Darrell Tidd et al v. Province of New Brunswick et al, 2023 NBKB 185

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

MC-76-2021

BETWEEN:

DARRELL TIDD, as Litigation Guardian of Devan Tidd, and **REID SMITH, as Litigation Guardian of Aaron Smith**,

Plaintiffs,

-and-

PROVINCE OF NEW BRUNSWICK and **REGIONAL HEALTH AUTHORITY A c/o Vitalité Health Network**,

Defendants

DECISION

Before:	Madam Chief Justice Tracey K. DeWare
Date of Hearing:	September 25, 2023
Date of Decision:	October 26, 2023
At:	Moncton, New Brunswick
Appearances:	**James Sayce**, **Adam Tanel**, and **Sue Tan** for the Plaintiffs **Denis Thériault** and **Véronique Guitard**, for the Defendant, Province of New Brunswick **Talia C. Profit, K.C.**, for the Defendant, Regional Health Authority A, c/o Vitalité Health Network

DeWare, C. J.

INTRODUCTION

[1] This decision responds to two motions filed by the Plaintiffs requesting the approval of a settlement agreement reached between the parties, the approval of the fee arrangements for Class Counsel, and approval of the payment of an honorarium for the two Representative Plaintiffs.

FACTS

[2] On October 1, 2021, a Certification Order was issued certifying a class proceeding on behalf of all persons who were admitted to, or resided at, the Restigouche Hospital Centre ("**RHC**") between January 1, 1954, and the present who were alive as of May 24, 2017. On June 26, 2023, the definition of the class was refined via a Consent Order whereby the class definition was amended to include only the following:

(a) all persons who were admitted to, or resided at, the RHC between May 24, 2004, and October 1, 2021, and who were alive as of May 24, 2017; and,

(b) all persons who were admitted to, or resided at, the RHC between January 1, 1954, and October 1, 2021, and who were alive as of May 24, 2017, and claimed that they were sexually assaulted.

[3] The amended class definition reduced the period of time available for consideration in the class proceedings to between May 24, 2004, and October 1, 2021, and was confined to everyone alive as of May 24, 2017. The reduction in the period to be considered in identifying Class Members, as ordered by the Court, was challenged by a potential Class Member at the hearing of these motions on the grounds that the amended definition results in inequities for some people who allege they have suffered as a result of their admission to the RHC.

[4] On August 4, 2020, I approved a Litigation Funding Agreement between the Representative Plaintiffs and Augusta Pool 1 Canada Limited. The request for funding approval was not opposed by the Defendants. This approval was granted

prior to the hearing and subsequent issuance of the Certification Order. At that time, I accepted submissions from the proposed Representative Plaintiffs' counsel that they would be unable to proceed further with the class proceeding in the absence of available funding. Pursuant to the funding agreement, Augusta Pool 1 Canada Limited was entitled to 7% of the litigation proceeds if the matter resolved prior to certification and 10% of the litigation proceeds if the action was resolved subsequent to certification. In this situation, Augusta Pool 1 Canada Limited are entitled to 10% of the litigation proceeds.

[5] Class Counsel entered into a Retainer Agreement in February 2019. The broad strokes of the Retainer Agreement included the following:

(a) Class Counsel was entitled to any disbursements not already paid by the Defendants as costs, plus applicable taxes, and interest thereon;

(b) an amount equal to a percentage of recovery plus HST where the applicable percentage rate shall be 30% where the action is settled or judgment is granted after a certification order;

(c) if the matter was settled prior to certification, the contingency fee agreement would be 25%; and

(d) if the matter was settled after the commencement of trial, the contingency fee would have been 33%.

[6] On June 14, 2023, the parties reached a proposed settlement agreement. The major components of the settlement agreement include the following:

(a) the establishment of a $17 million settlement fund;

(b) individual compensation amounts for Class Members who suffered physical and/or sexual assault ranging from $10,000 to $85,000 or, alternatively, a common experience payment for Class Members who suffered harm while at RHC ranging from $1,000 to $5,000 depending on a claimant's length of stay;

(c) a confirmation by the Province of New Brunswick that the receipt of compensation pursuant to the settlement will not impact the claimant's eligibility for Social Assistance or other benefits paid by New Brunswick; and

(d) a paper-based claims process that is simple, non-adversarial, user-friendly, and includes a presumption that claimants are acting honestly and in good faith.

[7] The $17 million settlement fund is designed to pay for the following items:

(a) compensation to Class Members;

(b) the costs associated with administration of notice and the claims process;

(c) an honorarium of $25,000 payable to each of the Representative Plaintiffs; and

(d) Class Counsel's fees and disbursements, as well as the Litigation Funder's Levy.

[8] The parties engaged in mediation over the course of three days in March 2023. The parties were assisted throughout the process by retired Ontario Superior Court Justice, the Honourable Todd Archibald. On March 31, 2023, the parties reached a settlement in principle and continued to fine-tune and negotiate contentious points up until June 28, 2023. As a result of this exhaustive process the terms set out in the previous two paragraphs were agreed upon and a detailed compensation system was designed in order to address the varied needs of the members of this class. The parties arrived at the terms for the proposed settlement agreement keeping in mind the complexity of the action and the potential risks to all, in particular Class Members.

[9] The terms of the settlement envision two classes of claimants. Section A claims would be based upon an individual's common experience at the RHC. Section B claims are individual damage assessments directly related to the nature of harm

experienced by the class member. The scale and manner of payment of Section A and Section B claims have been set out in the settlement agreement as follows:

SECTION A CLAIMS* - COMMON EXPERIENCE PAYMENT	
*Based on Claimant's cumulative length of stay at the RHC	
30 days or less	$1,000
31 days up to 100 days	$3,000
101 days or more	$5,000

SECTION B CLAIMS	
Sexual Abuse	
Level 1 Sexual Assault • A single incident of non-consensual sexual touching of a Claimant by staff, or other non-consensual sexual behaviour by staff towards a Claimant that is not a Serious Sexual Assault	$15,000
Level 2 Sexual Assault • More than one incident of non-consensual sexual touching of a Claimant by staff/ other patient or other non-consensual sexual behaviour that is not a Serious Sexual Assault.	$20,000
Level 3 Sexual Assault • One or two incidents of Serious Sexual Assault	$35,000
Level 4 Sexual Assault (i) More than two incidents of Serious Sexual Assault; or (ii) Level 3 Sexual Assault resulting in a Major Psychological Injury. Requires medical evidence in addition to the affirmation to support allegation that a Serious Sexual Assault resulted in Major Psychological Injury.	$60,000 plus Medical Evidence Fees of up to a maximum of $1,000 per Claimant
Physical Abuse	
Level 1 Physical Harm • One or more physical assaults not causing a Serious Physical Injury, but resulting in an observable injury such as a black eye, bruise or laceration; or • Use of any one of the following form of restraints: • Use of physical or mechanical restraint for:	$10,0000

• 12 consecutive hours or more up to 24 hours, on two occasions within a 30-day period; or • 24 consecutive hours or more; • Use of chemical restraints (i.e., by administration of psychotropic medication not prescribed as part of patients' ongoing care plan) on two occasions within a 30-day period; or • Placement in a seclusion room for 36 consecutive hours on one occasion within a 30-day period. This excludes placement in seclusion for up to 48 hours upon admission.	
<u>Level 2 Physical Harm</u> • One or more physical assaults causing a Serious Physical Injury; or • Use of the following form of restraints: • Use of physical or mechanical restraint for 24 consecutive hours or more, on two or more occasions within a 30-day period; • Use of chemical restraints (i.e., by administration of psychotropic medication not prescribed as part of patients' ongoing care plan) on more than two occasions within a 30-day period; or • Placement in seclusion rooms for 36 consecutive hours or more, one more than one occasion within a 30-day period. This excludes placement in seclusion for up to 48 hours upon admission.	$25,000

ISSUES

[10] The issues for the Court to resolve in this matter are as follows:

(a) is the proposed settlement fair, reasonable and in the best interests of the class as a whole;

(b) are the proposed fee and disbursements requested reasonable and should they be approved by the Court; and

(c) is it appropriate to award a $25,000 honorarium to the Representative Plaintiffs in this matter?

LAW AND ANALYSIS

Approval of Settlement Agreement

[11] Approval of a settlement of a class action is governed by Section 37 of the ***Class Proceedings Act***, RSNB 2011, c 125 which states as follows:

> **Settlement, discontinuance and dismissal**
>
> 37(1) A class proceeding may be settled or discontinued only
>
> (a) with the approval of the court, and
>
> (b) on the terms or conditions the court considers appropriate.
>
> 37(2) A settlement in relation to the common issues affecting a subclass may be concluded only
>
> (a) with the approval of the court, and
>
> (b) on the terms or conditions the court considers appropriate.
>
> 37(3) A settlement under this section is not binding unless approved by the court.
>
> 37(4) If a proceeding has been certified as a class proceeding, a settlement of the class proceeding or of common issues affecting a subclass that is approved by the court binds every class or subclass member who has not opted out of the class proceeding, but only to the extent provided by the court.
>
> 37(5) In dismissing a class proceeding or in approving a settlement or discontinuance, the court shall consider whether notice should be given and whether the notice should include
>
> (a) an account of the conduct of the class proceeding,
>
> (b) a statement of the result of the class proceeding, and
>
> (c) a description of any plan for distributing any settlement funds.
>
> 37(6) Subsections 21(3) to (5) apply with the necessary modifications to a notice referred to in subsection (5).

[12] In their pre-hearing submissions, Class Counsel succinctly set out the principles a court must consider in the approval of a settlement in class proceedings. In particular, Class Counsel set out the necessary facts for consideration at paragraphs 42 and 43 of their brief as follows:

42. This Court has adopted the following principles to be applied on a motion for settlement approval:

(a) To approve the settlement, the court must find that it is fair, reasonable, and in the best interests of the class;

(b) The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

(c) There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;

(d) To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

(e) It is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or, on the other hand, to simply rubber-stamp a proposal; and

(f) The burden of satisfying the court that a settlement should be approved is on the party seeking approval.

43. Courts throughout Canada, including this Court, have considered a number of factors in evaluating proposed settlements in class proceedings. These factors include:

(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) recommendation and experience of counsel;

(e) future expense and likely duration of litigation; the number of objectors and nature of objections;

(f) recommendations of neutral parties, if any;

(g) the presence of arm's length bargaining and the absence of collusion;

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

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

(j) the risk of not unconditionally approving/ the settlement.

[13] Class Counsel received six objections following their public announcement of a potential settlement. One of the individuals who filed an objection appeared and addressed the Court, Denis Frenette. Mr. Frenette courageously explained to the Court in both his oral and written submissions the significant hurdles he has faced in attempting to seek recourse for abuse he maintains he suffered while a patient at the RHC in late 1992 and early 1993. Mr. Frenette's account of his experiences at the RHC is difficult to read. Mr. Frenette filed a complaint outlining his mistreatment while at the RHC in September 1993. Mr. Frenette requested copies of his medical charts and reported the allegations of abuse to the RCMP in Campbellton in December 1993. Mr. Frenette brought his concerns to the Canadian Mental Health Association of New Brunswick, the Ombudsman's Office, the Human Rights Commission, and the New Brunswick Court of Queen's Bench, Family Division. Mr. Frenette was unable to obtain assistance from anyone in pursuing a complaint against the RHC as a result of the abuse he suffered during his admission as a patient.

[14] It is understandably difficult for someone like Mr. Frenette, who tried for so long to have his experience as a patient at the RHC acknowledged and addressed, to be denied participation in this settlement because he was not a patient during the pertinent class period. The Court understands Mr. Frenette's position and sympathises with his frustrations. The Court encourages Mr. Frenette to work with Class Counsel as the nature of the incidents he has described may provide an opportunity to participate in the class despite the dates of his admission.

[15] While Mr. Frenette is the only person who has formally presented his objections to the Court, there are likely many former patients of the RHC who will feel similar sentiments of frustration when their participation in the settlement is potentially precluded as a result of the amended class definition. However, class proceedings

are, by their nature, imperfect. They are designed to assist as many individuals as possible in as broad a fashion as possible while fully recognizing that to be manageable for the greater good, there must be clearly defined parameters which, unfortunately, results in some individuals being left out. The question this Court needs to resolve is if, despite the fact that some individuals will be left out by virtue of the class definition, this proposed settlement is the best possible outcome for the majority of the Class Members.

[16] There are many factors which allow me to conclude that this settlement is in the best interest of potential Class Members. The paper-based claims process will render participation in the settlement available for Class Members who might otherwise encounter hurdles in participating in the settlement process. Section A claimants will only need to establish that they were a patient at the RHC and the duration of their stay. This information will be available via the Defendants' records which should further facilitate participation in the settlement for Class Members. Class Members who will present Section B claims will be required to provide more detailed information by way of a declaration or an affidavit in order to set out their experience at the RHC. However, Class Counsel will be available to assist them with this process. In my view, both the procedures set out for Class Members to advance either Section A or Section B claims have been rendered as "user-friendly" as possible to support Class Members' participation in the settlement.

[17] In ***Gallant v. The Roman Catholic Episcopal Corporation of Halifax***, 2022 NSSC 347 (CanLII), Justice Brothers had the opportunity to canvass the law which has developed around the court's supervisory role in the approval of a settlement in a class proceeding. Justice Brothers noted at paragraphs 10 to 14 as follows:

> [10] **Settlements must fall within a "zone of reasonableness", and "reasonableness allows for a range of possible resolutions"** (***Anderson et al. v. Canada (Attorney General)***, 2015 NLTD(G) 167, at para. 81). Settlements do not need to be perfect to be approved. As stated in ***Ainslie v. Afexa Life Science Inc.***, 2010 ONSC 4294:
>
> > [31] The "zone of reasonableness" concept is helpful in guiding the exercise of the court's supervisory jurisdiction over the approval of a settlement of class actions. It is not the court's responsibility to

> determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented – as they clearly are in this case – by highly reputable counsel with expertise in class action securities 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.

[11] Here, it is clear that the case was negotiated at arm's length by experienced counsel (Rosenfeld Affidavit, October 28, 2022). In such cases, there is a strong initial presumption that the settlement reached is a fair one.

[12] In ***Manuge v. Canada***, 2013 FC 341, the court stated as follows:

> [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.

[13] This settlement occurred many years into the litigation, when the only remaining step was a common issues trial. At this stage, the knowledge base of counsel is very high. As stated in ***Klegg v. HMQ Ontario***, 2016 ONSC 2662, at para. 34:

> Their [the parties'] knowledge base going into the mediation was as high as it ever would be, short of completing the trial and reading the reasons of the trial judge. In short, the mediation that led to this settlement was based on layers and layers of actual, and not just imagined, information about the risks and rewards of further litigation.

[14] In addition, this settlement approval motion concerns events that occurred several decades in the past. Any additional protracted delay is of concern to the court. The statements in ***Seed v. Ontario***, 2017 ONSC 3534, are particularly apt:

> [13] Furthermore, and of some moment, I was more than modestly concerned that if this matter were not resolved currently, but, continued or was dragged out by the normal effluxion of hearing time and appeals, many of the class members, particularly those who passed through the defendant institution in the 50's and 60's, would not either participate in any resolution or would not live long

enough to realize some finality to this chapter of their respective lives.

[emphasis mine]

[18] In determining that the settlement was fair and reasonable, Justice Brothers explained her conclusion in ***Gallant*** at paragraphs 33 to 35 as follows:

> [33] To summarize, the claims process is certainly in the best interest of the class. The following aspects of the claim process are of significant value to the class:
>
> (a) the claims process is trauma-informed and explicitly intended to be restorative;
>
> (b) no class member is required to testify publicly;
>
> (c) any class member may request and obtain an apology from the Archbishop;
>
> (d) the claims process will be confidential;
>
> (e) class members are presumed to be acting honestly and in good faith;
>
> (f) class members have options and choices within the compensation scheme with respect to burdens of proof, degrees of process and available quantum of damages;
>
> (g) the claims process is intended to be completed within one (1) year's time;
>
> (h) all class members may avail themselves of legal assistance by contacting class counsel to assist with completing claims or obtaining the requisite documentation, at no charge; and
>
> (i) the claim form will be provided in an accessible format.
>
> [34] Given all of this, I conclude that the settlement reached is both fair and reasonable and is also in the best interest of the class.
>
> [35] **This action sought vindication for an extremely vulnerable class. The settlement provides compensation and a measure of closure to survivors who have lived with the consequences and burden of the abuse for decades. While no negotiated settlement is ever perfect, achieving everything that each party desires, this settlement is a fair, reasonable and a timely resolution of the decades-long pursuit of justice by the class members.**
>
> **[emphasis mine]**

[19] Associate Chief Justice McGrath considered a request for the approval of a settlement agreement in ***Jane Doe (#7) v. Newfoundland and Labrador***, 2022 NLSC 133 (CanLII). ACJ McGrath discussed the necessary analysis a court must undertake in the consideration of such a request at paragraphs 42 to 45 as follows:

> [42] In deciding whether to approve a class action settlement, the judge is acting somewhat outside the traditional judicial role of determining disputes in an adversarial context. While the judge must consider all the circumstances to determine whether the settlement is fair, reasonable and made in good faith, in most cases, the judge is acting on an incomplete set of facts. The judge is also expected to make informed assumptions and rely on counsel who are far better versed in the issues.
>
> [43] While the judge should place reliance on experienced counsel, the judge must also not lose sight of the rights of unrepresented parties who are not before the court. **These potential class members should expect that the court will scrutinize the proposed settlement with their rights in mind. That being said, the judge is not to enter into the fray and attempt to renegotiate the settlement.**
>
> [44] In ***Doucette v. Eastern Regional Integrated Health Authority***, 2010 NLTD 29, Thompson J. explained that the assessment of a settlement must begin by recognizing that it represents a compromise:
>
> > **Settlements are a product of compromise and are not held to a standard of perfection.** As Schulman J. held in Semple, a proposed settlement need only fall within ' a zone of reasonableness' to be approved. Similarly, Chief Justice Brenner of the B.C. Supreme Court in ***Sawatzky v. Societe Chirugicale Instrumentarium Inc.*** wrote:
> >
> > > All settlements are the product of compromise and a process of give and take and settlement rarely gives all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation.
>
> [45] In ***Anderson v. Canada (Attorney General)***, 2016 NLTD(G) 179, at paragraph 38, Stack J. noted that the Court can only approve or reject the settlement. It cannot modify the terms that the parties negotiated: **"[g]iven that a settlement may be less than perfect, better becomes the enemy of good"**. Stack J. further noted at paragraph 40 that, insofar as the settlement must fall within a zone of reasonableness, "[r]easonableness allows for a range of possible resolutions. It is an objective standard that allows for variation depending upon the subject

matter of the litigation and the nature of the damages for which the settlement is to provide compensation".

[emphasis mine]

[20] In the present matter, there remained significant legal issues to be resolved. The viability of the ***Charter*** claims was very much a live issue. The Applicability of limitation periods for abuse of a non-sexual nature was open for debate. The nature of the mental health challenges experienced by some Class Members would present barriers to their participation in a trial and could also prevent them from seeking compensation if the required documentation was overly complicated. These are some of the obvious hurdles which needed to be overcome by Class Members. There are also several other unique factors in this case which the parties and the Court would have had to grapple with such as the applicable standards of care and availability of key witnesses.

[21] The following considerations lead me to conclude that the proposed settlement is fair and reasonable:

(a) the negotiated settlement fund of $17,000,000 represents the largest class action settlement in New Brunswick to date;

(b) there were risks in proceeding to a common issues trial given the novel nature of some of the claims advanced and potential viability of limitation period defenses;

(c) individual damage assessments could take a very long time to complete and present a cumbersome burden for members of this class who have in the past and may continue to struggle with mental health challenges;

(d) the proposed paper-based framework is user friendly and recognizes the importance of accommodating and assisting Class Members as they come forward to present a claim;

(e) individuals who may have claims as a result of non-sexual abuse prior to May 2004 are excluded from participation as a Class Member, but their

potential claims are not released by this settlement, and they may pursue their own action should they choose to do so; and

(f) this settlement provides timely payment for Class Members who would otherwise would wait for many years as this litigation worked its way through the courts.

Approval of Class Counsel's fees

[22] This difficult case has been in the hands of experienced and competent counsel representing all parties. Class Counsel requests approval of their fee which is a 27.5% contingency fee. Class Counsel suggests there are four issues the Court must consider in determining whether or not the proposed fee is fair and reasonable. These issues are as follows:

(a) the risk taken by counsel at the outset of the class proceeding;

(b) the results achieved for the class;

(c) the contingency percentage found in the retainer agreement; and

(d) the amount of time and work expended by Class Counsel.

[23] Class Counsel suggest that there was significant risk in taking on this mandate. Class Counsel maintain that while they were firmly committed to prosecuting this action all the way to trial, they were cognizant of the very real risks involved given the novel nature of the class action and the inherent challenges faced when pursuing a claim for historical abuse. Class Counsel further recognized the challenge presented by the unique and varied situations of all the various members of the class and the impact this could have both in determining common and subsequently individual issues. Finally, the fact that this action was against a medical hospital which continues to operate presented unique hurdles to overcome. Class Counsel further points out that this action sought damages for breaches of section 15 of the **Charter**. The allegation of medical negligence and mental health discrimination in a class proceeding has yet to be tried. The

uncertainty of the outcome for this particular claim also must be considered in the overall assessment of risk in embarking upon this venture.

[24] Class Counsel has voluntarily reduced their contingency fee percentage from the 30% allowable pursuant to the executed retainer agreement, to 27.5% of the settlement. This 2.5% reduction results in a savings to the Class Members of $467,500.

[25] Class Counsel has provided a chart setting out all the time invested in the handling of this matter, from its beginning in 2019 up until September 2023. The chart below provides a breakdown of the time spent in the prosecution of the matter thus far:

CATEGORY	BILL VALUE	BILL HOURS
1 – Claims Investigation and Pleadings	$ 108,122.50	358.1
2 – Funding-Related Matters (Excl. Funding Motion)	$ 50,368.00	118.1
3 – Certification Motion – Preparation and Review of Cert Motion Records	$ 131,627.00	284
4 – Preparation of Certification Factum	$ 83,860.50	165.6
5 – Experts	$ 3,814.00	6.7
6 – Prep/Attendance at Certification Motion	$ 58,816.00	98
7 – Notice to Class	$ 28,737.00	49.8
8 – Case Management Conference	$ 40,795.00	76.9
9 – Other Motions (Funding Motion, Phase I Notice Motion)	$ 109,515.50	188.2
10 – Settlement Discussions	$ 97,032.50	141
11 – Communication with Class Members	$ 147,009.00	400.1
12 – Mediation	$ 182,280.00	294.5
13 – Appeals	$ 45,845.50	88.2
14 – Settlement Approval	$ 106,237.00	179.4
15 – Discovery	$ 5,602.50	13.5
	$	
TOTAL	$ 1,199,662.00	2462.1

[26] Class Counsel will continue to work on this matter through the implementation of the settlement and provide assistance to Class Members in obtaining appropriate recovery. Class Counsel estimates they will expend an additional $1,200,000 to $1,500,000 in time in order to conclude this work.

[27] The necessary sections to consider from the ***Class Proceedings Act*** are 40(2) and 40(5)(a):

> 40(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the motion of the solicitor.
>
> [...]
>
> 40(5) If an agreement is not approved by the court, the court may
>
> (a) determine the amount owing to the solicitor in respect of fees and disbursements,

[28] In determining whether or not the proposed fee agreement is fair and reasonable, the Court must take into account the following factors:

(a) the legal and factual complexities of the action;

(b) the risks undertaken, on both the merits and prospects of certification;

(c) degree of responsibility assumed by Class Counsel;

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

(e) the importance of the issues to the Class Members;

(f) the skill and competence demonstrated by Class Counsel through the action;

(g) the results achieved;

(h) the ability of the class to pay in the class's expectation of legal fees; and

(i) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation.

[29] I accept without difficulty that the legal and factual issues in this case rendered its prosecution difficult. There are many unknown factors that would only have been determined following a trial and many landmines which could easily have thwarted the Class Members' efforts in the presentation of this action. While the action had been certified with very few modifications, there did remain significant evidentiary hurdles as well as legal challenges to overcome given the unique characteristics of the Class Members, the potential for limitation of actions defenses, and the novel character of some of the claims advanced. Class Counsel in this matter took on the case initially without the backing of a third-party litigation funder. Further, had this matter proceeded to trial, given the scope of the issues and the expansive nature of the class, the total time potentially taken to manage the trial, without taking into consideration appeals, would have likely exhausted any available payment under the negotiated retainer agreement.

[30] Class Counsel suggests that they have put forth a very reasonable compromise in their agreement to accept a contingency fee of 27.5% given jurisprudence in similar cases where Courts have approved fee agreements based upon a 33% contingency fee. In particular, Class Counsel refers the Court to ***Baker (Estate) v. Sony BMG Music (Canada) Inc.,*** 2011 ONSC 7105 (CanLII) at paragraph 63:

> [63] **First, a contingent fee retainer in the range of 20% to 30% is very common in class proceedings, as it has been in other kinds of litigation in this province for some years.** As Class Counsel has pointed out, there have been a number of instances in recent years in which this Court has approved fees that fall within that range. These include:
>
> - ***Abdulrahim v. Air France***, [2011] O.J. No. 326: 30%
> - ***Ainslie v. Afexa Life Sciences Inc.***, 2010 ONSC 4294 (CanLII), [2010] O.J. No. 3302: 19.4%
> - ***Robertson v. ProQuest LLC***, [2011] O.J. No. 2013 24%
> - ***Osmun v. Cadbury Adams Canada Inc.***, [2010] O.J. No. 2093: 25%

- ***Pichette v. Toronto Hydro***, [2010] O.J. No. 3185: 28.5%
- ***Robertson v. Thompson Canada Ltd.***, [2009] O.J. No. 2650: 36%
- ***Cassano v. Toronto-Dominion Bank (2009)***, 98 O.R. (3d) 542: 20%
- ***Martin v. Barrett***, [2009] O.J. No. 2015: 29%

[emphasis mine]

[31] Class Counsel refers the Court to ***Cannon v. Funds for Canada Foundation***, 2013 ONSC 7686 (CanLII), at paragraph 3:

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

[32] The fee requested for approval in this case is $4,675,000. It can be comfortably assumed that the actual time expended by Class Counsel in prosecuting the action given the time already expended as well as the time necessary to implement the settlement and facilitate recovery for the Class Members will be in the vicinity of $2.5 million. Therefore, the multiplier in terms of Class Counsel's billed time will be in the vicinity of 1.922.1. Class Counsel suggests that this is not unreasonable and well within the range of multipliers previously approved by Courts in actions of this nature. Class Counsel has referred the Court to decisions where multipliers were accepted in excess of 2.5 (***Osmun v. Cadbury Adams Canada Inc.***, 2010 ONSC 2752, ***Kaplan v. PayPal CA Limited***, 2021 ONSC 1981).

[33] I accept the suggestion by Class Counsel that the vast majority of Class Members would have never been in a position to proceed with claims in the absence of this class proceeding. There is no question this is a highly vulnerable group of individuals who are challenged both from a mental health perspective but as well, very frequently, with the economic barriers which often accompany disabilities of this nature. The Class Proceeding was necessary to obtain recourse for these Class Members and was effectively and efficiently managed by Class Counsel. In

all the circumstances I have no difficulty determining the approval of a fee of $4,675,000 as fair and reasonable.

Honorarium

[34] Class Counsel request that an honorarium be approved of $25,000 for each of the Representative Plaintiffs. The Defendants take no position with respect to this request. Class Counsel suggest that these Representative Plaintiffs were particularly courageous in that they were willing to put themselves forward as Representative Plaintiffs while they continued to be patients of the RHC. Class Counsel highlights the amount of time and dedication that the Representative Plaintiffs and, significantly, their two litigation guardians have put into the prosecution of this matter.

[35] In ***Dolmage v. HMQ***, 2013 ONSC 6686 (CanLII), Justice Conway approved the payment of an honorarium to representative plaintiffs. In explaining the decision to grant the honorarium Justice Conway commented at paragraphs 46 to 51 as follows:

> [46] Class counsel sought approval of honorarium payments of $25,000 for each of the representative plaintiffs, to recognize **"the significance and difficulty for Ms. Seth and Ms. Slark who have suffered abuse, to come forward on behalf of all other residents, to tell their stories and to confront a painful past"**.
>
> [47] Ms. Seth and Ms. Slark addressed the court at the settlement approval hearing. They made it clear that they had not asked for the honorarium, that they did not want to take anything away from class members and that they would not accept any payment unless there is money left over after the claims of class members have been satisfied.
>
> [48] On a settlement approval motion, the court has jurisdiction to award honorarium payments to the representative plaintiffs out of the settlement fund.[19] **However, honorarium payments are infrequently made. They are reserved to those cases where, considering all of the circumstances, the contribution of the plaintiff has been exceptional.**[20]
>
> [49] In the case of Ms. Seth and Ms. Slark, their efforts in advancing this litigation, bringing this case to court, publicizing the story of Huronia and speaking in court at the settlement approval hearing have been exceptional indeed.[21] They have gone well beyond what could ever be expected of representative plaintiffs, in a particularly difficult case.

> [50] In particular, Ms. Seth and Ms. Slark have participated in and provided innumerable interviews to raise awareness of this class proceeding. The honorarium to Ms. Seth and Ms. Slark is, in the words of Perell J.,[22] "not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice".
>
> [51] I provided in the Settlement Approval Order that each of Ms. Seth and Ms. Slark are to receive the sum of $15,000 as an honorarium, to come from the Settlement Fund remaining after all claims of class members have been paid.
>
> **[emphasis mine]**

[36] While I note that Justice Conway did reduce the honorarium from $25,000 to $15,000 in his 2013 decision, I am satisfied that a $25,000 honorarium is appropriate in these circumstances. The Representative Plaintiffs and their families have stood at the forefront of this litigation for over four years and allowed the action to proceed through their voices and their difficult experiences. This was a generous act on their part which was rendered all the more poignant given the fact, at some periods during this process, they have remained patients at the RHC.

CONCLUSION AND DISPOSITION

[37] There are three main objectives behind the development of class action proceedings legislation in Canada. Class proceedings are designed to provide access to justice for litigants who would otherwise be unlikely to proceed with a claim, to promote judicial economy and encourage the efficient use judicial resources, and finally to encourage behaviour modification. In my view, all three objectives of a class proceeding have been met in this case. There is no doubt that individual Class Members, for all the reasons previously discussed, would have found the task of presenting an individual claim insurmountable. The judicial resources expended in this matter to date have been nominal in comparison to the results obtained by the parties. The Defendants' balanced and reasonable approach to the negotiation of this settlement is an obvious indicator of behaviour modification. The Defendants have put their best foot forward in establishing a settlement regime that recognizes the integrity and right to fair treatment of the Class Members. It is the hope of everyone that this approach of collaboration and

respect will continue long after the Class Members have resolved their claims and will be of benefit to all the individuals who may require the assistance of the RHC now and in the future.

[38] For all of the aforementioned reasons, it is therefore ordered as follows:

(a) The settlement agreement agreed upon between the parties on June 14, 2023, as amended on June 28, 2023, is approved pursuant to section 37 of the ***Class Proceedings Act***, RSNB 2011, c 125;

(b) The Court accepts and confirms that the settlement agreement reached between the parties is fair, reasonable and in the best interest of the members of the class;

(c) The Court confirms that the settlement agreement is binding on the Plaintiffs, all Class Members and the Defendants;

(d) The Court approves the form, content, and manner of distribution of the proposed Notice of Settlement Approval;

(e) The Court orders the appointment of Reva Devins as the Claims Supervisor pursuant to the Settlement Agreement;

(f) The Court approves and orders the payment of Class Counsel's fees in the amount of $4,643,000 plus $603,590 in HST/GST and the reimbursement of $15,487.72 in disbursements;

(g) The Court approves and orders the payment of $1,700,000, representing the 10% levy on the Settlement Agreement Fund and $238,272.37 in reimbursement of the Deployed Funds to the litigation funder, Augusta Pool 1 Canada Limited; and

(h) The Court approves and orders the payment of an honorarium in the amount of $25,000 payable to each of the Representative Plaintiffs, Arron

Smith as represented by his litigation guardian, Reid Smith, and Devan Tidd, as represented by his litigation guardian, Darrell Tidd.

DATED this 26th day of October 2023.

Tracey K. DeWare
Chief Justice of the Court of King's Bench of New Brunswick
New Brunswick, Trial Division