CITATION: C.S. v. Ontario, 2021 ONSC 6851
COURT FILE NO.: CV-16-00543895-00CP
DATE: 20211014

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
C.S.	)	*James Sayce*, *Jay Strosberg*, *Jamie Shilton*, and *Scott Robinson*, for the Plaintiff
Plaintiff	)	
– and –	)	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO	)	*Christopher A. Wayland* and *Jonathan Sydor* for the Defendant
Defendant	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: October 14, 2021

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*,[1] this action, which was commenced in 2015, was certified as a class action in 2018. In 2021, the parties have now agreed to settle subject to court approval. The Plaintiff, C.S., moves for approval of a $15.0 million settlement and Class Counsel moves for approval of its fee.

[2] Class Counsel seeks approval from the Court for fees in the amount of $4.05 million plus HST, which equates to a contingency fee percentage of 27% and a multiplier of approximately 2.3 on the sum of Class Counsel's billed time and anticipated time in the implementation of this settlement. Class Counsel seeks approval of an honorarium for C.S. of $15,000. In addition, Class Counsel seeks approval of the statutory levy for the Class Proceedings Fund and reimbursement of disbursements paid by the Fund.

[3] The action concerns the practice of "Youth Segregation" as implemented by the defendant provincial government of Ontario at its youth penal institutions. In the certification Order, Youth Segregation is defined as "the segregation at a Youth Justice Facility of a person under the age of eighteen alone in a designated room or area for more than six consecutive hours without any meaningful human contact."

[4] At the heart of the litigation is the question whether Youth Segregation is another

[1] S.O. 1992, c. 6.

Orwellian euphemism for torturous solitary confinement and a violation of the *Canadian Charter of Rights and Freedoms*.[2]

[5] In the last decade, the matter of whether the use of solitary confinement in federal and provincial adult and youth penal institutions is contrary to the *Charter* has been much litigated across the country.[3] The case at bar was litigated in the judicial light and fresh air of the contemporary jurisprudence that has provided declaratory and compensatory relief to the inmates who suffered from solitary confinement.

[6] However, without resolving the issue of whether Youth Segregation is the equivalent to the unconstitutional and unconscionable use of solitary confinement but having prompted review and some modifications in Ontario's practice, the case at bar has now settled in the atmosphere of the contemporary jurisprudence.

[7] For the reasons that follow, I approve the settlement, the honorarium, and Class Counsel's fee request and the ancillary relief.

B. Procedural History

[8] It is an understatement to say that this action was hard-fought.

[9] The Class Members in this action are persons who were detained in penal institutions under the *Youth Criminal Justice Act*.[4] The names of the Representative Plaintiffs and Class Members in this action have been reduced to initials.

[10] In the fall of 2015, P.M. (who was later replaced by C.S. as Representative Plaintiff) retained Class Counsel to commence an action against Ontario in respect of Youth Segregation in Youth Justice Facilities, the penal institutions for juveniles. These detention centres are operated by Ontario or Ontario supervises their operation by non-governmental organizations (NGOs) under contract with the province.

[11] Class Counsel is a consortium of Koskie Minsky LLP and Strosberg Sasso Sutts LLP.

[12] On November 3, 2015, the Statement of Claim was issued. The action against Ontario concerned the practice of Youth Segregation as implemented by Ontario at its youth penal institutions some of which are operated by the province and some of which were operated by NGOs under contract with the province.

[13] In December 2015, J.K. was added as a plaintiff and the Statement of Claim was amended.

[14] In May 2016, Ontario delivered its Statement of Defence, and it served a Third Party Claim on the NGOs that were operating youth justice facilities. Ontario sought contribution and indemnity from the NGOs.

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[2] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.
[3] *Francis v. Ontario*, 2020 ONSC 1644, aff'd 2021 ONCA 197; *Reddock v. Canada (Attorney General)*, 2019 ONSC 5053, aff'd 2020 ONCA 184; *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888, aff'd 2020 ONCA 184; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491, aff'd 2019 ONCA 243; *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, aff'd 2019 BCCA 228.
[4] S.C. 2002, c.1.

[15] Ontario vigorously defended the action and vigorously resisted certification. It denied any breach of the *Charter* or negligence or breach of fiduciary duty. Ontario pleaded that its decisions, actions, and omissions challenged by the Plaintiff constituted "policy decisions" for which it would not be liable in negligence. It relied on the coming into force of the *Crown Liability and Proceedings Act, 2019*[5] in the summer of 2019 which statutorily defined policy activity in respect of which Ontario could not be sued in negligence. It relied on limitation period defences under the *Limitations Act, 2002*.[6]

[16] In May 2016, P.M. experienced a mental health episode, and P.M. was no longer capable of representing the Class Members. Class Counsel received instructions from J.K. to request leave to file an amended pleading removing P.M. as a plaintiff. Ontario consented to the motion, and the Court granted leave. J.K. carried on as the lone putative Representative Plaintiff.

[17] In October 2016, J.K. and the NGOs brought motions to strike Ontario's Third Party Claim and Ontario brought a motion to require the Plaintiff to bring a Youth Court application for access to the institutional records that Ontario claimed were necessary for its response to the Plaintiff's motion for certification. I heard these motions together. I granted the motion to strike the Third Party Claim,[7] and I granted Ontario's motion with respect to the youth records.[8]

[18] There were appeals from both orders to the Ontario Court of Appeal. The appeal with respect to the youth records was quashed as being within the jurisdiction of the Divisional Court,[9] and the Divisional Court dismissed the motion for leave to appeal.[10]

[19] With respect to the third party claims, the Court of Appeal held that J.K could limit his claim for damages from Ontario in respect of the NGO-operated facilities to the amount corresponding with Ontario's relative degree of fault.[11] However, the Court held that J.K.'s Fresh as Amended Statement of Claim was not sufficiently clear as to achieve this result. The Court allowed the appeal and provided language for an amended Statement of Claim. J.K amended the Statement of Claim in accordance with the Court of Appeal's guidance.

[20] The action moved towards a hearing of the certification motion. The Plaintiff served a motion record, two supplementary records, and a reply record, totaling over one thousand pages of materials. Ontario's voluminous responding record comprised four volumes. Extensive cross-examinations took place in July and August 2018. The cross-examination of Dr. Stuart Grassian, the Plaintiff's main expert, took a full day, with the transcript running in excess of three hundred pages. Ontario's examinations of the Plaintiff and of the class member affiants were also lengthy, with several transcripts running over one hundred pages.

[21] In the run-up to the certification motion, discussions between the parties about Ontario's position on the certification motion raised the prospect of narrowing the claim to exclude the NGO-operated Youth Justice Facilities. J.K. agreed to seek the Court's approval to narrow his claim to only the Ontario-operated facilities and Ontario agreed not to oppose the certification

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[5] S.O. 2019, c. 7, Sched. 17.
[6] S.O. 2002, c. 24, Sch. B.
[7] *J.K. v Ontario*, 2016 ONSC 8047.
[8] *J.K. v Ontario*, 2016 ONSC 8040.
[9] *J.K. v. Ontario*, 2017 ONCA 332.
[10] *J.K. v. Ontario*, +.
[11] *J.K. v. Ontario*, +.

motion.

[22] The rationale for J.K. excluding the NGO-operated facilities included the following considerations: (a) the challenge of proving vicarious liability; (b) the challenge of proving Ontario negligent in its role in overseeing the NGO-operated facilities; (c) the likelihood that Ontario would have rights of production and discovery against NGOs with the prospect of delays and complications in this action; and (d) the fact that a substantial majority of Youth Segregation placements, up to 90% in some years, took place in Youth Justice Facilities directly operated by Ontario.

[23] Following a hearing on December 17, 2018, without opposition, I certified the action as a class proceeding excluding NGO-operated Youth Justice Facilities.[12] In addition, I substituted C.S. for J.K. as the Representative Plaintiff.

[24] The case at bar now concerns Youth Segregation placements at the following nine Youth Justice Facilities, all of which are or were directly operated by Ontario: Bluewater Youth Centre; Brookside Youth Centre; Cecil Facer Youth Centre; Donald Doucet Youth Centre; Invictus Youth Centre; Justice Ronald Lester Youth Centre; Roy McMurtry Youth Centre; Sprucedale Youth Centre; and Toronto Youth Assessment Centre.

[25] The court-supervised notice program was carried out between January 9, 2019 and July 1, 2019. Pursuant to the certification order, Class Members wishing to opt out of the proceeding were required to submit an opt-out form by April 9, 2019. No opt-out forms were received.

[26] In July 2020, the Plaintiff wrote to Ontario to make a discovery request, following which the parties engaged in informal settlement discussions. The parties then engaged Linda Rothstein, a partner with Paliare Roland Rosenberg Rothstein LLP to seek her assistance in mediating a resolution to the action.

[27] On December 21, 2020, Class Counsel wrote to this Court to advise that the parties had agreed to mediation. I was advised that for the mediation to be fruitful, better class size data was necessary. Class Counsel proposed that the Court issue a direction with respect to an application for access to youth records so that Ontario could prepare an accurate class size estimate for the purposes of the mediation.

[28] After I issued the requested direction, the parties attended before Justice Campbell of the Ontario Court of Justice in January 2021 to obtain access to relevant youth records. Ontario then prepared class size data, which it provided to Class Counsel. Ontario estimated that there are approximately 3,126 eligible individuals who meet the class definition. Those individuals were placed in secure isolation/secure de-escalation for at least six hours between April 1, 2004 and December 17, 2018, one or more times.

[29] The mediation was conducted by Ms. Rothstein over three days on March 25-26 and May 5, 2021. Continuous discussions between the parties took place in the interim.

[30] Following more negotiations, the parties concluded the terms of the Settlement Agreement on August 18, 2021.

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[12] *J.K. v. Ontario*, 2018 ONSC 7545.

C. Settlement Agreement

[31] The major terms of the settlement agreement are as follows:

a. Ontario pays $15 million for a settlement fund.

b. The Class Members may make claims for one or more placements in Youth Segregation. The compensation ranges from $1,000 to $40,000 per placement.

c. There is a nine-month time period to submit claims.

d. The claims process is paper-based, confidential, and non-adversarial in the sense that there are no in court proceedings. Claimants are not required to testify or appear in person. Claims are adjudicated on the basis of institutional records, unless the records are missing or substantially incomplete or unreliable in which case the adjudication is made on the basis of the claim form. Claimants will be required to complete claim forms setting out information about their identities and their experiences in Youth Segregation.

e. Cost of notice to the class and administration of the claims process are paid from the settlement fund.

f. Claimants will be required to sign consents authorizing the disclosure of relevant youth records for the purposes of the determination of their claims.

g. The lowest value Category 1 claims will be determined by the Claims Administrator.

h. Category 2-4 claims for higher levels of compensation will be adjudicated by the Honourable S. Casey Hill, retired judge of the Superior Court of Justice.

i. Class Members will receive compensation ranging from $1,000 - $35,000 for each approved claim, and each Class Member may make multiple claims in respect of multiple placements.

j. Each claimant with a Category 4 claim may receive a top-up to their compensation, in an amount of up to $5000, on a *pro rata* basis, if there are remaining funds in the settlement fund after all claims are processed.

k. If there are insufficient funds to pay all approved claims in full, the amounts payable will be adjusted downward on a *pro rata* basis.

[32] In the 2015 publication, *It's a Matter of Time*, about the use of segregation in Youth Justice Facilities in Ontario, the Provincial Advocate for Children and Youth reported that in none of the years 2009, 2013, or 2014 did any of the Youth Justice Facilities operated by Ontario report that average secure isolation/secure de-escalation placements were more than 72 hours – the threshold for a Category 2 or $5000 claim.

[33] The Advocate reported that among a subset of Ontario-operated Youth Justice Facilities, 86/834 placements in 2009 lasted more than 72 hours, with 41/460 and 38/436 placements exceeding that threshold in 2013 and 2014, respectively. In simpler terms, the percentage of placements which might exceed the 72-hour threshold to make a Category 2 claim or higher ranged from 8.7% to 10.3% over those three years.

[34] While the Advocate's data does not break down the remaining 89.7% to 91.3% in a form that would permit Class Counsel to estimate the proportion of eligible Category 1 placements (6-72 hours), the data with respect to average placement durations indicate that placements in the Category 1 range are typical experiences of secure isolation in the Ontario-operated Youth Justice Facilities.

[35] Within the same subset of Youth Justice Facilities, placements lasting 5-9 days ranged from 2.4% to 2.8% of all placements over the three reporting years, placements lasting 10-14 days ranged from 0.5% to 1.1% of all placements, and placements lasting for fifteen or more days ranged from 0% to 0.4% of all placements.

[36] Based on this data, Class Counsel concluded that the vast majority of eligible claims under the Settlement will be under Category 1 (placements of 6-72 hours), while a substantial proportion of the remainder will be under Category 2 (placements of 72 hours – 5 days).

[37] Class Counsel also reviewed the total number of placements in Ontario-operated Youth Justice Facilities as reported by the Advocate in 2009, made reasonable adjustments to allow for comparability, and multiplied this adjusted total by $1000, representing the Category 1 compensation level that will be applicable for the vast majority of claims. The result is approximately $687,600 per year, or, across a 14.5-year class period, just less than $10 million.

[38] Considering the relatively small numbers of higher value claims that are expected, and accounting for counsel fees, the Class Proceedings Fund's levy, and notice and administration costs, Class Counsel is confident that the settlement fund will be sufficient to pay all claims approved by the Claims Administrator and Claims Adjudicator.

[39] C.S. and Class Counsel recommend the settlement for approval.

D. Is Youth Segregation Unconstitutional Solitary Confinement?

[40] When this action commenced, Koskie Minsky LLP, a partner in the consortium of Class Counsel in the immediate case, was engaged in class actions against the federal government and the provincial government of Ontario about the use of solitary confinement in adult penal institutions.

[41] As ultimately confirmed by the courts in *British Columbia Civil Liberties Association v. Canada (Attorney General),*[13] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen,*[14] *Brazeau v. Attorney General (Canada),*[15] *Reddock v. Canada (Attorney General),*[16] and *Francis v. Ontario,*[17] solitary confinement was determined to be "the confinement of prisoners for 22 hours or more a day without meaningful human contact". This is the definition prescribed by what is known as the *Mandela Rules* promulgated by the United Nations.

[42] In *Brazeau*, *Reddock*, and *Francis*, it was eventually determined – at summary judgment hearings – that administrative segregation in adult federal prisons and Ontario's adult provincial

[13] 2018 BCSC 62, aff'd 2019 BCCA 228.
[14] 2017 ONSC 7491, aff'd 2019 ONCA 243.
[15] 2019 ONSC 1888, aff'd 2020 ONCA 184.
[16] 2019 ONSC 5053, aff'd 2020 ONCA 184.
[17] 2020 ONSC 1644, aff'd 2021 ONCA 197.

jails met the definition of solitary confinement. It was determined that the conditions of solitary confinement in adult prisons and penitentiaries across the country amounted to breaches of *Charter* and common law duties in respect of inmates with serious mental health issues as well as other inmates placed into prolonged solitary confinement of more than 15 days.

[43] At the commencement of this action, Class Counsel believed or suspected but actually did not know that young offenders were also being subjected to solitary confinement in the young offenders facilities operated by Ontario and by NGOs in Ontario.

[44] The legislative basis for Youth Segregation is found in the *Child, Youth and Family Services Act, 2017* and its predecessor legislation.[18] The legislation authorizes the use of "secure de-escalation", called "secure isolation" under the predecessor legislation, a practice involving the placement of a youth inmate of a Youth Justice Facility alone in a locked room. Under s. 174(3) of the Act, secure de-escalation is authorized only where staff are of the opinion that the youth is likely to cause serious property damage or serious bodily harm to another person and no less restrictive method of restraining the youth is practicable.

[45] It was Ontario's strongly held position throughout this class action up to the present that secure isolation is not solitary confinement as defined under the *Mandela Rules* in the caselaw, in the academic literature or as defined by the most motivated anti-solitary confinement activists.

[46] At the outset of the immediate action, Class Counsel did not know whether Ontario's Youth Justice Facilities actually practised "solitary confinement" as defined in the relevant international legal instruments. The applicable legislation and regulations contained safeguards that were designed to protect young people from conditions amounting to solitary confinement. There were some indications, but nothing conclusive, that Ontario was not following its own policies, and that youth were regularly being placed into conditions of solitary confinement as a result of Ontario's conduct.

[47] As the case progressed, the differences between "Youth Segregation" and "solitary confinement" became more and more apparent. This created the procedural risk that C.S. would be unable to establish a common issue and the liability risk of proving class-wide constitutional breaches, breaches of fiduciary duty, negligence, or damages.

[48] The evidence with respect to whether these limits and rules were being complied with was mixed. On the one hand, the plaintiffs and Class Members who swore affidavits in support of the motion for certification painted a disturbing picture of the day-to-day practices of Youth Segregation. For his part, C.S. deposed in his certification affidavit that C.S. had also been placed in Youth Segregation on numerous occasions, sometimes for long periods of time. On the other hand, reported data on the use of Youth Segregation suggested that average placements were below or near the limits established by the legislation.[19]

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[18] *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sch. 1, ss. 173-175. The *Child, Youth and Family Services Act, 2017* replaced the *Child and Family Services Act*, R.S.O. 1990, c. C.11, which authorized the use of "secure isolation" at ss. 126-128.

[19] In the 2015 publication on the use of segregation in Youth Justice Facilities in Ontario, the Provincial Advocate for Children and Youth reported that the system-wide average duration of secure isolation ranged from approximately 7 hours to approximately 9.5 hours between 2009 and 2014. The Advocate also reported that the average length of time of placements at many Youth Justice Facilities hovered at around one hour over that same period. Given that the Advocate's statistics included inmates aged 18 and older who were serving youth sentences in

[49] As this case progressed, it became apparent that it could be challenging for the Plaintiff to demonstrate that, at a systemic level, the durations of Youth Segregation placements came close to the durations of prolonged placements in adult solitary confinement at issue in *Brazeau*, *Reddock*, and *Francis*. Additionally, Youth Justice Facilities' statutorily mandated practice of observing youth inmates, whether on a continuous basis or every 15 minutes, may have made it challenging for the Plaintiff to show that the Class Members were being denied meaningful human contact.

[50] It turns out that Youth Segregation in Ontario is not as easily definable as solitary confinement as is the corresponding practice in adult facilities. Having litigated the other solitary confinement matters, Class Counsel is of the strong view that the risk of proceeding to a judgment and losing greatly outweighs the benefits available under the Settlement Agreement.

E. Retainer and Counsel Fee

[51] Pursuant to s. 32 of the *Class Proceedings Act, 1992*, the Plaintiffs in this action signed a contingency fee retainer agreement with Class Counsel. The relevant portions of the Retainer Agreement executed between C.S. and Class Counsel provide, among other things, the following:

> Except for any Costs paid to Class Counsel as provided in paragraph 10 above, Class Counsel shall be paid its fees upon achieving Success in the Action, whether by obtaining judgment on any of the Common Issues in favour of some or all Class members or by obtaining a settlement that benefits one or more of the Class members. The fees shall be paid by a lump sum payment to the extent possible, or (if a lump sum payment is not possible) by periodic payments, out of the proceeds of any judgment, order or settlement awarding or providing monetary relief, damages, interest or costs to the Class or any Class Member.
>
> In the event of Success, Class Counsel shall be paid an amount equal to
>
> > (a) any disbursements not already paid to Class Counsel by the Defendants as costs, plus applicable taxes and plus interest thereon in accordance with s. 33(7)(c) of the *Act*, plus
> >
> > (b) an amount equal to 33% of the Recovery plus HST.

[52] Class Counsel expended 2,623.2 hours to prosecuting this case up to early October 2021, with a value of $1,262,720.50, excluding HST.

[53] Class Counsel incurred $139,129.27 in disbursements (including taxes) in prosecuting this action of which they were reimbursed $117,229.27 from the Class Proceedings Fund leaving $21,900 unreimbursed.

[54] In total, Ontario has paid $15,000 in costs to the Plaintiff throughout the course of this action.

[55] Class Counsel expects to incur at least another $500,000 in fees between now and the end of the settlement implementation and administration phase.

[56] Should the Settlement be approved, the work left to be done to ensure the Settlement is

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Youth Justice Facilities, but who are not included in the class definition for this action, it is likely that even these modest numbers overstated the durations of Youth Segregation at issue in this action.

implemented and administered includes: (a) monitoring the implementation of the notice plan to ensure it has been disseminated in accordance with the approved notice plan; (b) communicating with Class Members; (c) assisting Class Members with the completion of Claim Forms, their Consents for production of relevant youth records, and their Identity Documents; (d) communicating with third parties such as caregivers, family members, and others who contact Class Counsel about the Settlement and claims process; (e) monitoring the claims process and the claims deadline; (f) communicating with and resolving any issues with the Claims Administrator regarding the disposition of submitted claims; and (g) reporting to the Court and parties regarding the disposition of the Settlement fund. Class Counsel estimates that it will devote time with a value of approximately $500,000 to complete the Settlement phase of this class proceeding.

[57] Class Counsel requests a Counsel Fee at 27%, *i.e.*, the fee request is $4.05 million plus HST. This fee represents a multiplier of approximately 2.3 on the sum of Class Counsel's billed time and anticipated time in the implementation of this settlement.

[58] The litigation was supported by the Class Proceedings Fund of the Law Foundation of Ontario. The Fund is to be paid its 10% levy on the compensation payable to the Class Members pursuant to O. Reg. 771/92 in addition to reimbursement of disbursement expenses.

F. Settlement Approval

[59] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[20]

[60] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[21]

[61] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[22] An objective

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[20] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

[21] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).

[22] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

and rational assessment of the pros and cons of the settlement is required.[23]

[62] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[24] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[25]

[63] Having read the motion materials and considered both parties' factums, I am satisfied that the settlements in the immediate case should be approved along with the ancillary relief.

[64] I obviously cannot determine on a settlement motion, the merits of C.S.'s action and its likelihood of success, but I agree with Class Counsel's assessment that in the immediate case, the risk of proceeding to a judgment and losing greatly outweighs the benefits available under the Settlement Agreement. I conclude that the settlement is reasonable and in the best interests of the class.

[65] The ancillary relief should also be approved.

G. Fee Approval

[66] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.[26] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[27]

[67] These risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding.[28]

[68] Fair and reasonable compensation must be sufficient to provide a real economic incentive

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[23] *Al-Harazi v. Quizno's Canada Restaurant Corp*. (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).
[24] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).
[25] *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd*., [2002] O.J. No. 2383 at para. 13 (S.C.J.).
[26] *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).
[27] *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).
[28] *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35; *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 t para. 17 (C.A.).

to lawyers to take on a class proceeding and to do it well.[29]

[69] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved.[30] Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee.[31] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[32]

[70] In the immediate case, in my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request should be approved. Class Counsel brought a high-risk action to an outcome that provides meaningful benefits to the Class Members in a settlement that is reasonable and in the best interests of the Class Members.

[71] Class Counsel earned their fee in this hard-fought litigation, and the fee should be and is approved.

H. Honorarium

[72] Turning to the matter of the honorarium. Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by an honorarium.[33] However, the court should only rarely approve this award of compensation to the representative plaintiff.[34] Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.[35]

[73] Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. In determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant

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[29] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61(S.C.J.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.).

[30] *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.

[31] *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at para. 92.

[32] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (C.A.).

[33] *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090; *Brazeau v. Attorney General (Canada)* 2019 ONSC 4721; *Houle v. St. Jude Medical Inc.*, 2019 ONSC 4560; *Dolmage v. HMQ*, 2013 ONSC 6686; *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528 at para. 43; *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26–43; *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at paras. 133–136; *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *Windisman v. Toronto College Park Ltd*., [1996] O.J. No. 2897 at para. 28 (Gen. Div.).

[34] *Sutherland v. Boots Pharmaceutical plc*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).

[35] *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.

personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.[36]

[74] In the immediate case, C.S. should be awarded an honorarium. C.S. made an extraordinary contribution and should be heralded for the bravery of his leadership and his pursuit for access to justice. C.S. made an extraordinary contribution that was instrumental to the fair and reasonable outcome of the class action.

I. Conclusion

[75] Orders accordingly. I have signed the Orders.

Perell, J.

Released: October 14, 2021

[36] *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

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DATE: 20211014

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

C.S.

Plaintiff

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

REASONS FOR DECISION

PERELL J.

Released: October 14, 2021