IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Anderson v. Canada (Attorney General)*, 2016 NLTD(G) 179
Date: November 7, 2016
Docket: 200701T4955CCP

BETWEEN:	**CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	FIRST THIRD PARTY
AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION** *(DISCONTINUED)*	SECOND THIRD PARTY

- AND -

Docket: 200701T5423CCP

BETWEEN:	**TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	FIRST THIRD PARTY

AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION** *(DISCONTINUED)*	SECOND THIRD PARTY

- AND –

Docket: 200801T0844CCP

BETWEEN:	**ROSINA HOLWELL AND REX HOLWELL**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	FIRST THIRD PARTY
AND:	**THE INTERNATIONAL GRENFELL ASSOCIATION** *(DISCONTINUED)*	SECOND THIRD PARTY

- AND –

Docket: 200801T0845CCP

BETWEEN:	**EDNA WINTERS AND JAMES ASIVAK**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	FIRST THIRD PARTY
AND:	**THE MORAVIAN CHURCH IN NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	SECOND THIRD PARTY

AND:	**THE MORAVIAN UNION (INCORPORATED)** *(DISCONTINUED)*	THIRD THIRD PARTY

- AND -

Docket: 200801T0846CCP

BETWEEN:	**JOYCE ALLEN AND DOMINIC DICKMAN**	PLAINTIFFS
AND:	**THE ATTORNEY GENERAL OF CANADA**	DEFENDANT
AND:	**HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	FIRST THIRD PARTY
AND:	**THE MORAVIAN CHURCH IN NEWFOUNDLAND AND LABRADOR** *(DISCONTINUED)*	SECOND THIRD PARTY
AND:	**THE MORAVIAN UNION (INCORPORATED)** *(DISCONTINUED)*	THIRD THIRD PARTY

Before: Justice Robert P. Stack

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: September 27 and 28, 2016

Summary:

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

Appearances:

Kirk Baert, Celeste Poltak, Steven Cooper, David Rosenfeld and Ches Crosbie, Q.C.	Appearing on behalf of the Plaintiffs
Jonathan Tarlton, Paul Vickery and Catherine Moore	Appearing on behalf of the Attorney General of Canada

Authorities Cited:

CASES CONSIDERED: Verna Doucette v. Eastern Regional Integrated Health Authority, 2010 NLTD 29; **McIntyre (Litigation guardian of) v. Ontario**, 2016 ONSC 2662; **Fraser v. Falconbridge Ltd.**, [2002] 24 C.P.C. (5th) 396, 33 C.C.P.B. 60 (Ont. Sup. Ct.); **McCarthy v. Canadian Red Cross Society**, (2007) 158 A.C.W.S. (3d) 12, [2007] O.J. No. 2314 (Sup. Ct.); **Wilson v. Servier Canada Inc.**, [2005] 252 D.L.R. (4th) 742, 137 A.C.W.S. (3d) 1104 (Ont. Sup. Ct.); **Smith Estate v. National Money Mart Co.**, 2011 ONCA 233; **Robinson v. Rochester Financial Ltd.**, 2012 ONSC 911; **Garland v. Enbridge Gas Distribution Inc.**, [2006] 153 A.C.W.S. (3d) 785, 56 C.P.C. (6th) 357 (Ont. Sup. Ct.); **Johnston v. Sheila Morrison Schools**, 2013 ONSC 1528; **Dolmage v. Ontario**, 2013 ONSC 6686; **McKillop and Bechard v. Ontario**, 2014 ONSC 1282; **Baker (Estate) v. Sony BMG Music (Canada) Inc.**, 2011 ONSC 7105; **Cannon v. Funds for Canada Foundation**, 2013 ONSC 7686; **Cassano v. Toronto-Dominion Bank**, [2009] 178 A.C.W.S. (3d) 1015, 79 C.P.C. (6th) 110, (Ont. Sup. Ct.); **Abdulrahim v. Air France**, 2011 ONSC 512; **Rideout v. Health Labrador Corp.**, 2007 NLTD 150; **Gagne v. Silcorp Ltd.**, [1998] 167 D.L.R. (4th) 325, 27 C.P.C. (4th) 114 (Ont. C.A.); **Slark (Litigation guardian of) v. Ontario**, 2013 ONSC 6686.

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18; *Survival of Actions Act*, R.S.N.L. 1990, c S-32.

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

REASONS FOR JUDGMENT

STACK, J.:

INTRODUCTION AND BACKGROUND

[1] This decision brings to an end these long-standing, complex and historic class actions between the Plaintiffs and the Defendant, the Attorney General of

Canada ("Canada"). The Plaintiffs and Canada have reached a settlement that I have already formally approved. These are my reasons for doing so.

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

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

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

SETTLEMENT APPROVAL

The Terms of the Proposed Settlement

[5] Because of the historic nature of the Settlement for the aboriginal class members, I will detail its provisions. The Settlement provides for an all-inclusive fund of $50,000,000 (the "Compensation Fund") to provide compensation to class members in accordance with a plan proposed by the Plaintiffs that includes a

residence-based payment and compensation for more serious abuse (the "Distribution Plan"). Out of the Compensation Fund will also be paid the cost of notice to class members of the hearing to approve the settlement, legal fees and disbursements of Plaintiffs' counsel, and the costs of providing notice of settlement approval and of administering the settlement process.

[6] The key terms of the Settlement include:

1) the $50,000,000 Compensation Fund;
2) notice costs, administration costs, and legal fees and disbursements, to be paid from the Compensation Fund;
3) General Compensation Payments ("GCP") for years resided at a Facility;
4) Abuse Compensation Payments ("ACP") depending on the harm suffered;
5) a paper-based claims application process; and
6) a commitment by Canada to fund mutually agreeable commemoration and healing initiatives with class member input, over and above the Compensation Fund.

The Proposed Distribution Plan

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

General Compensation Payment

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

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

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

Abuse Compensation Payment

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

Level	Description	Compensation Amount
1	• One or more incidents of fondling or kissing. • Nude photographs taken of the Class member. • The act of an adult exposing themselves. • Any touching of a student, including touching with an object, by an adult which exceeds recognized parental contact and which subjectively violates the sexual integrity of the Class member. • One or more incidents of simulated intercourse. • One to three incidents of masturbation.	$50,000.00
2	• One to three incidents of oral intercourse. • One to three incidents of digital anal or vaginal penetration. • One to three incidents of attempted anal or vaginal penetration. • Four or more incidents of masturbation. • One or more physical assaults causing a physical injury that: o led to or should have led to hospitalization or serious medical treatment by a physician	$100,000.00

	○ caused permanent or demonstrated long-term physical injury ○ impaired or disfigured ○ caused loss of consciousness ○ broken bones ○ caused serious but temporary incapacitation requiring bed rest or infirmary care for several days. Examples include severe beating, whipping, and second-degree burning.	
3	• One to three incidents of anal or vaginal intercourse. • Four or more incidents of oral intercourse. • One to three incidents of anal or vaginal penetration with an object.	$150,000.00
4	• Four or more incidents of anal or vaginal intercourse. • Four or more incidents of anal or vaginal penetration with an object.	$200,000.00

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

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

Eligibility

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

1) be a class member;
2) be alive as of November 23, 2006;
3) for a GCP, to have resided (as defined in the Settlement) at one of the Facilities during the "Class Period";

4) for an ACP, to have either resided at or attended one of the Facilities during the "Class Period" and to have suffered compensable abuse; and
5) have been under twenty one (21) years of age at the time of residence at one of the Facilities or when the compensable abuse was suffered.

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

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

Makkovik - April 1, 1949 to June 30, 1960

Cartwright - April 1, 1949 to June 30, 1964

Nain - April 1, 1949 to June 30, 1973

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

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

Paper-based Claims Process

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

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

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

Oversight of Claims Process

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

Priority of Payments from the Compensation Fund

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

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

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

Commemoration and Healing Benefits

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

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

1) a logo design contest among notable indigenous artists from Labrador with the logo being incorporated into commemorative pins and on informative plaques to be located in Happy Valley Goose Bay and in each of the five communities in which a Facility was located;
2) an archivist will be hired to identify, collect, catalogue, preserve and digitize material relevant to the residential school legacy in Newfoundland and Labrador. Part of this mandate will be to identify archival material located outside of Canada and, in collaboration with the Government of Canada and the appropriate indigenous

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

organizations, attempt repatriation of those materials where appropriate. The archivist will also be directed to prepare a mobile historical display based on the information found to better educate the public about the residential school system in Newfoundland and Labrador; and

3) a prominent Labradorian will be engaged to conduct community visits to receive and memorialize, both publicly and privately, stories tendered by those connected with the residential school system, including but not limited to the class members. The mandate will include receiving information and advice on appropriate healing processes and will result in a formal report.

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

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

The Proposed Claim Form

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

Proposed Notice Materials

[28] The Plaintiffs intend to provide significant notice of the Settlement to class members, which will include, among other things, direct mailings to class members, direct mailings to third parties, dissemination of a short form notice in

various media, and direct community outreach and meetings. The proposed notice materials are intended to be simple and easy to read and understand.

The Statutory and Regulatory Regime

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

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

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

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

> **7A.10.** (2) An application to court for approval of a settlement of a class action shall include:
>
> (a) a brief history of the proceeding;
> (b) a brief statement of the facts that form the basis of the settlement;
> (c) a discussion of the relevant issues of law;
> (d) the terms of the settlement and its amount;
> (e) a statement of the form of payment of the settlement;
> (f) the method of quantifying individual claims and the distribution of the settlement funds to class members;
> (g) the total amount of legal fees and disbursements and their impact on the settlement;

(h) details of unresolved claims, if any, including their number and how they are to be resolved;
(i) a plan of action for resolving individual claims;
(j) a statement of any differences in the manner of treatment of class members;
(k) the procedure for disbursing unclaimed funds;
(l) information of related class or representative proceedings in other jurisdictions; and
(m) the form of a notice proposed to be sent to class members.

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

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

The Position of Canada

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

[36] Counsel for Canada advised the Court that reconciliation with its aboriginal persons is a high priority for the federal government. It settled the matter for $50 million with that in mind. Although Canada left to the Plaintiffs the manner of distribution of the Settlement among the class members, it supports the application

for approval based upon the proposed Distribution Plan. The Settlement was reached following receipt of advice from independent actuaries and was contingent on amounts being paid to both resident class members and day students. It was also important for Canada that legal fees and administration costs be paid out of the Compensation Fund. Importantly, says Canada, the commemoration and healing components of the Settlement are an additional step towards reconciliation.

How the Court Approaches Settlement Approval

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

> [7] Settlements are a product of compromise and are not held to a standard of perfection. As Schulman J. held in *Semple*, 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'.

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

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

negotiations, that sometimes parties have reached their limit in negotiation, resile from their positions or abandon the effort'.

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

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

[40] We saw above that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions (**Verna Doucette** at paragraph 12). It is an objective standard that allows for variation depending upon

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

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

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

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

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

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

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

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

1. Likelihood of Recovery, or Likelihood of Success

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

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

General Litigation Risks

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

1) Risk of historical claims – This class action involved allegations concerning events that occurred between 35 to 65 years ago and spanned a 30 year period. Hundreds of class members and former staff of the Facilities are now of advanced age; many have passed away. Risks associated with continuing the common issues trial included fading memories of elderly witnesses, incomplete document

retention, and a potential inability to adduce evidence because of a lack of witnesses.

2) General litigation risks – As with all actions, there existed the risks of witnesses not providing sufficient evidence, the documentation not being sufficient, and the uncertainty associated with the Court making findings of fact.
3) Consolidated action risks – Litigation risks are amplified in this proceeding, which concerns five Facilities with differing class periods, but litigated together. This increased the risk of failing to prove the existence or breach of a fiduciary duty over the years for one or more of the Facilities; and
4) Class action litigation risks – as with many class actions, there was the risk that I would find there to be insufficient evidence or inferences necessary to find liability for the entire class across the entire class period for each of the Facilities.

Uncertain Results

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

1) the Plaintiffs could be unsuccessful in proving that a fiduciary duty existed;
2) the Plaintiffs might establish the existence of a fiduciary duty, but be unsuccessful in proving the duty was breached in common across the class over the entire class period for each of the five Facilities;
3) the Plaintiffs might succeed in establishing a breach of fiduciary duty but not be awarded aggregate damages resulting in the Court ordering individual assessment hearings; and
4) the Plaintiffs might succeed in proving a breach of fiduciary duty but some or all class members' claims may be barred by virtue of the application of a limitation period.

Potential Individual Hearings

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

1) would likely be adversarial in nature, which could require legal representation resulting in increased costs for class members;
2) would require significant time to complete, resulting in prejudice to the aging class and a denial of timely access to justice;
3) may require class members to testify, forcing a traumatic recounting of the abuse they suffered;
4) may require significant travel by elderly class members, causing barriers to participation for some; and
5) would likely limit recovery to those class members who are willing to come forward and be cross-examined about their difficult childhood experiences.

Delays Associated With Trial and Appeals

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

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

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

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

2. *Amount and Nature of Discovery or Trial Evidence*

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

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

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

3. Settlement Terms and Conditions

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

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

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

4. Recommendation and Experience of Counsel

[60] The Plaintiffs were represented by three experienced class action law firms, based, respectively, in Newfoundland and Labrador, Ontario and Alberta. The experience of Plaintiffs' counsel, both in this jurisdiction and elsewhere, militates

towards approving the Settlement. This is particularly so where a number of the lawyers involved have been associated with the Indian Residential Schools settlement and other cases of alleged institutional abuse.

5. *Future Expense and Likely Duration of Litigation*

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

6. *Recommendation of Neutral Parties, if Any*

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

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

7. *Number of Objectors and Nature of Objections*

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

8. *Presence of Good Faith and Absence of Collusion*

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

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

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

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

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

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

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

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

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

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

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

[73] Of the anticipated 800 or so eligible class members, Plaintiffs' counsel currently have an active database of 763 class members with whom they are in regular mail and email contact. Mr. Cooper advises that he has personally

responded to approximately 75 phone calls and 110 emails from class members since May 10, 2016 answering a variety of questions primarily around eligibility and potential timing of payments.

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

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

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

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

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

11. The Risk of Not Unconditionally Approving the Settlement

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

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

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

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

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

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

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

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

Disposition of the Application for Approval of the Settlement

[85] On the first day of trial, a year to the day before I approved the Settlement, Plaintiffs' counsel came into the historic Courtroom #1 in downtown St. John's seeking $50 million as compensation for the losses suffered by their Inuit and Innu clients. Both sides are to be congratulated on settling the litigation for exactly that amount. It is admitted by Plaintiffs' counsel that they likely could not have fared better had they completed the trial and been totally successful there and on appeal. But the Plaintiffs and Canada have achieved even more – they have also chosen to implement, at Canada's cost, a process of commemoration and healing that would have been beyond the jurisdiction of the Court to award. These meaningful measures of commemoration and healing, it is hoped, will also be important steps towards reconciliation.

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

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

FEES AND DISBURSEMENTS OF PLAINTIFFS' COUNSEL

The Legal Test for Retainer Agreement and Fee Approval

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

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

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

The Retainer Agreements

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

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

8. Legal fees shall be paid only in the event the Class Action is successful in obtaining judgment on the common issues in favour of some or all Class Members or in obtaining a settlement that benefits one or more Class Members (defined herein as "Success"). The legal fees shall be paid by a lump sum payment out of the proceeds of such judgment or settlement under the Act.

...

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

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

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

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

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

...

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

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

> 18. The Client acknowledges that time spent by the Firm prior to the date of execution of this agreement is to be included in the Base Fee.
>
> ...
>
> 21. The Client acknowledges that, in view of the nature of the Class Action, the Firm may require the assistance of additional lawyers or law firms to work on the common issues and class wide issues in the contemplated Class Action. The Client hereby authorizes the Firm to assemble and maintain a consortium of lawyers or law firms to conduct the Class Action. The Firm shall have overall responsibility for the conduct of the Class Action. The Firm may change the composition of the consortium and assign tasks among consortium members, as they consider advisable from time to time. The fees for the consortium shall be treated as part of the Firm's fees and shall be determined as set out above."

[92] Pursuant to the terms of the Retainer Agreements, Plaintiffs' counsel seek approval of fees of $16,665,000.00, which amounts to a contingency fee percentage of just slightly less than the 33 ⅓ % provided for.

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

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

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

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

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

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

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

> They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of

> recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial.

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

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

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

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

[101] In this case, Plaintiffs' counsel advises that they devoted 19,930 hours to this litigation. A fee of $16,665,000 represents a multiplier of 1.81 based upon the hourly rates cited by them. A multiplier of 1.81 is at the low end of class action jurisprudence given the risks, substantive legal hurdles and stage of proceeding at the time of settlement. Plaintiffs' counsel provided a chart that demonstrated court approved multipliers from 1.3 to more than 5, with the majority at greater than 2. Notwithstanding the inherent weaknesses of using lawyers' docket time and

assigned rates as a basis for awarding a fee, the exercise in this case does assist me in determining that the fees sought here are reasonable in all the circumstances.

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

Specific Legal Risks Assumed by Class Counsel in Prosecuting the Action

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

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

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

[105] I accept the facts as sworn to by Mr. Cooper in his affidavit in support of approval of the fees and disbursements of Plaintiffs' counsel. He identifies the unique factor present in this case which is lacking in almost all other class proceedings: for decades, the claims of these class members languished with no counsel wanting to take up their cause. This was despite the fact that nationally, hundreds of lawyers on the plaintiffs' side were involved for decades in residential school litigation, national negotiations and, ultimately, a pan-Canadian settlement (the "IRSSA") in 2005. But, as stated by Mr. Cooper, for these individuals in Newfoundland and Labrador:

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

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

[107] I discussed in detail above the legal risks involved in these claims in the context of why it was appropriate to approve the Settlement. Those same risks – the difficulties of proving historic claims, the challenges of establishing a fiduciary

duty and its breach, the risk of not obtaining an award of aggregate damages, and others – also apply to my consideration of the reasonableness of the fees and disbursements sought by counsel. These were neglected cases that were difficult to carry over uncharted legal terrain. Plaintiffs' counsel struggled for nine long years, expended more than a million of their own dollars in disbursements, suffered innumerable set-backs and delays, but persevered to achieve a laudable resolution for the class members. Failing was a real possibility. Had they failed, Plaintiffs' counsel would not only have been paid nothing for their nine years of work but would have been left holding the disbursement bag as well.

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

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

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

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

be seeking one-third of the Compensation Fund for legal fees. As sworn to by Mr. Cooper in his affidavit:

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

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

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

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

Time and Legal Fees Incurred by Class Counsel

[113] These actions were large, complex and vigorously defended. As we saw above, Plaintiffs' counsel devoted a significant amount of lawyer, student and clerk

time to prosecuting these actions efficiently and effectively. To this point of the proceeding Plaintiffs' counsel report that they have devoted approximately 20,000 hours of lawyer, student and clerk time.

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

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

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

efforts of Plaintiffs' counsel and assist me in concluding that the Retainer Agreements are reasonable.

Estimate of Settlement Implementation Time

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

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

[118] I am advised by Plaintiffs' counsel that in **Slark (Litigation guardian of) v. Ontario**, 2013 ONSC 6686 and **McKillop**, which involved claims processes similar to that proposed in the Settlement, class counsel devoted over 2,500 hours of lawyer, student and clerk time towards the administration and implementation of the settlements agreements, with a value of over $820,000 (not including taxes),

after the hearing of the settlement approval motions. One would expect, however, there to be efficiencies in implementation of the Settlement based on Plaintiffs' counsel's work and experience in those cases. In addition, the class size in this proceeding is approximately one quarter of that in those classes. As a result, Plaintiffs' counsel estimates that they will devote additional time with a value of approximately $300,000 to $400,000 during the implementation phase of the Settlement.

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

Conclusion on Retainer Agreements Approval

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

DISPOSITION

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

achieved, despite the challenges faced by the Plaintiffs and the passage of so many years.

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

Stack J.

ROBERT P. STACK
Justice