CITATION: Robinson v. Medtronic, Inc., 2020 ONSC 1688
COURT FILE NO.: CV-07-CV-341755CP
DATE: 20200319

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SHERRY MARIE ROBINSON, GREGORY ROBERT HORNING, DAN AUSTEN, and GLENDA AUSTEN, Plaintiffs

AND:

MEDTRONIC, INC. and MEDTRONIC OF CANADA LTD., Defendants

BEFORE: Justice Glustein

COUNSEL: *Won J. Kim, Megan B. McPhee, and Joel Rochon*, for the Plaintiffs

Danielle Royal, for the Defendants

HEARD: March 2, 2020

REASONS FOR DECISION

Nature of motion and overview

[1] The plaintiffs bring this motion pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (the "*CPA*") for an order (along with ancillary relief) to:

(i) on consent, approve the settlement of the actions (the "Settlement") in accordance with the terms of the settlement agreement executed on April 24, 2019 (the "Settlement Agreement"),

(ii) approve the payment of fees and disbursements for Class Counsel (Rochon Genova LLP and Kim Spencer McPhee Barristers P.C.), and

(iii) approve the payment of a $10,000 honorarium to each of the representative plaintiffs, Sherry Marie Robinson ("Sherry") and Dan Austen ("Dan").

[2] A similar motion was brought in Court File No. 05-CV-295910CP (the "Peter Action"). I release reasons concurrently in both motions and rely on the present reasons to set out the applicable law in both motions.

[3] At the hearing, by endorsement, I granted the relief sought approving the Settlement Agreement, payment of Class Counsel fees and disbursements, as well as the ancillary relief

sought, subject to some minor modifications to the draft order provided at court. I dismissed the request for the payment of the honoraria.

[4] I signed an order at the hearing with reasons to follow. I now set out my reasons below.

Facts

(a) Review of the litigation

[5] The action is a national class proceeding certified on behalf of Canadians surgically implanted with Medtronic Sprint Fidelis leads with the model numbers 6949, 6948, 6931 and 6930 (the “Leads”), which were recalled in October 2007.

[6] The Plaintiffs allege that the Leads (complex insulated wires connecting an Implantable Cardioverter Defibrillator (“ICD”) to the heart muscle) were prone to fracture causing injury. They claim damages as a result of the Defendants’ alleged negligence in the design, development, testing, manufacturing, licensing, assembly, distribution, marketing, and sale of the Leads.

[7] The primary function of ICDs is to deliver an electrical shock to the heart when the heart develops a life-threatening rhythm in order to terminate the abnormal rhythm and return the heart rhythm to normal. The Leads are small insulated wires that connect ICDs (and CRT-Ds) to the heart and their dual function is to sense the heart’s rhythm, by carrying information about the heart’s electrical activity back to the defibrillator and, if the defibrillator detects an abnormal heart rhythm, the lead carries high voltage electrical energy from the defibrillator back to the heart, in the form or either pacing stimuli or shocks.

[8] Leads must be extremely flexible and durable in order to withstand the bending and twisting caused by the various structures, movements and contractile functions that are located or take place in close proximity (i.e. respirations, contractions of the heart muscle, movements of components of the chest wall and nearby anatomy such as the shoulder).

[9] The Plaintiffs allege that the Leads contain a defect that makes them susceptible to fracturing, thereby threatening to either not deliver needed defibrillator therapy or to deliver unintended electrical shocks when no such therapy is required. When a lead fractures, it will typically be removed/replaced, unless the decision is made that the defibrillator function is no longer required (such as in elderly or otherwise frail patients who cannot physically withstand a further surgery), in which case the therapy may be turned off.

[10] Although worldwide distribution of the Leads was ultimately suspended in October of 2007 and the Plaintiffs have filed evidence suggesting a higher than normal failure rate, the Defendants maintain that the failure rate/rate of fracture for the Leads was comparable to other leads that they and other companies manufactured and sold, and they deny all liability in the action.

[11] This litigation was commenced by Sherry and her spouse, Gregory Robert Horning ("Greg") on October 15, 2007, after Sherry experienced several episodes of unintended shock from her Lead and underwent emergency replacement surgery in January 2007. As this replacement surgery occurred prior to the recall of the Leads, Sherry was implanted with the same Lead model number and had to live with the defective Lead until 2011 when it was safe to undergo another lead replacement procedure.

[12] On April 2, 2008, the court issued an order permitting the Statement of Claim to be amended to add Dan and his wife Glenda Austen ("Glenda") to the action as proposed representative plaintiffs. Dan was implanted with one of the Leads in July of 2007 and underwent replacement surgery with ensuing complications in November of that year.

[13] The Statement of Defence was delivered on November 22, 2010.

[14] The certification motion was heard by Perell J. on September 30 and October 1 and 2, 2009. By Order dated October 2, 2009, the action was conditionally certified as a class proceeding on behalf of the following classes (collectively, the "Class" or "Class Members"):

a. **"Implant Class"**

All persons implanted in Canada with one or more of the Leads.

b. **"Family Law Class":**

All family members of the Implant Class who are entitled to assert a derivative claim for damages under section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended, or other similar provincial legislation.

c. **"Health Insurer Class":**

All provincial or territorial health insurers who are entitled to assert a claim pursuant to the *Alberta Hospitals Act*, R.S.A. 2000, c. H-12, s. 62 and related provincial and territorial legislation.

[15] There were appeals following the decision on certification relating to, *inter alia*, the claim based on allegations of conspiracy and the issue of bifurcating discovery and the trial of certain common issues. In addition, there were multiple orders sought and granted allowing Class Counsel to obtain further information and records related to Class Members.

(b) The settlement process

[16] A two-day mediation took place before Strathy J. (as he then was) in January 2011. Although the mediation was unsuccessful in achieving a resolution at that time, it set the groundwork for the narrowing of certain issues, and the advancement of the litigation into the documentary discovery phase.

[17] Following further meetings with counsel for the Defendants, it was determined that the only path forward from a resolution perspective was to understand the population of Class Members who suffered injuries (confirmed by actual review of medical records for each individual forming part of the group), namely those individuals who had experienced unnecessary shocks, had premature explants, or had complications during the course of or following their premature explant surgery.

[18] Consequently, Class Counsel undertook comprehensive class-wide direct mailing to over 6,000 Class Members beginning in July 2014, using addresses provided from Medtronic. That process was followed up with individual telephone calls to confirm addresses and medical circumstances. If letters were returned, skip-tracing was undertaken, in order to contact as many of the Class Members as possible.

[19] In addition, several court orders were obtained in various jurisdictions across Canada to permit Class Counsel to obtain information about Class Members' circumstances from the Defendants as well as to obtain Class Member medical records from certain hospitals who were otherwise reluctant to provide medical records in the absence of signed consent forms.

[20] As a result of these efforts, approximately 3,500 Class Members were contacted by Class Counsel, and the medical records of more than 2,000 Class Members were reviewed. Of these, more than 700 were delivered to counsel for the Defendants in tranches, beginning April 16, 2015, pursuant to an agreement to provide records for the purposes of facilitating settlement discussions.

[21] A further mediation then proceeded in January 2018 with the Honourable Mr. Frank Iacobucci. The parties were able to reach an agreement on the basic terms of a proposed settlement, after which the process of drafting the settlement documents (including eligibility criteria, compensation terms, administration and notice protocols) began.

[22] At the same time, Class Counsel entered into complex and lengthy negotiations with public health insurers ("PHI") relating to the quantum of their recovery and the release language to be incorporated into the Settlement Agreement. Although significant work on the PHI side of the case had been undertaken prior to the 2018 mediation, there remained a divergence of views as to the appropriate quantum for the resolution of their claims. Agreement with PHIs was reached, allowing for the Settlement to proceed toward court approval.

[23] In March 2019, the Defendants communicated an interest in funding the Settlement before their year-end—April 26—which required that the Settlement Agreement be signed by that date. The parties expedited efforts to finalize the language of the Settlement Agreement and executed the Settlement Agreement on April 24, 2019, subject to obtaining the written consents of the PHIs.

[24] The Settlement Amount of $26 million, previously being held in trust by counsel for the Defendants, was deposited into a daily interest GIC on August 26, 2019, pending receipt of all PHI consents. By October 25, 2019, all PHIs had provided their executed consents.

[25] On December 19, 2019, I approved the form and substance of the Approval Hearing Notice and scheduled this settlement approval hearing. Once the issued and entered Approval Hearing Notice Order was received from the court on January 8, 2020, the parties and the claims administrator moved quickly to complete and execute the Escrow Agreement,[1] attended to transferring the Settlement Amount to the escrow account and finalized the applicable components of the Notice Plan which were implemented beginning on January 15, 2020.

(c) The Settlement Agreement

[26] The Settlement is national in scope and seeks to resolve all past and future claims in Canada relating to the alleged defects in the Leads. The following are the key terms of the Settlement Agreement.

1. The Settlement Benefits

[27] Pursuant to the Settlement Agreement, the Defendants have paid the Settlement Amount of $26 million CDN which, with accrued interest of $150,586.86, was transferred to RicePoint Administration, Inc. ("RicePoint") as Escrow Agent and Claims Administrator on January 10, 2020. It will be used to fund the payment of Approved Claims, the payment to the PHIs, the costs of notice, and the claims administration and court-approved Class Counsel fees, disbursements and applicable taxes.

[28] Class Members will be entitled to submit claims in accordance with the eligibility criteria contained in the Claims Eligibility Criteria. Compensation is available to Class Members (i) whose Leads fractured or (ii) were at risk of an impending fracture and as a result suffered from unintentional shocks and/or had their Lead(s) prematurely explanted/replaced.

[29] In order to be eligible for benefits under the Settlement Agreement, Class Members will need to (i) establish that they were implanted with one or more of the Leads and (ii) provide medical records reflecting that they suffered unintended shocks and/or had their Leads explanted/replaced prematurely as a result of a fracture or impending fractures.

[30] Class Members will need to provide either medical records that contain a contemporaneous medical opinion stating that they suffered unintended shocks and/or underwent surgery to explant/replace their Lead(s) as a result of a fracture or impending fracture in the Lead(s). If no such record exists, they can file a Physician Declaration (included in the Claim Package) wherein their treating physician can attest to the fact that a fracture or impending fracture in the Class Member's Lead was the principal reason for the explant/replacement of the Lead(s) and/or the cause of the unintended shock(s) experienced by the Class Member.

[1] All capitalized terms, unless otherwise defined, are as defined in the Settlement Agreement.

[31] The base compensation payable for an uncomplicated premature explant or unintended shocks caused by a fracture is $25,000, inclusive of all claims of Family Class Members. Additional payments may be made to Class Members who establish through medical records that they suffered excessive unintended shocks and/or sustained certain surgical complications at or immediately following their explant/replacement surgery. The qualifying complications are set out in detail in the Claims Eligibility Criteria and are reproduced in the Claim Package for Claimants' ease of reference. Finally, if, after all Claims have been finally adjudicated, there remains a residue, any such amount will be redistributed among Class Members with Approved Claims, to be distributed *pari passu*.

[32] Class Members who submit approved claims for excessive unintended shocks and/or surgical complications are also entitled to seek compensation for out-of-pocket expenses and/or income loss claims pursuant to the Settlement Agreement.

[33] Further, the Settlement Agreement allows for the over-subscription or under-subscription by Class Members. If a higher than expected number of Class Members advance Approved Claims, the value of all Approved Claims will be proportionately reduced and if a lower than expected number of Class Members advance Approved Claims, all payments to Class Members for Approved Claims will be proportionally increased.

[34] The Settlement Agreement also provides for the payment of $4,000,000 to the PHIs, to be distributed among them according to a population distribution metric, in full and final satisfaction of all subrogated and/or direct claims arising from the action. All PHIs have executed copies of the Consent/Release confirming that they have consented to the compromise of their claims through the Settlement Agreement in accordance with the terms of the applicable release language set out in the Settlement Agreement.

2. Notice

[35] The Settlement Agreement provides for a robust Notice Plan aimed at advising Class Members of the terms of the Settlement Agreement as well as providing information about this motion and the approval of the Settlement.

[36] The Notice Plan required that, prior to the within motion, notice of the Approval Hearing would be disseminated through a substantial direct mailing program both to Class Members and to cardiologists and electrophysiologists across Canada. In addition, the Approval Hearing Notice was to be published in national and regional newspapers in English and French, along with a digital media presence via Google Ads and press releases in both English and French.

[37] Direct mail notice was disseminated in accordance with the Notice Plan beginning on January 15, 2020. The settlement website, www.medtronicleadsettlement.com, went live on that date as well. In addition, the newspaper notices for the present hearing were disseminated in leading newspapers throughout Canada between January 11 and 18, 2020.

[38] The press releases in English and French were disseminated via Canada News Wire on January 18, 2020, in accordance with the Notice Plan. In addition, the Approval Hearing Notice was posted on Class Counsel's websites starting on January 15, 2020.

[39] Upon approval of the Settlement Agreement, a further notice will be disseminated to advise Class Members. Specifically, the Settlement Approval Notice will be directly mailed (either electronically or by regular mail) to Class Members and to Canadian cardiologists and electrophysiologists.

[40] Finally, the Settlement Approval Notice will be posted on the settlement website and Class Counsel's websites. Class Counsel will issue press releases in English and French via Canada News Wire to inform Class Members of the Settlement's approval.

3. The Claims Administrator

[41] Pursuant to the order of this court dated December 19, 2019, RicePoint was appointed the Claims Administrator for various pre-settlement purposes, including the direct mail and settlement website components of the Notice Plan, and for the purpose of receiving any objections to the Settlement Agreement and delivering same to counsel for the parties and the court.

[42] This motion also seeks to have RicePoint appointed as the Claims Administrator for the processing and adjudication of Claims under the Settlement. RicePoint has extensive expertise in administering national class action settlements in Canada, including settlements dealing with pharmaceutical and medical device cases and the related personal injury aspects of such cases.

[43] RicePoint provided Class Counsel with a comprehensive settlement administration proposal setting out costings for all aspects of the administration services it would provide, including assuming the various financial responsibilities attendant upon being the Escrow Agent and Claims Administrator, providing all services in both official languages, attending to the direct mail aspects of the Notice Plan, setting up and maintaining the settlement website and toll-free call centre, responding to Class Member inquiries both by telephone and e-mail, and sending out Claim Packages upon request. The total fee for RicePoint's work in implementing the Notice Plan and in administering the Settlement is $131,097 plus applicable taxes.

[44] Upon approval of the Settlement, RicePoint will continue many of these tasks. It will also review and adjudicate all claims submitted by or on behalf of Class Members, send all requisite administrator correspondence and deliver all payments to Class Members with Approved Claims.

4. The Claims Process

[45] Under the claims process, Class Members need only establish that they (i) had an implant with one or more of the Leads (in many cases, this will simply require either confirming that they received a Certification Notice or providing a copy of their device implant card) and (ii) suffered

unintended shocks and/or had their Leads explanted as a result of a fracture or impending fracture of their Lead(s).

[46] The deadline for filing claims will be 180 days following court approval, which will be posted on the settlement website and Class Counsel's websites, included in the Approval Notice sent to Class Members and cardiologists and set out in the press releases.

[47] RicePoint will adjudicate the claims of Class Members on the basis of the records submitted and the objective eligibility criteria. Under the Settlement Agreement, RicePoint will not need to consider subjective eligibility criteria in adjudicating claims.

[48] While Class Counsel will oversee the process, there is no appeal from the determination(s) of RicePoint, because of the objective nature of the eligibility criteria. This approach provides for more efficient processing and payment of claims, and results in more of the Settlement Amount being available to pay Class Members' claims rather than the fees charged by an outside adjudicator.

5. Class Member response

[49] Subsequent to the dissemination of the notice of the Settlement Approval Hearing, RicePoint received 320 telephone inquiries and 48 e-mail inquiries, sent out 50 requested Claim Packages and received 18 completed Claim Packages as of February 18, 2020. Four objections were received, as I discuss below.

(d) The retainer agreements

[50] The retainer agreements with the representative plaintiffs all provided that Class Counsel would carry all expenses and disbursements during the course of the litigation, and would only be paid in the event of success, whether through a settlement or following a trial on the merits. Sherry, Greg, and Glenda's retainers authorize payment of a legal fee in the amount of 30% of the recovery to the class. Dan's retainer provides for payment on the basis of either 25% of the recovery to the class or on the basis of a three-times multiplier on Class Counsel's base time whichever is higher.

(e) Time spent and expenses incurred in the action

[51] Class Counsel's docketed time in prosecuting the action, as of February 19, 2020 is $6,645,176 (plus HST of $863,872.88) representing thousands of hours of lawyer and legal support staff time over more than twelve years.

[52] Class Counsel incurred disbursements in the amount of $520,919.07.

[53] In addition to the work done to advance the litigation and secure the benefits contained in the Settlement Agreement, Class Counsel will be responsible for significant future work upon approval of the Settlement Agreement, including coordinating with RicePoint, responding to

Class Member inquiries, formalizing the Settlement Order, updating Class Counsel's websites, monitoring the implementation of the Settlement Agreement, addressing any questions or issues raised by Class Members or RicePoint, and attending this court to report on the administration of the Settlement Agreement as it progresses.

(f) The involvement of the representative plaintiffs

[54] The relevant evidence is set out in affidavits from counsel as well as Sherry and Dan. Counsel states in his affidavit that:

> It is proposed that [Sherry and Dan] be paid honoraria in recognition of the contributions they made in advancing this case towards settlement for the benefit of all Class Members. In this regard, it is proposed that each receive $10,000.
>
> All Representative Plaintiffs were required to make themselves available to assist with the various stages of the litigation, made significant contributions of time and effort in advancing the Action and no progress would have been made without their contributions which inured to the general benefit of all Class members and which should be recognized.

[55] Both representative plaintiffs swore similar affidavits setting out evidence relevant to their role in the litigation. In brief, each of them stated:

(i) They had been "involved in and have helped with moving the litigation forward for almost" 12-13 years;

(ii) "I have spoken with and been in written communication with my lawyers on numerous occasions to stay informed about the litigation and to advise my lawyers about my circumstances";

(iii) They engaged in "reviewing various pleadings, affidavits and providing information and documents for my lawyers to review and build this case up as best they could";

(iv) "I assisted with drafting and swore this affidavit and my prior affidavit in support of certification"; and

(v) "I also expressed my opinion on and provided instructions to my lawyers to agree to the Settlement Agreement".

(g) Objectors to the proposed settlement

[56] There were four written objections to the proposed settlement, including one from Dr. Kasra Khorasani, who made oral submissions to the court setting out his objection.

[57] Dr. Khorasani advised the court that he had a prior ICD implanted in 2005 which resulted in 49 shocks in the spring of 2007. Each shock was 800 volts, causing him to be thrown to the ground with severe pain and in great distress.

[58] He then received a Medtronic “Sprint Fidelis” Lead, and never experienced a shock again.

[59] Dr. Khorasani later learned of the recall of the Lead. It was not medically advisable for Dr. Khorasani to replace the Lead or insert a new lead. Consequently, he was required to keep the Lead. Since that time, Dr. Khorasani’s evidence was that (i) “[t]he anxiety about the lead’s functioning is still present to this day as it continues to be connected to my present ICD” and (ii) he has been provided with a “donut shaped magnet” (which he brought to court) to address any inappropriate shock if it were to occur. Dr. Khorasani advised that carrying the magnet (i) causes him stress because of fears that he will forget the magnet, and (ii) affects his daily life in travel through airports and by interference with electronic devices.

[60] Dr. Khorasani believes that a separate category of claimants who only suffered emotional and psychological loss should receive compensation.

[61] Finally, Dr. Khorasani claims not to have received the certification notice.

[62] I summarize the remaining written objections as follows:

(i) John Hawley claims that he suffered “depression” and “high anxiety” since he also could not change the Lead, resulting in “almost 10 years of worry”. As with Dr. Khorasani, Mr. Hawley believes that a separate category of claimants who only suffered emotional and psychological loss should receive compensation;

(ii) Denis Larouche believes that all class members should be entitled to minimum compensation since they all suffered psychological consequences which require some base level of compensation; and

(iii) Lauren Philion advises that “I have not had [an] episode yet or problem with my leads, so I’m hoping that by objecting if I do have a problem down the road I will be able to be compensated”.

Analysis

(a) Issue 1: Approval of the Settlement Agreement

1. <u>The applicable law</u>

[63] In deciding whether to approve a proposed settlement, the court must determine whether the settlement is fair, reasonable, and in the best interests of the class. Consideration must be given to the totality of the circumstances, including the factual context and the prevailing legal

issues (See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.), at para. 9 (*"Dabbs II*"); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.), at paras. 68-73 ("*Parsons I*"); and *Waldman v. Thomson Reuters Canada Limited*, 2016 ONSC 2622, 131 O.R. (3d) 367 (Div. Ct.), at para. 21 ("*Waldman*")).

[64] In undertaking this analysis, the following principles are to be used as a guide (see *Nunes v. Air Transat A.T. Inc.*, 2005 CarswellOnt 2503, at para. 7; and *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, 5 C.P.C. (7th) 341 ("*Osmun*"), at paras. 31 and 34):

(i) The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

(ii) There is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;

(iv) To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

(iv) A court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take, and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. 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 obligation;

(v) It is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or to simply rubber-stamp a proposal;

(vi) The burden of satisfying the court that a settlement should be approved is on the party seeking approval; and

(vii) The court cannot modify the terms of a proposed settlement. The court can approve or reject the settlement. In deciding whether to reject a settlement, the court should consider whether doing so would derail the settlement. The parties are not obligated to resume discussions and it is possible that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result would be contrary to the widely held view that the resolution of complex litigation through settlement is encouraged by the courts and favoured by public policy.

[65] The court may also weigh the following factors, keeping in mind that they are not to be applied mechanically and that in any given case, some factors will have greater significance than others (*Dabbs* II, at para. 13; *Osmun*, at paras. 32-33; and *Waldman*, at para. 22):

(i) the presence of arm's-length bargaining and the absence of collusion,

(ii) the proposed settlement terms and conditions,

(iii) the number of objectors and nature of objections,

(iv) the amount and nature of discovery, evidence or investigation,

(v) the likelihood of recovery or likelihood of success,

(vi) the recommendations and experience of counsel,

(vii) the future expense and likely duration of litigation,

(viii) information conveying to the court the dynamics of and the positions taken by the parties during the negotiations,

(ix) the recommendation of neutral parties, if any, and,

(x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

[66] Of the guiding principles, one of the most significant is whether "the settlement falls within a zone of reasonableness" (*Dabbs II*, at para. 30).

[67] The court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within the range of reasonableness.

[68] The parties have an obligation to provide sufficient information to allow the court to exercise its function of independent approval, although it is not necessary that discovery be complete at the time of settlement (*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.), at para. 40 ("*Dabbs I*").

[69] I now review the above factors based on the evidence on this motion.

2. Application of the law to the evidence

i. Presence of arm's-length bargaining and absence of collusion

[70] As set out above, the nature of this litigation and related settlement negotiations were highly adversarial. The parties underwent two separate mediations, several years apart, before reaching an agreement in principle.

ii. Amount of evidence, discovery, and investigation

[71] In addition to substantial investigation and research conducted since the outset of the action and the documentary discovery conducted, Class Counsel engaged in a large scale effort to determine the scope and breadth of Class Member injuries, which enabled them to assess the relative liability positions of the parties and to determine that the Settlement was the preferable course of action.

iii. Zone of reasonableness and likelihood of success

[72] The terms of the Settlement Agreement fall within the zone of reasonableness, having regard to all of the circumstances, particularly in view of the litigation risks at stake in this case. The action had potential weaknesses, including conflicting rates of Lead failure which may have resulted in the action being unsuccessful if tried on the merits on a class-wide basis.

[73] Challenges would have remained for Class Members in pursuing their individual damages after the common issues trial, particularly given the demographics of the Class, and the length of time that would have passed by then.

[74] The base compensation proposed is $25,000 for Class Members who experienced a fractured Lead and who had to undergo a premature explant and/or who suffered unintended shocks caused by the fracture. Additional compensation is available to eligible claimants who suffered complications at or following their premature explant procedures and/or who suffered from excessive unintended shocks. These claimants are also able to advance claims for income loss and out of pocket expenses. In the event that there is a lower than anticipated participation under the Settlement, eligible claimants' compensation will be proportionately increased.

[75] The assessment of damages in such cases is a challenging exercise, both because of the limited comparators available and because of the variability that results from the unique litigation risks involved in each case. For example, in the case of *Nantais et al. v. TPLC Proprietary (Canada) Limited et al.*, Judgment of Mr. Justice Brockenshire dated October 3, 1997 (unreported) ("*Nantais*"), which related to allegedly defective pacemaker leads, there were multiple categories of compensation ranging from $1,500-$15,000 (approximately $2,282-$22,825 in current values), with the alternative available for class members to have damages assessed by a special referee.

[76] In the case of *Hoy v. Medtronic Inc.*, 2001 BCSC 1343 ("*Hoy*"), a proposed class proceeding which involved alleged electrical conduction problems in pacemaker leads, the settlement amount was $1.5 million, inclusive of notice and counsel fees in relation to a class estimated to include 12,000 individuals. It is understood that there were ultimately 282 claimants who were paid an average of $5,300 (inclusive of the claims of PHIs and class counsel fees, approximately $6,885 at current values) (see Elaine Adair and Jill Yates, "Your Class Action Has Been Certified – Now What?" Case Note (2006), prepared for Canadian Institute's "Managing Complex Litigation Conference", April 24-25, 2006

(http://www.mondaq.com/canada/x/44890/Healthcare+Medical/Your+Class+Action+Has+Been+Certified+Now+What).

[77] The litigation risks and unpredictability in this area of law is demonstrated by a series of parallel cases brought against St. Jude Medical Inc. Three different class proceedings were brought in Canada – one in Ontario, one in Quebec and one in British Columbia – all related to the use of a silver-titanium alloy ("Silzone") in the manufacture of the cuffs of certain mechanical heart valves. It was alleged that Silzone was inherently unsuited for this application and that, by impairing tissue regrowth following implantation, patients were exposed to significant risks of implant failure and other heart injuries (see *Burnett v. St. Jude Medical Inc.,* 2009 BCSC 82 ("*Burnett I*"), at para. 67).

[78] In the class proceedings brought in British Columbia and Quebec, the plaintiffs secured settlements by largely limiting their claims to a specific complication known as a paravalvular leak ("PVL") – the loss of blood through an incompletely sealed valve cuff. The Ontario proceeding did not settle, but instead proceeded to a 138-day common issues trial after which the action was dismissed, yielding no compensation for any class member. Thus, in litigation relating to the same product, there were different outcomes (see *Burnett v. St. Jude Medical Inc.*, 2009 BCSC 1651; *Thibault* v. *St. Jude Medical Inc.*, Judgment of Mr. Justice André Roy, dated April 1, 2010; see also Notice of Approval of the Settlement Agreement Concerning the Class Action Regarding Silzone Products (*Thibault v. St. Jude Medical* English-Language Settlement Notice); and *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660)).

[79] The Settlement Agreement reflects a comprehensive approach to the settlement of the claims in the action. This settlement structure will provide benefits to Class Members in an expedient way through a straightforward and streamlined claims process.

[80] These considerations and risk factors guided the parties through the negotiation process to achieve a reasonable resolution of the litigation. The Settlement Agreement benefits the Class as a whole by removing the litigation risks and enabling recovery by Class Members during their lifetime. In all the circumstances, the compensation available to Class Members with compensable injuries is well within the reasonable range.

iv. Recommendation of Class Counsel

[81] Class Counsel recommends the approval of the Settlement Agreement on the grounds that it is fair and reasonable and in the best interests of the class. Class Counsel's experience and recommendation carries significant weight.

v. Support of the representative plaintiffs, neutral party and objections

[82] The Settlement Agreement has the support of the representative plaintiffs and its terms were supported by the parties' experienced mediator and a leading jurist, the Honourable Mr. Frank Iacobucci.

[83] With respect to Dr. Khorasani's objections, he eloquently explained his concerns about how the risk of shocks from the Lead have affected his emotional and psychological health. However, as acknowledged by Dr. Khorasani, he suffered no physical harm from the Leads and has not replaced the Leads. His claim is for psychological and emotional harm since he had previously endured 49 shocks from leads from a different manufacturer. Consequently, he would only be able to claim damages against the Defendants if he could establish, on an individual basis, that a person of "ordinary fortitude" would have suffered such damages, and that his situation was not "highly unusual" and "very individual" (*Mustapha v. Culligan of Canada, Ltd.*, 2008 SCC 17, [2008] 2 S.C.R. 114, at para. 18).

[84] Dr. Khorasani acknowledged that his case was unusual, and that not many individuals who would have been advised of the risk of shock (and been unable to change the Lead) would have had a similar reaction. The court expressed sympathy for the distress suffered by Dr. Khorasani. However, I accept the plaintiffs' submission that it was reasonable to exclude a group with only psychological and emotional damages of the risk of future shocks (without actual shock or a change in Leads), since any damages incurred by such a proposed group would be individual in nature, difficult to establish, and may only affect a very limited group of people. While the facts of Dr. Khorasani's case engender the sympathy of the court and those who attended the hearing, payment for pure psychological damages in the class action would not be reasonable on the basis of the above.

[85] Also, while Dr. Khorasani expressed concern that he did not receive a certification notice, I am satisfied that Class Counsel complied with the robust notice plan set out by Perell J. In any event, Dr. Khorasani advised the court that since the medical devices "saved my life", he would not have brought an action for damages.

[86] With respect to the remaining objectors, I do not accept that the objections they raise should vitiate the Settlement Agreement. A "minimum amount" for all individuals with the Leads (as suggested by Mr. Larouche) would not be based on the merit of any claim, and would be unfair to those claimants who objectively suffered damage. Other objections relating to the inability to claim for emotional and psychological loss without objective factors raise the same concerns as Dr. Khorasani's position. Objecting in order to obtain future compensation in the event of a subsequent shock (as suggested by Philion) is hypothetical, and not a basis to vitiate a settlement.

vi. Conclusion

[87] The Settlement is fair and reasonable and in the best interests of the Class Members. The process by which the Settlement was achieved was at all times arm's-length and adversarial in nature. At various times, the parties took conflicting views which, had they not resolved, would have resulted in termination of the negotiations. The Settlement fulfills all of the objectives of the *CPA*, and provides immediate, direct benefits to Class Members with eligible claims, while protecting them from serious risks of litigation.

(b) Issue 2: Approval of class counsel fees and disbursements

[88] Class Counsel are seeking approval for the payment of legal fees in the amount of $6,645,176 (plus applicable HST in the amount of $863,872.88), representing 30% of $22,000,000, being the Settlement Amount of $26,000,000 plus accrued interest of $150,586.86, less the $4,000,000 payment to the PHIs. Class Counsel are also seeking approval for payment of $520,919.07, inclusive of applicable taxes in relation to disbursements that have been incurred for the benefit of the Class, for a total of $8,029,967.95.

1. The applicable law

[89] In assessing the risks assumed by Class Counsel, risk is to be measured from the commencement of the action (*Gagne v. Silcorp Ltd.*, (1998), 41 O.R. (3d) 417 (C.A.) ("*Gagne*"), at para. 16). These risks include liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding (*Gagne,* at para. 17; *Endean v. Canadian Red Cross Society*, 2000 BCSC 97, at paras. 28 and 35) as well as the risk involved in all contingency fee cases of receiving no compensation for the time invested (*Green v. Canadian Imperial Bank of Commerce*, 2016 ONSC 3829, at para. 14). In a complex product liability case, proceeding as a single party claim would not be financially viable and in the absence of the possibility of a class proceeding, it is unlikely that such a claim would be successfully pursued.

[90] I reviewed the applicable law for approval of class counsel fees and disbursements in *Cass v. WesternOne Inc.*, 2018 ONSC 4794, at paras. 117-26:

> Class counsel fees are to be approved on the basis of whether they are "fair and reasonable" in all of the circumstances (*Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.) ("*Parsons 2*"), at para. 13-14 and 56; *Lefrancois v. Guidant*, 2014 ONSC 1956 ("*Lefrancois*"), at para. 52).
>
> The courts in *Lefrancois* (at para. 52) and in *Silver* (at para. 41) set out the following factors which may be considered by the court when determining whether class counsel's fees are fair and reasonable:
>
> (i) the factual and legal complexities of the matters,
>
> (ii) the risks assumed in pursuing the litigation, including the risk that the matter might not be certified, and the risk of loss at trial,
>
> (iii) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement,
>
> (iv) the amount in issue,
>
> (v) the result achieved,

(vi) the importance of the matter to the class members and to the public,

(vii) the degree of responsibility assumed and the skill and competence demonstrated by class counsel,

(viii) the ability of the class to pay, and

(ix) the expectations of the representative plaintiffs, the class and class counsel as to the basis for calculating fees and the amount of fees.

An agreement to make a contingent payment, on the basis of a percentage of a settlement or recovery, is contemplated by the word "otherwise" in s. 32(1)(c) of the *CPA*, and has often been awarded (*Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Gen. Div.) at pp. 528-29; *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Gen. Div.) ("*Crown Bay*"), at 86).

Contingency fee arrangements are an "important means" to provide "enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient". Similar to a multiplier, a contingency fee retainer "gives the lawyer the necessary economic incentive to take the case in the first place and to do it well" and, as such, "that opportunity must not be a false hope" (*Gagne v. Silcorp Limited* (1998), 41 O.R. (3rd) 417 (C.A.), at 422-23).

The policy of the *CPA* is to provide an incentive to class counsel to pursue class actions in order to increase access to justice. Class counsel fees have been awarded and are intended to compensate law firms for the risk that they may never be paid for their time or reimbursed for their disbursements. In *Parsons 2*, Justice Winkler (as he was then) stated (at para. 56; see also para. 14):

> […] The legislature has not seen fit to limit the amount of fees awarded in a class proceeding by incorporating a restrictive provision in the *CPA*. On the contrary, the policy of the *CPA*, as stated in *Gagne*, is to provide an incentive to counsel to pursue class proceedings where absent such incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding. […]

In *Crown Bay*, Winkler J. commented on the benefits of a contingency fee in class actions to encourage settlement (at 88):

> […] On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee

> arrangement encourages rather than discourages settlement […] Fee arrangements which reward efficiency and results should not be discouraged.

Similarly, in *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, Strathy J. (as he then was) endorsed contingency fee arrangements in class actions. He held (at paras. 21 and 22):

> There is much to be said in favour of contingent fee arrangements. Litigants like them. They provide access to justice by permitting the lawyer, not the client, to finance the litigation. They encourage efficiency. They reward success. They fairly reflect the considerable risks and costs undertaken by class counsel, including the risk that they will never be paid for their work, the risk that their compensation may come only after years of unpaid work and expense, and the risk that they will be exposed to substantial cost awards if the action fails. Effective class actions simply would not be possible without contingent fees. Contingent fee awards serve as an incentive to counsel to take on difficult but important class action litigation.
>
> […] in my respectful view, courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple – of the mathematical calculation of hours docketed times the hourly rate.

In *Abdulrahim v. Air France*, 2011 ONSC 512, Strathy J. (as he then was) approved a "one-third" contingency fee, referring to it as "standard in class action litigation". He held (at para. 13):

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

In *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 ("*Cannon*"), Justice Belobaba also approved a one-third contingency fee and held that there was a presumption that such arrangements are valid and enforceable provided that they are "fully understood and accepted by the representative plaintiffs". He held (*Cannon*, at para. 8):

> What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons.

In *Cannon*, Justice Belobaba provided "examples of clear cases where the presumption of validity could be rebutted" which included (*Cannon*, at para. 9):

(i) "Where there is a lack of full understanding or true acceptance on the part of the representative",

(ii) "Where the agreed-to contingency amount is excessive", and

(iii) "Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise unreasonable".

[91] I apply the above principles to the present case.

2. Application of the law to the facts of this case

[92] I find that there is no basis to rebut the "strong presumption of validity" of the contingency fee arrangement (*Cannon*, at para. 9).

[93] I rely on the following factors:

(i) The retainer agreements with the representative plaintiffs all provided that Class Counsel would carry all expenses and disbursements during the course of the litigation and would only be paid in the event of success, whether through a settlement or following a trial on the merits;

(ii) Sherry, Greg and Glenda's retainers authorize payment of a legal fee in the amount of 30% of the recovery to the class, and Dan's retainer provides for payment on the basis of either 25% of the recovery to the class or on the basis of a three-times multiplier on Class Counsel's base time whichever is higher. As such, all retainers allow for the fee being requested;

(iii) Class Counsel's docketed time in prosecuting the action, as of February 19, 2020 is $6,469,363.28, representing thousands of hours of lawyer and legal support staff time over the course of over twelve years. The total fee requested in this case reflects a multiplier of 1.027 on the base time incurred by Class Counsel;

(iii) Class Counsel undertook extensive work in bringing these cases forward and incurred disbursements in the amount of $520,919.07 (as of February 19, 2020);

(iv) In addition to the work done in advancing the litigation and securing the benefits contained in the Settlement Agreement, Class Counsel will be responsible for significant future work upon approval of the Settlement Agreement, including coordinating with RicePoint, responding to Class Member inquiries, formalizing the Settlement Order, updating Class Counsel's websites, monitoring the implementation of the Settlement Agreement and addressing any questions or issues raised by Class Members or RicePoint and attending this Court to report on the administration of the Settlement Agreement as it progresses;

(v) This litigation has been ongoing for over twelve years and has involved issues of considerable legal and medical complexity. Class Counsel conducted extensive legal and factual research in support of the claim and worked closely with an expert in preparing for certification, in attending on the contested certification and pleadings motions and all resulting appeals and in conducting the multiple settlement negotiations that ultimately resulted in the Settlement Agreement;

(vi) Class Counsel assumed the risk that the negotiations would not be successful and that the time spent and expense incurred in that process could be wasted and would be added to the time and expenses already incurred in prosecuting the action;

(vii) The financial burden of litigating this case, both in terms of disbursements and the lost opportunity costs associated with diverting time and other resources away from other files, has been significant, as reflected in the quantum of Class Counsel's base time and disbursements incurred;

(viii) Financial risk to Class Counsel also arose from the indemnities provided to the representative plaintiffs to protect against any possible adverse cost awards, particularly since there was no application made to the Ontario Class Proceedings Fund or any private third-party funder to protect against such cost awards;

(ix) The Settlement Agreement provides benefits to the Class Members which are both monetary and intangible. The value of the total benefits to Class Members amounts to $26,000,000 (plus accrued interest) and there are no reversionary rights to the Defendants;

(x) The monetary value of the benefits negotiated on behalf of the Class Members mitigates the risks involved in proceeding to a common issues trial, which would extend both the litigation risks and the duration of the action. Further, the qualifying criteria and other features of the Settlement Agreement are fair and will provide appropriate benefits to Class Members in a streamlined and expeditious process;

(xi) The anticipated average settlement value in this case will be $25,000 for Class Members who experienced unintended shocks and/or had their Lead(s) replaced prematurely because of a fracture or impending fracture. Additional payments may be made to Class Members who suffered complications during or shortly following their replacement surgery;

(xii) A further feature of the Settlement Agreement is that the process for determining the entitlements of the PHIs has already been resolved, such that no separate settlement needs to be negotiated on behalf of individual Class Members and the PHIs have no interest in any potential residue; and

(xiii) In the absence of a class proceeding, it is unlikely that the representative plaintiffs would have commenced litigation against the Defendants due to concerns regarding the expense associated with such complex litigation.

[94] Having regard to the factors identified above, including the risk assumed by Class Counsel, as well as the complexities of the proceeding, Class Counsel's request for legal fees is is fair and reasonable.

[95] For the above reasons, I approve the fees, disbursements, and taxes sought by Class Counsel, in the total amount of $8,029,967.95, comprised of $6,645,176 for fees, plus applicable HST of $863,872.88 and disbursements (inclusive of applicable taxes) of $520,919.07.

(c) Issue 3: Approval of honoraria for Sherry and Dan

<u>1. The applicable law</u>

[96] Perell J. reviewed the relevant principles governing the award of an honorarium to a representative plaintiff in *Hodge v. Neinstein*, 2019 ONSC 439, at paras 48-50:

(i) A representative plaintiff may receive an honorarium, on a *quantum meruit* basis, where he or she "rendered active and necessary assistance in the preparation or presentation of the case and … such assistance resulted in monetary success for the class";

(ii) Such an award of compensation is "rare", upon evidence of an "exceptional contribution that has resulted in success for the class"; and

(iii) When determining whether to award an honorarium and the amount of such an honorarium, the court may consider, amongst other factors: (a) active involvement in the initiation of the litigation and retainer of counsel, (b) exposure to a real risk of costs, (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation, (d) time spent and activities undertaken in advancing the litigation, (e) communication and interaction with other class members, and

(f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.

[97] In *Park v. Nongshim Co.*, 2019 ONSC 1997 ("*Park*"), I reviewed the law governing the approval of honorarium for class members. I set out that law below (*Park*, at paras. 84-86):

> The payment of honorarium to representative plaintiffs in Ontario for class actions is "exceptional and rarely done". In *Baker Estate v, Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 ("*Baker*"), Strathy J. (as he then was) conducted a thorough review of the case law and held, at paras. 93-95:
>
>> The payment of compensation to a representative plaintiff is exceptional and rarely done: *McCarthy v. Canadian Red Cross Society* [2007] O.J. No. 2314 (S.C.J.) at para. 20; *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.); *Bellaire v. Daya* [2007] O.J. No. 4819 (S.C.J.) at para. 71. It should not be done as a matter of course. Any proposed payment should be closely examined because it will result in the representative plaintiff receiving an amount that is in excess of what will be received by any other member of the class he or she has been appointed to represent: *McCutcheon v. Cash Store Inc.* [2008] O.J. No. 5241 (S.C.J.) at para. 12. That said, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, it may be appropriate to award some compensation: *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.) at para. 28.
>>
>> The Court of Appeal has recently indicated in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37 at paras. 134-135 that any compensation paid to the representative plaintiff should normally be paid out of the settlement fund and not out of Class Counsel's fee, to avoid concerns with respect to fee-splitting.
>>
>> It is interesting to note that on certification motions, the Court is often concerned to ensure that the representative plaintiff is truly engaged in the litigation and is not a mere "bench-warmer" or a "straw man" recruited by Class Counsel. Courts have frequently commented on the need to have an active and involved plaintiff who will be familiar with the proceedings, instruct counsel, monitor settlement discussions and generally act as any private

> client would in supervising his or her own litigation. A private client will normally receive indirect compensation for such efforts out of the proceeds of settlement or judgment. A representative plaintiff normally will not. That being said, these are contributions the Court expects a representative plaintiff to make and I respectfully agree with the observation of Hoy J. in *Bellaire v. Daya*, above, at para. 71 that compensation should not be awarded simply because the representative plaintiff has done what is expected of him or her. It should be reserved for cases, like *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.) where the contribution of the representative plaintiff has gone well above and beyond the call of duty.

In *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 ("*Robinson*"), Strathy J. again refused to order an honorarium. He summarized the factors for the court to consider, at para. 43:

> In this particular case, while I acknowledge the contribution made by Kathryn Robinson and by Rick Robinson, and commend them on the work they have done to bring this matter to a successful conclusion on behalf of their fellow class members, I am not prepared to award such compensation. In my respectful view, requests for compensation for the representative plaintiff are becoming routine, as Sharpe J. anticipated in *Windisman*, above. I agree with those who have expressed the opinion that compensation should be reserved to those cases where, considering all the circumstances, the contribution of the plaintiff has been exceptional. The factors that might be appropriate for consideration could include:
>
> (a) active involvement in the initiation of the litigation and retainer of counsel;
>
> (b) exposure to a real risk of costs;
>
> (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation;
>
> (d) time spent and activities undertaken in advancing the litigation;
>
> (e) communication and interaction with other class members; and

(f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.

The exceptional nature of an honorarium is even more circumscribed in a *cy-près* settlement where there is no monetary success for the class. Winkler J. (as he then was) held in *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 ("*Sutherland*"), at para. 22:

> While the work of the Representative Plaintiffs is commendable, to compensate them for their work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class member would be contrary to the precept of a Cy-pres distribution in particular and to a class proceeding generally. Compensation for representative plaintiffs must be awarded sparingly. The operative word is that the functions undertaken by the Representative Plaintiffs must be "necessary", such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that would be purely compensatory on a *quantum meruit* basis. Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. This request is denied.

[98] Sherry and Dan rely on the decision in *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369 (Gen. Div.) ("*Windisman*"). However, Sharpe J. (as he then was) did not conclude that honoraria should be paid in the ordinary course. Rather, he held that such an award "should not be seen as routine", and that "evidence" would be required to demonstrate that the representative plaintiff took a "very active part at all stages" of the action. Sharpe J. ordered the payment since the representative plaintiff "assumed the risk of costs" and "kept careful records of her time and effort" (at para. 28).

2. <u>Application of the law to the evidence</u>

[99] I find that the evidence does not support the "exceptional" order of the payment of an honorarium to either Sherry or Dan, based on the factors discussed above.

[100] There is no evidence of unusual or rare circumstances, let alone exposure to costs or evidence that the action could not have been brought without them. There is no evidence as to any exceptional time spent on the case (let alone records or other evidence as to the amount of time as was before the court in *Windisman* or *Robinson*). The essence of the evidence filed on the present motion is that the representative plaintiffs were "involved" in the litigation, stayed "informed about the litigation", and reviewed pleadings and provided information, opinions, and instructions to counsel, which was the work any representative plaintiff would be required to do. Without any unique factors to warrant an honorarium, I am not prepared to grant it.

Order

[101] For the above reasons, I grant the relief as set out in the order signed on March 2, 2020.

GLUSTEIN J.

Date: 20200319

CITATION: Robinson v. Medtronic, Inc., 2020 ONSC 1688
COURT FILE NO.: CV-07-CV-341755CP
DATE: 20200319

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHERRY MARIE ROBINSON, GREGORY ROBERT HORNING, DAN AUSTEN, and GLENDA AUSTEN,
Plaintiffs

AND:

MEDTRONIC, INC. and MEDTRONIC OF CANADA LTD.,

Defendants

REASONS FOR DECISION

Glustein J.

Released: March 19, 2020

Date: 20061215
Docket: CI 05-01-43585
(Winnipeg Centre)
Indexed as: Semple et al v. The Attorney General of Canada et al
Cited as: 2006 MBQB 285

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	**COUNSEL**
CHRISTINE SEMPLE, JANE MCCALLUM, STANLEY THOMAS NEPETAYPO, PEGGY GOOD, ADRIAN YELLOWKNEE, KENNETH SPARVIER, DENIS SMOKEDAY, RHONDA BUFFALO, MARIE GAGNON, SIMON SCIPIO, AS REPRESENTATIVES AND CLAIMANTS ON BEHALF OF THEMSELVES AND ALL OTHER INDIVIDUALS WHO ATTENDED RESIDENTIAL SCHOOLS IN CANADA, INCLUDING BUT NOT LIMITED TO ALL RESIDENTIAL SCHOOLS' CLIENTS OF THE PROPOSED CLASS COUNSEL, MERCHANT LAW GROUP, AS LISTED IN PART SCHEDULE 1 TO THIS CLAIM AND THE JOHN AND JANE DOES NAMED HEREIN, AND SUCH FURTHER JOHN AND JANE DOES AND OTHER INDIVIDUALS BELONGING TO THE PROPOSED CLASS, INCLUDING JOHN DOE I, JANE DOE I, JOHN DOE II, JANE DOE II, JOHN DOE III, JANE DOE III, JOHN DOE IV, JANE DOE IV, JOHN DOE V, JANE DOE V, JOHN DOE VI, JANE DOE VI, JOHN DOE VII, JANE DOE VII, JOHN DOE VIII, JANE DOE VIII, JOHN DOE IX, JANE DOE IX, JOHN DOE X, JANE	**Plaintiffs:** **National Certification Committee** Mr. K. Baert, Ms. C. Poltak, Mr. W. Percy and Mr. J. Horyski **Assembly of First Nations and National Chief Phil Fontaine** Mr. J.K. Phillips **Merchant Law Group** Mr. N. Rosenbaum

DOE X, JOHN DOE XI, JANE DOE XI, JOHN DOE XII, JANE DOE XII, JOHN DOE XIII, JANE DOE XIII BEING A JANE AND JOHN DOE FOR EACH CANADIAN PROVINCE AND TERRITORY, AND OTHER JOHN AND JANE DOES, INDIVIDUAL, ESTATES NEXT-OF-KIN AND ENTITIES TO BE ADDED,

Plaintiffs,

- and -

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS IN THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE

Defendants:

The Attorney General of Canada

Ms. K. Coughlan, Ms. J. Oltean and Ms. A. Kenshaw

United Church of Canada, Anglican Church in Canada, Presbyterian Church in Canada

Mr. A. Pettingill

All Catholic entities

Mr. R. Donlevy and Mr. P. Baribeau

**MISSIONARY SOCIETY OF THE)
METHODIST CHURCH OF CANADA)
(also known as THE METHODIST)
MISSIONARY SOCIETY OF)
CANADA), THE INCORPORATED)
SYNOD OF THE DIOCESE OF)
ALGOMA, THE SYNOD OF THE)
ANGLICAN CHURCH OF THE)
DIOCESE OF QUEBEC, THE SYNOD)
OF THE DIOCESE OF ATHABASCA,)
THE SYNOD OF THE ANGLICAN)
CHURCH OF THE DIOCESE OF)
BRANDON, THE ANGLICAN SYNOD)
OF THE DIOCESE OF BRITISH)
COLUMBIA, THE SYNOD OF THE)
DIOCESE OF CALGARY, THE SYNOD)
OF THE DIOCESE OF KEEWATIN,)
THE SYNOD OF THE DIOCESE OF)
QU'APPELLE, THE SYNOD OF THE)
DIOCESE OF NEW WESTMINSTER,)
THE SYNOD OF THE DIOCESE OF)
YUKON, THE TRUSTEE BOARD OF)
THE PRESBYTERIAN CHURCH IN)
CANADA, THE BOARD OF HOME)
MISSIONS AND SOCIAL SERVICE)
OF THE PRESBYTERIAN CHURCH)
OF CANADA, THE WOMEN'S)
MISSIONARY SOCIETY OF THE)
UNITED CHURCH OF CANADA,)
SISTERS OF CHARITY, A BODY)
CORPORATE ALSO KNOWN AS)
SISTERS OF CHARITY OF ST.)
VINCENT DE PAUL, HALIFAX, ALSO)
KNOWN AS SISTERS OF CHARITY)
HALIFAX, ROMAN CATHOLIC EPISC)
EPISCOPAL CORPORATION OF)
HALIFAX, LES SOEURS DE NOTRE)
DAME-AUXILIATRICE, LES SOEURS)
ST. FRANCOIS D'ASSISE, INSTITUT)
DES SOEURS DU BON CONSEIL,)
LES SOEURS DE SAINT-JOSEPH DE)
SAINT-HYACINTHE, LES OEUVRES)
DE JESUS-MARIE, LES SOEURS DE)
L'ASSOMPTION DE LA SAINTE)
VIERGE, LES SOEURS DE)**

**L'ASSOMPTION DE LA SAINT)
VIERGE DE L'ALBERTA, LES)
SOEURS DE LA CHARITE DE)
ST.- HYACINTHE, LES SOEURS)
OBLATES DE L'ONTARIO, LES)
RESIDENCES OBLATES DU QUEBEC,)
LA CORPORATION EPISCOPALE)
CATHOLIQUE ROMAINE DE LA)
BAIE JAMES (THE ROMAN)
CATHOLIC EPISCOPAL)
CORPORATION OF JAMES BAY))
THE CATHOLIC DIOCESE OF)
MOOSONEE, SOEURS GRISES DE)
MONTREAL/GREY NUNS OF)
MONTREAL, SISTERS OF CHARITY)
(GREY NUNS) OF ALBERTA, LES)
SOEURS DE LA CHARITE DES T.N.O.)
HOTEL-DIEU DE NICOLET, THE)
GREY NUNS OF MANITOBA INC. –)
LES SOEURS GRISES DU)
MANITOBA INC., LA)
CORPORATION EPISCOPALE)
CATHOLIQUE ROMAINE DE LA)
BAIE D'HUDSON-THE ROMAN)
CATHOLIC EPISCOPAL)
CORPORATION OF HUDSON'S BAY,)
MISSIONARY OBLATES-GRANDIN,)
LES OBLATS DE MARIE)
IMMACULEE DU MANITOBA, THE)
ARCHIEPISCOPAL CORPORATION)
OF REGINA, THE SISTERS OF THE)
PRESENTATION, THE SISTERS OF)
ST. JOSEPH OF SAULT ST. MARIE,)
SISTERS OF CHARITY OF OTTAWA,)
OBLATES OF MARY IMMACULATE-)
ST. PETER'S PROVINCE, THE)
SISTERS OF SAINT ANN, SISTERS)
OF INSTRUCTION OF THE CHILD)
JESUS, THE BENEDICTINE SISTERS)
OF MT. ANGEL OREGON, LES)
PERES MONTFORTAINS, THE)
ROMAN CATHOLIC BISHOP OF)
KAMLOOPS CORPORATION SOLE,)
THE BISHOP OF VICTORIA,)
CORPORATION SOLE, THE ROMAN)**

CATHOLIC BISHOP OF NELSON CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONAIRES OBLATES SISTERS DE ST. BONIFACE – THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER-THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE-FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC.

Defendants.

Judgment delivered:

December 15, 2006

SCHULMAN J.

[1] It is rare for this Court to have an opportunity to determine an issue of national and historic importance. This motion for an order certifying a class action and approving settlement of Residential School Litigation presents this Court with such an opportunity.

[2] The motion has been brought with the consent of all parties. For more than a century the Government of Canada, hereafter referred to as Canada, implemented a policy under which it compelled Aboriginal children to leave their homes and attend Indian Residential Schools, hereafter referred to as IRS, that were supervised by Canada and run by various churches. This policy was designed to reengineer Aboriginal people into a European model by educating them to abandon their language, culture and way of life and adopt the language, culture and religions of other Canadians. Looking back on the policy in 2006, it is an understatement to say that it is well below standards by which we like to think we treat other people and created problems for the Aboriginal people which require being addressed on a pan Canadian basis. There were 130 schools and they were located in all the provinces and territories of Canada except Newfoundland, New Brunswick and Prince Edward Island. While attending the schools many of the children were abused physically, sexually and emotionally and they suffered damage that in turn has adversely affected generations of Aboriginal people. The proposed settlement, which the parties are anxious to have concluded, provides for and creates unique and comprehensive remedies to

solve a serious problem that has confronted this country for decades. The agreement provides that it must be approved by judges in nine provinces and territorial courts and the settlement will fail unless all nine judges approve the settlement on substantially the same terms and conditions as provided in the settlement agreement.

[3] As in all cases where a Court is asked to approve a settlement involving vulnerable plaintiffs, this Court must ask itself before considering a rejection of the settlement, whether it can guarantee a better result. Before granting approval subject to conditions which call for significant changes to the agreement, a Court must ask itself whether it is worth risking the unravelling of the agreement and leaving nearly 80,000 Aboriginal people and their families to pursue the remedies available to them prior to the agreement being signed.

[4] As I understand it one or more of the judgments released by my colleagues in other provinces attach at least four conditions to their approval of the settlement. One of the conditions relates to the question of who is going to supervise the administration of the settlement. The agreement provides that the administration is to be supervised by the defendant, the Attorney General of Canada, whom I refer to as Canada. The condition of the judgments is that there be independent supervision subject to reporting to the Court. The judgment suggests that this may not be a material change in the agreement. I will discuss the risks that are created by the attaching of that and other conditions, in para. 33 of this judgment.

[5] In addressing the issues presented, I deal with the following matters;

a) the present plight of litigants and other persons who may wish to make a claim;

b) an outline of the proposed settlement;

c) the principles applicable to a motion for certification and how they relate to this case;

d) the principles relating to Court approval and how they relate to this case;

e) the recommendation of counsel for the represented parties;

f) the positions advanced by persons not represented by counsel either in writing or in person;

g) improvements suggested by Winkler J. in the Baxter case;

h) the risks of a conditional approval; and

i) conclusion.

a) The present plight of litigants and other injured persons;

[6] There are approximately 78,000 Aboriginal persons alive who attended and resided in Indian Residential Schools. Most of them live in Canada, although some live in the United States. Their numbers reduce weekly as 25 of them die.

Ten thousand of them have sued the federal government and churches and perpetrators of abuse. Of them, 11 per cent or 1100 have sued in Manitoba in one or another of 289 actions. If these 78,000 people were to pursue the remedies to which they may be entitled, through the court process, it would present our court system and all those people with a daunting challenge. As a result of pre-trial procedures including Judicially Assisted Dispute Resolution Conferences the vast majority of civil actions in Manitoba are settled before trial. In our Court fewer than 100 civil cases each year are brought to trial. These abuse claims are claims which are least likely to settle before trial. It is hard to imagine, in the event of claims being commenced for 11 percent of 78,000 or 8500 persons, when we would next take on any other civil trial if all the Manitoba claims were readied for trial. What would happen to the workload of the other Courts in Canada if the rest of the claims were sued and set down for trial?

[7] Now let us look at the situation confronting Aboriginal people who were devastated over the years by the events referred to in the pleadings. Many of them are impoverished. Many of them are illiterate. Culturally many of them are shy, reserved and reluctant to give evidence in Court. Relatively few of their claims have been tried to date. At the trials held to date, the plaintiffs have suffered the embarrassment of being required to give evidence publicly about the abuse they suffered many years before. In many of the cases they were required to recount their painful experience on prolonged examinations for discovery. One case took 16 years to wend its way to trial, appeal and the

Supreme Court. The trial lasted 60 days. Another claim by 26 plaintiffs lasted six years. The trial was conducted in three segments a total of 108 days. Other cases have taken between two and six years from start to finish. Many of the plaintiffs are of very modest means and the cost of engaging experts, conducting assessments and leading the evidence at trial is very great.

[8] In the context of this litigation, every plaintiff must overcome enormous hurdles in order to succeed in an action and realize on any judgment obtained. Starting with the question of realizing a judgment, it is in most cases of abuse, not good enough to obtain judgment against the perpetrator of abuse, because he or she may not have sufficient assets to pay the judgment. Consequently, it is necessary for each and every plaintiff to find a legal basis for holding Canada or a church liable, and in the case of the churches there is a real question of their ability to pay one or more of the judgments.

[9] While we live in an era where unrepresented litigants are filing their own claims in unprecedented numbers, making a claim in these circumstances requires the preparation of a written pleading which will test the skills of an experienced pleader. Pleadings prepared below the minimum standard run the risk of being struck out or dismissed fairly early in a proceeding. Legal representation is pretty well a must in these claims.

[10] If the Aboriginal plaintiffs find lawyers who will represent them and have the required expertise, one of the first problems to be addressed is whether the

claim can be brought on a timely basis or whether it will be barred by the **Limitation of Actions Act** C.C.S.M. c. L 150 and like legislation in other provinces. In Manitoba the legislature attempted in 2002 to amend the statute and relieve plaintiffs from the harshness of a 30 year ultimate limitation period (S.M. 2002, c.5, s.4) but the amendment is unlikely to help many of this class of plaintiff because it is a principle of law that a defendant acquires a vested right to have the benefit of any limitation period in place at the time a wrong is committed even if the limitation provision is later repealed.

[11] If a member of this class of plaintiffs is able to overcome the limitation problem which is inherent in these decades old claims, the claims may be met with attempts by the defendants to defeat the claims on a long list of grounds, a few of which I will describe briefly, many of which have not been tested in Court. Firstly, it may be argued that loss of language, culture and identity is not an item of damage for which Courts are able to award compensation. Secondly, the only legal basis for imposing liability against the federal government is by proof that a servant of Canada would be personally liable, if sued and that Canada is vicariously liable. In the case of claims pre-dating 1953, one would have to base the claim in negligence and show that the acts in question took place in the course of the wrong-doers employment. It was only by means of a legislative change in 1953 that Canada became liable for intentional torts of its servants. However, it may be argued that Canada is not liable for the tortious acts of all its employees. In one case the Supreme Court held that in order to support a

finding of vicarious liability there had to be a strong connection between what the employer was asking the employee to do and the wrongful conduct. The Court rejected a claim against a school where a man who was employed as a baker, driver and odd-job man assaulted a student in his living quarters. In negligence claims defendants might try to justify the actions of their servants by establishing that the operation of the schools and treatment of students met the standards of the times or contemporary standards. When one makes a claim in a civil action against another based on conduct that amounts to a crime, the burden of proof to be satisfied is proof on a balance of probabilities commensurate with the seriousness of the allegation. This is higher than the usual burden of proof in a civil trial.

[12] In November 2003 Canada created an ADR system as an alternative to litigation. Under the ADR program victims of IRS are permitted to make claims for damages for acts of physical and sexual abuse by school employees. The amount of the award is set by one of 32 full time adjudicators based on a grid consisting of several categories for which an adjudicator is able to make an award to a limit of $245,000.00. The amounts awarded vary from province to province. The adjudicators do not have the authority to award damages for lost earnings. Canada pays 70 percent of the amount of the award leaving it to the claimant to collect the other 30 percent from the church sponsor of the IRS in question. Since inception 5000 claims have been filed and 4000 of them are outstanding.

b) An outline of the proposed settlement;

[13] The settlement makes provision for payment by Canada with participation by several church defendants, of six kinds of payments, two of which are to residential students directly provided they were alive on May 30, 2005, and the rest of which address the broad social implications of the IRS legacy. Firstly, all former students alive at the above date will receive the sum of $10,000.00 for the first year of attendance in an IRS and a further sum of $3,000.00 for each year of attendance thereafter. An IRS student who attended one or more schools for say 12 years will receive $10,000.00 plus 11 times $3,000.00 or $43,000.00 without proof of legal liability on the part of anyone else and without proof of physical or sexual abuse. This category of payment is described as a Common Experience Payment (C.E.P.). It recognizes the common experience of all former students and arguably recognizes the loss of their culture, family ties and identity. Unless the student intends to make a claim for serious physical or sexual abuse or wrongful acts which are defined, the recipient must sign a release of all claims in exchange for payment. Canada has established a fund of $1.9 billion dollars to fund payments to every student. Canada bears the risk of any insufficiency in the fund. If there is a surplus it is not repaid to Canada but is to be paid according to a formula. The first sum up to $40 million goes to the National Indian Brotherhood Trust Fund and the Inuvialuit Education Foundation to be used for educational programs for all class members. If the surplus exceeds that amount, each C.E.P. recipient receives a pro rata share in the form

of personal credits for personal or group education up to $3,000.00. Canada also pays the cost of verifying the claims and the administrative cost of distribution.

[14] Under the terms of the proposed settlement, Canada has instituted a process under which it pays, pending finalization of the settlement, the sum of $8,000.00 as an interim payment to all persons otherwise entitled to a C.E.P. who were on May 30, 2005 over the age of 65.

[15] Secondly, class members have the right to seek and obtain payment of additional compensation for serious physical abuse, sexual abuse and specified wrongful acts through an Independent Assessment Process known as IAP. The parties, having observed the ADR process in action for more than a year, conducted studies, noted the shortcomings and proposed a series of significant improvements that have been incorporated into the settlement agreement. The awards under IAP consist not only of the damage award of the ADR process with a limit increasing to $275,000.00 but also compensation for lost earnings of up to $250,000.00. Compensation is paid in full by Canada not only for acts of employees but also for acts of any adult lawfully on the IRS premises. Where the claim is for abuse by fellow students the onus shifts to Canada and the Churches to show that it had reasonable supervision in place at the time. Unlike the Court process, the IAP process follows the inquisitorial mode. The adjudicator questions the witnesses at a closed or private hearing. Canada has committed itself to provide resources to ensure that at least 2500 IAP hearings

will be conducted each year and that all claims described as continuing claims be resolved within 6 years. There is provision for claims being referred to the courts in some circumstances, for example where the amount that a court might award exceeds the limit that the adjudicator might award. Any major changes to the IAP requires Court approval.

[16] In addition to the fact that the IAP process is an improvement over the former ADR system as described in para. 15, there are eight additional improvements as follows: an expanded list of compensable acts; a decreased threshold for proof of abuse; for claims resolved prior to the IAP without church contribution, a 30 per cent top up where less than 100 per cent was received; for claims processed under IAP payment on a scale that is uniform across the country; for claims referred to the Courts, a waiver of all limitation defences; a means to compensate non student invitees for abuse suffered up to the age of 21; an independent screening process for IAP claims; and a means for claimants to give evidence by video conference in cases of failing health.

[17] Thirdly, the settlement provides for Canada to fund to the extent of $60 million for five years, the setting up of a Truth and Reconciliation process, directed by a Commission consisting of nominees of former students, Aboriginal organizations, Churches and Canada. The goals of the Commission are to acknowledge the IRS experience; provide a safe setting for individuals to address the Commission; witness, promote and facilitate truth and reconciliation events at both national and community levels; educate the Canadian public about the

IRS system and its impacts; create and make public a record for future study; prepare a report on the legacy of the IRS; and support commemorative events.

[18] Fourthly, the settlement provides for a number of commemorative initiatives at national and community levels with a budget of $20 million and for the establishment of a $125 million dollar endowment over five years to fund Aboriginal healing programs.

[19] In addition, Canada has made the following commitment:

> Health Canada will expand its current Indian Residential Schools Mental Health Support Program to be available to individuals who are eligible to receive compensation through the Independent Assessment Process, as well as to Common Experience Payment Recipients, and to those participating in Truth and Reconciliation and Commemoration activities. It will offer mental health counselling, transportation to access counselling and/or Elder/Traditional Healer services and emotional support services, which include Elder support. Health Canada will offer these services through its regional offices, including the Northern Secretariat which has an office located in Whitehorse, Yukon.

[20] In addition, the Church organizations have agreed as part of the settlement to provide cash and in-kind services to a maximum of $102.8 million to develop new programs for class members and their families.

[21] Importantly, Canada will be paying from a separate fund legal fees for the conduct of the various Court actions, for negotiation of the settlement agreement, for conduct of the C.E.P. claims and a contribution toward legal fees to be earned on the IAP claims to the extent of 15 percent of the awards. I will say more about this in para. 30 and 31.

[22] The settlement agreement does not bind any member of the class to seek or accept the benefits provided in the agreement. It makes provision for class members to opt out of making a claim for C.E.P. and proceeding with a court claim. Para. 4.14 creates a threshold that if 5,000 persons opt out the agreement is invalidated and court approval set aside unless Canada chooses to waive compliance within a prescribed period.

c) The principles applicable to a motion for certification of a class action;

[23] This motion for certification has been brought pursuant to **The Class Proceedings Act** C.C.S.M. c. C130. Section 4 provides:

> **Certification of class proceeding**
>
> 4. The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
>
> (e) there is a person who is prepared to act as the representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class of notifying class members of the class proceeding, and

(iii) does not have, on the common issues, an interest that conflicts with the interests of other class members.

All parties consent to the order being made. However the consent of the defendants is conditional on the settlement being confirmed by this Court and the Courts in eight other jurisdictions. The statute provides with regard to settlements:

Settlement, discontinuance and abandonment

35(1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

Court approval of settlement

35(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

Settlement not binding unless approved

35(3) A settlement is not binding unless approved by the court.

It does not specify the matters to be considered in deciding whether to approve a settlement.

[24] In my view it is clear that all of the criteria have been met for certification of the action as a class action. I wish to discuss briefly the requirement of s. 4(d) that a class proceeding be "the preferable procedure for the fair and efficient resolution of the common issues."

[25] For the purpose of this section the class proceeding is the class proceeding sought by the parties including the implementation of the settlement with the C.E.P. payments (para. 13), IAP payments (para. 15), national and community based programs (paras. 17 to 20) and regime for payment of legal fees (paras. 30 and 31). That this procedure is preferable to the alternative which faces 78,000 claimants, our court systems and our community is self evident. I agree with the submissions of counsel that without rubber stamping a consent order a Court may properly be flexible and relax the standards that might be expected of a moving party in a contested motion. In the case of **Gariepy v Shell Oil Co.** [2002] O.J. No. 4022, Nordheimer J. stated at para. 27:

> ¶27 The first issue is whether this action should be certified as a class proceeding for the purposes of the proposed settlement. The requirements for certification in a settlement context are the same as they are in a litigation context and are set out in section 5 of the Class Proceedings Act, 1992. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.

In my view that means that the preferable procedure requirement has been satisfied in the circumstances of this case leaving any question of manageability or administration of the carrying out of the settlement agreement as a matter to be considered along with all other aspects of the settlement in deciding whether to approve it.

d) Principles relating to approval of a settlement;

[26] The minimum standards for obtaining court approval of a settlement have been described by the author in Class Actions in Canada by Ward K. Branch 2006 Canada Law Book Aurora, as follows:

> **16.30** While the Acts do not specify the test for approval, courts have held that the court must find that in all the circumstances the settlement is fair, reasonable and in the best interest of those affected by it. The settlement must be in the best interests of the class as a whole, not any particular member. Settlement approval should not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness. In *Dabbs v. Sun Life Assurance Co. of Canada*, the court stated that the following factors were a useful list of criteria for assessing the reasonableness of a proposed settlement:
>
> (1) likelihood of recovery, or likelihood of success;
> (2) amount and nature of discovery evidence;
> (3) settlement terms and conditions;
> (4) recommendation and experience of counsel;
> (5) future expense and likely duration of litigation;
> (6) recommendation of neutral parties if any;
> (7) number of objectors and nature of objections;
> (8) the presence of good faith and the absence of collusion.
>
> These factors have been adopted in many other cases both inside and outside Ontario. It is not necessary that all of the enumerated factors be present in each case, nor is it necessary that each factor be given equal weight in the consideration of any particular settlement.

To these factors I would add that the court should also consider whether the refusal of approval or attaching of conditions to approval, puts the settlement in jeopardy of being unravelled. It should be remembered that there is no obligation on parties to resume negotiations, that sometimes parties who have reached their limit in negotiation, resile from their positions or abandon the effort. The reality is that based on the assertions made at our hearing, many unrepresented Aboriginal people want the agreement affirmed, want the process expedited and not delayed, and the fact is that expectations have been created by announcement of the settlement and by the making of interim payments referred to in para. 14.

[27] While the proposed settlement may not be perfect, it certainly is within a zone of reasonableness. In my view it is fair, reasonable and in the best interest of the parties. In a companion proceeding, the motion for certification and approval in Ontario in the case of **Charles Baxter, Sr. and others v. The Attorney General of Canada** [2006] 00-CV-192059CP Winkler J. raises a concern about the manageability of the settlement of the action. That is certainly a matter to be considered on a motion for approval of a settlement. If, for example, a settlement were made with a party whose financial stability was in doubt the question might be more significant than in a case like this where the principal payer is the Government of Canada. I will say more about my view of this question in para. 32 when I address the question of whether the issue is one which makes the settlement less than perfect but reasonable and whether

Winkler J.'s proposal should be left as a suggestion for the parties to consider without making it a condition of approval.

e) Recommendation of counsel;

[28] The settlement agreement was negotiated by all parties with the benefit of experienced counsel. Counsel have not only signed the agreement but they have jointly recommended to the Court that the settlement be approved. Moreover a number of them have provided affidavits in support of the motion.

f) Position of the parties who are not represented by counsel;

[29] Fourteen persons filed written objections or comments in advance of the hearing. Several hundred persons, many of them members of the class, attended the hearing. Nineteen persons made oral presentations at the hearing touching on a number of subjects. Several of them supplemented the written presentations that they had filed in advance. Of those who complained about the settlement, more often it was because it was felt that payment should be made sooner rather than later. No substantive reason was offered for rejecting the settlement. Mr. Baert, counsel for the National Consortium responded to some of the points raised, providing clarification of the terms of the settlement. For my part I found the presentations moving and persuasive evidence as to how pervasive the damage caused to the Aboriginal community by the IRS policy and as to why it is in everyone's interest that the settlement be implemented without delay.

g) The feature of the settlement relating to payment of legal fees;

[30] The judges in the companion judgments have analyzed the provisions of the settlement agreement relating to payment of legal fees. The claims to fees are large, multiples of ten million, but many years work have gone into the various proceedings by experienced counsel. The fees in question are being paid by Canada from a fund which is separate from the source of payment to the members of the class. Most of the legal bills have been reviewed by or by persons employed by Canada's representative and he has recommended payment of them. There is an issue relating to the claim for fees of one law firm but the settlement agreement sets out a reasonable formula for determination of the firm's fees. The area of concern for me is the question of the absence of express provision in the agreement for review of legal fees on IAP claims. Under the settlement agreement Canada will on the making of an award, pay to each claimant's counsel an additional 15 percent of the award on account of legal fees. It appears that many of the lawyers who will be conducting the proceedings in the IAP claims are acting on contingency agreements entered into before the settlement agreement was made. None of the agreements are before the court but it appears that prior to the making of the settlement agreement many contingency agreements were entered into under which law firms may be entitled to claim 30 per cent or more of the recovery in a court action. One firm that claims to represent several thousand claimants has undertaken not to charge any IAP claimant more than 15 percent of the recovery in addition to the

amount received from Canada. That is, the firm has agreed to limit its claim to fees to 30 percent of the amount of the recovery. Even if every law firm in Canada were to agree to do the same, there is a risk that IAP claimants may be called on to pay unreasonably large amounts. On the IAP claims, liability is not in issue as the parties must have contemplated in composing the contingency agreements. There may be settlements short of hearing in some cases. It is easy to visualize circumstances in which no or relative small fee might be justified in addition to the contribution made by Canada.

[31] Under section 55 of the **Legal Profession Act** S.M. 2002 c.44, lawyers practicing in Manitoba must give clients a copy of the contingency agreement on execution of it, failing which it will be unenforceable. Further, along with a copy of the agreement they must give the client a copy of the section that articulates their right to apply for a declaration that the agreement is unfair and unreasonable. However, the evidence shows that many members of the class are illiterate and likely not aware of their rights to have their legal bills reviewed. While no evidence was led on the point one presenter did tell us that she put her name on a list provided by a law firm which she believed related to an offer of information about making an IRS claim. She later was told that she had signed a contingency agreement and when she tried to terminate the services of the law firm she was told that she could not do so. Winkler J. has made a very practical suggestion in the *Baxter* case for implementing a procedure for review of legal fees in the IAP claim. I recommend that the parties give serious consideration to

implementing his suggestion. Members of the class made negative comments at the hearing before me about the amounts paid to lawyers and about the conduct of lawyers who persuaded them to sign contingency agreements. In this paragraph I have approved the settlement as it relates to payment for work done to this time. This settlement is historic and I feel sure that once implemented, Canadians will look back with pride on the way the parties have agreed to put to rest the issues arising from the IRS legacy. An effective review of the legal fees would ensure that the IRS legacy would not be viewed as a windfall to the legal profession.

Critique of the settlement

[32] In the *Baxter* case Winkler J. has identified four deficiencies in the settlement agreement. The deficiencies have been summarized by Ball J. in para. 19 of his judgment in the companion case of **Sparvier v The Attorney General of Canada** 2006 SKQB (see his draft) as follows:

> (a) Financial information sufficient to enable the courts to make an informed decision regarding the anticipated cost of administration of the IAP will be provided for the purposes of approval and thereafter on a periodic basis (para. 52);
>
> (b) An autonomous supervisor or supervisory board will oversee the administration of the IAP, reporting ultimately to the court (para. 52);
>
> (c) The adjudicator hearing each case under the IAP will regulate counsel fees to be charged having regard to the complexity of the case, the result achieved, the intention to provide claimants with a reasonable settlement, and the fact that an additional

15% of the compensation award will be paid as fees by Canada (para. 78); and

(d) The parties will establish a protocol for determining the manner in which issues relating to the ongoing administration of the settlement will be submitted to the courts in each jurisdiction for determination. This will ensure that the requirement for unanimous approval of all courts of any material amendment will not unduly hinder or delay the ability of the courts to make timely decisions (para. 81).

While I agree that the settlement might be better if the four changes were made, it might still be regarded imperfect for a variety of reasons. In para. 31 of my judgment I have articulated my concerns about the desirability of making provisions for review of counsel fees on IAP claims. However, I would not make such a provision a condition of approval. Of the remaining conditions the ones that raise a red flag are (a) and (b) relating to production of financial information and supervision of the administration of the CEP and IAP. Of this, Winkler J. has made the following findings in *Baxter*:

> [38] The potential for conflict for Canada between its proposed role as administrator and its role as continuing litigant is the first issue that must be addressed. One of the goals of this settlement is to resolve all ongoing litigation related to the residential schools. The structure of the administration must be consistent with this aim and not such as to render itself subject to claims of bias and partiality based on apparent conflicts of interest. If such perception exists, it has the potential to taint even those areas where the neutrality is more enshrined such as the adjudication process. Accordingly, the administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class

members and insulate the government from unfounded conflict of interest claims. To effectively accomplish this separation and autonomy it is not necessary to alter the administrative scheme by replacing the proposed administration or by imposing a third party administrator on the settlement. Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government. By extension, such person, or persons, once appointed by the government and approved by the courts, is not subject to removal by the government without further approval from the courts. This is consistent with the approach taken in all class action administrations and there is no reason to depart from that approach in this instance.

[39] The autonomous supervisor or supervisory board envisioned by the court will have the authority necessary to direct the administration of the plan in accordance with its terms, to communicate with the supervisory courts and to be responsible to those courts. Simply put, it cannot be the case that the "administrator", once directed by the courts to undertake a certain task, must seek the ultimate approval from Canada. The administration of the settlement will be under the direction of the courts and they will be the final authority. Otherwise, the neutrality and independence of the administrator will be suspect and the supervisory authority of the courts compromised.

[40] The foregoing are organizational issues that relate to what may be called the "executive oversight" role in the administration. There are other issues in relation to the operational framework for delivery of the benefits under the settlement, particularly with respect to the costs of administration.

[42] Absent any explanation, the current costs of the ADR program appear to be excessively disproportionate when considered against the typical costs of administering a class action settlement. This court has never approved a settlement where the costs of administration exceed the compensation available let alone where the cost excess is a factor of three. It is no answer as was suggested in argument that since Canada, as defendant, has committed to funding the administrative costs separately from the settlement funding, the court need not be concerned with the quantum of that cost. This proposition must be rejected for two reasons. First, it ignores the court's supervisory role in class

actions. Secondly, it fails to recognize how the peculiar aspects of certain terms of this settlement relating to funding can impact unfairly on the class members while at the same time leaving the courts powerless to provide a remedy. This is addressed in more detail below. Thirdly, it fails to recognize that this is not a settlement where the administration is being paid out of a fixed settlement fund. The administrative costs will be paid from the general revenues of the government. This leads to a certain precariousness in respect of the administration and leads to the prospect of the ongoing administration of the settlement becoming a political issue to the potential detriment of the class members.

[44] This combination of inadequate information and absolute veto power over expenditures is unacceptable. The court cannot approve a settlement without adequate information to ensure that the class members' interests are being protected and that it will be able to maintain an effective ongoing supervisory role. As stated in *McCarthy* (No. 2474) at para. 21:

> …a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party.

It strikes me that an issue is being raised as to who, as between the courts and Canada, is to have ultimate control over the administration of the settlement. The settlement of this case is too important to the parties affected and is so fair and reasonable, that it is inappropriate to engage in that debate in this case. Canada has shown its good intentions in so many ways and the parties, after a lengthy and complex series of negotiations, have accepted that Canada will have the supervisory role. Issues like this one can well be left for other settings.

i) Risks of not unconditionally approving the settlement;

[33] The settlement agreement provides:

> 16.01 Agreement is Conditional
>
> This Agreement will not be effective unless and until it is approved by the Courts, and if such approvals are not granted by each of the Courts on substantially the same terms and conditions save and except for the variations in membership contemplated in Sections 4.04 and 4.07 of this Agreement, this Agreement will thereupon be terminated and none of the Parties will be liable to any of the other Parties hereunder, except that the fees and disbursements of the members of the NCC will be paid in any event.

This provision largely mirrors the condition set out in the settlement agreement referred to in **Parsons v. Canadian Red Cross Society** [1999] O.J. No. 3572 at para. 127. However, one could argue that the four conditions referred to in Winkler J.'s judgment in the *Baxter* case are much more substantial than the two conditions imposed in *Parsons*. Winkler J. has stated in para. 36 of *Baxter*:

> [36] I turn now to the specific deficiencies that must be addressed in the proposed administrative scheme. In my view they are neither insurmountable nor do they require any material change to the settlement agreement itself.

In para. 85 of *Baxter* he also stated, "The changes that the court requires to the settlement are neither material nor substantial in the context of its scope and complexity." There is another view that is reasonably arguable, that the conditions are not "substantially the same as" the terms of the settlement agreement. If the alternative interpretation is adopted it will be open to Canada to treat the settlement agreement as terminated and 78000 Aboriginal claimants will be returned to their pre-settlement plight. Also there will be nothing to compel the parties to resume negotiation and if they do, there is a risk that they will resile from positions agreed to. In other words there is a risk that the settlement will unravel although it is in its present form well within a zone of reasonableness.

j) Conclusion.

[34] Having reviewed the material that has been placed before this court I have reached the conclusion that the order of certification of a class action should be granted and the settlement should be approved unconditionally. An expectation has been created on the part of class members that they would receive payments and many have received interim payments. It would be unfortunate if this creative effort by all parties were brought to a halt and the whole settlement unravelled because of the imposition of conditions which may well have been rejected in the course of negotiations of the agreement. Negotiation involves give and take on the part of negotiating parties and the negotiation concluded with a settlement which cries out for confirmation.

J.

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis

through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third-party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways.
[page518]

The ABCP market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low-interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP, the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007, when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP

[page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two-thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian

ABCP market.

The Plan

(a) Plan overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution". The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1 million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be

designed to secure votes in favour of the Plan by various Noteholders and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

(b) The releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in art. 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

(a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;

(b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;

(c) the Canadian banks provide below-cost financing for the margin funding facility; and

(d) other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge

issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

[39] There are two principal questions for determination on this appeal:

(1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its

directors?

(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

[40] The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

(a) on a proper interpretation, the CCAA does not permit such releases;

(b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

(c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867;

(d) the releases are invalid under Quebec rules of public order; and because

(e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of

(a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entre to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the

Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", [See Note 2 below] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, supra, at p. 56:

The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Qubec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in Elan, supra, at pp. 306-307 O.R.:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian

ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP Dealers, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as Asset Providers and Liquidity Providers, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and . . . providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark, at para. 50, that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments, at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, it is unduly technical to classify

the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The statutory wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

(a) the skeletal nature of the CCAA;