THE KING'S BENCH
Winnipeg Centre

B E T W E E N :

DAVID WEREMY

Plaintiff

- and -

THE GOVERNMENT OF MANITOBA

Defendant

Proceeding under *The Class Proceedings Act,* C.C.S.M. c.C.130

MOTION BRIEF OF THE PLAINTIFF
(Motion for Settlement and Fee Approval returnable May 5, 2023)

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1. Notice of Motion, dated April 21, 2023;
2. Affidavit of James Sayce, sworn April 19, 2023;
3. Affidavit of David Weremy, sworn April 11, 2023;
4. Affidavit of Christine Currie, sworn April 12, 2023;
5. Affidavit of Shelley Fletcher, sworn April 12, 2023; and
6. Affidavit of Kevin O'Connell, to be sworn.

PART II - LIST OF CASE AUTHORITIES AND STATUTORY PROVISIONS

List of Case Authorities

1. *Weremy v. Manitoba*, 2020 MBQB 85.
2. *Weremy v. The Government of Manitoba*, 2021 MBCA 34.
3. *Gray v. Great-West Lifeco Inc.*, 2011 MBQB 13.
4. *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.).
5. *Tataskweyak Cree Nation et al. v. Canada (A.G.)*, 2021 MBQB 275.
6. *Semple v. Canada (Attorney General)*, 2006 MBQB 285.
7. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.).
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9. *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 3622 (C.A.).
10. *Anderson v. Canada (Attorney General),* 2016 NLTD(G)179.
11. *Verna Doucette v. Eastern Regional Integrated Health Authority*, 2010 NLTD 29.

12. *McLean v. Canada*, 2019 FC 1075.
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14. *Serhan v. Johnson & Johnson*, 2011 ONSC 128.
15. *Fontaine v. Canada (Attorney General)*, 2006 NUCJ 24.
16. *Manuge v. Canada*, 2013 FC 341.
17. *Clegg v. HMQ Ontario*, 2016 ONSC 2662.
18. *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.).
19. *Seed v. Ontario*, 2017 ONSC 3534.
20. *Richard v. British Columbia,* 2010 BCSC 773.
21. *Richard v. British Columbia*, 2015 BCSC 265.
22. *Slark (Lit. guard. of) v. Ontario*, 2013 ONSC 6686.
23. *McKillop (Lit. guard. of) v. Ontario*, 2014 ONSC 1282.
24. *Welsh v. Ontario*, 2018 ONSC 3217.
25. *Yeo v. Ontario*, 2021 ONSC 4534.
26. *Welsh v. Ontario*, 2019 ONCA 41.
27. *Grann v. Ontario*, 2021 ONSC 3817.
28. *Heyder v. Canada*, 2019 FC 1477
29. *Brazeau v. Canada (Attorney General),* 2020 ONSC 7229.
30. *K.L.B. v. British Columbia*, 2003 SCC 51.
31. *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233.
32. *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 (C.A.).
33. *Ford v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.).
34. *Abdulrahim v. Air France*, 2011 ONSC 512.

35. *Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670.

36. *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537.

37. *Cassano v. Toronto-Dominion Bank*, 2009 CanLII 35732 (O.N.S.C.).

38. *Ramdath v. George Brown College of Applied Arts and Technology*, 2016 ONSC 3536.

39. *Condon v. Canada*, 2018 FC 522.

40. *Romeo v. Ford Motor Co.* 2019 ONSC 1831.

41. *McLean v. Cathay Pacific Airways Limited*, 2021 BCSC 1456.

42. *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46.

43. *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374.

44. *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292.

45. *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105.

46. *Smith v. Inco Ltd.*, 2010 ONSC 3790.

47. *Ramdath v. George Brown College of Applied Arts and Technology*, 2012 ONSC 6173.

48. *John Wink Ltd. v. Sico Inc.*, [1987] O.J. No. 5 (H.C.).

49. *Kalra v. Mercedes Benz*, 2022 ONSC 941.

50. *MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726.

51. *Casseres v. Takeda Pharmaceutical Company,* 2021 ONSC 2846.

52. *Windisman v. Toronto College Park Ltd.,* [1996] O.J. No. 2897 (Gen. Div.).

53. *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528.

54. *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C (6th) 357 (O.N.S.C.).

List of Secondary Sources

55. Ward K. Branch & Mathew P. Good, *Class Actions in Canada*, 2nd ed (Toronto: Thomson Reuters, 2023) §17:2 Settlement Approval

56. Watson, Garry D., Q.C., - Class Actions - Uncharted Procedural Issues (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996)

List of Statutory Provisions

57. *Class Proceedings Act*, C.C.S.M. c. C130.

58. *The Limitation of Actions Act*, R.S.M. 1987, c. L150.

PART III - LIST OF POINTS TO BE ARGUED

1. The following questions will be addressed in this brief:

   (a) Should the Settlement be approved as being fair, reasonable and in the best interests of the Class?

   (b) Should the fees and disbursement reimbursement requested by Class Counsel be approved as being fair and reasonable?

   (c) Should the honorarium sought for the Plaintiff be approved?

PART IV - OVERVIEW

2. The proposed settlement entered into with the Defendant in this action, on March 7, 2023 (the "**Settlement**" or "**Settlement Agreement**"), sought to be approved herein, seeks to help close a difficult chapter in the lives of those persons with intellectual and development disabilities who resided at the Manitoba Developmental Centre ("**MDC**") over a 69-year period.

3. The Settlement provides a settlement fund of $17,000,000 ("**Settlement Fund**") for the compensation of Class Members' claims and the funding of a host of vital reconciliation initiatives. The Settlement offers

between $3,000 and $85,000 in individual compensation to Class Members through a paper-based claims process designed to be simple, user-friendly and enhance access to justice. It also allows reimbursement for medical evidence costs, and uniquely compensates for care resulting from re-traumatization during the claims process. The reconciliation initiatives also promise to help preserve the stories of Class Members well into the future, and to help individuals with disabilities throughout Manitoba. The reconciliation initiatives, which cannot be obtained at trial, should hold immense significant value to the Class and will leave a lasting legacy of this resolution.

4. Class Counsel submits that the terms of this Settlement, and all other relevant factors weigh heavily toward settlement approval.

5. Second and separately, Class Counsel is seeking approval from this Honourable Court of a total legal fee of $4,200,000 (plus taxes). Class Counsel undertook to act on behalf on the Plaintiff and the Class on a contingent basis, without any guarantee of payment for their work. Over the last 4 ½ years, Class Counsel worked diligently on behalf of the class to prosecute this proceeding against a Defendant with vastly superior resources. Class Counsel undertook 3,000 hours of lawyer, student and clerk time on this matter up to date, and expects to spend hundreds more in the implementation of the Settlement, if approved. Class Counsel's request for fees, equivalent to approximately 25% of the Settlement Fund,[1] is less than their entitlement pursuant to their retainer agreement and will only result

[1] If notice and administration costs estimates were included, the fee request would be equivalent to approximately a 23.7% contingency fee.

in a modest premium on the time devoted to compensate for the extensive risk undertaken in proceeding on a contingent basis.

6. Given the risks undertaken by Class Counsel, the result achieved, the ability of the Class to pay, the importance of the resolution to the Class, the skill and competence of Class counsel and the need to incentive lawyer to initiate these types of proceedings, the fees and disbursement reimbursement requested by Class Counsel are fair and reasonable in all of the unique circumstances of this case.

7. Lastly, the Plaintiff, David Weremy, agreed to be the representative Plaintiff to seek recourse not just for himself, but for all survivors of MDC. He agreed to be the public face of the Class in this case – agreeing to publicly share his account of the serious physical and sexual assaults he suffered at MDC. David instructed counsel, swore affidavits, produced documents, was examined under oath about his experiences, reviewed, considered and approved of the settlement, and at all times sought to vigilantly represent the interests of the survivors. This is the kind of selflessness that is essential to achieve the access to justice the *Class Proceedings Act* was designed to achieve. The $15,000 honorarium sought for Mr. Weremy should be approved as a small token of appreciation and commendation for his efforts on behalf of the Class.

PART V - FACTS

A. The Class Action

8. The action concerns allegations of abuse of the residents at the Manitoba Developmental Centre ("**MDC**"), in Portage la Prairie, Manitoba. MDC is owned and operated by the Defendant. It has housed persons with intellectual and developmental disabilities since 1890.[2]

9. The claim alleges physical and sexual abuse of residents, by staff and by other residents.[3] It alleged the Defendant's negligence and breach of fiduciary duty in the operation, management, administration, supervision, and control of MDC.

10. The "Class" defined in the Certification Order is: "all persons who resided at the Manitoba Developmental Centre for any period or periods of time between July 1, 1951 and [May 29, 2020], and who were alive as of October 31, 2016" (the "**Class**" or "**Class Member(s)**").

11. By virtue of having been admitted to MDC, all Class Members are persons with disabilities. A significant proportion of the Class is now quite elderly.[4] For example, the representative Plaintiff is 79 years old.[5] There is a real concern that prolonging recourse for the harms suffered by Class

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[2] *Weremy v. Manitoba*, 2020 MBQB 85 at para. 1, Book of Authorities of the Plaintiff ("**PBOA**"), Tab 1, leave to appeal ref'd 2021 MBCA 34, PBOA, Tab 2.
[3] Amended Statement of Claim dated December 19, 2018 ("**Amended Claim**"), paras. 25-29.
[4] Affidavit of Shelley Fletcher sworn April 12, 2023 ("**Fletcher Affidavit**"), para. 14.
[5] Affidavit of David Weremy sworn April 11, 2023 ("**Weremy Affidavit**"), para. 2.

Members would result in many of the members of the class not living long enough to see any benefit from this litigation.[6]

12. The Court certified the following common issues in May 2020:

(i) Is the claim in negligence statute-barred under *The Limitations of Actions Act*?

(ii) by its operation or management of MDC did the Defendant breach a duty of care it owed to the Class to protect them from actionable sexual, physical or mental harm?

(iii) by its operation or management of MDC, did the Defendant breach a fiduciary duty owed to the Class to protect them from actionable sexual, physical or mental harm?

(iv) if the answer to either of common issues (ii) or (iii) is "yes", can the Court make an aggregate assessment of the damages suffered by all Class members as part of the common issues trial?

(v) if the answer to either of common issues (ii) or (iii) is "yes", was the defendant guilty of conduct that justifies an award of punitive damages?; and

(vi) if the answer to common issue (v) is "yes", what amount of punitive damages ought to be awarded?

[6] Fletcher Affidavit, para. 14.

B. Litigation History

13. This action was commenced on October 31, 2018. The action was actively litigated over four and a half years. The key steps in the proceeding included the following:[7]

(a) The Statement of Claim was filed October 31, 2018;

(b) An Amended Statement of Claim was filed on December 14, 2018;

(c) The Defendant served and filed its Statement of Defence on February 8, 2019;

(d) The certification process continued between December 2018, when the Plaintiff served his affidavits, through the exchange of written briefs. The certification motion was heard on November 26, 2019, and the form and content of the Order signed on July 22, 2020;

(e) The Defendant sought leave to appeal the Certification Order, on August 14, 2020. The motion was heard on October 14, 2020. On April 8, 2021, the Defendant's motion for leave to appeal was dismissed by the Court of Appeal of Manitoba;

(f) Notice to the Class of certification was disseminated in October 2021;[8]

(g) The deadline to opt out was January 12, 2022 – the administrator received seven (7) opt-out forms by the deadline;

(h) Between October 2020 and March 2021, the parties discussed the scope and timing of the exchange of productions. Ultimately, a case management conference was required to establish a timetable for the discovery process, which initially required the exchange of productions by August 31, 2021. Later that deadline

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[7] Affidavit of James Sayce affirmed April 19, 2023 ("**Sayce Affidavit**"), paras. 6-28.

[8] Wide-spread public notice of certification was an important component of this action given the vulnerability of the Class. The parties employed an Administrator to deliver notice, and Class Counsel closely supervised the activities of that Administrator. The parties each paid half of the notice expenses incurred, with the Defendant's contribution capped at a maximum of $50,000. See Order of Justice Grammond dated August 25, 2021, Sayce Affidavit, Exhibit H.

was extended to October 31, 2021 on consent, at the request of the Defendant;

(i) Between April 2021 and October 2021, the Crown delivered approximately 66,000 documents as part of its documentary discovery obligations;

(j) Following the deadline to produce documents, Manitoba delivered an additional 1,000 documents by January 19, 2022;

(k) Examinations for discovery of the Defendant occurred over a total of four (4) days in late February and early March 2022;

(l) The Defendant provided approximately 400 undertakings during its examination;

(m) The Plaintiff continued its examination of the Defendant by way of Questions on Interrogatories, serving 89 interrogatories (most with several sub-parts) on March 31, 2022;

(n) In or about March 2022, the parties sought to commence a Judicially Assisted Dispute Resolution ("**JADR**") process, ultimately leading to the appointment of Justice Bock to provide JADR services on March 28, 2022;

(o) The Plaintiff, David Weremy, was examined for discovery over the course of two (2) days in November 2022;

(p) Further documents were produced by Manitoba in October 2022 following examinations for discovery;

(q) Between June and October 2022, the Plaintiff sought a commitment from the Defendant on the timing of the delivery of answers to undertakings and responses to Interrogatories. Ultimately, a case management conference was required to establish a timetable for the delivery of such responses. On October 7, 2022 Justice Grammond directed the Defendants to deliver answers to undertakings by January 12, 2023 and responses to interrogatories by February 28, 2023;

(r) In total, the Defendant produced approximately 68,000 documents, with an intention to produce more as part of their answers to undertakings and Interrogatories;

(s) A JADR mediation was conducted on December 14-16, 2022, which culminated in a term sheet being executed by the parties; and

(t) Negotiations leading to the execution of the Settlement Agreement were conducted between December 2022 and March 7, 2023 when the Settlement Agreement was executed.

14. The certification phase of this proceeding was lengthy and hard-fought. The Plaintiff served its materials in December 2018, and the Defendants' motion for leave to appeal of the certification decision was not resolved until April 2021. The certification phase spanned almost two and a half (2.5) years, not considering the amount of time the Plaintiff needed to build his case for certification.

15. The discovery process was equally complicated, difficult, and extensive. The parties did not easily agree on an appropriate timetable for the delivery of documents, and required the case management of the Court.[9] Once a timetable was set, approximately 68,000 documents were produced to the Plaintiff, with more to be produced in answer to approximately 400 undertakings given at examinations for discovery and questions on interrogatories.[10] The scope of the productions necessitated the Plaintiff's use of an e-discovery platform to manage and review the volume of documents produced, which Class Counsel funded.

16. The negotiations that led to the Settlement were conducted at a time where the parties had an extensive understanding of the case the Plaintiff would need to meet, having reviewed thousands of documents and obtained significant information from examination for discovery.

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[9] Sayce Affidavit, para. 13.
[10] Sayce Affidavit, paras. 136, 141.

17. The Settlement was achieved through arm's length negotiations assisted by the Honourable Mr. Justice Bock. The parties spent three full days negotiating an agreement in principle and several weeks thereafter in negotiating the specific details of the claims process and terms of the Settlement Agreement.

C. The Settlement

18. The key terms of the Settlement include:

(a) A $17,000,000 settlement fund (the "**Settlement Fund**");

(b) Individual compensation ranging from $3,000 up to $85,000 per Class member;

(c) A paper-based, non-adversarial claims process, in which causation is assumed;

(d) Reconciliation and commemorative initiatives including an apology to the Class, a $1,000,000 endowment for the benefit of Manitobans with intellectual and developmental disabilities, story-telling initiatives, a memorial, access to the MDC grounds after its closure, and reimbursement of counselling expenses ("**Reconciliation Initiatives**");

(e) An honorarium to the Representative Plaintiff; and

(f) Costs of notice to the Class and administration of the claims process will not be paid from the Settlement Fund.

19. The Settlement Agreement provides for two categories of compensation. Section A claims are eligible to receive $3,000 in compensation and only require a claimant to affirm that they were harmed without providing any further details. Section B claims require a claimant to provide details of the harm or abuse suffered, with compensation ranging from $4,500 to $85,000 awarded based on the severity of the harm in accordance with a grid.

PART VI - APPROVAL OF THE SETTLEMENT

A. The Framework and Principles Governing Settlement Approval

20. Pursuant to section 35 of the *Class Proceedings Act*, a class proceeding may only be conclusively and finally settled with the approval of the Court.[11] In determining whether to approve a settlement, the Court's paramount duty is to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole.[12]

21. Courts throughout Canada, including Manitoba, consider common factors in evaluating any proposed settlement in a class proceeding. These factors include, but are not limited to, the following:[13]

(a) the terms and conditions of the settlement;
(b) the likelihood of recovery or likelihood of success;
(c) the amount and nature of discovery, evidence or investigation;
(d) the number of objectors and nature of objections;
(e) the presence of arm's length bargaining and the absence of collusion;
(f) the information conveying to the court the dynamics of, and the positions taken, by the parties during the negotiations;
(g) communications with class members during litigation;
(h) the risks of not unconditionally approving the settlement, including future expense and likely duration of litigation;
(i) recommendation and experience of counsel; and

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[11] *Class Proceedings Act*, C.C.S.M. c. C130, s. 35(1), PBOA, Tab 57.
[12] *Gray v. Great-West Lifeco Inc.*, 2011 MBQB 13 at para. 58, citing Winkler J. (as he then was) in *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.) at para. 10, PBOA, Tabs 3, 4.
[13] *Tataskweyak Cree Nation et al. v. Canada (A.G.)*, 2021 MBQB 275 at para. 66, PBOA, Tab 5; *Semple v. Canada (Attorney General)*, 2006 MBQB 285 at para. 26, citing Ward K. Branch, *Class Actions in Canada* (Aurora, ON: Canada Law Book, 2006), PBOA, Tabs 6, 55.

(j) recommendation of neutral parties, if any.

22. However, courts have consistently cautioned "[t]hese factors are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process."[14]

23. The jurisprudence unanimously confirms that a Court's scrutiny on a settlement approval motion is to ensure only that the settlement falls within a zone of reasonableness. In order to be approved, a settlement need not be perfect.[15] The "range of reasonableness" test permits that a number of settlement possibilities may be in the best interests of the class when compared to the unpredictable alternative of continued litigation: "[a] less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation."[16]

24. Not even all provisions must meet the test of reasonableness.[17] To reject a settlement, the Courts must conclude that the settlement, as a whole, does *not* fall within a range of reasonable outcomes.[18]

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[14] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.) at para. 73, PBOA, Tab 7.
[15] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.) at para. 69, PBOA, Tab 7.
[16] *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 2811 (Gen. Div.) at p. 15, aff'd [1998] O.J. No. 3622 (C.A.) , PBOA, Tabs 8, 9; *Baxter v. Canada (Attorney General)*, [2006] O.J. No 4968 (S.C.) at para. 21, PBOA, Tab 4; *Anderson v. Canada (Attorney General),* 2016 NLTD(G)179 at para. 40; relying on *Verna Doucette v. Eastern Regional Integrated Health Authority*, 2010 NLTD 29 at para. 12, PBOA, Tabs 10, 11.
[17] *McLean v. Canada*, 2019 FC 1075 at para. 77, PBOA, Tab 12.
[18] *Tataskweyak Cree Nation et al. v. Canada (A.G.)*, 2021 MBQB 275 at para. 65, PBOA, Tab 5.

25. It is also important for the court to be mindful to not engage in extraneous non-legal considerations in its assessment of the settlement's fairness:[19]

> [T]hese matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement. [emphasis added]

26. Additionally, there is a "strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval."[20] Additionally, this Court is entitled to assume that the proposed settlement is the best reasonably achievable compromise:

> "Where the parties are represented – as they are in this case – by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation."[21]

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[19] *Baxter v. Canada (Attorney General)*, [2006] O.J. No 4968 (S.C.) at para. 9; relying on *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.) at para. 77, PBOA, Tabs 4, 7.
[20] *Ford v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.) at para. 113; relying on *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 2811 (Gen. Div.), aff'd [1998] O.J. No. 3622 (C.A.) , PBOA, Tabs 13, 8, 9.
[21] *Serhan v. Johnson & Johnson*, 2011 ONSC 128 at para. 55, PBOA, Tab 14.

27. In any complex negotiated agreement, there has inevitably been 'give and take' by all parties on a broad range of issues. For this very reason, settlement approval courts have determined that "it is inappropriate to apply a standard of perfection to the end product. Considerable deference must be shown to the process underlying the negotiated settlement."[22] In the result, approval courts have opined that:[23]

> It will always be a particular concern of the Court than an arms-length settlement negotiated in good faith not be too readily rejected. The parties are, after all, best placed to assess the risks and costs (financial and human) associated with taking complex class litigation to its conclusion. The rejection of a multi-faceted settlement like the one negotiated here also carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost. [emphasis added]

28. This sentiment applies with even greater force where the settlement occurs years into the litigation and after discovery is complete. At such a stage of litigation, the knowledge base of counsel is as high as it will ever be: "[T]he closer that class counsel is to trial, the more credible are their assertions about risk and reward. The closer the trial, the more likely that the class action settlement is fair and reasonable and in the best interests of the class."[24] In the present case, the action was settled on the precipice of adjudication on the merits.

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[22] *Fontaine v. Canada (Attorney General)*, 2006 NUCJ 24 at para. 38, PBOA, Tab 15.
[23] *Manuge v. Canada*, 2013 FC 341 at para. 6, PBOA, Tab 16.
[24] *Clegg v. HMQ Ontario*, 2016 ONSC 2662 at paras. 34-35, PBOA, Tab 17.

29. Lastly, where significant risks present themselves to the class in establishing liability or proving aggregate damages, making ongoing litigation protracted and complicated, courts have found that "[i]t is in the interests of the class members to have a timely and prompt payment":[25]

> [I] did not know how 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.[26] [emphasis added]

30. The settlement here was concluded when experienced counsel's knowledge base was at its highest after a lengthy documentary and oral discovery process, and in a situation where an aggregate award of damages would have been far from certain – necessitating lengthy individual assessments and years of attendant appeals – all of which augur strongly in favour of approval.

B. The Settlement is Fair, Reasonable & in the Class's Best Interests

i. The Terms and Conditions of the Settlement Weigh in Favour of Approval

31. The monetary and non-monetary benefits offered to under this Settlement are remarkable. All Class Members will benefit from some aspect of this Settlement.

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[25] *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.) at para. 18, PBOA, Tab 18.
[26] *Seed v. Ontario*, 2017 ONSC 3534 at para. 12, PBOA, Tab 19.

32. Each and every Class Members will be eligible to participate in the Reconciliation Initiatives, such the apology in the Legislative Assembly, receiving an apology addressed to them if they request one, being able to re-attend at MDC by guided tour, and benefiting from the storytelling and memorial projects described below. These initiatives are rare in class action settlements,[27] and they hold immeasurable value to this Class.[28]

Reconciliation Initiatives

33. The following is a summary of the Reconciliation Initiatives provided for in the Settlement Agreement:

(a) Manitoba will issue an apology in the Legislative Assembly, to the Class who suffered harm;

(b) A $1,000,000 endowment will be established with the Winnipeg Foundation, that may be drawn upon annually by community organizations to fund things like educational programming, inclusion initiatives, and projects that promote or support community inclusion of Manitobans with intellectual and developmental disabilities (the "**Endowment**");

(c) $50,000 will be allocated for the creation of audiovisual productions concerning the stories of Class Members and the history of MDC, to be developed through consultation with Class Members ("**Story-telling Initiative**");

(d) $150,000 will be allocated to reimburse claimants for counselling, psychological, or psychiatric care arising from any re-traumatization claimants experience as a result of making a claim ("**Counselling Funds**");

(e) Manitoba will erect a memorial on the grounds of the MDC Cemetery;

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[27] Sayce Affidavit, para. 86.
[28] Fletcher Affidavit, para. 28; Weremy Affidavit, paras. 25-39.

(f) Manitoba will allow reasonable access to Class Members to attend the MDC grounds after the closure of MDC on two dates to be determined;

(g) Manitoba will also allow access by one researcher for the purpose of selecting objects of historical significance and having those objects properly archived;

(h) Manitoba will preserve the MDC cemetery, including by making reasonable efforts to designate the cemetery a Site of Historical Significance; and

(i) Subject to applicable privacy and other legal requirements, Manitoba will provide all documents produced in this proceeding to Archives of Manitoba, so they may be properly retained and accessed in the future.

34. As further described below, these Reconciliation Initiatives are not achievable as a remedy at trial and even rare in other class action settlements. Regardless of whether a Class Member claims any compensation under the Settlement, they will be able to reap the benefits of these initiatives. The apology and tour will help a vulnerable Class achieve some closure after some of the most traumatic events in their lives. The story-telling and archiving will also allow aging Class Members to be able to document their experiences, so they won't be forgotten. The Endowment will establish a lasting legacy that will provide support not only to the Class, but also to other Manitobans with disabilities after the Class Members are gone. The representative Plaintiff and his support network strongly believe that these initiatives are meaningful and hold great value to the Class.[29]

[29] Weremy Affidavit, paras. 34-39; Fletcher Affidavit, para. 28; Currie Affidavit, para. 22.

Individual Compensation

35. Class Members can apply for two types of compensation – (1) Section A Claim compensation, and (2) Section B Claim compensation.

36. For Section A Claims the Class Member would be eligible for $3,000, *solely on the basis of* an affirmation that the claimant suffered harm while a resident at MDC.[30] This is not limited to physical or sexual assaults. In fact, Class Members will not be required to specify which harms they suffered, nor provide any details. A Section A Claim may be beneficial to many Class Members who either did not suffer the abuses specifically compensable as a Section B Claim, and those who cannot (or prefer not) communicate evidence of those abuses. The low burden of Section A Claim compensation will incentivize many Class Members to make a claim. Perhaps more important that the compensation, this process will allow these Class Members to obtain easily accessible vindication.

37. Class Members who suffered more serious harms can apply for Section B Claim compensation of between $4,500 and $85,000. Both physical assault and sexual assault is compensable under a Section B Claim. These are both types of assaults that were claimed in the pleadings in this action.

38. Moreover, the physical and sexual assaults compensable as a Section B Claim could have been perpetrated by *either* staff or by other residents. This allows Class Members to recover for assaults not directly perpetrated

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[30] Settlement Agreement executed March 7, 2023 ("**Settlement Agreement**"), Schedule "B", para. 9.

by the Defendants' agents, despite any limitation period – and other defences - that would otherwise apply to an action brought on that basis.

39. In fact, no limitation periods apply to the claims under the Settlement. As described below, *The Limitation of Actions Act*[31] could have well prevented many Class Members from receiving any recovery in this action, absent this Settlement. Many Class Members would have been required to prove before the Court, that their disability prevented them from commencing an action, and that the exceptions to the ultimate limitation period applied.[32] The individual awards offered under the proposed settlement are not contingent on proof of any exception to any limitation period.

40. The Reconciliation Initiatives also include funding for counselling relating to possible re-traumatization during the claims process.[33] This is an extremely rare and valuable component of this settlement, not previously offered in settlements of institutional abuse actions.

Claims Process

41. The claims process provides significant non-monetary benefits to Class Members including:[34]

(a) The claims process is paper-based and does not require Class Members to testify or appear in person;

(b) The claims process is confidential;

(c) Class Members can complete their claims with the assistance and privacy of their support networks;

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[31] R.S.M. 1987, c. L150, PBOA, Tab 56.
[32] See paras. 57-58 below.
[33] Settlement Agreement, Schedule "A", para. 19.
[34] See Settlement Agreement, Schedule "A"; Sayce Affidavit, para. 84.

(d) The Defendant is not entitled to cross-examine any claimant;

(e) Class Members are not held to the same standard of proof as in a civil court proceeding;

(f) Class Members are explicitly assumed "to be acting honestly and in good faith";

(g) Class Members do not have to prove causation; and

(h) Class Members do not have to prove the quantification of damages.

Prior Settlements in Comparable Cases

42. This proceeding follows a long line of certified – and settled – class proceedings concerning institutional abuse of persons with disabilities.[35] This settlement is well within the range of reasonableness when compared to previously court-approved settlements.

43. There has been some judicial commentary on the frailties of some institutional abuse settlements. That commentary has focused on settlements that only offer benefits to a small percentage of members, or only offer modest monetary benefits for significant harms.[36] This Settlement does *not* have the same frailties.

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[35] *Richard v. British Columbia,* 2010 BCSC 773, PBOA, Tab 20; *Richard v. British Columbia*, 2015 BCSC 265, PBOA, Tab 21; *Slark (Lit. guard. of) v. Ontario*, 2013 ONSC 6686 ("***Slark***") *at* paras. 13, 15-18, PBOA, Tab 22; *McKillop (Lit. guard. of) v. Ontario*, 2014 ONSC 1282 ("***McKillop and Bechard***") at paras. 9, 11-14, PBOA, Tab 23; *Clegg v. HMQ Ontario*, 2016 ONSC 2662 ("***Clegg***") at para. 11, PBOA, Tab 17; *Seed v. Ontario*, 2017 ONSC 3534 at para. 9, PBOA, Tab 19; *Welsh v. Ontario*, 2018 ONSC 3217 ("***Welsh***") at para. 56, PBOA, Tab 24; *Yeo v. Ontario*, 2021 ONSC 4534 ("***Yeo***"), PBOA, Tab 25.

[36] *Welsh v. Ontario*, 2018 ONSC 3217 at paras. 80, 86 (where the Court found that the settlement only benefited 10% of class members and only offered $22,5000 in compensation for rape), rev'd 2019 ONCA 41, PBOA, Tabs 24, 26; *Grann v. Ontario*, 2021 ONSC 3817 (where the Court found that the settlement did not offer compensation for the injuries originally plead in the action) , PBOA, Tab 27.

44. The Settlement's monetary awards are significantly greater than what was available through settlement of prior institutional abuse class actions involving persons with disabilities.[37] In many respects, the awards offered are substantially higher than settlements in those cases. For example:[38]

(a) Compensation for Section A Claims in the Settlement is $3,000 rather than $2,000 in *Slark*, *McKillop and Bechard*, and *Clegg* (there was no Section A compensation in *Yeo*);[39]

(b) The compensation amounts provided for in the Settlement for comparable harms are approximately 67% greater than in the settlements in *Slark*, *McKillop and Bechard*, *Clegg* and *Yeo*;

(c) An additional higher level of compensation is available for the most serious sexual assaults that did not exist in the Schedule 1 Settlements[40];

(d) The maximum individual compensation available in the Settlement is almost double the amount of the Schedule 1 Settlements ($85,000 vs $45,000);[41]

(e) Approved claims will be compensated more quickly than in the Schedule 1 Settlements as a result of the automatic payment of Section A Claims and the possibility that Section B Claims may be paid without waiting until the end of the claims process;

(f) The Reconciliation Initiatives are different in kind than those ultimately undertaken as a result of the Schedule 1 Settlements and do not require there to be sufficient funds available after claims are paid to implement them; and

(g) Counselling Funds were not available in any of the Schedule 1 Settlements.

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[37] See Schedule "A" – Previous Settlements in Select Class Proceedings.
[38] Sayce Affidavit, paras. 91-94.
[39] *Slark (Lit. guard. of) v. Ontario*, 2013 ONSC 6686, PBOA, Tab 22; *McKillop (Lit. guard. of) v. Ontario*, 2014 ONSC 1282, PBOA, Tab 23; *Clegg v. HMQ Ontario*, 2016 ONSC 2662, PBOA, Tab 17.
[40] "Schedule 1 Settlements" involved the institutions for persons with developmental disabilities in Ontario: *Slark, McKillop and Bechard, Clegg* and *Yeo*.
[41] See e.g. *Slark (Lit. guard. of) v. Ontario*, 2013 ONSC 6686, PBOA, Tab 22.

45. In the Schedule 1 Settlements, major psychological injury resulting from sexual assault was simply not compensated for.[42] Other settlements including sexual assault claims have compensated for diagnosed injury, but only where compensation has not previously been offered through another benefit system.[43] This Settlement offers an unqualified amount for "Serious Sexual Assault" (as defined in the Settlement Agreement) resulting in injury.

46. Furthermore, Class Members do not have to undergo an arduous litigation or adjudication process in order to receive the highest amounts of compensation available under the Settlement. In contrast to settlements in class actions concerning Indian Residential Schools,[44] or the individual issues process ordered in class actions concerning solitary confinement in Federal prisons,[45] lengthy assessments and cross-examinations are not required of claimants. To the extent any Class Member experiences re-traumatization as a result of making a claim, the Settlement Agreement provides for reimbursement for counselling, psychological or psychiatric care up to $1,500.[46]

Sufficiency of the Settlement Fund

47. In addition to individual compensation, there should be adequate total compensation to satisfy all possible claims that might be made.[47]

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[42] See e.g. *Slark (Lit. guard. of) v. Ontario*, 2013 ONSC 6686, PBOA, Tab 22; *Welsh v. Ontario*, 2018 ONSC 3217, PBOA, Tab 24; *Yeo v. Ontario*, 2021 ONSC 4534, PBOA, Tab 25.
[43] *Heyder v. Canada*, 2019 FC 1477, PBOA, Tab 28.
[44] *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.) at para. 48, PBOA, Tab 4.
[45] *Brazeau v. Canada (Attorney General),* 2020 ONSC 7229, PBOA, Tab 29.
[46] Settlement Agreement, Schedule "A", para. 19.
[47] *Yeo v. Ontario*, 2021 ONSC 4534 at para. 7, PBOA, Tab 25.

48. There are approximately 1,362 Class Members identified in this proceeding by the Defendant. The Settlement Fund provides gross settlement funds of $12,480 per person. In *Slark*, *McKillop and Bechard*, *Clegg*, and *Yeo* gross settlement funds per class members was approximately $5,600, $4,900, $6,400, $4600 and $2,200 respectively. In *Seed v. Ontario* ("***Seed***") and *Welsh* that amount was approximately $4,000 and $3,300 respectively. Each of these settlements had slightly different terms including some having funding for non-compensatory initiatives (*Slark, McKillop and Bechard*), some did not have Section A-type compensation (*Seed*, *Welsh* and *Yeo*), *Yeo* did not provide compensation for certain lower levels of assaults, and notice and administration costs were paid by the settlement funds in *Seed*, *Welsh* and *Yeo*.

49. From a net compensation perspective, assuming Class Counsel's fees and disbursements requests is approved and the Honorarium is approved and after removing the funding for the Reconciliation Initiatives, there would be approximately **$10,949,000** available for the compensation of individual claims. As a result, there is net compensation available of approximately **$8,039 per Class Member.** This too, is significantly higher than the net compensation per class member available in in *Slark*, *McKillop and Bechard,* and *Clegg*, which was approximately **$3,711 per class member**. It is also much higher than the net available in *Yeo* which was **$1,280 per class member**.[48]

[48] Sayce Affidavit, para. 99.

50. This assumes that all Class Members able to make a claim. In reality, not every single Class Member will make a claim, and the take-up rate is often much, much lower. There are various typical reasons why class members in any class action do not make claims. Some class members may not have been harmed in a compensable manner. Some class members may be deceased, and their estates may not have adequate knowledge of the class member's experience to make a claim. Some class members cannot communicate their experience on a claim form or even to a support person. Some may simply prefer not to think about their experience and would prefer to move on. In this case, the settlement allows Class Members to make a Section A claim despite certain barriers, but many Class Members will still choose not to make any claim.

51. Furthermore, the notice and administration costs will be paid by the Defendants and will not diminish the Settlement Fund.[49] This ensures Class Members will be able to receive the benefits of the Settlement Fund, regardless of the amount of work required by the Administrator.

52. In each of *Slark*, *McKillop*, *Bechard,* and *Clegg* there were sufficient funds to compensate all approved claims. In *Yeo*, the approved claimants shared in a pro-rata reduction of 15% of the maximum individual compensation amounts available. There are no material differences between this proceeding and those proceedings. As a result, Class Counsel believes the Settlement Fund will be sufficient to fully fund all approved claims.

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[49] Settlement Agreement, para. 5.

Experienced Claims Administrator and Claims Supervisor

53. The parties have agreed that RicePoint should be appointed Claims Administrator. RicePoint is an experienced notice and settlement administrator that has acted in similar roles in many previous class action claims processes.[50] The parties have also agreed that Irene Hamilton should be appointed Claims Supervisor, to conduct quality reviews of the Claims Administrator's decisions and a limited number of audits, in accordance with the terms of the Settlement.[51] Ms. Hamilton resides in Manitoba and has considerable experience in conducting independent and impartial reviews. Positions she has held include, inter alia: Manitoba Ombudsman from 2005-2012, Assistant Deputy Minister with Manitoba Justice from 2000-2005 and the Public Trustee of Manitoba from 1991-2000. She was also a Bencher and is a past President of the Law Society of Manitoba.[52]

ii. Likelihood of Recovery or Likelihood of Success

54. There was never a guarantee of recovery or success in this class action. As is the case with many institutional abuse class actions, there were general risks of historical claims lacking retrievable evidence, witnesses not providing expected evidence, and a court not finding sufficient evidence to find liability across the entire sixty-nine (69) year class period.[53]

55. In this case specifically, certification was hard-fought, discoveries were lengthy, and there were a number of contentious issues to be proven at a

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[50] Sayce Affidavit, para. 68.
[51] Settlement Agreement, Schedule "B", para. 25.
[52] Curriculum Vitae of Irene Hamilton, Sayce Affidavit, Exhibit J.
[53] Sayce Affidavit, para. 40(a).

common issues trial, as well as at individual issues trials, which would have likely required the cross-examination of Class Members.

56. Certifiability was opposed on several key criteria of s. 4 of the *Class Proceedings Act*. While the Defendant conceded that the pleadings disclosed a cause of action, and that a class proceeding was the preferable procedure, the Defendant challenged certification on: (1) the absence or insufficiency of evidence for a portion of the class period, (2) the application of a limitation period to claims in negligence, (3) a determination of discoverability with respect to the Plaintiff's individual breach of fiduciary duty claim, (4) the alleged lack of commonality of common issues relating to vicarious liability, and (5) an alleged conflict as between the class members in claims for vicarious liability.[54]

57. The Defendant raised evidentiary issues concerning the admission of core documents that the Plaintiff relied upon on certification, including Ombudsman reports on the failures of MDC, decisions identifying abuse by staff, and inquest reports into the death of residents.[55] The Defendant additionally raised the contention that there was a lack of evidence after 1977, given that the affidavits filed only concerned harms occurring during a portion of the class period.[56] Evidentiary issues are especially concerning in an historical case where one of the key allegations is that the Defendant did not keep adequate records and did not have proper policies in place to keep records.[57] The Court recognized that as this matter progresses, it may

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[54] Sayce Affidavit, para. 20.
[55] *Weremy v. The Government of Manitoba*, 2020 MBQB 85 at para. 25, PBOA, Tab 1.
[56] *Weremy v. The Government of Manitoba*, 2020 MBQB 85 at para. 59, PBOA, Tab 1.
[57] Amended Claim, para. 49(a-b).

become apparent that there is "no evidence" to advance the claim for all or part of the time frame after 1977, a matter to be determined at trial.[58] It was expected that similar arguments would be made by the Defendant at trial.

58. In addition, the Defendant raised limitations periods that may have been problematic for many Class Members' success on the common issues and at individual issues trials. While the claim was certified on the basis that the negligence claims may be encompassed by an exception for "actions for assault" in the *The Limitation of Actions Act*, the Court cautioned that "[t]his issue should be argued fully at trial."[59]

59. Similarly with respect to the claim for fiduciary duty, the Court agreed that each Class Member would have to establish at trial that he or she was under a disability that qualify for exception to the limitation period.[60] This would require each Class Member or their Substitute Decision Maker to provide evidence, which would be subject to cross-examination. The Class suffers from varying disabilities, and it was not at all clear at certification that each and every Class Member would be able to meet the test for an exception to the limitation period. The Court noted that one could not assume all Class Members were under a disability.[61]

60. The class action was certified, but proceeded with inherent risks and uncertainties, which included the following:

(a) whether the Plaintiff would be unsuccessful in proving negligence or breach of fiduciary duty;

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[58] *Weremy v. Manitoba*, 2020 MBQB 85 para. 73, leave to appeal ref'd 2021 MBCA 34, PBOA, Tabs 1, 2.
[59] *Weremy v. The Government of Manitoba*, 2020 MBQB 85 at para. 99, PBOA, Tab 1.
[60] *Weremy v. The Government of Manitoba*, 2020 MBQB 85 at paras. 104-105, PBOA, Tab 1.
[61] *Weremy v. Manitoba*, 2020 MBQB 85 para. 104, leave to appeal ref'd 2021 MBCA 34, PBOA, Tabs 1, 2.

(b) whether the Plaintiff establishes all other elements of negligence, or makes out a case on fiduciary duty, but the Defendant's duty of care is negated by the Defendant's "policy" defence;

(c) whether the Plaintiff succeeds in negligence and/or fiduciary duty, but is not awarded aggregate damages and the court orders individual assessment hearings; or

(d) whether the Plaintiff succeeds in negligence and/or fiduciary duty, but some or all class members' claims are barred by virtue of the application of potential limitation periods.

61. At a common issues trial, the Plaintiff would be required to prove the proposed answer to each certified common issue and rebut the Defendant's evidentiary and limitations period defences on a full record. The Plaintiff would be required to demonstrate what duties the Defendant owed to the Class. He would have faced the substantive obstacles of proving breach of fiduciary duty. If the Plaintiffs prevailed in demonstrating a wide duty of care and fiduciary duty to the Class, he would faced the challenge of proving to the trial judge that the Defendant failed in those duties to each resident who suffered specific types of harm from staff as well as residents. Several questions remained: what was the precise content of the Crown's duty of care owed to the residents over sixty-nine (69) years? Did the content of that duty change over time? If so, how? Moreover, it is well-settled law that proof of negligence, even aggravated negligence, would not have been enough for the Plaintiff to ground fiduciary liability, unless it was also associated with a breach of trust.[62] There was by no means a guarantee that the Plaintiff could make out all elements of this action to the benefit of the Class.

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[62] *K.L.B. v. British Columbia*, 2003 SCC 51 at paras. 48-49, PBOA, Tab 30.

62. Even assuming that success was achieved for the entire Class over the entire class period on the liability common issues, it is possible that individual assessments would be ordered instead of, or in addition to, aggregate damages. At the individual issues stage, the Plaintiff would be required demonstrate that each and every Class Member's claim was deserving of compensation at individual issues trials. Such trials could be extremely prejudicial to this vulnerable and aging Class: they could be adversarial, require significant time and to complete, and require Class Members to testify about traumatic injuries. Recovery may ultimately be limited to those Class Members who could communicate in a traditional manner or demonstrate documentary evidence of their losses.[63]

63. The common issues trial would be lengthy (a number of months), and a trial judge would likely require months to render a decision. Any appeals would require further delay of months or years. Determining a process for individual assessments would require an indeterminate amount of further time.[64]

64. The proposed settlement avoids all of these litigation risks, uncertainties, and potential prejudice. It allows each Class Member to be compensated for exactly what happened to them, without proving specific causes of action, or rebutting limitation periods.

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[63] Sayce Affidavit, para. 43(d).
[64] Sayce Affidavit, paras. 46-51.

iii. Amount and Nature of Discovery, Evidence or Investigation

65. The parties had extensively investigated this class proceeding, having nearly completed the discovery phase of this proceeding when the Settlement was reached. By that time:[65]

(a) The Defendant produced close to 68,000 documents over the course of sixteen (16) months, which reviewed by the parties;

(b) Class Counsel conducted extensive examinations for discovery of the Defendant's representative over four (4) days and delivered 89 questions on interrogatories about many topics including:

(i) Abuse prevention policies and procedures;

(ii) Abuse reports and investigations;

(iii) Staffing levels/ratios and staffing standards;

(iv) Population levels and capacities;

(v) Admission policies and characteristics of resident population;

(vi) Training and qualifications of staff;

(vii) Resident labour;

(viii) Resident deaths and reporting;

(ix) Physical plant; and

(x) Accreditation;

(c) The Defendant conducted an examination for discovery of the Plaintiff; and

(d) The parties exchanged extensive mediation briefs setting out in detail their respective positions on the issues in the litigation leading to trial.

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[65] Sayce Affidavit, paras 29-31.

66. The next step in the proceeding was the delivery of expert reports. Based on Class Counsel's review of the documents, answers on examinations for discovery and experience in other similar institutional abuse class proceedings, it was expected that expert opinions would have been obtained to show that Defendant failed to meet the applicable standards of care in the following areas:[66]

(a) Appropriate staffing levels;

(b) Appropriate number of residents for the facilities utilized;

(c) Standards with respect to the condition and adequacy of facilities;

(d) Appropriate placement or distribution of resident populations (i.e. the mixing of resident populations by gender, age, levels of disability, known behavioural issues);

(e) Appropriate abuse prevention, reporting and investigation policies;

(f) Appropriate regular systemic reviews of operational policies and performance;

(g) Appropriate reporting and remedial action taken with respect to violence in the institution; and

(h) Appropriate prioritization of resident care and safety.

67. Class Counsel and the Plaintiff had significant evidence to base their conclusions on the risks and potential outcomes of proceeding to trial and the possibility of Class Members having to go through individual assessment hearings after a successful common issues trial.

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[66] Sayce Affidavit, para. 30.

iv. Objections

68. Notice of the Settlement Approval Hearing was disseminated widely commencing on or around March 13, 2023, in accordance with the Order of Justice Grammond.[67] The deadline for Class Members to object to the Settlement is April 21, 2023.

v. Arm's length bargaining and the absence of collusion

69. Negotiations leading to this Settlement Agreement were always at arm's length, with there being no possible suggestion of collusion. The majority of active negotiation leading to an agreed upon term sheet took place in the presence of and with the assistance of the Honourable Justice Bock, who was appointed to conduct the Judicially Assisted Dispute Resolution ("**JADR**") by Court Order in March 2022.[68]

70. Settlement discussions began in September 2022 when the Plaintiff proposed a draft term sheet for further discussion. The parties exchanged extensive mediation briefs in October 2022 and November 2022, respectively. Those mediation briefs set out in exhaustive detail the positions of the parties and the evidence they expected to lead at trial. The parties exchanged correspondence on the draft term sheet proposed and then met on November 18, 2022 to discuss in-person. The JADR mediation took place on December 14, 15 and 16, 2022. With the assistance of Justice Bock, the parties were able to reach an agreement on a term sheet on December 16, 2022 setting out the broad terms of settlement. However, the arms length

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[67] Sayce Affidavit, Exhibit U.
[68] Sayce Affidavit, para. 28(n).

process required a further (3) three months thereafter to finalize a formal settlement agreement: between December 16, 2022 and March 7, 2023, the parties engaged in further settlement discussions to reach agreement on the specific terms of settlement and the details of the claims process. On March 7, 2023, the parties executed the Settlement Agreement.[69]

vi. Dynamics of the Parties during the Negotiations

71. As discussed above, the parties were not *ad idem* on the terms of the settlement before negotiations commenced after September 2022. The parties filed mediation briefs that outlined their preparedness to take this matter to trial. The majority of active negotiation between the parties required to successfully agree on terms took place over three full days of a JADR, with the assistance of the Honourable Justice Bock.[70]

vii. Communications with Class Members during litigation

72. Throughout the course of these proceedings, Class Counsel has communicated in a variety of ways with various Class Members. Numerous Class Members, supportive decision makers, caregivers and family members of Class Members have contacted Class Counsel. Class Counsel has maintained an active website for this action, updated it regularly and posted court and other documents for Class Members to review. Class Counsel has been actively involved in communicating to Class Members through the media, including press releases and interviews with various media outlets. Class Counsel has corresponded with or spoken to a number

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[69] Sayce Affidavit, paras. 28(t).
[70] Sayce Affidavit, para. 28(s).

of Class Members, supportive decision makers, caregivers and family members throughout the proceeding. Class Counsel devoted approximately 165 hours of lawyer, student and clerk time in communicating with class members, family members or their representatives throughout the course of this action.[71]

viii. Risks of not unconditionally approving the settlement, including future expense and likely duration of litigation

73. If this settlement were not approved, there would be significant delays before the determination of the common issues. The parties would exchange expert reports, likely not until the end of 2023.[72] A common issues trial would be scheduled and likely require between 2-3 months to complete, with 3-6 months required to render a decision, and appeals enduring another 11-14 months before final determination.[73] Therefore, it could be at least 2-3 years before a final determination on the common issues were made.

74. Even after a judicial determination of the common issues, individual assessments of the Class Members' damages, including determining the process for those assessments, could take years given the size of the Class and the claims being made.[74] These may require significant class member participation, not limited to the scheduling and conducting of examinations and cross-examinations. Such assessments would significantly prejudice a disabled and aging Class. Many Class Members would not be able to go through these types of examinations[75] and may choose to abandon the

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[71] Sayce Affidavit, para. 149.
[72] Sayce Affidavit, para. 46.
[73] Sayce Affidavit, para. 47.
[74] Sayce Affidavit, para. 50.
[75] Fletcher Affidavit, para. 28.

process. Many Class Members are also already in their 70s or older.[76] A significant portion of the Class has passed since October 31, 2016,[77] and many more would pass before the final determination of their awards.

ix. Recommendation and Experience of Class Counsel

75. Class Counsel are experienced class actions lawyers and have been appointed class counsel in numerous class actions including other institutional abuse claims and Crown liability claims. They have also been appointed in cases concerning: systemic negligence, sexual misconduct, Charter claims, pension funds, price-fixing, securities fraud, environmental damage, privacy law, and regulatory negligence. Koskie Minsky lawyers have argued cases in Ontario, Quebec, British Columbia, New Brunswick, Nova Scotia, Alberta, Saskatchewan, Manitoba, and Newfoundland and Labrador, as well as the Federal Court and before the Supreme Court of Canada. Many of the resulting precedents, including *Hollick v. Toronto (City)*, *Cloud v. Canada*, *Smith v. Inco Ltd.*, *Caputo v. Imperial Tobacco*, and *Markson v. MBNA Canada Bank* have shaped the way in which Canadian class actions are advanced. Class Counsel has become a leader in class action litigation in Canada.

76. In particular, Class Counsel has been involved in the litigation and settlement of a number of institutional abuse class actions that led to access to justice and compensation for thousands of class members, including: *Slark / McKillop / Bechard / Clegg* (Schedule 1 Institutions), *Seed* (schools for children with visual impairments), *Welsh* (schools for children with

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[76] Weremy Affidavit, para. 2; Fletcher Affidavit, para. 14.
[77] Sayce Affidavit, para. 51.

hearing impairments), *Cloud v. Canada* (pan-Canadian Indian Residential Schools Settlement), and *Anderson v. Canada* (5 residential schools in Newfoundland), and *Yeo v. Ontario* (an institution housing and assisting individuals with developmental disabilities), among others.

77. Class Counsel believes that the Settlement is fair, reasonable and in the best interest of the class given their experience and:

(a) the specific risks of proving this case at trial;
(b) general litigation risks;
(c) delays associated with the trial and attendant appeals;
(d) the difficulty, uncertainty and length of individual assessment hearings, if ordered;
(e) the advanced age of many Class Members;
(f) the compensation and paper-based claims process agreed to; and
(g) the Reconciliation Initiatives provided by the Settlement.

78. Class Counsel unreservedly recommend the approval of this Settlement Agreement, and the claims process within it.[78]

x. Recommendation of Neutral Parties

79. People First of Canada is an organization that advocates on behalf of people with disabilities and is not a party to this litigation, but which works with and assists the representative Plaintiff. The Executive Director of People

[78] Sayce Affidavit, para. 108.

First Canada has expressed complete support for the settlement in this case.[79]

PART VII - APPROVAL OF COUNSEL FEES

A. Principles Governing Fee Approval

i. The Prevailing Test

80. In determining whether to approve Class Counsel's request for legal fees and the retainer agreement itself, this court must determine whether those fees are fair and reasonable in all of the circumstances. The requisite factors to be taken into account are well established and include the following:

(a) the legal and factual complexities of the action;
(b) the risks undertaken, on both the merits and prospects of certification;
(c) the degree of responsibility assumed by class counsel;
(d) the monetary value of the matters at issue;
(e) the importance of the issues to the class members;
(f) skill and competence demonstrated by class counsel throughout the action;
(g) results achieved;
(h) ability of the class to pay and the class' expectation of legal fees;
(i) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation.[80]

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[79] Fletcher Affidavit, para. 28.
[80] *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 at para. 80, PBOA, Tab 31.

81. As a general guiding principle, various courts have confirmed that motions judges must apply the factor of risk to class counsel as one of the court's guiding considerations in their assessment of the 'reasonableness' of legal fees: "[t]he provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective [access to justice]… giv[ing] the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act [the CPA] is to fulfil its promise, that opportunity must not be a false hope."[81]

82. The final analysis of whether class proceedings legislation in each province will achieve their respective objectives (access to justice, behaviour modification and judicial economy) will largely depend on whether or not there are sophisticated and hard-working Class Counsel who are prepared to act for the class and hence bring these actions and do them well.[82]

83. Class counsel fees are not only to reward counsel for meritorious efforts, but to "also encourage counsel to take on difficult and risky class action litigation."[83]

84. Section 38(2) of the *Act* requires the Court to determine whether or not to approve the retainer agreement entered into between the representative Plaintiff and Class Counsel.

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[81] *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 (C.A.) at pp. 9-10, PBOA, Tab 32.
[82] Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996) at p. 3-4, cited by Cumming J. in *Ford v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.), at para. 59, PBOA, Tab 33.
[83] *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 9, PBOA, Tab 34.

85. Regardless of whether the retainer agreement is approved, under section 38(7) of the *Act*, the Court has the power to determine and approve fees and disbursements.

ii. The Retainer Agreement to be Approved

86. Pursuant to section 38 of the *Act*, an agreement respecting fees and disbursements between a solicitor and representative plaintiff must be in writing, and must be approved by the court.[84]

87. Class Counsel executed a written retainer agreement with the representative Plaintiff in October 2018,[85] which set out the terms and conditions of the fees to be sought by Class Counsel on conclusion of the action.

88. Under s. 38 of the *Class Proceedings Act*, a retainer agreement entered into between class counsel and a plaintiff may be contingent on success on in the proceeding.[86] Amounts owing under the agreement are a first charge on any settlement funds or monetary award.[87] The Court has wide authority to approve the agreement or determine the manner in which fees should be calculated.[88]

89. Mr. Weremy discussed key terms of the retainer agreement with Class Counsel prior to signing the retainer agreement.[89] Mr. Weremy's support workers, Ms. Currie and Ms. Fletcher also discussed the retainer agreement

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[84] *Class Proceedings Act*, C.C.S.M. c. C130, ss. 38(1)-(2), PBOA, Tab 57.
[85] Sayce Affidavit, Exhibit W; Weremy Affidavit, Exhibit A.
[86] *Class Proceedings Act*, C.C.S.M. c. C130, s. 38(1)(b), PBOA, Tab 57.
[87] *Class Proceedings Act*, C.C.S.M. c. C130, s. 38(6), PBOA, Tab 57.
[88] *Class Proceedings Act*, C.C.S.M. c. C130, ss. 38(2), 38(7), PBOA, Tab 57.
[89] Weremy Affidavit, para. 45; Currie Affidavit, para. 11; Fletcher Affidavit, para. 17.

with Class Counsel prior to execution.[90] Mr. Weremy also obtained independent legal advice before executing the retainer agreement.[91] Mr. Weremy understood the retainer agreement, and understood that Class Counsel could seek up to 33% of the recovery in the class action upon success.[92]

90. The retainer agreement is a contingency fee retainer that provides between one-quarter and one-third recovery, as is commonly the case in class action proceedings and personal injury litigation.[93]

91. The retainer agreement stipulates, amongst other things, that Class Counsel is to be paid 30% of all recovery (plus taxes) if the action is settled after a certification order is made, which is the stage at which the proposed Settlement was entered into. It also requires Class Counsel to be paid any disbursements not already paid as costs, plus taxes and interest.

92. If the retainer agreement is approved, per the *Class Proceedings Act*, it will be enforceable and amounts owing under the agreement will be a first charge on any settlement funds or monetary award.[94]

93. If the retainer agreement is not approved, the Court has the power to determine fees and disbursements owing to Class Counsel.

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[90] Weremy Affidavit, para. 47; Currie Affidavit, para. 11; Fletcher Affidavit, para. 17.
[91] Weremy Affidavit, para. 48; Currie Affidavit, para. 11; Fletcher Affidavit, para. 17.
[92] Weremy Affidavit, para. 49.
[93] Sayce Affidavit, paras. 179-181.
[94] *Class Proceedings Act*, C.C.S.M. c. C130, ss. 38(2), 38(6), PBOA, Tab 57.

iii. The Proper Approach is Percentage-Based

94. In applying the principles to determine class counsel fees, courts have repeatedly favoured a percentage-based approach, over a "multiplier" of counsel time, since a multiplier often fails to address the true risks of a class action contingency practice, and encourages bad time management.[95] This is especially the case where the retainer provided legal fees be calculated as a percentage of recovery for the class.

95. In this case, the factors set out in the case law (as described further below) are each met and justify the class counsel fee sought. Class Counsel seeks approximately 25% of the recovery in this case, which is well within the ordinary range as described below. It is fair and reasonable under all of the circumstances, including the excellent result reached.

96. Class Counsel worked efficiently and effectively and assigned appropriate tasks to the appropriate lawyers and students. Class Counsel devoted approximately 3,000 hours of lawyer, student and clerk time in the litigation of this action.[96] In comparison, Koskie Minsky LLP devoted over 12,600 hours of lawyer, student and clerk time in the prosecution of the *Slark v. Ontario* matter (an institutional abuse class action that settled after 5 years

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[95] See *Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670, PBOA, Tab 35 at footnote 9; also see *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537 at para 19, PBOA, Tab 36; *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.), 2009 CanLII 35732 (O.N.S.C.) at paras. 59-61, PBOA, Tab 37 (where the Court approved a percentage that would equate to a 5.5. multiplier on time. Also see *Ramdath v. George Brown College of Applied Arts and Technology*, 2016 ONSC 3536, at note 14, PBOA, Tab 38: “Over a period of years, plaintiff-side class action firms will win cases and lose cases. The “risk” that contingency lawyers face cannot be assessed case-by-case or one-off, but must be measured across a great many files. A “large” contingency recovery in one case will offset the loss or losses in other cases. That is why the “multiplier” approach that purports to assess risk by considering only the case that is currently before the court is fundamentally flawed, indeed unprincipled.”

[96] Sayce Affidavit, Exhibit V.

of litigation on the day before the common issues trial) and over 10,400 hours of lawyer, student and clerk time in the prosecution of *Anderson v. Canada* (a residential school abuse class action that settled after eight years of litigation and four months of the hearing of a common issues trial in St. John's, Newfoundland).[97] Class Counsel should not be penalized for its time-management and experience.

97. While the focus should not be placed on the multiplier for the reasons described above, the multiplier in this case is, like the percentage, also fair and reasonable under all the circumstances. Class counsel incurred approx. $1,386,000 in time as at April 15, 2023, and will incur a total of approximately $750,000-$1,000,000 more to complete the matter.[98] Therefore, on the basis of a class counsel fee of $4.2 million, the multiplier is approximately 1.76-1.97. This multiplier is very low compared to the multiplier in other cases.[99]

B. The Fee Sought is Reasonable

i. Legal and Factual Complexities of the Action

98. This action was litigated over more than four years. As described above, there were significant complexities associated with the litigation of this action.

99. Each fact alleged in the Statement of Claim remained to be proven on a class-wide basis at a common issues trial. Each cause of action was to be made out on a class-wide basis at a common issues trial. The Defendant

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[97] Sayce Affidavit, para. 128.
[98] Sayce Affidavit, para. 155.
[99] See Schedule "B" – Previous Fee Awards in Select Class Proceedings.

raised evidentiary issues at the certification motion. The claim itself alleged that the Defendant had failed to provide a system through which abuse would be recognize and reported,[100] such that evidence of the alleged abuses was lacking. There were also issues with the memory of an aging and disabled Class.

100. The certification of each cause of action was opposed on various bases. Class Counsel filed a lengthy certification motion record containing ten (10) affidavits and substantive documentary evidence.[101] The Defendants sought leave to appeal the decision on certification.

101. The discovery phase involved over six (6) days of oral discoveries, more than sixty-eight thousand 68,000 documents to be reviewed, and approximately four hundred (400) undertakings to be answered by the Defendant and reviewed by the Plaintiff.

102. The parties exchanged extensive briefs before engaging in three days of JADR mediation. Following that mediation, Class Counsel spent considerable time and effort in reaching this Settlement after nearly four months of arm's length negotiations with the Defendants.

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[100] Amended Claim, paras. 37(g-i).
[101] Sayce Affidavit, para. 14.

ii. Risks Undertaken, on Both the Prospects of Certification and the Merits

103. The assessment of the risk taken on by Class Counsel is assessed at the commencement of the proceeding, not that the time the settlement achieved.[102]

104. As noted above, this class action is an institutional abuse class action spanning 69 years of operation. Initiating this personal injury type class action was inherently risky at commencement. Class Counsel agreed to pursue this matter without any guarantee that it would be compensated at all for its work. It undertook significant risk in doing so.

105. It was not until the middle of the discovery process that Manitoba agreed to mediate and in the middle of the Defendants' obligation to respond to extensive undertakings and Questions on Interrogatories before it agreed to a resolution.

106. The section above titled "Likelihood of Recovery or Likelihood of Success" summarizes some of the risks involved in this case, which Class Counsel faced when it decided to proceed with this matter on a contingent basis.

107. In addition to the risk of not being remunerated at all for its work, Class Counsel faced delay and uncertainty in recovery when it agreed to proceed at claim commencement. In particular, at the outset of this proceeding

(a) the size of the Class was unknown;

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[102] *Condon v. Canada*, 2018 FC 522 at para. 97, PBOA, Tab 39.

(b) It was not clear how many Class members were harmed;

(c) The nature of the damages suffered by Class Members was not known;

(d) It was uncertain as to the ability of Class Members to proceed through individual assessment hearings after a common issues trial;

(e) It was uncertain as to the amount of damages obtainable for those who could be successful at an individual assessment process after a common issues trial; and

(f) The timeframe for recovery by class members if successful after a common issues trial and individual assessment process could have been estimated at 7-10 years.[103]

108. In short, there was significant risk that the amounts available to Class Members after a successful prosecution of this proceeding would not be sufficient to compensate Class Counsel for the time it devoted to this proceeding at its hourly rates, let alone any premium for engaging is such risk, or for the disbursements Class Counsel would need to incur during the course of this proceeding.

iii. Degree of Responsibility assumed by Class Counsel

109. Koskie Minsky LLP undertook complete responsibility for prosecuting this action to its end, on behalf of Mr. Weremy and the Class.

iv. Importance of the Issues to the Class Members

110. In many cases, Class Members their formative years at MDC, or spent a large part of their lives at MDC. The incidents alleged in this action and now compensable under the Settlement Agreement are the most terrible

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[103] Sayce Affidavit, para. 168.

things that happened in the Class Members' lives. It is extremely important for them to not only to be compensated for their harms, but to commemorate their stories.

111. The Class is comprised of extremely vulnerable people who require support in their daily lives. Finding the resources and support to litigate a historical abuse case would have been impossible for most Class Members. Furthermore, while the monetary value of the case as a whole is very high, the amounts at stake for many class members were such that individual litigation would not be viable. The Class required the assistance of Class Counsel to advance their interests in common, to achieve access to justice, and to achieve behaviour modification protecting other individuals with disabilities.[104]

v. Results Achieved

112. The result achieved for the Class Members in this case is remarkable.

113. The Settlement is described above. The claims process, individual compensation and Reconciliation Initiatives available to the Class are significant accomplishment, favourably comparable to settlement of similar cases, and provide benefits that are not available at trial and extremely rare to see in class action settlements.

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[104] *Romeo v. Ford Motor Co.* 2019 ONSC 1831, per Morgan J., at paras. 28-29, PBOA, Tab 40.

vi. Skill and Competence demonstrated by Class Counsel

114. The lengthy prosecution of this case through several procedural hurdles well illustrates the skill and competence of Class Counsel. Class Counsel led the case from the investigation stage, to certification, and through an extensive and voluminous discovery process.

115. Class Counsel brought its extensive experience in all stages of class action litigation to bear in this case to achieve a timely and reasonable resolution. In particular, Class Counsel's experience prosecuting historical abuse class proceedings against government entities was evident in the Plaintiff's decisive success on certification and the negotiation of unprecedented benefits for Class Members under the Settlement Agreement.

116. This Settlement does not merely replicate previous institutional abuse settlements that Class Counsel was involved in negotiating, but rather builds on those by achieving robust monetary and non-monetary benefits for the Class that are exceedingly rare in class action settlements – including legacy initiatives that will continue to benefit the Class well beyond the completion of the Settlement – and addressing frailties in other comparable settlements.

vii. Ability of the Class to Pay and the Class's Expectation of Legal fees

117. Retainer agreements in class actions matters are generally on a contingency basis and generally provide for a contingent fee in the range of one-fifth to one-third of recovery.

118. Lawyers practicing in personal injury litigation generally have retainer agreements for in-dividual litigation that provide for a contingent fee in the range of 25% to 33% of recovery, which retainer agreements need not be approved by a court. The retainer agreement is in line with retainer agreements approved in other class actions.[105]

119. Class Counsel executed a written retainer agreement with the representative Plaintiff in October 2018,[106] which set out the terms and conditions of the fees to be sought by Class Counsel on conclusion of the action. The representative Plaintiff obtained independent legal advice before executing the retainer agreement.[107]

120. The retainer agreement is a contingency fee retainer that provides between one-quarter and one-third recovery, as is commonly the case in class action proceedings and personal injury litigation.[108] It stipulates fees of between 25% to 33% of all recovery, plus taxes and disbursements.[109] The retainer states, amongst other things:

> 10. Whether or not Success is achieved in the Action, Class Counsel shall be paid all costs recovered in the Action from the Defendant, irrespective of the scale, including any disbursements, applicable taxes and any interest payable thereon and any other amount paid by the Defendant as costs. Class Counsel are authorized to settle the amount of costs awarded on any motion, appeals or the trial of the Common Issues.
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> 11. Except for any costs paid to Class Counsel as provided in paragraph 10 above, Class Counsel shall only be paid its fees upon

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[105] Sayce Affidavit, para. 181.
[106] Sayce Affidavit, Exhibit W; Weremy Affidavit, Exhibit A.
[107] Weremy Affidavit, para. 48; Currie Affidavit, para. 11; Fletcher Affidavit, para. 17.
[108] Sayce Affidavit, paras. 180.
[109] Weremy Affidavit, Exhibit A.

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.

12. 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 Defendant as costs plus applicable taxes and interest thereon in accordance with s. 33(7)(c) of the Act; plus

(b) an amount equal to a percentage of Recovery plus HST where the applicable percentage rate shall be as follows:

(i) Twenty-five percent (25%) if the action is settled or judgment is granted prior to a certification order being made;

(ii) Thirty percent (30%) if the action is settled or judgment is granted after a certification order is made and prior to the commencement of the trial of the Common Issues;

(iii) Thirty-three percent (33%) if the action is settled or judgment is granted after the commencement of the trial of the Common Issues;

13. Class Counsel must make a motion for the approval of their fees. The amount to be paid for Class Counsel fees is in the sole discretion of the Court considering fee approval but will not exceed any percentage provided for in this Agreement.

121. The fees stipulated are well in line with the common and expected fees in class action proceedings and other contingency fee arrangements.

122. The representative Plaintiff at all times expected that Class Counsel would seek the full amount of this percentage.[110] In fact, Class Counsel is seeking a fee that is notably less than it is entitled to under the retainer – 25% of the Settlement Fund, and approximately 23.7% of total recovery if administration costs estimates were included.

123. As described by the Executive Director of People First Canada, the vast majority of the Class Members are on social assistance, and would not have the means to fund litigation against Manitoba. These are some of the most vulnerable people, and often impoverished.[111] They simply would not be able to pay Class Counsel's fee on an hourly basis.

viii. Opportunity Cost to Class Counsel in the Expenditure of Time

124. Koskie Minsky LLP offers both fee-for-service and contingency-based work.[112] Significant time has been expended by Class Counsel in pursuing this litigation through the steps of certification, productions, discoveries, and preparation for trial, that could have been devoted to otherwise fee-for-service work. As of April 15, 2023, Class Counsel has expended approximately 3,000 hours of lawyer, clerk and student time, with a total value of $1,386,000.

125. In addition, there is considerable work which remains to be done by Class Counsel, including communications with class members, review of actuarial calculations, and other implementation matters. It is estimated that

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[110] Weremy Affidavit, para. 49.
[111] Fletcher Affidavit, paras. 12-13.
[112] Sayce Affidavit, para. 170 and Exhibit "W", Schedule "A" (Hourly Rates).

Class Counsel will incur an additional time in respect of the further work and preparation prior to this motion and following the motions in respect of the judgment implementation matters – estimated at approximately $750,000–$1,000,000. Therefore, the total value of the time spent to completion of this action and to be spent to the conclusion of the Settlement will be approximately $2,386,000, plus taxes, over the course of more than 5 years. This represents a very significant opportunity cost.

126. In addition, As of April 15, 2023, Class Counsel and Wolseley Law have incurred **$121,525.98** in disbursements (including taxes) since the commencement of this action to prosecute this matter effectively on behalf of the Class.

127. Class Counsel funded these disbursements on behalf of the Class without any guarantee of recovery. Class Counsel seeks recovery of the disbursements it incurred to date as well as an allowance of $25,000 for disbursements to be incurred following April 15, 2023, relating to attendance at the Settlement Approval hearing and the implementation of the Settlement.[113]

128. Had this matter proceeded to trial, Class Counsel would have had to invest and additional $500,000 for expert reports on behalf of the Class[114] – further risk Class Counsel agreed to take on for the Class.

[113] Sayce Affidavit, para. 157.
[114] Sayce Affidavit, para. 53.

ix. The Fee Sought is Consistent with Other Fee Awards

129. A contingency fee of 33.33% in a class action has frequently been held to be "presumptively valid".[115]

130. The request of a 1.76-1.97 multiplier or 25% of recovery is well within the jurisprudential spectrum regarding reasonable legal fees.[116]

C. The Importance of Compensation for Class Counsel in Class Proceedings

131. The issue of compensation for Class Counsel is a vitally important subject in class proceedings. The three objectives of class proceedings legislation are: access to justice, behaviour modification and judicial economy.[117] Achieving these objectives of is largely dependent on whether or not there are sophisticated and hard-working Class Counsel who are prepared to act for the class, bring these actions and do them well, despite risk that the expenses incurred in time and disbursements may never be recovered.[118].

132. Where Class Counsel achieve a successful result, they render a service not just to the class but to the legal system itself by providing access to justice, achieving judicial economy and contributing to behaviour modification. Simply put, if Class Counsel are not adequately and

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[115] *McLean v. Cathay Pacific Airways Limited*, 2021 BCSC 1456 at para. 55, PBOA, Tab 41.
[116] See Schedule "B" – Previous Fee Awards in Select Class Proceedings.
[117] *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at paras. 27-29, PBOA, Tab 42.
[118] *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.), PBOA, Tab 43; *Ford v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.), para. 59 citing Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996), pp. 3-4, PBOA, Tabs 33, 56.

consistently compensated in an amount that fairly reflects the seriousness of risks undertaken over the course of many years, the purpose of the legislation will not be achieved: "...class actions simply will not be undertaken by first rate lawyers... unless they are assured of receiving fair - and I would add "generous" - compensation in appropriate cases".[119]

133. A fee award that not only compensates Class Counsel for the amount of time actually incurred, but that also recognizes that the risk assumed on behalf of the class, is essential to ensuring that counsel remain to assume the necessary risks to act as Class Counsel. Class Counsel will inevitably take on worthy cases that they will nevertheless lose, visiting upon them significant financial consequences. If Class Counsel are not adequately compensated in cases where they are successful, they will not have an economic incentive to prosecute class actions, members of the public who have been wronged will be denied access to justice, and inappropriate behavior on the part of defendants will go unmodified.[120]

134. This has been acknowledged in legislative studies underpinning the class action statutes, as well as by settlement approval judges, and this is the lens through which risk evaluation at the fee approval stage must be viewed. As a result, it is paramount that the Court carefully consider not only all of the risks incurred by Class Counsel in prosecuting class proceedings, but also the ultimate risk concerning the fulfillment of the objectives of the legislation. Although the risks incurred in undertaking and continuing a class proceeding are varied and complex, the purpose of assessing the risks

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[119] *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292 at para. 53 (S.C.), PBOA, Tab 44.
[120] Sayce Affidavit, para. 171.

incurred by Class Counsel is clear: the issue of compensation will ultimately determine whether or not the class proceedings regime in Canada generally will be successful in fulfilling its legislative objectives.

135. The protracted nature of class proceedings results in increased expense to class counsel and exacerbates class counsel's risk of carrying enormous amounts of unpaid time and disbursements, since class counsel is often required to be out-of-pocket for these expenses throughout. Conversely, defendants tend to be well-resourced and represented by larger law firms, charging substantial hourly rates "with virtually unlimited resources".[121]

136. The risks borne by class counsel in the conduct of a class action are greatly increased as a result of the inherently protracted nature of these proceedings. Not only are class counsel required to shoulder enormous costs and unpaid time in order to prosecute these actions, but these must be borne for extended periods of time, sometimes more than a decade. Rare is the class action that proceeds with urgency. Class litigation is characteristically marked by considerable delay: "[i]t is well known that class proceedings generally move at a glacial pace." Motions for certification are also now longer and more costly than ever. In addition, a successful motion for certification is no longer typically the end of the litigation as cases are increasingly continuing beyond this stage, through discoveries and even to trial in ever increasing numbers. Certification is no longer the high watermark

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[121] *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105 at para. 65 (S.C.J.), PBOA, Tab 45.

of a class proceeding.[122] In this case, certification was hard-fought by the Defendant. Certifiability was opposed on several criteria of the *Class Proceedings Act*.[123]

137. The risks and high costs of litigation associated with pursuing complicated yet worthy cases have been eloquently described as follows:[124]

> There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequence of an order for costs would be to destroy such a claim, no order should be made. Injustice would be even more manifest if the impoverishment of plaintiff were caused by the very acts of which plaintiff complains in the action. [emphasis added]

138. This is precisely the problem that class proceedings legislation was designed to prevent – the injustice of the non-pursuit of meritorious claims. Such claims cannot be prosecuted diligently, or at all, without class counsel being willing and able though a contingent fee arrangement to assume all of the attendant financial risks. Approved fees are not only to reward counsel for meritorious efforts, but to "also encourage counsel to take on difficult and risky class action litigation".[125]

139. After a court approves a settlement agreement, class counsel's obligations to class members does not end, and class counsel are typically required to perform significant, uncompensated work to finalize settlement implementation distribution, notice and wind-up. Approved fees must allow

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[122] *Smith v. Inco Ltd.*, 2010 ONSC 3790, PBOA, Tab 46, and *Ramdath v. George Brown College of Applied Arts and Technology*, 2012 ONSC 6173, PBOA, Tab 47.
[123] Sayce Affidavit, para. 18.
[124] *John Wink Ltd. v. Sico Inc.,* [1987] O.J. No. 5 (H.C.), at para. 8, PBOA, Tab 48.
[125] *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 9, PBOA, Tab 34.

class counsel to continue to act for the class to ensure that each class member is able to access justice under the settlement.

PART VIII - APPROVAL OF HONOURARIUM

A. The Prevailing Test for Granting an Honourarium

140. An honourarium is justified where the representative plaintiff in a class proceeding can demonstrate a level of involvement and effort that goes beyond what is "normally expected" of a representative plaintiff, or where there is evidence they were financially harmed.[126]

141. The Court of Appeal in Ontario has approved the practice of awarding honouraria to representative plaintiffs out of the settlement fund, and not out of counsel's fees in order to avoid the spectre of fee splitting.[127]

142. Courts have often considered the time and efforts a Plaintiff has devoted when approving honouraria. For example, on settlement approval in *Slark*, an action similarly concerning abuse at a residential facility for developmentally disabled individuals, the Court remarked:[128]

> In the case of Ms. Seth and Ms. Slark, their efforts in advancing this litigation, bringing this case to court, publicizing the story of

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[126] *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 at paras. 133-136, PBOA, Tab 31; *Kalra v. Mercedes Benz*, 2022 ONSC 941 (unreported) at para. 34, PBOA, Tab 49 (where the court awarded $10,000 to the representative plaintiff for the hours he spent assisting in litigation); See also e.g.: *MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726 at paras. 54-59, PBOA, Tab 50 (where the court approved honoraria between $50,000 and $10,000 for representative plaintiffs who commenced a high-profile class action at enormous personal and financial sacrifice); and *Casseres v. Takeda Pharmaceutical Company,* 2021 ONSC 2846 at para. 10, PBOA, Tab 51 (where the Court approved an honourarium of $5,000 for "the good work" the plaintiffs did, because their effort and involvement went beyond what is normally expected).

[127] *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 at paras. 133-136, PBOA, Tab 31.

[128] *Slark (Lit. Guard. Of) v. HMQ,* 2013 ONSC 6686 at para. 46 (where the Court approved an honourarium of $15,000 for each of the plaintiffs), PBOA, Tab 22.

> Huronia and speaking in court at the settlement approval hearing have been exceptional indeed. They have gone well beyond what could ever be expected of representative plaintiffs, in a particularly difficult case.

143. Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case, assistance which resulted in monetary success for the class, it may be appropriate to award compensation to the representative plaintiff in their own right.[129]

B. The Honourarium for the Representative Plaintiff should be approved

144. In this case, the factors set out in the case law are all satisfied. Mr. Weremy's contributions to this class action went beyond what would be expected of him as a representative plaintiff.

145. Before commencing this action, Mr. Weremy had already been actively advocating on behalf of past residents of MDC for years.[130] Mr. Weremy personally spoke to past residents about what they suffered at MDC.[131]

146. Mr. Weremy contributed a significant amount of time to directing this litigation, being involved in pleadings, certification, examinations for discovery, preparation for judicially assisted dispute resolution, and

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[129] *Windisman v. Toronto College Park Ltd.,* [1996] O.J. No. 2897 (Gen. Div.) at para. 28, PBOA, Tab 52.
[130] Fletcher Affidavit, paras. 7, 22.
[131] Weremy Affidavit, para. 18(p); Fletcher Affidavit, paras. 19(n).

preparation for trial. Such time commitments have previously been considered in granting honouraria.[132]

147. Mr. Weremy commenced this class action around the age of 74. In doing so, he agreed to be the name and face of a high-profile action concerning very the sensitive topics of sexual and physical abuse. He courageously swore an affidavit containing the details of the sexual and physical abuse he endured at MDC. He agreed to be examined on the basis of that story, and he was examined on discovery by counsel for the Defendant.[133]

148. Mr. Weremy also actively assisted counsel in litigating this class action. He was directly involved at each step of the class proceeding.[134] Despite his ailing health at the time, Mr. Weremy instructed counsel during the litigation of the certification motion.[135] Despite his mobility issues and disabilities, Mr. Weremy also attended examinations for discovery and the judicially assisted negotiation with Manitoba, which lead to this settlement.[136]

149. Mr. Weremy expended many hours in actively assisting the litigation process of this class action. Yet he never expected he would receive compensation for the work he did. He did not do his job so well out of an expectation for personal gain.[137]

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[132] See e.g. *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528 at para. 43, PBOA, Tab 53 (where the court awarded $10,000 to the representative plaintiff for the hours he spent assisting in litigation); *Manuge v. Canada,* 2013 FC 341 at para. 50, PBOA, Tab 16.
[133] Sayce Affidavit, para. 28(o), Weremy Affidavit, para. 18(f).
[134] Weremy Affidavit, paras. 18-19.
[135] Weremy Affidavit, paras. 18-19.
[136] Weremy Affidavit, paras. 18-19.
[137] Weremy Affidavit, paras. 20-21.

150. A $15,000 honourarium is well within the range of honouraria previously approved for representative plaintiffs in other class actions.[138] Honouraria granted to plaintiffs for similar contributions are often much higher. For example, in *R v. Manuge* the Federal Court granted a $50,000 honourarium to a plaintiff who sought to commence and tenaciously litigated the class action.[139] In *Garland v. Enbridge Gas*, the Ontario Superior Court granted $25,000 to a plaintiff who actively communicated with counsel and offered assistance during the length of the case.[140]

PART IX - CONCLUSION AND ORDER SOUGHT

151. The proposed Settlement in this action offers exceptional benefits to all Class Members that go beyond that offered in similar institutional abuse cases. It is unreservedly recommended by experienced counsel, as well as the representative Plaintiff and his support network. The proposed settlement should be approved as fair, reasonable, and in the best interests of the Class.

152. The fees sought by Class Counsel are lower than that stipulated in the retainer agreement signed at the outset of this action and well within the range of fees approved on other settlements. It is fair and reasonable given the important results achieved despite the complexities of the action.

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[138] See Schedule C – Previous Honouraria Awards in Select Class Proceedings.
[139] *Manuge v. Canada,* 2013 FC 341 at para. 50, PBOA, Tab 16.
[140] *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C (6th) 357 (O.N.S.C.), PBOA, Tab 54.

153. The honourarium award sought for the representative Plaintiff is likewise justified given Mr. Weremy's contributions throughout this class proceeding, and comparable to similar awards.

154. The Plaintiff therefore respectfully requests:

(a) a declaration that the Settlement Agreement is fair, reasonable, and in the best interest of the class;

(b) an order approving the Settlement pursuant to section 35 of the *Class Proceedings Act*, C.S.S.M. c. C.130;

(c) a declaration that the Settlement Agreement is binding on the Plaintiff, on all class members, and on the Defendant;

(d) an order approving the form, content and manner of distribution of the proposed notice of settlement approval, if granted;

(e) an order approving the form of the proposed claim form;

(f) an order appointing RicePoint Administration Inc. as the administrator of the claims process pursuant to the Settlement Agreement;

(g) an order appointing Irene Hamilton as the Claims Supervisor pursuant to the Settlement Agreement;

(h) an order approving the retainer agreement between Class Counsel and the Plaintiff;

(i) an order approving Class Counsel fees of $4,200,000 plus taxes of $504,000 (or in such other amount as ordered by the Court) out of the Settlement Fund (defined below);

(j) an order approving Class Counsel's request for reimbursement for disbursements including all applicable taxes (the specific amount is subject to change and will be provided prior to the hearing of the motion) to be paid out of the Settlement Fund;

(k) an order approving a $15,000 honorarium payment to the Representative Plaintiff to be paid out of the Settlement Fund; and

(l) an order that the approved Class Counsel fees, approved reimbursement for disbursements, and the approved honorarium

payment to the Representative Plaintiff, shall be paid out of the Settlement within 30 days of the Court Approval Date as set out in the Settlement Agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of April, 2023.

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SCHEDULE "A"
PREVIOUS SETTLEMENTS IN COMPARABLE CLASS PROCEEDINGS

Case	Total Settlement Value	Class Size
Slark v. Ontario, 2013 ONSC 6686	$35 million	6,219
McKillop v. Ontario, 2014 ONSC 1282	$20.6 million	4,185
Bechard v. Ontario, 2014 ONSC 1282	$12.1 million	6,547
Clegg v HMQ, 2016 ONSC 2662	$35.9 million	7,792
Seed v. Ontario, 2017 ONSC 3534	$8 million	1,962
Welsh v. Ontario, 2018 ONSC 3217	$15 million	4,585
Yeo v. Ontario, 2021 ONSC 4534	$12 million	5,352

SCHEDULE "B"
PREVIOUS FEE AWARDS IN SELECT CLASS PROCEEDINGS

Case	Percentage	Multiplier	Stage of Action at Settlement
Cloud v Canada (approved as part of *Baxter v Canada*, 2006 CanLII 41673 (ONSC))		2.4	Post-certification
Anderson v. Canada (Attorney General), 2016 NLTD(G) 179	33.3%	1.81	After the close of the plaintiffs' case at trial
Dolmage, McKillop and Bechard v. HMQ, 2014 ONSC 1283	20.68%	2.38	First day of trial
Clegg v HMQ, 2016 ONSC 2662	9.67%	3	Post-certification
Robertson v. Thompson Canada Ltd., [2009] O.J. No. 2650 (S.C.J.)	36%	2.4	Post-certification, post-summary judgment
Omrod v. Toronto Hydro-Electric Systems Ltd., [2002] O.J. No. 4925 (S.C.J.)	35%	2	Post-certification
Walker v. Union Gas Ltd, [2009] O.J. No. 536 (S.C.J.)	29.8%	2.19	Pre-certification
Martin v. Barrett, [2008] O.J. No. 2105 (S.C.J.)	29%	2.5	Post-certification
Pichette v. Toronto Hydro, [2010] O.J. No. 3185 (S.C.J.)	28.5%	4.42	Pre-certification
Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907 (S.C.J.)	26.7%	2.78	Pre-certification, post-summary judgment
799376 Ontario Inc. (c.o.b. Lonsdale Printing	25%	2.88	Pre-certification

Services) (Trustee of) v. Cascades Fine Papers Group Inc., [2008] O.J. No. 5280 (S.C.J.)			
Pysznyj v. Orsu Metals Corp., [2010] O.J. No. 1994 (S.C.J.)	25%	2.11	Pre-certification
Osmun v. Cadbury Adams Canada Inc., [2010] O.J. No. 2093 (S.C.J.)	25%	2	Post-certification
405341 Ontario Ltd. v. Midas Canada Inc., [2013] O.J. No. 4107 (S.C.J.)	25%	1.3	Post-certification and discoveries
Robertson v. ProQuest LLC, [2011] O.J. No. 2013 (S.C.J.)	24%	1.7	Post-certification
Zaniewicz v. Zungui Haixi, [2013] O.J. No. 3894 (S.C.J.)	20.75%	3.3	Pre-certification
Cassano v. Toronto-Dominion Bank, 2009 CanLII 35732 (O.N.S.C.)	20%	5.5	Post-certification
Fantl v. Transamerica Life Canada, [2009] O.J. No. 3366 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 4324 (S.C.J.)	16%	2.75	Pre-certification
Lawrence v. Atlas Cold Storage Holdings Inc., [2009] O.J. No. 4067 (C.A.)	15.75%	~2	Pre-certification

SCHEDULE "C"
PREVIOUS HONOURARIA AWARDS IN SELECT CLASS PROCEEDINGS

Case	Honorarium
Toth v. Canada, 2019 FC 125	$50,000
Manuge v. Canada, 2013 FC 341	$50,000
Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907	$25,000
Merlo v. Canada, 2017 FC 533	$15,000 each
Dolmage/Slark (Litigation Guardian of) v. Ontario, [2013] O.J. No. 5530 (S.C.)	$15,000 each
Fulawka v. Bank of Nova Scotia, 2014 ONSC 4743	$15,000
Hislop v. Canada (AG), [2004] O.J. No. 1867 (S.C.)	$15,000 lead representative plaintiff, $10,000 secondary, $5,000 tertiary
McCrea v. Canada, 2019 FC 122	$10,000
Riddle v. Canada, 2018 FC 641	$10,000
Eklund v. Goodlife Fitness Centres Inc., 2018 ONSC 4146	$10,000
Anderson v. Canada, [2016] N.J. No 376 (S.C.)	$10,000 each