait explicitement à la clause 34.

90 However, I do not find this argument persuasive. The plain ordinary meaning of the words, "the giving of time for payment . . . or the varying of the terms of payment" encompasses the renewal agreement. Through this agreement, the appellant bank extended the term of the loan by three years and increased the rate of interest charged on the debt. I can see no support for the respondent's contention that the "giving of time for payment", as detailed in clause 34, does not include the giving of time for payment as effected by the renewal agreement.

Toutefois, je ne considère pas cet argument persuasif. Le sens clair et ordinaire des mots [TRADUCTION] «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» comprend la convention de renouvellement. Grâce à cette convention, la banque appelante a prorogé le prêt pour une durée de trois ans et a augmenté le taux d'intérêt applicable à la dette. Je ne vois rien qui justifie la prétention de l'intimé que «l'attribution d'un délai de paiement», mentionnée dans la clause 34, ne comprend pas l'attribution d'un délai de paiement en vertu de la convention de renouvellement.

1996 CanLII 182 (SCC)

91 In his book *The Law of Guarantee*, *supra*, at p. 556, McGuinness discusses the effect of agreements "to give time" to the principal debtor and says that the "giving of time" includes those agreements "which provide specifically for an extension of time for performance. . . . [for] further time in which to pay . . . the guaranteed debt". This is precisely what the renewal agreement accomplished and, thus, this is what was contemplated by the language of the guarantee agreement.

Dans son ouvrage intitulé *The Law of Guarantee*, *op. cit.*, à la p. 556, McGuinness analyse l'effet des conventions [TRADUCTION] «accordant un délai» au débiteur principal et affirme que l' [TRADUCTION] «attribution d'un délai» comprend toutes les conventions «qui prévoient expressément une prorogation du délai d'exécution [. . .] [afin] de disposer d'un plus long délai pour payer [. . .] la dette garantie». C'est précisément ce qui a été réalisé par la convention de renouvellement et c'est donc ce qui était prévu par le texte de la convention de cautionnement.

92 In other words, what we must consider is the substantive effect of the renewal agreement, rather than the form of the instrument by which it was executed. The parties did use a renewal agreement, but, at bottom, that renewal agreement extended the time for payment and increased the interest rate, events that are expressly covered in clause 34.

En d'autres termes, il faut prendre en considération l'effet réel de la convention de renouvellement, plutôt que la forme de l'instrument par lequel elle a été mise à exécution. Les parties ont bel et bien conclu une convention de renouvellement, mais, au fond, cette convention de renouvellement prorogeait le délai de paiement et augmentait le taux d'intérêt, ce qui était expressément prévu à la clause 34.

93 With respect, I do not agree with Carthy J.A. when he says that the words "notwithstanding the giving of time for payment" should be interpreted to refer only to forbearance by the bank to pursue remedies during the original term of the mortgage. This is a case where we should heed the warning of Lindley L.J. in *Cornish v. Accident Insurance Co.*, *supra*, and not use the *contra proferentem* doctrine in any guise to create a doubt, or to mag-

En toute déférence, je ne suis pas d'accord avec le juge Carthy lorsqu'il affirme que les mots [TRADUCTION] «nonobstant l'attribution d'un délai de paiement» devraient être interprétés de manière à désigner seulement une abstention de la part de la banque d'intenter un recours pendant la durée initiale de l'hypothèque. Il s'agit ici d'une affaire où nous devrions tenir compte de la mise en garde du lord juge Lindley dans *Cornish c. Accident Insur-*

nify an ambiguity. Like Killeen J., I am of the view that the plain wording of the agreement in question raises no real difficulty.

ance Co., précité, et ne pas appliquer la règle *contra proferentem* de manière à créer un doute ou à amplifier une ambiguïté. À l'instar du juge Killeen, je suis d'avis que le texte clair de la convention en cause ne pose aucune difficulté réelle.

(ii) *Under clause 34, did the appellant have to notify the guarantors of the renewal agreement?*

(ii) *En vertu de la clause 34, l'appelante était-elle tenue d'aviser les cautions de la convention de renouvellement?*

One of the last phrases of clause 34 reads as follows: "we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us" (emphasis added). By contrast, the preceding phrase which waives the guarantors' rights to be discharged in the event of certain material changes to the principal contract does not contain this phrase, "without notice to us". The respondent contends that this omission means that, if the bank failed to notify the guarantors of the relevant material changes, the guarantors would be discharged from their obligations. Because the respondent received no notice of the renewal agreement, he was released from his liability.

94

L'une des dernières phrases de la clause 34 se lit ainsi: [TRADUCTION] «nous conven[ons] toutes et chacune que le créancier hypothécaire [peut] renoncer au droit de résiliation pour violation et accepter d'autres engagements, cautionnements ou sûretés sans nous donner avis» (je souligne). Par contre, la phrase précédente, qui écarte les droits des cautions d'être libérées dans le cas où certaines modifications importantes seraient apportées au contrat principal ne renferme pas l'expression «sans nous donner avis». L'intimé soutient que cette omission signifie que si la banque n'avisait pas les cautions des modifications importantes pertinentes, les cautions seraient libérées de leurs obligations. Puisque l'intimé n'a reçu aucun avis de la convention de renouvellement, il est libéré de sa responsabilité.

Again, I am unable to agree with this line of argument. As already stated, the language of clause 34 is clear: the guarantor unconditionally promises to remain bound notwithstanding the extending of time or the changing of the rate of interest charged. It is rather odd to infer a condition of notice when the undertaking is so clear and unambiguous. Of course, the parties could have included a requirement of notice, but, as the language of the waiver in clause 34 is so clear, they would have had to do so explicitly. It may be that the insertion of the words "without notice to us", in connection with the waiver of breaches and the accepting of other covenants, sureties or securities, was simply made out of an abundance of caution, but, regardless, this cannot affect the clear waiver relating to extending time and changing the interest rate.

95

Là encore, je suis incapable de souscrire à ce raisonnement. Comme je l'ai déjà affirmé, le texte de la clause 34 est clair: la caution promet, de façon inconditionnelle, de demeurer liée nonobstant la prorogation du délai ou la modification du taux d'intérêt imposé. Il est plutôt étrange de déduire l'existence d'une exigence d'avis en présence d'un engagement aussi clair et net. Évidemment, les parties auraient pu inclure une exigence d'avis, mais, étant donné la clarté du texte de la renonciation figurant à la clause 34, il leur aurait fallu le faire explicitement. Il se peut que l'inclusion des mots «sans nous donner avis», relativement à la renonciation au droit de résiliation pour violation et à l'acceptation d'autres engagements, cautionnements ou sûretés, ait été faite simplement par excès de prudence, mais, néanmoins, cela ne saurait pas affecter la renonciation claire relative à la prorogation de délai et à la modification du taux d'intérêt.

1996 CanLII 182 (SCC)

(iii) *What is the effect of the respondent promising "as a principal debtor and not as a surety"?*

(iii) *Quel est l'incidence du fait que l'intimé a promis «à titre de débiteur principal et non de caution»?*

96 Clause 34 provides that the respondent and Conlin Engineering enter the agreement "as principal debtors and not as sureties". In his concurring judgment, Carthy J.A. reasoned that, as "principal debtors", the guarantors would be "expected" to be signatories to the renewal agreement. With respect, I do not agree.

La clause 34 prévoit que l'intimé et Conlin Engineering concluent la convention [TRADUCTION] «à titre de débiteurs principaux et non de cautions». Dans ses motifs concordants, le juge Carthy a considéré qu'on «s'attendrait» à ce que, à titre de «débiteurs principaux», les cautions soient signataires de la convention de renouvellement. En toute déférence, je ne suis pas de cet avis.

97 I agree with Robins J.A.'s conclusion that the evident intention of the parties, in using this kind of language, was to preserve the liability of the surety even in circumstances where the principal obligation was no longer enforceable, although I express no opinion on whether the language is sufficient to accomplish such an objective. In any event, it is unnecessary to consider whether this clause was sufficient to turn clause 34 into an indemnity agreement, because I am of the opinion that the respondent is liable as a guarantor.

Je suis d'accord avec la conclusion du juge Robins que les parties avaient manifestement l'intention, en utilisant cette terminologie, de maintenir la responsabilité de la caution même dans le cas où l'obligation principale ne pourrait plus être exécutée, quoique je n'exprime aucune opinion quant à savoir si cette terminologie est suffisante pour permettre d'atteindre un tel objectif. De toute façon, il n'est pas nécessaire de déterminer si cette clause était suffisante pour faire de la clause 34 une convention d'indemnisation, parce que je suis d'avis que l'intimé est responsable à titre de caution.

(iv) *What is the significance of the fact that the renewal form provides a space for the guarantor's signature?*

(iv) *Quelle importance faut-il attacher au fait que la formule de renouvellement comportait un espace pour la signature de la caution?*

98 The respondent points to the fact that the renewal agreement had a space for the signature of the guarantor as proof that the reasonable expectations of the parties were that, in the absence of the guarantors' consent to a renewal agreement, any such agreement would discharge the guarantors. With respect, I do not agree.

L'intimé souligne que le fait que la convention de renouvellement comportait un espace pour la signature de la caution prouve que les parties s'attendaient raisonnablement à ce qu'en l'absence du consentement des cautions à une convention de renouvellement, cette convention libérerait ces dernières. En toute déférence, je ne suis pas d'accord.

99 Our primary task is to determine the meaning of the guarantee contained in clause 34. This agreement was entered into in 1987. The wording or form of another subsequent contract, entered into three years later, cannot change the meaning of the original agreement. In my opinion, the space for the guarantors' signature on the renewal agreement is not helpful in trying to interpret the guarantee contract.

Il nous incombe, d'abord et avant tout, de déterminer le sens du cautionnement contenu dans la clause 34. Cette convention a été signée en 1987. Le texte ou la forme d'un autre contrat conclu trois ans plus tard ne saurait changer le sens de la convention initiale. À mon avis, l'espace prévu pour la signature de la caution dans la convention de renouvellement n'est d'aucune utilité pour tenter d'interpréter le contrat de cautionnement.

1996 CanLII 182 (SCC)

(v) *What exactly is the extent of the respondent's obligation?*

The respondent promised to guarantee the payment of the money secured by the 1987 mortgage. In my view, the terms of that mortgage determine the extent of the respondent's liability. Clause 34 does include a waiver of the guarantors' rights to be discharged in the case of material variation of the terms of the loan agreement. However, the fact that the renewal agreement does not discharge the respondent does not mean that the respondent is liable for the money secured by that renewal agreement — a contract to which he never consented. In clause 34, the guarantors promise to pay "the principal sum and all other moneys hereby secured" (emphasis added), i.e., secured by the original mortgage agreement. In other words, the respondent is not liable for interest at the increased rate of 13 percent. Rather, his responsibility, as specified in the 1987 agreement, and as found by Robins J.A. in the Court of Appeal, is to repay the balance owing on the principal sum with interest charged at the rate of 11.5 percent.

VI. Disposition

For the foregoing reasons, I would allow the appeal, with costs here and below, set aside the judgment of the Court of Appeal, and substitute therefor an order to the effect that the respondent is liable under his guarantee to pay the balance owing on the principal amount with interest at 11.5 percent per annum.

Appeal dismissed with costs, L'HEUREUX-DUBÉ, GONTHIER *and* IACOBUCCI JJ. *dissenting.*

Solicitors for the appellant: Lee, Bowden, Concord, Ontario.

Solicitors for the respondent: Siskind, Cromarty, Ivey & Dowler, London, Ontario.

(v) *Quelle est exactement l'étendue de l'obligation de l'intimé?*

100 L'intimé a promis de garantir le paiement des sommes garanties par l'hypothèque de 1987. J'estime que les conditions de cette hypothèque déterminent l'étendue de la responsabilité de l'intimé. La clause 34 comprend bel et bien une renonciation aux droits des cautions d'être libérées dans le cas où une modification importante serait apportée aux conditions de la convention de prêt. Toutefois, le fait que la convention de renouvellement ne libère pas l'intimé ne signifie pas qu'il est responsable des sommes garanties par cette convention de renouvellement — un contrat auquel il n'a jamais consenti. À la clause 34, les cautions promettent de payer [TRADUCTION] «le capital et toutes les autres sommes garantis par les présentes» (je souligne), c.-à-d. garantis par la convention hypothécaire initiale. En d'autres termes, l'intimé n'est pas responsable des intérêts calculés au taux majoré de 13 pour 100 par année. La responsabilité qui lui incombe en vertu de la convention de 1987, et selon ce que le juge Robins de la Cour d'appel a conclu, est plutôt de rembourser le solde exigible du capital, avec intérêts calculés au taux de 11,5 pour 100 par année.

VI. Dispositif

101 Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi, avec dépens devant toutes les cours, d'infirmer l'arrêt de la Cour d'appel et d'y substituer une ordonnance selon laquelle l'intimé a, en vertu de son cautionnement, la responsabilité de payer le solde exigible du capital, avec intérêts calculés au taux de 11,5 pour 100 par année.

Pourvoi rejeté avec dépens, les juges L'HEUREUX-DUBÉ, GONTHIER *et* IACOBUCCI *sont dissidents.*

Procureurs de l'appelante: Lee, Bowden, Concord (Ontario).

Procureurs de l'intimé: Siskind, Cromarty, Ivey & Dowler, London (Ontario).

1996 CanLII 182 (SCC)

TAB 9

Federal Court Cour fédérale

Date: 20211119

Docket: T-1663-17

Citation: 2021 FC 1260

2021 FC 1260 (CanLII)

Ottawa, Ontario, November 19, 2021

PRESENT: Mr. Justice Gascon

BETWEEN:

ARTHUR LIN

Plaintiff

and

AIRBNB, INC., AIRBNB CANADA INC.,
AIRBNB IRELAND UNLIMITED COMPANY,
AIRBNB PAYMENTS UK LIMITED

Defendants

ORDER AND REASONS

I. Overview

[1] This is a motion brought under Rules 334.29 and 334.4 of the *Federal Courts Rules*, SOR/98-106 [Rules], for judicial approval of: i) a class action settlement [Settlement Agreement], including the appointment of an administrator of the claims to be filed [Claims Administrator]; ii) the legal fees sought by class counsel Evolink Law Group and Champlain

Avocats [Class Counsel Fees]; and iii) the payment of an honorarium to the representative Plaintiff, Mr. Arthur Lin [Honorarium].

2021 FC 1260 (CanLII)

[2] The Settlement Agreement, a copy of which is attached as Schedule "A" to this Order, was concluded on August 27, 2021 between Mr. Lin and the defendants Airbnb, Inc., Airbnb Canada Inc., Airbnb Ireland Unlimited Company and Airbnb Payments UK Limited [collectively, Airbnb], in the context of a class action proceeding [Class Action] filed by Mr. Lin in relation to the display of prices on Airbnb's websites and/or mobile applications [Airbnb Platform]. The Airbnb Platform is a digital marketplace connecting individuals seeking accommodations [Guests] with other individuals offering accommodations [Hosts], and allowing them to transact.

[3] For the reasons that follow, I will approve the Settlement Agreement and the appointment of the Claims Administrator on the terms provided by the parties, but I will only approve in part the proposed Class Counsel Fees and Honorarium.

II. Background

A. *Procedural context*

[4] This Class Action was commenced on October 31, 2017. In his statement of claim, Mr. Lin alleged that Airbnb breached section 54 of the *Competition Act*, RSC 1985, c C-34 [*Competition Act*], a rarely used criminal offence known as "double ticketing," by charging Guests, for the booking of an accommodation offered by Hosts on the Airbnb Platform, a final

price that was higher than the price displayed at the first stage of browsing on the Airbnb Platform. More specifically, Mr. Lin contested the fact that Airbnb added "service fees" to the final price charged for its accommodation booking services, although these fees were not included in the initial price per night displayed on the Airbnb Platform. The heart of Mr. Lin's claim was that the inclusion of an additional service fee at a later stage of the sale process resulted in a higher price than the first price expressed to Guests, in contravention of section 54 of the *Competition Act*.

2021 FC 1260 (CanLII)

[5] For the purpose of the Settlement Agreement, the class members are defined as all individuals residing in Canada, other than Quebec, who, from October 31, 2015 to June 25, 2019: i) reserved an accommodation for non-business travel anywhere in the world using Airbnb; ii) whose reserved accommodation matched the parameters of a previous search made by the individual on the search results page of Airbnb; and iii) paid, for the reserved accommodation, a price (excluding applicable sales and/or accommodation taxes) that is higher than the price displayed by Airbnb on the said search results page for this accommodation [Class]. Mr. Lin claimed that the Class members having experienced this situation were entitled to the benefit of the lower price, and sought damages equal to the difference between the first price and the final price displayed on the Airbnb Platform.

[6] Following a contested hearing, I certified the proceeding as a class action in a judgment issued on December 5, 2019 (*Lin v Airbnb, Inc*, 2019 FC 1563 [Certification Judgment]).

[7] As of June 27, 2019, prior to the issuance of the Certification Judgment, Airbnb adjusted the Airbnb Platform so that Airbnb now displays an all-inclusive price for all accommodation bookings, excluding applicable taxes, at every step of the search and booking process.

2021 FC 1260 (CanLII)

[8] On December 16, 2019, Airbnb filed a Notice of Appeal of the Certification Judgment at the Federal Court of Appeal [FCA]. The appeal was heard on March 4, 2021 by way of Zoom. After the hearing, the FCA reserved its judgment, and the decision on the appeal was under deliberation when the Settlement Agreement was reached by the parties. The FCA is holding the appeal in abeyance pending the completion of the settlement process.

[9] A few weeks before Mr. Lin launched his class action proceeding before this Court in late October 2017, Mr. Preisler-Banoon had filed a similar class action before the Superior Court of Quebec in the matter *Preisler-Banoon c Airbnb Ireland*, 500-06-000884-177 [Quebec Action]. On September 13, 2019, prior to the hearing of the “authorization” (as the certification process is known in Quebec) of the Quebec Action, Airbnb and the Quebec plaintiff executed a settlement agreement. On February 3, 2020, the Superior Court of Quebec rendered a judgment approving the settlement of the Quebec Action (*Preisler-Banoon c Airbnb Ireland*, 2020 QCCS 270 [Quebec Settlement]). The Quebec Settlement has a gross value of $3,000,000 and provides to the Quebec class members (as they are defined in the Quebec Settlement) a credit of up to $45 on their next booking with Airbnb after confirming their eligibility.

B. *Overview of Settlement Agreement*

[10] The parties have entered into the Settlement Agreement on August 27, 2021, subject to this Court's approval. Mr. Lin's legal counsel, Evolink Law Group and Champlain Avocats [Class Counsel], have concluded that the Settlement Agreement is fair, reasonable, and in the best interests of Mr. Lin and the Class.

2021 FC 1260 (CanLII)

[11] The material terms of the proposed Settlement Agreement include:

- the settlement is valued at $6,000,000 [Settlement Amount], which includes any claims administration expenses [Administration Expenses], Class Counsel Fees, any Honorarium, and the applicable sales taxes;
- Airbnb will receive a full and final release in respect of the subject matter of this Class Action, namely, the display of prices on the Airbnb Platform [Release];
- the notification to eligible Class members and the claims procedure will be fully electronic, and managed by the Claims Administrator, Deloitte LLP [Deloitte];
- after the Court approves the Settlement Agreement, and before the claims deadline, eligible Class members can make a claim for a pro-rata share of up to $45 from the settlement funds that will remain after deduction of the Administration Expenses, Class Counsel Fees, Honorarium and applicable sales taxes from the Settlement Amount [Net Settlement Funds];
- distribution of the Net Settlement Funds to the eligible Class members that make a claim will be by way of a non-cash-convertible credit on the Airbnb Platform [Credit], to be redeemed on the next accommodation booking within 24 months of issuance; and

- the individuals covered by the Quebec Settlement are excluded from the Settlement Agreement, and claims relating to those individuals will be dismissed from this Class Action.

[12] Once the Settlement Agreement is approved, a hyperlink will be sent to Class members to make a claim. The Credit to be issued by Airbnb will be a one-time-use only, non-transferable, non-refundable, non-cash-convertible credit of up to $45 in value to each eligible Class member who submits a claim. The Credit's ultimate value will depend on the total number of approved claims and on the amount the Court approves for Administration Expenses, Class Counsel Fees, Honorarium and applicable sales taxes – which will all be deducted from the Settlement Amount. The Credit cannot be combined with any other offer discount, or coupon, and must be redeemed within 24 months after issuance, on the next Airbnb accommodation booking in any location worldwide. The Credit will be in the same amount for each Class member. In order to be able to redeem a Credit, the eligible Class members must accept the most recent version of Airbnb's Terms of Service and not be prohibited from using the Airbnb Platform (in accordance with the Terms of Service).

[13] In exchange, Class members will acknowledge that the Credit is in full and complete settlement of their claims and agree to give up any and all claims they may have against Airbnb relating in any way to the display of prices on the Airbnb Platform, including in respect of conduct alleged (or which could have been alleged) in the Class Action.

[14] With respect to Class Counsel Fees, Section 11.3 of the Settlement Agreement provides that Class Counsel will seek approval of the Court for the payment, by Airbnb, of Class Counsel Fees in the amount of $2,000,000, plus applicable taxes. The Settlement Agreement further states

2021 FC 1260 (CanLII)

that Class Counsel will not seek additional payments for disbursements. In October 2017, prior to the filing of the Class Action, Class Counsel had entered into a fee agreement with Mr. Lin [Retainer Agreement], which provides for a contingency fee not exceeding 33% of the total amounts recovered by the Class. I pause to observe that, surprisingly, the Class Counsel Fees mentioned in the Settlement Agreement are slightly above what is provided for in the Retainer Agreement concluded with Mr. Lin: they amount to one third of the Settlement Amount (i.e., 33.33%) as opposed to a maximum of 33% set out in the Retainer Agreement, representing a difference of $20,000.

2021 FC 1260 (CanLII)

[15] As far as the Honorarium is concerned, the Settlement Agreement provides that Class Counsel may ask the Court for the approval of an Honorarium of $5,000 to Mr. Lin.

[16] Airbnb does not oppose the terms of the Settlement Agreement relating to Class Counsel Fees and to the request made for an Honorarium to Mr. Lin, and has agreed to pay the Class Counsel Fees, Mr. Lin's Honorarium and applicable taxes that are approved by the Court. As indicated above, all of these amounts will be deducted from the Settlement Amount.

C. *Notices to Class members*

[17] On September 16, 2021, the Court issued an order for the distribution of short-form and long-form notices of settlement approval [together, Notices] to the affected Class members, in accordance with Rule 334.34 [Notice Order]. The Notice Order also fixed the settlement approval hearing before this Court on November 1, 2021.

[18] The Notices have been broadly distributed to all persons residing in Canada who were Airbnb customers between October 31, 2015 and June 25, 2019. Through these Notices, Class Counsel advised the Airbnb customers of the settlement of the Class Action and of the settlement approval hearing, and summarized certain elements of the Settlement Agreement. This summary notably referred to the maximum value of $45 for the Credit and explained the redemption process to be followed, as well as the procedure to opt out or object to the proposed settlement. The Notices further informed the potential Class members that the Notices were just a summary, indicated that the Settlement Agreement itself and other court documents were available through a link to the Class Counsel's website (i.e., https://evolinklaw.com/airbnb-service-fees-national-class-action), and mentioned that the Settlement Agreement shall prevail in case of any discrepancy between the Notices and the Settlement Agreement.

[19] The Notices were sent to the Airbnb customers at the end of September 2021. The Claims Administrator has provided its report on the results of the e-mail distribution of the Notices. They are as follows: i) 2,539,475 e-mails were sent; ii) 494,002 e-mails bounced or were undeliverable; iii) 765,736 e-mails were opened, with 412,934 unique opens to the e-mails. In total, 14 individuals contacted Class Counsel indicating a desire to opt out of the Class Action, and 4 individuals submitted a written objection to the proposed Settlement Agreement.

III. <u>Analysis</u>

[20] This motion is seeking the Court's approval for the Settlement Agreement, Class Counsel Fees and Mr. Lin's Honorarium. Each of these three requests will be dealt with in turn.

2021 FC 1260 (CanLII)

A. ***Settlement Agreement***

(1) The law relating to approval of class action settlements

[21] Rule 334.29 provides that a class proceeding settlement must be approved by the Court. The legal test to be applied is whether the proposed settlement is "fair, reasonable and in the best interests of the class as a whole" (*Bernlohr v Former Employees of Aveos Fleet Performance Inc*, 2021 FC 113 [*Bernlohr*] at para 12; *Wenham v Canada (Attorney General)*, 2020 FC 588 [*Wenham 1*] at para 48; *McLean v Canada*, 2019 FC 1075 [*McLean 1*] at paras 64-65).

[22] The factors to be considered in the analysis have been reiterated by the Court on several occasions (*Bernlohr* at para 13; *Wenham 1* at para 50; *McLean 1* at paras 64-66; *Condon v Canada*, 2018 FC 522 [*Condon*] at para 19). They are similar to the factors retained by the courts across Canada. These factors are non-exhaustive, and their weight will vary according to the circumstances and to the factual matrix of each proceeding. I summarize them as follows, in what I view as their order of relative importance:

1) The terms and conditions of the settlement;
2) The likelihood of recovery or success;
3) The expressions of support, and the number and nature of objections;
4) The degree and nature of communications between class counsel and class members;
5) The amount and nature of pre-trial activities including investigation, assessment of evidence and discovery;
6) The future expense and likely duration of litigation;

2021 FC 1260 (CanLII)

7) The presence of arm's length bargaining between the parties and the absence of collusion during negotiations;

8) The recommendation and experience of class counsel; and

9) Any other relevant factor or circumstance.

2021 FC 1260 (CanLII)

[23] A proposed settlement must be considered as a whole and in context. Settlements require trade-offs on both sides and are rarely perfect, but they must nevertheless fall within a "zone or range of reasonableness" (*Bernlohr* at para 14; *McLean 1* at para 76; *Condon* at para 18). Reasonableness allows for a spectrum of possible resolutions and is an objective standard that can vary depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation to class members. However, not every disposition of a proposed settlement agreement must be reasonable, and it is not open to the Court to rewrite the substantive terms of a proposed agreement (*Wenham 1* at para 51). The function of the Court in reviewing a proposed class action settlement is not to reopen and enter into negotiations with litigants in the hope of improving the terms of the agreement (*Condon* at para 44). In the end, the proposed settlement is a "take it or leave it" proposition.

[24] I make one other observation, which relates to the interaction between the approval of proposed class action settlements and the approval of class counsel fees. In mandating that both the class action settlements and the payment of class counsel fees be subject to the Court's approval (i.e., Rules 334.29 and 334.4), the Rules place an onerous responsibility on the Court to ensure that the class members' interests are not being sacrificed to the interests of class counsel, who have typically taken on a substantial risk and who have a great deal to gain not only in removing that risk but in recovering a significant reward from their contingency fee arrangement

(*Shah v LG Chem, Ltd*, 2021 ONSC 396 [*LG Chem*] at para 40).[1] The incentives and the interests of class counsel may not always align with the best interests of the class members. It thus falls on the Court to scrutinize both the proposed settlement agreement and the proposed class counsel fees, as they will typically be interrelated. This is the case here since the Net Settlement Funds available to Class members are equal to the Settlement Amount after deduction of the Class Counsel Fees and other expenses.

2021 FC 1260 (CanLII)

(2) Application to this case

(a) *Terms and conditions of the settlement*

[25] Under the terms and conditions of the settlement, the question to be determined is whether the proposed Settlement Agreement, when considered in its overall context, provides significant advantages to the Class members, compared to what would have been an expected result of litigation on the merits.

[26] The key terms of the Settlement Agreement, as seen by the parties, include: a Settlement Amount valued at $6,000,000; distribution of the Settlement Amount by way of a non-cash-convertible Credit issued on the Airbnb Platform; a maximum Credit of $45 per Class member, redeemable within 24 months on the next accommodation booking; and the dismissal of the claims for the Quebec-based members due to potential overlaps with the Quebec Settlement. In his submissions, Mr. Lin also refers to the fact that Airbnb has modified its behaviour and

---

[1] The certification criteria applicable in this Court are akin to those applied by the courts in Ontario and British Columbia (*Canada (Attorney General) v Jost*, 2020 FCA 212 at para 23; *Canada v John Doe*, 2016 FCA 191 at para 22; Certification Judgment at para 23). It is therefore not uncommon to see this Court and the FCA refer to case law arising from these provinces in matters relating to class actions, as such case law is instructive in this Court.

2021 FC 1260 (CanLII)

changed its pricing display, though this is not, as such, a term and condition of the Settlement Agreement.

[27] In his written and oral submissions to the Court, Mr. Lin focused on five particular aspects of the Settlement Agreement, namely, the non-cash nature of the Credit, the Release granted to Airbnb, the exclusion of Quebec members, the identity of the Claims Administrator, and the scope of eligible Class members. I will briefly look at each element.

(i) Non-cash nature of the Credit

[28] In the current case, the monetary benefit of the Settlement Agreement for the Class members will take the form of a non-cash distribution to the eligible Class members, namely, the Credit. I acknowledge that courts in Canada and in the United States have often expressed concerns about class action settlements – generally referred to as "coupon settlements" – in which class counsel are awarded large fees while leaving class members with coupons or other non-cash awards of little or no value. However, I agree with Mr. Lin that, while the Credit available to Class members in this case is a non-cash settlement, it does not bear the problematic attributes generally associated with "coupon settlements."

[29] First, the Credit granted to Class members will have a wide range of applications. The Class members will be able to use it towards accommodation bookings anywhere in the world, including local staycations or short road-trips, for both the service fees (paid to Airbnb) and the listing fees (paid to the Hosts) that are part of a booking on the Airbnb Platform. Second, the ultimate value of the Settlement Amount (i.e., $6,000,000) is known at the outset, and will not be

dependent on the number of individual Class members who actually redeem the Credit. Third, the claims procedure will be simplified, as eligible Class members will not be required to submit proof of their claims and will be entitled to share in the settlement upon acknowledging that they meet the requirements for a claim. Fourth, the redemption period is long enough, extending to a maximum of 24 months. Fifth, based on inquiries received from potential Class members after the Notices were distributed, Airbnb appears to have a number of repeat customers for its Airbnb Platform. There is therefore a good likelihood that Class members will do business with Airbnb again, and will effectively use the Credit.

2021 FC 1260 (CanLII)

[30] In sum, after scrutiny, I am satisfied that the Credit does not fit among those "coupon settlements" that the Court should be reluctant to approve. Rather, the Credit will be distributed in a way that is more akin to a gift card or a bill credit. In addition, based on the evidence before me, it is expected that the take-up rate will be significant among the Class members. Finally, in the circumstances, the distribution of the Net Settlement Funds in the form of Credits through the Claims Administrator is more practical and economical, compared to what a cash distribution would have entailed.

(ii) Release to Airbnb

[31] Turning to the Release clause, the Court has to review the scope of releases granted in class action settlement agreements to ensure that defendants do not unfairly obtain a broad release (or even a release for future claims), beyond the claims that are or could have been raised in the action. Here, I agree with Mr. Lin that there are no concerns relating to the scope of the Release granted to Airbnb in the Settlement Agreement. The Release is qualified by the words

"relating in any way to the display of prices on the Airbnb Platform, including conduct alleged (or which could have been alleged) in the Proceeding," which was the subject matter of Mr. Lin's Class Action. The Release is thus circumscribed to those price-related practices at the source of the Class Action. While the Release extends to all forms of price "display," including arguably false or misleading pricing representations, I am satisfied that it is not overbroad in the context of what was alleged by Mr. Lin in his Class Action.

(iii) Dismissal of the claims for Quebec members

[32] As stated above, the Quebec Settlement provides for the settlement of similar claims made by the class members in the Quebec Action, based on Airbnb's display of prices on the Airbnb Platform. I agree with Mr. Lin that it is fair and reasonable to exclude those claims from the Settlement Agreement as amounts received by the Quebec members under the Quebec Settlement would overlap with the Settlement Agreement and would create a potential of double indemnity for the class members residing in Quebec.

(iv) Use of Deloitte as Claims Administrator

[33] The estimated Administration Expenses primarily consist of the fees for the Claims Administrator, Deloitte, and amount to an all-inclusive total of $320,500. I agree with Mr. Lin that this amount is justified in the circumstances and I am satisfied that Deloitte is well qualified to act as Claims Administrator.

2021 FC 1260 (CanLII)

(v) Eligible Class members

[34] The Settlement Agreement provides for an additional requirement to be eligible to claim a Credit, which results in a slight reduction of the number of eligible Class members entitled to receive compensation. Eligible Class members will be limited to those individuals that used the Airbnb Platform for the first time between October 31, 2015 and June 25, 2019. Therefore, Class members that already had an account and had used the Airbnb Platform prior to October 31, 2015 will not be eligible for a Credit. Airbnb estimates that the difference between Class members who will be eligible for a Credit and the total of Class members who used the Airbnb Platform during the relevant period represents approximately 194,000 individuals.

[35] I am satisfied that this reduced distribution of the Settlement Amount to a more limited number of Class members is a reasonable compromise in light of Airbnb's position that those Guests who had experienced the impugned pricing practice more than once are on a different legal footing.

(vi) Other elements

[36] In assessing the terms and conditions of a proposed class action settlement and determining whether they are fair, reasonable and in the best interests of the class members, the Court should also consider the expected take-up rate by the class members, particularly where there is a fixed settlement fund as is the case here (*Condon* at para 48), or where the quantum of the compensation to be received by each claimant depends on the number of eligible claimants who submit a claim. The Court may therefore take into account evidence on the expected

2021 FC 1260 (CanLII)

participation in the settlement by class members when it assesses the sufficiency of available settlement funds or the effective monetary compensation of class members (*Bodnar v The Cash Store Inc*, 2010 BCSC 145 at para 21).

2021 FC 1260 (CanLII)

[37] In this case, based on the evidence provided by Mr. Lin (through the affidavit sworn by Class Counsel Simon Lin [Counsel Affidavit]), it is reasonable to estimate that approximately 30% of the Class members will apply for a Credit and participate in the claims process. The evidence reveals that, in the Quebec Settlement, the take-up rate ended up being effectively about 30%, translating into a credit of approximately $9.50 per individual Quebec class member. According to the Counsel Affidavit (at paragraphs 108-110), Class Counsel expects that, in the current case, the take-up rate will be “reasonably high” and “similar” to the Quebec Settlement, although it could be affected by some other factors, in particular the pandemic. Based on the evidence before me, I therefore agree that 30% is a reasonable rough estimation of the proportion of eligible Class members who are expected to file a claim to the Net Settlement Funds.

(vii) Conclusion

[38] In summary, when considered in their overall context, I am satisfied that the terms and conditions of the Settlement Agreement provide significant advantages to the Class members which might not have been achieved with the continued litigation, and are a positive factor supporting the approval of the Settlement Agreement.

(b) *Likelihood of recovery or success*

[39] The next factor to consider is the likelihood of recovery or success. This factor refers to the likelihood of success of Mr. Lin's Class Action if it were to proceed on the merits. This factor of likelihood of recovery or success must be assessed at the time when the parties choose between proceeding with the litigation or settling the matter. Under this factor, the Court must determine whether the proposed Settlement Agreement is an attractive viable alternative to continued litigation.

[40] Here, I am satisfied that the Settlement Agreement is a reasonable and attractive viable alternative to litigation for Mr. Lin and the Class, because litigating the Class Action could have led to unforeseen conclusions. The ultimate success of Mr. Lin in his Class Action was uncertain for three main reasons, namely, the pending appeal before the FCA, the risk involved at the merits trial, and the difficulties linked to enforcing a judgment from this Court in foreign jurisdictions.

[41] First, the pending appeal before the FCA focused on three important issues, for which the outcome is fairly difficult to predict: i) whether a section 36 claim based on section 54 of the *Competition Act* requires pleading and proving "reliance"; ii) whether it was sufficient for Mr. Lin to plead the simple difference between the two prices posted by Airbnb as damages under section 36 of the *Competition Act*; and iii) whether the Class description met the appropriate standard for certification. Since many of these issues are novel, the risk of an adverse decision from the FCA is a real possibility for the Class members.

2021 FC 1260 (CanLII)

[42] Second, the success of Mr. Lin at a merits trial faces several hurdles. In my reasons delivered in the Certification Judgment, I commented on the challenges in litigating this Class Action to a successful conclusion on the merits. I notably indicated that the application of the "double ticketing" provision to this case was not free from doubt (Certification Judgment at para 7), and that Airbnb had raised numerous valid points regarding the legal interpretation of sections 36 and 54 of the *Competition Act* and their application to this case (Certification Judgment at para 34). I further recognized that, in light of the paucity of "double ticketing" cases, Mr. Lin certainly appeared to be stretching the potential interpretation and application of section 54 of the *Competition Act*, and that he was extending it into unchartered territory (Certification Judgment at para 56). I noted that, in its submissions, Airbnb had raised valid and relevant points regarding the nature and identity of the product or products effectively supplied by Airbnb through the Airbnb Platform, and that it was certainly open to Airbnb to submit and argue that section 54 of the *Competition Act* could not apply to its situation because what is effectively supplied through the Airbnb Platform are two different products by two different persons at two different prices (Certification Judgment at para 53). In other words, there were solid factual and legal arguments advanced by Airbnb on the presence of two products, on whether what is supplied by Airbnb could be characterized as a bundle of different articles and services, and on whether the product at issue is the bundle or its components, as opposed to the accommodation booking services put forward by Mr. Lin (Certification Judgment at para 54). I also pointed out that it may look like a strange proposition to plead and argue that loss or damage could be established by a customer, based simply on a price differential between the lower and the higher price of a product, when the customer knew about both prices and nevertheless decided to accept the higher price and to proceed with the transaction (Certification Judgment at

2021 FC 1260 (CanLII)

para 83). I finally acknowledged that demonstrating and proving the existence of an actual loss or damage in these circumstances may present additional challenges for Mr. Lin and the Class members (Certification Judgment at para 83).

2021 FC 1260 (CanLII)

[43] All of these observations reflect the fact that the likelihood of success of Mr. Lin at the common issues trial was difficult to predict at the time of certification, and it remains so today. There is little to no jurisprudence on section 54 of the *Competition Act*, as well as considerable uncertainty in the law as to whether a trial judge would award damages in the context of this Class Action. It is also clear that the legal questions advanced by Mr. Lin were novel with no appellate jurisprudence, suggesting a strong likelihood of multiple levels of appeals after a decision at the merits trial.

[44] Third, there is also a risk with having to enforce a judgment against non-Canadian defendants, as is the case for some of the Airbnb entities.

[45] In sum, when the parties decided to conclude the Settlement Agreement, it was uncertain and questionable whether Mr. Lin's Class Action could be litigated successfully on the merits, given the state of the law on "double ticketing." Most of those factors are still relevant today. This, again, is a positive factor supporting the approval of the Settlement Agreement.

(c) *Expressions of support, and number and nature of objections*

[46] Turning to the expressions of support or objections to the proposed Settlement Agreement, Class Counsel has received a total of 84 correspondence from potential Class

members, further to the Notices sent by the Claims Administrator after the Notice Order. These responses can be categorized as follows: 43 were general inquiries; 23 members voiced their support for the Settlement Agreement; 14 expressed a wish to opt out; and 4 objected to the proposed settlement. I observe that the deadline for opting out or objecting to the Settlement Agreement – as set out in the Notices – has now passed. The opt-outs and objections were included as exhibits to the Counsel Affidavit.

2021 FC 1260 (CanLII)

[47] I agree with Mr. Lin that the number of opt-outs is small compared to the size of the Class. Furthermore, some of the opt-outs appear to have been sent due to confusion as to whether these Airbnb customers were included or not in the Class definition. With respect to the four objections, two complaints regarded the type of remedy available (i.e., a non-cash-convertible Credit to be used on the Airbnb Platform) and two objectors found the maximum amount of the Credit (i.e., $45) too low. One of the complainants who initially objected to the non-cash nature of the Credit distribution voiced some support after Class Counsel explained to him the rationale for the non-cash structure of the settlement. I note that none of the objectors attended the settlement approval hearing before this Court.

[48] I also agree with Mr. Lin that the few objections received do not detract from the fact that the proposed Settlement Agreement, for the Class as a whole, is fair and reasonable and in their best interests. Having considered all of the objections received, I am of the view that they are not sufficient to conclude that the Settlement Agreement should not be approved. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the Class as a whole (*Condon* at para 69).

(d) *Degree and nature of communications between Class Counsel and Class members*

[49] The degree and nature of communications between Class Counsel and Class members is another important factor to consider for the approval of the Settlement Agreement. As will be discussed below in section III.B, it is also, in my view, a factor having an impact on the approval of Class Counsel Fees.

[50] In this case, there is no doubt that Class Counsel and Mr. Lin have evidently communicated well. With regard to the communications between Class Counsel and Class members more generally, since the commencement of this Class Action, Class Counsel has maintained and updated a website to publish basic information regarding the case, including a mailing list that allows interested individuals to subscribe for updates. Court documents and other records have been posted on this website for Class members' review. Prior to the publication of the Notices, there were 70 individuals subscribed to that mailing list, and that number increased to 673 individuals after the Notices announcing the settlement approval hearing were distributed.

[51] After the conclusion of the Settlement Agreement, the Notices were sent by e-mail to all the Class members who registered with Class Counsel and provided valid e-mail addresses. Class Counsel also posted the Notices and the Settlement Agreement on their dedicated website for the Class members. As indicated above, the Claims Administrator provided a report detailing the delivery of the Notices, which showed that the Notices were widely disseminated to Airbnb

2021 FC 1260 (CanLII)

customers. I agree with Mr. Lin that, in light of the foregoing, sufficient steps were taken to provide notice of the Settlement Agreement to the Class members.

[52] However, in determining the approval of a proposed class action settlement, the Court's analysis must not look solely at the existence of communications to class members and at the efforts deployed by class counsel to distribute such communications in an adequate way. In the exercise of its role, the Court must also review and consider the actual contents of the communications with class members, in light of the proposed settlement agreement and of the evidence provided at the settlement approval motion, and assess whether sufficient information has effectively been provided to the class members to allow them to make an informed decision about the proposed settlement.

[53] In this case, further to my review of the evidence provided by Mr. Lin on this motion, I must conclude that Class Counsel's communications with Class members fall short of the mark to meet the requirements of an adequate, full and frank disclosure of the contemplated Settlement Agreement. In other words, there were some important shortcomings in the informative value of the Notices sent to the Class members. I understand that Class members could have access to the Class Counsel's website and to the Settlement Agreement itself, and that they were invited to do so at the end of the Notices. However, the actual text of both the short-form and long-form Notices were short on details regarding several key features of the proposed Settlement Agreement. More specifically:

- the Notices did not specify that the total Settlement Amount was $6,000,000;

2021 FC 1260 (CanLII)

- the Notices did not provide information on the actual amount or on the percentage base of Class Counsel Fees;

- while they mentioned that the Credit of $45 was a maximum amount which could be lowered depending on the number of claimants, the Notices did not provide any additional detail on the likely or expected take-up rate or on the amount of the effective Credit likely or expected to be received by the Class members.

[54] To the extent that the purpose of the Notices was to properly inform the Class members of the Settlement Agreement in order to give them the means to decide to accept it, opt out or voice an objection, I find that, in light of the evidence now before me, the Notices sent to the Class members did not provide a sufficiently transparent, informative and adequate disclosure to the Class members. Of course, I cannot change the Notices retroactively. But, in class actions involving consumer-related issues such as this one, which involve thousands of ordinary consumers affected by pricing or marketing practices or other business conduct, communications of a proposed settlement agreement to the potential class members ought to be much more transparent and forthcoming for the class members than what has been done by Class Counsel in this case.

[55] In my view, in such class action settlement agreements, the notices to the class members should always at least disclose, in clear terms and in both the short-form and long-form versions of the notices, the following basic information about the proposed settlement agreement: i) the quantum of the total settlement amount; ii) the precise list of deductions from the total settlement amount (such as class counsel fees or administration expenses) when these impact the net settlement amount to be received by the class members; iii) the quantum of these various deductions (including the quantum of the class counsel fees); iv) the percentage of the total

2021 FC 1260 (CanLII)

settlement amount to be received by class counsel as legal fees; v) the maximum compensation amount to be received by each class member, if any; and vi) the likely or expected effective compensation amount, or range of compensation amounts, to be received by the class members, when class counsel has information or is able to estimate the expected take-up rate and/or the likely or expected net compensation amount to be received. Generally speaking, having access to such minimal information is needed by the class members in order for them to be able to make a well-informed decision about what a proposed settlement agreement actually offers, and on whether they shall support it, opt out or object to it. In the current case, most of these basic elements were not included in the Notices to Class members, though some of them could be gleaned from the actual Settlement Agreement made indirectly available to Class Counsel through the Class Counsel's website. In my opinion, to simply provide a link to a 27-page Settlement Agreement as was done in this case does not amount to a satisfactory disclosure of the above-mentioned information to the Class members, and can hardly be considered fair, reasonable, and in the best interests of the Class.

[56] Though it is impossible to measure what would have been the effect of the disclosure of the above-listed information in the Notices, it is fair to say that it would likely have had a certain impact on the reactions, expressions of support or objections of the Class members to the proposed Settlement Agreement.

[57] For those reasons, I conclude that the degree and nature of communications between Class Counsel and Class members is at best a neutral factor for the approval of the Settlement Agreement.

2021 FC 1260 (CanLII)

(e) *Amount and nature of pre-trial activities, including investigation, assessment of evidence and discovery*

[58] At the time the Settlement Agreement was executed, very limited investigation, discovery, evidence gathering and pre-hearing work had been completed by the parties, meaning that the amount and nature of pre-trial activities necessary to take the case to trial remained high. Moreover, Airbnb's evidence showed that Airbnb does not have precise records of Class members that reserved an accommodation matching the parameters of a previous search made by the individual on the Airbnb Platform, as the Class was defined in this Class Action.

[59] Therefore, an important amount of necessary pre-trial work still had to be completed, and the evidence before me indicates that the parties had a good sense of the extent of this significant remaining pre-trial work. In the circumstances, I am satisfied that the parties were properly positioned to understand the amount and nature of pre-trial activities linked to continued litigation at the time of choosing to settle. This factor thus supports the approval of the Settlement Agreement.

(f) *Arm's length bargaining between the parties and absence of collusion during negotiations*

[60] There is a strong presumption of fairness when a proposed class action settlement, which was negotiated at arm's-length by experienced counsel for the class, is presented for Court approval. Here, I am satisfied that the negotiations leading to the Settlement Agreement were arm's length and adversarial in nature between Class Counsel and counsel for Airbnb, spanning several months. This, again, supports the approval of the Settlement Agreement.

2021 FC 1260 (CanLII)

(g) *Recommendation and experience of Class Counsel*

[61] Class Counsel are of the view that the proposed Settlement Agreement is fair, reasonable and in the best interests of the Class members. They recommend approval by the Court.

[62] Class Counsel and their firms are experienced, well-regarded plaintiffs' class action counsel. They have a wealth of experience in a substantial number of class actions to draw upon. I have no doubt that their decision to settle this case reflects their best exercise of judgment. Class counsel's recommendations are significant and are given substantial weight in the process of approving a class action settlement (*Condon* at para 76). This is the case here.

(h) *Future expense and likely duration of litigation*

[63] Courts have recognized that an immediate payment to class members through a settlement agreement is a factor in support of a proposed settlement. In this case, if there is no settlement now, counsel for the parties anticipate that a long time will be needed for a trial on the merits and for potential appeals, with the need for expert evidence. I am satisfied that this is another factor militating in favour of finding that the proposed Settlement Agreement is fair and reasonable and in the best interests of the Class.

2021 FC 1260 (CanLII)

(i) *Any other relevant factor or circumstance*

[64] Mr. Lin submits that the Court should also take into account that all three goals of class actions will likely be achieved by way of this Settlement Agreement, namely, access to justice, judicial economy and behavioural modification. I agree.

[65] In terms of access to justice, eligible Class members will obtain some monetary compensation from Airbnb by way of the Credit though, as I will discuss in more detail in section III.B.2.b below, the evidence suggests that this compensation is expected to be extremely modest.

[66] Judicial economy will also be achieved, as a long litigation with potential appeals will be avoided and the procedure for the payment of the Credit to the Class members will be simple, with limited Court supervision being required.

[67] Finally, behavioural modification has already been accomplished due to the combination of this Class Action and the Quebec Action, as Airbnb modified its pricing display across Canada in June 2019 whilst Mr. Lin's Class Action was underway. Counsel for Mr. Lin also rightly points out that the Class Action also has an impact for actual and potential wrongdoers throughout the Canadian economy since, in the Certification Judgment, the Court released a comprehensive decision giving teeth to the dormant section 54 of the *Competition Act*, thereby also contributing to potential behaviour modification of other "drip-pricing" practices, to the benefit of Canadian consumers.

2021 FC 1260 (CanLII)

(3) Conclusion on the Settlement Agreement

[68] After considering all of the above-mentioned factors, I am satisfied that I was presented with sufficient evidence to allow me to make an objective, impartial and independent assessment of the fairness and reasonableness of the proposed Settlement Agreement (*Condon* at para 38). A settlement is never perfect, and the Court needs to keep in mind that a settlement is always the result of a compromise, but that it puts an end to the dispute between the parties and provides certainty and finality. In this case, I find that the Settlement Agreement is fair, reasonable, and in the best interests of the Class and ought to be approved, including the appointment of the Claims Administrator.

B. ***Class Counsel Fees***

[69] I now turn to the Class Counsel Fees. Here, Class Counsel request that the Court award them an amount of $1,980,000 plus applicable taxes for Class Counsel Fees, representing 33% of the Settlement Amount, to be paid from the Settlement Amount. Airbnb does not oppose this request. Rightly so, Class Counsel are not asking the Court to approve the fees payment of $2,000,000 referred to in the Settlement Agreement, an amount that, in any event, they would not have been entitled to receive under the Retainer Agreement.

(1) The law relating to approval of class counsel fees

[70] Rule 334.4 provides that all payments to counsel flowing from a class proceeding must be approved by the Court. The overarching test applicable to class counsel fees is that they have

2021 FC 1260 (CanLII)

to be “fair and reasonable in all of the circumstances” (*Condon* at para 81; *Manuge v Canada*, 2013 FC 341 [*Manuge*] at para 28).

[71] The Court has established a non-exhaustive list of factors to assist in the determination of whether the class counsel fees are fair and reasonable (*Wenham v Canada (Attorney General)*, 2020 FC 590 [*Wenham 2*] at para 33; *McLean v Canada*, 2019 FC 1077 [*McLean 2*] at para 25; *McCrea v Canada*, 2019 FC 122 at para 98; *Condon* at para 82; *Manuge* at para 28). Again, these factors are similar to the factors retained by the courts across Canada. They include, in what I view as their order of relative importance:

1) risk undertaken by class counsel;
2) results achieved;
3) time and effort expended by class counsel;
4) complexity and difficulty of the matter;
5) degree of responsibility assumed by class counsel;
6) fees in similar cases;
7) expectations of the class;
8) experience and expertise of class counsel;
9) ability of the class to pay; and
10) importance of the litigation to the plaintiff.

[72] As is the case for the factors governing the approval of settlement agreements, these factors are non-exhaustive, and their weight will vary according to the particular circumstances of each class action. However, the risk that class counsel undertook in conducting the litigation and the degree of success or results achieved for the class members through the proposed

2021 FC 1260 (CanLII)

settlement remain the two critical factors in assessing the fairness and reasonableness of a contingency fee request by class counsel (*Condon* at para 83). The risk undertaken by class counsel includes the risk of non-payment but also the risk of facing a contentious case and a difficult opposing party (*Wenham 2* at para 34).

[73] It has long been recognized by the courts that, for class proceedings legislation to achieve its policy goals, class counsel must be well rewarded for their efforts, and the contingency agreements they negotiate with plaintiffs should generally be respected. The percentage-based fee contained in a retainer agreement is presumed to be fair and should only be rebutted or reduced "in clear cases based on principled reasons" (*Condon* at para 85, citing *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 [*Cannon*] at para 8).

[74] That being said, it is also the Court's role to protect the class, and there may be circumstances where the Court has to substitute its view for that of class counsel, in the interest of the class. The Court must consider all the relevant factors and then ask, as a matter of judgment, whether the class counsel fees fixed by the proposed agreement are fair and reasonable and maintain the integrity of the profession (*LG Chem* at para 46). This is especially true where, as in this case, the amount of class counsel fees comes out of the global settlement amount available to class members. Here, it is clear that the Net Settlement Funds available for distribution to Class members represents the difference between the Settlement Amount and the sum of Administration Expenses, Class Counsel Fees, Honorarium and applicable taxes.

2021 FC 1260 (CanLII)

[75] In the same vein, where the fee arrangement with class counsel is part of the settlement agreement, the Court must decide on the fairness and reasonableness of the proposed fee arrangements in light of what class counsel has actually accomplished for the benefit of the class members. The class counsel fees must not leave the impression or bring about conditions of settlement that appear to be in the interests of the lawyers, but not in the best interests of the class members as a whole. Stated differently, there has to be some proportionality between the fees awarded to class counsel and the degree of success obtained for the class members.

[76] In this case, Class Counsel apply to this Court for fees in an amount representing 33% of the value of the Settlement Amount, or $1,980,000, plus applicable taxes. Class Counsel submit that this is "consistent with" the terms of the Retainer Agreement. I pause to observe that, in the Retainer Agreement signed by Mr. Lin and Class Counsel in October 2017, Section 10 provides that Class Counsel's legal fees "shall not exceed **thirty-three percent (33%)**" [both emphases in original] of the total amounts recovered by the Class. Two mathematical examples are given at Section 12 of the Retainer Agreement, where the words "shall not exceed" are again used and repeated for each example. In other words, while it is not incorrect to state that the Class Counsel Fees amount presented to the Court for approval is "consistent" with the Retainer Agreement, I must underline that it nonetheless represents the upper maximum limit of what was expressly contemplated in the Retainer Agreement signed by Class Counsel and Mr. Lin.

2021 FC 1260 (CanLII)

(2) Application to this case

(a) *Risk undertaken by Class Counsel*

[77] The risk factor refers to the risk undertaken by Class Counsel when the class proceeding is commenced. It is measured from the commencement of the action, not with the benefit of hindsight when the result looks inevitable. This risk includes all of the risks facing class counsel, such as the liability risk, recovery risk, and the risk that the action will not be certified as a class action or will not succeed on the merits (*Condon* at para 83). The litigation risk assumed by class counsel is a function of the probability of success, the complexity of the proceedings, and the time and resources expended to pursue the litigation.

[78] There is no doubt in this case that a significant risk was undertaken by Class Counsel. Class Counsel did not seek any third-party litigation funding and bore 100% of the litigation risk. Class Counsel also provided a full indemnification to Mr. Lin in the event of any adverse cost awards. More importantly, there were real risks related to the fact that Mr. Lin's Class Action could not be certified at all, considering the extremely limited history of section 54 and the novelty of the interpretation and approach proposed by Class Counsel in this proceeding.

[79] Class Counsel certainly deserves credit and recognition for having brought a recourse based on sections 36 and 54 of the *Competition Act* and for having developed an innovative interpretation of section 54 on "double ticketing," something that had never been done in a competition class action. Innovation is what took human beings from caves to computers, and it

2021 FC 1260 (CanLII)

certainly merits to be rewarded, given the risks that are always inherent to any form of innovation.

[80] In light of the foregoing, the risk undertaken by Class Counsel in this case is, of course, a positive factor supporting the approval of the Class Counsel Fees.

(b) *Results achieved*

[81] In terms of the results achieved for the Class members, I find that they are mixed. Here, the Court has to distinguish between the non-monetary results stemming from the Settlement Agreement, and the monetary results. I accept that, broadly speaking, the results captured in the Settlement Agreement, both monetary and non-monetary, somehow improved the situation for Class members. However, there is a huge difference in the relative gains for Class members in terms of non-monetary and monetary benefits.

(i) Non-monetary benefits

[82] In this case, I agree that there are significant non-monetary benefits to the Class members, to the Airbnb customers in general, and to Canadian consumers. The most significant benefit consists in the behavioural modification of Airbnb, as Airbnb adjusted the Airbnb Platform throughout Canada in June 2019. Airbnb now displays an all-inclusive price for all accommodation bookings, excluding applicable taxes, at every step of the search and booking process. In other words, the pricing display practice that prompted Mr. Lin's Class Action has now ceased. This is likely the most significant aftermath of Mr. Lin's Class Action, and it

2021 FC 1260 (CanLII)

reverberates from the Class members to all existent and future Airbnb customers. I point out, however, that this result cannot be said to be an immediate effect of the Settlement Agreement itself, as Airbnb's behavioural modification preceded it and was even implemented before the Certification Judgment in this case. I further observe that the Quebec Action was also an instrumental factor leading up to Airbnb's behavioural modification in June 2019. Nevertheless, I am satisfied that Mr. Lin's Class Action was certainly one of the contributing elements having led to Airbnb's behavioural modification. Such behavioural modification is one of the three well-entrenched objectives of class actions (*L'Oratoire Saint-Joseph du Mont-Royal v JJ*, 2019 SCC 35 at para 6, citing *Hollick v Toronto (City)*, 2001 SCC 68 at para 15, *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paras 27-29, and *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 1).

2021 FC 1260 (CanLII)

[83] In weighing the non-monetary results achieved by Class Counsel's work, it is also appropriate for the Court to consider to what extent the two other main objectives of class actions – namely, access to justice and judicial economy – have been met by the proposed Settlement Agreement. Mr. Lin's Class Action provided access to justice for hundreds of thousands of Class members where, absent the Class Action, the scope of the individual claims would not justify litigation. The class action regime in the Rules was designed to encourage class counsel to advance actions like this one, where the individual claims are relatively small because, on an aggregate basis, entrepreneurial class counsel can earn a fee that justifies the risks associated with advancing the class action and the time invested (*Condon* at paras 101-102).

[84] There are also non-monetary benefits that do not solely benefit the Class members but have positive repercussions on a larger scale, for all Canadian consumers. It is well accepted that a change in a business conduct (such as pricing or marketing practices) is a recognized objective of class actions. Here, Mr. Lin's Class Action will serve as a legal precedent and authority in "drip-pricing" practices more generally, bearing in mind that the Certification Judgment was issued in the context of the low-hurdle test at the certification stage, and that the determination of the merits of the legal arguments on section 54 of the *Competition Act* still remains uncertain. I also agree with Class Counsel that this matter will indirectly serve as a deterrent for potential wrongdoers in the Canadian marketplace, who will now have a better knowledge that "drip-pricing" is a practice that can run afoul of applicable laws in Canada.

[85] I further agree that Mr. Lin's Class Action has successfully revived and resurrected section 54 of the *Competition Act*, which had been dormant for several decades. Now, the Canadian public, including merchants and consumers, has guidance on how best to comply with this *Competition Act* provision on "double ticketing," even in the digital economy. As I indicated at the hearing before this Court, we do not know yet whether section 54 is simply on life support further to the Certification Judgment and whether it will be able to survive a test on the merits, but Mr. Lin's Class Action has certainly awakened a sleepy section 54.

[86] I am therefore satisfied that the non-monetary results reached in this case are a positive factor for the approval of the Class Counsel Fees.

2021 FC 1260 (CanLII)

(ii) Monetary benefits

[87] Moving to the monetary front, the results achieved by the Settlement Agreement for the Class members are much more humble. In fact, based on the evidence before me, the monetary success for Class members is expected to be somewhat anemic. This, in my view, is the Achilles' heel hampering the Class Counsel Fees' request in this case.

2021 FC 1260 (CanLII)

[88] True, the Settlement Agreement and the Notices refer to a Credit of "up to" $45 in value for each eligible Class member. However, the evidence on the record (mostly contained in the Counsel Affidavit) reveals that what Class members are likely to receive from the settlement will not be very substantial, and far lower than the publicized $45. First, the evidence on the Quebec Settlement indicates that the take-up rate in that matter was effectively about 30%, and translated into an actual credit of approximately $9.50 per individual Quebec class member, well below the maximum of $45 that was also set out in the Quebec Settlement. Class Counsel expects that the take-up rate will be similar in this Settlement Agreement, although it could be affected by some other factors, in particular the pandemic.

[89] Second, the evidence on the record of this motion allows the Court to calculate the likely Credit expected to be effectively received by each Class member. This approximate assessment goes as follows. Airbnb estimates that there will be approximately 1,473,952 eligible claimants in this matter. Assuming a take-up rate of 30% similar to the Quebec Settlement (which is what Class Counsel expects), that would translate into approximately 442,200 Class members exercising their right to claim a Credit. As to the Net Settlement Funds available to be distributed

among Class members, they can be estimated to revolve around $3,420,500 (i.e., the Settlement Amount of $6,000,000, less the requested $1,980,000 for Class Counsel Fees, $322,500 for Administration Expenses, and some $277,000 for applicable taxes). This would result in an effective Credit of just above $8 for each Class member (i.e. $3,420,500 divided by 442,200 Class members), far less than the maximum of $45 referred to in the Notices to the Class members. I acknowledge that this back-of-the-envelope calculation is only a rough estimate but, even if I factor in a sizeable margin of error, the evidence on the record certainly allows the Court to infer that the expected Credit to be distributed to eligible Class members is more likely to gravitate around $10 than the publicized maximum of $45.

2021 FC 1260 (CanLII)

[90] I make another observation. The success or result achieved in any class action settlement is not an absolute figure but rather a relative one. It always needs to be assessed in relation to what was the anticipated full recovery of the damages alleged to have been suffered by the class members in the class action. This is what allows the Court to determine the fairness and reasonableness of the expected compensation brought about by a settlement agreement. In the current case, the Court is in a difficult position to do so since Mr. Lin and Class Counsel have not provided any estimate of what would have been the expected full recovery of the damages claimed in the Class Action. There is no measure of what the alleged price difference between the first price and the final price posted on the Airbnb Platform during the Class period would amount to, for all Class members affected. Or even an indication of what was the average price difference for the Class members. In other words, the Court has no information on the expected full recovery for Class members. Broadly speaking, the Court always needs to know what would have been the estimated full recovery of a class action in order to assess the recovery rate of a

proposed settlement and to figure out the relative success achieved by the settlement. In this case, the only benchmark available to the Court is Mr. Lin's own example: based on Mr. Lin's personal situation as outlined in the Certification Judgment, his claim against Airbnb represented an amount of approximately $92. The maximum Credit of $45 would thus represent a recovery rate slightly below 50% for Mr. Lin, and the likely or expected compensation amount of less than $10 estimated above would represent a much paler recovery rate of about 10%.

2021 FC 1260 (CanLII)

[91] In sum, the evidence before me on this motion indicates that, no matter what metric is being used, the monetary compensation likely or expected to be received by the Class members through the Credit will be extremely modest, and will likely lie at the low end of the spectrum for Class members. For all those reasons, I am not satisfied that the monetary results achieved by the Settlement Agreement are a positive factor for the approval of the Class Counsel Fees. Quite the contrary.

(c) *Time expended by class counsel*

[92] The time expended by class counsel can also be a helpful factor in the approval of class counsel fees, even in cases where the class counsel fees are contingency fees.

[93] Over the years, the courts have expressed a preference for utilizing percentage-based fees in class actions (see, e.g., *Mancinelli v Royal Bank of Canada*, 2017 ONSC 2324 at para 52). A percentage-based fee is paid based on a percentage of the amounts recovered and should be awarded at a level that appropriately incentivizes and rewards class counsel (*Condon* at para 84). Contingency fees help to promote access to justice in that they allow class counsel, rather than

the plaintiff, to finance the litigation. Contingency fees also promote judicial economy, encourage efficiency in the litigation, discourage unnecessary work that might otherwise be done simply to increase the lawyers' fees based on time incurred, properly emphasize the quality of the representation and the results achieved, ensure that counsel are not penalized for efficiency, and reflect the considerable costs and risks undertaken by class counsel (*Condon* at paras 90-91). This Court and the courts across Canada have recognized that the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases, and that class counsel's compensation consequently must reflect this reality (*Condon* at paras 90-91).

2021 FC 1260 (CanLII)

[94] The percentage-based fee set out in a contingency fee retainer agreement is therefore presumed to be fair and "should only be rebutted in clear cases based on principled reasons" (*Condon* at para 85, citing *Cannon* at para 8). Examples of "principled reasons" where a court may rebut the presumption that a percentage-based fee is fair include situations where: i) there is a lack of full understanding or true acceptance on the part of the representative plaintiff; ii) the agreed-to contingency amount is excessive; or iii) the presumptively valid contingency fee would result in a fee award so large as to be unseemly (*Condon* at para 85).

[95] I would add that situations where the class counsel fees are not commensurate with the gains of class members or are not aligned with the terms of the underlying retainer agreement with the representative plaintiff also qualify as other "principled reasons" where the courts may be justified to revisit a percentage-based contingency fee agreement. Importantly, the proposed class counsel fees need to be considered in relation to the actual result achieved for the Class

members, especially when the retainer agreement provides for the possibility of a range or margin of appreciation for the effective percentage-based fees to be paid.

[96] The main alternative to a percentage-based fee is applying a "multiplier" to class counsel's time spent in a matter. However, the use of a multiplier approach as the basis for approving class counsel fees has been criticized for, *inter alia*, encouraging inefficiency and duplication and discouraging early settlement (*Condon* at para 86). Nevertheless, it can serve as a "useful check" (*McLean 2* at para 37). According to Class Counsel, the range of multipliers generally accepted by the Canadian courts in class action settlements is approximately 1.5 to 3.5.

[97] Here, it is clear that Class Counsel have done extensive work over the past four years to reach the Settlement Agreement, including litigating certification through hearings before this Court and the FCA, and devising the settlement for the Class members. The evidence on this motion reveals that Class Counsel have collectively expended 1,628 hours in total up to the filing of the motion, with their services valued at $723,357.50. Class Counsel also expect that they will be required to spend a material number of additional hours to finalize the settlement, if the Settlement Agreement is approved. Class Counsel will notably have to oversee the publication and distribution of the notices of settlement approval; continue to implement and oversee the administration of this Class Action until the settlement distribution is complete; and liaise with the Class members who may have questions about the Settlement Agreement. There is nothing unreasonable in the details examined by the Court and I accept Class Counsel's evidence as an accurate reflection of the time value of the necessary professional services they rendered.

2021 FC 1260 (CanLII)

[98] Based on the requested Class Counsel Fees of $1,980,000, this would mean a multiplier varying between 2.3 and 2.7, depending on the additional work needed to implement the Settlement Agreement. Overall, I conclude that the time expended by Class Counsel is a positive factor supporting the approval of the Class Counsel Fees.

(d) *Complexity of issues*

[99] For the reasons discussed above, there is no question that this class action proceeding raised complex and difficult issues surrounding sections 36 and 54 of the *Competition Act*. To reiterate, in his Class Action, Mr. Lin brought forward an innovative argument on section 54 and the treatment of fragmented pricing or "drip-pricing" in the digital economy. Section 54 on "double ticketing" was created before the arrival of the digital economy and the emergence of online commerce, and the question of how the provision could extend and apply to current technologies and commercial practices is far from being simple and free from doubt. This is a positive factor for the Class Counsel Fees.

(e) *Degree of responsibility assumed by Class Counsel*

[100] Class Counsel, consisting of two small firms, took on full responsibility for this case, and bore 100% of the risk of the litigation. This, again, is a positive factor.

(f) *Fees in similar cases*

[101] Looking at the issue of fees in comparable cases, Class Counsel submit that, at 33%, the percentage of the Settlement Amount claimed as Class Counsel Fees is "comparable" to

2021 FC 1260 (CanLII)

percentages in settled class actions in the Canadian common law jurisdictions. With respect, I believe that this qualification deserves to be nuanced. I am instead of the view that a 33% contingency fee, while perhaps not unusual, nonetheless sits at the high end of the generally accepted range of court-approved fees for class counsel.

[102] The typical range for contingency fees has been recently described as being “15% to 33% of the award or settlement” in British Columbia (*Kett v Kobe Steel, Ltd*, 2020 BCSC 1977 [*Kobe Steel*] at para 54). In the precedent of this Court cited by Class Counsel in support of their claimed 33% contingency fees (i.e., *Condon*), the Court referred to a range of “up to 30%” and in fact affirmed a 30% contingency fee in that case, not 33% (*Condon* at paras 92, 111). I do not dispute that some cases confirmed the reasonableness of percentage-based fees of 33% (see, e.g., *McLean v Cathay Pacific Airways Limited*, 2021 BCSC 1456; *Cannon*; *Dwor et al v Car2Go et al*, VLC-S-S-205424, unreported settlement approved on September 20, 2021), but these matters appear to be the exception rather than the rule. Class Counsel also referred to precedents where the accepted contingency fee was at 30% or less in *Zouzout c Canada Dry Mott’s Inc*, 2021 QCCS 1815, at about 31.5% in *Hurst c Air Canada*, 2019 QCCS 4614, and between 15% to 25% in *Abihsira c Stubhub inc*, 2020 QCCS 2593. Moreover, in the Quebec Settlement, the court-approved contingency fee was 25%. I am mindful of the fact that the Quebec Settlement was a pre-certification settlement with no contested certification hearing, and that it involved a different theory of liability based on legislations other than sections 36 and 54 of the *Competition Act*. Nonetheless, it remains the closest precedent to the current Class Action.

2021 FC 1260 (CanLII)

[103] As rightly pointed out by Class Counsel, the issue to be determined is whether the requested Class Counsel Fees are fair and reasonable <u>in the circumstances</u>. In this case, despite significant positive results in terms of behavioural modification, the Settlement Agreement brings about a fairly limited success for the Class members on the monetary front, with a large discrepancy between the Class Counsel Fees sought and the likely or expected recovery rate of the Class members. This is an important factor to take into account. In the circumstances of this case, I am therefore not convinced that the low expected monetary return to Class members through the Credit can justify and support a percentage-based contingency fee of 33% that would reside at the high end of the spectrum observed in comparable cases.

(g) *Expectation of the Class*

[104] Another factor to consider is the expectation of the Class members as to the amount of counsel fees. The fact that the representative plaintiff, Mr. Lin, supports the Class Counsel Fees request is no indicator of the Class members' expectations. Based on the limited evidence before me, I cannot tell what is the expectation of the Class on the legal fees front, as the Class members were not truly aware of the Class Counsel Fees claimed.

[105] As mentioned above, the Notices provided no details on Class Counsel Fees. It is true that there was no opposition from Class members on Class Counsel Fees, but it may well be because the Class members were kept in the dark with respect to this issue. I again acknowledge that the Class members could have accessed the Settlement Agreement itself, where the amount of the Class Counsel Fees were precisely laid out; but this is a 27-page document that the average Class member is unlikely to read. Providing a link to the full text of a 27-page

2021 FC 1260 (CanLII)

Settlement Agreement is not an acceptable substitute to an adequate, full and frank disclosure on the Class Counsel Fees in the Notices themselves. As indicated above at paragraph 55 of these Reasons, notices to class members need to be transparent on the key terms of proposed class action settlement agreements, including on the issue of class counsel fees, in order to allow the Court to properly assess the fairness and reasonableness of proposed settlements and class counsel fees. In this case, I do not know what would have happened if the proposed Class Counsel Fees had been openly disclosed to the Class members in the Notices. But, given that – even with the existing Notices – there were some objections to the low level of the publicized $45 Credit, it may well have triggered more objections from Class members had they been properly informed about the real magnitude of the Net Settlement Funds, the percentage fees of Class Counsel and the likely or expected monetary amount to be distributed to the Class members.

[106] In my view, in situations like this one, where the likely or expected recovery to class members is limited and resides at the low end of the spectrum, notices to class members should clearly set out the total amount of the class counsel fees and the percentage that class counsel are seeking to receive from a settlement agreement, so that class members can have a full understanding of the agreement presented to them for approval. Communications between class counsel and class members need to be transparent, including on class counsel fees, so that class members can be in a position to make a well-informed decision on their approval and support of both the proposed settlement agreement and class counsel fees. Especially in situations where, as here, Class Counsel Fees eat up an important portion of the Net Settlement Funds available to Class members.

2021 FC 1260 (CanLII)

[107] Therefore, I am not persuaded that the Class members could fairly weigh this issue of Class Counsel Fees when deciding whether to opt out or to participate in the lawsuit going forward (*Condon* at para 107). This is a neutral factor in assessing the fairness and reasonableness of the Class Counsel Fees.

(h) *Quality and experience of Class Counsel*

[108] There is no doubt as to Class Counsel's standing in the class action legal community and in the areas of law relevant to this litigation. Evidence was provided that Class Counsel have practised in class actions for many years. They have a breadth of experience in litigating class actions, and have collectively negotiated settlements of several class actions. This is, of course, a positive factor favouring the approval of the Class Counsel Fees.

(i) *Ability of the Class to pay*

[109] It is also obvious that Class members did not and do not have the ability to pay for the services of Class Counsel. This, once again, is a positive factor in the Court's assessment of the Class Counsel Fees.

(j) *Importance of litigation to the plaintiff*

[110] Finally, I find that this Class Action is of limited importance to Mr. Lin and is a neutral factor in the determination of the fairness and reasonableness of Class Counsel Fees. This case is of no outstanding importance to Mr. Lin or to the Class members, in the sense that it does not involve human rights violation or personal injury. It has an impact for consumer protection and

2021 FC 1260 (CanLII)

the deterrence of potential anti-competitive behaviour, but nothing allows me to conclude that this matter would qualify as being a "litigation of importance" to Mr. Lin or the Class members.

(3) Conclusion on the Class Counsel Fees

[111] Looking at all the above-mentioned factors cumulatively, I am not satisfied that the Class Counsel Fees requested to be approved by Class Counsel in this case can be qualified as fair and reasonable in the circumstances, when considered in light of the modest results achieved for the Class members on the monetary front. In other words, in the particular circumstances of this case, the requested 33% percentage-based fees cross too many redlines to be approved as such.

[112] Important "principled reasons" lead me to this conclusion. I cannot help but note that the proposed 33% contingency fee is not entirely "consistent" with the Retainer Agreement concluded at the commencement of the Class Action. The Retainer Agreement provided, in underlined and bolded terms, that the Class Counsel legal fees "shall not exceed" 33% of the recovered sums. Nevertheless, the Class Counsel Fees sought in this motion are at the extreme high end of what the Retainer Agreement envisaged. In addition, the requested 33% fee also sits at the top of the range of percentage-based fees awarded by the courts in comparable cases. In sum, the legal fees sought by Class Counsel on this motion are at the maximum contemplated by the Retainer Agreement and in comparable cases, in a context where the likely or expected monetary result for the Class members sits at the totally opposite end of the spectrum as far as their anticipated recovery is concerned. This is not fair and reasonable.

2021 FC 1260 (CanLII)

[113] I find it unjustifiable, in light of the highly modest success likely or expected to be achieved for the Class members on the monetary front, that Class Counsel could be entitled to receive what they themselves recognized as being the top end of the spectrum for their contingency fees in the Retainer Agreement. When class counsel agree to fees up to a certain amount in the context of class actions, it has to mean something, and it goes without saying that achieving a low or short result for the class members does not sound like a situation where it is fair and reasonable to be granted the maximum of contemplated fees.

2021 FC 1260 (CanLII)

[114] In view of the significant contrast between the Class Counsel Fees sought, which are at the very top of the range contemplated in the Retainer Agreement and in comparable cases, and the expected monetary benefit to Class members, which will likely grant them a very low rate of recovery, I find that the requested Class Counsel Fees are disproportionate in relation to the overall results achieved for the Class, notwithstanding the commendable success in terms of Airbnb's behavioural modification. Put differently, while the success achieved for Class members is at best modest, the fees requested by Class Counsel are anything but modest. This does not fit the definition of being "fair and reasonable in the circumstances."

[115] There is no magic formula to determine what should be the appropriate percentage-based fees of class counsel in a class action settlement. It is a matter of judgment, based on the particular circumstances of any given case and the interests of the class, bearing in mind – in the current case – the material non-monetary benefits in terms of behavioural modification and the need to adequately reward entrepreneurial Class Counsel who were willing to undertake important risks and spent significant resources on this litigation. In the circumstances, I will

therefore slightly reduce the Class Counsel Fees to 30% or $1,800,000, which will remain in the upper part of the range and close to the maximum set out in the Retainer Agreement. By any measure, Class Counsel will still be very well compensated for their efforts. I am mindful of the fact that this reduction in Class Counsel Fees will bring diminutive material benefit to each Class member in terms of an increase in the likely or expected average Credit to Class members. But, in my judgment, this reduction will at least bring the Class Counsel Fees within fair and reasonable territory.

2021 FC 1260 (CanLII)

[116] As the British Columbia Supreme Court recently stated in *Kobe Steel*, "[t]he integrity of the profession is a consideration when approving legal fees in the class action context" (*Kobe Steel* at para 58, referring to *Plimmer v Google, Inc*, 2013 BCSC 681 and *Endean v The Canadian Red Cross Society*; *Mitchell v CRCS*, 2000 BCSC 971, aff'd 2000 BCCA 638, leave to appeal dismissed, [2001] SCCA No 27). Sometimes, substantial rewards to class counsel can create the wrong impression or perception that the ultimate beneficiaries of class actions are class counsel, rather than the class members. Where, as here, the settlement amount likely or expected to be received by class members is minimal – and in fact abysmal when compared to the legal fees claimed by Class Counsel –, there could be such a perception. In such cases, it is the Court's duty to attempt to rectify this perception and to ensure that counsel do not leave the impression that the class action process serves "to obtain a result in which [class counsel] are the only or major beneficiaries" (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2018 BCSC 2091 at para 53). As the court reminded in *Kobe Steel*, "[t]he ultimate purpose of the class action vehicle is to benefit the class, not their lawyers. The payment to the lawyers is simply a way to achieve

the benefits for the class, not the other way around" (*Kobe Steel* at para 58, citing *Cardoso v Canada Dry Mott's Inc*, 2020 BCSC 1569 [*Cardoso*] at para 37).

C. ***Honorarium***

2021 FC 1260 (CanLII)

[117] Class Counsel finally request that the Court award a $5,000 Honorarium to Mr. Lin, the representative plaintiff, to be paid from the Settlement Amount. Airbnb has indicated that it is prepared to make that payment if ordered by the Court.

(1) Law relating to the approval of an honorarium

[118] No specific Rule provides for the payment of an honorarium to a representative plaintiff in class actions. However, this Court has the discretion to award honoraria to representative plaintiffs, and it has indeed done so on numerous occasions (see, e.g., *Wenham 1*; *McLean 2*; *Condon*; *Manuge*). Honoraria to representative plaintiffs are to be awarded sparingly, "as representative plaintiffs are not to benefit from the class proceeding more than other class members" (*McLean 2* at para 57, referring to *Eidoo v Infineon Technologies AG*, 2015 ONSC 2675 at paras 13-22). In Ontario, the predominant view is that an honorarium is exceptional and that courts should only rarely approve an award of compensation to a representative plaintiff (*Park v Nongshim Co, Ltd*, 2019 ONSC 1997 at paras 84-86; *Markson v MBNA Canada Bank*, 2012 ONSC 5891 at paras 55-71). It requires an exceptional contribution that has resulted in success for the class.

[119] In other words, an honorarium is not to be awarded as a routine matter but is rather "a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice" (*Condon* at para 115). "Honorariums [*sic*] are given when the representative plaintiff(s) contribute more than the normal effort of such a position – for example, forfeiting their privacy to a high profile class litigation and participating in extensive community outreach" (*McLean 2* at para 57). It is only where representative plaintiffs can demonstrate "a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary, or where there is evidence that they were financially harmed because they agreed to be a class representative that an honorarium will be justified" (*Casseres v Takeda Pharmaceutical Company*, 2021 ONSC 2846 at para 10). Representative plaintiffs are not entitled to receive additional compensation for simply doing their job as class representatives (see, e.g., *Cardoso* at paras 42-51).

[120] In determining whether the circumstances are exceptional, the Court may consider several factors, including: i) active involvement in the initiation of the litigation and retainer of counsel; ii) exposure to a real risk of costs; iii) significant personal hardship or inconvenience in connection with the prosecution of the litigation; iv) time spent and activities undertaken in advancing the litigation; v) communication and interaction with other class members; and vi) participation at various stages in the litigation, including discovery, settlement negotiations and trial (*LG Chem* at para 50). A review of the case law also indicates that the courts have approved the payment of an honorarium to a representative plaintiff when he or she rendered active and necessary assistance in the preparation or presentation of the case, and such assistance resulted in monetary success for the class.

2021 FC 1260 (CanLII)

[121] In addition, the Court must also ensure that "the amount of any separate payment to the representative plaintiff is not disproportionate to the benefit derived by the class members, the effort of the representative plaintiff, and the risks assumed by the representative plaintiff" (*Parsons v Coast Capital Savings Credit Union*, 2010 BCCA 311 at para 19).

(2) Application to this case

[122] For the reasons that follow, I am not persuaded that the payment of the requested $5,000 Honorarium to Mr. Lin is justified in this case.

[123] I first note that, contrary to the situation in *Condon* (expressly referred to by counsel for Mr. Lin in his submissions to the Court), the affidavit of Mr. Lin is virtually silent on details of his involvement in this case, and does not state or even suggest that he expended a significant amount of time carrying out his duties as representative plaintiff. On his work as representative plaintiff, the affidavit of Mr. Lin is limited to a meagre two-line paragraph (paragraph 5), which reads as follows: "I assisted Class Counsel throughout this litigation, including providing information, offering my opinion and instructions, and keeping updated on developments." This provides no helpful evidence to the Court. I acknowledge that a slightly more elaborate statement is provided in the Counsel Affidavit (at paragraph 140), but it does not emanate from Mr. Lin himself and it essentially offers generic descriptions with limited particulars regarding the actual work done by Mr. Lin in this matter. In fact, the list of tasks described in the Counsel Affidavit boils down to a recitation of the usual tasks expected to be undertaken by any representative plaintiff.

2021 FC 1260 (CanLII)

[124] It is not sufficient for class counsel to simply argue the exceptional work done by a representative plaintiff. There needs to be evidence, from the representative plaintiff, at a convincing level of particularity, allowing the Court to assess and measure the nature and the involvement of the class representative. No matter how eloquent arguments from counsel may be, they cannot replace the need for the representative plaintiff to provide clear, convincing and non-speculative evidence supporting the extent and exceptional nature of his or her involvement (*Jensen v Samsung Electronics Co, Ltd*, 2019 FC 373 at paras 41-43).

2021 FC 1260 (CanLII)

[125] Here, there is no evidence that Mr. Lin was intimately involved in the Class Action, that he initiated the action himself, or that he was a driving force behind it. Furthermore, this is not a high profile litigation or a situation where Mr. Lin’s name was widely publicized, where he had exposure to the media, or where his privacy was invaded through the recitation of his personal story to advance the case. There is also no evidence of any community outreach and of public representations made by Mr. Lin about the case. Moreover, Mr. Lin did not have to prepare for or attend a cross-examination on his affidavit filed in support of the certification motion.

[126] I do not question Mr. Lin’s contribution or commitment to the Class Action, and Mr. Lin certainly deserves acknowledgement for his role in the conduct of the proceeding. However, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. In this case, I find no clear and convincing evidence of exceptional or extraordinary circumstances to support the payment of the substantial Honorarium requested by Mr. Lin. In short, I cannot conclude, based on the evidence before me, that Mr. Lin’s contribution, while laudatory, had any exceptional or extraordinary value.

[127] I further underline that the monetary compensation expected to be received by the Class members in this case will likely be excessively modest, in the form of a Credit which may not exceed $10. In these circumstances, to grant Mr. Lin an Honorarium of $5,000 would mean compensating him in an amount that would be more than 500 times the average benefit of each Class member. This would be preposterous and plainly unreasonable in the circumstances. What is more, an Honorarium of $5,000 would represent over 50 times the actual loss that Mr. Lin claimed to have suffered on his booking accommodation at the source of this Class Action. Again, nothing would justify such a massive Honorarium in a context where the benefits likely or expected to be received by the Class members are minuscule, and the evidence of any exceptional work done by Mr. Lin is absent.

(3) Conclusion on the Honorarium

[128] Having regard to the Credit awarded to the Class members from the Settlement Amount, the relevant authorities and the scant evidence on Mr. Lin's actual involvement in this proceeding, I find that the $5,000 Honorarium sought by Mr. Lin is unreasonable and unjustified in the circumstances. I instead determine that a nominal Honorarium of $1,000 is more appropriate and more commensurate with the Net Settlement Funds and the expected Credit and with the work done by Mr. Lin in this matter.

D. ***Rule 60***

[129] I take a moment to make a short remark on Rule 60, invoked by counsel for Mr. Lin in the form of an epilogue at the end of their written and oral submissions before the Court. It left

2021 FC 1260 (CanLII)

the impression that counsel was referring to this Rule to suggest that the Court might have some duty or obligation to inform Mr. Lin of gaps in his evidence or in his motion, and to provide him with an opportunity to correct any shortcomings. With respect, I do not agree that this is the purpose of Rule 60.

2021 FC 1260 (CanLII)

[130] Rule 60 provides that “[a]t any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Court considers just.” Rule 60 does not create some sort of obligation on the part of the Court to point out how a party’s case is incomplete or insufficient in terms of contents or evidence. It is well established that it is not the role of the courts to provide legal or tactical advice to litigants (*SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FCA 108 at para 9). Rather, Rule 60 is part of a group of provisions, namely, Rules 56 to 60, which address the consequences of a party’s failure to comply with the Rules, and articulate a series of actions that may be taken by a party, or the Court, in such situations. As I indicated in *Lessard-Gauvin v Canada (Attorney General)*, 2020 FC 730 at paragraphs 116-119, the objective of these Rules is to ensure that procedural irregularities can be rectified without necessarily resulting in the dismissal of a proceeding.

[131] Rule 60 is not a tool available to parties to obtain free legal advice from the Court or to ask the Court to do work that the parties themselves, or their counsel, may have failed to do.

IV. Conclusion

[132] For the reasons detailed above, I find that the Settlement Agreement is fair, reasonable and in the best interests of the Class as a whole, and that it shall be approved, along with the appointment of the Class Administrator.

[133] I find that the requested Class Counsel Fees are not fair and reasonable, and that they shall be adjusted downward to $1,800,000 plus applicable taxes.

[134] I find that the requested Honorarium for Mr. Lin is not fair, reasonable and justified, and that it shall be reduced to $1,000.

[135] An order will issue giving effect to these findings and substantially incorporating the language proposed by both parties in the draft orders submitted to the Court as part of the motion materials.

[136] No costs will be awarded.

2021 FC 1260 (CanLII)

ORDER in T-1663-17

THIS COURT ORDERS that:

A. General Terms

1. In addition to the definitions used elsewhere in these Reasons, for the purposes of this Order, the definitions set out in the Settlement Agreement attached as Schedule "A" to this Order apply to and are incorporated into this Order.

2. In the event of a conflict between the terms of this Order and the Settlement Agreement, the terms of this Order shall prevail.

B. Settlement Agreement

3. The Settlement Agreement is fair, reasonable, and in the best interests of the Settlement Class.

4. The Settlement Agreement is hereby approved pursuant to Rule 334.29 and shall be implemented and enforced in accordance with its terms.

5. All provisions of the Settlement Agreement (including its Recitals and Definitions) are incorporated by reference into and form part of this Order, and this Order, including the Settlement Agreement, is binding upon each member of the Settlement Class, including those Persons who are minors or mentally incapable, and the requirements of Rule 115 are dispensed with.

2021 FC 1260 (CanLII)

6. Upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever and absolutely released the Releasees from the Released Claims.

7. Upon the Effective Date, each Releasor shall not now or hereafter institute, continue, maintain, intervene in or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any proceeding, cause of action, claim or demand against any Releasee, or any other Person who may claim contribution or indemnity, or other claims over relief, from any Releasee, whether pursuant to legislation or at common law or equity in respect of any Released Claim.

8. For purposes of administration and enforcement of the Settlement Agreement and this Order, this Court will retain an ongoing supervisory role and the Defendants attorn to the jurisdiction of this Court solely for the purpose of implementing, administering and enforcing the Settlement Agreement and this Order, and subject to the terms and conditions set out in the Settlement Agreement and this Order.

9. No Releasee shall have any responsibility or liability whatsoever relating to the administration of the Settlement Agreement.

10. In the event that the Settlement Agreement is terminated in accordance with its terms, this Order shall be declared null and void and of no force and effect on subsequent motion made on notice.

2021 FC 1260 (CanLII)

11. Upon the Effective Date, the Proceeding shall be dismissed against the Defendants, with prejudice and without costs to the Defendants, Plaintiff, or Releasees, and that such dismissal shall be a defence to any subsequent action in respect of the subject matter hereof.

C. Appointment of Claims Administrator

12. Deloitte is hereby appointed as Claims Administrator pursuant to the Settlement Agreement and the duties and obligations are as set out in the Settlement Agreement, and are binding on the Claims Administrator.

13. The Claims Administrator's estimated fees, disbursements and other costs are $320,500, all-inclusive, and these Administration Expenses will be paid by Airbnb Ireland Unlimited Company, and will be deducted from the Settlement Amount in accordance with Sections 10.1(6) and 10.1(7) of the Settlement Agreement.

14. Unless ordered by a court of competent jurisdiction, no documents or information received by the Claims Administrator by reason of the settlement or its administration and implementation, whether received directly or indirectly and whether received before or after this Order was made, are producible in any civil or criminal proceeding, administrative proceeding, grievance, or arbitration.

15. Unless ordered by a court of competent jurisdiction, neither the Claims Administrator nor its employees, agents, partners, or associates can be compelled to be a witness in any civil or criminal proceeding, administrative proceeding, grievance, or arbitration where the information sought relates, directly or indirectly, to information obtained

2021 FC 1260 (CanLII)

by the Claims Administrator by reason of the settlement or its administration and implementation.

16. No person may bring an action or take any proceeding against the Claims Administrator or its employees, agents, partners, associates, or successors for any matter in any way relating to the settlement or its implementation and administration, except with leave of this Court on notice to all affected parties.

D. Class Counsel Fees

17. The Retainer Agreement between the plaintiff and Class Counsel is approved.

18. Class Counsel Fees in the amount of $1,800,000 plus applicable taxes is approved under Rule 334.4.

19. Other than Class Counsel Fees, Class Counsel shall not claim any other payments for this Proceeding, including disbursements.

20. The defendants shall pay the aforementioned Class Counsel Fees in accordance with the Settlement Agreement.

E. Honorarium

21. An Honorarium in the amount of $1,000 is awarded to the plaintiff.

22. The Defendants shall pay the aforementioned Honorarium in accordance with the Settlement Agreement.

2021 FC 1260 (CanLII)

23. No costs are awarded on this motion.

"Denis Gascon"

Judge

2021 FC 1260 (CanLII)

Schedule A

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

2021 FC 1260 (CanLII)

AIRBNB SERVICE FEES CLASS ACTION
NATIONAL SETTLEMENT AGREEMENT

Made as of August 27, 2021

Between

ARTHUR LIN

(the "**Plaintiff**")

and

AIRBNB INC., AIRBNB CANADA INC.,
AIRBNB IRELAND UNLIMITED COMPANY, and AIRBNB PAYMENTS UK LIMITED

(the "**Settling Defendants**")

Doc ID: 4909aa986de6bc22fd3470d382f706b897ab144c

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

AIRBNB SERVICE FEES CLASS ACTION
NATIONAL SETTLEMENT AGREEMENT

TABLE OF CONTENTS

RECITALS **1**

SECTION 1 – DEFINITIONS **3**

SECTION 2 – SETTLEMENT APPROVAL **8**

2.1 Best Efforts 8

2.2 Motions Seeking Approval of Notice and Certification 8

2.3 Motions Seeking Approval of the Settlement Agreement 8

2.4 Pre-Motion Confidentiality 8

2.5 Settlement Agreement Effective 8

SECTION 3 – SETTLEMENT BENEFITS **9**

3.1 Redeemable Credits 9

SECTION 4 – OPTING OUT AND OBJECTIONS **10**

4.1 Opt-Out and Objection Procedure 10

SECTION 5 – TERMINATION OF SETTLEMENT AGREEMENT **11**

5.1 Right of Termination 11

5.2 If Settlement Agreement is Terminated 12

5.3 Payments Following Termination 13

5.4 Survival of Provisions After Termination 14

SECTION 6 – RELEASES AND DISMISSALS **14**

6.1 Release of Releasees 14

6.2 No Further Claims 14

6.3 Dismissal of the Proceedings and Appeal 15

6.4 Material Term 15

SECTION 7 – DISTRIBUTION AND CONDITIONS OF CREDITS **15**

7.1 Distribution Process 15

7.2 Responsibility for Administration or Fees 17

SECTION 8 – EFFECT OF SETTLEMENT **17**

8.1 No Admission of Liability 17

8.2 Agreement Not Evidence 18

8.3 Confidentiality of Settlement Negotiations 18

SECTION 9 – NOTICE TO SETTLEMENT CLASS **18**

2021 FC 1260 (CanLII)

ALSL

Doc ID: 4909aa986de6bc22fd3470d382f706b897ab144c

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

9.1 Notices Required ... 18

9.2 Form and Distribution of Notices ... 18

SECTION 10 – ADMINISTRATION AND IMPLEMENTATION ... 19

10.1 Mechanics of Administration ... 19

10.2 Information and Assistance ... 20

SECTION 11 – CLASS COUNSEL FEES AND PLAINTIFF'S HONORARIUM ... 21

11.1 Responsibility for Fees and Taxes and Plaintiff's Honorarium ... 21

11.2 Responsibility for Costs of Notices ... 21

11.3 Court Approval for Class Counsel Fees and Disbursements ... 21

11.4 Court Approval for Plaintiff's Honorarium ... 21

SECTION 12 – MISCELLANEOUS ... 22

12.1 Motions for Directions ... 22

12.2 Headings, etc. ... 22

12.3 Computation of Time ... 22

12.4 Governing Law ... 23

12.5 Entire Agreement ... 23

12.6 Amendments ... 23

12.7 Binding Effect ... 23

12.8 Counterparts ... 24

12.9 Negotiated Agreement ... 24

12.10 Language ... 24

12.11 Recitals ... 24

12.12 Schedules ... 24

12.13 Acknowledgements ... 24

12.14 Authorized Signatures ... 25

12.15 Notice ... 25

12.16 Date of Execution ... 26

2021 FC 1260 (CanLII)

AL SL
Doc ID: 4909aa986de6bc22fd3470d382f706b897ab144c

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

AIRBNB SERVICE FEES CLASS ACTION
NATIONAL SETTLEMENT AGREEMENT

RECITALS

A. WHEREAS the Proceeding was commenced by the Plaintiff in the Federal Court of Canada and the Plaintiff claims class-wide damages allegedly caused as a result of the conduct alleged therein;

B. WHEREAS the Proceeding alleges that some or all of the Releasees' booking platforms displayed prices to Settlement Class Members during the Class Period in a manner that was contrary to Part VI of the *Competition Act*, RSC 1985, c C-34;

C. WHEREAS the Proceeding was certified as a class action by the Court on December 5, 2019, following a contested hearing and the Plaintiff was appointed representative plaintiff of the Class, but notice of the certification and an opportunity to opt out of the Proceeding have not yet been provided;

D. WHEREAS the Releasees do not admit, through the execution of this Settlement Agreement or otherwise, any allegation of unlawful conduct alleged in the Proceeding, and otherwise deny all liability and assert that they have complete defences in respect of the merits of the Proceeding or otherwise;

E. WHEREAS the Plaintiff, Class Counsel and the Settling Defendants agree that neither this Settlement Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an admission by or evidence against the Releasees or evidence of the truth of any of the Plaintiff's allegations, which allegations are expressly denied by the Settling Defendants;

F. WHEREAS the Settling Defendants are entering into this Settlement Agreement in order to achieve a final and nation-wide resolution of all claims asserted or which could have been asserted against the Releasees by the Plaintiff and the Settlement Class in the Proceeding, and to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

G. WHEREAS the Settling Defendants do not hereby attorn to the jurisdiction of the Court or any other court or tribunal in respect of any civil, criminal or administrative process except to the extent they have previously done so in the Proceeding or as expressly provided in this Settlement Agreement with respect to the Proceeding;

AL SL

2021 FC 1260 (CanLII)

Doc ID: 4909aa986de6bc22fd3470d382f706b897ab144c

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

H. WHEREAS Counsel for the Settling Defendants and Class Counsel have engaged in arm's-length settlement discussions and negotiations, resulting in this Settlement Agreement relating to Canada;

I. WHEREAS, on or around June 27, 2019, the Settling Defendants have adjusted the Airbnb Platform to display an all-inclusive price to Guests for the booking of Accommodations, at every step of the search and booking process;

J. WHEREAS as a result of these settlement discussions and negotiations, the Settling Defendants and the Plaintiff have entered into this Settlement Agreement, which embodies all of the terms and conditions of the settlement between the Settling Defendants and the Plaintiff, both individually and on behalf of the Settlement Class the Plaintiff represents, subject to approval of the Court;

K. WHEREAS the Quebec Action was commenced against certain of the Releasees by the Quebec Plaintiff, on behalf of the Quebec Class, and which action was settled in 2019 and finally approved by the Quebec Court in February 2020;

L. WHEREAS there is a pending motion before the Court where the Parties are in dispute as to the validity and/or enforceability of the settlement in the Quebec Action;

M. WHEREAS the Parties do not intend for any member of the Quebec Class to be eligible for benefits under this Settlement Agreement;

N. WHEREAS Class Counsel, on their own behalf and on behalf of the Plaintiff and the Settlement Class Members, have reviewed and fully understand the terms of this Settlement Agreement and, based on their analyses of the facts and law applicable to the Plaintiff's claims, having regard to the burdens and expense associated with prosecuting the Proceeding, including the risks and uncertainties associated with trials and appeals, and having regard to the value of the Settlement Agreement, have concluded that this Settlement Agreement is fair, reasonable and in the best interests of the Plaintiff and the Settlement Class he represents;

O. WHEREAS the Parties therefore wish to and hereby finally resolve on a national basis, without admission of liability, the Proceeding as against the Releasees, provided that members of the Quebec Class are not entitled to obtain recovery from this settlement; and

ALSL

Doc ID: 4909aa986de6bc22fd3470d382f706b897ab144c

2021 FC 1260 (CanLII)

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

P. WHEREAS the Parties agree to proceed to obtain approvals from the Court as provided for in this Settlement Agreement, on the express understanding that such agreement shall not derogate from the respective rights of the Parties in the event that this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason;

NOW THEREFORE, in consideration of the covenants, agreements and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that the Proceeding be settled and dismissed with prejudice as to the Settling Defendants, all without costs as to the Plaintiff, the Settlement Class Members, and the Settling Defendants, subject to the approval of the Court, on the following terms and conditions:

SECTION 1 – DEFINITIONS

For the purposes of this Settlement Agreement, including the recitals and schedules hereto:

(1) ***Accommodation*** means the offering by third parties of vacation or other properties for use on the Airbnb Platform**.**

(2) ***Account*** means the Airbnb account of a Settlement Class Member, which is linked to such Member's email address.

(3) ***Administration Expenses*** means all fees, disbursements, expenses, costs, taxes and any other amounts incurred or payable by the Plaintiff, Class Counsel, the Settling Defendants, or otherwise for the approval, implementation and operation of this Settlement Agreement, including the costs of notices, but excluding Class Counsel Fees and Class Counsel Disbursements.

(4) ***Airbnb Platform*** means collectively the Site, Application, and Airbnb Services.

(5) ***Airbnb Services*** means all services associated with the Site and the Application.

(6) ***Application*** means, collectively, the Airbnb mobile, tablet, and other smart device applications, and application program interfaces.

(7) ***Booking*** means a contract entered into directly between Hosts and Guests.

ALSL

Doc ID: 4909aa986de6bc22fd3470d382f706b897ab144c

2021 FC 1260 (CanLII)

(8) ***Bounce Back*** means an email that is returned to the sender because it cannot be delivered for some reason.

(9) ***Claim*** means any and all requests for a Redeemable Credit submitted by a Credit Eligible Class Member in accordance with this Settlement Agreement.

(10) ***Claims Administrator*** means Deloitte LLP.

(11) ***Claims Deadline*** means forty-five (45) days from the publication and dissemination of the notice of an approved settlement to Settlement Class Members described in Section 9.1.

(12) ***Class Counsel*** means Evolink Law Group, Sébastien A. Paquette and Jérémie John Martin.

(13) ***Class Counsel Disbursements*** include the disbursements and applicable taxes incurred by Class Counsel in the prosecution of the Proceeding.

(14) ***Class Counsel Fees*** means the legal fees of Class Counsel, and any applicable taxes or charges thereon, including any amounts payable as a result of the Settlement Agreement by Class Counsel or the Settlement Class Members to any other body or Person.

(15) ***Class Period*** means October 31, 2015 to June 25, 2019.

(16) ***Counsel for the Settling Defendants*** means Torys LLP.

(17) ***Court*** means the Federal Court of Canada.

(18) ***Credit*** means a credit-voucher to be used to make a Booking for Accommodation on the Airbnb Platform in the form of a single, one-time-use only, non-transferable, non-refundable and non-cash convertible credit of a value in Canadian dollars to be determined in accordance with Section 7.1(6).

(19) ***Credit Claiming Class Members*** means a Credit Eligible Class Member who claims a benefit under this Settlement Agreement in accordance with the procedure described in Section 7.1.

(20) ***Credit Eligible Class Members*** means a Settlement Class Member who meets all of the following criteria: (a) a resident of Canada but not a member of the Quebec Class; (b) used the

2021 FC 1260 (CanLII)

Airbnb Platform during the Class Period for the first time, for a purpose other than business travel; (c) was located in Canada (but not Quebec) at the time of the booking; and (d) has an active account at the time the credit is issued that has not been suspended or removed from the Airbnb Platform due to a violation of Airbnb's Terms of Service, policies or standards.

2021 FC 1260 (CanLII)

(21) ***Date of Execution*** means the date on the cover page as of which the Parties have executed this Settlement Agreement.

(22) ***Effective Date*** means the date when a Final Order has been received from the Court approving this Settlement Agreement.

(23) ***Final Order*** means a final order, judgment or equivalent decree entered by the Court approving this Settlement Agreement in accordance with its terms, once the time to appeal such order has expired without any appeal being taken, if an appeal lies, or if the order is appealed, once there has been affirmation of the order upon a final disposition of all appeals.

(24) ***Guests*** means third-party travelers seeking to book Accommodations.

(25) ***Hosts*** means third parties who offer Accommodations on the Airbnb Platform.

(26) ***Net Settlement Amount*** means the amount available for distribution to Credit Claiming Class Members as Credits, calculated by subtracting from the Settlement Amount the total of the amounts described in Section 3.1(2).

(27) ***Opt-Out Deadline*** means thirty (30) calendar days after the notices in Section 9.2 have been emailed to the Settlement Class Members.

(28) ***Party and Parties*** means the Settling Defendants, the Plaintiff, and, where necessary, the Settlement Class Members.

(29) ***Person*** means an individual, corporation, partnership, limited partnership, limited liability company, association, joint stock company, estate, legal representative, trust, trustee, executor, beneficiary, unincorporated association, government or any political subdivision or agency thereof, and any other business or legal entity and their heirs, predecessors, successors, representatives, or assignees.

ALSL

2021 FC 1260 (CanLII)

(30) ***Plaintiff*** means Arthur Lin.

(31) ***Proceeding*** means the action commenced by the Plaintiff against the Settling Defendants in the Court, bearing Court File No. T-1663-17.

(32) ***Quebec Action*** means *Martin Preisler-Banoon v. AirBnb Ireland UC et al.* commenced in the Quebec Court, District of Montreal, bearing Court File No. 500-06-000884-177.

(33) ***Quebec Class*** means, in respect of the Quebec Action, every person residing in Quebec, who between August 22, 2014 and June 26, 2019, while located in the province of Quebec, made a booking for anywhere in the world, for a purpose other than business travel, using Airbnb's websites and/or mobile application and who paid a price higher than the price initially advertised by Airbnb (excluding the QST or the GST).

(34) ***Quebec Court*** means the Superior Court of Quebec.

(35) ***Quebec Plaintiff*** means Martin Preisler-Banoon.

(36) ***Redeemable Credit*** has the same meaning as Credit.

(37) ***Released Claims*** means any and all manner of claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, whether personal or subrogated, damages, known or unknown, suspected or unsuspected, actual or contingent, liquidated or unliquidated, in law, under statute or in equity, that any of the Releasors ever had or now has, relating in any way to the display of prices on the Airbnb Platform, including conduct alleged (or which could have been alleged) in the Proceeding.

(38) ***Releasees*** means, jointly and severally, individually and collectively, the Settling Defendants and all of their present and former direct and indirect parents, owners, subsidiaries, divisions, affiliates, associates (as defined in the *Canada Business Corporations Act*, RSC 1985, c C-44), partners, joint ventures, franchisees, dealers, insurers, and all other Persons, partnerships or corporations with whom any of the former have been, or are now, affiliated, and all of their respective past, present and future officers, directors, employees, agents, mandataries, shareholders, attorneys, trustees, servants and representatives, members, managers and the

AL

predecessors, successors, purchasers, heirs, executors, administrators and assigns of each of the foregoing.

(39) ***Releasors*** means, jointly and severally, individually and collectively, the Plaintiff and the Settlement Class Members, on behalf of themselves and any Person or entity claiming by or through them as a parent, subsidiary, affiliate, predecessor, successor, shareholder, partner, director, owner of any kind, agent, principal, employee, contractor, attorney heir, executor, administrator, insurer, devisee, assignee, or representative of any kind, other than Persons who validly and timely opted out of the Proceeding in accordance with the orders of the Court.

(40) ***Settlement Agreement*** means this agreement, including the recitals and schedules.

(41) ***Settlement Amount*** means CAD$6,000,000.

(42) ***Settlement Class*** means all individuals residing in Canada, other than Quebec, who, from October 31, 2015 to June 25, 2019: (a) reserved an accommodation for anywhere in the world using Airbnb; (b) whose reserved accommodation matched the parameters of a previous search made by the individual on the search results page of Airbnb; and (c) paid, for the reserved accommodation, a price (excluding applicable sales and/or accommodation taxes) that is higher than the price displayed by Airbnb on the said search results page for this accommodation. Individuals who reserved an accommodation primarily for business travel are excluded.

(43) ***Settlement Class Member*** means a member of the Settlement Class who has not opted out of the Proceeding.

(44) ***Settling Defendants*** means Airbnb, Inc., Airbnb Canada Inc., Airbnb Ireland Unlimited Company, and Airbnb Payments UK Limited.

(45) ***Site*** means the Airbnb website, including any subdomains thereof, and any other websites through which Airbnb makes its services available.

2021 FC 1260 (CanLII)

ALSL

2021 FC 1260 (CanLII)

SECTION 2 – SETTLEMENT APPROVAL

2.1 Best Efforts

(1) The Parties shall use their best efforts and act in good faith to implement this Settlement Agreement and to secure the prompt, complete and final dismissal with prejudice of the Proceeding as against the Settling Defendants.

2.2 Motions Seeking Approval of Notice and Certification

(1) The Plaintiff shall file a motion before the Court, as soon as practicable after the Date of Execution, for orders approving the notices described in Section 9.1(1).

(2) The order approving the notices described in Section 9.1(1) shall be substantially in the form attached as Schedule A.

2.3 Motions Seeking Approval of the Settlement Agreement

(1) The Plaintiff shall make best efforts to file a motion before the Court for an order approving this Settlement Agreement as soon as practicable after the expiry of the opt-out period in Section 4.1(5) and within the timelines permitted under the *Federal Courts Rules*

(2) The order approving this Settlement Agreement shall be substantially in the form attached as Schedule B.

2.4 Pre-Motion Confidentiality

(1) Until the first of the motions required by Section 2.2(1) is brought, the Parties shall keep all of the terms of the Settlement Agreement confidential and shall not disclose them without the prior consent of Counsel for the Settling Defendants and Class Counsel, as the case may be, except as required for the purposes of financial reporting, the preparation of financial records (including tax returns and financial statements), as necessary to give effect to its terms, or as otherwise required by law.

2.5 Settlement Agreement Effective

(1) This Settlement Agreement shall only become final on the Effective Date.

ALJL

2021 FC 1260 (CanLII)

SECTION 3 – SETTLEMENT BENEFITS

3.1 Redeemable Credits

(1) The Settling Defendants shall offer to compensate Credit Eligible Class Members by offering credits of a total gross value equal to the Settlement Amount to be used on the Airbnb Platform, subject to the deductions and conditions set out in this Settlement Agreement.

(2) The following fees and costs shall be paid from the Settlement Amount and will be deducted from the gross value of the credits:

(a) Administration Expenses;

(b) The cost of publication of any notices to Settlement Class Members that the Court may require;

(c) The plaintiff's honorarium as described in Section 11.4, to the extent approved by the Court; and

(d) Class Counsel Fees and Class Counsel Disbursements, plus any applicable sales taxes, to the extent approved by the Court and as provided in Section 11.3 below.

(3) The value of each Redeemable Credit to be distributed to Credit Claiming Class Members shall be determined at the expiry of the Claims Deadline in accordance with Section 7.1(6).

(4) The Settlement Amount and other consideration to be provided in accordance with the terms of this Settlement Agreement shall be provided in full satisfaction of the Released Claims against the Releasees.

(5) For greater certainty, the Settlement Amount shall be all-inclusive of all amounts, including interest, costs, any honorarium paid to the Plaintiff, Administration Expenses, Class Counsel Fees, Class Counsel Disbursements, and taxes.

(6) The Releasees shall have no obligation to pay any amount in addition to the Settlement Amount, for any reason, pursuant to or in furtherance of this Settlement Agreement or the Proceeding. In particular, after the Settlement Agreement has been implemented and executed, there shall be no surplus amount remaining for remittance, reparation or compensation to any

ALSL

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

Settlement Class Member, Class Counsel or Plaintiff other than the Redeemable Credits, and the payment of Class Counsel Fees.

SECTION 4 – OPTING OUT AND OBJECTIONS

4.1 Opt-Out and Objection Procedure

(1) Potential Settlement Class Members seeking to opt out of the Proceeding or object to the settlement must do so by sending a written notice, personally signed by the potential Settlement Class Member (or the potential Settlement Class Member's parent or guardian if he/she is legally incapable), by pre-paid mail, courier, fax or email to Class Counsel at an address to be identified in the notice described in Section 9.1(1).

(2) Any potential Settlement Class Member who validly opts out of the Proceedings shall not be able to participate in the Proceeding and no further right to opt out of the Proceedings will be provided.

(3) An election to opt out or notice of objection will only be valid if it is received on or before the Opt-Out Deadline to the designated address in the notice described in Section 9.1(1).

(4) The written election to opt out or notice of objection must contain the following information in order to be valid:

(a) the potential Settlement Class Member's full name, current address, telephone number, and the e-mail address for which they received the notice in Section 9;

(b) an acknowledgment that the Potential Settlement Class Member is a resident of Canada (except Quebec) and aware that he/she will no longer be entitled to participate in any benefits from this settlement; and

(c) in the case of a written election to opt out:

(i) a statement to the effect that the Person wishes to be excluded from the Proceedings; and

(ii) the reasons for opting out; or

(d) in the case of a notice of objection:

ALSL

Doc ID: 4909aa986de6bc22fd3470d382f706b897ab144c

2021 FC 1260 (CanLII)

(i) the grounds for the objection; and

(ii) whether the potential Settlement Class Member intends to appear at the approval hearing himself/herself, or through his/her lawyer (at the potential Settlement Class Member's own expense);

(5) Class Counsel may request potential Settlement Class Members that submit an election to opt out or notice of objection to provide their proof of residency and/or other proof that they are a potential Settlement Class Member.

(6) Within thirty (30) days of the Opt-Out Deadline, Class Counsel shall provide to the Settling Defendants a list containing the names, contact information, and reason provided for opting out for each individual who has submitted an opt-out request in accordance with Section 4.1(4) above.

(7) With respect to any potential Settlement Class Member who validly opts out from the Proceedings, the Settling Defendants reserve all of their legal rights and defences.

(8) The Plaintiff through Class Counsel expressly waives his right to opt-out of the Proceeding.

SECTION 5 – TERMINATION OF SETTLEMENT AGREEMENT

5.1 Right of Termination

(1) In the event that the Court:

(a) declines to dismiss the Proceeding as against the Settling Defendants as provided in Section 6.3(1);

(b) declines to approve this Settlement Agreement or any material part, or approves this Settlement Agreement in a materially modified form; or

(c) issues a settlement approval order that is materially inconsistent with the terms of the Settlement Agreement or not substantially in the form attached to this Settlement Agreement as Schedule B;

or in the event any order approving this Settlement Agreement does not become a Final Order, the Plaintiff and the Settling Defendants shall each have the right to terminate this Settlement

2021 FC 1260 (CanLII)

2021 FC 1260 (CanLII)

Agreement by delivering a written notice pursuant to Section 12.15, within ten (10) days following an event described above.

(2) In addition, if the Credits are not provided to Credit Claiming Class Members in accordance with Sections 3.1(1) and 7.1, the Plaintiff shall have the right to terminate this Settlement Agreement by delivering a written notice pursuant to Section 12.15 or move before the Courts to enforce the terms of this Settlement Agreement.

(3) If more than 100 Settlement Class Members validly exercise their right to opt out in accordance with Section 4, the Settling Defendants shall have the right to terminate this Settlement Agreement by delivering a written notice pursuant to Section 12.15, within five (5) days of being provided with the opt out report described in Section 4.1(5).

(4) Except as provided for in Section 5.4, if the Settlement Agreement is not approved, is terminated, or otherwise fails to take effect for any reason, the Settlement Agreement shall be null and void and have no further force or effect, and shall not be binding on the Parties, and shall not be used as evidence or otherwise in any litigation or in any other way for any reason.

(5) Any order, ruling or determination made or rejected by the Court with respect to Class Counsel Fees shall not be deemed to be a material modification of all, or a part, of this Settlement Agreement and shall not provide any basis for the termination of this Settlement Agreement.

5.2 If Settlement Agreement is Terminated

(1) If this Settlement Agreement is not approved, is terminated in accordance with its terms, or otherwise fails to take effect for any reason:

(a) no motion to approve this Settlement Agreement that has not been decided shall proceed;

(b) the Parties will cooperate in seeking to have all issued order(s), in the Court or the Federal Court of Appeal, on the basis of the Settlement Agreement or approving this Settlement Agreement set aside and declared null and void and of no force or effect, and any Person shall be estopped from asserting otherwise;

ALSL

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

(c) within ten (10) days of such termination having occurred, Class Counsel shall make reasonable efforts to destroy all documents or other materials provided by the Settling Defendants and/or Counsel for the Settling Defendants under this Settlement Agreement or containing or reflecting information derived from such documents or other materials received from the Settling Defendants and/or Counsel for the Settling Defendants and, to the extent Class Counsel has disclosed any documents or information provided by the Settling Defendants and/or Counsel for the Settling Defendants to any other Person, shall make reasonable efforts to recover and destroy such documents or information. Class Counsel shall provide Counsel for the Settling Defendants with a written certification by Class Counsel of such destruction. Nothing contained in this Section 5.2 shall be construed to require Class Counsel to destroy any of their work product. However, any documents or information provided by the Settling Defendants and/or Counsel for the Settling Defendants, or received from the Settling Defendants and/or Counsel for the Settling Defendants in connection with this Settlement Agreement, may not be disclosed to any Person in any manner or used, directly or indirectly, by Class Counsel or any other Person in any way for any reason, without the express prior written permission of the relevant Settling Defendants. Class Counsel shall take appropriate steps and precautions to ensure and maintain the confidentiality of such documents, information and any work product of Class Counsel derived from such documents or information; and

(d) With respect to the Settling Defendants' motion to exclude the Quebec Class from this Action, the Plaintiff and the Quebec Class reserve all of their legal rights and defences.

5.3 Payments Following Termination

(1) If the Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason, the Settling Defendants shall be under no obligation to make any Credits available to Credit Eligible Class Members or make any other payments under this Settlement Agreement.

2021 FC 1260 (CanLII)

ALSL

Doc ID: 4909aa986de6bc22fd3470d382f706b897ab144c

2021 FC 1260 (CanLII)

5.4 Survival of Provisions After Termination

(1) If this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason, the provisions of Sections 5.1(4), 5.2, 5.3, 5.4, 8.1, and 8.2 and the definitions and Schedules applicable thereto shall survive the termination and continue in full force and effect. The definitions and Schedules shall survive only for the limited purpose of the interpretation of Sections 5.1(4), 5.2, 5.3, 5.4, 8.1, and 8.2 within the meaning of this Settlement Agreement, but for no other purposes. All other provisions of this Settlement Agreement and all other obligations pursuant to this Settlement Agreement shall cease immediately.

SECTION 6 – RELEASES AND DISMISSALS

6.1 Release of Releasees

(1) Upon the Effective Date, subject to Section 6.2, and in consideration of making available the Redeemable Credits and for other valuable consideration set forth in the Settlement Agreement, the Releasors forever and absolutely release and forever discharge the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, or now have.

(2) The Plaintiff and Settlement Class Members acknowledge that they may hereafter discover facts in addition to, or different from, those facts which they know or believe to be true regarding the subject matter of the Settlement Agreement, and it is their intention to release fully, finally and forever all Released Claims and, in furtherance of such intention, this release shall be and remain in effect notwithstanding the discovery or existence of additional or different facts.

6.2 No Further Claims

(1) Upon the Effective Date, each Releasor shall not now or hereafter institute, continue, maintain, intervene in or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any proceeding, cause of action, claim or demand against any Releasee, or any other Person who may claim contribution or indemnity, or other claims over relief, from any Releasee, whether pursuant to legislation or at common law or equity in respect of any Released Claim. For greater certainty and without limiting the generality of the foregoing, the Releasors shall not assert or pursue a Released Claim, against any Releasee under the laws of any foreign jurisdiction.

ALJL

6.3 Dismissal of the Proceedings and Appeal

(1) Upon the Effective Date, the Proceeding shall be dismissed with prejudice and without costs as against any party.

(2) Upon the Execution Date, the Parties shall inform the Federal Court of Appeal to hold the appeal A-464-19 in abeyance until the Court has heard and decided the approval of this settlement.

(3) If the Court approves the settlement, and upon the Effective Date, the parties shall execute any necessary order(s) to dismiss the appeal in A-464-19.

(4) If the Court does not approve the settlement, the Parties shall promptly inform the Federal Court of Appeal.

6.4 Material Term

(1) The releases, covenants, and dismissals contemplated in this Section shall be considered a material term of the Settlement Agreement and the failure of the Court to approve the releases, covenants, and dismissals contemplated herein shall give rise to a right of termination pursuant to Section 5.1 of the Settlement Agreement.

SECTION 7– DISTRIBUTION AND CONDITIONS OF CREDITS

7.1 Distribution Process

(1) Credit Eligible Class Members will be able to obtain a Redeemable Credit through a claim process as further described in this Section 7.

(2) Within ten (10) days of the Effective Date, a notice will be sent to Settlement Class Members notifying them that the settlement has been approved and containing a hyperlink for Credit Eligible Class Members to click on if they wish to claim a Redeemable Credit. The online claims process shall allow for the identification of each Credit Eligible Class Member who clicks on said hyperlink as a Credit Claiming Class Member. The Credit Eligible Class Members shall not be required to provide any further information or take any further action. Should any email sent to a Settlement Class Member or Credit Eligible Class Member result in a Bounce Back, no additional steps will be required from the Parties to communicate with the relevant class member.

ALJL

2021 FC 1260 (CanLII)

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

(3) All Claims by Credit Eligible Class Members must be submitted and received by the Claims Deadline. The Claims Deadline shall be clearly set forth in the notice and on the website of Class Counsel. As part of the claims process, the relevant Credit Eligible Class Member shall acknowledge that they fit the criteria for being a Credit Eligible Class Member.

(4) Credit Eligible Class Members who do not submit a Claim by the Claims Deadline shall no longer be eligible to receive benefits under this Settlement Agreement but will be bound by the remaining terms.

(5) Within ten (10) days of the Claims Deadline, the Claims Administrator shall provide a list of Credit Claiming Class Members along with the information collected through the automated process described above to Counsel for the Settling Defendants.

(6) Within sixty (60) days of the Claims Deadline, the Settling Defendants shall deliver to each Credit Claiming Class Member a Redeemable Credit to his or her Account, available to be redeemed automatically at the next check-out, of a value in Canadian Dollars equivalent to a *pro rata* share of the Net Settlement Amount. By way of illustrative example only, if there are 100,000 Credit Claiming Class Members, and the total fees, expenses, and taxes in Section 3.1(2) is CAD$2,500,000, then the Net Settlement Amount would be CAD$3,500,000 (i.e., $6,000,000 minus $2,500,000), and each Credit Claiming Class Member would receive a credit of CAD$35.

(7) For greater certainty, in the event that a Credit Claiming Class Member has made more than one booking during the Class Period, he or she will only be entitled to one Redeemable Credit.

(8) The Redeemable Credits may be used on the Airbnb Platform, within twenty-four (24) months from the date of issuance, for making Bookings of Accommodations in any location worldwide, after which period the Redeemable Credit will expire. The Redeemable Credits are one-time use only (and any amount not used on the transaction is extinguished), non-transferable, non-cash convertible, non-refundable, and cannot be combined with any other offer, discount, credit or coupon. It is also understood that a Credit Claiming Class Member must agree to the most recent version of the Terms of Service in order to meet the criteria to make a Booking of an Accommodation offered on the Airbnb Platform.

(9) Notwithstanding anything in this Section 7.1, in no event shall any Credit Claiming Class Member be entitled to a Redeemable Credit in an amount greater than CAD$45.

AL SL

2021 FC 1260 (CanLII)

2021 FC 1260 (CanLII)

(10) If the CAD $45 cap described in Section 7.1(9) is triggered and as a result a portion of the Net Settlement Amount remains undistributed, the Settling Defendants shall pay in the form of cash or cheque, on a *cy pres* basis, to an organization agreed to by the Parties and approved by the Court.

(11) It is expressly agreed and understood by the Parties that unused, unredeemed or unclaimed Redeemable Credits shall not constitute, nor may they under any circumstances give rise to, a remaining balance for any purpose, including for a claim for reparation or compensation by Settlement Class Members or for the payment of a charge, levy or toll by any third party, including a charge, levy or toll contemplated by any regulation. For greater certainty and without limitation, the Settling Defendants may terminate this Settlement Agreement in the event any court recognizes the existence of a remaining balance.

7.2 Responsibility for Administration or Fees

(1) Except as otherwise provided for in this Settlement Agreement, the Settling Defendants shall not have any responsibility, financial obligations or liability whatsoever with respect to the administration of the Settlement Agreement including, but not limited to, Administration Expenses.

SECTION 8 – EFFECT OF SETTLEMENT

8.1 No Admission of Liability

(1) The Plaintiff and the Releasees expressly reserve all of their rights if the Settlement Agreement is not approved, is terminated, or otherwise fails to take effect for any reason. Further, whether or not the Settlement Agreement is finally approved, is terminated, or otherwise fails to take effect for any reason, this Settlement Agreement and anything contained herein, any and all negotiations, documents, discussions and proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement, shall not be deemed, construed, or interpreted to be an admission of any violation of any statute or law, or of any wrongdoing or liability by the Releasees, or of the truth of any of the claims or allegations contained in the Proceedings, any Other Actions, or any other pleading filed by the Plaintiffs.

ALSL

2021 FC 1260 (CanLII)

8.2 Agreement Not Evidence

(1) The Parties agree that, whether or not it is finally approved, is terminated, or otherwise fails to take effect for any reason, this Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions and proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement, shall not be referred to, offered as evidence or received in evidence in any pending or future civil, criminal or administrative action or proceeding, except in a proceeding to approve and/or enforce this Settlement Agreement, to defend against the assertion of Released Claims, as necessary in any insurance-related proceeding, or as otherwise required by law.

8.3 Confidentiality of Settlement Negotiations

(1) Class Counsel or anyone currently or hereafter employed by or a partner with Class Counsel may not divulge to anyone for any purpose any information obtained in the course of the Proceeding on a confidential basis or the negotiation and preparation of this Settlement Agreement, except to the extent such information was, is or becomes otherwise publicly available or unless ordered to do so by a court.

SECTION 9 – NOTICE TO SETTLEMENT CLASS

9.1 Notices Required

(1) The Settlement Class Members shall be given notice of: (i) the hearing at which the Court will be asked to approve the Settlement Agreement and/or Class Counsel Fees, including the procedure for opting out or commenting on the proposed settlement; (ii) the Court's approval of the settlement; and (iii) if the proposed settlement is not approved or otherwise fails to take effect, notice that the proposed settlement was not approved and the litigation shall continue.

9.2 Form and Distribution of Notices

(1) The notices shall be in a form agreed upon by the Parties and approved by the Court or, if the Parties cannot agree on the form of the notices, the notices shall be in a form ordered by the Court.

ALSL

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

(2) The notices shall be disseminated by a method agreed upon by the Parties and approved by the Courts or, if the Parties cannot agree on a method for disseminating the notices, the notices shall be disseminated by a method ordered by the Courts.

2021 FC 1260 (CanLII)

SECTION 10 – ADMINISTRATION AND IMPLEMENTATION

10.1 Mechanics of Administration

(1) Except to the extent provided for in this Settlement Agreement, the mechanics of the implementation and administration of this Settlement Agreement shall be determined by the Court on motions brought by Class Counsel.

(2) The Parties agree that any information provided by the Settling Defendants in accordance with this Section shall be kept confidential, shall be used only for purposes of administering the Settlement Agreement, and shall not be used for marketing or any other purposes.

(3) The Claims Administrator will be required to (i) go through Airbnb's security review process for third-party vendors (including completing a vendor intake form) and be approved by Airbnb, and (ii) sign Airbnb's standard Controller/Processor Data Privacy Addendum. Should these conditions not be met, the Parties agree to replace the Claims Administrator with another that meets these requirements.

(4) The Claims Administrator shall administer the terms of this Settlement Agreement in a cost-effective and timely manner.

(5) The Claims Administrator shall maintain records of all Claims submitted for two years after the Claims Deadline, and such records will be made available upon request to Counsel for the Parties. The Claims Administrator shall also provide such reports and such other information to the Court as it or the Parties may require.

(6) The Administration Expenses will be paid out of the Settlement Amount, as directed by the Court. Should the Settlement Agreement not be approved by the Court or otherwise becomes null and void, no Administration Expenses shall be owed.

ALJL

Doc ID: 4909aa986de6bc22fd3470d382f706b897ab144c

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

(7) The Parties anticipate that no sales taxes will be payable in respect of Administration Expenses. To the extent any such taxes are payable, they will be paid from the Settlement Amount in accordance with Section 3.1.

2021 FC 1260 (CanLII)

10.2 Information and Assistance

(1) The Settling Defendants will provide to the Claims Administrator a list of the names and email addresses of Persons located in Canada, other than Quebec, who had Airbnb accounts during the Class Period.

(2) It is acknowledged that the Settling Defendants cannot precisely identify Settlement Class Members, any account lists provided under this Section 10.2 for the purpose of providing notice are overinclusive, and the fact a Person is included on such a list does not indicate he or she is a Settlement Class Member or Credit Eligible Class Member.

(3) The name and address information required by Section 10.2 shall be delivered to the Claims Administrator no later than ten (10) days after the orders required by Section 2.2(1) have been obtained, or at a time mutually agreed upon by the Parties.

(4) The Claims Administrator shall be bound by the same confidentiality obligations set out in Section 10.1(2). If this Settlement Agreement is not approved, is terminated, or otherwise fails to take effect for any reason, all information provided by the Settling Defendants pursuant to Section 10.2(1) shall be dealt with in accordance with Section 5.2(1)(c) and no record of the information so provided shall be retained by Class Counsel, any Court-appointed notice-provider and/or the Claims Administrator in any form whatsoever.

(5) The Settling Defendants will make themselves reasonably available to respond to questions respecting the information provided pursuant to Section 10.2(1) from the Claims Administrator. The Settling Defendants' obligations to make themselves reasonably available to respond to questions as particularized in this Section shall not be affected by the release provisions contained in Section 6 of this Settlement Agreement. Unless this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason, the Settling Defendants' obligations to cooperate pursuant to this Section 10.2 shall cease when all settlement funds or court awards have been distributed.

ALSL

2021 FC 1260 (CanLII)

(6) The Settling Defendants shall bear no liability with respect to the completeness or accuracy of the information provided pursuant to this Section 10.2.

SECTION 11 – CLASS COUNSEL FEES AND PLAINTIFF'S HONORARIUM

11.1 Responsibility for Fees and Taxes and Plaintiff's Honorarium

(1) The Settling Defendants, jointly and severally, agree to pay from the Settlement Amount the Class Counsel Fees, Class Counsel Disbursements, the Plaintiff's Honorarium, and applicable taxes, that are approved by the Court.

11.2 Responsibility for Costs of Notices

(1) The Settling Defendants shall be responsible for distribution of notices, which is part of the Administration Expenses and payable from the Settlement Amount. The Releasees shall not have any responsibility for the costs of the notices.

11.3 Court Approval for Class Counsel Fees and Disbursements

(1) Class Counsel Fees represent any and all claimable fees by Class Counsel that are to be approved by the Court. It is understood by the Parties that Class Counsel will seek approval of the Court for the Settling Defendants' payment of Class Counsel Fees in the amount of CAD$2 million, plus applicable taxes.

(2) The Settling Defendants will represent to the Court that they do not oppose approval of the Class Counsel Fees described in Section 11.3(1).

(3) Class Counsel will not seek approval for any additional payments (including any Class Counsel Disbursements).

(4) Class Counsel may seek the Court's approval to pay Class Counsel Fees contemporaneous with seeking approval of this Settlement Agreement. The Settling Defendants shall pay the Class Counsel Fees out of the Settlement Amount within ten (10) days of the Effective Date, by way of cheque and/or wire transfer, at Class Counsel's option.

11.4 Court Approval for Plaintiff's Honorarium

(1) Class Counsel may seek Court approval of an honorarium for the Plaintiff not exceeding five-thousand ($5,000) dollars CAD.

DocuSign Envelope ID: CA54CC73-B660-4875-AFA2-6BCD1DB96EB6

(2) The Settling Defendants will represent to the Court that they do not oppose approval of the honorarium described in Section 11.4(1).

(3) The Settling Defendants shall pay Plaintiff's Court-approved honorarium out of the Settlement Amount within ten (10) days of the Effective Date, by way of cheque payable to the Plaintiff, and delivered to Class Counsel's office.

SECTION 12 – MISCELLANEOUS

12.1 Motions for Directions

(1) Class Counsel or the Settling Defendants may apply to the Court as may be required for directions in respect of the interpretation, implementation and administration of this Settlement Agreement.

(2) All motions contemplated by this Settlement Agreement shall be on notice to the Parties, except for those applications concerned solely with the implementation and administration of the Distribution Protocol.

12.2 Headings, etc.

(1) In this Settlement Agreement:

(a) the division of the Settlement Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Settlement Agreement; and

(b) the terms "this Settlement Agreement," "hereof," "hereunder," "herein," and similar expressions refer to this Settlement Agreement and not to any particular section or other portion of this Settlement Agreement.

12.3 Computation of Time

(1) In the computation of time in this Settlement Agreement, except where a contrary intention appears,

(a) where there is a reference to a number of days between two events, the number of days shall be counted by excluding the day on which the first event happens and

ALSL

2021 FC 1260 (CanLII)

Doc ID: 4909aa986de6bc22fd3470d382f706b897ab144c

including the day on which the second event happens, including all calendar days; and

(b) only in the case where the time for doing an act expires on a holiday as "holiday" is defined in the *Interpretation Act*, RSC 1985, c. I-21, the act may be done on the next day that is not a holiday.

12.4 Governing Law

(1) This Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

12.5 Entire Agreement

(1) This Settlement Agreement constitutes the entire agreement among the Parties, and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements, agreements in principle and memoranda of understanding in connection herewith. None of the Parties will be bound by any prior obligations, conditions or representations with respect to the subject matter of this Settlement Agreement, unless expressly incorporated herein.

12.6 Amendments

(1) This Settlement Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment must be approved by the Court.

12.7 Binding Effect

(1) This Settlement Agreement shall be binding upon, and enure to the benefit of, the Plaintiff, the Settlement Class Members, the Settling Defendants, the Releasors, the Releasees and all of their successors and assigns. Without limiting the generality of the foregoing, each and every covenant and agreement made herein by the Plaintiff shall be binding upon all Releasors and each and every covenant and agreement made herein by the Settling Defendants shall be binding upon all of the Releasees.

ALSL

2021 FC 1260 (CanLII)

2021 FC 1260 (CanLII)

12.8 Counterparts

(1) This Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile or electronic signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

12.9 Negotiated Agreement

(1) This Settlement Agreement has been the subject of negotiations and discussions among the undersigned, each of which has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Settlement Agreement shall have no force and effect. The Parties further agree that the language contained in or not contained in previous drafts of this Settlement Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of this Settlement Agreement.

12.10 Language

(1) The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English; les parties reconnaissent avoir exigé que la présente convention et tous les documents connexes soient rédigés en anglais.

12.11 Recitals

(1) The recitals to this Settlement Agreement are true and form part of the Settlement Agreement.

12.12 Schedules

(1) The schedules annexed hereto form part of this Settlement Agreement.

12.13 Acknowledgements

(1) Each of the Parties hereby affirms and acknowledges that:

(a) he, she or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has read and understood the Settlement Agreement;

ALSL

2021 FC 1260 (CanLII)

(b) the terms of this Settlement Agreement and the effects thereof have been fully explained to him, her or the Party's representative by his, her or its counsel;

(c) he, she or the Party's representative fully understands each term of the Settlement Agreement and its effect; and

(d) no Party has relied upon any statement, representation or inducement (whether material, false, negligently made or otherwise) of any other Party, beyond the terms of the Settlement Agreement, with respect to the first Party's decision to execute this Settlement Agreement.

12.14 Authorized Signatures

(1) Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement on behalf of the Parties identified above their respective signatures and their law firms.

12.15 Notice

(1) Where this Settlement Agreement requires a Party to provide notice or any other communication or document to another Party, such notice, communication or document shall be provided by email, facsimile or letter by overnight delivery to the representatives for the Party to whom notice is being provided, as identified below:

ALSL

For the Plaintiff and for Class Counsel in the Proceedings:

Simon Lin
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6
Tel: 604.620.2666
Email: simonlin@evolinklaw.com

Jérémie John Martin and Sébastien A. Paquette
Champlain Avocats
1434 Sainte-Catherine Street West, Suite 200
Montreal, Quebec H3G 1R4
Tel: 514.944.7344
Email: jmartin@champlainavocats.com
spaquette@champlainavocats.com

For the Settling Defendants:

Sylvie Rodrigue and James Gotowiec
Torys LLP
79 Wellington St. West, 30th Floor
Toronto, ON M5K 1N2
Tel: 416.865.0040
Email: srodrigue@torys.com
jgotowiec@torys.com

12.16 Date of Execution

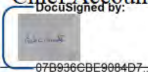
(1) The Parties have executed this Settlement Agreement as of the date on the cover page.

ARTHUR LIN on his own behalf and on behalf of the Settlement Class that he represents:

____

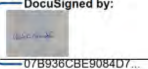
AIRBNB INC.

Name of Authorized Signatory: David Bernstein
Chief Accounting Officer

Signature of Authorized Signatory: DocuSigned by:

07B936CBE9084D7...

AIRBNB CANADA INC.

Name of Authorized Signatory: David Bernstein
President

Signature of Authorized Signatory: DocuSigned by:

07B936CBE9084D7...

ALSL

2021 FC 1260 (CanLII)

AIRBNB IRELAND UNLIMITED COMPANY

Name of Authorized Signatory: Killian Pattwell
Director, EMEA Tax

Signature of Authorized Signatory: DocuSigned by: Killian Pattwell
A1F8CFB1F4F047C...

AIRBNB PAYMENTS UK LIMITED

Name of Authorized Signatory: David Bernstein
Director

Signature of Authorized Signatory: DocuSigned by:
07B936CBE9084D7...

SIMON LIN LAW CORPORATION

Per: ______________________________

Name: Simon Lin
I have authority to bind the Corporation

JÉRÉMIE JOHN MARTIN

Per: ______________________________

Name: Jérémie John Martin

SÉBASTIEN A. PAQUETTE

Per: ______________________________

Name: Sébastien A. Paquette

2021 FC 1260 (CanLII)

2021 FC 1260 (CanLII)

For the Plaintiff and for Class Counsel in the Proceedings:

Simon Lin
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6
Tel: 604.620.2666
Email: simonlin@evolinklaw.com

Jérémie John Martin and Sébastien A. Paquette
Champlain Avocats
1434 Sainte-Catherine Street West, Suite 200
Montreal, Quebec H3G 1R4
Tel: 514.944.7344
Email: jmartin@champlainavocats.com
spaquette@champlainavocats.com

For the Settling Defendants:

Sylvie Rodrigue and James Gotowiec
Torys LLP
79 Wellington St. West, 30th Floor
Toronto, ON M5K 1N2
Tel: 416.865.0040
Email: srodrigue@torys.com
jgotowiec@torys.com

12.16 Date of Execution

(1) The Parties have executed this Settlement Agreement as of the date on the cover page.

ARTHUR LIN on his own behalf and on behalf of the Settlement Class that he represents:

AIRBNB INC.

Name of Authorized Signatory: David Bernstein
Chief Accounting Officer

Signature of Authorized Signatory: ____________________

AIRBNB CANADA INC.

Name of Authorized Signatory: David Bernstein
President

Signature of Authorized Signatory: ____________________

AIRBNB IRELAND UNLIMITED COMPANY

Name of Authorized Signatory: Killian Pattwell
Director, EMEA Tax

Signature of Authorized Signatory: ______________________

AIRBNB PAYMENTS UK LIMITED

Name of Authorized Signatory: David Bernstein
Director

Signature of Authorized Signatory: ______________________

SIMON LIN LAW CORPORATION

Per: Simon Lin

Name: Simon Lin
I have authority to bind the Corporation

JÉRÉMIE JOHN MARTIN

Per: Jérémie J. Martin

Name: Jérémie John Martin

SÉBASTIEN A. PAQUETTE

Per: ______________________

Name: Sébastien A. Paquette

ALSL

Doc ID: 4[illegible]

2021 FC 1260 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1663-17
STYLE OF CAUSE:	ARTHUR LIN v AIRBNB, INC., AIRBNB CANADA INC., AIRBNB IRELAND UNLIMITED COMPANY, AIRBNB PAYMENTS UK LIMITED
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 1, 2021
ORDER AND REASONS:	GASCON J.
DATED:	NOVEMBER 19, 2021

2021 FC 1260 (CanLII)

APPEARANCES:

Simon Lin	FOR THE PLAINTIFF
Jérémie John Martin Sébastien A. Paquette	FOR THE PLAINTIFF
Sylvie Rodrigue James Gotowiec	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Evolink Law Group Burnaby, British Columbia	FOR THE PLAINTIFF
Champlain Avocats Montréal, Quebec	FOR THE PLAINTIFF
Torys LLP Toronto, Ontario	FOR THE DEFENDANTS

TAB 11

T-463-07
2013 FC 341

Dennis Manuge (*Plaintiff*)

v.

Her Majesty the Queen (*Defendant*)

Indexed as: Manuge v. Canada

Federal Court, Barnes J.—Halifax, February 14; Ottawa, a pril 4, 2013.

Practice — Class Proceedings — Class action settlement — Motion by parties under Federal Courts Rules, r. 334.29 seeking approval for their negotiated settlement of class action taken with respect to Service Income Security Insurance Plan Long Term Disability (SISIP LTD) policy — Action at issue allowed to proceed as class action; challenging, in particular, defendant's practice of deducting monthly Pension Act disability benefits from LTD income payable to disabled class members — Court determining that defendant's interpretation of applicable SISIP LTD policy, practice thereof unlawful — Thereafter, parties negotiating financial implications of judgment — Value of financial settlement estimated at more than $887 million — Central component of proposed settlement constituting full recovery by class members or families thereof of all amounts unlawfully deducted or which would have been deducted in future from SISIP LTD income — Whether class action settlement should be approved — Majority of submissions made by class members expressing strong approval of terms of settlement — Settlement viewed very favourably by most beneficiaries — Thus, proposed settlement of action approved — Constituting generous, complete, thoughtful resolution of issues raised in litigation; would provide substantial financial assistance to thousands of disabled Canadian Forces veterans, families thereof — Class action settlement approved.

Practice — Class Proceedings — Legal costs — Motion brought, in particular, by counsel for class seeking approval for claim to legal fees under Federal Courts Rules, r. 334.4 payable from proceeds of proposed settlement in class action

T-463-07
2013 CF 341

Dennis Manuge (*demandeur*)

c.

Sa Majesté la Reine (*défenderesse*)

Répertorié : Manuge c. Canada

Cour fédérale, juge Barnes—Halifax, 14 février; Ottawa, 4 avril 2013.

Pratique — Recours collectifs — Règlement de recours collectif — Requête des parties présentée au titre de la règle 334.29 des Règles des Cours fédérales par laquelle elles sollicitaient l'approbation de leur règlement négocié quant au recours collectif concernant la police d'assurance invalidité prolongée (AIP) applicable du Régime d'assurance revenu militaire (RARM) — L'autorisation a été donnée de poursuivre l'action en cause comme recours collectif; celui-ci contestait, en particulier, la pratique de la défenderesse de déduire les prestations d'invalidité mensuelles versées aux membres du groupe atteints d'une invalidité au titre de la Loi sur les pensions des sommes qui leur sont versées à titre d'AIP — La Cour a jugé que la manière dont la défenderesse interprétait la police d'AIP applicable du RARM ainsi que sa pratique étaient illégales — Plus tard, les parties ont entrepris des négociations en vue de régler les questions liées aux incidences financières du jugement — La valeur du règlement pécuniaire a été estimée à plus de 887 millions de dollars — L'élément central du règlement proposé était le recouvrement intégral, par les membres du groupe ou par leur famille, des montants qui ont illégalement été déduits ou qui auraient autrement été déduits à l'avenir de leur revenu d'AIP du RARM — Il s'agissait de savoir si le règlement de recours collectif devait être approuvé — La majorité des observations des membres du recours collectif exprimaient leur forte approbation envers les modalités du règlement — Le règlement était perçu de manière très favorable par presque tous les bénéficiaires du groupe — Le règlement proposé relativement à la présente action a donc été approuvé — Il constituait une solution généreuse, exhaustive et réfléchie aux questions qui ont été soulevées au cours du litige, et il fournirait une aide financière substantielle aux milliers d'anciens combattants des Forces canadiennes ayant une invalidité et à leur famille — Règlement de recours collectif approuvé.

Pratique — Recours collectifs — Honoraires — Requête présentée, en particulier, par les avocats du groupe qui sollicitaient l'approbation de la Cour, au titre de la règle 334.4 des Règles des Cours fédérales, pour que leurs honoraires soient

2013 FC 341 (CanLII)

— Claim opposed by defendant's counsel on grounds of excessiveness — What amount of legal fees claimed by counsel for class should be approved? — Rules, r. 334.4 requiring that legal fees payable to class counsel must be fair, reasonable — In determining amount, Court examining several factors including results achieved; extent of risk assumed by class counsel; amount of professional time incurred; quality of representation; complexity of issues raised by litigation; fees approved in comparable cases — In present case, high quality of legal work performed by class counsel leading to favourable liability outcome — Litigation risk assumed by class counsel substantial, exceeding tolerance level of others — Evidence showing that law firms retained on behalf of class working for more than 6 years with over 8 500 hours of unbilled time — Settlement of class would provide meaningful compensation for several thousand deserving Canadian Forces (CF) veterans — Given all factors considered herein, legal fees representing 8 percent of retroactive refunds payable to class beneficiaries approved — Recovery of legal costs herein in keeping with fees approved in comparable cases, representing sufficient incentive to counsel to take on high-risk litigation without unduly impacting on much-needed recoveries of disabled CF veterans.

prélevés à même les sommes recouvrées au titre du règlement proposé — Les avocats de la défenderesse se sont opposés à cette demande au motif que le montant était excessif — Il s'agissait de savoir quel montant des honoraires demandés par les avocats du groupe devrait être approuvé — La règle 334.4 exige que les honoraires accordés aux avocats du groupe soient justes et raisonnables — Lorsque la Cour a été appelée à déterminer le montant, elle a dû examiner un certain nombre de facteurs, y compris les résultats obtenus, l'étendue du risque assumé par les avocats du groupe, la quantité d'heures de travail effectivement consacrées au litige, la qualité de la représentation, la complexité des questions soulevées par le litige et les honoraires approuvés dans des affaires comparables — En l'espèce, la grande qualité du travail juridique effectué par les avocats du groupe a conduit au résultat favorable — Le risque assumé par les avocats du groupe était important et excédait le degré de tolérance d'autres confrères — La preuve a révélé que les cabinets d'avocats retenus pour le compte du groupe ont travaillé plus de 6 ans au recours collectif et qu'ils ont investi plus de 8 500 heures de travail non facturé — Le règlement du présent recours collectif conférera une indemnisation digne de ce nom à plusieurs milliers d'anciens combattants des Forces canadiennes (FC) — Compte tenu de tous les facteurs exposés en l'espèce, des honoraires d'un montant correspondant à 8 p. 100 des remboursements rétroactifs qui seront versés aux prestataires du groupe ont été approuvés — Le recouvrement des honoraires décrit en l'espèce était conforme aux honoraires approuvés dans des affaires comparables et représentait un incitatif adéquat pour les avocats afin qu'ils acceptent des mandats relatifs à des recours collectifs à haut risque, sans pour autant avoir une incidence indue sur les sommes recouvrées par les anciens combattants des FC, dont ceux-ci avaient grand besoin.

This was a motion by the parties under rule 334.29 of the *Federal Courts Rules* seeking approval for their negotiated settlement of the class action taken with respect to the Service Income Security Insurance Plan Long Term d isability (SISIP LTd) policy. This action was allowed to proceed as a class action and it challenged, in particular, the defendant's practice of deducting monthly *Pension Act* disability benefits from the LTd income payable to disabled class members. It was determined that the defendant's interpretation of the applicable SISIP LTd policy and its practice were unlawful. That determination was not appealed and the parties negotiated to work out the financial implications of the judgment rendered. Counsel for the class also sought approval for their claim to legal fees under rule 334.4 of the Rules payable from the proceeds of the proposed settlement but this claim was opposed by the defendant's counsel on the ground that the proposed amount of legal fees was excessive.

Il s'agissait d'une requête des parties présentée au titre de la règle 334.29 des *Règles des Cours fédérales* par laquelle les parties sollicitaient l'approbation de leur règlement négocié quant au recours collectif concernant la police d'assurance invalidité prolongée (a IP) applicable du Régime d'assurance revenu militaire (Ra RM). L'autorisation a été donnée de poursuivre cette action comme recours collectif; celui-ci contestait, en particulier, la pratique de la défenderesse de déduire les prestations d'invalidité mensuelles versées aux membres du groupe atteints d'une invalidité au titre de la *Loi sur les pensions* des sommes qui leur sont versées à titre d'a IP. Il a été décidé que la manière dont la défenderesse interprétait l'a IP applicable du Ra RM et sa pratique étaient illégales. a ucun appel n'a été interjeté à l'égard de cette décision, et les parties ont entrepris des négociations en vue de régler les questions liées aux incidences financières du jugement rendu. Les avocats du groupe ont aussi demandé l'approbation de la Cour, au titre de la règle 334.4 des Règles, pour que leurs honoraires soient prélevés à même les sommes recouvrées au titre du règlement proposé, mais les avocats de

2013 FC 341 (CanLII)

The value of the financial settlement in question was estimated at more than $887 million which included the net present value of monies payable in the future to disabled class members. Similar offsets of *Pension Act* benefits from a number of other federal financial support programs were removed. The central component of the proposed settlement was 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. a lso negotiated were reasonable rates for pre- and post-judgment interest, the establishment of a $10 million bursary fund that could be accessed by class members and their families and a streamlined process for administering the payment of refunds and for resolving future claim disagreements.

The principal issue was whether the class action settlement should be approved. The appropriate amount of legal fees claimed by counsel for the class also had to be determined.

Held, the class action settlement should be approved and the legal fees claimed by counsel for the class granted in accordance with the reasons for order.

The vast majority of submissions made by class members expressed strong approval of the terms of settlement including the claim to legal costs. The overwhelming tone of the submissions to the Court was complimentary to the plaintiff and to his legal team and strongly supportive of the settlement. Based on this support, it could satisfactorily be said that the settlement was viewed very favourably by almost all class beneficiaries.

The criticism that the settlement ought to have imposed upon the government an indemnity obligation for legal costs failed to recognize that, in the Federal Court, legal costs are not, except in exceptional circumstances, payable by either party to a class proceeding regardless of the outcome pursuant to rule 334.39 of the Rules. In the absence of any provision in the 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.

la défenderesse se sont opposés à cette demande au motif que le montant proposé à titre d'honoraires était excessif.

La valeur du règlement pécuniaire en question a été estimée à plus de 887 millions de dollars, un chiffre qui comprend la valeur actualisée nette des montants qui seront versés aux membres du groupe qui ont une invalidité. d e plus, la défenderesse a mis fin à la déduction des prestations versées au titre de la *Loi sur les pensions* des sommes versées au titre d'un certain nombre d'autres programmes fédéraux de soutien financier. L'élément central du règlement proposé était le recouvrement intégral, par les 7 500 membres du groupe ou par leur famille, des montants qui ont illégalement été déduits ou qui auraient autrement été déduits à l'avenir de leur revenu d'a IP du Ra RM. Par ailleurs, les parties ont négocié des taux raisonnables en ce qui a trait aux intérêts avant et après jugement, à la création d'un fonds de perfectionnement de 10 millions de dollars auquel les membres du groupe et leur famille pourront avoir accès et à un processus simplifié quant à la gestion du paiement des remboursements et quant au règlement des différends possibles à l'égard des réclamations.

Il s'agissait principalement de savoir si le règlement de recours collectif devait être approuvé. Le montant approprié des honoraires des avocats du groupe devait également être déterminé.

Jugement : Le règlement de recours collectif doit être approuvé et les honoraires des avocats du groupe doivent être accordés en conformité avec les motifs de l'ordonnance.

La grande majorité des observations des membres du recours collectif exprimaient leur forte approbation envers les modalités du règlement, y compris quant à la réclamation relative aux honoraires. Les observations formulées à la Cour consistaient, en très grande majorité, en des compliments envers le demandeur et son équipe d'avocats ainsi qu'en un fort appui envers le règlement. Compte tenu de cet appui, on peut raisonnablement dire que le règlement était perçu de manière très favorable par presque tous les bénéficiaires du groupe.

La critique selon laquelle le règlement aurait dû imposer au gouvernement une obligation d'indemniser eu égard aux dépens ne tient pas compte du fait que, sauf dans des circonstances exceptionnelles, la Cour fédérale n'adjuge les dépens à ni l'une ni l'autre des parties dans le contexte d'un recours collectif, et ce, peu importe l'issue du recours, conformément à la règle 334.39 des Règles. Vu que les Règles ne contiennent pas de dispositions prévoyant que les dépens peuvent être payés séparément, il n'était pas déraisonnable de la part des parties de négocier un règlement portant que les dépens pouvaient être intégrés au produit du règlement.

2013 FC 341 (CanLII)

n otwithstanding some expressed concerns by a few class members, the proposed settlement of this action was approved. It was a generous, complete and thoughtful resolution of the issues that were raised in the litigation and would provide substantial financial assistance to thousands of disabled Canadian Forces (CF) veterans and their families. The terms of settlement were also the product of extensive negotiations between the parties and it would not serve the interests of the vast majority of class members to send the parties back into further discussions to address the concerns of a handful of those who opposed the arrangement. In short, it represented a fair and reasonable compromise that was in the best interests of the class as a whole.

a s for the claim by class counsel to legal costs, it was left to the Court under rule 334.4 to determine the appropriate amount thereof. Rule 334.4 requires that legal fees payable to class counsel must be fair and reasonable. In determining what is fair and reasonable, the Court had to 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, and the fees approved in comparable cases.

The high quality of the legal work performed by class counsel led to the favourable liability outcome. The litigation risk assumed by class counsel was substantial and almost certainly exceeded the tolerance level of others, a factor that favoured premium costs recovery. The evidence showed that the law firms retained on behalf of the class worked for more than 6 years and amassed more than 8 500 hours of unbilled time. The settlement of the class would provide meaningful compensation for several thousand deserving CF veterans, a factor that favoured the award of a costs premium to class counsel. The public interest in this case was more properly situated around the interests of the class than the supposed interest of the general public in controlling compensation for lawyers engaged in class litigation.

While a contingency fee agreement entered into between legal counsel and a representative plaintiff in a proposed class proceeding may be relevant and sometimes a compelling consideration in the final assessment of legal fees, 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. The contingency fee agreement that was executed by the plaintiff

Malgré les réserves exprimées par quelques membres du groupe, le règlement proposé relativement à la présente action a été approuvé. Il constituait une solution généreuse, exhaustive et réfléchie aux questions qui ont été soulevées au cours du litige, et il fournirait une aide financière substantielle aux milliers d’anciens combattants des Forces canadiennes (FC) ayant une invalidité et à leur famille. Les modalités du règlement étaient aussi le produit de longues négociations entre les parties et il ne servirait pas les intérêts de la grande majorité des membres du groupe de renvoyer les parties à la table de négociations pour qu’elles traitent des réserves exprimées par une poignée de personnes qui s’opposent à l’accord. Bref, le règlement constituait un compromis juste et raisonnable qui était dans les meilleurs intérêts du groupe dans son ensemble.

Quant aux honoraires demandés par les avocats du groupe, il appartenait à la Cour, en application de la règle 334.4, de déterminer le montant approprié de ces honoraires. La règle 334.4 exige que les honoraires accordés aux avocats du groupe soient justes et raisonnables. Lorsque la Cour a été appelée à déterminer ce qui est juste et raisonnable, elle a dû examiner un certain nombre de facteurs, y compris les résultats obtenus, l’étendue du risque assumé par les avocats du groupe, la quantité d’heures de travail effectivement consacrées au litige, le lien de causalité entre les efforts déployés par les avocats et le résultat obtenu, la qualité de la représentation, la complexité des questions soulevées par le litige, la nature et l’importance du litige et les honoraires approuvés dans des affaires comparables.

La grande qualité du travail juridique effectué par les avocats du groupe a conduit au résultat favorable. Le risque assumé par les avocats du groupe en lien avec le litige était important et excédait presque assurément le degré de tolérance d’autres confrères, un facteur militant en faveur d’une majoration des frais recouvrés. La preuve a révélé que les cabinets d’avocats retenus pour le compte du groupe ont travaillé plus de 6 ans au recours collectif et qu’ils ont investi plus de 8 500 heures de travail non facturé. Le règlement du présent recours collectif conférera une indemnisation digne de ce nom à plusieurs milliers d’anciens combattants des FC, un facteur qui milite en faveur de l’octroi de dépens majorés aux avocats du groupe. L’intérêt public en l’espèce s’articulait plutôt autour des intérêts du groupe que de l’intérêt général prétendu de la population à garder sous contrôle la compensation offerte aux avocats ayant participé au recours collectif.

Bien qu’une convention d’honoraires conditionnels conclue entre les avocats et un représentant demandeur dans le contexte d’un recours collectif projeté puisse être pertinente et qu’elle puisse parfois être une considération déterminante lors de l’examen définitif concernant les honoraires, une telle convention d’honoraires ne sera pas nécessairement une considération principale parce que celle-ci est plus souvent signée à un stade précoce de l’affaire, où on en sait fort peu

2013 FC 341 (CanLII)

was of no particular significance to the assessment here because the plaintiff and class counsel essentially walked away from the agreement.

sur son déroulement futur. La convention d'honoraires conditionnels qui a été signée par le demandeur n'était pas réellement importante dans le contexte du présent examen parce que le demandeur et les avocats du groupe ont essentiellement renoncé à cette convention.

g iven all the factors considered in this case, legal fees in an amount equal to 8 percent of the retroactive refunds payable to class beneficiaries were approved. The recovery of legal costs herein was in keeping with the fees approved in comparable cases and represented a sufficient incentive to counsel to take on high-risk litigation without unduly impacting on the much-needed recoveries of disabled CF veterans.

Compte tenu de tous les facteurs exposés en l'espèce, des honoraires d'un montant correspondant à 8 p. 100 des remboursements rétroactifs qui seront versés aux prestataires du groupe ont été approuvés. Le recouvrement des honoraires décrit en l'espèce était conforme aux honoraires approuvés dans des affaires comparables et représentait un incitatif adéquat pour les avocats afin qu'ils acceptent des mandats relatifs à des recours collectifs à haut risque, sans pour autant avoir une incidence indue sur les sommes recouvrées par les anciens combattants des FC, dont ceux-ci avaient grand besoin.

STaTuTeS and ReguLaTIOnS CITed

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (u .K.) [R.S.C., 1985, a ppendix II, no. 44].
Federal Courts Rules, SOR/98-106, rr. 334.29, 334.4.
Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1.
Pension Act, R.S.C., 1985, c. P-6.

LOIS eT RÈgLeMenTS CITÉS

Charte canadienne des droits et libertés, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-u .) [L.R.C. (1985), appendice II, nº 44].
Loi de l'impôt sur le revenu, L.R.C. (1985) (5e suppl.), ch. 1.
Loi sur les pensions, L.R.C. (1985), ch. P-6.
Règles des Cours fédérales, d ORS/98-106, règles 334.29, 334.4.

CaSeS CITed

aPPLIed:

Helm v. Toronto Hydro-Electric System Ltd., 2012 OnSC 2602 (CanLII), 40 C.P.C. (7th) 310.

COnSIdeRed:

Manuge v. Canada, 2008 FC 624, [2009] 1 F.C.R. 416, revd 2009 FCa 29, [2009] 4 F.C.R. 478, affd 2010 SCC 67, [2010] 3 S.C.R. 672; *Manuge v. Canada*, 2012 FC 499, [2013] 4 F.C.R. 647; *Châteauneuf v. Canada*, 2006 FC 286, 54 C.C.P.B. 47; *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 O.R. (3d) 281 (S.C.J.); *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, [2000] 8 W.W.R. 294; *Killough v. Canadian Red Cross Society*, 2007 BCSC 941, [2008] 2 W.W.R. 482; *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673, 83 O.R. (3d) 481 (S.C.J.).

ReFeRRed TO:

Bodnar v. Cash Store Inc., 2010 BCSC 145, 84 C.P.C. (6th) 49; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. n o. 1598 (g en. d iv.) (QL); *Slater Vecchio LLP v. Cashman*,

JuRISPRudenCe CITÉe

dÉCISIOn aPPLIQuÉe :

Helm v. Toronto Hydro-Electric System Ltd., 2012 OnSC 2602 (CanLII), 40 C.P.C. (7th) 310.

dÉCISIOnS exaMInÉeS :

Manuge c. Canada, 2008 CF 624, [2009] 1 R.C.F. 416, inf. par 2009 Ca F 29, [2009] 4 R.C.F. 478, conf. par 2010 CSC 67, [2010] 3 R.C.S. 672; *Manuge c. Canada*, 2012 CF 499, [2013] 4 R.C.F. 647; *Châteauneuf c. Canada*, 2006 CF 286; *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 R.J.O. (3e) 281 (C.S.J.); *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, [2000] 8 W.W.R. 294; *Killough v. Canadian Red Cross Society*, 2007 BCSC 941, [2008] 2 W.W.R. 482; *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673, 83 R.J.O. (3e) 481 (C.S.J.).

dÉCISIOnS CITÉeS :

Bodnar v. Cash Store Inc., 2010 BCSC 145, 84 C.P.C. (6th) 49; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. nº 1598 (d iv. gén.) (QL); *Slater Vecchio LLP v. Cashman*,

2013 FC 341 (CanLII)

2013 BCSC 134, [2013] 8 W.W.R. 392; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 12 C.P.C. (6th) 226, [2005] O.T.C. 208 (Ont. S.C.J.).

MOTIOn under rule 334.29 of the *Federal Courts Rules* in which the parties sought approval for their negotiated settlement of a class action involving the Service Income Security Insurance Plan Long Term d isability (SISIP LTd) policy and in which counsel for the class sought approval for their claim to legal fees under rule 334.4 of the Rules. Class action settlement approved; legal fees granted in accordance with reasons for order.

aPPeaRanCeS

Peter J. Driscoll, *Daniel Wallace* and *Ward K. Branch* for plaintiff.
Paul B. Vickery, *Lori Rasmussen* and *Travis Henderson* for defendant.

SOLICITORS OF ReCORd

McInnes Cooper, Halifax, and *Branch MacMaster LLP*, Vancouver, for plaintiff.
Deputy Attorney General of Canada for defendant.

The following are the reasons for order and order rendered in English by

[1] BARNES J.: 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, n ova Scotia and by a decision rendered on May 20, 2008, I certified the proceeding as a class action: see *Manuge v. Canada*, 2008 FC 624, [2009] 1 F.C.R. 416. That decision was appealed by the defendant and on February 3, 2009 the Federal Court of a ppeal set aside my certification order: see *Canada v. Manuge*, 2009 FCa 29, [2009] 4 F.C.R. 478. That decision was further appealed by the plaintiff, d ennis Manuge, to the Supreme Court of Canada and on d ecember 23, 2010 that Court, by unanimous decision, restored my order thereby allowing the action to

2013 BCSC 134, [2013] 8 W.W.R. 392; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 12 C.P.C. (6th) 226, [2005] O.T.C. 208 (C.S.J. Ont.).

Re Qu ÊTe présentée au titre de la règle 334.29 des *Règles des Cours fédérales* par laquelle les parties sollicitaient l'approbation de leur règlement négocié quant au recours collectif concernant la police d'assurance invalidité prolongée (a IP) applicable du Régime d'assurance revenu militaire (Ra RM) et par laquelle les avocats du groupe demandaient l'approbation de leurs honoraires au titre de la règle 334.4 des Règles. Le règlement de recours collectif a été approuvé et les honoraires ont été accordés conformément aux motifs de l'ordonnance.

OnT COMPaRu

Peter J. Driscoll, *Daniel Wallace* et *Ward K. Branch* pour le demandeur.
Paul B. Vickery, *Lori Rasmussen* et *Travis Henderson* pour la défenderesse.

a VOCa TS InSCRITS au dOSSIeR

McInnes Cooper, Halifax, et *Branch MacMaster LLP*, Vancouver, pour le demandeur.
Le sous-procureur général du Canada pour la défenderesse.

Voici les motifs de l'ordonnance et l'ordonnance rendus en français par

[1] LE JUGE BARNES : La présente instance avait été amorcée au moyen d'une déclaration déposée le 15 mars 2007. À la mi-février 2008, une requête en autorisation de l'instance comme recours collectif avait été plaidée devant moi à Halifax (n ouvelle-Écosse), et, par décision rendue le 20 mai 2008, j'ai autorisé l'instance comme recours collectif : voir *Manuge c. Canada*, 2008 CF 624, [2009] 1 R.C.F. 416. La défenderesse avait interjeté appel de cette décision, et le 3 février 2009, la Cour d'appel fédérale a annulé l'ordonnance d'autorisation que j'avais délivrée : voir *Canada c. Manuge*, 2009 Ca F 29, [2009] 4 R.C.F. 478. Le demandeur, M. d ennis Manuge, avait subséquemment interjeté appel de cet arrêt à la Cour suprême du Canada, qui, dans une

2013 FC 341 (CanLII)

proceed as a class action: see *Manuge v. Canada*, 2010 SCC 67, [2010] 3 S.C.R. 672.

[2] To their credit, the parties then jointly proposed to bring an issue of law before the Court for summary determination. That matter was argued before me at Halifax and by decision rendered on May 1, 2012, I determined that the defendant's interpretation of the applicable Service Income Security Insurance Plan Long Term d isability (SISIP LTd) policy and that, in particular, the practice of deducting monthly *Pension Act*, R.S.C., 1985, c. P-6, disability benefits from the LTd income payable to disabled class members was unlawful: see *Manuge v. Canada*, 2012 FC 499, [2013] 4 F.C.R. 647. 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 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.

g eneral Principles a pplicable to Class a ction 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, 84 C.P.C. (6th) 49, at paragraph 17. In *Châteauneuf v. Canada*, 2006 FC 286, 54 C.C.P.B. 47,

décision unanime rendue le 23 décembre 2010, a rétabli mon ordonnance, ce qui permettait que l'action soit poursuivie comme recours collectif : voir *Manuge c. Canada*, 2010 CSC 67, [2010] 3 R.C.S. 672.

[2] Les parties, et cela est tout à leur honneur, ont ensuite conjointement proposé de présenter une question de droit à la Cour, en vue d'obtenir un jugement sommaire. Cette affaire a été débattue devant moi à Halifax, et j'ai statué, par décision rendue le 1er mai 2012, que la manière dont la défenderesse interprétait la police d'assurance invalidité prolongée (a IP) applicable du Régime d'assurance revenu militaire (Ra RM) et, particulièrement, que la politique de déduire les prestations d'invalidité mensuelles versées aux membres du groupe atteints d'une invalidité au titre de la *Loi sur les pensions*, L.R.C. (1985), ch. P-6, des sommes qui leurs sont versés à titre d'assurance invalidité prolongée était illégale : voir *Manuge c. Canada*, 2012 CF 499, [2013] 4 R.C.F. 647. a ucun appel n'a été interjeté à l'égard de cette décision, et les parties ont entrepris des négociations approfondies en vue de régler les questions liées aux incidences financières de mon jugement.

[3] Les présents motifs sont délivrés en lien avec une requête des parties présentée au titre de la règle 334.29 des *Règles des Cours fédérales*, d ORS/98-106 (les Règles), par laquelle elles sollicitaient l'approbation de la Cour à l'égard de leur règlement négocié quant au présent recours collectif. Les avocats du groupe ont aussi demandé l'approbation de la Cour, au titre de la règle 334.4 des Règles, pour que leurs honoraires soient prélevés à même les sommes recouvrées au titre du règlement proposé. Les avocats de la défenderesse s'opposent à cette demande, au motif que le montant proposé à titre d'honoraires est excessif.

Les principes généraux applicables aux règlements de recours collectifs

[4] Il y a lieu que la Cour approuve un règlement de recours collectif dans le cas où, au vu des circonstances globales, elle juge que le règlement est juste et raisonnable, et qu'il est dans le meilleur intérêt du groupe dans son ensemble : *Bodnar v. Cash Store Inc.*, 2010 BCSC 145, 84 C.P.C. (6th) 49, au paragraphe 17. d ans

2013 FC 341 (CanLII)

at paragraph 7, Justice d anièle Tremblay-Lamer, described the general approach to the approval of a class settlement in this Court:

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. e ven 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. n o. 1598 (g en. d iv.) (QL), at paragraphs 10–11.

[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.

la décision *Châteauneuf c. Canada*, 2006 CF 286, au paragraphe 7, la juge d anièle Tremblay-Lamer a décrit la démarche générale de la Cour en matière d'approbation d'un règlement de recours collectif :

La Cour saisie d'un règlement d'un recours collectif n'y cherche pas la perfection, mais plutôt que le règlement soit raisonnable, un bon compromis entre les deux parties. Le but d'un règlement est d'éviter les risques d'un procès. Même imparfait, le règlement peut être dans les meilleurs intérêts de ceux qui sont affectés, particulièrement si on le compare aux risques et au coût d'un procès. Il faut toujours tenir compte qu'un règlement proposé signifie le désir des parties de régler le dossier hors cour sans aucune admission de part et d'autre ni quant aux faits ni quant au droit.

[5] La cour de révision ne peut réécrire les modalités de fond d'un règlement proposé, et les intérêts des membres du recours collectif ne devraient pas être examinés séparément de ceux de l'ensemble du groupe : voir *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. nº 1598 (d iv. gén.) (QL), aux paragraphes 10 et 11.

[6] Il sera toujours d'une grande importance pour la Cour de ne pas rejeter à la légère un règlement négocié d'égal à égal et de bonne foi. Les parties sont, après tout, les mieux placées pour apprécier les risques et les coûts (autant d'un point de vue financier que d'un point de vue humain) liés au fait de mener à terme un recours collectif complexe. Le rejet d'un règlement comportant de multiples aspects, comme celui négocié en l'espèce, entraîne aussi le risque de déraillement du processus de négociation et de la perte de l'esprit de compromis.

Les modalités du règlement proposé

[7] Le règlement proposé par les parties contient un certain nombre de modalités avantageuses, autant sur le plan financier que sur le plan administratif. La valeur du règlement pécuniaire a été estimée à plus de 887 millions de dollars, un chiffre qui comprend la valeur actualisée nette des montants qui seront versés aux membres du groupe qui ont une invalidité. d e plus, la défenderesse, en mettant fin à la déduction des prestations versées au titre de la *Loi sur les pensions* des sommes versées au titre d'un certain nombre d'autres

2013 FC 341 (CanLII)

programmes fédéraux de soutien financier, a sciemment amplifié l'incidence financière du règlement.

[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.

[8] L'élément central du règlement proposé est le recouvrement intégral, par les 7 500 membres du groupe ou par leur famille, des montants qui ont illégalement été déduits ou qui auraient autrement été déduits à l'avenir de leur revenu d'a IP du Ra RM. Le recouvrement rétroactif des prestations a été consenti jusqu'au 1er juin 1976, soit la date à laquelle avait commencé la compensation effectuée au titre de la *Loi sur les pensions*. Cette partie du règlement découle de la concession, faite par la défenderesse, d'abandonner sa défense relative aux limites à la couverture et d'agrandir le groupe pour qu'y soient inclus les membres des Forces canadiennes (FC) ayant une invalidité, lesquels auraient autrement été laissés pour compte. L'accord prévoit aussi que les conjoints et les enfants mineurs des membres décédés auront droit au recouvrement, au lieu de devoir recourir au processus lourd et complexe de reconnaissance des réclamations successorales.

[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.

[9] d e plus, les parties ont négocié des taux raisonnables en ce qui a trait aux intérêts avant et après jugement, qui remontent à 1992 et qui s'élevaient à 80 millions de dollars en date du 14 février 2013. Les intérêts continuent de s'accumuler, à raison de 1,3 million de dollars par mois.

[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 percent on retroactive LTd benefits payable to members and the right to deduct legal fees as an expense incurred in the recovery of taxable income.

[10] Les parties reconnaissent que les prestations d'a IP versées aux membres du groupe seront assujetties à l'impôt sur le revenu. Vu que les prestations d'a IP du Ra RM constituent un revenu imposable, le paiement d'impôt sur le revenu est essentiellement inévitable. Pour atténuer l'incidence de l'impôt sur les sommes forfaitaires recouvrées, les prestataires ayant une invalidité auront la possibilité, si cela leur permet de diminuer leur montant d'impôt à payer, de répartir les sommes reçues à titre de remboursements rétroactifs sur les années au cours desquelles elles auraient été exigibles. d 'autres mesures d'atténuation fiscale comprennent un supplément de traitement en espèces de 3,27 p. 100 sur les prestations rétroactives d'a IP devant être versées aux membres, ainsi que le droit de déduire les honoraires, à titre de dépense engagée en vue du recouvrement d'un revenu imposable.

2013 FC 341 (CanLII)

[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 a ssociation of u niversities 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 for each eligible applicant.

[11] Pour tenir compte des difficultés vécues par certains des membres du groupe, les parties ont convenu de créer un fonds de perfectionnement de 10 millions de dollars, qui sera géré pendant une période de 15 ans par l'a ssociation des universités et des collèges du Canada. Les membres du groupe et leur famille pourront avoir accès à ce fonds en vue d'études à temps partiel et à temps plein, et on s'attend à ce que des bourses allant jusqu'à 1 300 dollars puissent être accordées à chaque demandeur admissible.

[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 n ovember 30, 1989, the defendant has agreed unconditionally to treat all zero sum members as disabled during the initial 24-month own occupation disability period.

[12] Les parties ont aussi négocié un processus simplifié quant à la gestion du paiement des remboursements et quant au règlement des différends possibles quant aux réclamations. Plus précisément, un certain nombre de membres du groupe ont été visés par des compensations effectuées au titre de la *Loi sur les pensions* qui excédaient la valeur de leurs prestations d'a IP du Ra RM. Ces membres en sont venus à être désignés sous le nom de bénéficiaires à « somme zéro ». Il était difficilement possible d'établir si ceux-ci étaient constamment admissibles aux prestations d'a IP, parce que l'administrateur du Ra RM n'avait pas gardé leurs renseignements financiers et médicaux. Cet obstacle au recouvrement a été levé, en partie, en permettant à l'administrateur du Ra RM d'avoir accès aux données médicales provenant d'autres sources gouvernementales et en établissant des indicateurs approximatifs pour déterminer le degré constant d'invalidité d'une personne. Ce calcul tenait compte d'une reconnaissance « d'invalidité totale » au titre d'autres programmes de gestion de l'invalidité, comme celui du Régime de pensions du Canada. Pour les membres libérés après le 30 novembre 1989, la défenderesse a consenti, sans condition, à considérer comme invalides tous les membres à somme zéro au cours de la période de 24 mois initiale correspondant à leur emploi antérieur.

[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.

[13] u n processus d'appel simple et exécutoire a été établi pour les membres du groupe qui sont en désaccord avec l'évaluation de la défenderesse quant à l'invalidité ou avec la somme devant leur être versée. Les avocats du groupe se sont engagés à représenter les membres dans le cadre de tout appel interjeté à cet égard, lesquels seront instruits par une arbitre expérimentée, au sujet de laquelle les parties se sont entendues et dont la rémunération sera assurée par la défenderesse.

2013 FC 341 (CanLII)

[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. a t 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. g eorge Hrynewich wrote the following:

[14] Le règlement proposé prévoit aussi la nomination d'un surveillant, qui aura la responsabilité de vérifier si la défenderesse se conforme aux modalités du règlement. Le surveillant présentera un rapport chaque trimestre et sera rémunéré par la défenderesse.

[15] e n dernier lieu, à l'exception d'un différend qui reste à trancher entre les parties concernant le calcul de l'indice des prix à la consommation (IPC) concernant les prestations payables au titre de la police du Ra RM (et qui sera tranché à une date ultérieure par la Cour), le règlement prévoit la libération de la défenderesse à l'égard de toute responsabilité en lien avec les réclamations qui découlent du présent litige ou qui auraient pu y être soulevées.

L'opinion des membres du groupe

[16] L'avis préliminaire de règlement invitait les membres du groupe à écrire à leurs avocats pour exprimer leur appui ou leur opposition aux modalités du règlement. Les avocats ont reçu 269 réponses, qu'ils ont produites à la Cour par voie d'affidavit. u n petit nombre de membres du groupe ont écrit directement à la Cour. u n certain nombre de membres du groupe étaient présents lors de l'audition de la requête visant l'approbation du règlement proposé, et plusieurs d'entre eux se sont adressés à la Cour. Ils y exprimaient, dans la grande majorité de leurs observations, leur forte approbation envers les modalités du règlement, y compris quant à la réclamation relative aux honoraires. Seules 15 des observations écrites témoignaient d'un désaccord général quant au règlement, et 18 autres relataient uniquement un désaccord quant à la réclamation des frais juridiques. d e plus, 30 membres du groupe ont pris position pour que la défenderesse fasse droit à la réclamation des honoraires formulée par les avocats du groupe.

[17] Les observations formulées à la Cour consistaient, en très grande majorité, en des compliments envers M. Manuge et son équipe d'avocats ainsi qu'en un fort appui envers le règlement. Quelques exemples suffiront pour illustrer cette opinion générale. M. g eorge Hrynewich a rédigé ce qui suit :

2013 FC 341 (CanLII)

a s 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 a gency (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.

[TRADUCTION] Le règlement me permettra de récupérer ce que le Ra RM m'a arraché. Le montant à titre d'intérêts est acceptable en ce qui me concerne, parce qu'honnêtement, j'aurais probablement dépensé l'argent et je n'aurais gagné aucun revenu d'intérêt. Les honoraires des avocats? C'est certain que tout le monde aimerait que ces frais-là soient moins élevés, mais je m'attendais à ce qu'ils soient plus élevés, de sorte que j'estime qu'il sont justes. Ils ont travaillé beaucoup pour nous et ils ont dû composer avec plusieurs problèmes. Ce serait bien si M. Manuge pouvait en obtenir un peu plus pour tout le travail qu'il a fait pour lancer l'action en justice et la poursuivre. On ne peut échapper à l'impôt sur le revenu, et je préférerais plutôt que l'a gence du revenu du Canada (l'a RC) retienne trop d'argent et qu'elle me rembourse plus tard, plutôt que d'avoir à trouver les moyens de lui redonner de l'argent l'année prochaine. e n bref, je dois dire que je suis convaincu que nous avons atteint les buts principaux que je voulais qu'on accomplisse lorsque je me suis greffé à cette action en justice. Je ne m'y suis pas joint en m'attendant à devenir riche et je crois que le règlement est raisonnable et juste.

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.

Peut-être, et surtout, j'aimerais que ce processus prenne fin, et qu'il prenne fin alors que nous avons un règlement favorable. Si quelqu'un me promettait que j'obtiendrais définitivement plus d'argent, mais que cela pourrait nécessiter plusieurs années supplémentaires et nous faire perdre certains de nos autres gains, je lui dirais non merci. Cette personne devra pouvoir me garantir que j'obtiendrais des centaines de milliers de dollars, voire un million, avant que je lui dise que je songerais même à y penser. Ce n'est que mon avis, et je respecte l'opinion de la majorité des membres du groupe, ainsi que le jugement et les décisions de la Cour.

Marcel Pellerin wrote:

Marcel Pellerin a écrit ce qui suit :

Hello my name is Marcel Pellerin and I vote Ye S to accept this settlement proposal.

[TRADUCTION] Bonjour, je m'appelle Marcel Pellerin et je vote POuR l'acceptation de cette proposition de règlement.

I would have liked more tax relief, however I am very pleased that this whole thing is almost over.

J'aurais aimé bénéficier de plus d'allègements fiscaux, mais je suis cependant très content que toute cette histoire soit presque terminée.

The stress anxiety and physical illness that this has caused me over the last 10 years is more than I could continue to bare.

Je ne pourrais plus continuer d'endurer le stress, l'anxiété et les problèmes de santé physique que l'affaire m'a causés au cours des dix dernières années.

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.

Merci beaucoup à notre équipe d'avocats et à M. Manuge. Vous avez obtenu un merveilleux résultat pour le groupe, [n]otamment pour moi et pour ma fille adolescente.

d ana Morris wrote:

d ana Morris a écrit ce qui suit :

I would like to thank you and your staff for the work you have done on our behalf with this Class a ction. This was a

[TRADUCTION] J'aimerais vous remercier, vous et votre personnel, pour tout le travail que vous avez fait pour notre

2013 FC 341 (CanLII)

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 d ennis Manuge and Peter d riscoll, 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 a greement 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, "THan K YOu so very much" for giving us hope and "a little piece of ourselves back".

[18] g iven 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 rule 334.4 of the Rules, 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

compte dans le présent recours collectif. Il s'agissait d'une tâche monumentale, pour laquelle il fallait manifestement des nerfs solides. La minutie et le professionnalisme dont vous avez fait preuve devraient être la norme à imiter.

Je trouve toujours qu'il est difficile… non, impossible, d'estimer les sommes qui nous seront accordées; cela dit, à ce stade-ci, cela n'a pas d'importance! Si ce n'avait été du courage de dennis Manuge et de Peter driscoll, ainsi que de leur détermination à aller jusqu'au bout, nous (les membres du groupe) n'aurions rien à quoi nous attendre, ni à espérer.

À titre de membre du groupe et d'ancien combattant invalide, j'appuie, tout comme ma famille, l'accord et le pourcentage d'honoraires, tels que décrits par McInnes Cooper dans le courriel daté du 9 janvier 2013 et envoyé à tous les membres du groupe.

Je ne saurais assez dire « MERCI beaucoup », pour nous avoir donné de l'espoir ainsi que « redonné une petite partie de nous-mêmes ».

[18] Compte tenu du fort appui envers le règlement qui a été exprimé par la vaste majorité des membres du groupe ayant présenté des observations ainsi que de la notoriété générale de la présente affaire et de son issue au sein de la communauté des vétérans invalides, je suis convaincu que le règlement est perçu de manière très favorable par presque tous les bénéficiaires du groupe. Si l'insatisfaction à l'égard du règlement était généralisée, je me serais certes attendu à ce que plus que quelques membres du groupe aient fait part de leurs réserves à la Cour.

[19] a u vu des observations des membres du groupe, il appert que certains des opposants au règlement proposé croient, à tort, que la Cour a le pouvoir d'en modifier les modalités de manière unilatérale. À l'exception de l'approbation des honoraires en vertu de la règle 334.4 des Règles, la Cour n'a pas le pouvoir de modifier un règlement conclu entre les parties ou de leur imposer ses propres modalités. Le rôle de la Cour se limite plutôt à approuver ou à rejeter un règlement dans son intégralité.

[20] Le paiement d'impôt sur le revenu tiré des prestations rétroactives d'a IP, la réticence du gouvernement à contribuer au paiement des frais juridiques engagés par le groupe et l'absence d'indemnité à titre de dommages-intérêts généraux ou punitifs étaient trois questions

2013 FC 341 (CanLII)

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 points 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 rule 334.39 of the Rules. 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.

récurrentes au sujet desquelles certains membres du groupe avaient des réserves. Quelques personnes étaient préoccupées par des points précis, dont notamment la mère d'un ancien combattant décédé, qui s'opposait au fait que les membres de la famille élargie soient exclus du groupe.

[21] Les réserves exprimées par quelques membres du groupe à propos du défaut d'inclure une indemnité à titre de dommages-intérêts généraux ne sont pas convaincantes. Il s'agissait d'une réclamation relative à la violation d'un contrat, une situation dans laquelle on accorde rarement de telles indemnités, dont le montant n'est certainement pas substantiel. Les avocats soulignent aussi, non sans justification, que le fonds de perfectionnement de 10 millions de dollars au sujet duquel les parties se sont entendues représente une forme d'indemnité de remplacement pour les difficultés personnelles vécues par certains des membres du groupe au fil des ans. Le maintien des réclamations en dommages-intérêts généraux aurait également exigé de chacun des membres du groupe qu'il produit une preuve médicale et, possiblement, qu'il livre un témoignage au sujet des difficultés qu'il a vécues. Je suis d'avis qu'une telle démarche aurait nécessité plus de temps et de ressources financières, et qu'elle aurait été plus complexe que ne le justifieraient les avantages pécuniaires qui en auraient découlé.

[22] La critique selon laquelle le règlement aurait dû imposer au gouvernement une obligation d'indemniser eu égard aux dépens ne tient pas compte du fait que, sauf dans des circonstances exceptionnelles, la Cour n'adjuge pas les dépens à ni l'une ni l'autre des parties dans le contexte d'un recours collectif, et ce, peu importe l'issue du recours : voir la règle 334.39 des Règles. Cette disposition avait été adoptée dans le but d'éliminer un obstacle pratique à l'introduction d'un recours collectif par un représentant demandeur, car, sinon, ce dernier pourrait être exposé à une importante adjudication des dépens s'il devait ultimement être débouté. Vu que nos règles ne contiennent pas de dispositions prévoyant que les dépens puisse être payés séparément, il n'était pas déraisonnable de la part des parties de négocier un règlement portant que les dépens pouvaient être intégrés au produit du règlement.

2013 FC 341 (CanLII)

[23] a few members of the class complain that income tax will be payable on their retroactive LTd payments. Taxes are, however, the inevitable consequence of the application of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, and the manner in which SISIP LTd premiums were paid over the years. u nder the proposed settlement, class members are entitled to a 3.27 percent 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.

[23] Quelques membres du groupe se plaignent qu'ils devront payer l'impôt sur le revenu à l'égard de leurs prestations rétroactives d'a IP. Cependant, l'imposabilité est une conséquence inéluctable de l'application de la *Loi de l'impôt sur le revenu*, L.R.C. (1985) (5e suppl.), ch. 1, et de la manière avec laquelle les primes d'a IP du Ra RM ont été payées au fil des ans. Selon le règlement proposé, les membres du groupe ont droit à une majoration de 3,27 p. 100 aux fins de l'impôt et ils pourront choisir de recevoir des prestations échelonnées, si cela leur permet d'obtenir un résultat plus avantageux sur le plan fiscal. Ces mesures atténueront l'incidence de l'impôt sur le revenu à l'égard des sommes recouvrées imposables. On doit aussi garder à l'esprit que, si les membres du groupe avaient reçu leurs prestations intégrales d'a IP conformément à la police du Ra RM, celles-ci auraient été assujetties à l'impôt au moment de leur réception.

[24] n o 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.

[24] Il n'y aura jamais de règlement de recours collectif parfait. Le recouvrement est toujours confiné aux personnes qui répondent à la définition de membre du groupe, selon les modalités de l'autorisation. d ans des affaires, comme celle en l'espèce, qui concernent des milliers de réclamations uniques, il est impossible et non souhaitable de traiter chaque prestataire de la même manière, autant d'un point de vue financier que d'un point de vue administratif. Il est inévitable qu'un règlement comme celui en l'espèce laisse pour compte quelques personnes ou profite davantage à certains. d ans le cas présent, ces écarts ne sont pas assez importants pour rejeter le règlement proposé.

[25] n otwithstanding 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

[25] Je n'ai aucune hésitation à approuver le règlement proposé relativement à la présente action, et ce, en dépit des réserves exprimées par quelques membres du groupe. Il constitue une solution généreuse, exhaustive et réfléchie aux questions qui ont été soulevées au cours du litige, et il fournira une aide financière substantielle aux milliers d'anciens combattants des FC ayant une invalidité et à leur famille. Les modalités du règlement sont aussi le produit des longues négociations entre les parties. Il ne servirait pas les intérêts de la grande majorité des membres du groupe — dont un bon nombre éprouvent des difficultés financières — de renvoyer les parties à la table de négociations pour qu'elles traitent des réserves exprimées par une poignée de personnes

2013 FC 341 (CanLII)

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.

qui s'opposent à l'accord. Ce règlement a aussi reçu l'assentiment de la grande majorité des membres du groupe qui ont saisi l'occasion de faire connaître leur opinion à la Cour. e n résumé, le règlement constitue un compromis juste et raisonnable, qui est dans les meilleurs intérêts du groupe dans son ensemble et qui est, par conséquent, approuvé.

[26] I would be remiss if I failed to recognize legal counsel, Mr. Manuge and the g overnment 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.

[26] Il serait négligent de ma part de ne pas reconnaître que les avocats, M. Manuge et le gouvernement du Canada ont fait preuve d'un esprit de générosité et de compromis, lequel a manifestement guidé leurs négociations et a conduit au règlement du différend de longue date qui était au cœur de la présente affaire. Le règlement n'aurait pas été possible sans la ténacité de M. Manuge, la bonne volonté fondamentale des parties et le travail ardu de tous les avocats concernés.

[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.

[27] C'est toutefois différent en ce qui concerne la réclamation relative aux honoraires présentée par les avocats du groupe. Les parties ne s'entendent pas quant à cette question, et, quoi qu'il en soit, il appartient à la Cour, en application de la règle 334.4 des Règles, de déterminer le montant approprié de ces honoraires.

[28] a t 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 CanLII 22386, 49 O.R. (3d) 281 (S.C.J.) (*Parsons*). 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, [2000] 8 W.W.R. 294 (*Endean*), at paragraph 73.

[28] L'obligation que les honoraires accordés aux avocats du groupe soient justes et raisonnables est au cœur de l'application de l'article 334.4 des Règles : voir *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 R.J.O. (3e) 281 (C.S.J.) (*Parsons*). Lorsque la Cour est appelée à déterminer ce qui est juste et raisonnable, elle doit examiner un certain nombre de facteurs, y compris les résultats obtenus, l'étendue du risque assumé par les avocats du groupe, la quantité d'heures de travail effectivement consacrées au litige, le lien de causalité entre les efforts déployés par les avocats et le résultat obtenu, la qualité de la représentation, la complexité des questions soulevées par le litige, la nature et l'importance du litige, la probabilité que les réclamations individuelles aient été soumises aux tribunaux de toute façon, les opinions exprimées par le groupe, l'existence d'une convention d'honoraires et les honoraires approuvés dans des affaires comparables. On a aussi reconnu, dans certaines décisions, qu'il existe un intérêt public général à ce qu'un contrôle soit exercé sur

2013 FC 341 (CanLII)

les honoraires payables aux avocats : voir *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, [2000] 8 W.W.R. 294 (*Endean*), au paragraphe 73.

The Quality of Legal Representation and the Results a chieved

[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. e very dollar deducted will be returned to class members or their families with appropriate interest. n otwithstanding 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. a s 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 percent. 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

La qualité de la représentation juridique et les résultats obtenus

[29] Les décisions relatives à l'autorisation de recours collectif et à la responsabilité, lesquelles étaient à l'origine du règlement, découlaient d'une représentation habile et tenace de la part des avocats du groupe dans le contexte d'un processus contradictoire qui les opposait à des avocats tout aussi habiles et tenaces. Les questions en litiges ont été abordées en profondeur et ont été plaidées de manière convaincante; il ne fait aucun doute que la grande qualité du travail juridique effectué par les avocats du groupe a conduit au résultat favorable à leurs clients quant à la question de la responsabilité.

[30] Les modalités du règlement sont tout aussi impressionnantes. Chaque dollar déduit sera remboursé aux membres du groupe ou à leur famille, avec les intérêts applicables. a bstraction faite de l'incidence des honoraires, les sommes recouvrées par les membres du groupe constitueront une indemnisation valable et qui, pour nombre de ces derniers, était grandement nécessaire. Le fait que la défenderessse ait retiré ses allégations en défense fondées sur les limites à la couverture permettra à d'autres demandeurs de s'ajouter au recours collectif, ainsi que le recouvrement de sommes datant de 1976. u n fonds de perfectionnement de 10 millions de dollars sera établi, à titre d'indemnité de remplacement eu égard à d'éventuelles réclamations en dommages-intérêts généraux. Comme il a été discuté ci-dessus, il est notoire qu'il est difficile de prouver l'existence de dommages de droit dans un cas de violation de contrat. Cela se révèle particulièrement vrai dans des cas où les demandeurs ont une invalidité attestée par un médecin, et les incidences psychologiques découlant du manque d'argent sont souvent difficiles à isoler des autres facteurs sous-jacents. La solution retenue par les parties pour résoudre le présent litige était novatrice et créative. On peut en dire de même de l'inclusion des conjoints survivants et des enfants à charge, plutôt que de faire entrer en jeu la succession des membres du groupe qui sont décédés, avec les énormes difficultés

2013 FC 341 (CanLII)

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.

que ce processus entraînerait. d es mesures simples et efficientes ont été mises en place pour résoudre tout différend qui persisterait concernant les prestations, et on s'attend à ce que les prestataires acceptent celles-ci dans une proportion approchant 100 p. 100. Il s'agit de résultats qui n'auraient pas été raisonnablement envisagés par quiconque au début du présent litige. e n fait, si les négociations quant au règlement avaient été entreprises avant que j'aie rendu mon jugement, l'issue raisonnablement envisageable aurait été substantiellement moins favorable aux membres du groupe que celle en l'espèce. L'excellente représentation juridique offerte par les avocats du groupe et le succès obtenu dans le contexte des négociations quant au règlement sont des facteurs qui militent en faveur d'une majoration importante dans la taxation des dépens.

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] 8 W.W.R. 392.

[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. g iven 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 [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (u .K.)

Le caractère risqué du litige

[31] Il ne fait aucun doute que les avocats du groupe se sont exposés à un important degré de risque lorsqu'ils ont accepté le mandat quant à la présente affaire. u ne fois que l'affaire avait ultimement été autorisée comme recours collectif, les avocats étaient tenus de la porter jusqu'à sa conclusion définitive, pour le compte de tous les membres du groupe : voir *Slater Vecchio LLP v. Cashman*, 2013 BCSC 134, [2013] 8 W.W.R. 392.

[32] d ans le cours normal de ce type de litige, les avocats peuvent s'attendre à ce que leurs services soient retenus pendant de nombreuses années. e n l'espèce, on s'attendait à ce que des dizaines de milliers de pages de preuve documentaire soient communiquées; des interrogatoires exhaustifs de témoins ainsi que d'autres tâches préalables au procès étaient aussi envisagés. Lorsque les avocats du groupe ont accepté le mandat de représentation en justice, on ne s'attendait pas à ce que la question juridique déterminante soit réglée de manière sommaire et à ce que cette décision ne fasse pas l'objet d'un appel. Compte tenu de l'opposition exprimée par la défenderesse à l'égard de la requête en autorisation, les avocats auraient assumé qu'ils s'exposaient à un risque financier pouvant se mesurer en une possible perte d'heures de travail professionnel et en des débours qui atteindront probablement des dizaines de millions de dollars. Il ne s'agissait pas non plus d'une affaire où la responsabilité

2013 FC 341 (CanLII)

[R.S.C., 1985, a ppendix II, n o. 44]] 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.

de la défenderesse était presque chose certaine. L'issue de la réclamation quant au redressement fondé sur la Charte [*Charte canadienne des droits et libertés*, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-u .) [L.R.C. (1985), appendice II, nº 44]] était douteuse dans le meilleur des cas, et l'élément d'interprétation contractuelle qui a, en fin de compte, conduit au règlement n'était ni une certitude ni blindé contre un appel. Bien qu'il y eût possiblement une dimension politique au règlement définitif, il est peu probable qu'une telle somme eut été recouvrée, le cas échéant, si ma décision quant à la responsabilité avait été défavorable au groupe et qu'elle avait ensuite été confirmée en appel.

[33] e ven the motion to certify this action exposed counsel to considerable risk. a lthough 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.

[33] Même la requête en autorisation de l'action comme recours collectif exposait les avocats à un degré de risque considérable. Bien que ma décision d'autoriser le recours collectif ait été rétablie par la Cour suprême du Canada, la probabilité d'obtenir l'autorisation de pourvoi devant cette cour n'était d'environ qu'une chance sur dix. d e plus, l'arrêt de la Cour suprême du Canada était centré sur une question contestée en matière de droit judiciaire qui subsistait depuis longtemps dans la jurisprudence canadienne. Les avocats de M. Manuge ont entrepris un processus de trois ans pour obtenir l'autorisation du recours collectif. Ils ont aussi pris en charge des dizaines de milliers de dollars de frais remboursables et ils ont accepter d'indemniser M. Manuge pour sa possible condamnation aux dépens devant la Cour suprême du 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 d riscoll in 2007.

[34] Le risque assumé par les avocats du groupe en lien avec le litige s'illustre aussi par le fait que le différend qui était au cœur de l'affaire était bien connu depuis plus de 30 ans et que celui-ci n'avait pas été judiciarisé, que ce soit à titre individuel ou à titre de recours collectif, jusqu'à ce que Me Peter d riscoll accepte, en 2007, le mandat concernant la réclamation de M. Manuge.

[35] Counsel for the defendant points 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.

[35] Les avocats de la défenderesse soulignent que la décision de ne pas interjeter appel de mon jugement a fait diminuer de manière considérable le risque lié au litige. Par conséquent, ils ont prétendu que la valeur rattachée aux heures consacrées au travail professionnel par les avocats du groupe après ce moment-là ne devrait pas faire partie du calcul.

2013 FC 341 (CanLII)

[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. a ccording 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] a t 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 [at paragraphs 29, 36–38 and 42]:

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.

…

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.

[36] Les avocats du groupe prétendent que la plupart des heures de travail juridique qu'ils ont consacrées à la présente affaire étaient attribuables au fait que la demanderesse s'était initialement opposée au recours collectif. Selon eux, la conduite initiale de la défenderesse dans sa défense contre la réclamation diminue le poids de l'argument qu'elle présente à ce stade-ci, selon lequel les honoraires réclamés sont excessifs.

[37] À cette étape-ci, je ne me préoccupe pas particulièrement des positions que les parties avaient adoptées avant de conclure le règlement. Il suffit de relever que le risque lié au litige que les avocats du groupe ont assumé est surtout apprécié en fonction du risque assumé au tout début de l'affaire. Ce point a été souligné par le juge Warren Winkler dans la décision *Parsons*, précitée, dans les passages suivants [aux paragraphes 29, 36 à 38 et 42] :

[TRADUCTION] d e plus, un recours collectif introduit des complications supplémentaires. Les recours collectifs complexes se subsument dans les heures productives des avocats. Le risque assumé par les avocats n'est pas simplement en fonction des probabilités de gagner ou de perdre sa cause. Il faut aussi s'arrêter aux ressources investies par l'avocat du groupe et aux incidences que cela aura dans l'éventualité où le recours devait échouer. Le fait d'avoir gain de cause dans l'un des deux recours collectifs pourrait être une marque de réussite raisonnable. Cependant, pour l'avocat qui est débouté lors de son premier recours collectif, l'épuisement total des ressources dont il dispose pourrait faire en sorte qu'il serait incapable de piloter une autre action. Par conséquent, le véritable risque assumé par l'avocat du groupe n'est pas la simple réciproque de « l'évaluation de la probabilité de succès » de l'action, même si ce calcul ne repose sur aucun degré de certitude. À un certain point, un avocat qui défend un groupe dans le contexte d'un recours collectif complexe peut véritablement, pour reprendre les mots employés par M. Strosberg, « parier son cabinet », et ce, sans égard au degré de risque. Il faut en tenir compte lors de l'appréciation du facteur de « risque » eu égard aux honoraires appropriés pour les avocats.

[…]

Il appert du dossier que, même si le présent litige a pris la forme d'une négociation en vue d'un règlement à compter du milieu de l'année 1998, les risques assumés par l'avocat du groupe n'en étaient pas moins réels que s'il avait consacré ses heures professionnelles à l'obtention d'une décision dans un processus judiciaire, et ce, à tous les stades du litige.

2013 FC 341 (CanLII)

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. a ccordingly, 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.

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. a s 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.

…

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

d e plus, la législation autorisant les recours collectifs introduit plusieurs caractéristiques qui distinguent ces actions d'un litige ordinaire. u n des aspects qui alourdit le risque inhérent aux recours collectifs est l'exigence que tout règlement conclu soit approuvé par la cour. d e longues négociations nécessitent que les avocats et les parties y consacrent du temps et des ressources. Cependant, la cour n'approuvera pas un règlement de recours collectif qu'elle juge ne pas être dans le meilleur intérêt du groupe, et ce, sans égard à la question de savoir si les avocats du groupe sont d'avis contraire. Par conséquent, les avocats du groupe peuvent se trouver dans la situation d'avoir consacré du temps et des ressources en vue de la négociation d'un règlement, qu'ils croient être dans le meilleur intérêt du groupe, seulement pour réaliser que la cour n'approuvera pas le règlement qui a été conclu. Bien que cette situation constitue un risque en soi, elle entraîne aussi un avantage pour le défendeur, qui peut réussir à prolonger les négociations jusqu'à ce que les ressources des avocats du groupe soient épuisées, avant de présenter une « offre définitive de règlement » qui peut ultimement ne pas être approuvée par la cour. d ans de tels cas, les avocats du groupe peuvent avoir épuisé leurs ressources en tentant d'obtenir un règlement raisonnable et, par conséquent, être incapables de poursuivre le litige. Il s'ensuit que, dans le contexte d'un recours collectif, le risque n'est pas simplement apprécié en fonction des questions de savoir si un procès est prévu et si le groupe aura gain de cause. Il existe plutôt des risques inhérents à l'adoption et au maintien d'une stratégie donnée en vue du règlement de l'affaire.

Compte tenu de ce qui précède, je ne peux souscrire à la prétention selon laquelle le degré de risque dans la présente affaire était moins élevé du fait que les parties ont choisi de négocier. d e plus, contrairement à ce que certains intervenants ont fait observer, il semble que le fait que les avocats du groupe aient consacré du temps et des ressources dans les négociations occasionnait, au fur et à mesure que ces négociations continuaient, une augmentation du risque plutôt qu'une diminution. Les négociations devenaient plus difficiles du fait que les parties se rapprochaient d'un règlement, puisque les questions devenaient plus pointues, ce qui entraînait un accroissement, et non une diminution, du risque d'aboutir dans une impasse. La progression des négociations faisait en sorte qu'elles devenaient de plus en plus périlleuses.

[…]

Les dépenses des avocats du groupe, autant sur le plan du temps consacré que sur le plan financier, risquaient de devenir des pertes si un politicien au pouvoir avait décidé, pour des raisons de commodité ou de principe, de ne pas régler de recours collectifs ou d'instaurer de manière unilatérale un régime de compensation sans égard à la faute, et ainsi court-circuiter l'avocat du groupe et le litige. Il y avait toujours le

2013 FC 341 (CanLII)

reluctance on the part of a particular government or a class in a particular action to approve an agreement.

danger intrinsèque qu'un règlement pancanadien puisse être impossible à obtenir, en raison de la réticence d'un gouvernement en particulier ou du groupe partie à une action en particulier à approuver une entente.

[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.

[38] Je suis d'avis que le risque assumé par les avocats du groupe en lien avec le litige était important et qu'il excédait presque assurément le degré de tolérance d'autres confrères. Il s'agit d'un facteur militant en faveur d'une majoration des frais recouvrés, en partie pour inciter les avocats à accepter des mandats relatifs à des recours collectifs ardus qui concernent des réclamations potentiellement fondées qui pourraient sinon être abandonnées.

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 8 500 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 and are estimated to exceed $260 000 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.

Le temps et les efforts consacrés

[39] L'affidavit de Me Driscoll, l'avocat principal, révèle que les deux cabinets d'avocats retenus pour le compte du groupe ont travaillé plus de 6 ans sur le recours collectif (qui a nécessité 20 avocats) et qu'ils ont investi plus de 8 500 heures de travail non facturé. Il leur reste d'autres tâches considérables à accomplir, y compris superviser directement le processus de remboursement ainsi que fournir de l'aide relativement aux appels interjetés à titre individuel par les membres du groupe et suivre l'évolution de ces appels. Ils ont déployé des efforts considérables jusqu'à maintenant afin de répondre aux demandes de renseignements provenant de centaines de membres très actifs du groupe, et continueront sans doute de ce faire. Les frais remboursables s'élèvent maintenant à tout près de 200 000 dollars, et on estime que ceux-ci excéderont 260 000 dollars d'ici la conclusion de l'affaire. Les avocats ont assumé l'ensemble des dépenses liées au dossier, lesquelles représentaient, dans une très large mesure, un risque. Les avocats du groupe évaluent à plus de 3,2 millions de dollars leurs heures de travail non facturé à ce stade-ci. Cette évaluation me semble raisonnablement juste. Cependant, il est important de reconnaître que ces cabinets d'avocats ont assumé, pendant plusieurs années, les coûts liés à une grande partie des heures de travail facturables et l'ensemble des débours liés au dossier et qu'il leur reste un travail considérable à effectuer relativement à la surveillance et à la prise en charge des réclamations des membres du groupe à titre individuel.

2013 FC 341 (CanLII)

The Importance of the Litigation to the Class

[40] This was important litigation dealing with a long-standing, contractual grievance involving thousands of disabled CF veterans. Since 1976, the practice of deducting *Pension Act* disability payments from SISIP LTd benefits had been the source of hardship drawing considerable third-party criticism. u ntil my liability judgment was delivered, the g overnment 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 situated 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, [2008] 2 W.W.R. 482 (*Killough*), where at paragraph 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, the deduction of legal fees of about $1 500 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 from an award of $250 000 will result in a meaningful

L'importance du litige pour les membres du groupe

[40] Il s'agissait d'un important litige concernant un différend contractuel de longue date touchant des milliers d'anciens combattants des FC ayant une invalidité. d epuis 1976, la politique de déduire les prestations d'invalidité versées au titre de la *Loi sur les pensions* des prestations d'a IP du Ra RM avait entraîné plusieurs difficultés et avait attiré plusieurs critiques de la part de tierces parties. Le gouvernement du Canada a défendu sa position avec vigueur, jusqu'à ce que je rende mon jugement quant à la responsabilité. Le règlement du présent recours collectif conférera une indemnisation digne de ce nom à plusieurs milliers d'anciens combattants des FC, et le paiement au titre de ce règlement constituera vraisemblablement le quatrième en importance de l'histoire des recours collectifs au Canada. Il s'agit de facteurs qui militent en faveur de l'octroi de dépens majorés aux avocats du groupe.

L'intérêt public

[41] S'il existe un intérêt public concernant les affaires comme celle dont je suis saisi, celui-ci s'articule plutôt autour des intérêts du groupe que de l'intérêt général prétendu de la population à garder sous contrôle la compensation offerte aux avocats ayant participé au recours collectif. Je suis d'avis qu'il est pertinent de tenir compte de l'incidence des honoraires liés au recours collectif sur les sommes recouvrées par les membres du groupe pour décider si ces honoraires sont raisonnables et justes. Je crois qu'il s'agissait de la préoccupation exprimée par la Cour suprême de la Colombie-Britannique dans la décision *Killough v. Canadian Red Cross Society*, 2007 BCSC 941, [2008] 2 W.W.R. 482 (*Killough*), lorsqu'elle a fait mention, au paragraphe 8, des répercussions des honoraires convenus sur les sommes qui seraient sinon disponibles pour le groupe.

[42] Pour quelqu'un comme M. Manuge, dont la réclamation aux prestations rétroactives d'a IP est estimée à moins de 10 000 dollars, la déduction d'un montant de 1 500 dollars au titre des honoraires ne pourrait être considérée comme injuste ou déraisonnable. Cependant, pour un ancien combattant des FC qui a une invalidité majeure limitant sa capacité de travailler, la déduction

2013 FC 341 (CanLII)

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.

d'un montant de plus de 37 000 dollars d'une indemnisation de 250 000 dollars entrainera une perte importante d'un point de vue financier. e n bref, les personnes qu'on pourrait qualifier de celles ayant le plus besoin de leurs indemnités rétroactives sont celles qui assument la plupart de la responsabilité quant aux honoraires. Il s'agit d'un facteur qui milite en faveur d'une diminution de la somme accordée aux avocats du groupe.

The Contingency Fee a greement, the Claim to a Percentage Recovery and the u se of a Multiplier

La convention d'honoraires conditionnels, la réclamation d'un pourcentage du recouvrement et le recours à un multiplicateur

[43] I accept that a contingency fee agreement entered into between legal counsel and a representative plaintiff in a proposed class proceeding may be relevant and, sometimes, a compelling consideration in the final assessment of legal fees. It strikes me, nonetheless, that such a fee agreement will not necessarily be a primary consideration because it is most often executed at an early point in time when very little is known about how the litigation will unfold. I made essentially the same point in my decision to certify this proceeding in *Manuge v. Canada*, 2008 FC 624 [cited above], at paragraph 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]

[43] Je reconnais qu'une convention d'honoraires conditionnels conclue entre les avocats et un représentant demandeur dans le contexte d'un recours collectif projeté peut être pertinente et qu'elle peut parfois être une considération déterminante lors de l'examen définitif concernant les honoraires. J'ai néanmoins l'impression qu'une telle convention d'honoraires ne sera pas nécessairement une considération principale, parce que celle-ci est plus souvent signée à un stade précoce de l'affaire, où on en sait fort peu sur son déroulement futur. Il s'agit essentiellement du point que j'ai soulevé au paragraphe 34 de la décision *Manuge c. Canada*, 2008 CF 624 [précitée], au paragraphe 34, la décision par laquelle j'ai autorisé la présente instance comme recours collectif :

> u n autre point soulevé par la Couronne concerne l'ampleur des honoraires conditionnels qui seraient payables au titre du mandat de représentation en justice conclu entre M. Manuge et son avocat. Ce mandat prévoit des honoraires représentant 30 p. 100 de tout jugement rendu en faveur de M. Manuge, outre les débours. Le mandat précise aussi que les honoraires payables [TRADUCTION] « devront être approuvés par la Cour ». Il n'y a évidemment rien d'illégitime à ce que soit conclu un accord d'honoraires conditionnels dans un cas comme celui-ci, dont l'issue est imprévisible et où les sommes, considérées isolément, ne semblent pas justifier un recours aux tribunaux. Le montant des honoraires payables à l'issue d'un recours collectif dépendra naturellement de l'appréciation du juge de première instance et devra être proportionnel aux efforts effectivement consentis et au risque pris par l'avocat. Je n'ai aucune réserve sur l'aptitude de la Cour à examiner cet aspect, au besoin, dans l'exercice de sa fonction de surveillance[1].

[1] a lso see *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 O.R. (3d) 281 (S,C,J,), at para. 58.

[1] Voir aussi *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386, 49 R.J.O. (3e) 281 (C.S.J.), au par. 58.

2013 FC 341 (CanLII)

[44] When Mr. Manuge entered into the fee agreement with his legal counsel, no one knew that the issue of certification would ultimately reach the Supreme Court of Canada or that the determinative liability issue would be finally resolved after a short hearing on agreed evidence and without extensive discovery or a trial. Similarly, no one could have accurately predicted the outcome of the negotiations that led to the settlement now before the Court including the willingness of the respondent to abandon what was likely a viable, if partial, limitations defence.

[44] Personne ne savait, lorsque M. Manuge a conclu la convention d'horaires avec ses avocats, que la question de l'autorisation du recours collectif serait ultimement plaidée à la Cour suprême du Canada ni que la question déterminante de la responsabilité serait en fin de compte résolue après une courte audience en fonction d'une preuve produite d'un commun accord et sans qu'elle ne nécessite un long processus d'interrogatoire préalable, ni un procès. d ans la même veine, personne n'aurait pu prédire avec exactitude l'issue des négociations ayant conduit au règlement dont la Cour est saisie, ni que la défenderesse consentirait à abandonner sa défense valable, quoique partielle, relative aux limites à la couverture.

2013 FC 341 (CanLII)

[45] The contingency fee agreement that was executed by Mr. Manuge and which purported to award legal fees of 30 percent 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 percent 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 percent of the total value of the retroactive entitlements of class members.

[45] La convention d'honoraires conditionnels qui a été signée par M. Manuge et qui avait pour objet de prévoir des honoraires équivalant à 30 p. 100 des sommes recouvrées pour le compte des membres du groupe n'est pas réellement importante dans le contexte du présent examen. Il en est ainsi, parce que M. Manuge et les avocats du groupe ont essentiellement renoncé à cette convention. Ils demandent maintenant l'approbation d'honoraires représentant approximativement 7,5 p. 100 de la valeur brute du règlement, y compris les prestations antérieures et les prestations futures. Ils proposent aussi que les honoraires soient en totalité payés à même les montants dus aux membres du groupe à l'égard du passé, ce qui représenterait environ 15,7 p. 100 de la valeur totale de leurs prestations rétroactives.

[46] a part 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.

[46] Mis à part le fait évident que les honoraires réclamés à ce stade-ci représentent environ un quart du montant prévu dans la convention d'honoraires conditionnels initiale, on ne m'a présenté aucune explication claire quant à savoir comment en était-on arrivé à la somme de 65 millions de dollars, hormis l'observation selon laquelle cette somme a été fixée à un montant moindre que celui du montant des intérêts courus prévus dans le règlement. La somme réclamée à titre d'honoraires n'est guère plus qu'un simple nombre, qui s'avère d'ailleurs être très élevé.

[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. e ach approach has its place. The multiplier

[47] Il est approprié d'utiliser des pourcentages et des multiplicateurs pour déterminer les honoraires liés à un recours collectif, mais surtout pour vérifier leur caractère raisonnable, et non pas pour établir un montant absolu.

appears to be a tool better suited to cases where the social benefits achieved may be greater than the amounts recovered and where a percentage approach would likely under-compensate counsel. In the so-called common fund cases the use of a percentage appears to be preferred because it tends to reward success and to promote early settlement.

Chaque méthode a son utilité. Le multiplicateur semble être une méthode qui convient davantage à des cas où les effets sociaux bénéfiques obtenus peuvent être plus importants que les sommes recouvrées et où la méthode du pourcentage entraînerait probablement une compensation insuffisante pour les avocats. Le recours à un pourcentage semble être privilégié dans ce que l'on appelle les affaires de fonds communs, parce que cette méthode tend à récompenser la réussite et à favoriser un règlement rapide.

[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 [at paragraphs 45–48]:

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.

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.

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] Selon moi, il est dangereux d'accorder une importance excessive à la méthode du multiplicateur ou à celle fondée sur un pourcentage du règlement dans une affaire comme celle-ci. Je partage la préoccupation exprimée par le juge Ian Pitfield dans les passages suivants de la décision *Killough*, précitée [aux paragraphes 45 à 48] :

[TRADUCTION] a vec égards, les autres facteurs n'ont pas pour effet d'élever l'apport des avocats dans la présente affaire au même degré que celui des avocats en lien avec le règlement antérieur. Bien que le temps consacré à l'affaire et les multiplicateurs comparatifs soient pertinents et utiles, il convient de faire preuve de prudence lorsque vient le temps d'utiliser ces facteurs comme référence pour déterminer le caractère raisonnable des honoraires. La principale préoccupation réside dans le fait qu'il n'existe pas de moyens pour établir si le temps consacré était nécessaire et s'il représentait une utilisation raisonnable et productive du temps des avocats. Les recours collectifs ne doivent pas constituer une invitation à accumuler des heures de travail sans tenir compte de la productivité.

L'accumulation importante de temps facturé en lien avec une affaire juridique ne justifie pas toujours une compensation établie au moyen de taux de base ou de multiples de ceux-ci. e n revanche, des démarches qui nécessitent peu de temps peuvent justifier des honoraires plusieurs fois plus élevés que la valeur comptable aux heures consacrées.

Les comparaisons entre la méthode du multiplicateur et celle du pourcentage du recouvrement sont complètement arbitraires. L'efficacité des multiplicateurs est affectée par le caractère raisonnable, qui ne peut nullement être apprécié en fonction des heures accumulées et des taux horaires desquels le multiplicateur est dérivé. La comparaison du pourcentage de recouvrement est réduite, et, par conséquent, elle semble être plus favorable en comparant les honoraires globaux à un montant global de règlement qui comprenait l'ensemble des prestations, le fonds de gestion, la taxe sur les produits et services et la taxe de vente provinciale le cas échéant, et l'ensemble des honoraires. Les honoraires ont été inclus, sans égard à l'affirmation, répétée à maintes reprises dans les

2013 FC 341 (CanLII)

affidavits et les observations, selon laquelle les honoraires n'étaient pas liés à aucune autre considération du règlement.

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.

e n résumé, bien que les avocats doivent être compensés de manière juste et raisonnable eu égard au risque assumé et au travail effectué pour le compte du groupe qu'ils représentent, la détermination du caractère raisonnable est, en fin de compte, plus subjective qu'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 g eorge Strathy in *Helm v.Toronto Hydro-Electric System Ltd.*, 2012 On SC 2602 (CanLII), 40 C.P.C. (7th) 310, at paragraphs 25–27:

[49] La défenderesse met considérablement l'accent sur la valeur relativement faible des heures de travail professionnel consacrées par les avocats du groupe et elle fait ensuite valoir que le modificateur habituel, situé entre 1,5 et 3,5, devrait être employé. Cela me semble simpliste et en grande partie insensible aux facteurs militant en faveur d'un recouvrement majoré. Il convient de récompenser l'efficacité dont les avocats ont fait preuve dans l'obtention d'un excellent résultat, et non de la décourager au moyen de l'application rigide d'un multiplicateur aux heures de travail consacrées. e n l'espèce, je souscris aux opinions exprimées par le juge geor ge Strathy dans la décision *Helm v. Toronto Hydro-Electric System Ltd*., 2012 On SC 2602 (CanLII), 40 C.P.C. (7th) 310, aux paragraphes 25 à 27 :

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?

[TRADUCTION] Les honoraires proposés représentent une majoration importante en comparaison à une situation où ils seraient calculés en fonction de la multiplication du temps consacré par les taux horaires réguliers. e st-ce que cela justifie pour autant de refuser de tels honoraires? Seraient-ils plus appropriés, ou moins appropriés, si le règlement avait été conclu quatre années plus tard, à la veille du procès, alors que plus d'un million de dollars en heures de travail facturable auront été accumulées? Les avocats ne devraient-ils pas être récompensés pour avoir réussi à obtenir une conclusion rapide et louable quant au présent litige? n e devraient-ils pas être félicités pour avoir adopté une stratégie dynamique et innovatrice à l'égard du jugement sommaire, laquelle a fait en sorte que le demandeur a pu entreprendre des négociations de règlement sérieuses et qui se sont en fin de compte avérées productives?

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.

Les avocats du demandeur sont des professionnels sérieux, responsables, engagés et efficaces en matière de recours collectif. Ils font preuve d'esprit d'initiative. Ils accepteront certaines causes qu'ils perdront, ce qui leur occasionnera des conséquences importantes sur le plan financier. Ils accepteront des mandats relatifs à des affaires, pour lesquels ils ne seront pas payés pendant des années. À mon avis, ils devraient être généreusement compensés lorsqu'ils obtiennent des résultats excellents de manière rapide, comme en l'espèce.

2013 FC 341 (CanLII)

For those reasons, I approve the counsel fee.

a lso see *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 12 C.P.C. (6th) 226 (Ont. S.C.J.), at paragraph 107.

[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 paragraph 80. Cases that generate a recovery of a few million dollars may well justify a 25 percent to 30 percent 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 percent. 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 CanLII 41673, 83 O.R. (3d) 481 (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 percent 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 percent of the retroactive refunds payable to class beneficiaries (including the cancellation of debts owing

2 In *Baxter,* above, a costs award representing 4.87 percent 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 percent 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 percent of the total award.

Pour les présents motifs, j'approuve les honoraires.

Voir aussi la décision *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 12 C.P.C. (6th) 226 (C.S.J. Ont.), au paragraphe 107.

[50] Il n'est pas non plus d'une grande utilité de s'inspirer des précédents dans lesquels les honoraires approuvés constituaient un pourcentage des montants recouvrés. d es honoraires raisonnables devraient avoir un lien adéquat avec la somme recouvrée : voir *Endean*, précitée, au paragraphe 80. Les affaires étant à l'origine de recouvrements de quelques millions pourraient bien justifier une adjudication des dépens correspondant à 25 à 30 p. 100 du recouvrement global. Il est plus difficile d'appuyer une telle solution lorsque la décision prévoit le recouvrement de centaines de millions de dollars. On peut supposer qu'il s'agit du motif pour lequel les avocats du groupe n'invoquent pas l'indemnité de 30 p. 100 prévue dans la convention d'honoraires conditionnels. Il s'agit aussi du motif pour lequel le pourcentage de dépens accordés dans les trois précédents qui se comparent le mieux à la présente affaire en ce qui concerne les sommes recouvrées était situé au bas de l'échelle : voir *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673, 83 R.J.O. (3e) 481 (C.S.J.); *Endean*, précitée, et *Killough*, précitée[2]. Ces décisions comparables n'appuient pas une adjudication des dépens d'approximativement 7,5 p. 100, ou, en termes financiers, 65 millions de dollars, dans la présente affaire.

Conclusion

[51] Compte tenu de tous les facteurs exposés ci-dessus, j'approuverai des honoraires d'un montant correspondant à 8 p. 100 des remboursements rétroactifs qui seront versés aux prestataires du groupe (y compris

2 d ans la décision *Baxter,* précitée, une adjudication des dépens correspondant à 4,87 p. 100 d'un paiement projeté de presque deux milliards de dollars a été approuvée. Cela a donné lieu à des honoraires se situant entre 85 et 100 millions de dollars. d ans la décision *Endean*, précitée, des honoraires de 52 500 000 dollars ont été approuvés, ce qui représentait 4,26 p. 100 du total de la somme recouvrée. d ans la décision *Killough*, précitée, les parties ont consenti à des honoraires de 37 290 000 dollars, et ceux-ci n'ont pas été déduits des produits du règlement. Ce montant a été approuvé par la Cour — non sans réserve — et il représentait 3,64 p. 100 du montant total accordé.

2013 FC 341 (CanLII)

by class members to Manulife Financial). This figure is approximately 4 percent of the total value of the settlement. In addition I will approve the deduction of an amount equal to 0.079 percent 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 a gency or to the appropriate provincial agency.

l'annulation des dettes des membres du groupe à la Financière Manuvie). Ce montant représente approximativement 4 p. 100 de la valeur totale du règlement. d e plus, j'approuverai la déduction d'un montant correspondant à 0,079 p. 100 des sommes à rembourser aux prestataires du groupe (y compris l'annulation des dettes des membres du groupe à la Financière Manuvie), à titre d'indemnité pour les frais remboursables. Les avocats du groupe sont aussi autorisés à déduire la taxe sur les produits et services, la taxe de vente harmonisée ou la taxe de vente provinciale des sommes à rembourser aux prestataires du groupe, selon le cas, ainsi qu'à remettre ces montants à l'a gence du revenu du Canada ou à l'organisme provincial approprié.

[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.

[52] Je suis convaincu que le recouvrement des honoraires décrit ci-dessus est conforme aux honoraires approuvés dans les affaires comparables. Fait plus important, il représente un incitatif adéquat pour les avocats afin qu'ils acceptent des mandats relatifs à des recours collectifs à haut risque, sans pour autant avoir une incidence indue sur les sommes recouvrées par les anciens combattants des FC, dont ceux-ci avaient grand besoin. J'exprime ma reconnaissance aux avocats, pour leur examen approfondi de la jurisprudence pertinente et, plus particulièrement, les avocats du ministre, qui ont joué leur rôle d'adversaire nécessaire en l'espèce.

d iscretionary Payments

Les paiements discrétionnaires

[53] Class counsel have undertaken to create a fund for veterans in need of legal assistance with the allocation of $1 003 420 from their costs award. In addition they propose to pay to Mr. Manuge an honorarium of $50 000 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. 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

[53] Les avocats du groupe se sont engagés à créer un fonds d'aide juridique à l'intention des anciens combattants, par l'allocation d'un montant de 1 003 420 dollars, lequel est tiré des dépens qui leur ont été accordés. d e plus, ils proposent de payer à M. Manuge des honoraires de 50 000 dollars, en reconnaissance de son apport important relativement à la présente action. Plusieurs membres du groupe ont prétendu que M. Manuge devrait recevoir un montant supérieur à 50 000 dollars. Cependant, dans la mesure où la Cour a une forme de contrôle sur les dépens accordés aux avocats, je ne crois pas qu'il soit approprié que M. Manuge reçoive un montant supérieur à celui décrit dans l'avis préliminaire de règlement qui a été envoyé aux membres du groupe. Il s'agissait des modalités de la proposition qui aurait été

2013 FC 341 (CanLII)

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 percent 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 percent 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.

examinée par les membres du groupe, et il n'est pas souhaitable d'y apporter, après coup, une modification unilatérale à cette étape-ci. La proposition de créer un fonds d'aide juridique à l'intention des anciens combattants est louable, et la Cour approuve aussi cette proposition, si cela s'avère nécessaire.

[54] aucuns dépens ne sont accordés relativement à la présente requête.

[55] Je laisse aux avocats le soin d'apporter les modifications requises à la proposition d'ordonnance de règlement qui sera soumise à la Cour pour exécution et délivrance.

ORDONNANCE

LA COUR ORDONNE que le règlement relatif à la présente action soit approuvé, selon les modalités proposées par les parties.

LA COUR ORDONNE EN OUTRE que les dépens à payer aux avocats du groupe soient approuvés, selon les modalités suivantes :

a) en ce qui concerne les honoraires, par la déduction d'un montant correspondant à 8 p. 100 du remboursement et l'annulation des dettes, le cas échéant, de chaque prestataire admissible du groupe envers la Financière Manuvie;

b) en ce qui concerne les débours, par la déduction d'un montant correspondant à 0,079 p. 100 du remboursement et l'annulation des dettes, le cas échéant, de chaque prestataire admissible du groupe envers la Financière Manuvie;

c) par la déduction des remboursements à verser aux prestataires du groupe et la remise de tout montant payé à titre de taxe sur les produits et services, de taxe de vente harmonisée ou de taxe de vente provinciale, selon le cas.

2013 FC 341 (CanLII)

TAB 12

Federal Court Cour fédérale

Date: 20240117

Docket: T-119-19

Citation: 2024 FC 68

2024 FC 68 (CanLII)

Ottawa, Ontario, January 17, 2024

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

DENNIS MANUGE, RAYMOND TOTH, BETTY BROUSSE, BRENTON MACDONALD, JEAN-FRANCOIS PELLETIER AND DAVID WHITE

Representative Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

[1] The Representative Plaintiffs and the Defendant bring this joint motion pursuant to Rule 334.29 of the *Federal Courts Rules*, SOR/98-106 [the Rules] seeking approval of the Final Settlement Agreement [FSA] in this Class Action. Class Counsel also seek the approval of the legal fees and disbursements of Class Counsel and an honorarium of $10,000 for each of the Representative Plaintiffs.

[2] In general, the FSA addresses an alleged miscalculation and resulting underpayment of disability pension benefits for members and veterans of the Canadian Armed Forces [CAF] and the Royal Canadian Mounted Police [RCMP] and their spouses, common-law partners, dependents, survivors, or estates. In 2018, the Minister of Veterans Affairs Canada [VAC] acknowledged a miscalculation of the provincial tax credits to the wage rate that resulted in lower payments to eligible recipients of certain pension benefits. The total amount of the underpayment was estimated at $165 million. VAC allocated $165 million to make "Corrective Payments"; approximately half of these payments have been distributed since 2018.

[3] Other errors were subsequently discovered by Class Counsel. The settlement addresses the impact of the additional errors and the interest on the Corrective Payments.

[4] For the reasons that follow, the Court approves the FSA, the legal fees for Class Counsel and disbursements, and the honoraria for the Representative Plaintiffs.

[5] The documents attached to these Reasons and Order, including the FSA, provide more extensive details. The FSA is the result of negotiations based on the knowledge and understanding of Class Counsel and the Defendant, with the assistance of expert actuarial evidence regarding how various benefits were affected by the calculation errors. The expert report, prepared by Mr. Alexander MacLeod, explains the methodology and the formula that will be applied to calculate the amount to be paid to address the underpayments based on the identified errors.

2024 FC 68 (CanLII)

[6] The Court's reasons understate the complexity of the calculation of adjustments to the benefits at issue and the method to correct the miscalculations. The written and oral submissions of Class Counsel and the affidavits and exhibits of the Plaintiffs and Defendant have illuminated the issues and have been carefully considered. Both Class Counsel and the Defendant strongly support the negotiated settlement and commend the successful outcome for Class Members. The Court is more than satisfied that the FSA is fair and reasonable and in the best interest of Class Members.

2024 FC 68 (CanLII)

[7] The Court is also satisfied that the legal fees and disbursements are fair and reasonable. At first glance, a reader may view the possible maximum amount of Class Counsel fees and disbursements, expressed as a dollar value, as a windfall. However, as explained below, Class Counsel have invested countless hours and expended significant amounts to bring this Class Action to this point without certainty of its success and their work will continue. Class Counsel will receive their fees and disbursements in accordance with the Retainer Agreement executed with the Representative Plaintiffs, which provide for a percentage of the settlement amount. Class Counsel do not seek their fees with respect to the amount to correct the initial error acknowledged by VAC. Class Counsel's fees relate to the additional errors discovered through their diligence. Among other things, Class Counsel will only receive their fees and disbursements as Class Members receive their payments, and on a *pro rata* basis.

I. Background

A. *The Plaintiffs*

[8] Dennis Manuge is a resident of Nova Scotia and former member of the CAF. Mr. Manuge served from August 1994 until his discharge in December 2002 due to medical conditions suffered while in the CAF. As a result, Mr. Manuge could no longer meet all the occupational requirements of universality of service. He has received a monthly disability pension since 2002. Mr. Manuge attests to his involvement in this Class Action, including sharing his records and assisting in "unpacking" the miscalculations to be rectified.

[9] Raymond Toth is an Ontario resident. He served in the CAF until his discharge in 2007. He could no longer meet all the occupational requirements due to injuries sustained during his service in the CAF. He has received a monthly disability pension since February 2004.

[10] Betty Brousse is an Ontario resident. Ms. Brousse served in the CAF for 27 years and retired in 2001. She has received a monthly disability pension since October 2000. Ms. Brousse attested to her involvement in the Class Action, including her affidavits to support a Motion for Summary Trial (ultimately adjourned *sine die*) and the use of her personal information to demonstrate the miscalculations and how the FSA will address the miscalculations.

[11] Brenton MacDonald is an Ontario resident and former member of the RCMP. Mr. MacDonald retired in April 2004 after 38 years of service. His career with the RCMP included a role in the Compensation Branch, where he was engaged in pensions, benefits, and

2024 FC 68 (CanLII)

compensation issues. He has received a monthly disability pension since April 2004. Class Counsel commended Mr. MacDonald for his helpful guidance in understanding the complexity of pension benefits.

2024 FC 68 (CanLII)

[12] Jean-Francois Pelletier is a Nova Scotia resident. He served in the CAF in the Royal Navy from 1986 to 2005. He has received a monthly disability pension since 2002.

[13] David White is a Nova Scotia resident. He was a member of the RCMP from 1973 to 2002. He retired due to a medical disability resulting from an injury sustained while on duty. Mr. White has received a monthly disability pension since August 2002. Mr. White, whose late father served in the Royal Canadian Navy and was also a Class Member, provided insight regarding how simplified the FSA process is for Class Members' estates to receive their settlement payment compared to the process that VAC established for estates to claim the Corrective Payment for the initial miscalculation. Mr. White's personal information was also used to demonstrate the miscalculations and the impact of the settlement agreement, including a comparison between the settlement agreement and successful litigation.

[14] All of the Representative Plaintiffs described how they became aware of the error in the calculation of the wage rate and its impact on their benefits, how they contacted counsel to pursue a remedy for the underpayment and subsequently engaged with Class Counsel, and provided information and documents to pursue this action. In addition, the Representative Plaintiffs provided information to other Class Members regarding the issues in this action and the

status of the proceedings. All explained that they only became aware that Class Counsel would seek an honorarium for them after the proposed settlement had been negotiated.

B. *The Proceedings to Date*

2024 FC 68 (CanLII)

[15] In early 2019, the Plaintiffs, individually through their respective counsel, commenced four separate but similar class proceedings. The proceedings all alleged that their annual disability pension had been miscalculated and sought damages and/or restitution. Counsel acting for the Plaintiffs entered into an agreement to work together, which has since been referred to as a “Consortium”. The Court ordered that the four claims be consolidated, and stayed a fifth competing claim.

[16] On October 30, 2019, Class Counsel filed their Consolidated Statement of Claim, which included allegations regarding the initial error, and errors subsequently discovered, which are described below (the Territorial Tax error and Canada Employment Amount error).

[17] On December 23, 2020, the Court certified the Class Action. The Plaintiff’s motion for certification, which was initially contested, was adjourned due to the impact of the early days of the COVID-19 pandemic. As a result of negotiations between the parties, the common questions were refined and the motion for certification then proceeded on consent.

[18] In the Order for Certification the Class is defined as:

> All members and former members of the Canadian Armed Forces and Royal Canadian Mounted Police, and their spouses, common law partners, dependants, survivors, orphans, and any other

> individuals, including eligible estates of all such persons, who received, at any time between 2002 and the present, disability pensions, disability awards and other benefits from the Defendant that were affected by the annual adjustment of the basic pension under section 75 of the Pension Act including, but not limited to, the awards and benefits listed [in the Schedule to that Order].

2024 FC 68 (CanLII)

[19] The Court certified the following common issue for the purposes of this Class Proceeding:

a. Did the Defendant owe a duty of care to the Class when calculating: (a) the annual adjustment of the basic pension under section 75 of the *Pension Act*; and (b) the disability pensions, disability awards, and other benefits that were affected by the annual adjustment of the basic pension?

b. If the Defendant owed the Class a duty of care, did the Defendant breach the standard of care?

c. If the Defendant breached the standard of care, did the Class suffer damage as a result?

d. Was the Defendant enriched by its calculation of the annual adjustment of the basic pension under section 75 of the *Pension Act*, and the disability pensions, disability awards, and other benefits that were affected by the annual adjustment of the basic pension?

e. If the Defendant was enriched, did the Class suffer a corresponding deprivation?

f. If the Defendant was enriched and the Class suffered a corresponding deprivation, was there a juristic reason therefor?

g. Is the Class entitled to an award for interest and/or "equitable compensation" or "equitable damages”?

h. Can damages for the Class be assessed in the aggregate pursuant to Federal Courts Rule 334.28?

[20] Class Counsel developed and administered a bilingual website, which has been operating since February 2021, to inform Class Members of the issues and the status of the Class Action and to permit Class Members to register and express their interest in the Class Action.

[21] On July 30, 2021, the Defendant filed their Statement of Defence, acknowledging the initial error and denying the two subsequent errors.

[22] An extensive discovery period ensued.

[23] On July 30, 2021, the Notice of Certification was widely published, including in major newspapers, via the VAC website, and more directly to Class Members "My VAC accounts". The opt-out period expired on March 30, 2022. Only one opt-out form was received by Class Counsel.

[24] In early 2022, the Plaintiffs advised of their intention to bring a motion for summary trial. In July 2022, the Plaintiffs filed an extensive motion record. The Court scheduled the hearing for January 2023. The Court later adjourned the hearing of the motion *sine die* on the request of the parties, and their negotiations to resolve the Class Action continued.

[25] On November 8, 2023 the parties executed the FSA.

[26] As noted, the settlement arises out of and resolves a miscalculation of disability pension benefits for members and veterans of the CAF and the RCMP and their spouses, common-law partners, dependents, survivors, orphans, or estates.

2024 FC 68 (CanLII)

C. *The Initial Error and Additional Errors*

[27] Under subsection 75(1) of the *Pension Act*, RSC 1985, c P-6 [Pension Act], monthly disability pensions and allowances are adjusted annually to account for annual increases to the Canadian Consumer Price Index [CPI] and a "wage rate" calculation (average wages of certain categories of federal public sector employees minus income tax, calculated using the province with the lowest combined provincial and federal income tax rate). The disability pensions and related benefits include those payable under the Pension Act; section 32 of the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11; section 3 of the *Flying Accidents Compensation Regulations*, CRC, c 10; and section 2(2) of the *Civilian War-related Benefits Act*, RSC 1985, c C-31.

[28] In November 2018, Canada's Veterans Ombudsman identified an error in the calculation of disability awards from 2003-2010; an accounting error that amounted to approximately $165,000,000 [the Initial Error]. The Minister responsible for VAC acknowledged the error and VAC undertook to make retroactive Corrective Payments, as mentioned above. The Corrective Payments did not include interest.

[29] Class Counsel subsequently discovered additional errors that were caused by undervaluing the wage rate over a longer period than initially estimated. The additional errors include the Defendant's failure to consider Nunavut as the province or territory with the lowest applicable tax rate [Territorial Tax Error] and the failure to account for the Canada Employment Amount, a tax credit [CEA Tax Error].

2024 FC 68 (CanLII)

D. *Included and Excluded Benefits*

[30] The FSA includes a definition of the terms used, including “Affected Benefits”. The list of Affected Benefits includes Pension Act benefits (e.g. disability, death, attendance allowance, *Civilian War-related Benefits Act* war pensions, *Flying Accidents Compensation Regulations* benefits and RCMP Disability Benefits awarded pursuant to the Pension Act.

[31] Through the process of document disclosure and negotiations, Class Counsel became aware that the alleged calculation errors did not affect some benefits:

- Disability awards under the *Veterans Well-being Act*, SC 2005, c 21 (retroactive payments exceeded the value of the alleged underpayments);
- Escort and treatment allowances under the *Veterans Well-being Regulations*, SOR/2006-50 and the *Veterans Health Care Regulations*, SOR/90-594 (underpayments were not on a class-wide basis); and/or
- Education allowances under the *Children of Deceased Veterans Education Assistance Act*, RSC 1985, c C-28 (historical overpayments were several times greater than the alleged underpayment amounts).

[32] Class Counsel also discovered that compassionate awards, previously listed as a separate Affected Benefit in the Certification Order, were paid as disability pensions under the Pension Act and had already been included as Affected Benefits.

[33] Class Counsel explain that recipients of the above noted excluded benefits were not disadvantaged at all by the calculation errors addressed in the FSA.

2024 FC 68 (CanLII)

E. *The Settlement Agreement*

[34] The Parties engaged in extensive negotiations to reach the FSA. The FSA is based on the calculation of five components: the Territorial Tax Error, the CEA Tax Error, Interest on the Territorial Tax Error and CEA Tax Error, and Interest on the Corrective Payments paid to date and Interest on the Corrective Payments yet to be paid. The following Chart provides a summary of the proposed recovery under the FSA:

Alleged Error	Recovery Amount
Territorial Tax Error	Paid at 100% of the alleged underpayment
CEA Tax Error	Paid at 25% of the alleged underpayment
Applicable interest on the Territorial Tax Error and the CEA Tax Error	2.9% simple interest
Applicable interest on the Corrective Payments paid based on the Initial Error	2.9% simple interest
Applicable interest on the Corrective Payment not yet paid based on the Initial Error	2.9% simple interest

[35] The affidavit of Mr. MacLeod, Manager in the Valuations and Dispute Advisory Group, KPMG LLP, explains his role in assisting Class Counsel to identify the miscalculation of the benefits and determine the additional amounts that should have been paid along with the Corrective Payments. His detailed report illustrates how the formula to be applied in the settlement was arrived at and how it will be implemented, using real-life examples.
Mr. MacLeod also explains how the Court approved legal fees and disbursements, in accordance with the retainer agreement, have been incorporated into the formula and the final settlement agreement.

2024 FC 68 (CanLII)

[36] Among other information included in Mr. MacLeod's Report, Table 3 sets out the value of the various components of the Total Settlement Value. Table 3 provides the following amounts:

- Territorial Tax Error - $528.5 million
- CEA Tax Error - $31.7 million
- Interest on the Territorial Tax Error and CEA Tax Error - $194.9 million
- Interest on the Corrective Payments (i.e. the amount paid out by VAC after 2018) - $26.7 million
- Interest on the Corrective Payments not yet paid - $39.4 million

The Total Settlement Value calculated by Mr. MacLeod is $821.2 million. The settlement amount is $817.3 million. The difference of $3.9 million arises from the negotiations between the parties. For example, Class Counsel explain that the Administrator's Costs will be paid by the Defendant and not from amounts to be paid to Class Members, which is a benefit to Class Members that has been taken into account to arrive at the final settlement amount.

[37] Mr. MacLeod also explains that because the Relevant Period (January 1, 2003 to December 31, 2023) had not yet concluded at the time of his report, the precise amount of the Affected Benefits paid to the Class over the relevant period (as defined in the FSA and as used in the formula) cannot yet be determined.

[38] Class Members fall into one of two groups. The "VAC Payment Group" includes Class Members with an existing payment relationship with VAC. Class Members that do not have an

2024 FC 68 (CanLII)

existing payment relationship with VAC fall into the "Claims Based Payment Group"; this group will be required to submit a simple claim form and the Administrator will assess their claims.

[39] As noted, the settlement has a total value of up to $817,300,000. The VAC Payment Group will receive their share of a total of $435,500,000. The Claims Based Payment Group will receive their share of up to $381,800,000. The approximate class size is 333,711.

2024 FC 68 (CanLII)

[40] The Affidavit of the Defendant's affiant**,** Rory Beck, Manager of Litigation Coordination at VAC, describes the FSA and its impact.

[41] Mr. Beck explains that, but for this settlement agreement, the precise calculation of the total adjustments to the benefits paid to Class Members, during the relevant period (January 1, 2003–December 31, 2023) would be a complex and long process. Mr. Beck explains that the settlement is "based on the estimated shortfall between the total benefits paid to the Class during the relevant period, and the total that allegedly should have been paid, plus an amount for interest. In addition, an amount has been added to the settlement in respect of interest on the Disability Pension Corrective Payments".

[42] Mr. Beck further explains how the settlement will be shared:

> The comprehensive settlement amount will be pro-rated among Class Members based on the proportion that each individual's sum total of affected benefits, as defined in the FSA, paid during the relevant period represents in relation to the sum of all Affected Benefits paid to the entire class during the Relevant Period, as defined in the FSA. If every claimant could be located and paid, the total payment under the settlement would be approximately $817,300,000.

[43] Mr. Beck states that there are approximately 330,711 Class Members who are entitled to 332,840 payments. Mr. Beck explains that 2,129 Class Members are eligible for two separate payments, one as a Veteran and the other as a survivor or dependant of the Veteran, hence the different numbers.

2024 FC 68 (CanLII)

[44] Mr. Beck notes that the VAC Payment Group is comprised of Class Members entitled to 117,697 payments. The Claims Based Payment Group is comprised of Class Members entitled to 215,143 eligible payments.

[45] Mr. Beck explains the breakdown of possible eligible payments. The median Class Member would receive approximately $1,258.75 less the court approved costs. The mean Class Member would receive approximately $2,455.53 less court approved costs. Mr. Beck further explains that the majority of the eligible payments are less than $5,000. Only 40 eligible payments exceed $35,000.

[46] As noted by Mr. Beck, the VAC Payment Group is a smaller group, but the total amount of their payments will be greater. The Claims Based Payment Group is larger, and Class Counsel and VAC will make efforts to reach out to and notify these Class Members of the process to make their claims. As explained below, Class Counsel's fees are contingent on payments made to Class Members, and Class Counsel cannot obtain fees if a Claims Based Class Member does not make a claim.

[47] The FSA requires the Defendant to make automatic settlement payments to the VAC Payment Group within nine months of this Court's Order approving the FSA. Members of the

Claims Based Payment Group will be required to submit a claim form to the Administrator within twelve months of this Order approving the FSA. The Defendant, Administrator, and Class Counsel undertake to work cooperatively to notify potential Claims Based Payment Group Members. All payments will be tax-exempt.

2024 FC 68 (CanLII)

[48] Class Counsel note that they will also continue to assist Class Members who have not yet received their Corrective Payment, and do not seek legal fees for this work.

[49] The Defendant has agreed to pay the ongoing costs of the Administrator of the agreement; these costs will not be deducted from the total settlement amount (i.e. there will be no *pro rata* deduction from individual payments). The parties note that this is of significant benefit to Class Members.

[50] Class Counsel note that only one objection was received in response to the Notice of Settlement. The objector disputes the deduction of legal fees from the payments to Class Members. As Class Counsel explain, the deduction of legal fees was a factor in the negotiation of the agreement. Moreover, the Rules do not permit the Court to order costs in a Class Action.

[51] In addition, another Class Member's correspondence to the Court was relayed to Class Counsel and Counsel for the Defendant. Class Counsel confirmed that the concerns noted by the Class Member related to benefits that were found to be unaffected by the calculation errors and, therefore, were not covered by the settlement. Class Counsel confirmed that the Class Member has not been disadvantaged.

II. The Issues

[52] The issues to address are:

1. Whether the Court should approve the Settlement Agreement, which requires considering whether the agreement is fair, reasonable, and in the best interests of the class.
2. Whether the Court should approve an honorarium of $10,000 to each of the Representative Plaintiffs.
3. Whether the Fee Agreement for Class Counsel should be approved, which entails consideration of whether the amount of the legal fees and disbursements is fair and reasonable.

III. The Statutory Provisions

[53] The Rules state that:

334.29 (1) A class proceeding may be settled only with the approval of a judge.	**334.29 (1)** Le règlement d'un recours collectif ne prend effet que s'il est approuvé par un juge.
(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.	**(2)** Il lie alors tous les membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif
…	…
334.32 (1) Notice that a proceeding has been certified as a class proceeding shall be given by the representative plaintiff or applicant to the class members.	**334.32 (1)** Lorsqu'une instance est autorisée comme recours collectif, le représentant demandeur en avise les membres du groupe.

2024 FC 68 (CanLII)

IV. Should the Court Approve the Settlement Agreement?

A. *The Guiding Principles from the Jurisprudence*

[54] In *Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 327, Justice McDonald summarized the guiding principles at paras 47-50:

> [47] Rule 334.29(1) of the *Federal Courts Rules*, SOR/98-106 provides that class proceedings may only be settled with the approval of a judge. The applicable test is "whether the settlement is fair and reasonable and in the best interests of the class as a whole" (*Merlo v Canada*, 2017 FC 533 at para 16 [*Merlo*]).
>
> [48] The Court considers whether the settlement is reasonable, not whether it is perfect (*Châteauneuf v Canada*, 2006 FC 286 at para 7; *Merlo* at para 18). Likewise, the Court only has the power to approve or to reject the settlement; it cannot modify or alter the settlement (*Merlo* at para 17; *Manuge v Canada,* 2013 FC 341 at para 5).
>
> [49] The factors to be considered in assessing the overall reasonableness of the proposed settlement are outlined in a number of cases (see *Condon v Canada*, 2018 FC 522 at para 19; *Lin v Airbnb Inc*, 2021 FC 1260 at para 22) and include the following:
>
> a. Likelihood of recovery or success;
>
> b. The amount of pre-trial work including discovery, evidence or investigation;
>
> c. Settlement terms and conditions;
>
> d. Future expense and likely duration of litigation;
>
> e. Expressions of support and objections;
>
> f. Presence of good faith and the absence of collusion;
>
> g. Communications with class members during litigation; and,
>
> h. Recommendations and experience of counsel.

2024 FC 68 (CanLII)

> [50] As noted in *McLean v Canada*, 2019 FC 1075 [*McLean*] at paragraph 68, in addition to the above considerations, the proposed settlement must be considered as a whole and it is not open to the Court to rewrite the substantive terms of the settlement or assess the interests of individual class members in isolation from the whole class.

2024 FC 68 (CanLII)

[55] In *Condon v Canada*, 2018 FC 522 at para 20 [*Condon*], Justice Gagné noted that these factors are guidelines; some may not be relevant at all and some may carry more weight than others.

B. *Class Counsel's Submissions*

[56] Class Counsel submit that all relevant factors support the approval of the settlement agreement. They submit that the settlement is in the best interest of the class as a whole.

[57] Class Counsel note, among other advantages, that the settlement will fairly compensate Class Members, including their survivors and estates, and will result in payments to aging Class Members in a straight-forward process within the foreseeable future, avoiding the delay and other challenges of ongoing litigation. Class Counsel add that the settlement provides results comparable – and likely more generous – than what could be achieved through litigation. Class Counsel also note that successful litigation is never guaranteed.

[58] Class Counsel explain that the settlement fully compensates Class Members for the miscalculations arising from the Territorial Tax Error. In addition, it provides an interest rate of 2.9% for the Initial Error and the additional errors. The recovery for the CEA Tax Error, described as a more speculative claim, reflects a compromise achieved through negotiations.

[59] Class Counsel highlight several features that reflect the fairness and reasonableness of the Settlement:

- The Territorial Tax Error amount will be paid at 100%;
- The pre-judgment interest rate will be 2.9%;
- Interest will be applied on all amounts payable;
- The relevant period spans 21 years, which far exceeds the limitation period which could have applied to recovery if the action proceeded to litigation;
- Automatic payments will be made where possible (e.g. to the VAC Payment Group);
- The amounts payable are not taxable;
- An experienced Administrator will administer the agreement and their costs will be paid by the Defendant;
- Robust information sharing mechanisms will continue in order to locate and notify eligible Class Members and to ensure they can pursue their entitlements;
- A simple claim form will be used; and
- Class Counsel will continue to assist Class Members to recover the amounts they are entitled to, including to assist in recovery of the Corrective Amount (for the Initial Error).

[60] Class Counsel note other factors that could impede success, including the possibility of legislative or policy changes to affect benefit schemes.

[61] Class Counsel have described their efforts over the past five years in identifying the errors, seeking disclosure, reviewing thousands of pages of documents, engaging experts, and assessing the extent of the alleged miscalculations and their impact.

2024 FC 68 (CanLII)

[62] Class Counsel note that they engaged in active and challenging negotiations, which were brought to a head by their motion for summary judgment (ultimately adjourned *sine die*).

[63] Class Counsel also note that they engaged in regular communication with Class Members through several means, including a bilingual website, to provide information to Class Members. These communication mechanisms will continue as the settlement is administered.

C. *The Attorney General of Canada's Position*

[64] The Defendant, the Attorney General on behalf of Canada [AGC], agrees that the Settlement Agreement is fair and reasonable and is in the best interests of Class Members. The AGC commended Class Counsel on their diligence and professionalism throughout the negotiations in advocating for an excellent outcome for Class Members. The AGC noted that while the Settlement Agreement reflects compromises by both parties, it will ensure that payments are made to Class Members in a more expeditious and simpler manner than if individual claims and calculations were required. The AGC also relayed Canada's appreciation of the role and commitment of members of the CAF and RCMP and Canada's strong support for the Settlement Agreement, which will benefit Class Members.

D. *The Settlement Agreement is Fair, Reasonable and in the Best Interests of the Class*

[65] The Court has considered all the relevant factors, including the complexity of calculations; the defences that could have been raised if the litigation continued; the potential for further changes to be made in the benefits at issue; the overall benefits of the settlement as

2024 FC 68 (CanLII)

described above, which resulted from concessions and compromises on both sides; the views of experienced Class Counsel; the support of the Class Members; and the Defendant's support for the FSA and acknowledgement of the successful outcome for Class Members.

2024 FC 68 (CanLII)

[66] The likelihood of recovery or success is a relevant factor in determining whether to approve a Settlement Agreement. As Class Counsel noted, despite VAC's acknowledgement of the Initial Error, the subsequent errors discovered required careful assessment and negotiations to address. The allegations of miscalculation of benefits, in particular the Territorial Tax Error and CEA Tax Error, would have been contested by the Defendant and would have required dissection of complicated and intersecting benefits and statutory provisions. As Class Counsel also noted, the success of the claim of unjust enrichment was questionable given the existing jurisprudence.

[67] As in other class proceedings involving large classes where a significant proportion may be older and where every benefit (even of a modest amount) is important, the prospect of pursuing individual claims and awaiting an outcome must be balanced against the benefit of the settlement amount and the clear process for its distribution. As noted in the Beck affidavit, the majority of the individual amounts to be paid out falls below $5,000 and the average amount payable will be $2,455.53. Claims by individual Class Members, which would be most likely pursued in Small Claims Court, would have entailed a more formal process, additional costs, and delay. The cost vs. benefit would likely discourage many from pursuing their own individual claims.

[68] The Representative Plaintiffs attest to their support for the settlement and their belief that it is fair and reasonable and avoids protracted and costly litigation. They also note the benefits of the proposed payment regime and claims process.

2024 FC 68 (CanLII)

[69] No objections to the FSA itself have been received. The only objection suggested that the Defendant should bear the burden of Class Counsel fees and disbursements.

[70] The consortium of Class Counsel combined their expertise and cumulative decades of experience in litigating class actions to achieve the settlement for Class Members. The recommendation of Class Counsel that Class Members support the agreement and that the Court approve the FSA carries significant weight.

[71] All these factors lead to finding that the FSA is fair, reasonable, and in the best interests of the Class Members.

V. Should an Honorarium be paid to the Representative Plaintiffs?

[72] Class Counsel requests that the Court approve an award of $10,000 as an honorarium for each of the Representative Plaintiffs, to be paid out of the amount approved for Class Counsel's fees and disbursements. The honorarium does not reduce the amounts payable to Class Members.

[73] As noted in *Toth v Canada*, 2019 FC 125, the Court has the discretion to award such an honorarium and has done so in several class actions. An honorarium is a recognition that the

Representative Plaintiffs made a meaningful contribution to the class action, without which it would not have been pursued.

[74] In *Robinson v Rochester Financial,* 2012 ONSC 911 at para 43, the Court identified several factors to consider when deciding whether to award compensation to a representative plaintiff, including their active involvement in the litigation, significant personal hardship or inconvenience in connection with the prosecution of the litigation, time spent in advancing the litigation, communication with other class members, and participation in the litigation.

[75] In *Tk'emlúps te Secwépemc First Nation v* Canada, 2023 FC 357 [*Tk'emlúps te Secwépemc*], Justice MacDonald noted the relevant factors guiding the approval of honoraria at para 52:

> [52] The list of factors relevant for consideration on whether the individual Representative Plaintiffs should receive honoraria includes: significant personal hardship; active involvement in the initiation of the litigation and retainer of counsel; time spent and activities undertaken in the litigation; communications and interactions with other class members; and participation at various stages of the litigation (*Merlo* at para 72; *Toth v Canada*, 2019 FC 125 at para 96).
>
> [53] The litigation required exceptional efforts on the part of the individual Representative Plaintiffs, who spent 11 years shouldering the burden of this difficult and psychologically taxing litigation. Former Chief Shane Gottfriedson and former Chief Garry Feschuk continued their active involvement in this litigation for years after their terms as elected Chiefs of their respective Nations ended.

[76] As noted above, the Representative Plaintiffs pursued their own litigation upon learning of the Ombudsman's discovery of the initial error. They have subsequently pursued this action

2024 FC 68 (CanLII)

over the last five years. Among other things, they provided Class Counsel with personal examples of the impact of the miscalculation, have liaised with Class Members, gathered and disseminated information, and provided affidavits and exhibits to permit this action to progress.

[77] Taking into account the relevant considerations, the Court agrees that the efforts of the Representative Plaintiffs warrant their receipt of the proposed honorarium.

VI. Should the Fee Agreement be Approved?

A. *The Fees and Disbursements of Class Counsel*

[78] In accordance with Rule 334.4 of the Rules, Class Counsel seek approval of their fees and disbursements. Class Counsel submit that the fees and disbursements reflect the Class Action Retainer Agreement [Retainer Agreement] executed between the Representative Plaintiffs and the Consortium (Gowling WLG (Canada) LLP, McInnes Cooper, Michel Drapeau Law Office, Koskie Minsky LLP and Murphy Battista LLP). The Consortium acts on behalf of the approximately 333,711 Class Members, comprised of veterans and their families and estates.

[79] Class Counsel explain that the corrective payments allocated by VAC to address the Initial Error ($165 million) are not subject to any Class Counsel fees. The approved fees and disbursements for Class Counsel relate only to the amounts in excess that address the additional errors and interest, as described above (Territorial Tax Error amount, CEA Tax Error amount, and interest on these amounts).

2024 FC 68 (CanLII)

[80] Class Counsel note the extensive amount of time and effort expended to litigate and settle this action, noting that $580,000 in disbursements have been paid to date, and additional disbursements of $420,000 are anticipated. Class Counsel estimate that approximately $8 million in billable time has been docketed to date, and an additional 10,000 hours of work remains to be done.

2024 FC 68 (CanLII)

[81] The Retainer Agreement provides for payment of Class Counsel's fees on a percentage-based contingency basis (i.e. to be paid only in the event of success). Class Counsel took carriage of this class action on a contingency basis; if the action was not successful, Class Counsel would not receive any fees and disbursements. Class Counsel have assumed this risk and financed the litigation to date without any reimbursement. The terms were set out in the certification motion, the Notice of Certification, and in the November 2023 Notice of the Proposed Settlement. The Notice of Certification and Notice of the Proposed Settlement were both published in national newspapers, online, and made available to Class Members via their "My VAC accounts".

[82] The FSA contemplates that the recovery amount available and paid to each Class Member will deduct the Court approved legal fees and disbursements [Court-approved costs] on a *pro rata* basis. Class Counsel propose a "blended costs rate" for Counsel fees, which includes HST and disbursements. Class Counsel note that a more detailed calculation of costs was set out in the Notice to Class Members. The Class Members support the fee agreement.

[83] The affidavit of Mr. MacLeod explains how the percentage-based deduction from each settlement payment, amounting to a blended amount of 17.46% reflects the Retainer Agreement

to provide fees and disbursements to Class Counsel. Mr. MacLeod's Report provides details about how the blended amount as a percentage (17.46%) was calculated, noting that this includes HST and the estimated disbursements.

[84] The Retainer Agreement – which describes the regressive scale contingency fee arrangement (with a lower percentage of fees applicable to increasing ranges of total amounts to be paid) – leads to a blended amount of legal fees of 15.24%. The addition of disbursements and HST results in the blended amount of 17.46%, which will be deducted from the amount to be paid to each Class Members as the amounts are paid.

[85] Class Counsel note that although the VAC Payment Group is smaller in size, the anticipated total amount to be paid to this group is $435.4 million.

[86] Class Counsel fees with respect to the VAC Payment Group are estimated to be up to approximately $66.4 million after HST and disbursements. Class Counsel note that Class Members in the VAC Payment Group will automatically receive their eligible amounts within nine months. Class Counsel's fees will be deducted on a *pro rata* basis from each amount paid. Although the payments will be automatic to these Class Members, there remains some uncertainty in the precise number of claims to be paid.

[87] Class Counsel fees with respect to the Claims Based Payment Group, which will require ongoing efforts by Class Counsel to locate and assist claimants, could be up to approximately $58.2 million after HST and disbursements.

2024 FC 68 (CanLII)

[88] The Class Members in the Claims Based Payment Group must be notified of their eligibility (if they are not already aware) and must proactively make a claim, to be assessed by the Administrator. The legal fees and disbursements will also be deducted on a *pro rata* basis. However, there is considerable uncertainty regarding how many members of the Claims Based Payment Group will submit claims. There is also considerable uncertainty with respect to the total amount of fees and disbursements to be paid to Class Counsel, as this is contingent on their and others' ongoing efforts to reach out to eligible Class Members and assist them to make their claims.

[89] Class Counsel submit that the risks taken and the results achieved, coupled with the time and effort expended, among other relevant considerations, support their request that the Court approve the fees and disbursements.

B. *The Principles from the Jurisprudence*

[90] The factors to be considered in assessing the reasonableness of Class Counsel's fees have been established in the jurisprudence (e.g. *Manuge v Canada*, 2013 FC 341 at para 28 [*Manuge 2013*]; *Condon* at paras 81-83; *Merlo v Canada*, 2020 FC 1005 at paras 78-98;). They include the results achieved, the risks taken, the time expended, the complexity of the issues, the importance of the litigation or issue to the plaintiff, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of Class Members to pay for the litigation, the expectations of the class, and fees in similar cases.

2024 FC 68 (CanLII)

[91] The two key factors are usually the risks taken and the results achieved (*Condon* at para 83; *Mancinelli v Royal Bank of Canada*, 2018 ONSC 4206 at para 2 [*Mancinelli*]; *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at para 41 [*Brown*]). The jurisprudence has acknowledged that the fees for Class Counsel are the reward for taking on risk (as measured at the outset of the case) and pursuing litigation with skill and diligence (*Condon* at paras 90-91; *Mancinelli* at para 4; *Brown* at para 50; *Manuge 2013* at para 37).

[92] In *Tk'emlúps te Secwépemc*, Justice MacDonald noted that the Court should consider whether the legal fees are "fair and reasonable" in the circumstances (citing *McLean v Canada*, 2019 FC 1077 at para 2). Justice MacDonald canvassed the established principles and captured these at para 15:

> [15] The "fair and reasonable" considerations were outlined at paragraph 25 of *McLean* as follows:
>
>> The Federal Court has an established body of non-exhaustive factors in determining what is "fair and reasonable". In *Condon v Canada*, 2018 FC 522 at para 82, 293 ACWS (3d) 697 [*Condon*]; *Merlo v Canada*, 2017 FC 533 at paras 78-98, 281 ACWS (3d) 702 [*Merlo*]; and *Manuge* at para 28, the factors included: results achieved, risk undertaken, time expended, complexity of the issue, importance of the litigation to the plaintiffs, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of the class to pay, the expectation of the class, and fees in similar cases. The Court's comments follow but it should be borne in mind that the factors weigh differently in different cases and that risk and result remain the critical factors (*Condon* at para 83).

[93] Most recently, and subsequent to the hearing of this motion, in *Moushoom v Canada (Attorney General)* 2023 FC 1739 [*Moushoom*], Justice Aylen addressed the issue of class

2024 FC 68 (CanLII)

counsel fees in "mega-fund" cases. A "mega-fund" generally refers to an amount of recovery exceeding $100 million. In *Moushoom*, Justice Aylen approved the largest settlement in Canadian history; an amount of over $23 billion. Class Counsel fees were the subject of some negotiation and the Court ultimately reduced the amount of the fees.

2024 FC 68 (CanLII)

[94] Justice Aylen noted that in mega-fund cases, generally, a percentage based class counsel fee generates a windfall exceeding a fair and reasonable amount that would be out of step with the relevant factors, including the risk taken by counsel. Justice Aylen concluded that in mega-fund cases, when considering the reasonableness of the fees and the relevant factors, the Court should focus on the dollar amount of the fees. Justice Aylen noted at paras 108-111:

> [108] The determination of the premium should be based on all of the circumstances of the case, including the predominant considerations of the risk undertaken by class counsel and the results achieved, followed by the additional considerations noted above (the time and effort expended by class counsel, the complexity and difficulty of the matter, the degree of responsibility assumed by class counsel, fees in similar cases, expectations of the class, experience and expertise of class counsel, the ability of the class to pay and the importance of the litigation to the plaintiff). While fees in similar cases have been recognized as a relevant consideration, I find that their utility is limited in mega-fund settlements (for the reasons noted above), but I see no reason to remove it completely from the list of factors. Rather, I anticipate that the weight this Court gives to fee comparisons in mega-fund settlements such as this will be minimal.
>
> [109] Moreover, I find that an additional factor should be added to the list – namely, whether the amount requested is on the consent of all parties.
>
> [110] The amount of weight to be attributed to each of the factors and, in particular, the predominant factors of risk and result, will depend upon the facts of the case. That said, there will come a point where the weight attributed to the result achieved (and the resulting adjustment) must plateau no matter how high the financial settlement achieved.

> [111] In determining the premium, the Court should also be guided by the principle of proportionality, which underpins the *Federal Courts Rules*, so that fees are not excessive in the sense of having little relation to the risk undertaken or the results achieved [see *Brown*, supra at para 53].
>
> [112] Therefore, in a mega-fund settlement, rather than focusing on the percentage of recovery or the multiplier, the Court's focus should be on the actual dollar amount of the approved counsel fee.

2024 FC 68 (CanLII)

C. *The Fee Agreement is Reasonable*

[95] The maximum amount that Class Counsel could receive if all eligible payments are made is approximately $124.6 million (after accounting for HST and disbursements) on a total settlement value of $817.3 million. As mentioned above, the total includes the fees for the VAC Payment Group (approximately $66.4 million, after HST and disbursements), which will be paid to Counsel as amounts are paid to Class Members automatically and on a pro- rata basis, and the maximum amount for the Claims Based Payment Group (approximately $58.2 million, before HST and disbursements).

[96] Although this amount is very large when expressed as a total dollar value, as a percentage, this represents 15.24% (without HST and disbursements) of the total settlement value and reflects the Retainer Agreement. The fees are within the range of fees awarded in many other class proceedings, including those less complicated and benefiting far smaller classes. As Class Counsel noted, there is a ceiling on their fees and disbursements but there is no floor; the receipt of fees will depend on the take-up rate, particularly regarding the Claims Based Payment Group. As noted above, the Class is very large with over 330,000 Class Members, and Class Counsel's work is not yet done.

2024 FC 68 (CanLII)

[97] In the present case, Class Counsel in four separate actions took the unique approach of forming a Consortium, consolidating the actions and working together to uncover additional issues, collectively sorting out a complex benefit scheme, and advocating for a very large class. The expenditures of time and money beginning in 2018, including to engage actuarial experts to get to the bottom of the alleged additional miscalculations, entailed a financial risk. Success, despite the acknowledgement of the Initial Error, was not certain.

[98] The Defendant submits that the Fee Agreement is a matter between the Class Members and Class Counsel. The Defendant does not take any position with respect to the approval of fees.

[99] The total amount of the settlement at $817.3 million brings it well into the "mega-fund" settlement category, and the percentage based fees requested for approval have been scrutinized. Class Counsel's fees pursuant to the regressive scale contingency fee as described in the Retainer Agreement provides for a significant amount in real dollars. This reflects the significant risks taken, the efforts of experienced Class Counsel, and the excellent results achieved by Class Counsel for the Class. As noted, the work of Class Counsel is not over; Class Counsel will continue to devote additional hours to complete the Settlement to ensure that Class Members seek and receive the amounts they are eligible to receive.

[100] The relevant factors – many of which are the same factors that support the fairness and reasonableness of the Settlement Agreement – support finding that Class Counsel's fees and disbursements are fair and reasonable.

[101] The Court has not overlooked the guidance provided in *Moushoom* regarding the assessment of the fairness and reasonableness of Class Counsel fees in large mega-fund settlements. The fees awarded in *Moushoom* compared to the amount of the settlement stand in stark contrast to the much smaller (yet still very large) settlement in the present case. However, there are significant differences in the two proceedings.

[102] In *Moushoom*, Justice Aylen noted that the claims were not novel; the Canadian Human Rights Tribunal had already concluded that Canada was liable for the same conduct alleged by Class Counsel.

[103] In the present case, Class Counsel do not seek any fees for the Corrective Payments previously acknowledged by VAC, but rather only for the amounts over and above the Corrective Payments (valued at $165 million). Class Counsel investigated and discovered additional errors in the calculation of benefits, which had not been discovered by VAC, auditors, or the Ombudsman, and calculated the impact of the errors, then pursued these claims along with the interest on the Corrective Payments. These claims were disputed by the Defendant, but ultimately negotiated in the FSA. In the present case, the Defendant does not take any position regarding the fees sought. Also, unlike *Moushoom*, the fees will be paid on a *pro rata* basis out of the payments to Class Members. As noted above, the Class consists of approximately 333,711 members and the total number of individual payments could reach 332,840.

[104] As noted above, Class Members were made aware of the Retainer Agreement on several occasions and no objections were voiced. Also as noted, Class Counsel will continue to invest

2024 FC 68 (CanLII)

significant time and effort to contact Class Members in the Claims Based Payment Group and assist them in making their claims. The payment of Counsel fees associated with this Group are contingent on claims being paid. Class Counsel will also assist Class Members who have not yet pursued their Corrective Payments.

[105] The factors noted in the previous jurisprudence and in *Moushoom* have been applied to the current facts. Although the total maximum dollar amount for Class Counsel fees is large, the relevant factors support the conclusion that the fees are reasonable.

2024 FC 68 (CanLII)

ORDER in file T-119-19

WHEREAS this action was certified as a class proceeding by Order dated December 23, 2020;

AND WHEREAS the Representative Plaintiffs and the Defendant [collectively, the Parties]) entered into a proposed agreement, the Final Settlement Agreement [Settlement Agreement], on 8 November 2023 to resolve all claims relating to or arising from this class proceeding up to and including 31 December 2023;

AND WHEREAS court approval of the Settlement Agreement is required under the *Federal Courts Rules*, SOR/98-106 *[Rules]*;

AND WHEREAS Court approval of the costs of the proceeding, including Class Counsel's fees, disbursements, taxes on legal fees, and honorarium amounts to be paid to the Representative Plaintiffs from Class Counsel's fees is required under the *Rules*.

UPON considering the Notices of Motion, the affidavits filed by the Parties in support of the motions, the written and oral submissions of the parties and for the more detailed reasons set out above;

THIS COURT ORDERS that:

1. The Settlement Agreement, attached hereto at **Schedule "A"**, is approved and shall be implemented in accordance with its terms, this Order, and further orders of this Court.

2. All provisions of the Settlement Agreement form part of this Order and are binding on the Parties and all Class Members who did not validly opt-out of this Class Proceeding.

3. In this Order, the term "Final Order" means this Order once the time to appeal this Order has expired without any appeal being taken, or, if this Order is appealed, once there has been affirmation of this Order upon a final disposition of all appeals.

4. The Notice of Settlement Approval is hereby approved in English and in French in the form attached at **Schedule "B"**, subject to the right of the Parties to make, on consent, non-material amendments as may be necessary or appropriate;

5. The Plan of Distribution is hereby approved in the form attached at **Schedule "C"**, subject to the right of the Parties to make, on consent, non-material amendments as may be necessary or appropriate.

6. The notice stipulated in this Order satisfies requirements under the *Rules* and constitutes good and sufficient notice to Class Members of this Order and the Court's approval of the settlement of this class proceeding.

7. Court-Approved Costs, as defined in the approved Settlement Agreement, are fixed at 17.46%, to be deducted from Settlement Payments and paid to Class Counsel in accordance with the process described in the approved Settlement Agreement. The fixed rate of Court-Approved Costs includes consumption taxes, which are deemed to be the rate of

2024 FC 68 (CanLII)

harmonized sales tax applicable in the province of Ontario. No other consumption taxes shall apply.

8. The Representative Plaintiffs shall each be paid an honorarium fee of $10,000, to be paid by Class Counsel from their Approved Legal Fees.

9. The releases as described in the approved Settlement Agreement, including the definitions of Released Claims and Releasees, are hereby approved and bind the Representative Plaintiffs and all Class Members who did not validly opt-out of the Class Proceeding. In particular:

   a. Upon the date of the Final Order, the Releasees are forever and absolutely released jointly and severally by the Class Members and each of them, from the Released Claims; and

   b. The Class Members, and each of them, are barred from making any claim or taking or continuing any proceedings arising out of or relating to the Released Claims against any Releasee or other person, corporation, or entity that might claim damages and/or contribution and indemnity and/or other relief under the provisions of the applicable Negligence Act, the common law, Quebec civil law, or any statutory liability for any relief whatsoever, including relief of a monetary, declaratory, or injunctive nature, from the Releasees.

10. The Parties shall provide the Court with an update on the status of the administration of the Settlement Agreement within six months of the Final Order, and in six month intervals thereafter until the Court directs the Parties that further updates are not required.

11. The Court may issue such further and ancillary orders as are necessary to implement and enforce the provisions of the Settlement Agreement and this Order.

12. There shall be no costs of the motions.

13. The Class Proceeding shall otherwise be dismissed without costs.

14. A copy of the Final Order shall be placed on each of the Court Files T-119-19, T-136-19, T-183-19, and T-269-19.

"Catherine M. Kane"

Judge

2024 FC 68 (CanLII)

2024 FC 68 (CanLII)

SCHEDULE "A"

Court File Number: T-119-19

FEDERAL COURT

CERTIFIED CLASS ACTION

BETWEEN:

DENNIS MANUGE, RAYMOND TOTH, BETTY BROUSE, BRENTON MACDONALD, JEAN-FRANCOIS PELLETIER and DAVID WHITE

Representative Plaintiffs

-and-

HIS MAJESTY THE KING

Defendant

FINAL SETTLEMENT AGREEMENT

WHEREAS:

1. Dennis Manuge, Raymond Toth, Betty Brousse, Brenton MacDonald, Jean-Francois Pelletier, and David White ("Representative Plaintiffs") each commenced proposed class proceedings against Her Majesty the Queen, designated as His Majesty the King since September 2022, in Federal Court, which were consolidated in the proceeding bearing Court File Number T-119-19 ("Class Proceeding");

2. The Representative Plaintiffs are former members (or "Veterans") of the Canadian Armed Forces ("CAF") or the Royal Canadian Mounted Police ("RCMP") who became disabled due to their service and who have received benefits as a result of their service-related disabilities;

3. In November 2018, Canada's then Veterans Ombudsman, Guy Parent ("Veterans Ombudsman") announced that his office had discovered "an accounting indexation error" by which Veterans Affairs Canada ("VAC") had not factored the basic provincial tax credit into the calculation of annual adjustment rates between 2003 and 2010 resulting in reduced payments to eligible recipients of disability benefits under s. 75 of the *Pension Act*. The Veterans Ombudsman reported that VAC estimated the error affected about "270,000" CAF and RCMP Veterans as well as "Survivors, and their estates";

2024 FC 68 (CanLII)

5. The Consolidated Statement of Claim ("Claim") alleges additional errors in the Defendant's annual indexing calculations under s. 75 of the *Pension Act* from 2003 to present. In particular, the Claim includes allegations that the Defendant did not, when calculating the "average annual gross composite wage" (or "wage rate") under s. 75(1) (b) *Pension Act* consider the Canada Employment Amount ("CEA") or use the correct tax rate payable in the province or territory with the lowest combined provincial and federal income tax rate;

6. The Representative Plaintiffs allege that they, and those in similar circumstances (the "Class"), have been, and continue to be, undercompensated due to the Defendant's miscalculation of the annual adjustment of benefits under s. 75 of the *Pension Act* ("Annual Adjustment");

7. The Class Proceeding was certified by Order of the Honourable Madam Justice Kane on 23 December 2020 ("Certification Order");

8. The Class is defined in the Certification Order as:

> All members and former members of the Canadian Armed Forces and Royal Canadian Mounted Police, and their spouses, common law partners, dependents, survivors, orphans, and any other individuals, including eligible estates of all such persons, who received – at any time between 2002 and the present – disability pensions, disability awards, and other benefits from Veterans Affairs Canada that were affected by the annual adjustment of the basic pension under section 75 of the ***Pension Act*** including, but not limited to, the awards and benefits listed at Schedule "A".
>
> - *Pension Act* pension for disability;
> - *Pension Act* pension for death;
> - *Pension Act* attendance allowance;
> - *Pension Act* allowance for wear and tear of clothing or for specially made apparel;
> - *Pension Act* exceptional incapacity allowance;
> - *Veterans Well-being Act* disability award;
> - *Veterans Well-being Act* clothing allowance;
> - *Veterans Well-being Act* remuneration for escort's meals, transportation and accommodations;
> - *Veterans Health Care Regulations* remuneration of an escort's travel;
> - *Veterans Health Care Regulations* treatment allowance;
> - *Veterans Review and Appeal Board Act* compassionate award;
> - *Civilian War-related Benefits Act* war pensions and allowances for salt water fishers, overseas headquarters staff, air raid precautions workers, and injury for remedial treatment of various persons and voluntary aid detachment (World War II);

- *Children of Deceased Veterans Education Assistance Act* monthly allowance for education; and
- *Flying Accidents Compensation Regulations* flying accidents compensation;

9. The Representative Plaintiffs and the Defendant (collectively, "Parties") wish to resolve all claims relating to or arising from the Class Proceeding by making the payments described in this agreement to Class Members who were affected by the alleged miscalculation of the Annual Adjustment; and

10. This agreement evidences the Parties' desire to achieve a final settlement agreement that will be subject to approval by the Federal Court ("Agreement" or "Final Settlement Agreement").

NOW THEREFORE, in consideration of the mutual agreements, covenants, and undertakings in this Agreement, the Parties agree as follows:

INTERPRETATION

11. For the purposes of this Agreement:

"Administrator" means a contractor who will be responsible for processing Claim Forms and issuing Settlement Payments to Claimants;

"Affected Benefits" means the following benefits:

- *Pension Act* pension for disability;
- *Pension Act* pension for death;
- *Pension Act* attendance allowance;
- *Pension Act* allowance for wear and tear of clothing or for specially made apparel;
- *Pension Act* exceptional incapacity allowance;
- *Veterans Well-being Act* clothing allowance;
- *Civilian War-related Benefits Act* war pensions and allowances for salt water fishers, overseas headquarters staff, air raid precautions workers, and injury for remedial treatment of various persons and voluntary aid detachment (World War II); and
- *Flying Accidents Compensation Regulations* relating to compensation for flying accidents;
- RCMP Disability Benefits awarded in accordance with the *Pension Act*;

"Annual Adjustment" has the same meaning as in the recitals;

"Certification Order" has the same meaning as in the recitals;

"Claimant" means any person, including an Estate or Estate beneficiary, who submits a

2024 FC 68 (CanLII)

2024 FC 68 (CanLII)

Claim Form to the Administrator during the Claims Period and is found to be entitled to the Settlement Payment of a Class Member in the Claims Based Payment Group;

"Claims Based Payment Group" means every Class Member who, on the date of the Final Order, does not have a current payment arrangement with VAC, or is not in receipt of VAC benefits on a recurring monthly basis;

"Claim Forms" means the forms that must be completed by a Claimant and received by the Administrator during the Claims Period;

"Claims Period" means the period ending twelve (12) months from the date of the Final Order;

"**Claims Payment End Date**" means the period ending 24 months from the date of the Final Order;

"Class" has the same meaning as in the recitals;

"**Class Counsel**" refers to McInnes Cooper, Gowling WLG (Canada) LLP, Koskie Minsky LLP, Murphy Battista LLP, and Michel Drapeau Law Office, who together represent the Class in this Class Proceeding;

"Class Member" means every member of the Class, including an Estate, who is eligible to receive a Settlement Payment under either the VAC Payment Group or the Claims Based Payment Group;

"Class Proceeding" has the same meaning as in the recitals;

"Court-Approved Costs" means all court-approved payments, disbursements, costs, legal fees, and taxes on legal fees;

"Designated Beneficiary" means:

a) Any person who submitted and received payment for a claim between 2019 and 2021 based on the indexation error identified by the Veterans Ombudsman;

b) The most recently listed beneficiary for the Supplemental Death Benefit under the *Canadian Forces Superannuation Act*; or

c) The most recently listed beneficiary under the *Royal Canadian Mounted Police Superannuation Act*.

"**Disability Pension Corrective Payments"** means the amounts paid, or payable, under paragraphs 4 and 22;

"**Estate**" means the estate of any deceased Class Member;

"**Final Order**" means the Federal Court's order approving this Agreement in accordance with its terms, once any time to appeal such order has expired without any appeal being taken, or, if the order is appealed, once there has been affirmation of the order upon a final disposition of all appeals;

"**Funding Request**" means a list of all Claimants the Administrator has determined are eligible for a Settlement Payment in a given calendar month throughout the Claims Period;

"Interim Period" means the time-period between the date of the Final Order and the date VAC issues Settlement Payments to the VAC Payment Group;

"Parties" has the same meaning as in the recitals;

"Released Claims" means any and all actions, causes of action, common law, Québec civil law and statutory liabilities, contracts, claims, grievances, and complaints, and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown, including for damages, contribution, indemnity, costs, expenses, and interest (both pre-judgment and post-judgment interest) which any Class Member ever had, or now has, directly or indirectly, arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to claims made in the Class Proceeding, whether asserted directly by the Class Member or by any other person, group, or legal entity on behalf of or as a representative for the Class Member. For greater clarity, the Released Claims include all benefits listed in the Class definition in the Certification Order as described in paragraph 8 of this Agreement, are not restricted to the Affected Benefits, and only include amounts received before or during the Relevant Period but do not include Disability Pension Corrective Payments;

"Releasee" means His Majesty the King in Right of Canada, the Attorney General of Canada, the Minister of Veterans Affairs, and all of their predecessors, successors, and assigns, officers, employees, servants, members of the CAF and RCMP, and agents;

"**Relevant Period**" means the period from and including 1 January 2003 to 31 December 2023;

"**Settlement Approval Order**" means the Federal Court order approving this Agreement in accordance with its terms;

"Settlement Payments" means any payments made to, or on behalf of, Class Members under this Agreement, of the Settlement Payment Calculation Amount with respect to that Class Member;

"Settlement Payment Calculation Amount" means the product that results from multiplying the Sum of All Affected Benefits Paid to that Class Member during the Relevant Period by "X".

"X" is the quotient that results from dividing (i) the Total Settlement Amount by (ii) the sum of all Affected Benefits paid to the entire Class during the Relevant Period. The following formula expresses the Settlement Payment Calculation Amount:

Settlement Payment Calculation Amount	=	Sum of All Affected Benefits Paid to Specific Class Member during Relevant Period	x	"X"

2024 FC 68 (CanLII)

"X"	=	Total Settlement Amount	÷	Sum of All Affected Benefits Paid to Entire Class during Relevant Period

The Defendant agrees to make best efforts to determine: (i) the sum of all Affected Benefits paid to a specific Class Member during the Relevant Period; and, (ii) the sum of all Affected Benefits paid to the entire Class during the Relevant Period, as soon as practicable, and, in any event, before the motion to approve the Settlement.

(The Settlement Payment to will be approximately 2% of the Sum of All Affected Benefits Paid to a Class Member during the Relevant Period.)

"Survivor" means:

a) A surviving spouse of a Class Member in receipt, at the time of the Final Order, of a pension under section 45 of the *Pension Act*;

b) A person cohabiting in a conjugal relationship with a Class Member and in receipt, at the time of the Final Order, of a pension under section 46 of the *Pension Act*;

c) A spouse of a Class Member in receipt, at the time of the Final Order, of a pension under section 47 of the *Pension Act*;

d) Any child, or children, of a Class Member who were at any time in receipt of a pension under section 34 of the *Pension Act*;

e) Any parent, or parents of a Class Member who were at any time in receipt of a pension under section 52 of the *Pension Act*; and

f) Any sibling, or siblings of a Class Member who were at any time in receipt of a pension under section 53 of the *Pension Act*;

"**Total Settlement Value**" means $817,300,000;

"**VAC**" has the same meaning as in the recitals. For clarity, VAC refers to Veterans Affairs Canada, the department within the Government of Canada responsible for administering Affected Benefits; and

"VAC Payment Group" means every Class Member or Survivor who, on the date of the Final Order or during the Interim Period, has a current payment arrangement with VAC and is in receipt of VAC benefits on a recurring monthly basis. For clarity, a Class Member may become part of the VAC Payment Group after the date of the Final Order and during the Interim Period, but no such Class Member can receive more than one Settlement Payment.

12. The Parties acknowledge that they have reviewed and participated in settling the terms of this Agreement. The Parties agree that any rule of construction or interpretation to the effect that any ambiguity is to be resolved against the drafting parties is not applicable in interpreting this Agreement.

2024 FC 68 (CanLII)

2024 FC 68 (CanLII)

EFFECTIVE DATE OF AGREEMENT

13. This Agreement will become effective and binding on the Parties and Class Members upon the date of the Final Order.

14. None of the provisions of this Agreement will become effective unless and until the Federal Court approves the Agreement in this form in the Final Order, subject to the Parties' ability to make non-material amendments on consent as necessary.

TOTAL SETTLEMENT AMOUNT AND SETTLEMENT PAYMENT CALCULATION AMOUNT

15. The maximum possible total value of Settlement Payments to be paid to Class Members by the Defendant as part of this Agreement is $817,300,000. This amount is inclusive of Court-Approved Costs.

16. Upon the final day of the Relevant Period, the Defendant shall determine the Settlement Payment Calculation Amount for each individual Class Member.

17. On or before January 31, 2024, the Defendant shall provide to Class Counsel and the Administrator a list of all Class Members confirming the value of the Settlement Payment Calculation Amount for each individual Class Member.

18. Based upon the good faith estimate of the Parties, the total value of Settlement Payments to be paid to Class Members in the VAC Payment Group is $435,500,000, and the potential total value of Settlement Payments to be paid to Claimants for Class Members in the Claims Based Payment Group is $381,800,000, subject to small variations during the Interim Period. These amounts are inclusive of Court-Approved Costs.

19. If the aggregate of all Settlement Payments is less than $435,500,000, the difference up to $10,000,000, less Court-Approved Costs, will be paid to a veterans' charity, or charities, as agreed upon by the parties and approved by the Court.

RESPONSIBLITY AND TIMING FOR PAYMENTS TO CLASS MEMBERS

20. The Defendant shall be responsible for paying Settlement Payments to Class Members in the VAC Payment Group in accordance with the terms of this Agreement.

21. The Defendant shall pay Settlement Payments to Class Members in the VAC Payment Group within nine (9) months of the Final Order.

22. The Defendant will continue to make Disability Pension Corrective Payments according to paragraph 4 of this Agreement based on the "accounting indexation error" identified by the Veterans Ombudsman in November 2018 to all Claimants who meet the requirements listed at https://www.veterans.gc.ca/eng/help/faq/disability-pension-correct-pay. The appropriate Claim Form will make reference to the procedures for making a request for Disability Pension Corrective Payments. Any corrective payments made to Claimants according to this paragraph will not be subject to Court-Approved Costs, or the Released Claims, and are not included in the definition of Settlement Payment under this Agreement.

23. The Administrator shall be responsible for paying Settlement Payments to Claimants in the Claims Based Payment Group in accordance with the terms of this Agreement.

VAC PAYMENT GROUP – LIVING CLASS MEMBERS

24. The Defendant shall make automatic Settlement Payments to living Class Members in the VAC Payment Group directly through the usual, ongoing, process of remitting VAC payments of benefits to that Class Member.

25. Class Members eligible as Claimants to the Claims Based Payment Group at the time of the Final Order who, during the Interim Period, establish a current payment arrangement with VAC and receive of VAC benefits on a recurring monthly basis, are eligible to be part of the VAC Payment Group.

VAC PAYMENT GROUP - SURVIVORS

26. If a deceased Class Member entitled to a Settlement Payment has a Survivor who is part of the VAC Payment Group, the Defendant shall pay the Settlement Payment on behalf of the deceased Class Member to the deceased Class Member's Survivor(s) in the following priority order:

    a) A surviving spouse of a Class Member in receipt, at the time of the Final Order, of a pension under section 45 the *Pension Act*;

    b) A person cohabiting in a conjugal relationship with the Class Member and in receipt, at the time of the Final Order, of a pension under section 46 of the *Pension Act*;

    c) A spouse of a Class Member in receipt, at the time of the Final Order, of a pension under section 47 of the *Pension Act*;

    d) Any child, or children, of a Class Member who were at any time in receipt of a pension under section 34 of the *Pension Act*;

    e) Any parent, or parents of a Class Member who were at any time in receipt of a pension under section 52 of the *Pension Act*; and

    f) Any sibling, or siblings of a Class Member who were at any time in receipt of a pension under section 53 of the *Pension Act*.

27. The Defendant shall automatically pay Settlement Payments to Survivors under priority steps (a), (b) and (c) directly through the usual, ongoing process of remitting VAC payments of benefits to that Survivor.

28. When more than one Survivor is entitled to receive a Settlement Payment on behalf of a deceased Class Member under priority steps (d), (e), or (f) above, the Defendant shall divide and distribute the Settlement Payment equally among all eligible Survivors identified under the same priority step.

2024 FC 68 (CanLII)

2024 FC 68 (CanLII)

29. For Survivors under priority steps (d), (e), or (f) above who have a current payment arrangement with VAC, the Defendant shall automatically pay Settlement Payments directly through the usual, ongoing process of remitting VAC payments of benefits to that Survivor.

30. For Survivors under priority steps (d), (e), or (f) above who do not have a current payment arrangement with VAC, the Defendant shall make a good faith effort to contact them and update their payment arrangement.

31. The Defendant will provide Class Counsel and the Administrator with a list of all payments made to Class Members in the VAC Payment Group within thirty (30) days of those payments being issued.

VAC PAYMENT GROUP – DEATH DURING INTERIM PERIOD

32. If a Class Member who was part of the VAC Payment Group dies during the Interim Period, and has no Survivor, VAC shall make best efforts to pay that Class Member's Estate directly without the need for them to submit a Claim Form to the Administrator. If VAC is unable to pay the Estate of a Class Member who dies during the Interim Period within ten (10) months of the Final Order, VAC will notify the Administrator, and the Estate will be eligible to apply for a Settlement Payment through the Claims Based Payment Group process.

33. If a Survivor who was entitled to automatically receive the Settlement Payment of a deceased Class Member as noted in paragraph 26 dies during the Interim Period and VAC is unable to issue a payment directly to the Estate of that Survivor, any Claimant who submits a Claim Form to the Administrator to receive the Settlement Payment for that Survivor will be entitled to receive the same Settlement Payment that the Survivor would have received had the payment been issued through the VAC Payment Group.

CLAIMS BASED PAYMENT GROUP – FINDING CLAIMANTS

34. The Administrator will make best efforts to locate and notify all persons eligible to receive a Settlement Payment as Claimants to the Claims Based Payment Group. To assist in that regard, no later than 60 days from the Settlement Approval Order, the Defendant will provide Class Counsel and the Administrator with:

    a) The names, service numbers, Client Service Delivery Network identification number, executor personal information, and last known contact information of all Class Members in the Claims Based Payment Group;

    b) Any information concerning the identity and contact information related to an estate trustee or estate representative acting for the Estate of a deceased Class Member in the Claims Based Payment Group;

    c) Any information concerning the identity of any person who submitted and received payment for a claim between 2019 and 2021 based on the indexation error identified by the Veterans Ombudsman.

2024 FC 68 (CanLII)

35. If required, the parties will work collaboratively and make best efforts to obtain additional information on Claimants either by court order or other means, from the Government of Canada organizations responsible for administering the *Canadian Forces Superannuation Act* and the *Royal Canadian Mounted Police Superannuation Act*. The Defendant will make reasonable efforts to assist Class Counsel with obtaining information from the Government of Canada organizations responsible for administering the *Canadian Forces Superannuation Act* and the *Royal Canadian Mounted Police Superannuation Act* to identify class members and acknowledges the application of s. 8(2)(m) of the *Privacy Act* in this regard.

CLAIMS BASED PAYMENT GROUP - SETTLEMENT PAYMENTS

36. The Administrator shall determine a Claimant's eligibility for a Settlement Payment after receipt of a Claim Form received within the Claims Period. The Administrator shall review the Claim Form and documents, if any, received from a Claimant to determine entitlement to a Settlement Payment before the end of the Claims Payment End Date.

37. At the end of each month during the Claims Period and through to the end of the Claims Payment End Date, the Administrator shall provide the Defendant with a Funding Request list describing all Claimants eligible to receive a Settlement Payment on behalf of a Class Member as determined by the Administrator in the same month. For each Settlement Payment to be paid by the Administrator, the Funding Request will include, but not be limited to: the Class Member's name and Client Service Delivery Network identification number, the Claimant's name, email address, telephone number, and relationship to the Class Member, and the amount to be paid.

38. Within 30 days of receipt of the Funding Request, and upon the availability of the funds, the Defendant shall make one payment to the Administrator equal to the total of the Funding Request. For greater certainty, while the Administrator may begin accepting and processing Claim Forms at the beginning of the Claims Period, the Administrator cannot make Settlement Payments until it receives funds from the Defendant. Further, it is understood between the Parties that the best estimate of the Defendant is that it will not be in a position to provide funds to the Administrator until August, 2024. The Defendant agrees that it will provide funds to the Administrator at the earliest possible date.

39. The Administrator shall complete all Claims Based Payment Group Settlement Payments as soon as practicable, but no later than the Claims Payment End Date.

40. The Administrator shall make Settlement Payments to approved Claimants as follows:

    a) Living Class Members who have submitted a valid claim form, appended to this Agreement at Schedule "A", and who are claiming on their own behalf shall be paid their entitlement by the Administrator as soon as practicable;

    b) An Estate Trustee, Estate Administrator or Executor of a deceased Class Member's estate who produces valid documents to the satisfaction of the Administrator demonstrating their appointment as such shall be paid their entitlement by the Administrator as soon as practicable;

c) All claims submitted within the Claims Period other than those in ss. (a) and (b) shall be held until the end of the Claims Period, at which time the Administrator shall act as follows:

i. Where there is **only one Claimant,** that person shall be paid the entitlement as soon as practicable

ii. Where there is **more than one Claimant**, the Administrator shall pay the person ranked highest in the following priority hierarchy:

First Priority	Surviving spouse or common law partner
Second Priority	Surviving child/children
Third Priority	Surviving grandchild/grandchildren
Fourth Priority	Surviving parent
Fifth Priority	Surviving siblings
Sixth Priority	Surviving nieces or nephews (including nieces-in-law and nephews-in-law)
Seventh Priority	Surviving next of kin
Eighth Priority	Charitable organization provided for by a deceased Class Member under a Will

*Should there be more than one Claimant with equivalent highest priority, the entitlement shall be divided equally among those Claimants.

iii. Where **no claim** has been submitted for on behalf of a Class Member by the end of the Claims Period, the entitlement for that Class Member shall be considered through the Designated Beneficiaries framework.

41. In consultation with the Parties, the Administrator will develop all written communications to Claimants related to the Settlement Payments, including the letter explaining to the Claimant how the Settlement Payment was calculated and how Court-Approved Costs were deducted from the Settlement Payment.

42. The Administrator will provide monthly reports to the Defendant and Class Counsel to confirm the details of the payments issued.

43. The Parties agree to determine jointly, as soon as practicable, the Administrator's scope of engagement and then seek the Federal Court's approval of the Administrator's appointment as soon as practicable. The Parties will also make best efforts to obtain approval of the Administrator's appointment during the hearing of the motion before the Federal Court to approve this Agreement.

2024 FC 68 (CanLII)

2024 FC 68 (CanLII)

CLAIMS BASED PAYMENT GROUP - DESIGNATED BENEFICIARIES

44. If the Administrator has not received a Claim Form from a Claimant by the end of the Claims Period, the Administrator shall take best efforts to make the Settlement Payment directly to an identifiable individual in the following priority order:

    a) Any person who submitted and received payment for a claim between 2019 and 2021 based on the indexation error identified by the Veterans Ombudsman;

    b) The most recently listed beneficiary for the Supplemental Death Benefit under the *Canadian Forces Superannuation Act*; or

    c) The most recently listed beneficiary under the *Royal Canadian Mounted Police Superannuation Act*.

LEGAL FEES

45. Class Counsel shall be entitled, subject to the Federal Court's approval, to payment of the Court-Approved Costs to be deducted *pro rata* from each Settlement Payment. The Defendant shall not take a position with respect to Class Counsel's motion to approve payment of fees and disbursements.

46. Class Counsel agree that no additional amount except as approved by the Federal Court shall be deducted for legal fees from any Settlement Payments made to Class Members. Class Counsel further agree to provide reasonable assistance to Class Members with respect to the administration of this Agreement and the Class Proceeding in consideration for the fees approved by the Federal Court. For greater clarity, Class Counsel will not provide legal assistance to Class Members in respect of applications for pensions, benefits, or other awards that may be available to Class Members through VAC or other government agencies.

47. Prior to making a Settlement Payment to a Class Member or Survivor in the VAC Payment Group, the Defendant will deduct Court-Approved Costs relating to that Settlement Payment and pay that amount to Gowling WLG (Canada) LLP, in trust, within thirty (30) days of issuing the Settlement Payments to that Class Member.

48. Prior to making a Settlement Payment to a Claimant, the Administrator will deduct Court-Approved Costs relating to that Settlement Payment and pay that amount to Gowling WLG (Canada) LLP, in trust on a monthly, ongoing basis during the Claims Period.

AUDIT

49. The Administrator shall have the opportunity to review, examine, or audit all Settlement Payments. The Defendant shall have the opportunity to review, examine, or audit all actions of the Administrator under this Final Settlement Agreement.

50. The Defendant will keep Class Counsel fully informed as to the steps taken and the progress of administering and distributing Settlement Payments, including providing copies of documents summarizing payments made under this Agreement. The Defendant will provide month end statements to Class Counsel of all payments made under this Agreement in that month and an updated final report on completing the administration of the settlement. The monthly statements shall be provided no later than the 15th day of the following month and the final report on the 15th day of the month following the last payment. Class Counsel will promptly inform the Defendant of any errors or omissions they identify. The Parties will make reasonable efforts to resolve differences in regard to the statements and final report, as well as to any issues arising that relate to access by Class Counsel to information and documents on administration and distribution of Settlement Payments. In the event that the Parties cannot resolve differences, either Party may apply to the Federal Court for directions and/or a determination.

51. For greater certainty, Class Counsel are entitled to access the master list of Class Members, and individual calculation letters that accompany payments, but are not otherwise entitled to documents in the Defendant's files. Class Counsel are not entitled to access an individual Class Member's file or documents in the Defendant's files on a Class Member's medical condition or the assessment of benefits payable to or on behalf of one or more Class Member, and are further not entitled to access documents that are subject to legal privilege, including solicitor-client, litigation privilege, or cabinet confidence.

COST OF NOTICE AND CLAIMS ADMINISTRATION

52. The Parties shall jointly agree on a notice (or notices) to the Class and the means of publication of the notice (or notices) as well as the process for administering Settlement Payments, all subject to the Federal Court's approval.

53. The cost of publishing the notice, or notices, shall be paid by Class Counsel as a disbursement, recoverable as a Court-Approved Cost.

54. The Administrator shall be paid by the Defendant. The amount to be paid will be agreed upon by the parties and will not be deducted from Settlement Payments to Class Members. For greater certainty, payment of the Administrator will not form part of the Court-Approved Costs.

2024 FC 68 (CanLII)

2024 FC 68 (CanLII)

RELEASES

55. Upon the date of the Final Order, the Representative Plaintiffs and Class Members agree that all Released Claims are barred from legal action. Further, the Parties agree that all Class Members who have not opted out during the Opt-Out Period will be bound by a deemed release in the form set out in the Final Order.

56. The Final Order will declare that:

    a) Upon the date of the Final Order, the Releasees are forever and absolutely released jointly and severally by the Class Members, and each of them, from the Released Claims; and

    b) The Class Members, and each of them, are barred from making any claim or taking or continuing any proceedings arising out of or relating to the Released Claims against any Releasee or other person, corporation, or entity that might claim damages and/or contribution and indemnity and/or other relief under the provisions of the applicable Negligence Act, the common law, Québec civil law, or any statutory liability for any relief whatsoever, including relief of a monetary, declaratory, or injunctive nature, from the Releasees.

57. The Representative Plaintiffs and Class Members further agree that following implementation of the settlement, all necessary steps will be taken to effect a dismissal or discontinuance of the Class Proceeding, to be approved by the Federal Court.

58. Upon the Federal Court issuing the Final Order, there will be a deemed release in respect of all persons falling within the Class definition in favour of Canada, the Attorney General of Canada, His Majesty the King in Right of Canada, and all current and former Ministers, employees, departments, Crown agents, agencies, Crown servants, and members of the CAF and RCMP for the matters pleaded, or which could have been pleaded in respect of the calculation of the annual is it adjustment, known and unknown, in the Class Proceeding.

59. This Final Settlement Agreement is not to be construed as an admission of liability by Canada.

SETTLEMENT APPROVAL

60. The Parties agree that they will seek the Federal Court's approval of this Final Settlement Agreement.

61. The motion for approval of the negotiated Final Settlement Agreement, and Class Counsel's fees will be prepared by Class Counsel and will be provided to Counsel for Canada in draft for comment before filing with the Federal Court. The Parties agree to have the motions heard in one sitting.

2024 FC 68 (CanLII)

TAXATION AND SOCIAL BENEFITS

62. The Defendant confirms that the Affected Benefits are non-taxable. The Defendant shall assist in seeking confirmation from Canada Revenue Agency that none of the Settlement Payments will be treated as taxable income.

63. If Canada Revenue Agency confirms that none of the Settlement Payments will be treated as taxable income, neither the Defendant nor the Administrator shall withhold any amounts on account of tax, or file with the Canada Revenue Agency information reporting Settlement Payments made under this Agreement.

64. Benefits administered by VAC will not be negatively affected by the Class Member's receipt of a Settlement Payment under this Agreement, including by offset.

CONFIDENTIALITY

65. Any information provided, created, or obtained in the settlement and administration of the settlement, whether written, digital, or oral, will be confidential to the Parties, their counsel, and the individual Claimant who is the subject of the particular information and will not be used for any purpose other than the Settlement unless otherwise agreed by the Parties, except where otherwise provided by law. Save as otherwise required by law, the undertaking of confidentiality as to the discussions and all communications, whether written, digital or oral, made in and surrounding the negotiations leading to this Agreement continues indefinitely.

OTHER TERMS

66. Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Agreement on behalf of the Parties identified below.

67. This Agreement constitutes the entire agreement between the Parties and may not be modified or amended except in writing, on consent of the Parties, and with Court approval.

68. This Agreement shall, without notice, be automatically terminated if the Federal Court does not approve this Final Settlement Agreement. In the event of termination, this Agreement shall have no further force or effect, save and except for this section, which shall survive termination.

69. As soon as reasonably possible, the parties shall jointly prepare a French language version of this Agreement.

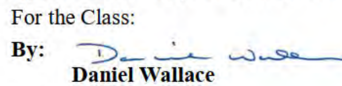
70. The Parties may apply, on notice, to the Federal Court as may be required for directions in respect of the interpretation, implementation, and administration of this Agreement.

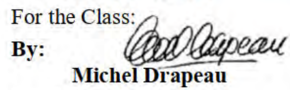
71. The Federal Court shall retain and exercise continuing and ongoing jurisdiction with respect to implementation, administration, interpretation, and enforcement of the terms of this Agreement.

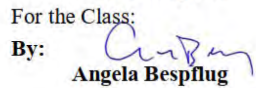
72. This Agreement may be signed in counterparts.

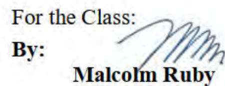
73. All references to currency herein are to the lawful money of Canada.

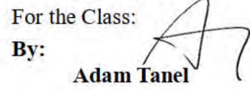
Signed this 8th day of November 2023.

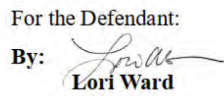
For the Class:
By: 
Daniel Wallace

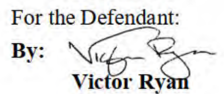
For the Class:
By: 
Michel Drapeau

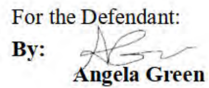
For the Class:
By: 
Angela Bespflug

For the Class:
By: 
Malcolm Ruby

For the Class:
By: 
Adam Tanel

For the Defendant:
By: 
Lori Ward

For the Defendant:
By: 
Victor Ryan

For the Defendant:
By: 
Angela Green

2024 FC 68 (CanLII)

DRAFT

2024 FC 68 (CanLII)

Claim Form – *Manuge v. HMK*

Claim Form for Claimants under settlement of Manuge v. His Majesty the King Pension Miscalculation Class Proceeding

IMPORTANT:

- Claimants are encouraged to complete and submit this Claim Form online at: [Insert Website Information]. Online submission will mean faster and more secure processing of the Claim.
- If you use a pen to fill in this Claim Form, please print as clearly as possible. You can submit your Claim Form as an attachment to an e-mail to ____________, or by regular mail/courier to the Administrator at: [insert all KPMG contact information]
- Claimants are required to attach a document establishing proof of identity and any other document that may be necessary as set out in the below sections
- This Claim Form must be submitted no later than _____ 2024.
- Where the Claim Form asks for information “if known”, that information is helpful for the Administrator, but not required.

1. I make this claim as (check one box only):

   [ ] A Living Class Member
   You are only required to complete sections 1 and 4;

   [ ] A representative of an Estate of the deceased Class Member
   You are only required to complete sections 2 and 4;

   [ ] A family member of the deceased Class Member
   You are only required to complete sections 3 and 4.

SECTION 1 – LIVING CLASS MEMBER

2. Full Name (first, middle and last name): ______________________

3. Maiden name, if applicable: ______________________

4. Date of Birth (day/month/year): ___________________

5. My VAC Identifier (CSDN ID, K number or Service Number): ____

6. I request a payment to myself under the settlement of the Class Proceeding approved by the Federal Court Order. Proceed to Section 4.

SECTION 2 - A REPRESENTATIVE OF AN ESTATE OF THE DECEASED CLASS MEMBER

DRAFT

7. Deceased's Full Name (first, middle and last name): ______________________

8. Deceased's Maiden Name, if applicable: ___________________________

9. Deceased's Date of Birth (Day/Month/Year), if known: ________________

10. Deceased's VAC Identifier (CSDN ID, K number or Service Number), if known: ______________________________________

11. The Deceased died (check one box only):

    [ ] with a Will;
    [ ] without a Will;
    [ ] not known.

12. At the time of death, the Deceased's address was as follows, if known:

    ______________________ (Street Address) ________________ (Postal Code) ____________ (Country)

    ______________________ (City, Town or Village) ________________ (Province, Territory, or State)

13. I am the ____________________of the Deceased's estate.

14. I attach the following document to show that I am the estate trustee, estate administrator or executor of the Deceased's estate.

    [ ] Will;
    [ ] Court appointment.
    [ ] Other document. Please specify: ________________

15. I request a payment to the Estate on behalf of the Deceased under the settlement of the Class Proceeding approved by the Federal Court Order. Proceed to Section 4.

SECTION 3 – FAMILY MEMBER OF THE DECEASED CLASS MEMBER

16. Deceased's Full Name (first, middle and last name): ________________

17. Deceased's Maiden Name, if applicable: ___________________________

18. Deceased's Date of Birth (Day/Month/Year), if known: ________________

2024 FC 68 (CanLII)

DRAFT

2024 FC 68 (CanLII)

19. Deceased's VAC Identifier (CSDN ID, K number or Service Number), if known:

    ____

20. At the time of death, the Deceased's address was as follows, if known:

    ______________________ ________________ ____________
    (Street Address) (Postal Code) (Country)

    ______________________ ________________
    (City, Town or Village) (Province, Territory, or State)

21. I am the following relationship to the Deceased (check one box only):

    [ ] Spouse or common law partner
    [ ] Child
    [ ] Grandchild
    [ ] Parent
    [ ] Sibling
    [ ] Niece or nephew (including nieces-in-law and nephews-in-law)
    [ ] Next-of-kin (Please specify relationship ________________)
    [ ] Charitable organization provided for by the Deceased's Will (Will required)

22. I request a payment to me on behalf of the Deceased under the settlement of the Class Proceeding approved by the Federal Court Order. Proceed to Section 4.

SECTION 4 – METHOD OF CONTACT, PAYMENT METHOD AND SIGNATURE

23. For communication purposes, email communication is preferred (check one box only):

    [ ] My email address is: ___________________
    [ ] I am unable to communicate via email, I can be contacted by phone at: __________________________
    [ ] I am unable to communicate via email or phone and consent to be contacted at the mailing address that I have provided in Paragraph 25.
    [ ] My Power of Attorney, __________________________, will communicate on my behalf and their email address/phone number is as follows: __________________________

24. I understand that the payment will be made by cheque sent to the address at Paragraph 25.

2024 FC 68 (CanLII)

DRAFT

25. My Mailing Address:

(Street Address)	(Postal Code)	(Country)
(City, Town or Village)	(Province, Territory, or State)	

26. My phone number is ____________________.

27. I attach a copy of my proof of identity. The proof of identity needs to be issued by a federal, provincial, territorial or state government authority and valid (i.e., not expired). To be considered acceptable, the valid proof of identity needs to include your name, date of birth and photo (see various options below and check one box only):

[ ] Driver's license
[ ] Health card (if it shows your name, date of birth and photo)
[ ] Passport
[ ] Canadian military identification card
[ ] Veterans service card
[ ] Canadian citizenship card
[ ] Secure certification of Indian status card
[ ] Government-issued identification card
[ ] U.S. permanent resident card

28. I understand that the Administrator may require that I provide additional documentation.

29. By signing the Claim Form at Paragraph 30, I consent to the use, collection, disclosure, and retention of my personal information provided on this form. The personal information collected by KPMG will be used exclusively for the purpose of processing and determining my entitlement to make a claim under the *Manuge v. HMK* class action settlement (CFN: T-119-19). KPMG may process applications using automation to support processing of decision-making. The personal information provided in this claim form may also be disclosed to Class Counsel, Veterans Affairs Canada, or an auditor, if applicable, for the purpose of: validating identity; carrying out any lawful investigations to confirm that I am an eligible Class Member; processing of claims; development of payment strategy; and/or reporting obligations. I further consent to the use and disclosure of records containing my personal information that are in the possession of the Government of Canada to KPMG for the purpose of processing and determining my entitlement to make a claim under the *Manuge v HMK* class action settlement.

DRAFT

2024 FC 68 (CanLII)

30. I solemnly declare that the information provided in this Claim Form is correct.

______________________________	______________________________
Signature	Date (Day/Month/Year)
______________________________	______________________________
Witness Name (Capital Letters)	Witness Signature

Information Regarding Disability Pension Corrective Payment

31. If you were legally entitled to inherit the assets of a deceased Class Member who received a *Pension Act* disability pension between 2003-2010, you may be entitled to a corrective payment in addition to the amounts recovered in this Class Proceeding. Information about the Disability Pension Corrective Payment, and a link to the application, are on VAC's website: Disability Pension Corrective Payment.

32. Class Counsel has committed to assisting those applying for corrective payments at no cost. Class Counsel can be contacted for assistance as follows:

Call:1-866-545-9920
Email: info@vetspensionerror.ca

2024 FC 68 (CanLII)

SCHEDULE "B" – Short Form Notice

LEGAL NOTICE

Do you collect a disability-related benefit administered by Veterans Affairs Canada?

A class action settlement may affect you.
Please read this notice carefully.

On [**date**] the Federal Court approved a settlement in a certified class action involving alleged underpayment of certain disability pension benefits administered by Veterans Affairs Canada ("**VAC**") payable to members or former members of the Canadian Armed Forces ("**CAF**") and the Royal Canadian Mounted Police ("**RCMP**") and their spouses, common-law partners, survivors, other related individuals, and estates (the "**Settlement**").

If you received any of the disability-related benefits listed in this notice at any time between 2003 and 2023, you may be entitled to compensation under the Settlement. As the executor, estate trustee, administrator, or family member of a deceased class member who collected VAC-administered disability benefits, you may also be able to claim on behalf of the estate.

If you are entitled to compensation under the Settlement and you have an active payment arrangement with VAC, such as direct deposit, you do not need to do anything to receive payment.

If you are claiming on behalf of a deceased veteran of the CAF or RCMP, including as the executor, trustee, administrator of an estate, or a family member, you must submit a claim form to [NAME], the administrator ("Administrator") responsible for handling claims available at:

[**Administrator Details**]

[**Obtaining Claim Form Details**]

The deadline to submit a claim is [**date**]. All eligible claimants are entitled to receive legal assistance free of charge from Class Counsel for purposes relating to implementing the Settlement, including preparing and/or submitting a claim to the Administrator.

For more information or for assistance with filing a claim, send an email to info@vetspensionerror.ca, or call toll-free at 1-866-545-9920. To see the full text of the Final Settlement Agreement, please visit https://vetspensionerror.ca/court-documents/.

2024 FC 68 (CanLII)

WHO IS INCLUDED?

The Settlement covers members and former members of the CAF and the RCMP and their spouses, common–law partners, dependants, survivors, orphans, and any other individuals, including eligible estates of all such persons, who received—at any time between 2003 and 2023—disability benefits based on annual adjustments of the basic pension under s. 75 of the *Pension Act* (the "**Class Members**").

The terms of the Settlement are binding on Class Members. The Settlement includes releases of claims asserted in the certified Class Action.

WHAT BENEFITS ARE AFFECTED?

The Settlement affects prescribed annual adjustments of the following benefits (the "**Affected Benefits**"):

- *Pension Act* pension for disability;
- *Pension Act* pension for death;
- *Pension Act* attendance allowance;
- *Pension Act* allowance for wear and tear of clothing or for specially made apparel;
- *Pension Act* exceptional incapacity allowance;
- *Civilian War-related Benefits Act* war pensions and allowances for salt water fishers, overseas headquarters staff, air raid precautions works, and injury for remedial treatment of various persons and voluntary aid detachment (World War II);
- *Flying Accidents Compensation Regulations* flying accidents compensation;
- RCMP Disability Benefits awarded in accordance with the *Pension Act;*
- *Veterans Well-being Act* clothing allowance;

WHAT DOES THE SETTLEMENT PROVIDE?

The Settlement provides direct compensation to Class Members who receive (or have previously received) any of the Affected Benefits listed above, since January 1, 2003. Class Members will receive a single payment equal to [**X%**] of all Affected Benefits they have received since January 1, 2003. The total amount of compensation paid by Canada to the Class could be as much as $817,300,000.

This is only a summary of the benefits available under the Settlement. The full text of the Final Settlement Agreement ("**FSA**") is available online at https://vetspensionerror.ca/court-

2024 FC 68 (CanLII)

documents/. You should review the entire FSA in order to determine your entitlement and any steps you may need to take to access compensation.

HOW AM I PAID?

Eligible Class Members who are currently collecting VAC-administered disability benefits or pensions will receive a Settlement payment automatically through the same payment method they currently use to collect benefits, including by direct deposit.

Class Members who received Affected Benefits between 2003 to 2023 but who do not have a current payment arrangement with VAC will be required to make a claim with the Claims Administrator. This includes all Class Members who are deceased, and where an executor, estate trustee, administrator of an estate, or a family member is making a claim on behalf of that Class Member.

However, if a deceased Class Member has a survivor who is in receipt of VAC benefits and has a current payment arrangement, that survivor will automatically receive the deceased Class Member's entitlement without the need to make a claim with the Claims Administrator.

HOW DO I MAKE A CLAIM?

If you do not have an active payment arrangement with VAC, you must submit a claim form with the Administrator here:

[**Administrator Details**]

Please read and follow the instructions on the Claim Form. Class Counsel are available, free of charge, to answer your questions and assist you with preparing your claim form.

The deadline to file a claim is [date].

AM I RESPONSIBLE FOR LEGAL FEES?

You are not responsible for payment of legal fees. The Federal Court has approved Class Counsel's fees (including HST) and disbursements to be automatically calculated and deducted from the Settlement amount you are entitled to receive before the payment is issued.

The Federal Court approved payments to Class Counsel equal to approximately 17% of each payment made under the Settlement. The FSA contains additional details about Class Counsel fees, available online at https://vetspensionerror.ca/court-documents/.

Class Counsel are available to assist Class Members through the claims process free of charge.

FURTHER INFORMATION?

For further information or to get help with your claim, contact Class Counsel by phone, email, or online:

Visit: https://vetspensionerror.ca/
Call:1-866-545-9920
Email: info@vetspensionerror.ca

DO YOU KNOW ANY OTHER RECIPIENTS OF A VAC DISABILITY PENSION?

Please share this information with them.

2024 FC 68 (CanLII)

Long Form Notice

LEGAL NOTICE

Do you collect a disability-related benefit administered by Veterans Affairs Canada?

A class action settlement may affect you.
Please read this notice carefully.

The Federal Court has authorized this notice.
This is not a solicitation from a lawyer or a lawsuit against you.

On [**date**] the Federal Court approved a settlement in a certified class action involving alleged underpayment of certain disability pension benefits administered by Veterans Affairs Canada ("**VAC**") payable to members or former members of the Canadian Armed Forces ("**CAF**") and the Royal Canadian Mounted Police ("**RCMP**") and their spouses, common-law partners, survivors, other related individuals, and estates (the "**Settlement**").

If you received any of the disability-related benefits listed in this notice at any time between 2003 and 2023, you may be entitled to compensation under the Settlement. As the executor, estate trustee, administrator of an estate, or family member of a deceased class member who collected VAC-administered disability benefits, you may also be able to claim on behalf of the estate.

If you are entitled to compensation under the Settlement and you have an active payment arrangement with VAC, such as direct deposit, you do not need to do anything to receive payment.

If you are claiming compensation on behalf of a deceased veteran of the CAF or RCMP, including as the executor, trustee, administrator of an estate, or family member, you are required to submit a claim form ("Claim Form") to [NAME], the administrator ("Administrator") responsible for handling claims:

[**Administrator Details**]

[Obtaining Claim Form Details]

The deadline to submit a claim is [**date**]. All eligible claimants are entitled to receive legal assistance free of charge from Class Counsel for purposes relating to implementing the Settlement, including preparing and/or submitting a claim to the Administrator.

2024 FC 68 (CanLII)

For more information or for assistance with filing a claim, send an email to info@vetspensionerror.ca, or call toll-free at 1-866-545-9920. To see the full text of the Final Settlement Agreement, please visit https://vetspensionerror.ca/court-documents/.

2024 FC 68 (CanLII)

WHAT THIS NOTICE CONTAINS

BASIC INFORMATION
1. Why did I get this notice?
2. What is a class action?
3. What are VAC-administered disability benefits?
4. What is this lawsuit about?
5. Why is there a Settlement?

WHO IS INCLUDED IN THE SETTLEMENT?
6. Who is included in the Settlement?

SETTLEMENT BENEFITS?
7. What does the Settlement provide?
8. What happens if the recipient of the benefit is deceased?
9. How can I receive a payment?
10. How do I file a claim?
11. When is the deadline to file a claim?
12. When will I receive my payment?
13. Who determines if I have a valid claim?
14. Can my claim be denied?
15. What am I giving up in the Settlement?
16. Can I remove myself from the Settlement?
17. Am I responsible for legal fees?

THE LAWYERS REPRESENTING YOU
18. Who are the lawyers for the Class?

BASIC INFORMATION

1. Why did I get this notice?

The Federal Court has authorized this notice to inform you about the Settlement. This notice explains the lawsuit, the Settlement, and how to claim compensation. You should read the entire notice, as your rights may be affected even if you do nothing.

In an effort to reach as many people as possible, copies of this notice have been distributed to veterans' organizations across Canada. You may have received this notice from the lawyers in the class action or from someone you know, or you may have found this notice in a newspaper or public place. If you know a current or former member of the CAF or the RCMP, please show them a copy of this notice.

2. What is a class action?

In a class action, one or more people called "**Representative Plaintiffs**" sue on behalf of those who have similar claims. All of these people are called a "**Class**" or "**Class Members**." The courts resolve the issues for everyone affected by the class action, except for those who exclude themselves, or "opt-out" of, the lawsuit. In this class action, the deadline to opt-out has passed.

3. What are VAC-administered disability benefits?

Many current and former members of the CAF or the RCMP and their family members receive, or received, some kind of disability benefit, pension, or related payment administered by VAC. If you are a current or former member of the CAF or the RCMP, or you are related to a current or former member, including deceased former members, you may have received (or may currently be receiving) one or more of the following benefits:

- *Pension Act* pension for disability
- *Pension Act* pension for death
- *Pension Act* attendance allowance
- *Pension Act* allowance for wear and tear of clothing or for specially made apparel
- *Pension Act* exceptional incapacity allowance
- *Civilian War-related Benefits Act* war pensions and allowances for salt water fishers, overseas headquarters staff, air raid precautions works, and injury for remedial treatment of various persons and voluntary aid detachment (World War II)
- *Flying Accidents Compensation Regulations* flying accidents compensation
- RCMP Disability Benefits awarded in accordance with the *Pension Act*
- *Veterans Well-being Act* clothing allowance;

2024 FC 68 (CanLII)

If you have a My VAC Account, you can check online for the types of benefits you receive.

4. What is this lawsuit about?

Each year, VAC is required to calculate an annual adjustment in monthly disability benefits to account for inflation and changes in the cost of living. The annual adjustment is mandated by s. 75 of the *Pension Act.*

The Class Action alleges that since 2003 VAC has made errors in calculating increases in annual adjustments, meaning that Class Members have been underpaid by small amounts each month over many years. Canada does not admit that VAC made these errors, but it has agreed to make payments to Class Members to resolve the dispute. In this Settlement, the benefits that were allegedly affected by calculation errors are referred to as the "**Affected Benefits**". A list of Affected Benefits is included in the response above to Question 3.

5. Why is there a Settlement?

The Federal Court has approved a Settlement between the Plaintiffs and Canada. Following a Settlement Approval Hearing on December 18, 2023, in Ottawa, the Federal Court determined that the Settlement is fair, reasonable, and in the best interests of the Class as a whole.

By agreeing to settle the lawsuit, the parties have avoided the costs, uncertainty, and delay of going to trial and obtaining judgment. In this case, it also means that Class Members will not need to testify in court and prove each necessary element of their case. Class Members will have the certainty of knowing their entitlement to payments under the Settlement and will receive payments more quickly under a timeline described in the Settlement and approved by the Federal Court.

WHO IS INCLUDED IN THE SETTLEMENT?

6. Who is included in the Settlement?

The Settlement affects any person who falls under the Class Definition. The Court certified a Class Definition on December 23, 2020 as:

> All members and former members of the Canadian Armed Forces and Royal Canadian Mounted Police, and their spouses, common law partners, dependants, survivors, orphans, and any other individuals, including eligible estates of all such persons, who received – at any time between 2002 and the present – disability pensions, disability awards, and other benefits from Veterans Affairs Canada that were affected by the annual adjustment of the basic pension under section

2024 FC 68 (CanLII)

75 of the *Pension Act* including, but not limited to, the awards and benefits listed above.

2024 FC 68 (CanLII)

SETTLEMENT BENEFITS

7. What does the settlement provide?

The Settlement provides direct compensation to Class Members who receive (or have previously received) any of the Affected Benefits listed in the answer to Question 3, above, since January 1, 2003. Each Class Member is entitled to a payment of [**%**] of all Affected Benefits they have received since January 1, 2003. The total amount of compensation paid to the Class could be as much as $817,300,000.

The Settlement also provides a streamlined process for the survivors, executors, trustees and administrators of Class Members' estates and family members of deceased Class Members to submit claims for compensation even if the deceased died without a will.

This is only a summary of the benefits available under the Settlement. The full text of the Final Settlement Agreement ("**FSA**") is available online at https://vetspensionerror.ca/court-documents/. You should review the entire FSA in order to determine your entitlement and any steps you may need to take to access compensation.

8. What happens if the recipient of the benefit is deceased?

If the Class Member who received Affected Benefits at any time from 2003 to 2023 is deceased and that Class Member has a survivor who is currently receiving VAC-administered benefits, then that survivor will automatically receive the deceased Class Member's entitlement. Survivors with an active payment arrangement with VAC will receive payment automatically, without the need to file a claim form.

If the deceased Class Member has no survivor currently receiving VAC-administered benefits, then an executor, estate trustee, or administrator of that Class Member's estate should submit a claim to the Administrator to receive the Settlement amount.

Additionally, other persons such as family members of the deceased Class Member may make a claim, including:

- Surviving spouses or common law partners
- Surviving children
- Surviving grandchildren
- Surviving parents
- Surviving siblings
- Surviving nieces or nephews
- Any other surviving next of kin
- Charitable organization provided for by a deceased Class Member under a will

2024 FC 68 (CanLII)

If more than two individuals claim in respect of the same Class Member, the FSA contains a process to determine how the payment should be made.

9. How can I receive a payment?

If you are already receiving VAC-administered disability benefit payments as a Class Member, then VAC will calculate the amount owing to you under the Settlement and pay you in the same way that you normally receive benefit payments from VAC. For example, if you are registered for direct deposit, you will automatically receive a payment under the Settlement as an additional amount in a future deposit. As noted above in Question 8, survivors of a deceased CAF or RCMP Class Member who have an active payment arrangement with VAC will automatically receive that CAF or RCMP Class Member's payment through a second, separate deposit.

Any Class Member who received Affected Benefits between 2003 to 2023 but who does not have a current payment arrangement with VAC must submit a claim to the Administrator to receive a Settlement Payment. This includes all Class Members who are deceased, and applies to an executor, estate trustee, administrator of an estate or family member who is making a claim on behalf of the deceased Class Member.

If you have received VAC benefits in the past but the payments have stopped or your banking information has changed, you must complete a Claim Form and submit it to the Administrator before the deadline in order to receive a payment.

10. How do I file a claim?

If you do not have an active payment arrangement with VAC, you are required to submit a Claim Form with the Administrator here:

[**Administrator Details**]

Please read and follow the instructions on the Claim Form. The deadline to submit a claim is [date]. Class Counsel are available, free of charge, to assist you with preparing your claim form.

If you have any questions about the Claim Form or would like assistance with submitting your claim, please contact Class Counsel at info@vetspensionerror.ca.

11. When is the deadline to file a claim?

The deadline to file a claim is **[Claim Period end date**]. Please note that it is not enough to send your claim form to Class Counsel. **All claim forms must be sent to the Administrator.**

12. When will I receive my payment?

The timing of payments will depend on whether you have a current payment arrangement with VAC. Class Members who do not have an active payment arrangement with VAC will need to submit a Claim Form to the Administrator. Some of these claims can be processed more quickly than others. Please contact Class Counsel for more information.

Class Members with a current payment relationship with VAC will receive payments automatically beginning after [**date of Final Order**]. Canada is required to complete all automatic payments by [**date of Final Order + 9 months**].

If you do not have a current payment arrangement with VAC, you are required to submit a Claim Form to the Administrator to be eligible to receive compensation under the Settlement. The time required to process these claims will depend on a number of factors, including whether you are claiming on behalf of a deceased Class Member. The deadline to submit a claim is [**Claim Period end date**] and all claims are required to be paid by [**Claims Payment End Date**]. You should submit a claim as soon as possible to ensure timely payment.

13. Who determines if I have a valid claim?

The Federal Court has appointed KPMG to act as the Administrator. The Administrator is a neutral third-party responsible for administering the Settlement in accordance with the approved Settlement, under the supervision of the Court.

14. Can my claim be denied?

The Administrator will notify you if your claim is denied.

Your claim can be denied if (a) you are not an eligible Class Member because you do not meet the Class Definition; (b) you have already been compensated under the Settlement, including if you submit a claim on behalf of a Class Member whose entitlement has already been paid; or (c) if your claim did not include required supporting documents. (Some types of claims require additional documentation while others do not; see the Claim Form or contact Class Counsel for assistance).

If your claim is rejected because you are missing the required supporting documents, please reach out to Class Counsel for assistance.

2024 FC 68 (CanLII)

15. What am I giving up in the Settlement?

Unless you have previously opted out, the Settlement requires you to surrender the right to pursue specific individual claims against Canada. Under the Settlement, you are "releasing" Canada from liability, which means you, or someone on your behalf, cannot sue Canada for underpayment of the disability-related benefits based on the annual adjustment errors alleged in the Class Action for any time up to and including December 31, 2023.

16. Can I remove myself from the Settlement?

No. The deadline to exclude yourself as a Class Member, or "opt-out", expired on March 30, 2022. The Settlement is now final and binding by order of the Federal Court.

17. Am I responsible for legal fees?

You are not responsible for payment of legal fees. The Federal Court has approved Class Counsel's fees, including HST and disbursements, to be automatically calculated and deducted from the Settlement amount you are entitled to before the payment is issued.

The Federal Court approved payments to Class Counsel equal to approximately 17% of each payment made under the Settlement. The FSA contains additional details about Class Counsel fees, available online at https://vetspensionerror.ca/court-documents/.

Class Counsel are available to assist Class Members through the claims process free of charge.

THE LAWYERS REPRESENTING YOU

18. Who are Class Counsel, the lawyers for the Class?

Class Counsel are:

- Gowling WLG of Toronto;
- McInnes Cooper of Halifax;
- Koskie Minsky LLP of Toronto;
- Michel Drapeau Law Office of Ottawa; and
- Murphy Battista LLP of Vancouver.

Class Counsel are available to answer any questions you may have about the Settlement or the claims process.

2024 FC 68 (CanLII)

GETTING MORE INFORMATION

This notice summarizes the Settlement. More details are in the Final Settlement Agreement available online at https://vetspensionerror.ca/court-documents/.

For more information or for assistance filing a claim, send an email to info@vetspensionerror.ca, or call toll-free at 1-866-545-9920.

2024 FC 68 (CanLII)

2024 FC 68 (CanLII)

ANNEXE "B" - Avis abrégé

AVIS LÉGAL

Percevez-vous une prestation liée à un handicap et administrée par Anciens Combattants Canada?

Le règlement d'un recours collectif peut vous concerner.
Veuillez lire attentivement cet avis.

Le [**date**], la Cour fédérale a approuvé un règlement dans le cadre d'un recours collectif certifié concernant le paiement insuffisant présumé de certaines prestations de pension d'invalidité administrées par Anciens Combattants Canada (« **ACC »**) payables aux membres ou anciens membres des Forces armées canadiennes (« **FAC »)** et de la Gendarmerie royale du Canada (" **GRC** ") et à leurs époux, conjoints de fait, survivants, autres personnes liées et successions (le " **règlement** ").

Si vous avez reçu l'une des prestations liées à l'invalidité énumérées dans cet avis à tout moment entre 2003 et 2023, vous pourriez avoir droit à une compensation dans le cadre du règlement. En tant qu'exécuteur testamentaire, fiduciaire de la succession, administrateur ou membre de la famille d'un membre du groupe décédé qui a reçu des prestations d'invalidité administrées par ACC, vous pouvez également être en mesure de faire une réclamation au nom de la succession.

Si vous avez droit à une indemnisation en vertu du règlement et que vous avez un accord de paiement actif avec ACC, tel qu'un dépôt direct, vous n'avez rien à faire pour recevoir le paiement.

Si vous faites une demande au nom d'un ancien combattant décédé des FAC ou de la GRC, notamment en tant qu'exécuteur testamentaire, fiduciaire, administrateur d'une succession ou membre de la famille, vous devez soumettre un formulaire de demande à [NOM], l'administrateur (« administrateur ») responsable du traitement des demandes, disponible à l'adresse suivante :

[**Détails pour l'administrateur**]

[**Obtenir les détails du formulaire de réclamation**]

La date limite pour soumettre une réclamation est le [**date**]. Tous les demandeurs éligibles ont le droit de recevoir une assistance juridique gratuite de la part des avocats du Groupe pour les besoins de la mise en œuvre du règlement, y compris la préparation et/ou la soumission d'une réclamation à l'administrateur.

Pour plus d'informations ou pour obtenir de l'aide pour déposer une demande, envoyez un courriel à info@vetspensionerror.ca, ou appelez le numéro gratuit 1-866-545-9920. Pour

consulter le texte intégral de la Convention de règlement final, veuillez vous rendre sur le site https://vetspensionerror.ca/court-documents/.

2024 FC 68 (CanLII)

QUI EST CONCERNÉ ?

Le règlement concerne les membres et anciens membres des FAC et de la GRC, ainsi que leurs époux, conjoints de fait, personnes à charge, survivants, orphelins et toute autre personne, y compris les successions admissibles de toutes ces personnes, qui ont reçu - à tout moment entre 2003 et 2023 - des prestations d'invalidité fondées sur des ajustements annuels de la pension de base en vertu de l'article 75 de la *Loi sur les pensions* (les « **membres du groupe** »).

Les modalités du règlement lieront l'ensemble des membres du groupe. Le règlement comprend des renonciations aux réclamations déposées dans le cadre du recours collectif certifié.

QUELLES SONT LES PRESTATIONS CONCERNÉES ?

Le règlement affecte les ajustements annuels prescrits des prestations suivantes (les "**prestations affectées**") :

- Pension pour invalidité *en vertu de la loi sur les pensions ;*
- Pension suite à un décès *en vertu de la loi sur les pensions;*
- Allocation pour soins *en vertu de la loi sur les pensions;*
- Allocation pour usure de vêtements et port d'articles d'habillement *spéciaux prévue par la loi sur les pensions;*
- Allocation exceptionnelle d'incapacité *en vertu de la loi sur les pensions ;*
- • Pensions et allocations de guerre pour les pêcheurs canadiens en eau salée, personnel central d'outre-mer, engagés de la défense passive et pour blessures au cours d'un traitement curatif de diverses personnes et Détachement des auxiliaires volontaires (Seconde Guerre mondiale) en vertu de la *Loi sur les prestations de guerre pour les civils*;
- Indemnités en vertu du *Règlement sur l'indemnisation en cas d'accident d'aviation* ;
- Prestations d'invalidité de la GRC accordées conformément à la *loi sur les pensions ;*
- Allocation vestimentaire en vertu de la *Loi sur le bien-être des vétérans;*

2024 FC 68 (CanLII)

QUE PRÉVOIT LE RÈGLEMENT ?

Le règlement prévoit une compensation directe pour les membres du groupe qui reçoivent (ou ont déjà reçu) l'un des avantages concernés énumérés ci-dessus, depuis le 1er janvier 2003. Les membres du groupe recevront un paiement unique égal à [**X %**] de tous les avantages affectés qu'ils ont reçus depuis le 1er janvier 2003. Le montant total de l'indemnisation versée par le Canada au groupe pourrait s'élever à 817 300 000 $.

Il ne s'agit que d'un résumé des avantages offerts par le règlement. Le texte intégral du document d'entente finale intitulée « transaction défénitive » ("**FSA**") est disponible en ligne à l'adresse suivante : https://vetspensionerror.ca/court-documents/. Nous vous conseillons de consulter l'intégralité de l'entente de transaction définitive afin de de bien identifier vos droits et les mesures à prendre pour accéder à l'indemnisation.

COMMENT SUIS-JE PAYÉ ?

Les membres du groupe admissibles qui perçoivent actuellement des prestations d'invalidité ou des pensions administrées par ACC recevront automatiquement un paiement au titre du règlement par le biais de la méthode de paiement qu'ils utilisent actuellement pour percevoir les prestations, y compris par dépôt direct.

Les membres du groupe qui ont reçu des avantages touchés entre 2003 et 2023, mais qui n'ont pas d'entente de paiement avec ACC, devront présenter une demande à l'administrateur des réclamations. Cela comprend tous les membres du groupe qui sont décédés et lorsqu'un exécuteur testamentaire, un fiduciaire de la succession, un administrateur de la succession ou un membre de la famille fait une réclamation au nom de ce membre du groupe.

Toutefois, si un membre du groupe décédé a un survivant qui reçoit des prestations d'ACC et qui a conclu un accord de paiement, ce survivant recevra automatiquement le droit du membre du recours collectif décédé sans qu'il soit nécessaire de présenter une demande à l'administrateur des réclamations.

COMMENT FAIRE UNE DEMANDE D'INDEMNISATION ?

Si vous n'avez pas d'accord de paiement présentement en vigeur avec ACC, vous devez soumettre un formulaire de demande à l'administrateur ici :

[**Détails pour l'administrateur**]

Veuillez lire et suivre les instructions figurant sur le formulaire de réclamation. Les avocats du groupe sont à votre disposition, gratuitement, pour répondre à vos questions et vous aider à préparer votre formulaire de réclamation.

2024 FC 68 (CanLII)

La date limite pour déposer une demande d'indemnisation est le [date].

SUIS-JE RESPONSABLE DES FRAIS DE JUSTICE ?

Vous n'êtes pas responsable du paiement des frais juridiques. La Cour fédérale a approuvé que les honoraires (y compris la TVH) et les débours des avocats du groupe soient automatiquement calculés et déduits du montant du règlement que vous avez le droit de recevoir avant que le paiement ne soit émis.

La Cour fédérale a approuvé des paiements à l'avocat du groupe correspondant à environ 17 % de chaque paiement effectué dans le cadre du règlement. Le document de transaction défénitive contient des détails supplémentaires sur les honoraires des avocats du groupe, disponibles en ligne à l'adresse suivante : https://vetspensionerror.ca/court-documents/.

Les avocats du groupe sont disponibles pour assister gratuitement les membres du groupe tout au long de la procédure de réclamation.

DES RENSEIGNEMENTS COMPLÉMENTAIRES ?

Pour de plus amples informations ou pour obtenir de l'aide pour votre demande, contactez les avocats du groupe par téléphone, par courriel ou en ligne :

Visitez : https://vetspensionerror.ca/
Appeler1-866-545-9920
Courriel : info@vetspensionerror.ca

CONNAISSEZ-VOUS D'AUTRES BÉNÉFICIAIRES D'UNE PENSION D'INVALIDITÉ ACC ?

Veuillez partager ces renseignements avec eux.

2024 FC 68 (CanLII)

Avis détaillé

AVIS LÉGAL

Percevez-vous une prestation liée à un handicap et gérée par le ministère des Anciens Combattants ?

Un règlement de recours collectif peut vous concerner.
Veuillez lire attentivement cet avis.

La Cour fédérale a autorisé la publication de cet avis.
Il ne s'agit pas d'une sollicitation de la part d'un avocat ou d'un procès contre vous.

Le [**date**], la Cour fédérale a approuvé un règlement dans le cadre d'un recours collectif certifié concernant le paiement insuffisant présumé de certaines prestations de pension d'invalidité administrées par Anciens Combattants Canada ("**ACC**") payables aux membres ou anciens membres des Forces armées canadiennes ("**FAC**") et de la Gendarmerie royale du Canada ("**GRC**") et à leurs époux, conjoints de fait, survivants, autres personnes liées et successions (le "**règlement**").

Si vous avez reçu l'une des prestations d'invalidité énumérées dans le présent avis à tout moment entre 2003 et 2023, vous pourriez avoir droit à une compensation dans le cadre du règlement. En tant qu'exécuteur testamentaire, fiduciaire de la succession, administrateur d'une succession ou membre de la famille d'un membre du groupe décédé qui a reçu des prestations d'invalidité administrées par ACC, vous pouvez également être en mesure de faire une demande au nom de la succession.

Si vous avez droit à une indemnisation en vertu du règlement et que vous avez un accord de paiement présentement en vigueur avec ACC, tel qu'un dépôt direct, vous n'avez rien à faire pour recevoir le paiement.

Si vous demandez une indemnisation au nom d'un ancien combattant décédé des FAC ou de la GRC, notamment en tant qu'exécuteur testamentaire, fiduciaire, administrateur d'une succession ou membre de la famille, vous devez soumettre un formulaire de demande (« formulaire de demande ») à [NOM], l'administrateur (« administrateur ») chargé de traiter les demandes :

[**Détails pour l'administrateur**]

[Obtenir les détails du formulaire de réclamation]

La date limite pour soumettre une réclamation est le [**date**]. Tous les requérants éligibles ont le droit de recevoir une assistance juridique gratuite de la part des avocats du groupe pour les besoins de la mise en œuvre du règlement, y compris la préparation et/ou la soumission d'une réclamation à l'administrateur.

Pour plus de renseignements ou pour obtenir de l'aide afin de déposer une demande, envoyez un courriel à info@vetspensionerror.ca, ou appelez le numéro sans frais 1-866-545-9920. Pour consulter le texte intégral de l'entente de transaction définitive, veuillez vous rendre sur le site https://vetspensionerror.ca/court-documents/.

CE QUE CONTIENT LE PRÉSENT AVIS

INFORMATIONS DE BASE
1. Pourquoi ai-je reçu cet avis ?
2. Qu'est-ce qu'un recours collectif ?
3. Quelles sont les prestations d'invalidité gérées par ACC ?
4. Quel est l'objet de ce procès ?
5. Pourquoi y a-t-il un règlement ?

QUI EST CONCERNÉ PAR LE RÈGLEMENT ?
6. Qui est visé par le règlement ?

LES AVANTAGES LIÉS AU RÈGLEMENT ?
7. Que prévoit le règlement ?
8. Que se passe-t-il si le bénéficiaire de la prestation est décédé ?
9. Comment puis-je recevoir un paiement ?
10. Comment déposer une demande d'indemnisation ?
11. Quelle est la date limite pour déposer une demande d'indemnisation ?
12. Quand recevrai-je mon paiement ?
13. Qui vérifie la validité de ma demande ?
14. Ma demande peut-elle être refusée ?
15. À quoi est-ce que je renonce dans le règlement ?
16. Puis-je me retirer du règlement ?
17. Suis-je responsable des frais de justice ?

LES AVOCATS QUI VOUS REPRÉSENTENT
18. Qui sont les avocats du groupe ?

2024 FC 68 (CanLII)

2024 FC 68 (CanLII)

INFORMATIONS DE BASE

1. Pourquoi ai-je reçu cet avis ?

La Cour fédérale a autorisé le présent avis afin de vous informer sur le règlement. Cet avis explique le procès, le règlement et la démarche à suivre pour demander une indemnisation. Vous devez lire l'avis dans son intégralité, car vos droits peuvent être affectés même si vous ne faites rien.

Afin de rejoindre le plus grand nombre de personnes possible, des copies de cet avis ont été distribuées aux organisations d'anciens combattants à travers le Canada. Vous avez peut-être reçu cet avis des avocats du recours collectif ou de quelqu'un que vous connaissez, ou vous avez peut-être trouvé cet avis dans un journal ou un lieu public. Si vous connaissez un membre actuel ou ancien des FAC ou de la GRC, veuillez lui montrer une copie de cet avis.

2. Qu'est-ce qu'un recours collectif ?

Dans un recours collectif, une ou plusieurs personnes appelées **« représentants »** intentent une action au nom de ceux qui ont des réclamations similaires. Toutes ces personnes sont appelées « **groupe** »" ou « **membres du groupe** ». Les tribunaux règlent les questions pour toutes les personnes concernées par le recours collectif, à l'exception de celles qui s'excluent elles-mêmes du recours. Dans ce recours collectif, la date limite pour s'exclure est dépassée.

3. Quelles sont les prestations d'invalidité gérées par ACC ?

De nombreux membres actuels et anciens des FAC ou de la GRC et les membres de leur famille reçoivent, ou ont reçu, une prestation d'invalidité, une pension ou un paiement connexe administré par ACC. Si vous êtes un membre actuel ou ancien des FAC ou de la GRC, ou si vous avez un lien de parenté avec un membre actuel ou ancien, y compris les anciens membres décédés, vous avez peut-être reçu (ou recevez peut-être actuellement) une ou plusieurs des prestations suivantes :

- Pension d'invalidité en *vertu de la loi sur les pensions*
- Pension *en vertu de la loi sur les pensions* Pension en cas de décès
- Allocation de présence de la *loi sur les pensions*
- Indemnité *prévue par la loi sur les pensions pour l*'usure des
- *(loi sur les prestations civiles liées à la guerre)* pensions et allocations de guerre pour les pêcheurs en eau salée, le personnel des quartiers généraux d'outre-mer, les ouvrages de protection contre les raids aériens et les blessures pour le traitement correctif de diverses personnes et le détachement d'aide volontaire (Seconde Guerre mondiale) loi sur les prestations civiles liées à la guerre)

vêtements ou pour des vêtements spécialement confectionnés

- Allocation exceptionnelle d'incapacité *prévue par la loi sur les pensions*
- *Règlement sur l'indemnisation des victimes d'accidents aériens* indemnisation des victimes d'accidents aériens
- Prestations d'invalidité de la GRC accordées conformément à la *loi sur les pensions*
- Allocation vestimentaire en vertu *de la loi sur le bien-être des anciens combattants ;*

2024 FC 68 (CanLII)

Si vous avez un compte Mon ACC, vous pouvez vérifier en ligne les types d'avantages que vous recevez.

4. Quel est l'objet de ce procès ?

Chaque année, ACC est tenu de calculer un ajustement annuel des prestations mensuelles d'invalidité afin de tenir compte de l'inflation et de l'évolution du coût de la vie. L'ajustement annuel est prescrit par l'article 75 de la *loi sur les pensions*.

Le recours collectif allègue que depuis 2003, ACC a commis des erreurs dans le calcul des augmentations des ajustements annuels, ce qui signifie que les membres du groupe ont été sous-payés de petits montants chaque mois pendant de nombreuses années. Le Canada n'admet pas qu'ACC a commis ces erreurs, mais il a accepté d'effectuer des paiements aux membres du recours collectif pour régler le différend. Dans le présent règlement, les avantages qui ont été prétendument touchés par les erreurs de calcul sont appelés les « **avantages affectés »** . Une liste des avantages affectés est intégrée à la réponse à la question 3 ci-dessus.

5. Pourquoi y a-t-il un règlement ?

La Cour fédérale a approuvé un règlement entre les demandeurs et le Canada. À la suite d'une audience d'approbation du règlement tenue le 18 décembre 2023 à Ottawa, la Cour fédérale a déterminé que le règlement est juste, raisonnable et dans le meilleur intérêt de l'ensemble du groupe.

En acceptant de régler le recours collectif, les parties ont évité les coûts, l'incertitude et les délais d'un procès et d'un jugement. Dans ce cas, cela signifie également que les membres du groupe n'auront pas besoin de témoigner devant le tribunal et de prouver chaque élément nécessaire de leur dossier. Les membres de la classe auront la certitude de connaître leur droit aux paiements dans le cadre du règlement et recevront les paiements plus rapidement selon un échéancier décrit dans le règlement et approuvé par la Cour fédérale.

2024 FC 68 (CanLII)

QUI EST CONCERNÉ PAR LE RÈGLEMENT ?

6. Qui est visé par le règlement ?

Le règlement concerne toute personne qui entre dans le cadre de la définition du groupe. Le 23 décembre 2020, la Cour a certifié la définition du groupe comme suit :

> Tous les membres et anciens membres des Forces armées canadiennes et de la Gendarmerie royale du Canada, ainsi que leurs conjoints, conjoints de fait, personnes à charge, survivants, orphelins et toute autre personne, y compris les successions admissibles de ces personnes, qui ont reçu - à tout moment entre 2002 et aujourd'hui - des pensions d'invalidité, des indemnités d'invalidité et d'autres avantages d'Anciens Combattants Canada qui ont été touchés par l'ajustement annuel de la pension de base en vertu de l'article 75 de la *Loi sur les pensions,* y compris, mais sans s'y limiter, les indemnités et les avantages énumérés ci-dessus.

INDEMNITÉS DE RÈGLEMENT

7. Que prévoit le règlement ?

Le règlement prévoit une compensation directe pour les membres du groupe qui reçoivent (ou ont déjà reçu) l'un des avantages affectés énumérés dans la réponse à la Question 3, ci-dessus, depuis le 1er janvier 2003. Chaque membre du groupe a droit à un paiement de [%] de tous les avantages affectés qu'il a reçus depuis le 1er janvier 2003. Le montant total de l'indemnisation versée au groupe pourrait s'élever à 817 300 000 dollars.

Le règlement prévoit également une procédure simplifiée pour les survivants, les exécuteurs testamentaires, les fiduciaires et les administrateurs des successions des membres du groupe, ainsi que pour les membres de la famille des membres du groupe décédés, afin de soumettre des demandes d'indemnisation, même si le défunt est décédé sans testament.

Il ne s'agit que d'un résumé des avantages offerts par le règlement. Le texte intégral de l'entente finale de transaction défénitive ("**FSA**") est disponible en ligne à l'adresse suivante : https://vetspensionerror.ca/court-documents/. Nous vous conseillons de consulter l'intégralité de la transactipon définitive afin de bien comprendre vos droits et les mesures à prendre pour accéder à l'indemnisation.

8. Que se passe-t-il si le bénéficiaire de la prestation est décédé ?

Si le membre du groupe qui a reçu des prestations affectées à tout moment entre 2003 et 2023 est décédé et que ce membre du groupe a un survivant qui reçoit actuellement des

prestations administrées par ACC, ce survivant recevra automatiquement le droit du membre du groupe décédé. Les survivants ayant conclu un accord de paiement avec ACC recevront le paiement automatiquement, sans avoir à remplir un formulaire de demande.

Si le membre du groupe décédé n'a pas de survivant recevant actuellement des prestations administrées par ACC, l'exécuteur testamentaire, le fiduciaire de la succession ou l'administrateur de la succession de ce membre du groupe doit soumettre une demande à l'administrateur afin de recevoir le montant du règlement.

En outre, d'autres personnes, telles que les membres de la famille du membre de l'action collective décédé, peuvent déposer une réclamation, y compris :

- Conjoints ou concubins survivants
- Enfants survivants
- Petits-enfants survivants
- Parents survivants
- Frères et sœurs survivants
- Nièces et neveux survivants
- Tout autre parent survivant
- Organisme de bienfaisance créé par un membre décédé du groupe en vertu d'un testament

Si plus de deux personnes déposent une demande au titre du même membre du groupe, la FSA prévoit une procédure pour déterminer comment le paiement doit être effectué.

9. Comment puis-je recevoir un paiement ?

Si vous recevez déjà des prestations d'invalidité administrées par ACC en tant que membre du groupe, ACC calculera le montant qui vous est dû en vertu du règlement et vous paiera de la même manière que vous recevez normalement les prestations d'ACC. Par exemple, si vous êtes inscrit au dépôt direct, vous recevrez automatiquement un paiement en vertu du règlement en tant que montant supplémentaire dans un dépôt futur. Comme indiqué ci-dessus à la question 8, les survivants d'un membre décédé des FAC ou du groupe de la GRC qui ont un accord de paiement actif avec ACC recevront automatiquement le paiement de ce membre des FAC ou du groupe de la GRC par le biais d'un deuxième dépôt distinct.

Tout membre du groupe qui a reçu des prestations affectées entre 2003 et 2023, mais qui n'a pas d'accord de paiement avec ACC, doit soumettre une réclamation à l'administrateur pour recevoir un paiement aux termes du règlement. Ceci inclut tous les membres du groupe qui sont décédés, et s'applique à un exécuteur testamentaire, un fiduciaire de la succession, un administrateur de la succession ou un membre de la famille qui fait une réclamation au nom du membre du groupe décédé.

2024 FC 68 (CanLII)

Si vous avez reçu des prestations d'ACC dans le passé mais que les paiements ont cessé ou que vos informations bancaires ont changé, vous devez remplir un formulaire de demande et le soumettre à l'administrateur avant la date limite afin de recevoir un paiement.

10. Comment déposer une demande d'indemnisation ?

Si vous n'avez pas d'accord de paiement présentement en vigueur avec ACC, vous devez soumettre un formulaire de réclamation à l'administrateur ici :

[**Détails pour l'administrateur**]

Veuillez lire et suivre les instructions figurant sur le formulaire de demande d'indemnisation. La date limite pour soumettre une réclamation est le [**date**]. Les **avocats du groupe sont à votre disposition, gratuitement, pour vous aider à remplir votre formulaire de réclamation.**

Si vous avez des questions sur le formulaire de réclamation ou si vous souhaitez obtenir de l'aide pour soumettre votre réclamation, veuillez contacter l'avocat du groupe à l'adresse suivante : info@vetspensionerror.ca.

11. Quelle est la date limite pour déposer une demande d'indemnisation ?

La date limite pour déposer une réclamation est le **[date de fin de la période de réclamation**]. Veuillez noter qu'il ne suffit pas d'envoyer votre formulaire de réclamation à l'avocat du groupe. **Tous les formulaires de réclamation doivent être envoyés à l'administrateur.**

12. Quand recevrai-je mon paiement ?

L'échéancier des paiements dépendra de l'existence ou non d'un accord de paiement avec ACC. Les membres du groupe qui n'ont pas d'accord de paiement présentement en vigueur avec ACC devront soumettre un formulaire de réclamation à l'administrateur. Certaines de ces réclamations peuvent être traitées plus rapidement que d'autres. Veuillez contacter l'avocat du groupe pour plus de renseignements.

Les membres du groupe qui ont une entente de paiement avec ACC recevront automatiquement leurs paiements à compter du [**date de l'ordonnance définitive**]. Le Canada est tenu d'effectuer tous les paiements automatiques au plus tard le [**date de l'ordonnance définitive + 9 mois**].

2024 FC 68 (CanLII)

Si vous n'avez pas d'accord de paiement avec ACC, vous devez soumettre un formulaire de réclamation à l'administrateur pour être éligible à recevoir une compensation dans le cadre du règlement. Le temps nécessaire au traitement de ces réclamations dépendra d'un certain nombre de facteurs, y compris si vous faites une réclamation au nom d'un membre du groupe décédé. La date limite pour soumettre une réclamation est le [**date de fin de la période de réclamation**] et toutes les réclamations doivent être payées au plus tard le [**date de fin du paiement des réclamations**]. Vous devez soumettre une réclamation dès que possible afin de garantir un paiement en temps voulu.

13. Qui vérifie la validité de ma demande ?

La Cour fédérale a désigné KPMG pour agir à titre d'administrateur. L'administrateur est un tiers neutre chargé d'administrer le règlement conformément au règlement approuvé, sous la supervision de la Cour.

14. Ma demande peut-elle être refusée ?

L'administrateur vous informera si votre demande est refusée.

Votre demande peut être refusée si (a) vous n'êtes pas un membre éligible du groupe parce que vous ne répondez pas à la définition du groupe ; (b) vous avez déjà été indemnisé dans le cadre du règlement, y compris si vous soumettez une demande au nom d'un membre du groupe dont le droit a déjà été payé ; ou (c) si votre demande n'a pas été accompagnée des documents justificatifs requis. (Certains types de réclamations nécessitent des documents supplémentaires, d'autres non ; consultez le formulaire de réclamation ou contactez l'avocat du groupe pour obtenir de l'aide).

Si votre demande est rejetée parce qu'il vous manque les pièces justificatives requises, veuillez contacter l'avocat du groupe pour obtenir de l'aide.

15. À quoi est-ce que je renonce dans le règlement ?

À moins que vous ne vous soyez précédemment exclu, le règlement vous oblige à renoncer au droit de poursuivre et d'entreprendre des réclamations individuelles spécifiques contre le Canada. En vertu du règlement, vous "libérez" le Canada de toute responsabilité, ce qui signifie que vous, ou quelqu'un en votre nom, ne pouvez pas poursuivre le Canada pour le paiement insuffisant des prestations liées à l'invalidité sur la base des erreurs d'ajustement annuel alléguées dans le recours collectif pour toute période allant jusqu'au 31 décembre 2023 inclusivement.

2024 FC 68 (CanLII)

2024 FC 68 (CanLII)

16. Puis-je me retirer du règlement ?

Non. La date limite pour vous exclure en tant que membre du groupe, ou "opting-out", a expiré le 30 mars 2022. Le règlement est désormais définitif et contraignant en vertu d'une ordonnance de la Cour fédérale.

17. Suis-je responsable des frais de justice ?

Vous n'êtes pas responsable du paiement des honoraires et autres frais juridiques. La Cour fédérale a approuvé que les honoraires des avocats du groupe, y compris la TVH et les débours, soient automatiquement calculés et déduits du montant du règlement auquel vous avez droit avant que le paiement ne soit émis.

La Cour fédérale a approuvé des paiements à l'avocat du groupe correspondant à environ 17 % de chaque paiement effectué dans le cadre du règlement. La transaction définitive contient des détails supplémentaires sur les honoraires des avocats du groupe, disponibles en ligne à l'adresse suivante : https://vetspensionerror.ca/court-documents/.

Les avocats du groupe sont disponibles afin d'aider gratuitement les membres du groupe tout au long de la procédure de réclamation.

LES AVOCATS QUI VOUS REPRÉSENTENT

18. Qui sont les avocats du groupe?

Les avocats du groupe sont :

- Gowling WLG de Toronto ;
- McInnes Cooper de Halifax ;
- Koskie Minsky LLP de Toronto ;
- Michel Drapeau Law Office d'Ottawa ; et
- Murphy Battista LLP de Vancouver.

Les avocats du groupe demeurent disponibles pour répondre à toutes les questions que vous pourriez avoir sur le règlement ou sur la procédure de demande d'indemnisation.

OBTENIR PLUS DE RENSEIGNEMENTS

Cet avis résume le règlement. Vous trouverez plus de détails dans la transaction définitive disponible en ligne à l'adresse suivante : https://vetspensionerror.ca/court-documents/.

Pour plus d'informations ou pour obtenir de l'aide pour déposer une demande, envoyez un courriel à info@vetspensionerror.ca, ou appelez le numéro gratuit 1-866-545-9920.

2024 FC 68 (CanLII)

Schedule "C" – Distribution Plan

Distribution Plan

The Parties will notify Class Members of Settlement Approval in the following manner:

1. The Defendant shall post a banner of the Short Form Notice on the My VAC Account for all Class Members, directing them to a link to the Short Form Notice;

2. The Defendant shall publish the Long Form Notice on the website of Veterans Affairs Canada;

3. Class Counsel shall publish the Long Form Notice on their designated website: www.vetspensionerror.ca;

4. Class Counsel shall send the Short Form Notice to all individuals who registered for an update on the website www.vetspensionerror.ca;

5. Class Counsel shall issue a press release by [**date**];

6. Class Counsel shall place online advertisements using the Google and Meta Advertising networks. The online advertisements will provide links to the designated website: www.vetspensionerror.ca. The budget for online advertising shall be $50,000;

7. Class Counsel shall publish the Short Form Notice, or an agreed-upon short form bulletin in print and/or digital editions of the *Globe & Mail*, *National Post*, *La Presse*, and the *Legion Magazine*; and

8. Class Counsel shall make best efforts to circulate Short or Long Form Notices, or an agreed-upon short form bulletin, to community centres across Canada operated by the Royal Canadian Legion. Class Counsel, subject to their discretion and considering take-up rates during the Claims Period, may circulate the Short or Long Form Notices, or an agreed-upon short form bulletin, to various Canadian Armed Forces regimental associations and/or various Royal Canadian Mounted Police divisions or various divisions of the Royal Canadian Mounted Police Veterans' Association.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-119-19
STYLE OF CAUSE:	DENNIS MANUGE, RAYMOND TOTH, BETTY BROUSE, BRENTON MACDONALD, JEAN-FRANCOIS PELLETIER AND DAVID WHITE v HIS MAJESTY THE KING
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 18, 2023
REASONS FOR ORDER AND ORDER:	KANE J.
DATED:	JANUARY 17, 2024

2024 FC 68 (CanLII)

APPEARANCES:

Malcolm N. Ruby and Adam Bazak Michel Drapeau and Joshua Juneau Angela Bespflug Kirk M. Baert, Adam Tanel and Alec Angle Daniel Wallace	FOR THE REPRESENTATIVE PLAINTIFFS
Lori Ward, Angela Green and Victor Ryan	FOR THE DEFENDANT

SOLICITORS OF RECORD:

GOWLING WLG (CANADA) LLP Toronto, Ontario	FOR THE REPRESENTATIVE PLAINTIFFS

MICHEL DRAPEAU LAW OFFICE
Ottawa, Ontario

MURPHY BATTISTA LLP
Kelowna, British Columbia

KOSKIE MINSKY LLP
Toronto, Ontario

MCINNES COOPER
Halifax, Nova Scotia

Attorney General of Canada FOR THE DEFENDANT
Halifax, Nova Scotia

2024 FC 68 (CanLII)

TAB 13

Federal Court Cour fédérale

Date: 20190129

Docket: T-210-12

Citation: 2019 FC 122

2019 FC 122 (CanLII)

Ottawa, Ontario, January 29, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JENNIFER MCCREA

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER AND REASONS

[1] The Plaintiff and Defendant bring this joint motion pursuant to Rule 334.29 of the *Federal Courts Rules,* SOR/98-106 [the *Rules*] seeking approval of the Settlement Agreement in this class action. Within the Settlement Agreement, the parties also seek an honorarium in the amount of $10,000 for the representative plaintiff, Jennifer McCrea; the legal fees of the Class Counsel; a process to permit opting out of the Settlement Agreement; the appointment of a Monitor and a process to resolve disputed claims. In addition, the parties seek approval of an

ancillary order to amend the Plaintiff's Statement of Claim to reflect the causes of action which were certified and to certify an amended definition of the "Class". The Court issued a Direction on December 4, 2018 to amend the style of cause to reflect that the Defendant is Her Majesty the Queen in Right of Canada.

2019 FC 122 (CanLII)

[2] For the reasons that follow, the Court approves the Settlement Agreement, the honorarium for the representative plaintiff and the fees and disbursements of Class Counsel.

I. Background

[3] The background to this action was previously described in *McCrea v Canada (Attorney General)*, 2013 FC 1278 [*McCrea 2013*], which addressed the Defendant's motion brought pursuant to Rule 220 to determine a question of law, which the Defendant argued would be conclusive of the action.

[4] The background was also described in *McCrea v Canada (Attorney General)*, 2015 FC 592, [2015] FCJ No 1225 (QL) [*McCrea 2015*], which is the Order and Reasons for the certification of this class action.

[5] The affidavit of Mr. Michael Wright, the managing partner at Cavalluzzo LLP, the Class Counsel's firm, provides additional details of the procedural history. In addition, the Defendant provided a succinct and consistent summary.

2019 FC 122 (CanLII)

[6] To provide context for the issues to now be determined, the key aspects of the background previously described are set out below.

[7] The Plaintiff, Ms. McCrea, represents others who, like herself, were contributors to the Employment Insurance [EI] program, gave birth to a child, and were in receipt of parental benefits. Some EI recipients became ill while in receipt of parental benefits and applied to convert their parental benefits to sickness benefits during their period of illness, which would have extended their benefit period to account for the period of time they were ill. Some recipients were not able to care for their child while they were ill and had to rely on others to do so. The EI recipients who sought to convert their parental benefits to sickness benefits were denied the sickness benefits. Some returned to work, although they required more time to recover from their illness, because their parental benefits ended.

[8] Other EI recipients, who became ill and made inquiries about sickness benefits, were advised by representatives of the Employment Insurance Commission (the relevant authority at the time) or Service Canada that they were ineligible for the sickness benefits and, therefore, they did not apply to convert their parental benefits to sickness benefits.

[9] The Plaintiff explained that the rationale or explanation offered for being denied sickness benefits was the strict application of paragraph 18(b) of the *Employment Insurance Act,* SC 1996, c 23 (as amended) [the *Act*], as it read at the relevant time. Paragraph 18(b) required that a claimant for sickness benefits be otherwise available for work. Claimants already on parental

leave, who were caring for a child and receiving benefits, were considered not to be available for work.

2019 FC 122 (CanLII)

[10] The Plaintiff argued that the wording of paragraph 18(b) made it impossible for claimants to receive sickness benefits. She noted that if the illness had occurred prior to the birth of their child, the claimants would have been entitled to up to 15 weeks of benefits because they would have been otherwise (i.e., but for their illness) available for work. Claimants would have subsequently received maternity and parental benefits after the birth of their child.

[11] The Act had been amended in 2002 by the *Budget Implementation Act*, 2001, SC 2002, c 9 to, among other things, respond to the decision of the Canadian Human Rights Tribunal [CHRT] in *McAllister-Windsor v Canada (Human Resources Development)*, [2001] CHRD No 4, [2002] CLLC 240-001 [*McAllister-Windsor*]. In *McAllister-Windsor*, the CHRT found that the "anti-stacking" or capping of sickness, maternity and parental benefits at 30 weeks (the cap in existence at that time) discriminated against women who became ill before or during the maternity or parental leave period. The 2002 amendments allowed for extensions of the benefit period to allow "stacking" of maternity, parental and sickness benefits, but did not include a specific amendment to section 18 of the Act to remove the requirement that a person seeking sickness benefits must be otherwise available for work.

[12] The Plaintiff acknowledged that the parental benefits regime had evolved over the years in several positive ways, including the 2002 amendments to respond to *McAllister-Windsor*. The Plaintiff argued that the 2002 amendments were intended to provide that those on parental leave

who become ill either before, during, or after their parental leave would be eligible to receive sickness benefits and that this would extend their benefit period by up to 15 weeks. The Plaintiff argued, among other things, that the 2002 amendments were not implemented as intended to address the identified gap because those who became ill while on parental leave were still denied sickness benefits.

2019 FC 122 (CanLII)

[13] The Plaintiff noted that many claimants who were denied sickness benefits appealed their decisions to the Board of Referees and some also appealed to the EI Umpire (a process that no longer exists). Although the vast majority of claimants were unsuccessful, two (Ms. Rougas and Ms. Kittmer) were successful before the EI Umpire. It appears that these appeals to the Umpire, along with other advocacy efforts, raised awareness of the impossibility of being available for work while on parental leave, which is intended to permit a parent to be away from their employment to care for a young child.

[14] On March 24, 2013, amendments to the *Act* included in the *Helping Families in Need Act*, SC 2012, c 27 came into force. The *Helping Families in Need Act,* among many other amendments, amended section 18 to provide that those in receipt of parental benefits were not disentitled to sickness benefits due to their unavailability for work. This amendment ensured that claimants *after* March 24, 2013, in similar circumstances to the Plaintiff and Class Members would not be denied sickness benefits due to their unavailability for work. Since March 2013, those who apply to convert their parental benefits to sickness benefits are eligible to extend their benefits by up to 15 weeks, assuming that the other criteria for eligibility are met. However, the 2013 amendments do not benefit the Plaintiff or the Class Members who were on parental leave

and became ill before that clarification in the *Act* came into force because the amendments are not retroactive.

[15] Although the Plaintiff filed her Statement of Claim in 2012, this class action is limited to the period from March 3, 2002, the date of the coming into force of the 2002 amendments, to March 24, 2013, the date of the coming into force of the 2013 amendments.

2019 FC 122 (CanLII)

[16] Despite the change in policy evidenced by the 2013 amendments, the Defendant opposed the Plaintiff's claim.

[17] The Defendant initially brought a motion pursuant to Rule 220 of the *Federal Courts Rules,* SOR/98-106, for a preliminary determination on a question of law, which focused on the interpretation of key provisions of the Act. The Defendants argued that the determination of the following question would be conclusive of the central issue and would dispose of the litigation:

> Did the Employment Insurance Act preclude the payment of sickness benefits to individuals during the period in which they were in receipt of parental benefits, under the legislation as it stood between March 3, 2002 and March 24, 2013?

[18] The Court dismissed the Defendant's motion (*McCrea 2013*), which meant that the question of law would not be determined. The Court found, among other things, that the statutory provisions at issue were interrelated and to some extent inconsistent, and that the *Act* had to be read as a whole to best understand the benefits regime. The Court noted that the record necessary to support the motion was at that point not sufficient and would be contentious at the next stages.

In addition, the resolution of the proposed question of law would only narrow the issues, leaving several other complicated issues to be resolved.

[19] On the Plaintiff's motion for certification in 2014, the Defendant argued that the causes of action pleaded had no reasonable prospect of success and disputed every other aspect of the test to determine whether the action should be certified as a class action.

[20] Upon considering the submissions of the parties, the evidence on the record and the jurisprudence, the Court granted the Plaintiff's motion and certified the action as a class proceeding, but only in part (*McCrea 2015*). The causes of action in negligent misrepresentation, unjust enrichment and misfeasance in public office were struck as they were found to have no reasonable prospect of success. The cause of action in negligence and some common questions which arise from that cause of action were certified. Ms. McCrea was found to be an appropriate representative plaintiff for the Class Members.

[21] The Defendant subsequently brought a motion, which the Court granted, to clarify specific terms of the Certification Order. The Plaintiff successfully appealed that decision and the original terms were reinstated. The parties then prepared for the next steps in the litigation and entered into discussions regarding amendments to the Plaintiff's Statement of Claim to reflect the causes of action as certified and to amend the class definition. In early 2018, the Plaintiff adjourned its proposed motion to amend the definition of the class to pursue further settlement discussions to resolve the litigation. Ultimately, a proposed settlement agreement was reached in August 2018.

2019 FC 122 (CanLII)

[22] On September 11, 2018, the Court approved the Notice Plan, including the Notice to the Class informing them of the Certification Order, the proposed Settlement Agreement and other pertinent information. This information includes: how to support or object to the settlement in writing or in person, how to participate at the hearing of the motion to approve the settlement, how to opt out of the class if desired, how the claims process would operate, who will administer the agreement, how disputes can be addressed regarding the payment of benefits pursuant to the agreement, and where to obtain additional information.

2019 FC 122 (CanLII)

[23] The Notice Plan described the manner in which Notice would be provided in order to ensure, to the greatest extent possible, that all potential Class Members are aware of the proposed Settlement Agreement and, if approved, how they can claim their benefits. The Notice of the Settlement Agreement was posted on the Government of Canada website, Class Counsel's website, and other social media and was published in major Canadian newspapers.

[24] This brings us to the present motion. In accordance with Rule 334.29, the Court must approve the Settlement Agreement. This motion is brought by the Plaintiff jointly with and on consent of the Defendant. However, this is not a rubber stamp process. Although the Court cannot tinker with the terms and conditions of the Settlement Agreement, the Court must determine whether the Settlement Agreement as a whole is fair and reasonable and whether it will reach those entitled to benefit from it.

[25] On this motion, Class Counsel thoroughly explained the terms of the proposed Settlement Agreement and responded to several questions from the Court. Similarly, Counsel for the

Defendant highlighted key features of the Settlement Agreement and clarified some small, yet significant, aspects which will ensure that the settlement can be implemented efficiently.

II. The Proposed Settlement

2019 FC 122 (CanLII)

[26] The proposed settlement provides that:

- Class Members who establish that they applied for sickness benefits for an illness, injury, or quarantine during their parental leave, and were denied, are eligible for compensation. Claimants identified through the Employment and Social Development Canada [ESDC] File Review Project are deemed to be eligible Class Members. Claimants not identified as Class Members by the File Review Project will be eligible where it is established that they meet the class definition.

- ESDC will determine the amount of each Class Member's payment. The Defendant has agreed to make payments to eligible Class Members in an amount that is equivalent to the amount of sickness benefits that they would otherwise have received.

- Class Members will submit their claims in a simple form and will not be required to provide medical evidence to establish their illness.

- All eligible Class Members, including eligible estates, will receive compensation in satisfaction of all the claims raised, calculated as the number of weeks of illness they suffered during that benefit period, less the number of weeks they were paid sickness benefits, multiplied by the weekly EI benefit rate that applied at the time of their claim. The highest benefit rate in that period was $501. The details are set out in the Settlement Agreement which is attached to the Court's Order.

- In exchange for the compensation paid, all Class Members, except for those who have opted out within the Opt Out Period, will be deemed to have provided a full and final release of all claims against the government in respect of the matters at issue.

- The opt out deadline will be 60 days from the date of the approval of the Settlement Agreement.

- Class Members will be able to make their claim for compensation within a six month claims period. The claims period begins on the Implementation Date of the Settlement Agreement. Claimants may apply within five months from that date, with a possible one month extension, and their claims will be paid out in a timely manner.

- A third party Monitor, Mr. Gordon McFee, will be appointed to provide outside oversight of the administration process and to make recommendations to the administrator to ensure the efficient and fair processing of the claims. Mr. McFee's role, among other things, will permit possible problems to be resolved early in the process.

- ESDC will provide notice of the settlement, opt out process, and claims process to the class in accordance with the Notice Plan and will administer the claims process in accordance with the Administration Plan. ESDC will develop guidelines and provide training to the officers who will administer the claims. The Defendants will pay all amounts and taxes for the notice and for the Administration process and for the appointment of the Monitor.

- ESDC will send up to three reminders during the claims process to Class Members who have been identified and who have not submitted claims.

2019 FC 122 (CanLII)

- Class Members who are denied their claim may seek a review of the decision by a designated Prothonotary of the Federal Court. The Class Member may submit a form (which is attached to the Order approving the Settlement Agreement) to seek review and both the Class Member and ESDC will have an opportunity to make brief written submissions. The Prothonotary's decision will be final.

- The Administrator will provide periodic reports to Class Counsel and the Monitor. The Monitor and the Administrator will provide final reports to the Court on the results of the claims administration process.

- The settlement is without any admission of liability.

- The Court retains jurisdiction until the claims are administered.

[27] In addition, the Plaintiff's Fresh as Amended Statement of Claim will be approved, which among other changes reflects the causes of action that were certified. The definition of the Class is also amended to include those who became ill while on maternity leave where that illness continued into the parental leave and benefits period and to include those who were in receipt of benefits under the analogous legislation in Quebec.

[28] The total amount of the settlement is estimated to be between $8.5 and $11 million. It is estimated that there are 1880 potential Class Members of which 1738 are deemed to be eligible because they have already been identified by ESDC. Another 142 possible Class Members have been identified, including those that will fall within the expanded definition of the Class.

2019 FC 122 (CanLII)

[29] The Settlement Agreement also proposes that Class Counsel receive their legal fees and disbursements in the amount of $2,212,389, together with applicable taxes (GST and HST) thereon, not to exceed $2.5 million in total. The legal fees will be paid by the Defendant in addition to and separately from the compensation paid to eligible Class Members.

2019 FC 122 (CanLII)

III. The Issues

[30] There are three issues to address:

1. Should the Court approve the Settlement Agreement? This entails consideration of whether the agreement is fair, reasonable and in the best interests of the class.

2. Should the Court approve an honorarium of $10,000 to Ms. McCrea as the representative plaintiff?

3. Should the Court approve the fee agreement for Class Counsel? The Court considers whether the amount of the legal fees and disbursements is fair and reasonable and should be approved only after determining whether to approve the proposed Settlement Agreement for the Class Members.

IV. Principles from the Jurisprudence Regarding Approval of Settlement Agreements

[31] Rule 334.29 of the *Rules* provides:

334.29 (1) A class proceeding may be settled only with the approval of a judge.	334.29 (1) Le règlement d’un recours collectif ne prend effet que s’il est approuvé par un juge.
(2) On approval, a settlement	(2) Il lie alors tous les

binds every class or subclass member who has not opted out of or been excluded from the class proceeding.	membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif.

2019 FC 122 (CanLII)

[32] Several recent cases have canvassed the principles that apply to the approval of a settlement in a class action and the principles are not in dispute. For example, *Manuge v Canada*, 2013 FC 341, [2014] 4 FCR 67 [*Manuge*]; *Condon v Canada*, 2018 FC 522, 293 ACWS (3d) 697 [*Condon*]; *Riddle v Canada*; 2018 FC 641, 296 ACWS (3d) 36, and *Merlo v Canada*, 2017 FC 533, [2017] FCJ No 773 (QL) [*Merlo*] have been cited by the Plaintiff and Defendant.

[33] As the parties note, the test for the approval of a settlement agreement has been stated in slightly different words in recent cases. While the basic test remains the same and is not in dispute, the relevant factors which inform the test may differ between cases and carry varying degrees of weight (*Condon* at para 20).

[34] The recent jurisprudence in this Court has been consistent in articulating the test. In *Merlo*, Justice McDonald noted at para 16, "[o]n approving a settlement, the test to be applied 'is whether the settlement is fair and reasonable and in the best interests of the class as a whole '" (citations omitted).

[35] In *Condon*, Justice Gagné provided an overview of the principles regarding the approval of a settlement in a class action and the factors to consider at paras 17-19:

> [17] The test for approving a class action settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the Class as a whole, taking into account the claims and defences in the litigation and any objections to the

settlement by class members. However, the test is not whether the settlement meets the demands of a particular class member.

[18] A settlement need not be perfect (*Châteauneuf v Canada*, 2006 FC 286 at para 7). It need only fall "within a zone or range of reasonableness" (*Ontario New Home Warranty Program v Chevron Chemical Company* (1999), 46 OR (3d) 130 (Ont Sup Ct J) at para 89).

[19] In determining whether to approve a settlement, the Court may take into account factors such as:

1. The likelihood of recovery or likelihood of success;
2. The amount and nature of discovery, evidence or investigation;
3. Terms and conditions of the proposed settlement;
4. The future expense and likely duration of litigation;
5. The recommendation of neutral parties, if any;
6. The number of objectors and nature of objections;
7. The presence of arm's length bargaining and the absence of collusion;
8. The information conveying to the Court the dynamics of, and the positions taken, by the parties during the negotiations;
9. The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and
10. The recommendation and experience of counsel.

(See *Ford v F Hoffmann-La Roche Ltd* (2005), 74 OR 3d 758 (Ont Sup Ct J) (QL) at para 117.)

2019 FC 122 (CanLII)

V. The Settlement Agreement

[36] The Court has considered all the relevant factors. As noted by both the Plaintiff and the Defendant, the most relevant considerations are the likelihood of recovery and success and the settlement terms and conditions.

A. *The likelihood of recovery if the action proceeded to trial*

[37] The action claimed several causes of action, including negligence, against the Defendant with respect to how the EI Commission implemented the 2002 amendments to the *Act*. The Plaintiff notes that despite their intention to establish negligence, there would have been several hurdles, including establishing a duty of care and proving that it was not met. For example, both parties note that the majority of the decisions of the EI Umpires relied on a strict or literal interpretation of section 18. This would have posed an obstacle to establishing negligence in the administration of the amendments.

[38] The Plaintiff also sought general damages, including for inconvenience and mental distress related to the pursuit and denial of claims. The Plaintiff acknowledges that there was a substantial likelihood that general damages would not have been awarded at trial. This is due in part to the current state of the law regarding general damages for this kind of anxiety and frustration and to the difficulty in establishing the criteria for general damages for mental distress as set out in *Fidler v Sun Life Assurance Co. of Canada,* 2006 SCC 30, [2006] 2 SCR 3.

2019 FC 122 (CanLII)

[39] The Defendant agrees that this is a novel case which raises complex issues involving a comprehensive statutory benefit scheme. The Defendant notes that the Courts have not yet recognized a duty of care related to the implementation of statutory provisions, as claimed by the Plaintiff. The Plaintiff would first need to establish that such a duty exists and then prove a breach of the duty, both of which would be challenging and would require a voluminous record, witness testimony and novel legal arguments. The Defendant adds that the entitlement to and quantification of general damages would pose similar challenges.

2019 FC 122 (CanLII)

[40] The Plaintiff and Defendant acknowledge that if general damages could be sought, each Class Member would have to establish their individual claim, which would pose significant challenges. In the event that the Plaintiff succeeded at trial, individual trials would have been required to determine whether each Class Member had met the test for general damages and whether the statutory limitation period barred their claim.

[41] The success of this litigation could not be predicted with any certainty. Continuing the litigation would have required considerable time, effort and resources which may not have been warranted by the risk. Even if negligence or the other causes of action were found, the nature of the damages claimed would not be easily established. Despite the natural inclination to root for a fair and equitable result to address a seemingly unfair or illogical situation caused by the provisions of the *Act*, the Court’s focus would be on the legal issues, which are complicated. As noted by the parties, they each knew the issues and the strengths and weaknesses of their case and used their knowledge in a collaborative way to reach this settlement.

B. *The amount and nature of discovery evidence*

[42] The record before the Court is voluminous and permits the Court to determine that the Settlement Agreement is fair and reasonable. The Record includes the past decisions of the Court with respect to the Rule 220 motion and the Certification motion. The Record also includes several affidavits, including affidavits prepared for the approval of the Notice to the Class; the affidavit of Mr. Michael Wright, the managing partner of the Class Counsel's firm, Cavalluzzo LLP, which details the history of the litigation; the affidavit of Ms. Manon Courcelle, Manager of Employment Insurance Business Services, Transformation and Integrated Service Management Branch at Service Canada, which details the work undertaken by ESDC to identify Class Members and to prepare for the administration of the settlement; and the affidavits of Ms. McCrea.

[43] Although the litigation did not proceed to the discovery stage, the evidence before the Court provides a comprehensive background, demonstrating the issues at stake and the efforts of the parties to reach a fair settlement. The Plaintiff and Defendant both acknowledged each other's full understanding of the EI regime, the issues and the strengths and weaknesses of their positions.

C. *The terms and conditions of the settlement*

[44] The terms and conditions of the settlement are outlined above. The parties agree that the terms were carefully crafted by both parties to ensure fair compensation, a timely administrative process and other safeguards to ensure that the interests of the class are protected.

2019 FC 122 (CanLII)

[45] The terms and conditions of the settlement are outlined above. The parties agree that the terms were carefully crafted by both parties to ensure fair compensation, a timely administrative process and other safeguards to ensure that the interests of the class are protected.

2019 FC 122 (CanLII)

[46] The highlights include that the eligible Class Members who submit valid claims will be paid 100% of the amount they would have received had their claim been approved when they requested to convert their parental benefits to sickness benefits. The costs of the administration of the claims, the Monitor fees and Class Counsel's fees and disbursements will be paid separately by the Defendant. In other words, these costs will not cut into the amount to be paid to Class Members. The Claims process is designed to be simple and efficient. The evidentiary threshold to establish a claim is relatively low and Class Counsel will provide assistance to Class Members with their claims. ESDC has established a dedicated team to determine the claims and an internal review process for claims that may be denied. In addition, denied claims will be independently reviewed, on application by the claimant, by a Prothonotary of this Court, as an additional safeguard.

[47] Although the Class Members will not receive general damages as originally sought, they will receive the full amount that they would have received at the time they sought to convert their parental benefits to sickness benefits.

[48] Class Members will not receive interest. However, any award of interest following trial would be discretionary. The Court notes that in the relevant period, interest rates were low. The Plaintiff and Defendant both agree that the settlement, which provides 100% of the amount that

the claimant would have received at the time of the illness, but without interest, remains a fair amount given the other attributes of this Settlement Agreement.

[49] Other beneficial features of the agreement offset what has been abandoned and must be considered. Timely payments are promised to class members who need only submit a simple form, without the need for documentary proof or testimony. As noted above, 1738 claimants are deemed to be eligible Class Members as they are already known to ESDC. Another 138 persons may be Class Members. ESDC has done extensive preparatory work, including identifying and contacting Class Members, which should pave the way for a streamlined and prompt payment process.

[50] Other non-monetary features of the Settlement Agreement also enhance its benefit to Class Members. Notably, the definition of the Class is amended to capture all claimants who applied for and were denied benefits for sickness during their EI “parental window”. This will include those who became ill while on maternity leave and continued to be ill while on parental leave, to permit them to claim the weeks of illness while on parental leave as sickness benefits. The expanded definition was a point of dispute, but was ultimately negotiated and included in the Settlement Agreement.

[51] The appointment of a third party Monitor to assist in identifying any systemic issues that may arise and to make recommendations to the Administrator to address any such issues, will add to the efficiency of the claims process. The proposed monitor, Mr. McFee, is a retired senior Public Servant with extensive experience and knowledge of social benefits schemes, including

2019 FC 122 (CanLII)

EI. Mr. McFee was the former Director of Policy and Legislative Development and former Director of EI Appeals. However, his role now is independent from ESDC. Both parties strongly support Mr. McFee as Monitor.

2019 FC 122 (CanLII)

[52] The review process for disputed claims is also designed to be simple and to bring finality. A claimant who is denied compensation may seek a review by a Prothonotary of the Federal Court. The Prothonotary will review the claim based on the same documents or record provided to ESDC, along with the submissions of the claimant and ESDC. The Prothonotary will either confirm the ESDC decision or send the claim back to ESDC for redetermination. The Prothonotary's determination of the disputed claim will be a final determination, not subject to further review or appeal. This process is designed to ensure that there is an additional level of independent review.

[53] Class Members will be assisted by Class Counsel during the claims process if necessary. There is no need for the Class Members to engage or pay other counsel. Class Members who seek a review by a Prothonotary of a denied claim will also be assisted by Class Counsel.

[54] The Monitor and the Administrator will provide final reports to the Court after the administration period. The Court will retain jurisdiction over this Action until all the claims submitted in accordance with the Settlement Agreement have been determined.

[55] The take up rate for this settlement is anticipated to be high. The file review undertaken by ESDC to identify eligible claimants has resulted in 1738 claimants being deemed eligible.

The multi-faceted Notice Plan, which includes Facebook, Twitter, the Government of Canada website, ads in major newspapers, and the toll-free phone line and website established by Class Counsel, has reached many Class Members. Further outreach will continue as the second phase of the Notice Plan is implemented and reminders are sent throughout the administration of the agreement.

2019 FC 122 (CanLII)

[56] It is also noted that to date, 106 letters of support for the Settlement Agreement have been received.

D. *The Risks of not Approving the Settlement*

[57] In the event that the Settlement Agreement is not approved, Class Members who pursued the litigation would incur expenses and further periods of uncertainty, perhaps up to three years. A discovery process, lengthy trial, and possible appeal would prolong the determination of an uncertain outcome.

[58] Moreover, the Plaintiff and the Class would be bound by the original Statement of Claim and the original definition of the Class. As such, some Class Members who will benefit from this Settlement Agreement would not benefit from the litigation even if it were ultimately successful. Similarly, the estate of any deceased claimant would not benefit from ongoing litigation.

E. *Communications with Class Members*

[59] Since this litigation commenced in 2012, Class Counsel have maintained a website, a toll-free phone line and a Facebook page to provide information to potential Class Members about the status of the litigation. More recently, the website and Facebook page have communicated the Notice to the Class Members of the terms and conditions of the proposed settlement, how to convey support or to object and how to participate in the hearing of this motion, among other information. Class Counsel sent emails to all Class Members who had registered with them advising of the proposed Settlement Agreement. Class Counsel reports that their website has been viewed by over 5300 users and that they have received more than 240 calls.

[60] In addition, the Notice of the Proposed Settlement was posted on the Government of Canada website in September 2018 and was published in major Canadian newspapers.

F. *Support for the Agreement; The Views of Class Members*

[61] Class Counsel received 106 letters and emails of support in response to the Notice of the proposed settlement. A potential Class Member, T.R., also spoke in support of the proposal at the hearing of the motion to approve the proposed settlement.

[62] The overall sentiment expressed in the letters was strong support for the settlement. Many Class Members wrote in detail about becoming sick while on leave, some very seriously, and described the significant challenges, pain and fear their illnesses injected into what had been

2019 FC 122 (CanLII)

expected to be a happy time in their lives. Class Members explained how being denied sickness benefits affected them and their families by exacerbating financial and emotional stresses and requiring them to make difficult choices about their work and health. Several Class Members communicated intense frustration that they had been denied benefits and relief that they might now see that money.

2019 FC 122 (CanLII)

[63] S.D. wrote:

> I believe the settlement offered at this point in time is sufficient and reasonable form of compensation for my loss… At the time of denial I felt pressure to return to work and the decision made by EI employees forced me to return to work on a part time basis which was not enough time for me to recover fully and I actually ended up having to quit my job that I had been an employee of for 15 years and so I do feel that the settlement will help me feel that some form of justice is and will be served after such a stressful experience at the time.

[64] S.B. wrote:

> Now with this Class Action I feel that my voice can be heard, that perhaps some restitution can be made and that there are others out there who deserve the same consideration.

[65] T.H. wrote:

> I would like to extend my sincerest thank you to Jennifer McCrea for having the courage and determination to put forth the energy to show what is right and just. Thank you… Support is everything. Support when needed is everything. This is why I support this class action suit. This needs to be corrected.

[66] At the settlement approval hearing, T.R spoke about her experience of being denied EI sickness benefits while on parental leave. T.R. described the physical and emotional strain

created by her long-term illness and the great difficulty it presented for her family. She was unable to return to work when she had planned but was denied sickness benefits. The denial caused enormous financial stress. T.R. told the Court that she was livid and heartbroken but did not have the energy to continue to challenge the denial at the time. She expressed gratitude towards the women who began this action and offered her support for the Settlement Agreement because she wants the sickness benefits to be given to the people who should have received them.

2019 FC 122 (CanLII)

[67] In Ms. McCrea's affidavit, she expressed the belief that the Settlement Agreement is fair and reasonable for the Class, considering the risks and delays associated with continuing the litigation. In particular, she noted that the proposed settlement provides for a simple application process and recovery of the full amount of the EI benefits that Class Members would have received. She said that non-recovery of interest is a small concession, representing a reasonable balance.

[68] Some Class Members noted with concern that the Settlement Agreement does not provide damages for mental distress. For example, D.D. sent a letter stating that she supports payments being made, but she disagrees with the settlement amount. She noted that the proposal does not include interest or compensation for pain and suffering, which she believes should be considered. D.D. described her fight with cancer and the financial impact of being denied benefits. She wrote:

> I was forced to work via lack of monetary support by an employment insurance program I had paid into for ten years prior to my diagnosis. I risked my life for nearly a full year after I

> returned, and I was not declared "cured" for another 4 after that.
> Certainly this must be considered.

[69] T.R. also stated before the Court her hope that emotional costs be considered for compensation.

[70] In Ms. McCrea's affidavit, she noted that there is a substantial likelihood that damages for inconvenience and mental distress would not have been awarded after trial. She also acknowledged that Class Members would have had a significant burden to provide individual evidence justifying such recovery. Ms. McCrea believes that a significant portion of the potential recovery is achieved in the Settlement Agreement.

[71] While some Class Members expressed concern about the settlement amount, the great majority of those who expressed views regard the proposed settlement favourably.

G. *Objections to the Settlement Agreement*

[72] Only five written objections were received, which represents approximately 0.2 % of the estimated Class Members. The written objections filed do not reveal the reason for the objection. For example, one objector stated that "it does not apply to me," and another, that she "[does not] want to fight for this". The cryptic nature of the objections suggests that the objectors did not fully understand the terms of the Settlement Agreement, including that they did not have to do anything more to make a claim. Objectors may choose to opt out of the litigation and could pursue their own actions. However, if they do not opt out, they will be bound by the settlement whether they make a claim or not.

2019 FC 122 (CanLII)

[73] The Court’s focus is on the reasonableness and fairness of the settlement for the class as a whole. A few dissatisfied or misinformed Class Members should not derail an agreement that is otherwise well supported and reasonable when all relevant factors are taken into account

H. *Good Faith*

[74] The Plaintiff and Defendant commended each other for their conduct in advocating for their respective positions in an assertive yet respectful and collegial manner, and in their approach to the negotiation of the settlement. Although the settlement discussions remain privileged, each party acknowledged the other’s skill and advocacy coupled with the good faith demonstrated throughout the process.

[75] Of note, ESDC undertook an extensive File Review Project to identify all potential Class Members and to contact them directly and indirectly through public and social media campaigns. The features of the Settlement Agreement, including the Opt Out process, the claims process, the appointment of a Monitor and the review process for disputed claims, all demonstrate the efforts made to ensure that the litigation would be resolved in a fair manner to benefit the class. ESDC’s initiative to identify all potential class members as the litigation was ongoing in order to ensure that ESDC would be prepared for the next steps has paved the way for an efficient claims’ administration process.

2019 FC 122 (CanLII)

I. *Arm's Length Bargaining*

[76] The Class Members were represented by experienced counsel who advocated for their best interests throughout the litigation. The Defendant's Counsel were all equally highly skilled and, as acknowledged by the Plaintiffs, formidable opponents. Both the Plaintiff and Defendant advanced their respective positions in an adversarial process. As noted above, the Defendant sought to put an end to the litigation early on by way of a Rule 220 motion. The Defendant also strongly opposed the certification of the action. However, as the litigation continued and settlement discussions ensued following certification, both the Defendant and Plaintiff made concessions to reach a fair resolution.

[77] Given the continuity of the team of Counsel for both the Plaintiff and Defendant, each "side" had a thorough understanding of the issues, the strengths and weaknesses of their own positions, and the impact that the settlement would have on Class Members.

J. *The recommendations of experienced Class Counsel*

[78] Class Counsel are experienced in litigating class actions. The affidavit of Mr. Wright, managing partner of the Class Counsel's firm, Cavalluzzo LLP, details the approach taken by the team of Class Counsel throughout the litigation. Given the experience of this team and their pursuit of the interests of the Class for well over six years, including defending motions and pursuing appeals, their recommendation that this settlement is fair and reasonable is accorded significant weight.

2019 FC 122 (CanLII)

K. *The Recommendation of the Representative Plaintiff*

[79] Ms. McCrea was engaged throughout the litigation (as described in more detail below) and was well aware of the risks of the litigation and of the benefits of the settlement. In addition to her efforts since early 2012 to advance both the issue of providing sickness benefits for those on parental leave and the litigation, she travelled to attend the hearing of this motion to approve the Settlement Agreement, further demonstrating her commitment and support.

L. *Conclusion*

[80] Upon considering all the relevant factors, the Court concludes that the Settlement Agreement, which is appended to the Court's Order, is fair and reasonable and is in the best interests of the Class Members.

VI. The Honorarium for The Representative Plaintiff is Approved

[81] Class Counsel requests that the Court approve an award of $10,000 as an honorarium to the representative plaintiff, Ms. McCrea, to be paid in addition to the amount payable to each Class Member.

[82] The Court has the discretion to award such an honorarium and has done so in several class actions. As noted in *Johnston v The Sheila Morrison Schools,* 2013 ONSC 1528 at para 43, [2013] OJ No 1126 (QL), an honorarium is "not an award but a recognition that the

2019 FC 122 (CanLII)

representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice".

[83] In *Robinson v Rochester Financial Ltd.,* 2012 ONSC 911 at para 43, [2012] 5 CTC 24[*Robinson*], the Court, in declining to award compensation to the representative plaintiff, noted that compensation should be reserved for cases where "considering all the circumstances, the contribution of the plaintiff has been exceptional." The Court identified several factors to consider in deciding whether to award compensation to the representative plaintiff, including their active involvement in the litigation, significant personal hardship or inconvenience in connection with the prosecution of the litigation, time spent in advancing the litigation, communication with other class members and participation in the litigation, including settlement negotiations and trial.

[84] In the present case, Ms. McCrea's contribution is indeed exceptional as measured by any standard, including the factors noted in *Robinson*.

[85] Class Counsel aptly noted that Ms. McCrea's role in this litigation required the stamina of a marathon runner given the many obstacles in the path of the litigation without a finish line in plain sight. There is no doubt that Ms. McCrea has ably advanced the interests of the Class Members. She has raised awareness of a "gap" in the parental benefits regime for those, like her, who became ill while in receipt of parental benefits in the relevant period, before the clarifying amendment was made to the *Act* in 2013. Ms. McCrea was one of the many real people affected. She became the recognized face of this issue long before the Statement of Claim was filed.

2019 FC 122 (CanLII)

Among other things, Ms. McCrea immersed herself in the issues raised in this litigation, prepared several affidavits, provided input to Class Counsel regarding the terms of the settlement, communicated with other potential Class Members and brought their views to the attention of Class Counsel. She has been the spokesperson for the Class Members to respond to inquiries from the press and to explain what is at stake. She will likely continue to be one of the "go to" persons for the foreseeable future following the approval of the settlement as it is implemented. Class Counsel praised Ms. McCrea as an ideal representative plaintiff over the six plus years of this litigation.

2019 FC 122 (CanLII)

[86] The Court has no hesitation in approving the honorarium of $10,000 for Ms. McCrea in recognition of her role in bringing this litigation and this cause to the finish line. No doubt, Ms. McCrea did not envision or welcome the disclosure of personal information or the additional stress of years of litigation in her busy life as a working parent. Many letters of support for the settlement expressed the gratitude of Class Members for Ms. McCrea's role in taking up their collective cause, raising awareness about the need for policy and legislative change and for pursuing the litigation for their benefit.

VII. The Fees and Disbursements are Reasonable

[87] In accordance with Rule 334.4 the Court must approve the legal fees and disbursements of Class Counsel. Rule 334.4 provides that:

No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the	334.4 Tout paiement direct ou indirect à un avocat, prélevé sur les sommes recouvrées à l'issue d'un recours collectif, doit être approuvé par un juge.

payments are approved by a judge.

A. *The Fees and Disbursements Requested*

2019 FC 122 (CanLII)

[88] Class Counsel seeks approval of their legal fees and disbursements in the amount of $2,212,389 plus applicable taxes, which in total will not exceed $2,500,000. This amount is to be paid separately and directly by the Defendant. In other words, Class Counsel's legal fees and disbursements will not come out of the amounts to be paid to Class Members.

[89] The affidavit of Mr. Wright explains that several lawyers, law clerks, paralegals and administrative assistants spent many hours since 2012 to pursue this litigation. The legal work and other tasks were performed by those best suited to do so. A detailed chart was provided outlining the hours spent by various members of this team from 2012 to the end of October 2018.

[90] Class Counsel explained that as of October 29, 2018, their team had docketed 2,949.2 hours of time (or $830,731 in fees, excluding taxes). As of the date of this hearing, that amount had risen to $865,000. Class Counsel anticipates that an additional $120,000 in fees will be incurred over the next several months as Class Counsel will assist Class Members with their claims. Class Counsel also noted that $93,301 in disbursements have been incurred (excluding taxes) and an additional $ 15,000 in disbursements is anticipated. Therefore, the total actual fees and disbursements are estimated at $950,000. However, as the jurisprudence in class actions has established, the fees approved recognize that more than the actual amounts incurred are warranted for several reasons.

[91] In the initial retainer agreement, the representative plaintiff entered into a contingency fee agreement with the Class Counsel which provided that Class Counsel would receive 30% of the total amount recovered plus HST. However, as the litigation evolved, the fee arrangement was revised.

[92] The proposed fees now sought by Class Counsel are not based on a percentage of the settlement or on a multiplier applied to the actual costs incurred, rather. Instead, they are a fixed amount.

[93] Class Counsel submits that the fees agreed upon are fair and reasonable if they are assessed with reference to either a multiplier applied to the actual hours that would otherwise be billed or a percentage of the total amount of the settlement. Class Counsel submits that while neither approach is a good fit, the multiplier approach would be the better option to "cross check" the reasonableness of the fees in the present circumstances.

[94] Class Counsel noted that the fees requested would reflect the application of a multiplier of 2.2, if a multiplier approach were used.

[95] Alternatively, if a percentage approach were considered, the proposed fee would be in the range of 19-24 % of the total value of the settlement, which is expected to be in the range of $ 8.5 to $11.5 million. As noted above, the payment of fees will not reduce the total amount of the settlement.

2019 FC 122 (CanLII)

[96] Class Counsel submits that the fees are fair and reasonable when all the relevant factors are considered, including the steps involved in this litigation, the duration of the litigation, and more importantly, the risks undertaken by Class Counsel and the successful result achieved.

2019 FC 122 (CanLII)

[97] The Defendant does not oppose the requested fees and disbursements and notes that Class Counsel's explanation of the fee structure, the jurisprudence and the relevant factors to be considered supports the reasonableness of the fees and the Court's approval.

B. *The Relevant Principles from the Jurisprudence*

[98] The factors to be considered in assessing the reasonableness of Class Counsel's fees have been set out in recent jurisprudence (e.g. *Condon* at paras 82-83, *Merlo* at paras 78-98, *Manuge* at para 28) and include: the results achieved, the risks taken, the time expended, the complexity of the issues, the importance of the litigation or issue to the plaintiff, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of Class Members to pay for the litigation, the expectations of the class, and fees in similar cases.

[99] The jurisprudence has emphasized that the two key factors are the risks taken and the results achieved. In *Condon,* Justice Gagné noted at para 83:

> [83] In particular, courts have focused on two main factors in assessing the fairness and reasonableness of a fee request: (1) the risk that class counsel undertook in conducting the litigation; and (2) the degree of success or result achieved (*Parsons 2000*, above at para 13; *Sayers v Shaw Cablesystems Limited,* 2011 ONSC 962 at para 35). Risk in this context is measured from the commencement of the action (*Gagne v Silcorp Ltd* (1998), 49 OR (3d) 417 (Ont CA) at para 16). These risks include all of the risks facing class counsel, such as the liability risk, recovery risk, and

> the risk that the action will not be certified as a class action (*Gagne*, above at para 17; *Endean v Canadian Red Cross Society*, 2000 BCSC 971 (QL) at paras 28, 35).

[100] In *Brown v Canada (Attorney General),* 2018 ONSC 3429, 297 ACWS (3d) 295, Justice Belobaba reiterated that risk and results are the key factors at para 41:

> 41 The two most important factors are risk incurred and results achieved. As between the two, it is the risk incurred that "most justifies" a premium in class proceedings. The nature of the risk incurred is primarily the risk of non-payment. As noted by the Ontario Law Reform Commission in its seminal *Report on Class Actions*, "the class lawyer will be assuming a risk that after the expenditure of time and effort no remuneration may be received ... [that is] the risk of non-payment."
>
> [Footnotes omitted]

[101] In *Manuge* at para 37, Justice Barnes explained that the litigation risk taken by class counsel is "primarily measured by the risk they assumed at the outset of the case."

[102] There are generally two approaches to assessing the reasonableness of Class Counsel Fees—a percentage of the total settlement or a multiplier applied to fees and disbursements actually incurred.

[103] In *Condon*, Justice Gagné noted at paras 86-87 that the application of a multiplier to class counsel's time has been criticized for discouraging efficiency and early settlement. On the other hand, percentage-based fees encourage a results-based approach and reward counsel for their effectiveness. Courts have suggested a preference for percentage based fees in class actions.

2019 FC 122 (CanLII)

[104] Justice Gagné expanded on the benefits of a percentage based fee, noting that entrepreneurial lawyers who accept contingency fee arrangements for class actions make such actions possible, noting at paras 89-91:

> [89] Effective class actions would not be possible without contingency fees that pay counsel on a percentage basis.
>
> [90] Contingency fees help to promote access to justice in that they allow counsel, rather than the client, to finance the litigation. Contingency fees also promote judicial economy, encourage efficiency in the litigation, discourage unnecessary work that might otherwise be done simply to increase the lawyer's fee based on time incurred, properly emphasize the quality of the representation and the results achieved, ensure that counsel are not penalized for efficiency, and reflect the considerable costs and risks undertaken by class counsel (*Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 21).
>
> 91 This Court, and courts across Canada, have recognized that the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases, and that class counsel's compensation consequently must reflect this reality (*Manuge,* above at para 49; *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602 at para 26; *Griffin v Dell Canada Inc*, 2011 ONSC 3292 at para 53). Compensation must be sufficiently rewarding to "provide a real economic incentive to lawyers to take on a class proceeding and to do it well" (*Sayers*, above at para 37).

[105] In *Gagne v Silcorp Ltd.*(1998), 167 DLR (4th) 325 at para 16, 1998 CarswellOnt 4045(Ont CA) [*Gagne*], the Court explained the multiplier approach, noting that a multiplier is in part a reward to counsel for bearing the risk of litigation. In assessing the risk, "[t]he 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."

2019 FC 122 (CanLII)

[106] In *Gagne,* the Court added at para 25 that the selection of the appropriate multiplier is an art, not a science, and is informed by all the relevant factors.

[107] In *Châteuneuf v Canada,* 2006 FC 446, 151 ACWS (3d) 20, Justice Tremblay-Lamer also explained the multiplier approach, noting at para 10 that a multiplier of 1.5 to 3 has been found to be appropriate:

> [10] The system adopted in Ontario is covered in subsection 33(7) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. On the motion of a solicitor who has entered into an agreement, the court shall determine the amount of the solicitor's base fee. The base fee is calculated by multiplying the hours worked by the solicitor's usual hourly rate, to which the court may add an additional fee, calculated by multiplying the base fee by a multiplier to reflect the risks incurred by the solicitor. The case law recognizes that a multiplier of between 1.5 and 3.5 is appropriate: Rachel Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004), at page 474. Finally, the court determines 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.

[108] Much of the jurisprudence cited with respect to the assessment of the reasonableness of fees arises in the context of the fees as part of the total settlement. In the present case, the Settlement Agreement provides that the fees will be paid separately by the Defendant. In other words, the fees do not come out of the total settlement. In *Fantl v Transamerica Life Canada,* [2009] OJ No 4324 (QL), 181 ACWS (3d) 219 (Ont Sup Ct) [*Fantl*], the Court considered a similar arrangement where the class was not asked to share their recovery. The Court considered how to measure the fairness and reasonableness of the fees in the circumstances. At para 76, the Court stated "the solution is to measure fairness and reasonableness from more perspectives. What the case at bar requires is to measure fairness and

2019 FC 122 (CanLII)

reasonableness of the counsel fee against what is fair and reasonable to all of the class, Class Counsel, the defendant, and the public interest."

[109] Whether the fees in a class action are based on a percentage of the total settlement, a multiplier of the actual fees, or another basis, the jurisprudence emphasizes that the fees are the reward for taking on the litigation and all the risks entailed and pursuing the litigation with skill and diligence. Without the possibility of such a reward, such litigation would not be feasible. Many actions would not be pursued but for the role that Class Counsel takes on. The same considerations apply to the fees in the present case, which are fixed.

C. *Application of the principles and Relevant Factors*

[110] The fees sought to be approved are of a fixed amount. However, the initial fee agreement was based on a percentage of the ultimate recovery. As the jurisprudence notes, such contingency fees permit class actions to be pursued and provide incentives and ultimately a reward for class counsel to take on risky litigation and pursue it with diligence. Whether a multiplier or a percentage, the jurisprudence establishes that more than the hourly rates and disbursements actually incurred is justified in successful Class Actions.

[111] Although I agree that when "cross checked" with reference to a percentage of the settlement or a multiplier, the fees are fair and reasonable, the fees are best assessed against all the relevant factors. As noted in *Fantl,* the fairness and reasonableness of the fees should be assessed from more perspectives, including what is fair to the Class and to Class Counsel. In my view, the application of several factors noted in the jurisprudence, including the risk of the

2019 FC 122 (CanLII)

litigation, the settlement achieved, the effort, diligence, experience and commitment of Class Counsel and the "team" supporting Class Counsel all point to the reasonableness of the amount.

[112] With respect to the litigation risk, as noted in *Manuge* at para 37, it is the risk taken by Class Counsel at the outset—i.e. when the action is launched—that is most relevant. In the present case, Class Counsel took on this litigation over six years ago. The litigation raised novel issues and posed thorny evidentiary challenges, including the need to establish a duty of care by the Defendants in the administration of a complex benefits regime. Class Counsel faced discouraging EI Umpire decisions and limitation periods, among other obstacles. Class Counsel assumed the "carrying costs" of the litigation for over six years. There was no certainty that the action would even be certified and indeed, not all claims were certified. As Class Counsel noted, the Defendant was a formidable opponent. Taking on the Government is not for the faint of heart.

2019 FC 122 (CanLII)

[113] The issues raised in the litigation were novel and complex. Class Counsel faced the Defendant's opposition to all aspects of the litigation. Class Counsel, among other things, defended a Rule 220 motion, pursued an appeal of a reconsideration order regarding the terms of the Certification Order, advocated for an expansion to the Class definition and raised awareness and understanding of the issues at stake. Class Counsel remained undeterred in advocating for the Class.

[114] The results achieved are demonstrated by the Settlement Agreement. The Settlement Agreement provides that the sickness benefits that eligible claimants would or should have

received at the relevant time, but for the impossible requirement of being otherwise available for work, will now be paid. Although this is only part of what the litigation sought to achieve, this is the nature of a settlement—each party made compromises. Class Counsel and the Class Members who have voiced their support to date describe it as an excellent result. As noted, the few objectors did not articulate any clear reason for not supporting the settlement. Notably, eligible claims will be paid promptly, based on a simple form and the Class Counsel fees will not reduce the amounts payable to eligible claimants.

2019 FC 122 (CanLII)

[115] The time and effort expended by each member of the Class Counsel team since 2012 is well documented in the affidavit of Mr. Wright. The Court has also observed, through the Rule 220 motion, the certification motion and other Case Management Conferences, the diligent efforts of the Class Counsel team.

[116] With respect to the quality of the representation, Class Counsel notes that their firm, Cavalluzzo LLP, with 36 members, has significant experience in class action litigation, which was brought to bear in this litigation. Several experienced counsel were involved to varying degrees, drawing on their respective areas of expertise, including expertise in the EI benefits regime. As noted above, the members of the Class Counsel team divided the necessary work based on skill and experience. For example, work done by students and paralegals was billed at their respective and appropriate rates.

[117] The importance of this litigation to the class is an equally relevant factor, which goes above and beyond the fact that Class Members will now receive some compensation. Many

2019 FC 122 (CanLII)

Class Members had sought to resolve their claims by appealing to the EI Umpire. Unsuccessful claimants were likely discouraged by the outcome for them, while observing that new benefit programs were promised and implemented to address other important needs, but not to address their failed claims. The amounts at issue for the eligible claimants are not large, but the terms of the settlement are nonetheless a victory for the Class Members and their cause. Parental benefits—as important as they are—may not approach the salary a parent would receive while working. A parent on leave from their employment, caring for their child continues to have expenses to pay, yet with a reduced income. The added stress of becoming ill, but not being able to convert those weeks of illness to sickness benefits in order to extend or retain their parental benefits for their intended purpose of caring for a child rather than recovering from their illness, spurred the Class Members on to pursue this litigation.

[118] The maximum amount a claimant could receive if they are eligible for a full 15 weeks of benefits at the highest weekly rate is $7500, and for many the amount may be much less. The benefits would have likely been of more help at the time of the illness. Nevertheless, the settlement is a very good result for the Class Members. They will receive their benefits, albeit years later, and they will have witnessed both a change in the legislation to benefit others like them and improvements in the manner that information is shared by Service Canada about such benefits.

[119] As one Class Member noted, the importance of supporting mothers and children cannot be overstated. The settlement appears to recognize this. The letters of support also clearly convey

the benefit of the settlement to individual claimants and the recognition of the importance of supporting families and children.

[120] The representative plaintiff, Ms. McCrea, supports the approval of Class Counsel's fees. As noted, she initially entered into a contingency fee agreement for Class Counsel to receive 30% of the total amounts recovered plus HST. Class Members were aware of this initial agreement and of the revised arrangement for fees. No objections were made to the proposed fees. The current agreement provides that the fees for Class Counsel will not come out of the total amount of the settlement for class members. Rather, the fees of Class Counsel will be paid separately by the Defendant. This is an advantage as it ensures that Class Members will receive 100% of the benefits that they would have received had they been paid out at the relevant time.

[121] As noted above, in addition to the fees and disbursements already incurred by Class Counsel, further work remains to be done. Class Counsel will continue to incur costs over the course of the administration of the settlement, as they will provide reasonable assistance to Class Members in pursuing their claims and to those who seek a review of a denied claim.

[122] Comparisons with the fees approved in other class actions settlements also demonstrate that the fees in the present case are well within the norm. Although no two cases are the same, there is nothing unusual or disproportionate about the fees. For example, in *Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc.,* 2018 ONSC 6447, 298 ACWS (3d) 474 and *Fakhri v Alfalfa's Canada, Inc.,* 2005 BCSC 1123, [2005] BCJ No 1723, a 2.5 multiplier was applied. In *Condon,* the fees approved were 30% of

2019 FC 122 (CanLII)

the total settlement, which was valued at $17.5 Million. In *Fantl*, the fees represented 17% of the total settlement. In *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686, [2013] OJ No 5825 (QL), the Court approved fees of 33.33% where the total settlement was $28.2 Million.

2019 FC 122 (CanLII)

[123] Upon considering the jurisprudence and the relevant factors, in particular the risk taken by Class Counsel at the outset of this litigation, their skill and diligence in pursuing the issue and the litigation, which individual Class Members could not have done on their own, and the ultimate results achieved, the Court concludes that by any measure, the fees of Class Counsel are fair and reasonable and are approved.

VIII. Conclusion

[124] The Court finds that the Settlement Agreement is fair and reasonable and is, therefore, approved. In addition, the honorarium for Ms. McCrea as representative plaintiff is warranted given her significant contribution to this litigation and settlement and is approved. The fees and disbursements of Class Counsel are also fair and reasonable and are approved.

[125] In addition, the Plaintiff's Statement of Claim is amended to reflect the causes of action which were certified and to certify an amended definition of the "Class".

ORDER in T-210-12

THIS COURT ORDERS that:

1. For the purposes of this Order, the following definitions shall apply:

   "Administrator" means the Transformation and Integration Service Management branch of Employment and Social Development Canada;

   "Approval Date" means the date that this Order is executed;

   "Approval Orders" means this Order and the Order approving counsel fees in this matter;

   "Canada" or **"Government of Canada"** means Her Majesty the Queen in Right of Canada;

   "Claimant" means a person who completes a Claim Form and submits it for Individual Payment, but is not necessarily a class member;

   "Class Counsel" means Cavalluzzo LLP;

   "Class Members" mean all persons who meet the class definition set out in paragraph 3 below;

   "Implementation Date" means the date on which implementation of the settlement commences and is the latest of:

   i) the day following the last day on which a Class Member may appeal or seek leave to appeal the Approval Order;

   ii) the day after the date of a final determination of any appeal brought in relation to the Approval Order; or

   iii) April 3, 2019.

   "Settlement Agreement" means the final **Settlement Agreement**, including the Schedules listed at **Section 1.07** of the agreement, executed between the parties on August 22, 2018, and attached as **Appendix "A"** to this Order.

2. All applicable parties have adhered to and acted in accordance with the Notice Order dated September 11, 2018.

2019 FC 122 (CanLII)

LEAVE TO FILE FRESH AS AMENDED STATEMENT OF CLAIM AND AMENDMENT TO THE CLASS DEFINITION

3. The Plaintiff is given leave to file the Fresh as Amended Statement of Claim and the style of cause is amended to name Her Majesty the Queen in Right of Canada as Defendant.

4. The class definition is amended to read as follows:

The class includes all persons who, during the period from March 3, 2002 to, and including, March 23, 2013:

i) Applied for and were paid parental benefits under the El Act or corresponding types of benefits under Quebec's An Act Respecting Parental Insurance;

ii) Suffered from an illness, injury or quarantine while in receipt of parental benefits;

iii) Applied for sickness benefits in respect of the illness, injury or quarantine referred to in ii; and

iv) Were denied a conversion of parental benefits to sickness benefits because:

(a) the person was not otherwise available for work; or

(b) the person had not previously received at least one week of sickness benefits during the benefit period in which the parental benefits were received.

OPT OUT PROCEDURE

5. Any class member who wishes to opt out of this class action must do so by completing and sending to Class Counsel the form appended as **Schedule "G"** to the **Settlement Agreement** no later than April 2, 2019 (the "Opt Out Deadline"); where sent by regular mail, the opt-out form shall be postmarked no later than April 2, 2019.

6. No Class Member may opt out of this class proceeding after the Opt Out Deadline.

2019 FC 122 (CanLII)

7. Class Counsel shall serve on the parties and file with the Court, within two (2) weeks of the expiry of the Opt Out Deadline, an affidavit listing all persons who have opted out of the class proceeding, if any.

8. No person other than the parties or the Court may access the affidavit listing all persons who have opted out of the class proceeding and the said affidavit and any exhibits may only be filed under seal.

2019 FC 122 (CanLII)

SETTLEMENT APPROVAL

9. The Settlement of this action on the terms set out in the **Settlement Agreement**, and as expressly incorporated by reference into this Order, is fair and reasonable and in the best interests of Class Members as a whole, and is approved, subject to the following changes to the Settlement Agreement, which are made on the consent of the parties:

    (a) As reflected in paragraph 5 above, the Opt Out Deadline shall be 60 days from the date of the Approval Order, such that where sent by regular mail, the Opt Out form shall be post-marked no later than 60 days from the date of the Approval Order; and

    (b) The Claims Form (Schedule "L" to the Settlement Agreement) is amended to add the Court File Number, to delete the second and third sentences in Box 10, and to add additional instructions in the "Instructions Box", as reflected in **Appendix "B"** to this Order.

10. The Settlement and this Order, including the releases referred to in paragraph 12 below, are binding on the Parties and on every Class Member and Claimant, including persons

under a disability, unless they opt out on or before the expiry of the Opt Out Deadline, and are binding whether or not such Class Member claims or receives compensation.

11. The **Settlement Agreement** shall be implemented in accordance with this Order and further orders of this Court.

2019 FC 122 (CanLII)

DISMISSAL AND RELEASE

12. The present action, and the claims of the Class Members and the Class as a whole, are dismissed against the Defendants and the Government of Canada, without costs and with prejudice and such dismissal shall be a defence and absolute bar to any subsequent action against the Defendant in respect of any of the Claims or any aspect of the Claims made in the Class Actions and relating to the subject matter hereof, and are released against the Releasees in accordance with Section 10 of the Settlement Agreement, in particular as follows:

> (a) Each Class Member, their Estate Executors, and their respective legal representatives, successors, heirs and assigns ("Releasors") fully, finally and forever release and discharge Her Majesty the Queen in Right of Canada, and all current and former Ministers, employees, officials, departments, Crown agents, agencies, and Crown servants ("Releasees") from any and all actions, suits, proceedings, causes of action, common law, Quebec civil law and statutory liabilities, equitable obligations, contracts, claims, losses, costs, grievances and complaints and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses and interest which any Releasor may ever have had, may now have, or may in the future have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise with respect to or in relation to any aspect of the Class Actions and this release includes any such claim made or that could have been made in any proceeding including the Class Actions whether asserted directly by the Releasor(s) or by any other person, group or legal entity on behalf of or as representative of the Releasor(s);

(b) The **Releasors** agree that if they make any claim or demand or take any actions or proceedings against another person or persons in which any claim could arise against a Releasee for damages or contribution or indemnity and/or other relief over under the provisions of the *Negligence Act,* R.S.O. 1990, c. N-3, or its counterpart in other jurisdiction in relation to the Class Actions, then the **Releasors** will expressly limit their claims to exclude any portion of the **Releasees'** responsibility;

(c) Canada's obligations and liabilities under the **Settlement Agreement** constitute the consideration for the releases and other matters referred to in the **Settlement Agreement** and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Releasors are limited to the benefits provided and compensation payable pursuant to the **Settlement Agreement**, in whole or in part, as their only recourse on account of such claims.

2019 FC 122 (CanLII)

APPOINTMENTS

13. The Department of Employment and Social Development, otherwise known as Employment and Social Development Canada ("ESDC"), shall administer the claims process in accordance with the Settlement Agreement. The cost of Administration shall be borne by ESDC.

14. Mr. Gordon McFee is appointed as Monitor of the claims process. The fees, disbursements and applicable taxes of the Monitor shall be paid in accordance with Section 9, and **Schedule "M"** of the **Settlement Agreement**.

15. No person may bring any action or take any proceeding against the Administrator or the Monitor or the members of such bodies, or any employees, agents, partners, associates, representatives, successors or assigns, for any matter in any way relating to the Settlement Agreement, the public notice campaign, administration of the Settlement Agreement or the implementation of this judgment, except with leave of this Court on notice to all affected parties.

OPT OUT THRESHOLD

16. In the event that the number of persons who appear to be eligible for compensation under the **Settlement Agreement** and who opt out of this class proceeding exceeds two hundred (200), Canada may exercise the option to void the **Settlement Agreement** and this judgment will be set aside in its entirety, subject only to the right of Canada at its sole discretion to waive compliance pursuant to **Section 2.03** of the **Settlement Agreement**.

2019 FC 122 (CanLII)

NOTICE

17. Notice of the Settlement Approval shall be provided, and distributed as set out in **Schedule "C"** to the **Settlement Agreement**. The Notice Plan (Phase II) satisfies the requirements of rules 334.23, 334.32, 334.34, 334.35 and 334.37 of the Federal Courts Rules and constitutes sufficient and adequate notice to the class members and other affected parties.

18. The Notice Plan shall be completed no later than forty five (45) days after this Order.

19. Notice of the Settlement Approval shall be given in the form(s) attached as **Appendix "C" (English)** and **Appendix "D" (French)** to this Order**.**

CLASS COUNSEL FEES, NOTICE FEES AND HONORARIUMS

20. Class counsel legal fees and disbursements in the amount of $2,212,389, together with any applicable taxes thereon, not to exceed the amount of $2,500,000, is approved and shall be paid to Class Counsel within sixty (60) days of the Implementation Date, and such amount is to be paid in addition to and separate and apart from the individual compensation paid to eligible Class Members.

21. No fee may be charged to Class Members in relation to claims under the **Settlement Agreement** without prior approval of the Federal Court.

22. The Representative Plaintiff Jennifer McCrea shall receive the sum of $10,000 as an honorarium to be paid in accordance with **Section 12.01** of the **Settlement Agreement**.

2019 FC 122 (CanLII)

CONTINUING JURISDICTION AND REPORTING

23. This Court, without in any way affecting the finality of this Order, reserves exclusive and continuing jurisdiction over this action, the Plaintiffs, all of the Class Members, Deemed Class Members and the Defendant for the limited purposes of implementing and enforcing and administering the **Settlement Agreement** and this Order.

24. The Administrator shall report back to the Court on the Administration of the **Settlement Agreement** as contemplated in **Schedule "K"** to the **Settlement Agreement.**

25. The Monitor shall report back to the Court on the Administration of the **Settlement Agreement** at reasonable intervals and upon completion of the administration, in accordance with **Section 9.02** of the **Settlement Agreement** or as requested by the Court.

26. This Court may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the **Settlement Agreement**.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-210-12
STYLE OF CAUSE:	JENNIFER MCCREA v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 3, 2018, DECEMBER 4, 2018
ORDER AND REASONS:	KANE J.
DATED:	JANUARY 29, 2019

APPEARANCES:

Stephen Moreau Tassia Poynter	FOR THE PLAINTIFF
Christine Mohr Cynthia Koller Heather Thompson	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Cavalluzzo LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFF
Deputy Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANTS

2019 FC 122 (CanLII)

TAB 14

Federal Court

Cour fédérale

Date: 20190819

Docket: T-2169-16

Citation: 2019 FC 1075

2019 FC 1075 (CanLII)

CLASS PROCEEDING

BETWEEN:

GARRY LESLIE MCLEAN,
ROGER AUGUSTINE,
CLAUDETTE COMMANDA,
ANGELA ELIZABETH SIMONE SAMPSON,
MARGARET ANNE SWAN and
MARIETTE LUCILLE BUCKSHOT

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR APPROVAL ORDER

PHELAN J.

I. Introduction

[1] This settlement agreement is the culmination of litigation concerning tragic, scarring events in the lives of those who attended Indian Day Schools. These events include mockery, belittlement, and physical, sexual, cultural and emotional abuse, which are soul damaging. Healing will be a long-term process at best.

[2] This case involves allegations of assault, abuse and mistreatment of children who are our most precious gift.

[3] It is not possible to take the pain and suffering away and heal the bodies and spirits, certainly not in this proceeding. The best that can be done is to have a fair and reasonable settlement of the litigation.

[4] This proceeding is a motion to approve a settlement agreement [Settlement Agreement or Settlement] pursuant to Rule 334.29(1) of the *Federal Courts Rules*, SOR/98-106, dismiss the claims of Class Members against the Defendant without costs and with prejudice, and other procedural steps that flow from the approval of the Settlement.

[5] The Settlement Agreement to be approved is the agreement of March 12, 2019, as amended by the Amending Agreement dated May 13, 2019.

2019 FC 1075 (CanLII)

Since the conclusion of the hearing, the parties have worked to finalize the text of certain schedules, most particularly Schedule K, the final version of which, as well as others, form part of the Court's Approval Order.

II. Overview

[6] For over 50 years, many Indigenous children were compelled to attend day schools [Indian Day Schools] operated by the Defendant. The principal difference between Indian Day School students and Residential School students is that Day School students went home at night.

[7] Although the Defendant does not admit liability in the Settlement Agreement, the Settlement acknowledges that children were divided from their families and culture and were denied their heritage. Many were physically, emotionally and sexually abused.

[8] The proposed settlement represents access to justice for a class of approximately 120,000 aging people [Survivor Class Members] and their spouses, children, and grandchildren [Family Class Members]. Indian Day School students were not included in the now famous Indian Residential School Settlement [IRSS]. However, many of the same abuses recognized in the IRSS were inflicted on those attending Indian Day Schools.

[9] The lessons learned from some of the well-recognized problems of the concept and operation of the IRSS were reflected in this Indian Day Schools Settlement Agreement. While there is criticism of the Settlement Agreement, no agreement can be perfect and the law recognizes that reality in the legal standard set for approval. The law also recognizes that the

2019 FC 1075 (CanLII)

Settlement Agreement is a compromise of competing interests and that it is not the role of the Court to meddle in or tinker with the agreed terms (*Châteauneuf v R*, 2006 FC 286 at para 7, [2006] FCJ No 363 [*Châteauneuf*]). The Court must either accept or reject the settlement as a whole, except for its approval of counsel fees, which are severable from the rest of this Settlement.

[10] In summary, this Settlement will make over $1.47 billion available to compensate survivors and their families. The compensation process is designed to be a relatively simple, paper-based process administered by a Court-approved Claims Administrator and supported by Class Counsel, a highly regarded large national law firm who, through their involvement in the creation of the Settlement, has in-depth knowledge and appreciation of the issues to be addressed and the resources needed to carry out their obligations.

[11] As explained to the Court, the process is designed to be expeditious and to avoid the re-traumatization and hardship experienced by many who made claims through the IRSS.

[12] A critical feature of this Settlement is a Legacy Fund which will provide $200 million in funding for healing/wellness support and language and cultural initiatives as part of an overall approach to recognition, compensation and personal resolution.

[13] This Court has concluded in these Reasons that the provisions of the Settlement other than the counsel fees provisions are fair, reasonable and in the best interests of the Class. A separate Order and Reasons will issue with respect to the approval of counsel fees.

2019 FC 1075 (CanLII)

III. Background

A. *Indian Day Schools*

2019 FC 1075 (CanLII)

[14] Beginning in 1920, Canada established, funded, controlled and maintained a system of day schools for the compulsory education of Indigenous children across the country - the Indian Day Schools. These schools were called “Federal Indian Day Schools” in the southern part of the country, while in the North (the Territories and Northern Quebec) they were generally referred to as “Federal Day Schools”.

[15] Attendance at these schools was, as expected, compulsory. However, truancy resulted in punishment for not only the student but also for the family including the cancellation of the “allowance” to which parents were entitled.

[16] Approximately 190,000 children attended these schools and approximately 127,000 of those children were living as of October 2017. The sad fact is that with the passage of time approximately 1,800 such survivors die each year; this number will steadily increase annually with time.

[17] Canada funded the schools, paying for such matters as teachers’ salaries and bonuses, compensation for administration personnel, and the construction and maintenance of schools. Although many schools were associated with churches of various denominations, almost all schools were ultimately supervised and administered by Indian Agents who were required to

conduct monthly inspections and prepare associated reports for the federal department responsible.

[18] Beginning in the 1960s and continuing for the following two decades, Canada transferred the funding and control of these schools to the provinces, territories, and Indigenous governments.

2019 FC 1075 (CanLII)

[19] These schools had profoundly negative effects on many of their students. The representative plaintiffs were exposed to a program of denigration, psychological abuse and physical violence often for such simple things as speaking their own language to others of their community at the schools. This experience had a deep and lasting impact on the representative plaintiffs, impairing their sense of self-worth and impeding their relationships with others and leading to personal issues with substance abuse among the many ills that resulted from that abuse.

[20] In the course of the approval hearing process and at the hearing itself, the Court heard brief narratives of a similar nature, both from supporters and objectors to the Settlement. While it was not the function of the settlement hearing to delve into the personal “truths” of Class Members, their submissions were entirely consistent with the experience of the representative plaintiffs.

[21] The time for exploring the individual experiences of Survivor Class Members is both through the claims process and under the auspices of the Legacy Fund. The settlement approval process has a different objective.

B. *History of the Action*

[22] The history of the action gives context to the Settlement.

[23] The harms experienced by Indian Day School survivors were much the same as those outlined in the IRSS; however, the Indian Day School survivors were largely left out of this earlier settlement.

[24] As a result, Garry McLean, Ray Mason and Margaret Swan decided to initiate a class proceeding in Manitoba. Mr. Mason and Ms. Swan testified in these settlement proceedings. Sadly, Mr. McLean passed away this February.

[25] For almost seven years the action lay fallow; the then counsel had considerable difficulty marshalling the resources to carry on the litigation and no other firms were prepared to assist or take it on.

[26] As a result, the plaintiffs retained new Class Counsel, Gowling WLG [Gowling].

[27] Under Gowling's guidance, the action in this Court was commenced on December 15, 2016.

2019 FC 1075 (CanLII)

[28] While information gathering meetings were conducted between Class Counsel and Canada's counsel, a certification hearing was scheduled for October 2018. This action was certified on consent on June 21, 2018.

C. *Nature of the Claim/Damages*

[29] The Statement of Claim at first review pleaded very broad causes of action. This led to some confusion as to the scope of the litigation, the breadth of the remedies and the nature of any release which would be required.

[30] There was particular concern for the impact of this litigation on Aboriginal and treaty rights.

[31] However, as became clear through the Settlement Agreement, this litigation and the Settlement became essentially a tort-based claim in the nature of assault, systemic negligence and breach of fiduciary duties resulting in physical and psychological abuse specific to each class member.

[32] Canada made it clear that in respect of settlement, only individual rights were at issue. There was no impact on any collectively-held Aboriginal or treaty rights.

[33] This position was reaffirmed to the Federal Court of Appeal and referred to in its judgments in *Cree Nation of Eeyou Istchee (General Council) v McLean*, 2019 FCA 185;

2019 FC 1075 (CanLII)

Nunavut Tunngavik Incorporated v McLean, 2019 FCA 186; and *Whapmagoostui First Nation v McLean*, 2019 FCA 187, issued June 20, 2019.

D. *Settlement Negotiations*

[34] Settlement negotiations commenced in August 2018 and consumed seventeen (17) days over the period from August 2018 to December 2018, after which an agreement in principle was concluded.

[35] I am satisfied, based on the record before the Court, that issues which ranged from quantum to implementation were complex and difficult. As difficult as it may be for those who lived through the harmful aspect of the Indian Day School system, compromise was necessary to reach this settlement.

E. *Settlement Agreement—Key Provisions and Amendments*

(1) Basics

[36] Compensation is available to Survivor Class Members who experienced harm associated with attending a Federal Indian Day School listed in Schedule K of the Settlement during the Class Period. Compensation is based on a grid or levels of harm - the range having been established having regard to damage awards for somewhat similar harms. The range is from $10,000 for Level 1 to $200,000 for Level 5.

2019 FC 1075 (CanLII)

[37] Canada will provide $1.27 billion initially, and up to $1.4 billion if required, for Level 1 claims and an unlimited amount for Level 2-5 claims.

[38] The "Class Period" runs from January 1, 1920 until the date of closure or relinquishment of control by Canada of any particular day school or, if not transferred from Canada, the date on which the written offer of transfer by Canada was not accepted by the First Nation or Indigenous government.

[39] If a Survivor Class Member dies on or after July 31, 2007, their Estate Executor is still eligible to be paid the compensation to which the Survivor Class Member would have been entitled.

[40] Schedule K to the Settlement lists the Federal Indian Day Schools and the Class Period associated with each school. While concern was expressed by those opposing approval that some schools had been omitted from Schedule K, that list has continued to be updated. The list will close as of the issuance of this Court's Approval Order in order to give certainty to the definition for Class Members. Those survivors whose schools are not included in Schedule K or did not attend a listed school during the defined Class Period are not defined as Survivor Class Members under the Settlement and therefore will not receive compensation and will not be bound by the Settlement Agreement. Following approval, there is a mechanism for the Exceptions Committee to refer applications to the parties that have been rejected because a claimant's school or attendance period was not included in Schedule K. The parties can then agree to amend Schedule K with approval of the Court.

2019 FC 1075 (CanLII)

(2) Claims Process

[41] The claims process "is intended to be expeditious, cost effective, user-friendly and culturally sensitive" according to the Settlement Agreement. All reasonable and favourable inferences that can be drawn in favour of a claimant are to be drawn and doubt is to be resolved in favour of a claimant.

[42] The Claims Deadline was initially one (1) year after the "Implementation Date". This provision attracted considerable opposition and was amended to two and a half (2.5) years after the Implementation Date.

[43] The claims process is based on a simple claim form on which claimants self identify a single level of compensation. There is a requirement to provide supporting evidence that increases with the level of compensation claimed.

[44] After submission to the Claims Administrator, the claim proceeds to processing including a determination of the appropriate level of compensation. In my view, the process is relatively straightforward and mechanisms will be in place to handle issues such as necessary documentation and potential disagreement with the compensation level.

[45] A review process is contemplated for such cases permitting reconsideration by the Claims Administrator, a first tier review by a Third Party Assessor, and a second tier appeal to an

2019 FC 1075 (CanLII)

Exceptions Committee, which has one Survivor Class member, one member of Class Counsel, one member of Canada's counsel, and a fourth agreed upon individual.

(3) Counsel Fees

[46] Based at least in part on some of the difficulties with various counsel and with legal fees arising from the IRSS, the parties set up a somewhat unique regime for counsel fees for individual claims following settlement approval. It was the subject of objections to which further comment will be directed.

[47] Class Counsel will, after settlement approval, be available to Class Members if they require assistance at no cost. In addition to the Class Counsel legal fees of $55 million in fees and disbursements, a further $7 million will be paid in trust to Class Counsel for post-implementation services for four (4) years following the Implementation Date. These counsel fee provisions are severable from the rest of the Settlement, meaning the Court could approve the rest of Settlement separate from the approval of counsel fees.

[48] No legal fees or disbursements are to be charged to Class Members (Survivors and Family) other than the fees provided to Class Counsel without prior approval of this Court. The provision attracted much opposition from various legal counsel and their supporters.

2019 FC 1075 (CanLII)

(4) Opt-Out Provision

[49] An important right enshrined in this Court's class action rules is the right of any class member to opt out of the Settlement after which they may pursue their own claim independent of the Settlement.

[50] The original opt-out period was amended from 60 days after Court approval of the Settlement to 90 days.

[51] If the number of Survivor Class Members opting out exceeds 10,000, the Settlement is void and the Court's approval order is set aside, unless Canada waives compliance with this provision within 30 days of the opt-out period. The threshold is high but at less than 10% of potential claimants, it is a reasonable threshold.

(5) Legacy Fund

[52] Similar to the situation in the Sixties Scoop settlement approval in *Riddle v Canada*, 2018 FC 641, 296 ACWS (3d) 36 [*Riddle*], Canada will provide a $200 million Legacy Fund to the McLean Day Schools Settlement Corporation (a not for profit corporation) to support (1) commemoration events; (2) wellness/healing projects; and (3) the restoration of Indigenous languages and culture. The directors of the corporation will appoint an Advisory Committee comprised of Indigenous survivors and their families to provide guidance on grant applications and support with legacy projects.

2019 FC 1075 (CanLII)

[53] The Legacy Fund is the vehicle through which Class Members will be able to tell their story and hopefully start some element of long-term healing.

(6) Statements of Support and Objections

[54] As part of the approval process, Class Members were invited to file Statements of Support and Objection Forms. The Court approved the Statement of Support form and Objection Form in its order of March 13, 2019, which approved the notice of certification and settlement approval hearing.

[55] The forms were available in English, French and certain Indigenous languages including Cree, Ojibwe, Dene, Inuktitut and Mi'kmaq.

[56] Approximately 3,360 Statements of Support and 2,485 Objection Forms were received, the bulk of which were postmarked before the deadline set by the Court of May 3, 2019.

[57] Of the 1,247 objection forms received in the 24 hours prior to the deadline, 903 listed their legal representation. Of those listing legal representation, 810 were sent by or listed their legal counsel as Sunchild Law or Kirkby Fourie Coertze Law.

[58] The majority of objectors adopted a variation of 15 concerns set out by Sunchild Law or through a notice which they distributed.

2019 FC 1075 (CanLII)

[59] Of the approximately 2,485 objections, 1,844 objected to the terms of the Settlement and 1,016 objected to the counsel fees.

[60] To understand the nature of these objections, the following is a summary - some of which will be addressed in the Court's discussion of the fairness and reasonableness of the Settlement:

- shortness of period to claim;
- inability to choose counsel;
- absence of emotional support;
- difficulties with document collection;
- absence of money for future care;
- no appeal for Level 1 decision;
- inability to add schools to list;
- absence of confidentiality;
- lack of disclosure by Canada;
- exclusion of Day Scholars;
- lack of procedural fairness;
- lack of Court oversight;
- absence of Common Experience Payment (as in IRSS);
- payments less than IRSS;
- re-traumatization through claims process;
- complexity of written process;
- absence of payment for loss of language and culture;
- predeceased not compensated;

2019 FC 1075 (CanLII)

- potential language issue;
- time frame too narrow for the Class Period;
- same payment regardless of time at schools;
- absence of consultation;
- Legacy Fund money should be paid to claimants; and
- lack of computer resources to apply for compensation.

2019 FC 1075 (CanLII)

[61] Some of the objectors, appearing in person or through counsel, touched on at least some of the above points. In addition to that list were arguments about the Court's jurisdiction, the extent of the Release and issues said to be unique to the Quebec Civil Code.

[62] Few, if any, of the objectors wanted the whole settlement vitiated. They generally wanted the Court to add or subtract provisions or direct the parties to do so. In the rare case of a total rejection of the Settlement, the objector seemed to believe that rejection would simply result in a new agreement with all of the present benefits and none of the burdens (the objected points) as a replacement.

IV. Issues

[63] The issues in the motion to approve the Settlement are:

1. Is the Settlement fair and reasonable and in the best interests of the Class?
2. Should the Class Counsel fees be approved?

This second issue is the subject of a separate set of reasons.

V. Analysis

A. *Legal Framework*

[64] The test for approving a class action settlement is well-established and described in such Federal Court decisions as *Merlo v Canada*, 2017 FC 533 at paras 16-19, 281 ACWS (3d) 702 [*Merlo*], and *Toth v Canada*, 2019 FC 125 at paras 37-39, 302 ACWS (3d) 634 [*Toth*].

[65] It is whether, in all the circumstances, the Settlement is "fair, reasonable and in the best interests of the class as a whole".

[66] The following non-exhaustive factors summarized in *Condon v Canada*, 2018 FC 522 at para 19, 293 ACWS (3d) 697, are to be considered:

a. The likelihood of recovery or likelihood of success;

b. The amount and nature of discovery, evidence or investigation;

c. Terms and conditions of the proposed settlement;

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 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;

2019 FC 1075 (CanLII)

i. The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and

j. The recommendation and experience of counsel.

2019 FC 1075 (CanLII)

[67] These factors are not only non-exhaustive but are to be given varying weight depending on the circumstances.

[68] Recent case law in this Court and in other superior courts (see *Manuge v R*, 2013 FC 341 at paras 5-6, 227 ACWS (3d) 637; *Hunt v Mezentco Solutions Inc*, 2017 ONSC 2140 at paras 162-163, 278 ACWS (3d) 482) have emphasized that the settlement must be looked at as a whole and particularly it is not open to the Court to rewrite the substantive terms of the settlement or assess the interests of individual class members in isolation from the whole class.

[69] This principle addresses many of the points of opposition where the objector wishes the Court to impose an important term or delete a particular provision.

[70] Associated with this admonition against "tinkering" with the settlement is the question of ongoing Court supervision of the Settlement. It is established that the settlement approval process is a "take it or leave it" proposition and there are instances in other courts where settlement agreements have been rejected. On the other hand, there are many instances, including numerous cases in this Court, where the courts have maintained an ongoing supervisory role whether contemplated in the settlement or not.

[71] While there could be a fine line between inappropriately modifying a settlement and requiring further court supervision, *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481, 2006 CarswellOnt 7879 (Sup Ct J), speaks to the ability and desirability of courts to continue and, if necessary, add judicial supervision over the implementation, interpretation and enforcement of a settlement. This is particularly the case, in my view, when dealing with complex, intricate settlements covering vast areas of this country and touching upon a wide diversity of its people - as in the present case.

2019 FC 1075 (CanLII)

[72] The supervisory role of the court and its benefits were reiterated by the Supreme Court of Canada in *JW v Canada (Attorney General)*, 2019 SCC 20, 431 DLR (4th) 579. In the context of the IRSS Agreement, which is in many ways analogous to this Indian Day Schools Settlement, the Court addressed the role of the court in ensuring that claimants receive the benefits they were promised. Justice Coté at paragraph 120 in concurring reasons emphasized that the terms of a Settlement Agreement can shape and limit a court's supervisory authority, but a court cannot approve a settlement that ousts the court's supervisory authority completely.

[73] Therefore the Court will retain jurisdiction and ensure that the Settlement is implemented as contemplated. That ongoing supervision addresses another of the objection topics.

[74] I would add that the parties contemplated this ongoing supervision in paragraphs 7, 18 and 19 of the draft Approval Order attached in Schedule G to the Settlement Agreement.

[75] The Court's supervisory role in implementation can ensure that not only actions planned are taken but that decisions and procedures are consistent with the implementation of the Settlement. This does not mean that the Court can supplant the review processes in the Settlement, but rather it can help fill gaps or remedy a failure to apply the terms of the Settlement as negotiated between the parties.

[76] Consistent with the prohibition against Court modification or alteration of the Settlement is the principle that a class action settlement is not required to be perfect (*Châteauneuf* at para 7). It must fall within a "zone or range of reasonableness" (*Ontario New Home Warranty Program v Chevron Chemical Co,* 46 OR (3d) 130 at para 89, [1999] OJ No 2245 (Sup Ct J)).

[77] Reasonableness does not dictate a single possible outcome so long as the settlement falls within the zone. Not every provision must meet the test of reasonableness - some will, some will not. This result is inherent in the negotiation and compromises of a settlement. As discussed by Justice Shore in *Riddle* at paragraph 33, the settlement must be looked at as a whole and the alternatives of no agreement must also be factored into the analysis:

> …. In cases such as this, "[…] a Court must ask itself whether it is worth risking the unravelling of the agreement and leaving nearly 80,000 Aboriginal people and their families to pursue the remedies available to them prior to the agreement being signed". According to the evidence, it is undeniable that "bringing closure is critical" for the survivors of the Sixties Scoop. Other risks may also be involved in cases such as this, where this type of settlement agreement would not be at the heart of this process:
>
> (a) a national certification order may not be granted;
>
> (b) a fiduciary duty may be found not to be owed, as in Ontario;
>
> (c) liability might not be established;

2019 FC 1075 (CanLII)

> (d) statutory limitation periods could bar many or all of the class' claims;
>
> (e) an aggregate award of damages could be denied by the court forcing class members through lengthy and protracted individual assessment;
>
> (f) proven damages could be similar to or far less than the settlement amounts;
>
> (g) ordering reconciliation, commemorative or healing initiatives, of the nature the Foundation is tasked with, would have been outside the jurisdiction or purview of any court to order.
>
> [Citations omitted].

2019 FC 1075 (CanLII)

B. *Factors*

(1) Likelihood of recovery/success

[78] In a settlement situation, the parties cannot easily put their frank assessment of the merits of their case to the Court - the approval might not be given and the parties would then have to proceed with the action.

[79] However, it is obvious that this is a complex case, that there would be significant evidentiary problems dealing with long past events and many legal issues and defences with which to contend. While there may be some assurance of some success, its nature and breadth is clearly uncertain. It is a case which cries out for settlement.

[80] As in any litigation there are risks, even where clients have difficulty understanding or accepting this - as said earlier, particularly where events are so soul-scarring. One of the risks is

that of limitation periods. Even if the current policy of Canada is to not necessarily enforce limitation periods in litigation involving Indigenous peoples, some ultimate provincial and territorial limitations may be applicable to Survivor and Family Class claims. There is always the risk that a current government policy, over the life of the litigation, may change. Although most limitation statutes now exempt childhood sexual abuse claims from limitation periods, other claims involving non-sexual abuse may be barred depending on the applicable limitations statute.

2019 FC 1075 (CanLII)

[81] If applicable, a six-year limitation period would catch virtually all of the claimants. Even a 30-year ultimate limitation period could operate to bar claims of any Survivor Class member who reached majority before December 1976. Given that most Indian Day Schools were closed or no longer operated by Canada as of that date, the number of Class Members eligible for compensation would be substantially reduced.

[82] On a less technical but more painful note related to limitation periods, there is a substantial risk of delay and re-traumatizing in respect of limitation periods which had not expired or been suspended. Because limitation periods may be personal, it may not be possible to make a common finding on limitations issues (see e.g. *Smith v Inco Ltd,* 2011 ONCA 628 at paras 164-165, 107 OR (3d) 321).

[83] Further and separately, absent a settlement, the prospect of re-traumatization to deal with the merits of the class action seems to be a near certainty.

[84] The Settlement provides certainty on limitation risk and on a class period that starts from 1920 - a result which might never be achieved in litigation.

[85] To the risk of limitation periods must be added the uncertainty surrounding the law of Canada's fiduciary duty to persons similarly situated to class members.

[86] The law is still unsettled regarding whether Canada owes a fiduciary duty to Class Members as part of its fiduciary obligations to Aboriginal peoples. While there is little doubt that there is a fiduciary relationship between the Crown and Aboriginal peoples, the Supreme Court of Canada in *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 81, [2002] 4 SCR 245, circumscribed fiduciary duty holding that the Crown does not owe fiduciary duties "at large but in relation to specific Indian interests". Issues of control over the "interest" or acts in the best interests of the class would loom large in the litigation.

[87] In *Brown v Canada (Attorney General),* 2017 ONSC 251 at paras 70-71, 136 OR (3d) 497 [*Brown*], Justice Belobaba concluded that Canada had no fiduciary duty to protect and preserve the Aboriginal identity of children, in a summary judgment decision on the common issues of a Sixties Scoop case. Comments in cases such as *Brown,* even said in respect of a summary judgment, feed the fire of uncertainty regarding Canada's fiduciary duties.

[88] I note, however, that there are two bases of fiduciary duty within this claim. The first could be the broader fiduciary duty of Canada owed to Aboriginal children to protect and preserve their connections to their communities, culture, and support systems. Advancing this

2019 FC 1075 (CanLII)

duty would have some risk given the finding in the *Brown* summary judgment. The second basis is a more narrow duty that Canada may have owed to students in day schools to protect them from abuse after mandating their attendance in the day schools. In *Blackwater v Plint,* 2005 SCC 58 at paras 59-63, [2005] 3 SCR 3 [*Blackwater*], the Supreme Court of Canada found that this type of fiduciary duty may exist regarding residential school students but accepted that breach of that duty would require proof of dishonesty or intentional disloyalty by Canada. Therefore, establishing either type of fiduciary duty carried with it some risk.

2019 FC 1075 (CanLII)

[89] In terms of a claim of negligence by Canada, although establishing a duty of care might not be that difficult, there would still be risk in establishing that the standard of care at the time had been breached (see *Blackwater* at paras 13-15).

[90] This uncertainty is magnified in the case of Family Class Members as Canada has yet to be found to owe a duty of care to persons like the Family Class. That aspect of the litigation faced issues of foreseeability, proximity and changes in policy not yet settled in law.

[91] Lastly, there would be a significant issue with establishing the required causal link between harm suffered and duty of care. This is particularly the case for Family Class Members.

[92] There is a risk that aggregated damages could not be awarded but would have to be assessed individually. Not only delay and difficulty of proof would be involved, but the requirement to re-live the events could be overwhelming in some cases.

[93] The Settlement reduces the risks, simplifies the compensation process, and allows Family Class Members (who do not receive direct compensation) to at least participate in the healing process through the Legacy Fund.

2019 FC 1075 (CanLII)

[94] While the above discusses risks to the Class Members, Canada is not free from risk - they have just been careful not to flesh these risks out.

[95] Each of the risks faced by the Class Members could also be turned on Canada. Courts could well find in favour of the Class on all or significant portions of the claim. Given the settlement in the IRSS, it is difficult to see how equity - at least in the eyes of the public - would flow to the government.

[96] The risks are real to both sides; the case would be long and complex. Recovery, at least at these levels, is uncertain. The parties faced a real and present risk of failure for their respective sides.

(2) The amount and nature of discovery, evidence and investigation

[97] The type of investigation necessary to take this case to trial appears to require much further work. The parties had turned to settlement discussions early thus avoiding discovery and production of documents requirements. However, the Court was presented with sufficient evidence to make an objective assessment of the fairness of the proposed Settlement.

2019 FC 1075 (CanLII)

[98] The hurdles faced by the Plaintiffs and the work to deal with the individual claims and amass a case were outlined in the evidence of former counsel Joan Jack (on the issue of counsel fees). It was backbreaking, financially ruinous work even at a preliminary stage. Some sense of the magnitude of the work can be garnered from the decision in *Brown*—the Ontario Sixties Scoop case paralleling *Riddle*.

[99] I am satisfied that Gowling, from the time it assumed the mandate for this litigation, have put in reasonable and arguably extensive effort to gather relevant facts, assess liability and damages, and to meet with Class Members and communities to assess what might be on the horizon not only to settle the case but to assess the negative possibilities of trial. Gowling has submitted affidavits from a historian and from an actuary, as well as from the named plaintiffs, Class Counsel, and others, which aid the Court in assessing the appropriateness of the Settlement.

(3) Terms and Conditions of the Settlement

[100] In the context of this case, this is a critical, if not the critical, factor in this assessment. A summary of its critical terms is outlined earlier in these reasons.

[101] The Settlement addresses a historic wrong—fair societies pay for their mistakes at one time or another. The Settlement provides up to $1.4 billion in compensation to be shared by those who attended the over 700 Federal Indian Day Schools and experienced Level 1 harm. An unlimited amount is available to those who suffered greater levels of harm. The Settlement is not limited to compensation for Class Members who are Aboriginal peoples as defined in the

Constitution, but they are the overwhelming beneficiaries of the Settlement (having been overwhelmingly the survivors of Indian Day Schools). The amount does not include legal costs of counsel, which is the subject of a separate payment scheme.

2019 FC 1075 (CanLII)

[102] Not all settlements are good and settlement will not always be better than litigation (see Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018)), but this is a case where settlement generally and this Settlement are vastly preferable to the risky litigation, delays, costs, trauma and uncertainty inherent in this litigation.

[103] The Settlement includes such a feature as the Legacy Fund. There is uncertainty that a court could order such a creation but, no doubt for another day, if Aboriginal issues and litigation are *sui generis*, remedies available might likewise be *sui generis*.

[104] That issue need not be faced here. The Legacy Fund is a substantial benefit which might not otherwise be achievable.

[105] The Court has previously discussed the simple, expedient paper-based compensation process. Criticism of it is unwarranted. In addition, the non-monetary compensation through Legacy Fund projects and its healing and cultural aspect are significant and address one arc of the objections filed and/or heard in this proceeding.

[106] The parties have made reasonable efforts to avoid the negative aspects of the IRSS - it would have been folly to ignore those lessons learned.

[107] Some of the salient features of the Settlement which underpin its "fairness, reasonableness and best interests of the Class" are:

- significant compensation to the broadest class of affected people;
- the simplicity of the process based upon a "Harms Grid" developed through analysis of relevant cases;
- process oversight by an experienced and renowned claims administrator;
- a claims process founded on the assumptions of truth and good faith with a requirement to draw all reasonable favourable inferences for the Class claimants;
- efforts to avoid re-traumatization and avoidance of individual hearings, a benefit recognized in *Riddle* at para 36;
- efforts to reduce the need for and the costs of paying third party lawyers subject always to the Court's jurisdiction to permit such retainers or the ability to opt out entirely;
- expedient and certain compensation for an aging class;
- the previously addressed benefits to the Family Class for reconciliation, healing and education purposes; and
- the tax-free nature of compensation and non-impairment of benefits already received.

(4) Future Expense and Duration of Litigation

[108] It is reasonable to expect that if this litigation did not settle it would be long and involved over an extensive period of time. This is particularly meaningful with an aging class of whom approximately 1,800 pass away each year.

[109] In *Riddle* at paragraph 41 and in the affidavit of the named Plaintiff Margaret Swan, the factor of age and the certainty that justice is attempting to be done are important considerations for the Court.

2019 FC 1075 (CanLII)

[110] If this matter went to individual damages hearings, the Plaintiffs estimate that those hearings would not begin until after 2024. In my view, this is an optimistic assumption that the Defendant will admit all liability, waive all defences and that otherwise the scheduling "stars would align" to facilitate this.

(5) Class Counsel Recommendation

[111] Both counsel recommend the Settlement. While emphasis may be placed on Class Counsel, the Court cannot ignore the Crown counsel who have extensive experience and reputation in this type of litigation and who also unequivocally support the Settlement.

[112] Class Counsel are highly experienced. They have practices in the pertinent areas of this action. They apparently have fostered and have had previous connections with Indigenous communities in Canada.

[113] As was evident throughout this litigation, Class Counsel has been "alert and alive" to the needs of claimants, the risk-reward balance, the lessons learned from other similar cases and the understanding of, and the required commitment to put in place, the necessary infrastructure and personnel to carry out the Settlement.

[114] While the parties did not specifically make arguments regarding the factors of arm's length bargaining, the dynamics of negotiations and the recommendation of neutral parties, there is nothing in the record in this case or in the Court's observations that suggest that this was anything other than an arm's length, good faith negotiation completely devoid of collusion or

2019 FC 1075 (CanLII)