IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Jane Doe (#7) v. Newfoundland and Labrador*, 2022 NLSC 133
Date: August 31, 2022
Docket: 201701G2568

BETWEEN:

JANE DOE (#7)

FIRST PLAINTIFF

AND:

JOHN DOE (#9) (DISCONTINUED)

SECOND PLAINTIFF

AND:

JOHN DOE (#10)

THIRD PLAINTIFF

AND:

JOHN DOE (#11)

FOURTH PLAINTIFF

AND:

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR

DEFENDANT

Before: Associate Chief Justice Rosalie McGrath

Place of Hearing:	St. John's, Newfoundland and Labrador
Dates of Hearing:	June 15 and 16, 2022

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Supplemental Filings: June 24, 2022

Summary: The Court approved the settlement of a class action proceeding relating to sexual abuse suffered by Class Members while resident at various youth institutions operated by the Defendant. The Court determined that the settlement was fair, reasonable and in the best interests of the class as a whole. Class Counsel fees were approved subject to a final determination once the effective amount of the Settlement was known. The Court awarded honoraria to the Representative Plaintiffs.

Appearances:

Lynn Moore, Andrew Martin and James R. A. Locke	Appearing on behalf of the Plaintiffs
Donald Anthony, Q.C., David Rodgers, H. Michael Rosenberg, Holly Kallmeyer	Appearing on behalf of the Defendant

Authorities Cited:

CASES CONSIDERED: *Doucette v. Eastern Regional Integrated Health Authority*, 2010 NLTD 29; *Anderson v. Canada (Attorney General)*, 2016 NLTD(G) 179; *McKillop (Litigation Guardian of) v. Ontario*, 2014 ONSC 1282; *Seed v. Ontario*, 2017 ONSC 3534; *Welsh v. Ontario*, 2018 ONSC 3217; *Yeo v. Ontario*, 2021 ONSC 4534; *Grann et al. v. HMQ in Right of the Province of Ontario*, 2021 ONSC 3817; *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 1222; *Sherry v. CIBC Mortgage Inc.*, 2022 BCSC 676; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752; *Redublo v. CarePartners*, 2022 ONSC 1398; *Hodge v. Neinstein*, 2019 ONSC 439; *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311; *Slark (Litigation Guardian of) v. Ontario*, 2013 ONSC 6686

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Limitation of Actions Act*, S.N.L. 1995 c. L-16.1

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RULES CONSIDERED: *Rules of the Supreme Court*, 1986, S.N.L. 1986, c. 42, Sch. D.

REASONS FOR JUDGMENT

MCGRATH, A.C.J.:

INTRODUCTION

[1] The Plaintiffs in this class action request that I approve the settlement agreement they have entered into with the Defendant in respect of claims of sexual abuse in Newfoundland and Labrador's youth custody facilities from 1973 to 1989.

[2] I certified the common issues in this proceeding in October 2019. Both parties then filed applications for summary trial, each seeking judgment. Shortly before the hearing of the applications, the parties reached a settlement that provides compensation to Class Members (as defined below)[1] and releases their claims.

[3] The parties submit that the settlement properly balances the harm suffered by Class Members against the risk and expense of continued litigation. They therefore ask the Court to approve the settlement because it is fair, reasonable, and in the best interests of the class as a whole.

BACKGROUND

[4] Over the course of the 1970s and 80s, the Defendant operated facilities to house both Crown wards and young offenders, including the Whitbourne Training

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[1] Any capitalized terms not otherwise defined herein have the meaning given to them in the Settlement Agreement (as defined below)

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School, the Pleasantville Training School, and the St. John's Youth Centre (referred to collectively as the "Institutions").

[5] The Representative Plaintiffs are former residents of the Institutions and current residents of Newfoundland and Labrador or Ontario. The Plaintiffs pleaded that they were subjected to sexual abuse while they resided at an Institution. In particular, Jane Doe (#7) pleaded that three different staff members at the Girls' Home and Training School sexually assaulted her from 1979 to 1982. John Doe (#10) pleaded that two guards sexually assaulted him many times at the Whitbourne Training School in 1974. Meanwhile, John Doe (#11) pleaded that a priest took him and another boy from the Whitbourne Training School and brought them to a cabin where the priest drugged and sexually assaulted him.

[6] The Plaintiffs commenced this action by issuing a statement of claim on July 7, 2017 and amended that Statement of Claim on September 10, 2019. On October 2, 2019, the Court certified a class proceeding on consent. The four common issues were stated as follows:

a) What procedures or training were in place for staff at the Institutions respecting recognition, discovery, prevention, reporting, or otherwise dealing with sexual misconduct? Were these procedures or training adequate, reasonable, and in accord with applicable standards at the relevant times?

b) What procedures or training were in place for residents at the Institutions respecting recognition, discovery, prevention, reporting, or otherwise dealing with sexual misconduct? Were these procedures or training adequate, reasonable, and in accord with applicable standards at the relevant times?

c) If the procedures or training identified in questions (a) or (b) were not adequate, reasonable, and in accord with applicable standards at the relevant times, did this constitute a breach by the Defendant of a duty of care or a fiduciary duty owed to the Class? and

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d) Did the Defendant fraudulently conceal knowledge that residents of the Institutions suffered sexual battery or other sexual misconduct by a Delegate or fellow resident of the Institutions between May 1, 1973 and June 28, 1989?

[7] The Settlement Agreement defines the Class as "all persons, except Excluded Persons, who were subjected to misconduct of a sexual nature by a Delegate or a fellow resident of the Institutions while the Class Member was resident at, or attended for any period of time, one or more of the Institutions during the Class Period. The Class Period ran from May 1, 1973 to June 28, 1989 (the "Class Period").

[8] Excluded Persons are non-residents of the province who did not opt in, residents who opted out, those who had already released their claims, and those who had died before March 10, 2022. Delegates mean officers, employees, servants, contractors, agents and volunteers of, or affiliated with, the Defendant ("Delegates").

[9] The Amended Statement of Claim pleaded that the Defendant (i) repeatedly failed to protect Class Members from sexual misconduct by Delegates and fellow residents; (ii) hired unqualified staff, and failed to properly screen, train, and supervise them; (iii) failed to prevent Delegates and other residents from sexually abusing Class Members; and (iv) failed to properly investigate these instances of abuse.

[10] The parties engaged in extensive documentary discovery, following which the Plaintiffs filed an application for summary trial asking that the first three common issues relating to alleged lack of policies be decided in their favour. The Defendant then filed a cross-application for summary trial on the basis that it did, in fact, have such policies, and they met the applicable standard of care. The hearing of the summary trial application and cross-application was scheduled to begin March 7, 2022.

[11] In support of their application for summary trial, the Plaintiffs filed affidavits from the Representative Plaintiffs describing their experiences of sexual misconduct

at the Institutions. The Plaintiffs also led evidence from Sharron Callahan, the Director of Youth Corrections during the final years of the Class Period. Based on this evidence, the Plaintiffs argued that the Defendant's breach of its fiduciary duties could be inferred as a matter of common sense.

[12] In its cross-application for summary trial, the Defendant filed affidavit evidence in support of its position that its policies consistently required the reporting of any sexual misconduct in its youth custody facilities and that staff were aware of and complied with this requirement. The Defendant also filed affidavit expert evidence that its policies were consistent with those in facilities across the country during the Class Period.

[13] The parties agreed that transcripts from examinations for discovery could be used as cross-examinations on the witnesses' affidavits for the purpose of the summary trial applications. All of the witnesses who had worked at the Institutions testified that they had been unaware of sexual misconduct during the Class Period, and that if they had, they would have reported it in accordance with the Defendant's policies.

[14] Shortly before the summary trial applications were to be heard, the parties reached an agreement in principle, and later, a settlement agreement. While the parties' negotiating positions are privileged, they did confirm to the Court that negotiations were conducted at arm's length and the parties engaged in hard bargaining.

SUMMARY OF SETTLEMENT AGREEMENT

[15] The Parties entered into a settlement agreement dated March 22, 2022 (the "Settlement Agreement") and received the Court's preliminary views on it. This resulted in the parties entered into an amending agreement dated March 28, 2022, which revised the notice plan appended to the Settlement Agreement. It is that Settlement Agreement, as amended, for which the parties seek court approval. In support of their application, the parties filed a joint brief.

[16] The Settlement Agreement provides for a settlement fund of $12.5 million (the "Settlement Fund"), as well as an additional notice administration fund of $250,000 (the "Notice Administration Fund") and honoraria for each of the Representative Plaintiffs to a limit of $25,000 each. The Defendant has paid Class Counsel the $12,500,000 Settlement Fund, the $250,000 Notice Administration Fund and the $75,000 maximum honoraria that are all held in trust (the "Trust Fund"). The amount of honoraria ordered by the Court shall be paid from the $75,000 held in trust and any fees and disbursements due to Class Counsel will be paid out of the Settlement Fund. Both the honoraria and Class Counsel fees and disbursements are subject to Court approval and are to be paid out as ordered by the Court. The cost of implementing the Notice Plan and Trust Fund and disseminating the Settlement Approval Notice will be funded first from the Notice Administration Fund, and thereafter from the Settlement Fund.

[17] If any Funds remain in the Notice Administration Fund following the implementation of the Notice Plan, those funds revert to the Defendant. Similarly, if the Court orders less than $75,000 paid out as honoraria, the difference between the $75,000 deposited in trust and the amount ordered shall be paid back to the Defendant.

[18] The Settlement Agreement also provides for fees and disbursements of the Claims Administrator, including the costs of the ACR and costs of the Distribution Protocol (all as defined below) to be paid out of the Settlement Fund.

[19] While the Settlement Agreement appends a proposed distribution protocol as Schedule "A" (the "Distribution Protocol"), counsel acknowledge that the Settlement Fund will be distributed in accordance with whatever distribution protocol is approved by this Court.

[20] The Distribution Protocol provides for the appointment of Trilogy Class Action Services ("Trilogy") as Claims Administrator ("Claims Administrator"). The Claims Administrator will be responsible for reviewing claim forms and determining membership in the Class. Class Members will have 12 months from the date which the Court order approving the Settlement Agreement becomes a final

order (the "Effective Date") to advance a claim under Track 1, 2A, or 2B. Each such claim is intended to be non-adversarial and directed at facilitating access to justice. The level of scrutiny of each claim is proportionate to the size of the claim, with the most valuable claims attracting the highest level of vigilance.

[21] The Settlement Agreement provides that the Defendant will make reasonable efforts to confirm whether a claimant against the Settlement Fund ("Claimant") resided at one of the Institutions during the Class Period. Otherwise, the Defendant will have no involvement in the administration of the Settlement Agreement, save and except with regard to its reversionary interest, as set out below.

[22] Claims will be assigned a point value that determines the amount of money to be paid. The value of a point is $5,000, subject to a *pro rata* reduction in the event that the Settlement Funds are insufficient. The maximum number of points that can be assigned to a claim is 100 points (i.e., for a maximum value of $500,000).

[23] Track 1 claims require the Claimant to attest that they were subjected to sexual abuse at an Institution during the Class Period. If the Claims Administrator is satisfied that a Track 1 Claimant meets the criteria for Class Membership, in the absence of evidence to the contrary, the claim will be accepted. Each Track 1 claim will be allotted 10 points, with a value of $50,000, subject to a *pro rata* reduction, as necessary, in the event of an insufficiency.

[24] Track 2 claims will be separated into 2A and 2B, with the latter encompassing those claims that allege oral, vaginal or anal penetration, as well as those claims that merit an interview. Track 2 claims will be assessed by the Abuse Claims Reviewer ("ACR"). The Plaintiffs propose that the Court appoint Rhonda Fiander, MSW, RSW as the ACR.

[25] The ACR will consider the written claim and any appended materials to score Track 2A claims. In addition to the written claim and any appended materials, the ACR will conduct an interview with the Claimant to score Track 2B claims. Track 2 claims will be scored on the 100-point scale set out in the Distribution Protocol,

which focuses on the nature and impact of the sexual abuse. A dissatisfied Track 2 Claimant can ask the ACR to reconsider a score. There will be no further review of that reconsideration.

[26] Class Members will release their claims in respect of sexual misconduct at the Institutions during the Class Period and the action will be dismissed on consent of the parties.

[27] The Distribution Protocol expressly states that the evaluation of claims is to be "expeditious, cost effective, user friendly, and trauma-informed". It also states that "[o]ne of the central goals of the Distribution Protocol is to minimize the burden on Abuse Claimants". In the absence of evidence to the contrary, therefore, the assumption is that Claimants are acting honestly and in good faith. The parties submit that the need to access justice is appropriately balanced against the need to deter fraud, insofar as the Administrator and the ACR have discretion to dismiss or reduce unmeritorious claims.

[28] Ms. Fiander tendered two affidavits in support of this application for settlement approval. Ms. Fiander is a Registered Social Worker and a Certified Mental Health Specialist, who holds a Masters in Social Work. She has worked with vulnerable and traumatized people for forty years. Ms. Fiander indicates that she takes a trauma-informed approach to her work, which allows her to create safety and build trust with the individuals with whom she works.

[29] In addition to the Representative Plaintiffs, another four Class Members swore affidavits in support of this application, emphasizing the importance of a non-adversarial claims process.

[30] The parties recognize that, as knowledge of sexual misconduct may only be in the possession of a Claimant and the perpetrator, the number of Class Members is unknown and may never be known. To the last date of the settlement approval hearing, Class Counsel were aware of 108 persons who claim to be Class Members. Additional Class Members may come forward in the course of the claims process.

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[31] However, the Defendant submits that it requires finality. As a result, it asserts that it has agreed on a payment that exceeds the value that it would ascribe to the claims of known Class Members. In the event that additional Class Members file claims, the Defendant expects that there will be funds to pay the risk-adjusted value of those claims. Conversely, if fewer Class Members file claims, the Defendant maintains a reversionary interest in the remainder of the Settlement Fund. The same is true of any remainder in the Notice Administration Fund and any amount not paid out in respect of the maximum $75,000 honoraria. The Defendant says that this arrangement allowed it to settle with a class of unknown size while still protecting the public purse.

[32] The Defendant takes no position with respect to the fees and disbursements of Class Counsel, or any honoraria sought for the Representative Plaintiffs. These issues also have no bearing on approval of the Settlement Agreement. Class counsel fees, disbursements and the honoraria were dealt with in a separate brief filed by Class Counsel.

SUPPORT FOR THE SETTLEMENT AGREEMENT

[33] The Representative Plaintiffs instructed Class Counsel in negotiating the Settlement Agreement. Each of the Representative Plaintiffs filed an initial affidavit approving of the Settlement Agreement, as well as updated affidavits acknowledging how the Settlement Funds would be disbursed. Four other Class Members also tendered initial and updated affidavits in support of this application for settlement approval.

[34] Trilogy Class Action Services was appointed as the Claims Administrator for the purpose of giving notice in accordance with the court-ordered notice plan. The notice plan included the translation and distribution of notices in French, English, Innu-aimun, and Inuktitut. Paul Battaglia, the President of Trilogy, tendered an affidavit to confirm that Trilogy had complied with the notice plan insofar as possible. Mr. Battaglia was not available to file an affidavit prior to the date of the settlement approval hearing but the Vice-President of Trilogy, Robert Ferguson, subsequently filed an affidavit providing updated and additional information with

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respect to the noticing requirements. He further confirmed that Trilogy had not received any objections to the settlement from potential Class Members.

[35] Class Counsel also recommend the Settlement Agreement. Class Counsel are experienced in prosecuting civil actions for sexual abuse in Newfoundland and Labrador. Lynn Moore, who acts as lead Class Counsel in this matter, tendered an affidavit in support of this application for settlement approval. She deposed that the Class Members were unlikely to see a better outcome through either continued negotiation or litigation. She is of the opinion that the compensatory aspect of the settlement is within a range that counsel expected on a judgment, without the uncertainty of the outcome or the potential delay of appeals. On the whole, she feels the Settlement Agreement represents the best realistic outcome for the Class Members.

PUBLIC APOLOGY

[36] The Settlement Agreement expressly provides that the Defendant does not admit liability. Nevertheless, the Defendant says it recognizes that Class Members have disclosed accounts of serious harm. It says that, if the Settlement Agreement is approved, it expects that a senior member of the Provincial Government will deliver an apology to Class Members in the House of Assembly. The Plaintiffs did not bargain for this apology, and it is not a term of the Settlement Agreement. However, it is also a benefit the Court could not order. The Defendant therefore submits that it is a non-monetary benefit that signals the Defendant's good faith efforts to help Class Members find closure.

APPROVAL OF COUNSEL FEES

[37] As noted above, the Settlement Agreement provides for Class Counsel fees and disbursements to be first paid out of the Settlement Funds. Such fees and disbursements must be approved by the Court under section 38(2) of the *Class Actions Act*, SNL 2001, c.C-18.1 (the "Act").

[38] Class Counsel asks this Court to approve fees on a contingency basis, representing 25% of the Settlement Funds (i.e. $3,125,000.00) together with disbursements of $70,255.26. At the request of the Court, Class Counsel provided a supplementary breakdown of (i) the estimated number and general nature of hours of work performed by various lawyers with the law firm; as well as (ii) the disbursements incurred to date.

APPROVAL OF HONORARIA

[39] As with the request for approval of Class Counsel fees and disbursements, the Defendant takes no position with respect to the honoraria to be paid to the Representative Plaintiffs or the amount of any such payment. It is Class Counsel that asks this Court to approve a payment of $25,000.00 to each of the three Representative Plaintiffs.

ISSUES

1. Should the Court approve the Settlement Agreement?

2. Should the Court approve the fees and disbursements of Class Counsel and on what terms?

3. Should the Court award an honorarium to each of the Representative Plaintiffs and, if so, in what amount?

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LAW AND ANALYSIS

ISSUE 1 – Should the Court approve the Settlement Agreement?

[40] The primary issue in this application is whether the Settlement Agreement should be approved. In deciding this issue, I must determine whether the Settlement Agreement is fair, reasonable, and made in good faith.

[41] Section 35 of the *Act* requires court approval to give effect to a settlement in a class proceeding. Section 40 provides that the *Rules of the Supreme Court*, 1986, S.N.L. 1986, c. 42, Sch. D. (the "*Rules*"), apply to class proceedings to the extent that they do not conflict with the *Act*. Rule 7A.10(1) sets out the requirements on an application for approval of a settlement in a class proceeding. Rule 7A.10(3) also sets the test for approval: whether the settlement is "fair, reasonable and made in good faith". The fairness and reasonableness of a settlement is assessed with reference to "the best interests of the class as a whole".

[42] In deciding whether to approve a class action settlement, the judge is acting somewhat outside the traditional judicial role of determining disputes in an adversarial context. While the judge must consider all the circumstances to determine whether the settlement is fair, reasonable and made in good faith, in most cases, the judge is acting on an incomplete set of facts. The judge is also expected to make informed assumptions and rely on counsel who are far better versed in the issues.

[43] While the judge should place reliance on experienced counsel, the judge must also not lose sight of the rights of unrepresented parties who are not before the court. These potential class members should expect that the court will scrutinize the proposed settlement with their rights in mind. That being said, the judge is not to enter into the fray and attempt to renegotiate the settlement.

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[44] In *Doucette v. Eastern Regional Integrated Health Authority*, 2010 NLTD 29, Thompson J. explained that the assessment of a settlement must begin by recognizing that it represents a compromise:

> Settlements are a product of compromise and are not held to a standard of perfection. As Schulman J. held in *Semple*, a proposed settlement need only fall within ' a zone of reasonableness' to be approved. Similarly, Chief Justice Brenner of the B.C. Supreme Court in *Sawatzky v. Societe Chirugicale Instrumentarium Inc.* wrote:
>
> > All settlements are the product of compromise and a process of give and take and settlement rarely gives all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation.

[45] In *Anderson v. Canada (Attorney General)*, 2016 NLTD(G) 179, at paragraph 38, Stack J. noted that the Court can only approve or reject the settlement. It cannot modify the terms that the parties negotiated: "[g]iven that a settlement may be less than perfect, better becomes the enemy of good". Stack J. further noted at paragraph 40 that, insofar as the settlement must fall within a zone of reasonableness, "[r]easonableness allows for a range of possible resolutions. It is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation".

[46] When determining the criteria of fairness, reasonableness, and good faith, Stack, J. in *Anderson* considered a constellation of factors:

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>
> - likelihood of recovery, or likelihood of success;
> - amount and nature of discovery or trial evidence;
> - settlement terms and conditions;

- recommendation and experience of counsel;
- further expense and likely duration of litigation;
- recommendation of neutral parties, if any;
- number of objectors and nature of objections;
- presence of good faith and absence of collusion;
- degree and nature of communications by counsel and Plaintiff with class members during the litigation;
- information conveying to the court the dynamics of, and the positions taken by the parties, during the negotiation; and
- the risk of not unconditionally approving the settlement.

[47] As the parties seeking approval of the settlement, it is the Plaintiffs who bear the onus of satisfying the Court that the criteria in Rule 7A.10(3) are met and the settlement should be approved. In marshalling the application for settlement approval, the Plaintiffs are therefore obliged to provide full and frank disclosure of all material information.

[48] Nevertheless, as noted at paragraph 42 of *Anderson*, when a settlement is "negotiated and pursued at arm's-length by experienced class counsel after a long and difficult court process", the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation. As Stack J. noted at paragraph 43 of *Anderson*, "it would take convincing evidence to the contrary for me not to approve the Settlement".

Application of Settlement Approval Criteria

[49] The parties submit that a review of the factors below supports their joint position that the Court should approve the Settlement Agreement.

i. Likelihood of Success

[50] As noted above, the Settlement Agreement was concluded shortly before the summary trial applications were to be heard. By that time, the parties had completed written and oral discoveries, including significant documentary production. As the presiding judge, I had the benefit of reading the briefs. I was therefore able to make an initial assessment of the relative strengths of both sides of the action.

[51] Based on that assessment, I agree with the parties' position that there was a chance the Plaintiffs would not have been successful. The Defendants presented case law and expert evidence that, if accepted by the Court, could have resulted in a finding that the Defendant met the standard of care and acted as a prudent fiduciary throughout the Class Period. If I reached those conclusions, I would have had no choice but to dismiss the action. That dismissal would have been binding on all Class Members with the effect of *res judicata*. Class Members might have pursued other theories of liability on an individual basis, but they would have been left at a significant disadvantage. As it was only the Defendant who led expert evidence, Class Counsel recognized that there was real litigation risk to proceeding further.

[52] The Settlement Agreement reflects that litigation risk and it represents a realistic compromise to the Plaintiffs' position.

ii. Amount and nature of discovery or trial evidence

[53] As discussed above, the Settlement Agreement was concluded after the completion of discovery, the conduct of cross-examinations, and the exchange of summary trial briefs. As in *Anderson*, "the parties were in a very good position to

evaluate the totality of the evidence and the current state of Canadian law on the matters at issue to order to assess the prospects of success" (reference: paragraph 56).

iii. Settlement terms and conditions

[54] The Settlement Agreement will also deliver a result that this Court could not have ordered in the form of a non-adversarial process that should promote greater access to justice. The non-adversarial claims process should encourage reluctant Class Members to come forward without undue embarrassment, shame or fear of their abuse becoming public. A non-adversarial process should therefore ensure that more Class Members receive compensation. It reduces barriers that might otherwise prevent the most vulnerable members of the Class from pursuing redress.

[55] While the Settlement Agreement reflects a compromise to the theoretical value of any Class Member's individual claim, the parties submit that it is nevertheless in the interest of the Class as a whole to secure an accessible and non-adversarial process that will likely maximize damages in the aggregate. I agree that the amount of the Settlement Fund and the stream-lined non-adversarial process will in all likelihood achieve that result.

[56] I also agree that Class Counsel were well positioned to evaluate the fairness of the bargain. Although it is impossible to determine the precise number of Claimants, the certification and settlement approval notices were robust and Class Counsel have taken significant additional measures to garner publicity. As a result of these efforts, some 108 persons had identified themselves as Class Members as at the time of the settlement approval hearing.

[57] There can be no certainty at this stage whether there will be additional Claimants, which track a Claimant will choose or the degree of harm suffered by each Claimant. In fact, the non-adversarial claims process contemplated in the Distribution Protocol may serve to increase the number of Claimants. However, that should not unduly detract from the benefits due to Class Members. If all 108 potential Class Members filed claims, the average value of the claim could be as

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high as $115,741 before deducting Class Counsel's fees and disbursements and Claims Administration Costs.

[58] I also note that Class Counsel have considerable experience litigating civil claims for sexual misconduct, particularly for Claimants who were minors in care. Class Counsel therefore have a reasonable understanding of the distribution of injuries among those who have identified themselves as Class Members. In these circumstances, I will give significant deference to Class Counsel's assessment that the Settlement Agreement is adequate.

[59] Notwithstanding such deference, I also note that the adequacy of the estimated and maximum amount of payments out of the Settlement Fund is confirmed by case law. The Settlement Agreement contemplates payments to a maximum of $500,000 per Claimant, after paying Class Counsel's fees and disbursements. The maximum payment available under the Settlement Agreement significantly exceeds the maximum payment available in *Anderson*, for children who were abused in residential schools. In *Anderson* compensation was limited to $225,000 for five academic years of residence at one of the schools and four or more incidents of vaginal or anal intercourse or penetration with an object. As in the Settlement Agreement, payments were to be reduced *pro rata*, as necessary, in the event of an insufficiency.

[60] Other intuitional abuse class action settlements that have received judicial approval have been much less generous. In recent cases from Ontario dealing with sexual abuse in facilities for youth and disabled persons, the maximum compensation per Claimant has been set between $42,000 and $45,000, with much shorter claims periods than the 12 months contemplated by the Settlement Agreement. (Reference: *McKillop (Litigation Guardian of) v. Ontario*, 2014 ONSC 1282; *Seed v. Ontario*, 2017 ONSC 3534, *Welsh v. Ontario*, 2018 ONSC 3217 and *Yeo v. Ontario*, 2021 ONSC 4534).

[61] The case law therefore confirms that the Settlement Agreement should meet or exceed benefits payable in other class proceedings of this kind.

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[62] The Defendant's public apology is another important feature to consider and one that the Court could not order. Although not reflected in the Settlement Agreement, as noted above, the Defendant has expressed its willingness to address Class Members' experiences in the House of Assembly. It hopes that this public acknowledgment of Class Members' suffering will help them to heal.

[63] Other courts in Canada have noted the importance of public apologies. As Pierce J. held at paragraph 80 of *Grann et al. v. HMQ in Right of the Province of Ontario*, 2021 ONSC 3817, another case addressing harm to youths in provincial care, "[t]he cost is minimal but the returns for the dignity and healing of the Crown wards would be substantial". There is no doubt that a public apology would represent an intangible but significant step forward.

[64] While I am in general agreement with Counsel on the salutary aspects of the Settlement Agreement, there was one feature that gave me some initial concern, i.e., the Defendant's reversionary interest in the Settlement Fund. However, the parties note that the Defendant has funded a robust notice campaign to ensure that Class Members have an adequate opportunity to file claims, with 108 identified to the date of the hearing. Additionally, the Defendant has paid the entirety of the Settlement Fund, as well as the Notice Administration Fund and maximum honoraria into a trust account controlled by Class Counsel.

[65] The Defendant says it required a reversionary interest because it does not have visibility into the number of Claimants and the severity of their injuries. The reversionary interest permitted the Defendant to settle this action without accepting the Plaintiffs' assumptions and predictions for the quantification of damages. In similar circumstances, courts have relied on Class Counsel's continued vigilance when approving reversionary interests. (Examples: *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 1222, *McKillop* and *Welsh*)

[66] Having considered this further, in light of the wide-ranging notice provisions, the fact that in excess of 100 Class Members have come forward to date and the amount allotted to Claimants, I no longer harbor any lingering concerns over this

issue. It appears unlikely that an appreciable portion of the Settlement Funds will revert to the Defendants.

iv. Recommendation and experience of counsel

[67] As referenced above, Class Counsel have decades of experience prosecuting civil claims for sexual misconduct and particularly claims for sexual misconduct that occurred at the Institutions. Class Counsel are well positioned to evaluate the Settlement Agreement, and they unequivocally recommend that the Settlement Agreement be approved.

v. Risks and cost of continued litigation

[68] The parties advised that, if the Court does not approve the Settlement Agreement, and barring some further renegotiation, it will be terminated and the parties will resume litigation. The summary trial applications will need to be rescheduled. Further, even if the Plaintiffs prevail on their summary trial application, they will likely face one, if not, two levels of appeal. If the judgment withstands appeal, the favourable resolution of the common issues will compel individual proceedings to determine the experience of each Class Member and quantify their damages.

[69] The delays inherent in these steps would no doubt result in additional prejudice to the Class Members. The Class is aging, and some Class Members are in poor health. Several Claimants have died since the beginning of this action, including one of the Plaintiffs initially named in the statement of claim, John Doe (#9). In addition to the risk of losing on the merits, continued litigation therefore carries the risk that Class Members' claims will not be determined within their lifetimes. Class Members' claims do not survive the death of the Claimant.

[70] Continued litigation also carries the risk that Class Members will be unwilling to engage in adversarial individual proceedings for fear of re-traumatization. They

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may simply not be willing to pursue a claim on the common issues or undergo individual damage assessments in Court.

[71] While I also recognize that it will be some time before Claimants make their way through the claims administration process, this delay pales in comparison to the delays that would be inherent in the trial and appeal processes. Similarly, I know there will be costs associated with the claims administration process. In fact, I requested that Trilogy and the ACR provide updated Affidavit evidence on the amount of fees they would likely anticipate. This request was made to ensure that the Court and the Representative Plaintiffs had a full and frank understanding of the amounts that were likely available for distribution to Class Members. After requesting this information, Trilogy then reduced its base fee from $275,000 to $150,000 (plus HST). It also confirmed that it would charge $475 plus HST per Abuse Claim and an hourly rate of $325 plus HST for work in excess of two hours that may be required in respect of a claim. The ACR also confirmed her hourly rate of $100 with an estimate of 10 hours per assessment. While these costs are significant, the cost of engaging in the individualized court process of claim verification and damage assessment (including the retention of experts) would likely be far greater.

[72] In approaching my task of overall assessment and considering the risk and costs associated with failing to approve the Settlement Agreement, I am cognizant of my role as a Judge in these proceedings. I must only determine whether the settlement is fair, reasonable and in the best interests of the class as a whole. It is not for me to put myself in the position of counsel and attempt to negotiate a better deal. Experienced Class Counsel entered into hard bargaining with the Defendant and now feel that they received the best settlement they could get. In doing so, they were in the best position to assess the risks and costs.

[73] As Stack J. held at paragraph 88 in *Anderson*, "[m]ost importantly, I do not know at what point a good settlement could be lost in a search for the better. I accept, however, that it would be imprudent for the Court to weigh into the process to try to impose or broker a different deal".

vi. Views of neutral parties, if any, and any objectors

[74] The Court does not have the benefit of views from any neutral parties. However, it is significant that no one has registered an objection to the Settlement Agreement.

[75] Class Counsel advised that they had initially expected one objector to appear but were advised on the eve of the hearing that the proposed objector would not oppose the settlement.

[76] I also note that third parties had previously attempted to intervene in proceedings. In particular, the Innu Nation had engaged counsel to deal with the notice to be given in connection with the certification of the class proceeding. Trilogy also conducted a robust notice plan that provided Class Members with a meaningful opportunity to participate in the settlement approval application. Finally, several Class Members tendered affidavits in support of the Settlement Agreement. As a result, I am satisfied there was ample opportunity for potential Class Members to object if they chose to do so.

vii. Presence of good faith and absence of collusion

[77] I have no reason to believe any party was acting in bad faith or collusion. Class Counsel attested that the Settlement Agreement was the result of arm's length hard bargaining in the run-up to contested applications for summary trial.

viii. Communication with Class Members

[78] Class Counsel and the Representative Plaintiffs all confirmed that they had been in close communication throughout this proceeding. Class Counsel had also engaged resources to ensure that Class Members obtained information regarding all aspects of the action, promoted the action to newspaper and television outlets, and received regular calls from Class Members regarding the action and the Settlement

Agreement. As a result of these efforts, several residents of other provinces took the affirmative step of opting into the action. Class Counsel have now compiled a database of some 108 known Class Members.

[79] The Representative Plaintiffs also confirmed that they gave direct instruction to Class Counsel in negotiating and accepting the Settlement Agreement. I also have the comfort of knowing that the Representative Plaintiffs and the additional Class Members who filed affidavits in support of the Agreement have had adequate disclosure of the nature and estimated amount of fees, disbursements and claims administrative costs that will be deducted from the Settlement Fund.

[80] The affidavits that were initially filed did not include an acknowledgement that the costs of administering the settlement process would be deducted from the $12,500,000 Settlement Fund. However, after I requested clarification on the estimated Claims Administration Costs, Class Counsel filed new affidavits from these Class Members indicating their knowledge of the costs and their continued support of the Settlement Agreement.

[81] I am therefore satisfied that the Settlement Agreement reflects these Class Members' views of the best interests of the Class.

ix. Dynamics of the settlement negotiation

[82] While the conduct of the negotiations is privileged, it was readily apparent that this litigation was hard fought. I have had numerous case management meetings and court appearances with counsel. Both parties had fully briefed the Court for the summary trial applications and were prepared to proceed to a hearing of these applications. While counsel were courteous with each other, it was clear to me that both sides were seeking judgment in their favour with no concessions.

[83] As a result, taking all of the above factors into account, I am prepared to approve the Settlement Agreement. While there can be no certainty at this stage of

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precise amounts that will be paid to each Class Member, the agreement creates a non-adversarial process designed to enhance access to justice for vulnerable persons who may not otherwise have come forward.

[84] It also allows Claimants to choose how they would like their Claims assessed. Any concerns over persons coming forward with unfounded claims is addressed through the Defendant's ability to check its own institutional records. Further, the more serious claims of sexual abuse will be assessed by a person with experience in a trauma-informed approach to assessments given her long history of involvement in history of claims of sexual abuse. I am prepared to approve her appointment as ACR, with Trilogy as the Claims Administrator.

[85] While there are caps on the amount that can be received in any one claim, the maximum amount is far in excess of the maximum amounts approved in similar class action proceedings. The *pro rata* reduction in the event that there are insufficient funds also demonstrates that Class Members are being treated as equally as possible.

[86] I am also well aware of the potential that the Class Members may have been unsuccessful on the common issues. There was real risk associated with proceeding through litigation. The delay that would be inherent in proceeding through the Court process was also a significant risk for this aging group of Class Members. Overall, I find that this Settlement Agreement was negotiated through the hard work and tenacity of experienced counsel. I am satisfied that it represents a compromise that is fair, reasonable and in the best interests of the Class as a whole.

ISSUE 2 - Should the Court approve the fees of Class Counsel and on what terms?

[87] As noted above, Class Counsel seeks approval of legal fees representing 25% of the $12,500,000 Settlement Fund together with disbursements of $70,255.26.

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[88] Class Counsel had previously entered into contingency fee agreements with the Representative Plaintiffs that provided for differing percentages on a sliding scale based upon the amount of the recovery. That contingency fee agreement provided for a fee of one-third of any amount recovered less than or equal to $50,000,000.00. Based on the information available at the time of the execution of the contingency fee agreement, Class Counsel estimated a total legal fee for the class action at $25,000,000.00. Counsel explained that they were required to estimate a fee under section 38 of the *Act*. However, that was a daunting task with the number of potential claimants being unknown. As a result, the value of the settlement was over estimated rather than underestimated.

[89] The overestimation is also explained by the fact that when the claim was commenced, the intention was to include claims for persons who had suffered physical or psychological abuse as well as sexual abuse. As it was only the claims for sexual abuse that proceeded by way of class action, the size of the class and the resulting settlement was significantly reduced. As such, Class Counsel is now seeking approval of a fee of $25% of the core settlement fund paid to them.

[90] The Representative Plaintiffs and the four other potential Class Members who filed affidavits are in agreement that Class Counsel should be paid this 25% contingency fee as well as the amount of disbursements incurred. As noted above, the Defendant takes no position.

[91] Class Counsel points out that they have had to carry all disbursements, as the Representative Plaintiffs would not have been able to reimburse them. Further, they conservatively estimate that an additional one thousand hours will be required to assist claimants and to perform other ancillary duties after settlement approval.

[92] The work carried out by Class Counsel to date has consisted of multiple meetings and telephone calls with the Representative Plaintiffs and potential Class Members, legal research, interoffice consultations, extensive document review, and drafting of pleadings and briefs. Further, oral discovery examinations were carried out in anticipation of the summary trial applications. Finally, the parties engaged in

hard bargaining resulting in the settlement agreement, followed by applications for approval of the settlement agreement.

[93] In support of their application for court approval of their fees, Class Counsel notes that the prevailing view in class action approval hearings is to approve a contingent fee as opposed to applying a multiplier to the lawyer's docketed hours times hourly rate. In support of this, counsel refers to paragraph 95 of the decision of Justice Stack in *Anderson* in which he further canvassed case law from other provinces, noting that Canadian Courts have turned away from using the multiplier approach. The reason for this is dangers inherent in placing reliance on a statement by counsel of the time expended, which is then multiplied by hourly rates that are also set by counsel.

[94] As such, there is no real way to test the amount of time expended or to consider whether the rate represents the going rates for similarly experienced counsel in the jurisdiction. The contingency fee approach is therefore generally regarded as being much more principled then the multiplier approach.

[95] I agree that, because of the inherent problems in relying on counsel's docketed time and hourly rate, the trend in Canadian case law is to use the contingency fee approach to approval of class action fees. As noted by Stack, J. at paragraph 94 of *Anderson*, the contingency fee agreement should be the starting point of the court's fair and reasonable analysis. However, that is not to say that a review of the detailed docketed time and hourly rate is an irrelevant consideration when assessing the reasonableness of counsel fees.

[96] In *Sherry v. CIBC Mortgage Inc.*, 2022 BCSC 676 case, Strathy, J, as he then was, commented on the use of contingency fee agreements versus the multiplier approach in approving fees in class action settlements. While he preferred the use of a contingency fee agreement, at paragraph 22 he noted that it is appropriate to use other methods of measurement, such as time multiplied by hourly rate, or a multiplier, or the result, as a check against the reasonableness of the fees claimed. However, even when doing that check, a Court should not be too quick to disallow a contingency 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. Where the multiplier effectively represented twice the amount docketed, the court in that case found it was not out of the reasonable range.

[97] Recognizing the need for full disclosure and the need for a check on the reasonableness of the fees, I asked Class Counsel to provide me with the docketed time. Unfortunately, Class Counsel was unable to provide a summary of docketed hours spent by their lawyers in respect of this matter. However, Ms. Moore estimated that she and her law partner, Mr. Martin, spent a total of 4500 hours and 1300 hours, respectively, on this matter. As well, another associate had estimated time of approximately 1200 hours. Another associate had docketed time of 188.3 hours. In total, the estimated and docketed time multiplied by the lawyers' hourly rates totaled $2,087,075.00.

[98] In addition to using the multiplier approach as a check and balance, I will also consider the non-exhaustive list of factors set out by Justice Stack at paragraphs 88-89 of *Anderson*:

> 88 In determining whether to approve the Retainer Agreements and the corollary legal fees, I must determine whether those fees are fair and reasonable in all the circumstances. An example of the factors to be taken into account is set out in *Smith (Estate) v. National Money Mart Co.* at paragraph 80, as follows:
>
> 1) the legal and factual complexity of the action;
> 2) the risks undertaken, including that the action might not be certified;
> 3) the degree of responsibility assumed by the class counsel;
> 4) the monetary value of the matters at issue;
> 5) skill and competence demonstrated by class counsel;
> 6) the results achieved;
> 7) ability of the class to pay and the class expectation of fees;
> 8) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation.
>
> 89 Each case will turn on its facts and the factors listed above from *Smith* provide a guide only. A key factor will be at what point in the course of the litigation the proceeding settles – whether before or after certification, before or after discoveries, or before or after trial. Depending on the circumstances, therefore, a court may look at different or other factors. There will be occasions when some of the factors are self-evident – for example, in this case the monetary value of the matters at

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> issue and the results achieved are obvious from the fact that the case opened with Plaintiffs' counsel seeking $50 million on behalf of class members and it closed with them obtaining $50 million for the class members. ...

The complexity of the action

[99] Class Counsel submitted that the action was complex. It started out as an action relating to physical, psychological and sexual abuse over a wide ranging time period. Eventually a decision was made to proceed with individual actions relating to abuse that occurred prior to the enactment of the *Limitation of Actions Act*, S.N.L. 1995 c. L-16.1. Those individual actions will challenge the constitutional validity of that legislation in respect of claims for physical abuse.

[100] The smaller class action, however, still involved young Crown wards and young offenders who were abused over a 16-year period in multiple institutions. The fact that the claimants included both Crown wards and young offenders meant that there were two different legislative regimes by which children could be detained. This would have added to the complexity.

The risks undertaken

[101] Class Counsel submitted that the law firm took significant risks in proceeding with this class action. I agree with that assessment. The question of negligence in the operation of residential institutions had not been previously adjudicated. The historic nature of the claims also added to the difficulty of proof, thereby increasing associated risk to Class Counsel.

The Responsibility assumed by Class Counsel

[102] Class Counsel states they assumed responsibility for the prosecution of the file and pushed at every opportunity to advance the matter. As the judge who case managed this proceeding, I can appreciate the amount of responsibility counsel took

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to ensure the proceeding was advanced as soon as possible. There is no doubt that they certainly took the initiative in advocating for their clients.

Monetary value/results achieved

[103] While the monetary value of the claim is far less than was estimated in the written contingency fee agreement, I recognize the original estimate was an overestimation and based upon the inclusion of claims of physical abuse. There was also no way of fully appreciating how many potential claimants would be in the Class. However, given the number of persons who have come forward following an extensive notification process, the monetary value of the claim is within the range of cases for sexual abuse in this jurisdiction and throughout Canada.

Skill and competence of Class Counsel

[104] As senior class counsel, Ms. Moore has numerous years of experience in prosecuting similar claims as well a prior career in criminal law. Her associates also have numerous years of experience in prosecuting sexual abuse cases. Counsel have been diligent in advancing all arguments and vigorously pursued this case with skill and competence.

The ability of the Class to pay and the Class expectations of fees

[105] The affidavit evidence indicates that the Class Members had no ability to pay Class Counsel on their own. As such, without a contingency agreement on fees, the action could not have been pursued. As noted above, as of the date of the settlement hearing, there had been no objections noted from the Class Members regarding the fee.

The opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation

[106] Ms. Moore notes that her firm has lost many business opportunities given the time and resources allotted to the action. As well, they have carried disbursements in excess of $70,000.00. However, counsel says that the disbursements pale in comparison to their lost business opportunities given the time and energy devoted to the action. They have had to turn away many prospective clients due to time constraints.

Fairness and reasonableness of the fee

[107] The Plaintiffs submit that the fee of 25% is fair, reasonable and consistent with similar cases. For example, in *Anderson*, a fee of one-third of the settlement was approved. However, I do note in that case that the amount recovered was equal to the amount originally claimed and counsel were part way through a trial at the time of settlement. Further, counsel had held numerous public meetings to explain the settlement agreement.

[108] In *Sherry*, a fee of 25%, equaling $1.8 million dollars, was deemed fair and reasonable. In the Ontario Superior Court case of *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, counsel had originally entered into a contingency fee agreement representing 30% of any settlement. However, they subsequently sought a fee of 25%. That percentage was accepted by the Court as being reasonable.

[109] During the course of the hearing, I questioned Class Counsel as to the reasonableness of this fee if the full $12,500,000 million Settlement Fund was not used to compensate Class Members and, in fact a portion reverted to the Defendant. In that event, Class Counsel would be paid a percentage of legal fees on government funds that were not ultimately part of the settlement.

[110] In the Ontario Superior Court of Justice case of *Welsh*, Perell, J, also expressed concerns in approving Class Counsel fees when it could not be determined whether the full settlement would be used to pay out full costs, fees and benefits to Class Members. At paragraph 95 of that decision, the Court noted that there was a possibility of the balance of the settlement fund reverting to the Province of Ontario depending on the quantity and quality of the take up of claims and depending on the amount of the approved class counsel fee. As a result, he felt that class counsel's fees should be reduced proportionally by the amount of the settlement fund, if any, that reverted to Ontario.

[111] Class Counsel took the position that, in light of the fact that more than 100 people had already come forward as Claimants, it was highly unlikely that Settlement Funds would revert to the Defendant. However, it was acknowledged that if the Court was concerned, I could make a partial award at this stage with the remainder to be determined at a later date.

[112] The potential concern of allowing payment of all counsel fees at the time of settlement approval was also considered by Stack, J. in *Anderson*. At paragraph 119, he noted that he would normally be inclined to have a portion of the fees held back until the distribution plan has been completed. However, he declined to do so given the many years that had passed, the significant contribution of professional time (approximately 20,000 hours of lawyer, student and clerk time) and disbursements incurred (almost $1,400,000.00) as well as the demonstrated commitment of counsel to the interests of the Class Members. However, what it is notably different in that case is that the defendant retained no reversionary interest in the settlement fund. Any excess funds were to be divided equally among one class of claimants.

[113] In the matter before me, there is a possibility that $12,500,000 may not be the actual amount of the settlement. While I am inclined to agree with Class Counsel that the likelihood of amounts reverting to the Defendant is low given the number of Claimants that have come forward, that is based on assumptions and predictions. There is no certainty. I must also consider that counsel for the Defendant took the position in the joint brief that the Settlement Fund exceeds the value it would ascribe to the claims of known Class Members.

[114] That being said, I will start my consideration of the fees to be approved by finding that, if the entirety of $12,500,000 paid into trust is used to fund the settlement, I would be prepared to approve contingency fees of 25% of $12,500,000. However, it is premature to determine that at this stage.

[115] I therefore find it is fair and reasonable that Class Counsel receive fees as requested on a contingency basis representing 25% of the following sum:

a) the Settlement Funds (ie., $12,500,000.00); less

b) the amount of the Net Settlement Funds that is to revert to the Defendant in accordance with Section 7.4(4) of the Settlement Agreement.

[116] However, as the above sum will remain unknown until immediately prior to distribution in accordance with the terms of the Distribution Protocol, I will not make a final approval at this stage. I am, however, prepared to now recognize the significant time and effort that has gone into this litigation and the results that have been achieved as a result. It is therefore fair and reasonable to make an interim order approving payment of Class Counsel Fees in the amount of $2,500,000.00 plus HST (i.e., 25% of $10,000.000.00). I also approve a final payment of Class Counsel Disbursements in the amount of $70,255.26 plus HST. Class Counsel may transfer such amounts from the Settlement Funds sixty (60) days from the Effective Date.

[117] I will make a final order approving additional Class Counsel Fees, representing 25% of the difference between the Settlement Funds and the amount of the Net Settlement Funds to revert to the Defendant, plus HST, once the Claims Administrator has determined the last of the Abuse Claims and any requests for reconsideration. Class Counsel may contact the Court to arrange for a hearing date to finalize that order.

[118] In making this interim order for payment of Class Counsel fees and disbursements, I recognize there is a possibility that more than $2,500,000.00 will

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revert to the Defendant. Class Counsel could therefore be in a position where they have received more than a 25% contingency fee. However, that risk is low and the original signed contingency fee agreements provided for a one-third contingency fee. I have also considered that the interim payment is only slightly in excess of the estimated docketed time multiplied by the applicable hourly rates. Finally, I have considered the risks taken by Class Counsel, the fact that they have carried disbursements and given up other opportunities, and the amount of time this action has been outstanding. As such, in the event that more than $2,500,000.00 reverts to the Defendant, the interim payment shall represent the amount of the final approval of Class Counsel fees.

ISSUE 3 – Should the Court award an honorarium to each of the Representative Plaintiffs and, if so, in what amounts?

[119] The Defendant has paid $75,000.00 in trust to Class Counsel to fund an honorarium of up to $25,000.00, inclusive of taxes and interest, to each of the Representative Plaintiffs, for services provided to the Class. The honoraria is subject to Court approval but the Defendant takes no position on this issue. Class Counsel submits that a payment of $25,000.00 to each of the three Representative Plaintiffs is appropriate.

[120] Class Counsel notes that each Representative Plaintiff came forward to offer their own tale of sexual abuse and trauma, albeit through the use of a pseudonym pursuant to an order of this Court.

[121] They provided Affidavit evidence in support of the certification application, summary trial applications and the application for approval of the Settlement Agreement. While they were not cross-examined on these Affidavits and did not undergo discovery examinations, the risk of having to do so loomed large.

[122] The Representative Plaintiffs also provided Affidavits indicating their role in providing input on litigation strategy, giving instructions when important decisions

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were being made and being advised of the results of examinations for discovery conducted by Class Counsel.

[123] Other Canadian Courts have approved the payment of honoraria in class action settlements. In a recent Ontario Superior Court of Justice decision in *Redublo v. CarePartners*, 2022 ONSC 1398, Justice Akbarali summarized Ontario and British Columbia decisions in which representative plaintiffs have been awarded honoraria. At paragraph 110, she noted that, in determining whether and when to avoid honoraria and how much, the judge must view the question through the lens of the goals of legislation that allows for class actions: i.e. access to justice, behavior modification, and judicial economy.

[124] At paragraph 111, she notes specific reasons why the court should award honoraria to representative plaintiffs in class proceedings. These can be summarized as follow:

1. Honoraria provide an incentive to representative plaintiffs to take on and advance an action. Without them, there would be no access to justice for the class.

2. In cases where class members' damages may be modest, honoraria serve to encourage a representative plaintiff to take on obligations and risks out of proportion to the individual's damages. Again, without the representative plaintiff, there would be no proceeding.

3. The payment of an honorarium incentivizes representative plaintiffs to take an active role in the process and acts as a check and balance on entrepreneurial class counsel.

4. In cases involving sexual, physical and institutional abuse, honoraria advance the cause of justice for all class members as they protect other class members from being re-traumatized by the litigation process. Representative plaintiffs

ensure that victims of abuse do not have to navigate their claims alone or risk public exposure of the details of their abuse. In the meantime, representative plaintiffs assist to secure accountability in institutional change on behalf of the class of survivors.

5. Honoraria also serve to at least defray out of pocket costs or financial losses incurred by a representative plaintiff.

6. Without honoraria, the class benefits at the expense of the representative plaintiffs.

7. Honoraria ensures that representative plaintiffs are not unduly prejudiced by taking on the responsibilities and obligations of the role.

[125] This Court has also previously granted a request for honorarium payments to representative plaintiffs. In *Anderson*, Justice Stack awarded representative plaintiffs an honorarium of $10,000 each where those plaintiffs rendered active and necessary assistance in the preparation and presentation of the case, resulting in monetary success for the class. At paragraph 79, Stack, J. noted that the representative plaintiff's accomplishments far exceeded their respective individual interests.

[126] In this case, I recognize that Class Members were youths at the time they suffered sexual abuse decades ago, at a time when they were either Crown wards or young offenders. No doubt, many of these Class Members have suffered the effects of such abuse over the years and may be reluctant to subject themselves to re-traumatization by bringing forward individual actions. The Representative Plaintiffs have taken the brave action of stepping up to tell their own stories. While they are protected by the use of a pseudonym, they still risked public exposure of the details of their abuse and its aftermath.

[127] Further, given the unsettled legal issues, it is unlikely that an individual plaintiff would have been willing to incur the expense of taking on an action for historical sexual abuse if that individual's claim was on the lower or even middle range of the spectrum of sexual abuse. A representative plaintiff in these circumstances deserves recognition for taking on obligations or risks out of proportion to the damages he or she may obtain.

[128] In support of the award of honoraria, I have affidavit evidence that the Representative Plaintiffs took an active role in advising Class Counsel both throughout the proceeding and in settlement negotiations. I also recognize that the Representative Plaintiffs ran the risk of having a costs award against them. Those considerations weigh in favour of awarding an honorarium.

[129] Unfortunately, in this instance, I do not have a detailed record of the actions taken by the Representative Plaintiffs. I know that they provided affidavit evidence in support of the certification and summary trial applications. However, they did not undergo discovery examinations and were not cross-examined. Their affidavits in support of the request for an honoraria do not reveal that they incurred any out of pocket costs or financial losses in their role. I am advised that they did not incur any of the class action disbursements. In the course of submissions, Class Counsel suggested these Representative Plaintiffs incurred travel costs to attend meetings at their offices and long distance telephone charges. However, evidence of any expenses is not contained in their affidavits.

[130] Overall, considering the contribution of the Representative Plaintiffs, I am prepared to award honorarium payments to each of them. However, the amount of the honoraria that is sought is not in line with the case law.

[131] While Stack, J did make an honorarium award to the representative plaintiffs in *Anderson*, each representative plaintiff was awarded $10,000.00. It is also notable in that case that the matter settled part way through a trial so that the representative plaintiffs were much more involved in the process. At paragraph 81, Justice Stack noted that each of them was required to describe the abuse they alleged in the statement of claim, swear affidavits in support of certification, endure cross

examination on these affidavits, participate in examinations for discovery, participate in preparations with counsel for all such attendances and travel from Labrador to St. John's to testify at the common issues trial.

[132] In *Sherry*, Watchuk, J. affixed an honorarium payable to the representative plaintiff at $5,000.00. At paragraph 47, it was noted that the representative plaintiff had dedicated significant time and energy to understanding the issues, strategizing with class counsel and swearing various affidavits.

[133] In the 2019 Ontario Superior Court of Justice decision in *Hodge v. Neinstein*, 2019 ONSC 439, Justice Perell gave one representative plaintiff an honorarium of $10,000.00 to reimburse her for personal expenses and to acknowledge her "extraordinary contribution" (paragraph 53).

[134] In *Redublo*, the representative plaintiffs were awarded $5,000.00 each as an honorarium. Both representative plaintiffs had come forward with their own stories and discharged their duties to the class in a competent manner, rendering necessary assistance to class counsel. In that case, both individuals volunteered to act as representative plaintiffs and use their own names. However, the resolution of that claim came at an early stage of the litigation and the role that they took on was not particularly onerous or traumatic. Neither sustained any financial losses or incurred costs relating to the litigation.

[135] In *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311, the court determined that an appropriate honorarium payment to a representative plaintiff was $3,500.00. At paragraph 22, the court noted that:

> ... in no case should the award be so large as to create the impression that the representative plaintiff was put into a conflict of interest. The outer bounds of what could be considered appropriate will vary from case to case, depending on factors such as the terms of settlement or award at issue and the personal circumstances of the representative plaintiff.

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[136] In *Parsons*, the representative plaintiff exposed herself to costs, assumed responsibility for deriving benefit for others, attended at an examination for discovery and was available for conversation during the mediation. These factors were not extraordinary but did militate in favour of a payment of a modest sum.

[137] In the 2017 decision in *Seed v. Ontario*, Justice Gans awarded an honorarium of $15,000.00 to the representative plaintiff. While he would have liked to award more he viewed this as the upper limit set in other Ontario cases. He felt bound by that case law. However, that representative plaintiff had testified at the hearing, and demonstrated a high degree of participation in the matter. The court agreed with the submissions of counsel that the representative plaintiff could not have been more engaged or involved in the direction or prosecution of the actions at all times. That case was settled virtually on the eve of trial and after a series of failed mediation attempts.

[138] A similar amount of $15,000.00 was awarded to each of two representative plaintiffs in the Ontario Superior Court of Justice case of *Slark (Litigation Guardian of) v. Ontario*, 2013 ONSC 6686. Again, however, as noted at paragraph 49, this was a case in which the representative plaintiffs went well beyond what could ever be expected of a representative plaintiff, in a particularly difficult case. Both plaintiffs had participated in and provided numerous interviews to raise awareness of the class proceeding.

[139] Class Counsel were unable to provide me with any cases in which an honorarium greater than $15,000.00 was awarded to a representative plaintiff. Even in the above two cases in which the court awarded $15,000.00 such an award was not made to three separate representative plaintiffs. Further, those cases involved situations in which the representative plaintiff's role was extraordinary.

[140] I must also consider the magnitude of the amount requested in light of what Class Members may receive. There may be some Class Members who were sexually abused at one of the institutions who would only be allotted points valued at $50,000.00. There is then a real possibility that amount will be further reduced *pro*

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rata if there are insufficient funds in the Settlement Fund. A $25,000 honorarium therefore appears to be high in light of the settlement.

[141] Overall, while I find that the contribution of the Representative Plaintiffs have been commendable, allowing this class action to proceed and providing justice to all Class Members, I would describe their contribution as modest. I would therefore make an honorarium award of $10,000.00 to each of the Representative Plaintiffs. Such funds are to be paid out of the Trust Funds within sixty (60) days of the Effective Date. In accordance with section 7.4(2) of the Settlement Agreement, Class Counsel shall pay $45,000.00 from the Trust Funds (representing the $75,000 initial payment less the amount of honoraria ordered) to the Defendant within 60 days of the Effective Date.

CONCLUSION

[142] In view of the foregoing, the test for settlement approval is met and I order that the Settlement Agreement is approved.

[143] In respect of Class Counsel fees and disbursements:

a) I therefore find it is fair and reasonable that Class Counsel receive fees as requested on a contingency basis representing 25% of the following sum:

    i. the Settlement Funds (ie., $12,500,000.00); less

    ii. the amount of the Net Settlement Funds that is to revert to the Defendant in accordance with Section 7.4(4) of the Settlement Agreement.

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b) The above sum will remain unknown until immediately prior to distribution in accordance with the terms of the Distribution Protocol. However, I am prepared to now recognize the significant time and effort that has gone into this litigation and the results that have been achieved as a result. It is therefore fair and reasonable to make an interim order approving payment of Class Counsel fees in the amount of $2,500,000.00 plus HST (ie., 25% of $10,000.000.00). I also approve a final payment of Class Counsel disbursements in the amount of $70,255.26 plus HST. Class Counsel may transfer such amounts from the Settlement Funds sixty (60) days from the Effective Date.

c) I will make a final order approving additional Class Counsel Fees representing 25% of the difference between the Settlement Funds and the amount of the Net Settlement Funds to revert to the Defendant, plus HST, once the Claims Administrator has determined the last of the Abuse Claims and any requests for reconsideration. Class Counsel may contact the Court to arrange for a hearing date for this final order.

d) In the event that more than $2,500,000.00 reverts to the Defendant, the interim payment in subparagraph (b) above shall represent the amount of the final approval of Class Counsel fees and disbursements.

[144] I order that an honorarium of $10,000.00 be paid to each of the Representative Plaintiffs. Such funds are to be paid out of the Trust Funds within sixty (60) days from the Effective Date. In accordance with section 7.4(2) of the Settlement Agreement, Class Counsel shall pay $45,000.00 from the Trust Funds to the Defendant within sixty (60) days of the Effective Date.

[145] I approve both the Short Form and Long Form Notices of Settlement Approval attached as Appendix "A" to these reasons for judgment.

ROSALIE MCGRATH
Associate Chief Justice

APPENDIX A

Long Form Notice of Settlement Approval

Did you attend a Training School or a Youth Secure Custody Institution between May 1, 1973 to June 28, 1989?

You may be eligible for compensation. Please read this notice carefully.
Pour lire cet avis en français: www.NFLDsexabuseclassaction.ca
[insert applicable notice of website translated Innu-aimun and Inuktituk]

The Supreme Court of Newfoundland and Labrador (the "Court") approved this notice. This is not a solicitation from a lawyer.

The Supreme Court of Newfoundland and Labrador has approved a settlement between the Province of Newfoundland and Labrador and persons who were subjected to sexual abuse while attending training schools or youth secure custody institutions between May 1, 1973 to June 28, 1989.

This notice explains who is eligible for compensation and how to claim it. You must make a claim before [12 months from the Effective Date]. You cannot make a claim after this date and you will not be able to participate in the settlement.

BASIC INFORMATION

Why did I get notice of the settlement?

The Supreme Court of Newfoundland and Labrador approved the settlement on **[date].** The Court also approved this notice to let you know about the settlement and how to claim compensation.

WHO IS INCLUDED IN THE SETTLEMENT?

Which individuals are involved?

The class includes people who were subjected to sexual abuse while residing, or attending, a youth secure custody institution or training school in Newfoundland and Labrador at any point during the class period, which ran from May 1, 1973 to June 28, 1989. The institutions included in this class action are:

- the Whitbourne Training School, also known as the Whitbourne Youth Center, the Boys' Home, the Boys' Home and Training School, and the Whitbourne School for Boys, at different times, located in Whitbourne;
- the Pleasantville Training School, also known as the Girl's Home, the Girls' Home and Training School, and the Pleasantville School for Girls at different times, located in Torbay and St. John's; and
- the St. John's Youth Centre.

The class does not include people who died before March 10, 2022, people who have already sued and received compensation, people who opted out of the class action, and people who are not normally resident in Newfoundland and Labrador and did not opt into the class action.

Sexual abuse may include:

- sexual assault by staff, volunteers, and other residents;
- beatings where the young person was naked or partially naked;
- detention while naked or partially naked; and
- sexually derogatory language.

Who should I contact with questions?

The Claims Administrator is Trilogy Class Action Services, and you can contact them at inquiry@trilogyclassactions.ca or call them toll free at 1-877-400-1211.

You can visit the website for this class action at http://www.NFLDsexabuseclassaction.ca. You can also write to the Claims Administrator at this address:

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Newfoundland and Labrador Sex Abuse Class Action
117 Queen Street, P.O. Box 1000
Niagara-on-the-Lake, ON
L0S 1J0

HOW DO I GET COMPENSATION?

What can class members get?

Class members' compensation will vary with the severity of the abuse they suffered and the inquiries they sustained, subject to a $500,000 cap on any class member's claim. The Court has decided that an independent Claims Administrator will review all the class member's claims and determine how much compensation each class member will receive.

When will class members receive compensation?

Class members must submit their claims within one year of the date on which the approval of the settlement become final. This means that if you think you are eligible, you must submit a claim with the Claims Administrator by **[12 months after the Effective Date]**. After the Claims Administrator has reviewed all the claims, they will distribute the compensation.

How will class members receive compensation?

If you are eligible, you have two options to pursue compensation: you can either attest, under penalty of perjury, that you experienced sexual abuse during the class period or you can complete a claim form and describe the sexual assault abuse you experienced. You may be eligible for more compensation if you complete the claim form. If you complete a claim form, you may be interviewed by the claims assessor about your experience. This interview will be conducted by a social worker, and it will take place outside of court.
Individuals do not need to testify in front of a court to receive compensation. To be eligible for more money, individuals will have to describe in writing the sexual abuse they experienced and the effect that it had on them. For the most serious sexual abuse, individuals may be interviewed by the claims assessor about their experiences.

You do not need to provide any documents to prove you experienced sexual abuse. If you have such documents, you can use them to supplement your claim.

How will compensation be assessed?

The Claims Administrator will consider the following factors in assessing the severity of claims:

a. Duration;

b. Frequency/number of instances;

c. Degree of intrusiveness into child's body (e.g., clothed/unclothed, oral, anal, vaginal);

d. Level or severity of force, violence, coercion, or threats;

e. Control of environment (e.g., solitary confinement, isolated on a field trip);

f. Number of persons that abused the claimant;

g. Reported sexual abuse to an authority figure; and/or

h. Presence and extent of grooming.

The Claims Administrator will also consider whether the class member experienced any of the following impacts because of the sexual abuse:

a. Behaviour problems;

b. Academic problems;

c. Loss of faith;

d. Damage to family relationships/interpersonal difficulties;

e. Mental health symptoms, including:

    i. Depression;

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ii. Suicide attempt and suicidal ideation;

iii. Anxiety;

iv. Substance abuse;

v. Sexual acting out;

vi. Runaway;

vii. Flashbacks; or

viii. Nightmares; or

f. Adult and current functioning:

i. Underemployment/unemployment

ii. Relationship problems; or

iii. Substance abuse.

In assessing the impacts of the sexual abuse, the Claims Administrator will also consider whether the claimant was predisposed to more serious impacts on account of risk factors, in which case the impact of the sexual abuse may be diminished. Risk factors include, but are not limited to:

a. Childhood of poverty;

b. Family breakdown;

c. Exposure to substance in home;

d. Absence of parental supervision; and/or

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e. Being the victim of sexual or physical child abuse outside the institutions that are included in this class action, or witnessing sexual or physical child abuse of a third person.

The claims Administrator will assign each claim a certain number of points depending on all these factors. Class members will receive compensation in proportion to the point value of their claim.

Do I need my own lawyer to make a claim?

No. Class members are represented by Morris Martin Moore, who are class counsel. You may contact Class Counsel at:

Morris Martin Moore
184 Park Avenue
Mount Pearl, NL A1N 1K8
Tel: 709-747-0077
Fax: 709-747-0104
www.mmmlawyers.com

How will the lawyers be paid?

Class counsel will be paid from the Settlement Fund. The Court has approved the lawyers' fees and you do not have to pay any more to make a claim.

What if I want my own lawyer?

If you want to hire your own lawyer, you may do so at your own expense.

What have I given up in the settlement?

Class members have given up their right to sue the Province of Newfoundland and Labrador for sexual abuse at the training schools and youth secure custody institutions during the class period.

Can I remove myself from the settlement?

No. If you do not like the settlement, you cannot opt out.

Who do I contact for more information?

You may contact the Claims Administrator at inquiry@trilogyclassactions.ca or you may call them toll free at 1-877-400-1211. You can write to the Claims Administrator at:

Newfoundland and Labrador Sex Abuse Class Action
117 Queen Street, P.O. Box 1000
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Short Form Notice of Settlement Approval

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- beatings where the young person was naked or partially naked;
- detention while naked or partially naked; and
- sexually derogatory language.

What does the settlement provide?

The Province will pay $12,500,000 to establish a settlement fund to compensate class members, pay class counsel's legal fees and disbursements, and pay for the administration of the settlement. The settlement funds will be divided between class members, subject to a $500,000 cap on any class member's claim. Additionally, the Province will pay up to $250,000 to provide notice of the settlement and $30,000.00 in honoraria for the Representative Plaintiffs.

How do I claim money?

If you think you are eligible for compensation, you must contact the Claims Administrator. You can call them toll free at 1-877-400-1211, write to them at inquiry@trilogyclassactions.ca, or visit their website at http://www.NFLDsexabuseclassaction.ca.

You will have to attest, under penalty of perjury, that you were subjected to sexual abuse during the Class Period while you attended one of the included institutions.

You must make your claim before [12 months after the Effective Date]. You cannot make a claim after this date and you will not be able to participate in the settlement.

For more information, please visit http://www.NFLDsexabuseclassaction.ca or call 1-877-400-1211 (toll free).

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