Court File No.: CV-16-547155-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JAMES YEO

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE MOVING PLAINTIFF
(Motion for Settlement Approval Returnable June 23, 2021)

June 16, 2021

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PART I - OVERVIEW

1. This class action is the latest, and likely last, in a series of institutional abuse class actions against the Ontario Crown in respect of its control and operation of residential facilities for persons with disabilities and mental health issues designated as Schedule 1 Institutions pursuant to the *Developmental Services Act*.

2. The action alleges negligence and breach of fiduciary duty in the control and operation of the Child and Parent Resource Institute (formerly the Children's Psychiatric Research Institute, or **"CPRI"**).

3. This action was commenced in 2016. A twelve-week trial was scheduled to commence in March 2021. After a last-minute mediation, conducted by Justice Archibald, the parties executed a settlement agreement in February 2021. The proposed settlement includes:

(a) $12,000,000 in gross settlement funds

(b) A claims process:

(i) that is non-adversarial and user-friendly;

(ii) where claimants are presumed to be acting honestly and in good faith;

(iii) that is paper-based and does not require class members to testify, appear in person or be cross-examined; and

(c) Individual compensation ranging from $3,500 to $45,000.

4. The proposed settlement follows the broad contours of the settlements proposed and approved in the class actions regarding fifteen other Schedule 1 Institutions.

5. As is discussed at length below, the Crown's position was that CPRI was operated in a manner that was different to and better than the other Schedule 1 Institutions. Accordingly, the Crown's position was that it was not negligent in the operation and management of CPRI and bore no liability.

6. The Plaintiff has maintained throughout this action that the residents of CPRI who suffered abuse deserve the same dignity, respect and compensation as that afforded to residents of the other Schedule 1 Institutions.

7. Despite resolving the other Schedule 1 class actions between 2013 and 2016, this action proceeded to the steps of the courthouse because the Crown believed that it could succeed at the common issues trial given a significantly different evidentiary foundation than existed in respect of the other Schedule 1 Institutions, whereas the Plaintiff would not concede that individuals at CPRI should not be treated in a similar fashion to those harmed at other Schedule 1 Institutions.

8. Ultimately, both parties made significant concessions from their trial-ready positions in order to achieve the proposed settlement. Given that the parties were about to embark on a twelve-week common issues trial, they could not have been in a better place assess the risks and rewards of agreeing to the Settlement.

9. In light of all the evidentiary foundation leading to trial, the risks facing the parties, and the benefits provided by the proposed Settlement and its claims process, Class Counsel are of the view that this Settlement is fair, reasonable and in the best interests of the class as a whole and ought to be approved.

PART II - THE FACTS

A. Overview of the Claim

10. CPRI is a residential facility for the care of children and youth with complex mental health and developmental impairments located in London, Ontario. CPRI was and is operated under the direct control of the Crown. Until 1974, CPRI was operated pursuant to the *Children's Mental Hospitals Act* and the *Mental Health Act*. In 1974, CPRI was designated as a Schedule 1 Institution pursuant to the *Developmental Services Act*; it retained that designation until it was de-listed in 2011.[1]

[1] Amended Statement of Claim, at para. 17, Exhibit "E" to the affidavit of Jonathan Ptak (settlement approval), sworn June 16, 2021 ("Ptak Settlement Approval Affidavit"), Motion Record of the Plaintiff re Settlement Approval (hereinafter "PMR-SA"), Tab 2E, p. 156.

11. Throughout its existence, CPRI housed children with developmental disabilities and disturbed behaviours. Early on, CPRI began also admitting other children experiencing serious psychiatric conditions. The child and youth residents of CPRI were placed there by their caregivers voluntarily, or were wards of the Crown who were legally remanded into the care of CPRI.[2]

12. In this class action, the Plaintiff alleges that he and other class members suffered harm during the time that they were inpatients at CPRI. Further, the Plaintiff alleges that the Crown, in breach of its common law and fiduciary duties, created the conditions where these harms occurred and/or failed to act to prevent such harms.

B. Other Schedule 1 Class Actions in Ontario

13. There were nineteen (19) Schedule 1 Institutions. There have been class proceedings involving sixteen (16) of those institutions: *Slark v. Ontario* ("*Slark*"), *McKillop v. Ontario* ("*McKillop*"), *Bechard v Ontario* ("*Bechard*"), *Clegg v. Ontario* ("*Clegg*"), and now this proceeding.

14. In general, all of these proceedings sought compensation on behalf of former residents who suffered physical and sexual harm as a result of alleged failures on the part of the Crown to operate and manage these facilities in accordance with prevailing standards. All of these cases have been challenging and highly complex actions whose class periods span multiple decades, where productions have run into the tens and in this case hundreds of thousands of documents, and where applicable standards of care have significantly evolved over time. These cases have also raised novel legal claims related to limitation periods, fiduciary duties, systemic duties of care, and Crown immunities.

15. The first of these class actions, *Slark*, was commenced in 2009 and concerned the Huronia Regional Centre in Orillia, Ontario. After contested certification proceedings and extensive trial preparations, the parties reached a settlement on what was to be the first day of a four-month trial.[3]

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[2] Amended Statement of Claim at para. 9, Exhibit "E", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2E, p. 155.
[3] *Dolmage, McKillop and Bechard v. HMQ*, 2014 ONSC 1283 at para. 6.

The settlement provided for $35,000,000 in gross settlement funds[4] and a paper-based claims process with maximum compensation of $42,000 per class member.

16. Following *Slark* were *Bechard* and *McKillop,* which were certified on consent in 2011. After extensive productions and examinations for discovery, *Bechard* and *McKillop* were settled in late 2013 on the same basis as *Slark* – in these cases a combined $32,700,000 in gross settlement funds[5] and a paper-based claims process with maximum compensation of $42,000 per class member. The settlements in *Slark*, *McKillop,* and *Bechard* were approved by Conway J. on December 3, 2013 and February 24, 2014.[6]

17. The *Slark*, *McKillop,* and *Bechard* class proceedings led to individuals contacting Class Counsel about the other Schedule 1 Institutions. This led to the commencement of *Clegg* in June 2014, which initially made claims in relation to the remaining sixteen (16) Schedule 1 Institutions.

18. CPRI was initially included in the *Clegg* proceeding. In or about mid-2015, the parties in *Clegg* negotiated a consent certification of that proceeding. The agreement to certify *Clegg* was conditional on four (4) of the sixteen (16) Schedule 1 Institutions initially named being excluded from *Clegg*. CPRI was one of the institutions excluded at that time.

19. Settlement discussions followed certification in *Clegg*, resulting in an agreement whose terms were virtually identical to those in *Slark*, *McKillop,* and *Bechard.* The settlement in respect of the twelve institutions involved in *Clegg* included $28,869,330.93 in gross settlement funds and a paper-based claims process with maximum compensation of $42,000 per class member. In the words of this Court the settlement terms, "generally mirror[ed] the terms of the other three settlements and… achieve[d] overall parity and virtually identical compensation schemes."[7] This Court approved the *Clegg* settlement on April 25, 2016.[8]

20. Parallel to the Schedule 1 cases were other class actions against the Crown related to its control and operation of residential institutions for Blind and Deaf children and youth: *Seed v*

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[4] Including $2,700,000 designated for Strategic Program Investments.
[5] Including $2,700,000 designated for Strategic Program Investments.
[6] *Dolmage v. HMQ*, 2013 ONSC 6686 at paras. 38, 52; and *McKillop and Bechard v. HMQ*, 2014 ONSC 1282 at para. 9.
[7] *Clegg v HMQ Ontario*, 2016 ONSC 2662 at para. 10.
[8] *Clegg v HMQ Ontario*, 2016 ONSC 2662.

Ontario ("*Seed*") and *Welsh v Ontario* ("*Welsh*").[9] The settlements in *Seed* and *Welsh* included $8,000,000 and $15,000,000 in gross settlement funds respectively and paper-based claims processes with a maximum compensation of $45,000 per class member.

21. A Settlement in this proceeding has now been reached by the parties – providing a total of $12,000,000 in gross settlement funds and a paper-based claims process with a maximum compensation of $45,000 per class member.

C. CPRI Differentiated from Other Schedule 1 Institutions

22. CPRI was not included among the facilities to which the *Clegg* certification order and settlement applied. It was the Crown's position that CPRI was substantially unlike the other Schedule 1 Institutions. In an affidavit filed as part of the Crown's certification record for *Clegg*, Anne Stark, the Administrator of CPRI, deposed that "CPRI was, from the outset, created to be uniquely different from other Schedule 1 facilities".[10] According to Ms. Stark, while the other Schedule 1 Institutions admitted individuals to receive long-term residential care, with many residents admitted for ten years or more, CPRI focused on outpatient care and shorter-term stays.[11] Ms. Stark deposed that "CPRI's purpose or mandate has never included providing custodial or long-term residential services."[12]

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[9] *Seed v. Ontario* concerned the W. Ross MacDonald School for the Blind in Brantford, Ontario. Following contested certification proceedings, extensive discoveries, and trial preparations, a settlement was reached on the eve of trial very similar in process to the settlements in *Slark*, *Bechard*, and *McKillop*: an $8 million settlement fund, a paper-based claims process, and individual compensation capped at $45,000: *Seed v. Ontario*, 2017 ONSC 3534 at para. 9. *Welsh v. Ontario* concerned three provincial schools for the Deaf. The Crown initially opposed certification before ultimately consenting. Following documentary productions and the approval of the settlement in *Seed*, a settlement was reached identical in process to that in *Seed* – in this case a $15 million settlement fund, a paper-based claims process, and individual compensation capped at $45,000: *Welsh v. R*, 2019 ONSC 4204 at para. 14.

[10] Affidavit of Anne Stark, sworn February 13, 2015 at para. 6, Exhibit "B", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2B, p. 80.

[11] Affidavit of Anne Stark, sworn February 13, 2015 at paras. 13-15, Exhibit "B", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2B, pp. 85-86.

[12] Affidavit of Anne Stark, sworn February 13, 2015 at para. 15, Exhibit "B", Ptak Settlement Approval Affidavit., PMR-SA, Tab 2B, pp. 85-86.

23. Ms. Stark added that CPRI, unlike the other Schedule 1 Institutions, sought to engage the parents of child and youth residents:

> Throughout the entire history of CPRI, but for those instances where parental contact is prohibited, parents have been encouraged to stay onsite during their child's admission, to actively engage in their child's services, to visit the child if the child is receiving intensive treatment onsite, and to have the child return home for regular visits.[13]

24. According to Ms. Stark, the differences between CPRI and the other Schedule 1 Institutions extended to the responsible Ministry's treatment of CPRI. Following the establishment of the Ministry of Children and Youth Services in 2004, CPRI was the only Schedule 1 Institution which became a responsibility of the new Ministry, with the other facilities remaining responsibilities of the Ministry of Community and Social Services.[14] Further, CPRI was funded as a separate item, distinct from the other facilities, in the responsible Ministry's budget.[15] For Ms. Stark, one of the clearest illustrations of the fundamental differences between CPRI and the other Schedule 1 Institutions was that CPRI remains the only institution still in operation, the others having been phased out.[16]

25. Among the exhibits appended to Ms. Stark's affidavit was the "Williston Report" on residential care for people with developmental disabilities. The Williston Report was commissioned in 1971 by the provincial Ministry of Health and authored by Walter Williston.[17] After reviewing some of the features which distinguished CPRI from other Schedule 1 Institutions, Mr. Williston concluded:

> This institute, I say without qualification, is one of the greatest centres of its kind in the world.[18]

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[13] Affidavit of Anne Stark, sworn February 13, 2015 at para. 44, Exhibit "B", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2B, pp. 94-95.
[14] Affidavit of Anne Stark, sworn February 13, 2015 at para. 87, Exhibit "B", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2B, p. 106.
[15] Affidavit of Anne Stark, sworn February 13, 2015 at para. 91, Exhibit "B", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2B, p. 107.
[16] Affidavit of Anne Stark, sworn February 13, 2015 at paras. 94-95, Exhibit "B", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2B, p. 108.
[17] Williston Report, Exhibit "C", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2C, p. 118.
[18] Williston Report, p. 46, Exhibit "C", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2C, p. 129.

26. This was the background against which the present action was commenced. While previous institutional abuse class actions had a strong track record in achieving compensation and vindication for class members, the Crown's evidence filed for the certification motion in *Clegg* showed that any action in respect of CPRI would not be a simple replay of the same story. Rather, any such claim would be faced with evidence as to CPRI's unique operational characteristics and purportedly outstanding performance.

D. Case Chronology

27. Reflecting these real challenges, instead of a quick resolution following *Clegg*, this class action has been hard-fought over the course of a lengthy procedural history. In the five years since the case was commenced, the parties have argued contested motions, exchanged hundreds of thousands of documents, conducted discoveries, exchanged expert reports, and begun trial preparations in earnest. These efforts culminated in the Settlement, concluded just two weeks before the commencement of trial. The following is a brief chronology of the litigation that led to the Settlement.[19]

i. Certification: Contested until Just Prior to the Hearing

28. The Crown initially opposed certification.

29. The Plaintiff served his certification record, which included affidavits from seven class members. The Defendant's responding record including affidavits from five lay and expert witnesses. After a reply record was filed, cross-examinations of twelve witness were conducted.[20] Subsequently, the Crown brought a motion to challenge some of the refusals given by the Plaintiff during these cross-examinations. The motion proceeded to a contested hearing before Belobaba J., who upheld all but one of the Plaintiff's refusals and awarded costs against the Crown.[21] Only after the Plaintiff served his factum in support of certification did the Crown consent to certification, some two weeks before the hearing. [22]

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[19] See also the case chronology attached as Exhibit "L" to the Ptak Settlement Approval Affidavit, PMR-SA, Tab 2L, p. 277.
[20] Ptak Settlement Approval Affidavit at para. 20, PMR-SA, Tab 2, p. 13.
[21] Order and Endorsement of Belobaba J. dated October 31, 2016, Exhibit "J", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2J, p. 233.
[22] Ptak Settlement Approval Affidavit at para. 24, PMR-SA, Tab 2, p. 14.

30. Justice Belobaba issued the certification order on December 26, 2016.[23] The class is defined therein as "all persons, who were alive as of February 22, 2014, who were inpatients of and resided at CPRI during the time period from September 1, 1963 to July 1, 2011, exclusive of any time for which an individual was a resident in the Glenhurst or Pratten 1 wards" (the "Class" or "Class Members").[24]

31. The common issues certified in this action were the same as those certified in *Slark*, *McKillop, Bechard*, and *Clegg*.[25]

32. Justice Belobaba appointed James Templin representative plaintiff for the class.[26]

ii. Notice, Discovery, and Trial Preparation

33. Following certification, a court-supervised notice program was carried out, which included placements of the notice in media, distribution to agencies and support services likely to be relied on by class members, and direct mailings to each of the likely class members whom the Crown was able to identify in Ministry databases.[27] Through this process a class list of 5,352 Class Members was provided by the Crown.

34. Following distribution of the notice, at total of ninety-four individuals opted out.[28]

35. Between April 2017 and February 2018, the Crown delivered approximately 280,000 documents as part of its documentary discovery obligations.

36. Thereafter the parties commenced examinations for discovery in 2018 – six days of examination of the Defendant and two days of the Plaintiffs.

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[23] Certification Order of Justice Belobaba dated December 22, 2016, Exhibit "K", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2K, p. 238.
[24] Certification Order of Justice Belobaba dated December 22, 2016 at para. 2, Exhibit "K", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2K, p. 238.
[25] Ptak Settlement Approval Affidavit at para. 28, PMR-SA, Tab 2, p. 15.
[26] Certification Order of Justice Belobaba dated December 22, 2016 at para. 5, Exhibit "K", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2K, p. 238.
[27] Ptak Settlement Approval Affidavit at para. 30(c), PMR-SA, Tab 2, p. 16.
[28] Ptak Settlement Approval Affidavit at para. 30(f), PMR-SA, Tab 2, p. 16.

37. In September 2018 Mr. Yeo replaced Mr. Templin as representative Plaintiff. Both Mr. Templin and Mr. Yeo were examined for discovery.[29]

38. Discovery motions by both parties were initiated and then resolved in May 2019.[30]

39. At a trial scheduling court appearance on October 2, 2019, a twelve-week common issues trial was scheduled for commencement on March 8, 2021.[31]

40. Following the scheduling of the trial, trial preparations began. From then until the mediation in January 2021 the litigation continued including, among other things:

(a) Further documents produced by the Crown between February 2019 and June 2020 following examinations for discovery;

(b) A Rule 36 examination of one of the Crown's key witnesses – Dr. Benjamin Goldberg, a long-time CPRI Administrator – was agreed to and conducted in June/July 2020;

(c) A motion for further and better productions from the Defendant was initiated by the Plaintiff and resolved in June-August 2020;

(d) The Plaintiff's expert reports were delivered in September 2020;

(e) A motion for leave to examine class members was initiated by the Defendant (having originally been initiated in 2018), and was briefed, heard, and dismissed in November-December 2020;

(f) The Defendant's expert reports were delivered in December 2020;

(g) The parties concluded a document admission agreement for trial in December 2020;

(h) Trial preparation was ongoing in earnest including: document review; organization and preparation; searching for and interviewing potential witnesses; preparing and exchanging witness summaries; preparing witnesses for trial; preparing requests to admit, and preparing written submissions.

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[29] Ptak Settlement Approval Affidavit at para. 30(j), PMR-SA, Tab 2, p. 17.
[30] Ptak Settlement Approval Affidavit at para. 30(l), PMR-SA, Tab 2, p. 17.
[31] The parties had previously submitted a Trial Certification Form (attached as Exhibit "P" to the Ptak Settlement Approval Affidavit) to the Court, indicating that twelve weeks of court time would be necessary for the conduct of the trial. The Plaintiff estimated that his case would be conducted over twenty days and would involve the evidence of fourteen witnesses, including four experts; the Crown estimated that its defence would be mounted over forty days, and would involve thirty-seven witnesses including three or four experts: Ptak Settlement Approval Affidavit at para. 30(m), PMR-SA, Tab 2P, p. 338.

iii. Expert Reports

41. On September 10, 2020, the Plaintiff served reports prepared by three experts:

(a) Dr. James Anglin, a Professor Emeritus at the School of Child & Youth Care at the University of Victoria;

(b) Barry Lewis MSW, a consultant to governmental authorities on the effective delivery of residential care services to children and youth; and

(c) Dr. Richard Sobsey, a Professor of Educational Psychology with a research emphasis on providing care and treatment to individuals with mental disabilities.[32]

42. Based on the evidence reviewed and the opinions of these experts, the following systemic failings of the Defendant in the operation of CPRI were identified and alleged by the Plaintiff:

(a) it created an inherently dangerous situation by mixing resident populations, including:

(i) housing children from disparate age groups together; and

(ii) housing sexual assault victims in the same facility and units as sexually aggressive children;

(b) it permitted a culture, contagion and normalization of violence against children, including:

(i) children regularly seeing and being victimized by peer-on-peer violence;

(ii) children regularly seeing and being victimized by sexual assaults; and

(iii) children regularly seeing their peers being violently restrained by staff;

(c) it failed to adequately report and investigate violence, including by inappropriately relying on Children's Aid Societies to investigate incidents of violence suffered by children under its care;

(d) it failed to engage independent reviewers to assess operational practices and inappropriately relied on inapplicable or ineffective reviews:

(e) it failed to perform adequate systemic analyses to determine the extent of violence and victimization at the facility and how to correct it; and

[32] Ptak Settlement Approval Affidavit at para. 43, PMR-SA, Tab 2, p. 21.

(f) it prioritized CPRI's research mandate over the residential care and safety of the class members.

43. The Crown disputed the qualifications of Dr. Anglin and Dr. Sobsey to give their evidence.[33]

44. In response, the Crown served reports prepared by four experts:

(a) Dr. Javeed Sukhera, Associate Professor of Psychiatry and Paediatrics, Western University;

(b) Dr. Tim E. Moore, Professor of Psychology, York University;

(c) Bruce Rivers, an expert and consultant on child welfare issues; and

(d) Melissa Currie, an expert on statistical analysis and data management.

45. Dr. Sukhera opined on the legislative and professional standards applicable to CPRI's operations, physical plant, and residential care of class members. Having reviewed these standards as well as documentary evidence regarding CPRI's internal reporting, auditing, and accreditations, Dr. Sukhera concluded that CPRI met all appropriate standards applicable over the class period.[34]

46. Dr. Moore opined on the fallibility of childhood memories. Having been asked to review the affidavits sworn by several class members for the motion for certification and their resident files, Dr. Moore concluded that there were indications of confused facts and other errors in the class members' recollections of their experiences at CPRI.[35]

47. Mr. Rivers opined on the nature and evolution of the duty to report abuse and harm under the *Child and Family Services Act* and related legislation over the class period. After reviewing internal guidelines, memoranda, training documents, and other documents related to CPRI's

[33] The Crown alleged that Dr. Anglin lacked the requisite qualifications to give expert opinion evidence relative to the appropriateness of services, therapeutic approaches, and treatment of individuals admitted to CPRI with mental health issues or deal diagnoses. The Crown alleged that Dr. Sobsey's training and experience were focused on special education and were not relevant to institutions like CPRI; that Dr. Sobsey was not impartial due to his alleged position as a "self-proclaimed advocate"; and that Dr. Sobsey's opinions extended beyond his proposed areas of expertise: Ptak Settlement Approval Affidavit at para. 44, PMR-SA, Tab 2, p. 22.
[34] Ptak Settlement Approval Affidavit at para. 47, PMR-SA, Tab 2, p. 22.
[35] Ptak Settlement Approval Affidavit at para. 48, PMR-SA, Tab 2, pp. 22-23.

relationship with the local London-Middlesex Children's Aid Society, Mr. Rivers concluded that CPRI was compliant with its duty to report over the class period.[36]

48. Ms. Currie analyzed class member residency data to provide opinions as to the mean length of stay at CPRI and variations in the mean over the class period. Ms. Currie concluded that over the class period, the length of stay ranged from a mean of approximately 77 days (2.5 months) to approximately 221 days (7 months), with an overall mean of approximately 143 days (4.5 months).[37]

49. A fifth expert report was ready to be served should the mediation have failed.

iv. Judicial Mediation and Subsequent Negotiations

50. Throughout the course of the litigation the Defendant rebuffed offers to discuss settlement and mediate, including a cancelled mediation in 2018.[38]

51. Finally, in the fall of 2020 while continuing to prepare for the commencement of trial on March 8, 2021, and while maintaining trial-ready postures, the parties agreed to participate in a mediation before The Honourable Justice Todd L. Archibald in early January.[39]

52. The mediation took place over late into the evening for two days when a third day of mediation was agreed to (January 5-7, 2021). The parties benefited from the extensive involvement and assistance from Archibald J.[40] Over the succeeding weeks, the parties continued negotiations to reach a final settlement agreement.[41] Finally, on February 22, 2021, with just two weeks before the commencement of trial, the parties executed the Settlement Agreement.

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[36] Ptak Settlement Approval Affidavit at para. 49, PMR-SA, Tab 2, p. 23.
[37] Ptak Settlement Approval Affidavit at para. 50, PMR-SA, Tab 2, p. 23.
[38] Ptak Settlement Approval Affidavit at paras. 32-34, PMR-SA, Tab 2, p. 18.
[39] Ptak Settlement Approval Affidavit at para. 35, PMR-SA, Tab 2, p. 18.
[40] Ptak Settlement Approval Affidavit at para. 35, PMR-SA, Tab 2, p. 18.
[41] Ptak Settlement Approval Affidavit at para. 36, PMR-SA, Tab 2, pp. 18-19.

E. The Proposed Settlement Agreement

53. The key terms of the Settlement are:

(a) $12,000,000 available made up of

(i) a $10,000,000 settlement fund (the "Settlement Fund"); and

(ii) a $2,000,000 contingency fund (the "Contingency Fund") to be made available by the Crown in the event the Settlement Fund is insufficient to pay the claims;

(b) The compensation that a claimant can receive ranges from $3,500 to $45,000;

(c) Cost of notice to the class and administration of the claims process are to be paid from the Settlement Fund;

(d) The compensation awards will not be subject to tax or government claw-backs of social assistance benefits; and

(e) The claims application process is paper-based and does not require former residents to testify or appear in person.

54. The key terms of the claims administration process are:

(a) The claims process is intended to be simple non-adversarial, and user-friendly;

(b) Claimants are presumed to be acting honestly and in good faith;

(c) A paper-based process not requiring claimants to testify or be cross-examined;

(d) The Defendant is only entitled to submit documents, without argument, in response to claims, if it so chooses. If it does, the claimant or Class Counsel have an opportunity to respond;

(e) Claimants have nine months to prepare and submit their claim forms;

(f) Claimants for the least serious claims of sexual assault are not required to submit any supporting documentation;

(g) Claimants for compensation for physical assault and for more serious claims of sexual assault are required to swear/affirm to the information they provide and submit supporting documentation from a physician, psychologist, counsellor, or other professional, depending on the claim category;

(h) There are provisions for payment to doctors, psychiatrists, counsellors, and other professionals to cover the cost of preparing the supporting documentation a claimant requires to make a claim;

(i) Claimants may, but are not required to, request their CPRI resident files to obtain supporting documentation through a streamlined process set up by the Settlement;

(j) A reconsideration process is included where if a claimant is found to be ineligible, if a claim is denied in whole, or if a claim for serious sexual assault is not assessed as such by the administrator;

(k) There is a process for the assessment of claims submitted after the claims deadline; and

(l) The decisions of the administrator and any reconsideration decisions are final and binding, with the exception of the administrator's determinations as to a class member's eligibility for compensation, which are reviewable by the court.

55. The proposed Settlement is modeled after the court-approved settlements in respect of the 15 other Schedule 1 Institutions. Specifically, this settlement is similar to the other Schedule 1 settlements in the following respects:

(a) Paper-based claims processes, employing user-friendly claims forms, in which the Crown has no right of cross-examination or response;

(b) Claims processes in which Class Members are presumed to be acting honestly and in good faith;

(c) Roughly equivalent compensation grids to define differing amounts of compensation for Class Members who have suffered different kinds and intensities of harm; and

(d) Commitments by the Crown that no amounts paid as compensation will be subject to tax or clawed back from social assistance benefits.

56. Due to particularities of this action, as well as lessons learned from previous actions, key differences include:

(a) Procedural fairness in the claims process enhanced by:

(i) A more robust reconsideration process;

(ii) A defined process to consider certain late claims;

(iii) A robust resident file request process; and

(iv) Access to the court on determinations of eligibility.

(b) Payments to doctors and other professionals to cover the costs of preparing supporting documentation for claims;

(c) Increase in compensation available up to up to a maximum of $45,000, from $42,000;

(d) Cost of administration and notice are included in Settlement Fund; and

(e) no compensation for low-level, unparticularized harm[42] or lower-level physical assaults.[43]

PART III - ISSUES AND THE LAW

A. The Test for Approving a Class Action Settlement

57. Pursuant to s. 29(2) of the *Class Proceedings Act, 1992*, a class action may only be settled with the approval of the court.[44] The case law is clear that a settlement should only be approved if the court is satisfied that it is fair, reasonable, and in the best interests of the class members.[45]

58. The overarching question is whether the settlement falls within a range or zone of reasonableness.[46] The assessment of the reasonableness of a settlement agreement is not a static valuation, but one that permits a host of acceptable outcomes depending upon the subject matter of the litigation and the nature of damages for which the settlement is intended to provide compensation.[47]

59. To determine whether the settlement is reasonable, "[t]he supervising court must compare the settlement with what would probably be achieved at trial, discounting for any defences, legal or evidentiary hurdles or other risks that would have to be confronted and overcome if the matter

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[42] No "Section A" claims from prior Schedule 1 settlements, which required simply to confirm that "harm" was suffered without particularizing the harm.
[43] Physical Assaults Level 1 (one or more physical assault with no observable injury or repeated, persistent and excessive wrongful acts constituting demeaning behaviour, or excessive physical punishment) and Level 2 (one or more physical assaults not cause serious physical injury but causing an observable injury such as black eye, bruise or laceration) from prior Schedule 1 settlements are excluded.
[44] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 29(2), Plaintiff's Settlement Approval Factum, Schedule B, Tab B.
[45] *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.) at para. 30, aff'd [1998] O.J. No. 3622 (C.A.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 9, Book of Unreported Authorities of the Plaintiff (hereinafter "**PBOA**"), Tab 3.
[46] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 69, PBOA, Tab 3; *Di Filippo and Caron v. Bank of Nova Scotia et al.*, 2019 ONSC 3282 at para. 8; *Clegg v. HMQ Ontario*, 2016 ONSC 2662 at paras. 31, 33, 37; *Sheridan Chevrolet v. Valeo S.A.*, 2021 ONSC 3555 at para. 4.
[47] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70, PBOA, Tab 3.

were to proceed to trial."[48] The court must also examine the fairness and reasonableness of the scheme of distribution under the proposed settlement.

B. The Settlement was Modelled after Similar Approved Settlements

60. This proceeding is the latest and likely final chapter in the litigation involving Ontario's Schedule 1 Institutions. Prior class proceedings involving fifteen (15) of the nineteen (19) Schedule 1 Institutions have all settled, and those settlements have all been approved and implemented.[49]

61. Each of those settlements included a gross settlement fund available to the class and compensation process, a paper-based claims process that does not require class members to testify, and individual compensation for specified harms of up to a maximum of $42,000 per person.[50]

62. The Settlement was framed in accordance with the settlements in *Slark*, *McKillop, Bechard* and *Clegg*: a gross settlement fund available to the class and compensation process, a paper-based claims process that does not require class members to testify, and individual compensation for specified harms of up to a maximum of $45,000 per person.

63. The claims process in the Settlement is almost identical to those in the settlements approved in *Slark*, *McKillop, Bechard* and *Clegg,* with adjustments based on the parties' experiences in the claims processes in those cases – including enhanced procedural fairness provisions.

64. Similar settlements and claims processes were also reached and approved by the court in *Seed* and *Welsh*.[51]

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[48] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 at para. 12.
[49] *Dolmage v. HMQ*, 2013 ONSC 6686; *McKillop and Bechard v. HMQ*, 2014 ONSC 1282; *Clegg v HMQ Ontario*, 2016 ONSC 2662.
[50] *Slark v. Ontario* Settlement Agreement, Schedule A Compensation Plan at para. 13, Exhibit "Y", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2Y, pp. 423-424; *McKillop v. Ontario* Settlement Agreement, Schedule A Compensation Plan at para. 13, Exhibit "Z", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2Z, pp. 447-448; *Bechard v. Ontario* Settlement Agreement, Schedule A Compensation Plan at para. 13, Exhibit "AA", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2AA, p. 464; *Clegg v. Ontario* Settlement Agreement, Schedule A Compensation Plan at para. 16, Exhibit "BB", Ptak Settlement Approval Affidavit, PMR-SA, Tab 2BB, pp. 499-500.
[51] *Seed v. Ontario*, 2017 ONSC 3534; *Welsh v. R*, 2019 ONSC 4204.

65. In approving the settlements in those comparable proceedings this Court noted:

(a) The paper-based claims process in *Slark* "avoid[ed] class members having to provide oral accounts and relive their experiences;[52]

(b) The overall terms of settlement in *Slark* "reflect[ed] the very real litigation risks the plaintiffs face[d]", and given the advanced age of class members and this historical nature of the claims, "the benefits of an immediate and certain settlement [could not] be overstated";[53]

(c) The settlements in *McKillop* and *Bechard* "fairly achieved" the compromise between the realities of protracted litigation, the outcome of which was uncertain, and the recognition that class members are entitled to financial compensation;[54]

(d) The *Slark* settlement provided a "legitimate template" for succeeding settlements, including the *Clegg* settlement, given the proximity of the parties to trial at the time the *Slark* settlement was concluded;[55]

(e) The class in *Clegg*, former residents of other Schedule 1 Institutions, benefitted from the non-monetary aspects of previous settlements, in particular the apology of the Premier of Ontario to "the men, women and children of Ontario who were failed by a model of institutional care for people with developmental disabilities", and the public access to approximately 63,000 documents, many from the ministerial level applicable to the entire Schedule 1 system, which resulted from *Slark*;[56]

(f) The settlement in *Seed* reflected the significant risks of ongoing litigation, in particular the to-be trial judge's view that it was unlikely that "the plaintiff could avoid individual damage hearings after a finding of liability, if indeed there were to be one, based upon a finding of institutional or systemic abuse, a notion, the proof of which would have been tricky in and of itself";[57]

(g) The paper-based claims process in *Seed* "avoid[ed] the shame and embarrassment that individual class members might [have] experience[d] if they were called upon or forced to disclose in a public forum the events which from their perspective was anything but pleasant";[58]

(h) But for the settlement in *Seed*, if the litigation "continued or was dragged out by the normal effluxion of hearing time and appeals, many of the class members, particularly those who passed through the defendant institution in the 50's and 60's,

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[52] *Dolmage v. HMQ*, 2013 ONSC 6686 at para. 30.
[53] *Dolmage v. HMQ*, 2013 ONSC 6686 at paras. 31-32.
[54] *McKillop and Bechard v. HMQ*, 2014 ONSC 1282 at paras. 28, 36.
[55] *Clegg v HMQ Ontario*, 2016 ONSC 2662 at para. 36.
[56] *Clegg v HMQ Ontario*, 2016 ONSC 2662 at paras. 17-18.
[57] *Seed v. Ontario*, 2017 ONSC 3534 at para. 12.
[58] *Seed v. Ontario*, 2017 ONSC 3534 at para. 15.

would either not participate in any resolution or would not live long enough to realize some finality to this chapter of their respective lives";[59]

(i) The amounts of compensation provided for under the *Welsh* settlement agreement were "decidedly more than would have been achieved had the case gone to trial", a result that was "frankly, impressive";[60] and

(j) The paper-based claims process in *Welsh* was "largely honour-based", comparing favourably with the likelihood that individual assessments would have been necessary had judgment been rendered following a common issues trial.[61]

66. This Settlement was designed based on the guidance from these decisions.

C. The Risks Facing the Class at the Common Issues Trial and Beyond

67. The Class faced significant risks as it approached the common issues trial and beyond in proving claims in an individual claims process in the event of success on the common issues.

i. Failings Independent of the Other Schedule 1 Institutions

68. While this case was initially framed in a similar fashion to *Slark*, *McKillop*, *Bechard*, and *Clegg*, it became apparent throughout the course of the litigation that CPRI was operated in a different fashion than the Schedule 1 Institutions that were the subject of those cases. Many of the systemic failings that were identified in the Schedule 1 Institutions that were subject to the previous proceedings were not present or not present to the same degree at CPRI. In particular:

(a) The populations served were different – CPRI admitted children with developmental disabilities with disturbed behaviours and/or serious psychiatric conditions and other children with serious psychiatric conditions;

(b) the express purpose of residential stays by class members were different – shorter term diagnosis and treatment instead of long-term custodial care;

(c) the number of class members housed in the institutions at any one time were different – while the population varied over time CPRI generally housed approximately 100 inpatients at a time as opposed to many hundreds in the cases of *Slark*, *McKillop*, and *Bechard*;

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[59] *Seed v. Ontario*, 2017 ONSC 3534 at para. 13.
[60] *Welsh v. R*, 2019 ONSC 4204 at para. 14.
[61] *Welsh v. R*, 2019 ONSC 4204 at para. 16.

(d) the average length of stay by class members was different – approximately 4 months at CPRI instead of years at other Schedule 1 Institutions;

(e) the staffing levels and approach to staffing were different – widespread understaffing compared to American Association on Mental Deficiency (AAMD) standards was not noted at CPRI;

(f) operational reviews by third parties were different – CPRI was accredited by the Canadian Hospital Accreditation Council and underwent compliance reviews pursuant to the *Child and Family Services Act*;

(g) operational policies and procedures relating to programing, patient care and self-help were different – CPRI had in place a number of committees and policies that were not in place in the other institutions;

(h) behavioural intervention approaches were different – at CPRI such interventions were stated to be in accordance with physicians' directions; and

(i) use of class member labour was different – there appeared to be no widespread use of resident labour in operating CPRI.[62]

69. Instead, additional or independent systemic failings were alleged with respect to CPRI (see para. 42 above). An assessment of these systemic allegations was unique as compared to the other Schedule 1 Institutions.

ii. Expert Opinions on Standards and Breach Differed

70. The experts retained by the parties were divided on the standards of care applicable to CPRI and whether CPRI met those standards during the class period. The alleged systemic failings noted above were identified or confirmed by the experts retained by the Plaintiff.

71. In addition to challenging the expertise of the Plaintiff's experts, the Defendant submitted reports from several experts who provided the following general opinions:

(a) CPRI's operations, physical plant, and residential care of class members (including internal reporting, auditing, quality control and accreditations) met all appropriate (and changing) standards applicable over the class period;

(b) Childhood memories are fallible, as exemplified by indications of confused facts and other errors in the class members' recollections of their experiences at CPRI; and

[62] Ptak Settlement Approval Affidavit at para. 40, PMR-SA, Tab 2, pp. 19-20.

(c) CPRI was compliant with its duty to report abuse to the Children's Aid Society in accordance with *Child and Family Services Act* over the class period.

72. There were significant risks to the Class that the opinions of the Defendant's experts would prevail at trial for the entire class period or portions thereof, thereby precluding findings of liability on a systemic basis at the common issues trial. Failure to obtain such finding of systemic negligence, for any period or periods of time, would negate class members' ability to obtain any compensation in individual assessment processes for those periods.

iii. Evidentiary Foundation Leading to Risks on Systemic and Individual Liability

73. Based on the evidence gleaned from Class Counsel's review of the productions, the examinations for discovery, the expert reports and opinions delivered, the *Rule* 36 examination of Dr. Goldberg and discussions with class members, the following was understood in advance of trial:

(a) The vast majority of physical incidents involving class members reported at CPRI were as a result of resident-on-resident interactions;

(b) The vast majority of physical incidents between staff and residents reported at CPRI or complained of related to application of behavioural intervention techniques;

(c) The average length of stay of a class member at CPRI was approximately 4 months - materially shorter than the years of residency in other Schedule 1 Institutions;

(d) There did not appear to be overcrowding of class members as existed in other Schedule 1 Institutions;

(e) There did not appear to be understaffing as existed in other Schedule 1 Institutions;

(f) Parents voluntarily chose to admit their children to this institution knowing of its purpose and likely having some understanding of the other patients admitted;

(g) CPRI received accolades and praise for its programming;[63]

[63] Including: the American Psychiatric Association's "Gold Achievement Award" in 1970; the Canadian Association for Community Living identified CPRI as setting the standard, and providing a model to follow, for similar units in Canada; the Royal Commission on Health Services, 1961-1964, concluded that CPRI should be used as a model for 15 pan-Canadian clinics; Accreditation Canada commented that CPRI “has much to celebrate” and “has a solid reputation in the community, and is viewed as a leader, a mentor and an innovator”; and Walter Williston noted that "[t]his institute, I say without qualification, is one of the greatest centres of its kind in the world". See Ptak Settlement Approval Affidavit at paras. 11, 52(f)-(i), PMR-SA, Tab 2, pp. 11, 24.

(h) CPRI implemented policies and procedures intended to address the protection of residents and attempt to ensure regular quality control, which did not exist at all or to the same extent at other Schedule 1 Institutions;[64]

(i) CPRI's operations were reviewed by third parties, including accreditation by Canadian Hospital Accreditation Council and compliance reviews pursuant to the *Child and Family Services Act*; and

(j) CPRI initiated a trauma-informed model of care during the class period.

74. This evidentiary foundation faced by the class significantly increased the risk of being unable to prove systemic negligence for the entire class period and of individuals being unable to prove their claims in individual assessment processes or individual proceedings. Some of the factors increasing risk to the class included:

(a) Claims against an institution for assaults between residents are significantly more challenging than claims of employee-perpetrated assaults, for which vicarious liability may be established;[65]

(b) Absent a finding about the systemic use of behaviour intervention techniques, claims related to alleged employee physical interactions would likely involve an assessment of whether behaviour intervention techniques, approved by a physician, were applied appropriately – significantly increasing the liability risk to class members;

(c) To prove systemic failings the Plaintiff would have to overcome or distinguish:

(i) the accolades and praise for programming;

(ii) complimentary third-party reviews of operations conducted at CPRI; and

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[64] Such as: in or around April of 1980, CPRI enacted a patients' a "Bill of Rights", which was unique to CPRI and was not introduced at other Schedule 1 Institutions; CPRI had in place the following committees: Administrative Advisory Committee; Professional Advisory Committee; Medical Advisory Committee; Clinical Care and Audit Committee; Quality Assurance Committee; Resident Care Audit Committee; Committee for the Prevention and Management of Physically Aggressive Behaviour; and Behavioural Standards Review Committee: Ptak Settlement Approval Affidavit at paras. 52(e), (l), PMR-SA, Tab 2, p. 24.

[65] See e.g. *Rollins (Litigation Guardian of) v. English Language Separate District School Board No. 39*, [2009] O.J. No. 6193 (Sup. Ct.), aff'd 2012 ONCA 104, where, the trial having been conducted nineteen years after the incident in question, the plaintiffs were unable to establish that an injury inflicted by one child upon another was the result of inadequate supervision by school authorities, PBOA, Tab 4; *Patrick v. St. Clair Catholic District School Board*, 2013 ONSC 4025; *Lee (Litigation Guardian of) v. Toronto District School Board*, 2013 ONSC 3085; *Da Silva v. Gomes*, 2018 ONCA 610, where the Ontario Court of Appeal affirmed at para. 15 that "supervising authorities are not legally responsible for 'a sudden unexpected event in the midst of an acceptable, safe activity'". See also *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60, illustrating the prospect that institutional vicarious liability may not even be made out in respect of abuses committed by an employee.

(iii) the policies and procedures intended to address the protection of residents and attempt to ensure regular quality control;

(d) Expert evidence suggesting that childhood memories are frail and prone to confusion and error, which might impact a class member's ability to prove their individual claims; and

(e) Voluntary assumption of risk by parents who admitted their children being aware of the purpose of the institution and some understanding of the other residents housed there might have been raised in defence of claims in this proceeding.

iv. Legal Risks Faced by the Class

75. The Crown sought to defend this proceeding, in part, by alleging that many of the decisions, actions or omissions complained of in this proceeding were policy decisions rather than operational decisions, and were immune from challenge in court.[66] The Class faced a risk that the court may find some actions complained of, such as the choice of housing particular groups of Class Members at the same facility, to be policy decisions.

76. In or about July 2019 this risk was markedly increased with the coming into force of the *Crown Liability and Proceedings Act* ("*CLPA*"). The *CLPA* sought to significantly curtail negligence actions against the Defendant. When the *CLPA* was announced it was feared that this proceeding would be dismissed in its entirety had a fully restrictive interpretation of the *CLPA* prevailed. The scope and application of the *CLPA* were only beginning to be assessed at the level of the Superior Court of Justice in 2019 and 2020. The Court of Appeal's decision in *Francis v Ontario*[67] was only rendered after the mediation in this matter, after the Settlement Agreement was executed and after the common issues trial was to begin. Ultimately the *CLPA* added significant risk to this proceeding from July 2019 until Settlement.

77. In addition, despite *Francis v Ontario*'s limiting of the application of the *CLPA,* the risk relating to the Crown's common law immunity for policy decision-making continued.[68]

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[66] Statement of Defence at para. 49, Exhibit "F" to the Ptak Settlement Approval Affidavit, PMR-SA, Tab 2F, p. 185. See *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42.
[67] *Francis v. Ontario*, 2021 ONCA 197.
[68] See *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 71-91.

78. Other defences raised by the Crown included:

(a) Relying on the Ontario Court of Appeal's decisions in *Brazeau v. Canada (Attorney General)*[69] and *Dennis v. Ontario Lottery and Gaming Corporation*,[70] the Crown took the position that the Plaintiff was unable to articulate a systemic, class-wide duty of care, and had only pleaded a series of discrete breaches of legal duties (e.g. inadequate supervision, failure to provide privacy, failure to properly report suspected or alleged abuse, and failure to implement policies to reduce the use of restraints and intrusive measures). If the Plaintiff were unable to establish a systemic duty of care, it would not be possible to prove the Crown's liability on a class-wide basis;

(b) Relying on the Supreme Court of Canada's decision in *Hinse v. Canada (Attorney General)*,[71] the Crown also took the position that the action sought to hold it directly liable in negligence, rather than vicariously liable for the negligence of Crown servants pursuant to s. 5(1)(a) of the *Proceedings Against the Crown Act*.[72] While the force of this argument was also weakened by the Ontario Court of Appeal's decision in *Francis v. Ontario*,[73] it remained live throughout the history of this action through to the conclusion of the Settlement;

(c) The Crown took the position that CPRI was operated over the class period in accordance with prevailing standards of care,[74] and that the alleged failure to comply with the "best interests of the child" standard had been rejected as a ground of liability by the Supreme Court of Canada in *K.L.B. v. British Columbia*.[75] The Crown argued that the experts called by the Plaintiff had failed to identify cognizable standards against which CPRI's performance could be measured, and that they failed to account for the important elements of CPRI's training programs and operations, which, according to the Crown, more than met applicable standards; and

(d) The Crown specifically pleaded in its Statement of Defence that it would not be possible to quantify or award aggregate damages in respect of any harm suffered by the Class Members, as "[t]he experience of each child admitted to CPRI was unique."[76] Thus, even if liability were found, it is possible that it would be many years before compensation could be awarded, and only after time-consuming

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[69] *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184 at paras. 114-122.
[70] *Dennis v. Ontario Lottery and Gaming Corporation*, 2013 ONCA 501 at paras. 49-60.
[71] *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at paras. 91-92.
[72] *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 5(1)(a), Plaintiff's Settlement Approval Factum, Schedule B, Tab B.
[73] *Francis v. Ontario*, 2021 ONCA 197 at paras. 142-147.
[74] Statement of Defence at paras. 52-53, Exhibit "F" to the Ptak Settlement Approval Affidavit, PMR-SA, Tab 2F, 186.
[75] *K.L.B. v. British Columbia*, 2003 SCC 51 at paras. 44-46.
[76] Statement of Defence at para. 68, Exhibit "F" to the Ptak Settlement Approval Affidavit, PMR-SA, Tab 2F, p. 189.

individual claims processes that were onerous relative to the claims process established under the Settlement.

79. Further the Defendant sought to curtail the evidence the Plaintiff intended to call at the common issues trial to prove his case. The Defendant initially sought leave to examine the Plaintiff's Class Member witnesses for trial. Following this Court's dismissal of the Crown's motion for leave to examine class members, the Crown notified Class Counsel that it would object to the admission of any class member's evidence as to their individual experiences at CPRI.[77] The Crown's position on individual Class Members' evidence raised the risk that such evidence would not be admitted by the trial court.

v. Other Litigation Risks

80. In addition, the following case-specific litigation risks for trial existed:

(a) Risks associated with the fading memories of witnesses, incomplete document retention over the years, and inability to adduce evidence due to lack of witnesses, among other risks;

(b) Risk of witnesses not providing expected evidence, the documentation not being sufficient, vagaries of trial and trial testimony, and the uncertainty associated with the court making findings of fact existed in this case;

(c) Risk that a court will not find there to be sufficient evidence or inferences necessary to find liability across the entire class across the entire class period;

(d) Risks associated with changing standards over time, which may have resulted in findings that those standards were not breached at all or only breach for certain periods this proceeding covered - This may have led to success for some class members but not for others;

(e) Risk that the Plaintiff would be unsuccessful in proving negligence or breach of fiduciary duty altogether; and

(f) Risk that the Plaintiff succeeds in negligence and/or fiduciary duty, but is not awarded aggregate damages and the court orders individual assessment hearings.

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[77] Letter from Lisa Brost dated December 17, 2020, Exhibit "R" to the Ptak Settlement Approval Affidavit, PMR-SA, Tab 2R, p. 346.

vi. Risks and Processes Involved in Individual Hearings

81. Even assuming that success was achieved for the Class on liability at the common issues trial, it was possible that individual assessments would have be ordered instead of or in addition to aggregate damages. If so, such hearings:

(a) would likely be adversarial in nature, which could lead to a need for representation of and potentially increased expenses for Class Members;

(b) would likely require significant time to complete, leading to prejudice for the aging Class and a denial of timely access to justice;

(c) would likely require Class Members to testify, forcing a traumatic recounting of the harms they suffered; and

(d) would likely limit recovery to those Class Members who are able to overcome perceived or alleged credibility issues as alleged by the Defendant as a result of their mental health issues, which could prove prejudicial for a significant component of this Class.

vii. Delays Associated with Trial and Processes that Would Follow

82. The common issues trial was set to commence on March 8, 2021 and last for twelve (12) weeks. Even if the Plaintiff was successful at the common issues trial, there would likely be a significant delay in obtaining compensation associated with trial and any attendant appeals. Class Counsel estimates that it could take a further eighteen (18) months following the completion of the common issues trial to have a final decision that could be implemented, without any guarantee of success.[78] In addition, should an aggregate award of damages not be made, individual assessments of the class members' damages could take years given the size of the class and the claims being made. Any such delays would result in certain prejudice to class members, and accordingly, a denial of access to justice thereto.

[78] Ptak Settlement Approval Affidavit at para. 59, PMR-SA, Tab 2, p. 27.

D. The Benefits of the Settlement

i. Key Settlement Terms

83. The key terms of the Settlement Agreement include:

(a) $12,000,000 available made up of:

(i) a $10,000,000 settlement fund (the "Settlement Fund"); and

(ii) a $2,000,000 contingency fund (the "Contingency Fund");

(b) The compensation awards will not be subject to tax or government claw-backs;

(c) The claims application process is paper-based and does not require former residents to testify or appear in person; and

(d) The compensation that a claimant can receive ranges from $3,500 to $45,000;

84. The Settlement structure and claims process are very similar to and were structured based on the settlements in *Slark*, *McKillop, Bechard*, and *Clegg*.

85. In addition, the claims administrator – who will be reviewing and assessing the claims – is the same as that involved in *Slark*, *McKillop*, *Bechard*, and *Clegg* as well as in and *Welsh*. This will increase the likelihood of consistent assessment between claimants in this proceeding and those in cases with similar if not identical claims processes.

86. The key differences between this Settlement and those in the other Schedule 1 Institution settlements are the lack of compensation for low level unparticularized harm[79] and lower level physical assaults.[80] These concessions are reasonable and necessary given the absence of evidence supporting such claims, as noted above. In light of, *inter alia,* the Williston Report, the discovery evidence, the expert evidence and the trial evidence of Dr. Goldberg, the Plaintiff made the informed decision to prioritize compensation for individuals who had suffered more extensive

[79] No "Section A" claims from prior Schedule 1 settlements, which required simply to confirm that "harm" was suffered without particularizing the harm.

[80] Physical Assaults Level 1 (one or more physical assault with no observable injury or repeated, persistent and excessive wrongful acts constituting demeaning behaviour, or excessive physical punishment) and Level 2 (one or more physical assaults not cause serious physical injury but causing an observable injury such as black eye, bruise or laceration) from prior Schedule 1 settlement are excluded.

harm. Risking that compensation in order to "roll the dice" on lower level harms would not have been in the best interests of the Class as a whole.

ii. The Benefits of the Claims Process under the Settlement

87. The paper-based claims process provides significant non-monetary benefits and promotes access to justice as compared to an individual claims process following a common issues trial or an individual action, including:

(a) The claims process is intended to be simple non-adversarial, and user-friendly;

(b) Claimants are presumed to be acting honestly and in good faith;

(c) The paper-based process does not require claimants to testify or be cross-examined;

(d) There is a nine month claims process resulting in timely payments;

(e) The Defendant is only entitled to submit documents, without argument, in response to claims, if it so chooses. If it does, the claimant or Class Counsel have an opportunity to respond; and

(f) There are provisions for reimbursement for fees for the cost of preparing the supporting documentation.

88. These benefits are a very important component of the Settlement Agreement. In particular, there is a concern that class members might be hesitant to come forward if individual assessment hearings were ordered after a common issues trial. Class members often convey to Class Counsel that they are afraid to be involved because of retribution from the defendants and, in that context, repeatedly want assurances that they will not be exposed. Further, the class members often explain that they support the action, but are very reluctant to describe their experiences, because they are embarrassed, ashamed or do not want it publicly known what happened to them. The paper-based claims process herein will not require class members to testify or appear in person, and it will not require any personal information to be disclosed publicly. This will increase the number of people who will chose to seek recourse for the harms they suffered while at CPRI.

89. The presumption of honesty and lack of a requirement to testify and be cross-examined is of a significant benefit to Class Members, who would otherwise face full scrutiny of their allegations, childhood memories, and personal and medical circumstances and conditions.

Effectively, if a Class Member states what happened to them in this claims process, they will be believed and compensated accordingly.

90. Finally, as in *Clegg*, this class has indirectly received an apology from the Premier of Ontario that was delivered on December 9, 2013. That apology extended beyond class members in *Slark*, *McKillop*, and *Bechard* actions and included an apology to those in Schedule 1 system as a whole as Premier Wynne noted "I offer an apology to the men, women and children of Ontario who were failed by a model of institutional care for people with developmental disabilities."[81]

E. Sufficiency of the settlement funds

91. To assess whether the Settlement Fund and Contingency Fund (totaling $12,000,000) would be sufficient for the claims expected to be made in this proceeding, Class Counsel undertook a detailed comparative analysis of the settlement distributions in *Clegg, Seed* and *Welsh*.

92. The net expected funds available to pay class member claims in this case are approximately $6,850,000.[82] Class Counsel compared this sum to the net compensation paid to class members in *Clegg, Seed*, and *Welsh* and adjusted for the differential in class sizes, the fewer levels of compensable harm in the Settlement and the increased quanta of individual compensation in the Settlement. The expected funds available to pay class member claims in this case (approximately $6,850,000) is well within the range of $5,400,000 to $8,300,000 estimated based on the net compensation for comparable claims in *Clegg*, *Seed*, and *Welsh*.

93. This comparative analysis did not take into account the following factors, among others, which might impact claims in this case:

(a) the significant evidence that CPRI was operated differently than, and in many ways superior to, other Schedule 1 Institutions;

(b) the drastically fewer accounts of staff on resident physical and sexual abuse at CPRI as compared to the other Schedule 1 Institutions;

(c) the differential in the length of stay in this case (approximately 4 months) to that in other Schedule 1 Institutions (often many years);

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[81] Ptak Settlement Approval Affidavit at para. 103, PMR-SA, Tab 2, pp. 36-37.

[82] This figure represents the value of the Settlement Fund less legal fees, disbursements, CPF levy, notice and administration cost, plus the Contingency Fund less the maximum CPF levy on the Contingency Fund.

(d) the differential in staffing levels and training as compared to other Schedule 1 Institutions;

(e) the differential in the accommodations for class members and lack of overcrowding as compared to other Schedule 1 Institutions;

(f) the accreditation and compliance reviews undertaken at CPRI; and,

(g) the accolades received by CPRI for its programming including Walter Williston's report from 1971 which was critical of other Schedule 1 Institutions but noted about CPRI that "[t]his institute, I say without qualification, is one of the greatest centres of its kind in the world."

94. The above estimates and comparable factors should provide comfort that the combination of the Settlement Fund and Contingency Fund should be sufficient to satisfy the claims of Class Members that are compensable under the Settlement.

F. The Settlement is Fair, Reasonable, and in the Best Interests of the Class as a Whole

95. The Plaintiff and Class Counsel are of the view that the Settlement is fair, reasonable and in the best interests of the Class given the following factors:

(a) The evidentiary foundation leading to trial;

(b) The risks associated with proving liability at the common issues trial;

(c) The risk, delays, and adversarial nature of an individual claims process if the Plaintiff were successful at the common issues trial but aggregate damages were not awarded;

(d) The delays associated with trial and attendant appeals;

(e) The user-friendly, paper-based claims process that promotes access to justice; and

(f) The comparison between the Settlement in the present case to the settlements in *Slark*, *McKillop*, *Bechard,* and *Clegg*, given the differing factual matrix.

96. In light of the evidence presented and positions taken, and the risks of proceeding to a common issues trial, considering the risks and likely delays that would have followed even in the event of success in the common issues trial, and given the confidentiality and simplicity of the claims and distribution processes, the Settlement ought to be approved.

PART IV - ORDER REQUESTED

97. The Plaintiff respectfully requests that the Court grant this motion and approve the proposed Settlement Agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of June, 2021.

DAVID ROSENFELD
ADAM TANEL
JAMIE SHILTON

KOSKIE MINSKY LLP

Lawyer for the Plaintiff

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Dolmage, McKillop and Bechard v. HMQ*, 2014 ONSC 1283
2. *Dolmage v. HMQ*, 2013 ONSC 6686
3. *McKillop and Bechard v. HMQ*, 2014 ONSC 1282
4. *Clegg v. HMQ Ontario*, 2016 ONSC 2662
5. *Seed v. Ontario*, 2017 ONSC 3534
6. *Welsh v. R*, 2019 ONSC 4204
7. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.)
8. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 (C.A.)
9. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)
10. *Di Filippo and Caron v. Bank of Nova Scotia et al.*, 2019 ONSC 3282
11. *Sheridan Chevrolet v. Valeo S.A.*, 2021 ONSC 3555
12. *Brown v. Canada (Attorney General)*, 2018 ONSC 3429
13. *Rollins (Litigation Guardian of) v. English Language Separate District School Board No. 39*, [2009] O.J. No. 6193 (Sup. Ct.)
14. *Rollins (Litigation Guardian of) v. English Language Separate District School Board No. 39*, 2012 ONCA 104
15. *Patrick v. St. Clair Catholic District School Board*, 2013 ONSC 4025
16. *Lee (Litigation Guardian of) v. Toronto District School Board*, 2013 ONSC 3085
17. *Da Silva v. Gomes*, 2018 ONCA 610
18. *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60
19. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
20. *Francis v. Ontario*, 2021 ONCA 197
21. *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184
22. *Dennis v. Ontario Lottery and Gaming Corporation*, 2013 ONCA 501

23. *Hinse v. Canada (Attorney General)*, 2015 SCC 35

24. *K.L.B. v. British Columbia*, 2003 SCC 51

SCHEDULE "B" - RELEVANT STATUTES

1. *Class Proceedings Act, 1992*, S.O. 1992, c. 6

Discontinuance, abandonment and settlement

29 (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

2. *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17

Extinguishment of causes of action respecting certain governmental functions

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Policy decisions

(4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.

Same, policy matters

(5) For the purposes of subsection (4), a policy matter includes,

(a) the creation, design, establishment, redesign or modification of a program, project or other initiative, including,

(i) the terms, scope or features of the program, project or other initiative,

(ii) the eligibility or exclusion of any person or entity or class of persons or entities to participate in the program, project or other initiative, or the requirements or limits of such participation, or

(iii) limits on the duration of the program, project or other initiative, including any discretionary right to terminate or amend the operation of the program, project or other initiative;

(b) the funding of a program, project or other initiative, including,

(i) providing or ceasing to provide such funding,

(ii) increasing or reducing the amount of funding provided,

(iii) including, not including, amending or removing any terms or conditions in relation to such funding, or

(iv) reducing or cancelling any funding previously provided or committed in support of the program, project or other initiative;

(c) the manner in which a program, project or other initiative is carried out, including,

(i) the carrying out, on behalf of the Crown, of some or all of a program, project or other initiative by another person or entity, including a Crown agency, Crown corporation, transfer payment recipient or independent contractor,

(ii) the terms and conditions under which the person or entity will carry out such activities,

(iii) the Crown's degree of supervision or control over the person or entity in relation to such activities, or

(iv) the existence or content of any policies, management procedures or oversight mechanisms concerning the program, project or other initiative;

(d) the termination of a program, project or other initiative, including the amount of notice or other relief to be provided to affected members of the public as a result of the termination;

(e) the making of such regulatory decisions as may be prescribed; and

(f) any other policy matter that may be prescribed.

3. *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27

Liability in tort

5 (1) Except as otherwise provided in this Act, and despite section 71 of the *Legislation Act, 2006*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

(d) in respect of a tort committed by any of its servants or agents;

JAMES YEO Plaintiff	and	**HMQ** Defendant	Court File No. CV-16-547155-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT **TORONTO**

FACTUM OF THE MOVING PLAINTIFF
(Motion for Settlement Approval
Returnable June 23, 2021)

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