CITATION: Robertson v. ProQuest Information and Learning LLC, 2011 ONSC 2629
COURT FILE NO.: 03-CV-252945CP
DATE: 20110502

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	
HEATHER ROBERTSON Plaintiff	*Kirk Baert* and *Celeste Poltak*, for the Plaintiffs
– and –	
PROQUEST INFORMATION AND LEARNING LLC, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC. Defendants	*Donald A. Cameron* and *Christina Capone-Settimi*, for the Defendant, ProQuest Information and Learning LLC *Wendy Matheson* and *Andrew Bernstein*, for the Defendant, Rogers Publishing Limited *Ernest M. Chan*, for the Defendant, Cedrom-SNI Inc. *Ryder Gilliland*, for the Defendant Toronto Star Newspapers Ltd
	HEARD: April 11, 2011

C. HORKINS J.

[1] This is a motion for approval of the settlement of this class action and class counsel fees pursuant to s. 29 of the *Class Proceedings Act*, 1992, S.O. 1992, c. C.6 ("*CPA*"). Notice of this approval hearing has been given to the class and no objections have been delivered.

BACKGROUND

[2] This action was commenced on July 25, 2003, and certified on October 21, 2008. The statement of claim alleges that the defendants breached class members' rights to their articles and literary works under the *Copyright Act*, R.S.C. 1985, c. C-42. The claim alleges that class members had granted print publishers the limited one-time right to reproduce their works in only

print editions of newspapers or magazines. By the defendants' reproduction, distribution and communication of these works to the public in electronic media, such as online databases, without the permission of authors or the copyright holders, the plaintiff claimed the defendants had infringed the class members' copyrights.

[3] The plaintiff, Heather Robertson, is a well-known and prolific Canadian freelance writer. Ms. Robertson has published more than 15 fiction and non-fiction books and has been contributing to Canadian magazines and newspapers for over 40 years. Ms. Robertson is also a founding member and past president of the Professional Writers' Association of Canada ("PWAC").

[4] The plaintiff brought a similar class action against Thomson Canada Ltd. The court approved a settlement in that action in 2009: *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (S.C.J.).

[5] Each of the defendants vigorously defended this action. They have asserted a number of different statutory and common law defences including, their own statutory copyrights in newspapers and magazines as collective works, an implied licence to make freelance works available in electronic databases, consent of the authors, acquiescence, limitation periods, laches and fair dealing.

[6] After the plaintiff delivered her certification motion materials and after certification had been granted in the *Thomson* action, the defendants consented to certification of this action on October 21, 2008. However, as a result of a plethora of third and fourth party claims (some 204 in total), which were commenced following certification, the original certified class definition was subsequently amended twice, on September 15, 2009 and July 19, 2010.

[7] The numerous third and fourth party claims created complexity and delay, and had the potential to undermine the progress of the plaintiff's entire action, including its very manageability as a class proceeding. Eventually, the problems that the third and fourth party actions created were resolved. On July 19, 2010, Justice Cullity ordered that the class definition would be amended so that it would be limited only to the creators or assignees of literary works published in print by Toronto Star, Rogers, Canwest, or their predecessors in interest.

[8] A two-day mediation was held in May 2010. While a settlement was not reached at the mediation, negotiations followed and a settlement was reached with Toronto Star, Rogers and CEDROM in December 2010. A settlement agreement with ProQuest followed in January 2011.

[9] The insolvency of the defendant Canwest Publishing Inc. ("Canwest") created a unique challenge for the plaintiff and her counsel in their efforts to settle this action.

THE CANWEST INSOLVENCY

[10] As a result of Canwest's insolvency, it sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*"). Justice Pepall granted an initial order pursuant to the provisions of the *CCAA* in favour of Canwest. As a result of this order, actions against Canwest, including this class action, were stayed.

[11] Ms. Robertson filed a claim in the *CCAA* proceedings covering all claims advanced against Canwest in this class action. In June 2010, Ms. Robertson's claim was settled. The Canwest settlement valued the class members' claims against Canwest at $7.5 million in the insolvency. The class members received shares arising out of the insolvency. In return, the settlement provided a licence for class members' Canwest works and a release of all claims relating to Canwest content, except for claims against ProQuest which would continue.

[12] On June 16, 2010, Justice Pepall approved the settlement with Canwest, finding that the settlement represented "a reasonable, pragmatic and realistic compromise of the class claims" and was in the best interests of the class (*Robertson v. ProQuest Information and Learning Co.* [2011] O.J. No. 1160). The settlement provided a "possible avenue for recovery" from Canwest in the insolvency, while at the same time preserving the claims of the class against the other defendants, as well as the claims against ProQuest for alleged violations relating to Canwest content.

[13] As a result of Canwest's insolvency and this settlement, Ms. Robertson was ultimately issued 166,451 Class C Voting Shares of Postmedia Network Canada Corp. (the successor to Canwest).

[14] Ms. Robertson then retained RSM Richter, a financial services firm, to assist in the valuation of these shares and to maximize recovery for class members through the sale of the shares. RSM Richter solicited interest in the shares and contacted more than 28 potential buyers. RSM Richter estimated (as of March 16, 2011) that the value of the Postmedia shares was in the range of approximately $12 to $15.50 per share.

[15] On April 19, 2011, on the recommendation of RSM Richter, Ms. Robertson accepted an offer of $14.40 per share ($2,396,894.40).

THE SETTLEMENT

[16] Under the terms of the settlement agreements, Toronto Star, Rogers and CEDROM have agreed to pay $3.475 million and ProQuest has agreed to pay $2 million. In addition, there will be the proceeds from the sale of the Postmedia shares ($2,396,894.40) for a total of $7,871,894.40 million.

[17] This amount will be available for distribution to the class after deducting the costs of administering the compensation program (including notice to the class), class counsel fees, disbursements and taxes, reimbursement to the Law Foundation of Ontario for paid disbursements and the 10% levy owing to the Law Foundation of Ontario

[18] William Dovey of Duff & Phelps will administer this settlement. Mr. Dovey was the claims administrator for the *Thomson* settlement. With the benefit of his experience, an improved claims process has been designed to administer the settlement in this action. The administrator will charge a flat fee of $175,000 plus reasonable disbursements and taxes.

[19] The relative contribution of each defendant's contribution to settlement is fair. Amongst Toronto Star, Rogers and Canwest publications, the Canwest publications were accessed from

ProQuest's databases 2.16 times more often than the Toronto Star and Rogers publications (i.e. of the three publishers, Canwest works represented 68% of those accessed, Rogers works represented 15%, and Toronto Star works represented 17%). Accordingly, at a trial, the plaintiff would have expected a smaller recovery for Toronto Star and Rogers works than for Canwest works in any event. In that context, the settlement of $3.475 million for Toronto Star and Rogers works is fair and reasonable.

[20] Given the risk created by Canwest's insolvency, the settlement amount for Canwest works is fair and reasonable. Canwest was the main defendant with respect to Canwest works. After Canwest sought creditor protection, full recovery from it became unrealistic. The Canwest settlement and subsequent sale of the shares, made the best of this difficult situation.

[21] After the Canwest settlement, ProQuest became the only defendant from whom the plaintiff could recover for Canwest works. ProQuest's position in this action is different than the print publisher defendants' position and it may have been more difficult to establish liability and damages against it.

[22] As a result of these settlements, the continuing claims against ProQuest would have been limited to Canwest content only. Any future judgment against ProQuest would likely have taken into account the sale of the Postmedia shares. ProQuest would have argued that the proceeds from the sale of the shares be deducted from whatever amount they were found liable to pay.

[23] Since the claims against Canwest and ProQuest related to the same content, the value of the settlement for the Canwest content requires one to combine ProQuest's proposed payment of $2 million with the proceeds from the sale of Postmedia shares.

[24] Under the terms of the various settlement agreements, the class members will benefit from a claims-based compensation scheme for freelance works at issue in this action on the following general basis:

(a) class members will file a claims form with the Administrator;

(b) the claims form will identify the works for which a class member claims compensation and the publication in which the works was first published;

(c) the Administrator will allocate points to a class member who files a claim according to a points allocation system based on length of work and dissemination level of publication;

(d) twelve (12) of the most frequently accessed Toronto Star, Rogers and Canwest publications have been designated in this process as "Tier 1" publications, twenty-three (23) publications have been designated as "Tier 2" and all other eligible publications as "Tier 3";

(e) once the time for making claims has expired, the Administrator will calculate the points to be awarded for each claiming class member; and

(f) subject to a maximum cap of 1% for any individual or one individual class member and a minimum payment of $5, compensation owing will be determined on a pro rata basis on the basis of total points awarded.

[25] As eight years have passed since this action was commenced, the parties wish to give class members another opportunity to opt out. Further, they have agreed that the defendants can unilaterally terminate the settlement if more than 300 class members opt out.

[26] After the expiry of the second opt out period (whereby class members can choose not to participate in the settlement), the settlement funds (the global proceeds less payments to class counsel and the costs of providing notice) will be paid to the Claims Administrator. The reasonable fees and costs incurred by the Claims Administrator in administering the claims process and the Class Proceedings Fund levy described above will also be paid out of the settlement funds.

[27] The Claims Administrator will collect claims from class members, calculate each claimant's entitlement and distribute the funds to those class members. If there are any funds remaining, those amounts will be paid to PWAC, with no reversionary entitlement to the defendants.

[28] Toronto Star and Rogers have agreed to publish the notice of settlement approval hearing and notice of settlement approval at no expense in The Toronto Star, Hamilton Spectator, Waterloo Region Record, Guelph Mercury, Macleans, Chatelaine, Canadian Business, Châtelaine and l'Actualité. This agreement to provide essentially free notice has saved class members a significant amount of money for the notice program, likely over $200,000, which has real and measurable value for the class.

COMPARING THIS SETTLEMENT WITH THE *THOMSON* SETTLEMENT

[29] It is expected that many of the class members who will apply for compensation in this action, have received compensation in the *Thomson* settlement. In *Thomson,* the defendants paid $11 million, an amount greater than what is being paid to settle this action. Since class members are being given another opportunity to opt out and since a comparison between the two settlements is inevitable, it is important to appreciate why this settlement compares favourably with the *Thomson* settlement.

[30] In *Thomson,* the gross settlement was $11 million. After deducting class counsel fees ($4 million and $200,000 in G.S.T.), disbursements ($85,074.19), the cost of notice (approximately $455,000), charitable payments to PWAC, the Writers' Union of Canada and the Canadian Association of Photographers and Illustrators in Communications ($75,000), payments to the Class Proceedings Fund ($602,050.59) and the costs of administration ($160,662.78), the net sum of $5.4 million was available for distribution to class members.

[31] Many of the deductions will be less in this action, leaving a larger percentage of the global fund for distribution to the class. In particular, class counsel is seeking fees in the range of $1.9 million (exclusive of taxes and disbursements), the cost of the notice program will be less

because Toronto Star and Rogers are providing notice in several of their respective publications at no cost and the levy owing to the Class Proceedings Fund will be less.

[32] As a result, a higher proportional percentage of the settlement funds will be available for distribution to class members than in the *Thomson* settlement. Specifically, some $5 million, or about 63% of $7,871,894.40, versus $5.4 million, or 49% of $11 million as in *Thomson*.

[33] In addition, there are critical differences between the class members' claims in this action and those in the *Thomson* action. These differences, set out below, demonstrate that the two settlements are not strictly comparable:

(a) There are arguably stronger defences in this action than in the *Thomson* action. *Thomson* was commenced in 1996 when fewer freelance writers were likely aware of the existence of electronic databases.

(b) This action was commenced in 2003 and the 3-year limitation period in the *Copyright Act* could bar claims arising before 2000 as the existence of electronic databases was well known by 2000 and class members whose claims arose before 2000 would have discovered their claims by that time.

(c) After the *Thomson* action was commenced, many print publishers began using freelance agreements in order to obtain a licence for the electronic rights in class members' works. Rogers disclosed approximately 7,603 freelance agreements in its affidavit of documents. Works covered by these agreements could be excluded from this action.

(d) The defendants claim that they have more information than what was available in the *Thomson* action relating to the royalties print publishers received for licensing works to electronic databases. They argue this royalty information demonstrates the defendants did not earn profits even close to the range of the damages sought in this action.

(e) The notional minimum statutory damages in the *Copyright Act* may be out of proportion with the royalties and could be reduced or dispensed with entirely.

(f) The defendants in this action have learned from the claims process in the *Thomson* settlement that there may be fewer class members in this action than initially expected. In the *Thomson* action, it was estimated that there were between 5,000 and 10,000 class members. In fact, the number of claimants was far less (837). Ms. Robertson expects a similar number of claimants in this action.

SETTLEMENT APPROVAL

Legal Framework

[34] Section 29(2) of the *CPA* provides that a settlement of a class proceeding is not binding unless it has been approved by the court. The test for approving a 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.

[35] When considering the approval of negotiated settlements, the court may consider, among other things the following factors: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arm's length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: See *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[36] These factors provide a guide for analysis rather than a rigid set of criteria that must be applied to every settlement. In practice, it may be that all of the factors are not applicable or should not be given equal weight. (See *Parsons v. Canadian Red Cross Society*, *supra*, at para. 73.)

[37] The court is not required to have evidence sufficient to decide the merits of the issue. This "is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture. This is imperative in order that the court might be satisfied that the settlement delivers adequate relief for the class in exchange for the surrender of litigation rights against the defendants" (*Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 (S.C.J.) at para. at 92).

[38] A settlement does not have to be perfect. It need only fall "within a zone or range of reasonableness": *Ontario New Home Warranty Program v. Chevron Chemical Co.*, *supra,* at para. 89: See also *Parsons*, at para. 69 (S.C.J.); *Bilodeau v. Maple Leaf Foods Inc.*, [2009] O.J. No. 1006 (S.C.J.) at paras. 45-46; *Dabbs v. Sun Life Assurance Co. of Canada*, *supra*, at pp. 439-440; *Frohlinger v. Nortel Networks Corp.*, *supra,* at para. 8.

[39] The "zone of reasonableness" concept helps to guide 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 are in this case, by 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.

[40] As stated in *Dabbs v. Sun Life Assurance Co. of Canada, supra*, at p. 440, there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by class counsel, is presented for Court approval:

> [T]he recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

Factors Supporting Approval

[41] I accept that the settlement was the product of hard fought negotiations conducted by experienced counsel at arm's length. The settlement is grounded in a principled approach to the assessment of damages and reasonably reflective of the litigation risks, costs and delays that would result from taking the matter to trial.

[42] It is significant that Ms. Robertson supports and recommends approval of the settlement. She played an active role in this action and in the *Thomson* action. I agree with Justice Cullity's statement in *Thomson* at para 18 "[t]his is obviously a case in which the court must give considerable weight to Ms. Robertson's opinion that the settlement and its terms are in the best interests of the class." As well, there are no objections to the settlement.

[43] Before embarking on settlement negotiations, Class Counsel had significant information about the liability and damage issues from their involvement in the *Thomson* action, and the document discovery process in this action. Given the information available to Class Counsel, they were well situated to evaluate the risks, to negotiate and agree on a resolution of the action for the benefit of all Class Members.

[44] Class Counsel had an appropriate evidentiary basis to evaluate settlement. Also, there is sufficient evidence before the court to allow it to exercise an objective, impartial and independent assessment of the fairness of the proposed settlement agreement.

[45] In particular, the likelihood of recovery or success leads me to conclude that the settlement is fair, reasonable and in the best interests of the class. The following analysis explains why this factor is so critical to the court's approval of the settlement.

[46] From the outset of this action, there were considerable risks at both the certification and merits stages, including the risk that a resolution would take many years, that the plaintiff would fail to establish copyright infringement, that the action would fail because of limitations defences or a court would award damages on a much smaller scale than anticipated.

[47] Success at a common issues trial was by no means guaranteed. The defendants argued that freelance writers granted an implied licence to use the works in electronic media. In particular, the class members each licensed the print publishers to use their works. The scope of that licence was arguably unclear and the defendants claimed it included an express or implied

term permitting the right to publish the works in electronic media. The plaintiff has always taken the position that class members merely licenced a one-time right to publish their works in print. However, an adverse determination at trial on this issue would end the litigation for class members and provide no recovery.

[48] Further, the defendants argue the class members are barred from recovery by their acquiescing in the use of their works. They rely on the doctrines of estoppel, waiver, acquiescence and laches. In the alternative, the defendants argue that all claims in respect of infringements before July 25, 2000 (three years before the claim was commenced) are barred by the limitation period prescribed in the *Copyright Act*.

[49] If the defences failed, there was still a risk that the trial judge would find that a global award of aggregate damages pursuant to s. 24 of the *CPA* was not appropriate. Such a ruling would trigger individual issues trials or references to deal with damages.

[50] Assuming aggregate damages were awarded, there would still be considerable uncertainty about the quantum of damages. While the plaintiff could rely on s. 38.1 of the *Copyright Act* to pursue statutory damages for copyright breach, there has been no case that has awarded damages on the scale sought in circumstances similar to this action.

[51] It is anticipated that the defendants, and in particular the print publishers, would have argued that the royalties they received pale in comparison to the statutory damages sought, or that the statutory amounts would be grossly disproportionate to actual losses and that the court should exercise its discretion to award damages below the statutory minimums.

[52] Even if the plaintiff succeeded on all issues at a common issues trial, recovery may have been delayed and uncertain in the event of an appeal.

[53] In addition to the monetary aspect of this settlement, Ms. Robertson explains that the settlement will have important implications for future practice in the publishing industry. The proposed settlements will assist in normalizing relationships between publishers and freelance writers in addition to delineating the respective rights and obligations of the parties surrounding copyright ownership. Given that this litigation has already caused many major publishers to use written agreements with freelancers, there is every reason to believe that this industry standard will continue.

[54] In summary, I conclude that this settlement is fair and reasonable and in the best interests of the class as a whole.

APPROVAL OF CLASS COUNSEL FEES

[55] Class Counsel seeks approval of their retainer agreement and asks that the court fix their fees at $1.9 million (exclusive of taxes). They also request approval of incurred disbursements of $214,762.33.

Legal Framework

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

[57] In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at para. 67, Cumming J. summarized some of the factors to be considered by the court when fixing class counsel's fees:

(a) the factual and legal complexities of the matters dealt with;

(b) the risk undertaken, including the risk that the matter might not be certified;

(c) the degree of responsibility assumed by class counsel;

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

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

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

(g) the results achieved;

(h) the ability of the class to pay;

(i) the expectations of the class as to the amount of fees; and

(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[58] With these factors in mind, the following review confirms the reasonableness of the proposed fee.

The Retainer Agreement

[59] By agreement dated March 5, 2007, Ms. Robertson retained Koskie Minsky LLP to act as lead counsel in this litigation and to prosecute the claim through to the end of the common issues trial. The retainer agreement provides that payment of legal fees and disbursements would be contingent upon success at trial or settlement of this matter.

[60] The retainer agreement provides that legal fees are based upon the multiplication of a base fee by a multiplier to be determined by the court. As well, the retainer agreement provides that the law firms of Dimock Stratton LLP and Theall Group LLP were to continue to assist in the litigation, primarily to provide substantive intellectual property advice.

The Time and Fees Incurred

[61] The value of Class Counsel's total docketed time as of March 29, 2011 is $1,118,873.32. Among all class counsel this reflects an average of 267 hours per year.

Law Firm	Total Hours	Total Fees	Total Disbursements	Total
Koskie Minsky LLP	1,872.70	$975,358.10	$127,244.10	$1,102,602.20
Dimock Stratton LLP	104.50	$52,081.58	$282.05	$52,363.63
Theall Group LLP	27.41	$14,781.06	$663.92	$15,444.98
McGowan & Co.	134.70	$76,652.58	$2,342.08	$78,994.66
Total (with tax)	**2,139.31**	**$1,118,873.32**	**$130,532.15**	**$1,249,405.47**

[62] Koskie Minsky LLP had docketed time as of March 29, 2011, valued at approximately $975,358.10. This represents about 1,870 hours of billable time over the last eight (8) years, or an average of 234 hours per year, or 20 hours per month.

[63] Dimock Stratton LLP has been involved since the inception of this litigation. It has advised on all substantive copyright and intellectual property law issues, provided litigation strategy including issues arising out of the structure of the settlement agreements, and attended the mediation. McGowan & Co. (later Theall Group LLP) has extensive experience in the area of class proceedings and has also acted in this litigation since its commencement.

[64] The fees and disbursements cover a variety of work that was undertaken: case conferences, certification, amendments to the class definition, motions to deal with the numerous third and fourth party claims, documentary production, review of documents, research of liability, and damage issues and the steps leading to this settlement.

Risks Assumed, Results Achieved and the Plaintiff's Support

[65] I have already reviewed the risks that class counsel assumed and the positive results of Class Counsel's efforts. Class Counsel collectively acted under the terms of a contingency fee arrangement. They faced the considerable risk that this action would not succeed and no fees would be recovered for the efforts undertaken on behalf of the class and Ms. Robertson. The settlement is the product of extensive negotiations and the skill of all counsel involved.

[66] Ms. Robertson supports the fees that Class Counsel request. In her view, the quantum is reasonable in the circumstances. From the start of this action, Ms. Robertson has had frequent contact with class counsel and she has played an active role in the litigation. Given Ms. Robertson's involvement in this class action, her support and approval of the fees is significant. As well, no one in the class has objected to the settlement and the fees requested.

The Fee is Reasonable

[67] The fees are substantially less than the $4 million that Ms. Robertson supported and were approved in the *Thomson* action. Furthermore, there were complications in this action that did not arise in *Thomson*. For example, there were multiple defendants in this action each with their own counsel and approach to the litigation. As well, numerous third and fourth party actions added to complexity of this class action. Lastly, the plaintiff was confronted with the insolvency of Canwest and the risk that there may be no recovery from this defendant.

[68] A $1.9 million fee represents approximately 24% of the global settlement proceeds (or about a 1.7 multiplier). In Ms. Robertson's view, the fees requested "reflect the significant efforts put forward by my counsel in this action and the success achieved for the class."

[69] The purpose of a multiplier was discussed in *Gagne v Silcorp Ltd.*, [1998] O.J. No. 4182 (C.A.) at para. 16 as follows:

> The multiplier is in part a reward to the solicitor for bearing the risks of acting in the litigation. The court must determine whether these risks were sufficient that together with the other relevant considerations a multiplier is warranted. While this determination is made after the class proceeding has concluded successfully, it is the risks when the litigation commenced and as it continued that must be assessed.

[70] The risks that I have described warrant a multiplier being applied to the base fee. The base fee is $1,118,873.32. Section 33(7) of the CPA states that a court may apply a multiplier to a base fee that results in fair and reasonable compensation. The multiplier requested is justified and allows for fair and reasonable compensation.

[71] Lastly, the disbursements were all necessary and reasonable and are allowed.

COMPENSATION FOR HEATHER ROBERTSON

[72] Class Counsel request that Ms. Robertson receive $5,000 as compensation for acting as a representative plaintiff. While I do not doubt that Ms. Robertson diligently fulfilled her role as the representative plaintiff, I am not prepared to award her compensation for this role.

[73] Compensation orders for representative plaintiffs are not routine. As stated by McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41 it is expected "that the proposed representative will vigorously and capably prosecute the interests of the class." Fulfilling this role does not lead to compensation.

[74] Compensation for representative plaintiffs must be awarded sparingly and limited to those cases where "a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class" (*Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 at para. 28).

[75] In *Windisman v. Toronto College Park Ltd.,supra,* evidence was presented to justify compensating the representative plaintiff. For example the court explained at para. 28:

> Ms. Windisman took a very active part at all stages of this action. It seems clear that the case would not have been brought but for her initiative. She assumed the risk of costs and she devoted an unusual amount of time and effort to communicating with other class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding. She kept careful records of her time and effort.

[76] However, active participation alone will not justify compensation. As Winkler J. noted in *Sutherland v Boots Pharmaceutical PLC, supra*, at para. 22, the work of the representative plaintiff must be "necessary" and "result in monetary success for the class". Further, if compensation is justified it should be "purely compensatory on a quantum meruit basis."

[77] There is good reason for limiting compensation in this manner as explained in *Sutherland* at para. 22 as follows:

> ... Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims.

[78] Class Counsel submit that Ms. Robertson played a significant role in directing the litigation and communicating with class members just as she did in the *Thomson* action. In *Thomson*, the court ordered that Ms. Robertson be paid $5,000 in compensation for acting as a representative plaintiff. However, beyond the court order there are no reasons discussing the justification for the compensation order. It does not follow that compensation should be paid in this action because it was paid in *Thomson.*

[79] I was not provided with affidavit evidence to explain the basis for a compensation order and why this is one of the exceptional cases justifying such an order. The submissions of Class Counsel are not enough to support a request for compensation. Care must be taken to ensure that there is a sufficient evidentiary basis for allowing compensation, particularly since the compensation is taken from the settlement fund as recently directed in *Smith Estate v National Money Mart Co.,* [2011] O.J. No. 1321 (C.A.) at para. 135.

[80] In these circumstances, I decline to allow Ms. Robertson compensation.

CONCLUSION

[81] In summary, I approve the settlement and the Class Counsel fees and disbursements. I direct that Class Counsel report to the court when the administration of the settlement is completed.

C. Horkins

C. Horkins J.

Released: May 2, 2011

CITATION: Robertson v. ProQuest Information and Learning LLC, 2011 ONSC 2629
COURT FILE NO.: 03-CV-252945CP
DATE: 20110502

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HEATHER ROBERTSON

Plaintiff

– and –

PROQUEST INFORMATION AND LEARNING LLC, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC.

Defendants

REASONS FOR JUDGMENT

Horkins J.

Released: May 2, 2011