SUPREME COURT OF NOVA SCOTIA

Citation: Elwin v. Nova Scotia Home for Colored Children,

2014 NSSC 375

Date: 20141016

Docket:Halifax No. 343536

Registry: Halifax

Between:

June Elwin, Harriet Johnson and **Deanna Smith**

Plaintiffs

v.

The Nova Scotia Home for Colored Children, a body corporate and **The Attorney General of Nova Scotia**, representing Her Majesty the Queen in the right of the Province of Nova Scotia

Defendants

Decision

Judge:	The Honourable Justice Arthur LeBlanc
Heard:	September 17 and October 6, 2014 at Halifax, Nova Scotia
Written Decision:	October 16, 2014
Counsel:	Raymond Wagner, Q.C. and Michael Dull for the Plaintiffs
	Catherine Lunn for the Defendant (AGNS) watching brief only
	No one appearing for the Defendant (The Nova Scotia Home for Colored Children)

By the Court:

Introduction

[1] This is a motion for approval of fees and disbursements of plaintiffs' counsel in a class proceeding following a settlement.

Background

[2] This proceeding arises out of decades of systemic abuse of residents of the Nova Scotia Home for Colored Children. In the late 1990s, a number of former residents of the Home approached the eventual class counsel with their allegations. Between March 2001 and December 2004, counsel commenced individual proceedings on behalf of 62 former residents. The defendants included the Home, the Province of Nova Scotia, and various children's aid societies.

[3] According to the materials filed with the court, counsel began filing individual proceedings in earnest in 2001 and 2002, as well as beginning to assemble information about the residents. Beginning in 2003 the various defendants began issuing and serving Demands for Particulars and Interrogatories, filing defences to the individual actions, and bring interlocutory applications, including a summary judgment motion in one proceeding that was eventually dealt with by the Court of Appeal. Ultimately, most claims in respect of the individual claimant were dismissed on limitations grounds, with the exception of breach of fiduciary duty: see *Milbury v. Nova Scotia (Attorney General)*, 2006 NSSC 293, varied at 2007 NSCA 52.

[4] By 2007 counsel was preparing, filing, and serving lists of documents, and by 2008 counsel was seeking production of documents from the Home, and the defendants had begun conducting discovery examinations of former residents. Plaintiffs' counsel began discovery examinations of representatives of the various defendants beginning in 2009.

[5] In 2009 the Home was successful in a summary judgment motion in respect of most causes of action in the claims of two residents. In each case, most claims were dismissed on the basis of a limitations bar, with the exception of breach of

fiduciary duty. Appeals in both claims were dismissed, as were applications for leave to appeal to the Supreme Court of Canada: see *Borden v. Nova Scotia (Attorney General)*, 2009 NSSC 132, affirmed at 2010 NSCA 15, leave to appeal refused, [2010] S.C.C.A. No. 167; *Smith v. Nova Scotia (Attorney General)*, 2009 NSSC 137, affirmed at 2010 NSCA 14, leave to appeal dismissed, [2010] S.C.C.A. No. 168. A motion for reconsideration by the Supreme Court of Canada was also dismissed: [2010] S.C.C.A. No. 168, 2011 CarswellNS 218.

[6] In 2012 class counsel made a successful motion for production of documents in one of the individual proceedings, obtaining production by the Home of documents relating to alleged abuse of residents between 1954 and 1959 (the plaintiff had been a resident between 1955 and 1959): *Morrison v. Nova Scotia (Attorney General)*, 2012 NSSC 136. Counsel also undertook historical research at the Nova Scotia Archives and obtained documents under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5.

[7] The *Class Proceedings Act*, S.N.S. 2007, c. 28 (the Act), came into force in June 2008. Counsel commenced the class proceeding under the legislation in early 2011. The motion for certification was filed in February 2012.

[8] After cross-examination on affidavits in March and April 2013, a settlement was concluded between the representative plaintiffs and the Home on April 10, 2013; that settlement was approved by the court by order dated July 11, 2013. After the settlement with the Home, the Province of Nova Scotia remained the only defendant. In April 2013 the Province moved to strike all or part of the record; after amendments were made, the court affirmed that some of the material in issue was admissible, while striking certain items: 2013 NSSC 196. The proceeding against the Province continued to a contested certification hearing over roughly two weeks in June and July 2013. The parties provided briefs on various issues, including certification criteria, proposed amendments to the statement of claim, the law respecting private statutes, declaratory relief, and non-delegable duty, admissibility of certain documentary evidence, and alleged vicarious liability of the Province for acts of children aid society officials. The certification motion was conditionally granted in part, with an adjournment to permit the plaintiffs to address alleged deficiencies in the pleadings and the litigation plan: 2013 NSSC 411.

[9] The representative plaintiffs and the Province entered into settlement negotiations, leading to a settlement as to quantum and distribution being

concluded on June 3, 2014, and approved by the court on July 7. No former residents have opted out of the class proceeding.

Issue

[10] The issue on this motion is whether the fees and disbursements sought by class counsel are fair and reasonable.

Fees in class proceedings

[11] This motion is governed by the Nova Scotia *Class Proceedings Act* and by the fee agreement between counsel and the representative plaintiffs. Section 41 of the Act sets out the requirements of agreements for fees and disbursements as between counsel and representative plaintiffs. Subsection 41(1) sets out the content of such an agreement:

> 41 (1) An agreement respecting fees and disbursements between a solicitor and a representative party must be in writing and shall (a) state the terms or conditions under which fees and disbursements are to be paid; (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding; (c) where interest is payable on fees or disbursements referred to in clause (a), state the manner in which the interest will be calculated; and (d) state the method by which payment is to be made, whether by lump sum or otherwise.

[12] Such an agreement requires court approval for enforceability:

> (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the application of the solicitor. (3) An application under subsection (2) may (a) unless the court otherwise orders, be made without notice to any other party; or (b) where notice to any other party is required, be made on the terms or conditions that the court may order respecting disclosure of the whole or any part of the agreement respecting fees and disbursements. (4) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. (5) Where an agreement is not approved by the court, the court may (a) determine the amount owing to the solicitor in respect of fees and disbursements; (b) direct that a taxation be conducted in accordance with the Civil Procedure Rules; or (c) direct that the amount owing be determined in any other manner.

[13] Sections 65-70 of the *Legal Profession Act*, S.N.S. 2007, c. 28, governing taxation of fees and lawyers' right to sue for their accounts, do not apply to fee agreements in class proceedings: s. 41(6).

[14] There is as yet no Nova Scotia written decision dealing with a claim of fees and disbursements by class counsel at the conclusion of a class proceeding. Murphy J. did deal with class counsel's fees in *King v. Nova Scotia (Attorney General)*, Hfx. No. 321400, where he allowed counsel's fees at the level of 15 percent upon a settlement. The contingency agreement provided for a fee of 30 percent plus disbursements and applicable taxes if the matter settled or went to trial, and 35 percent if it went to appeal. Counsel had reduced the fee requested to between 15 and 20 percent, depending on the percentage of class takeup. Murphy J.'s order does not reference the takeup rate. It should be noted that the defendant also paid costs of $450,000.00. The total settlement agreement was valued at some $22,443, 750.00. Class counsel's submissions to the court indicated that "hundreds of hours" had been spent, pursuing both settlement and litigation tracks.

[15] Counsel submits, based on caselaw from other provinces, that class counsel is typically allowed a premium on fees for taking on meritorious but difficult matters. This, it is argued, is consistent with the objectives of the legislation, which depend on rewarding counsel for assuming the risk of a class proceeding. Counsel submits that the general test, as noted in *Gagne v. Silcorp Ltd.* (1998), 167 D.L.R. (4th) 325, 1998 CarswellOnt 4045 (Ont. C.A.), is whether the fees sought are "fair and reasonable" (para. 26). I note that the Ontario *Class Proceedings Act*, S.O. 1992, c. 6, included that exact language. Specifically, s. 33(7)(b) permits the court, having determined a base fee under a fee and disbursement agreement, to "apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success…"

[16] Counsel cites the remarks of Winkler J. (as he then was) in *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (Ont. Sup. Ct. J.), at para. 13:

> … If the CPA is to achieve the legislative objective of providing enhanced access to justice then in large part it will be dependent upon the willingness of counsel to undertake litigation on the understanding that there is a risk that the expenses incurred in time and disbursements may never be recovered. It is in this context that a court, in approving a fee arrangement or in the exercise of fixing fees, must determine the fairness and reasonableness of the counsel fee. Accordingly, the case law that has developed in Ontario holds that the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the solicitor in conducting the litigation and the degree of success or result achieved…

[17] And further, at para. 56:

> The fees being sought are substantial. However, the quantum of a counsel fee, in and of itself, does not provide a valid basis for attacking the fee. The test in law, as set out in *Gagne* is whether the fees are fair and reasonable in the circumstances. 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 an incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel foes may accompany a class proceeding…

[18] In *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, [2011] O.J. No. 1321, the Ontario Court of Appeal referred to a number of relevant considerations, quoting the motions judge's summary as follows, at para 80:

> Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[19] Counsel submits that "the trend in Canada is to award fees based on a percentage basis and … placing emphasis on the quality of representation and the benefit conferred on the class." The authority cited for this is *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 160 D.L.R. (4th) 186, [1998] O.J. No. 1891 (Ont. Ct. J. (Gen. Div.)), where Winkler J. made the following comments after reviewing the specific fee-determination provisions of the Ontario *Class Proceedings Act*:

> … The scheme of the CPA seems to envisage that sections 32 and 33 operate independently of one another. Hence the duplicate provisions for court approval. Moreover, a restrictive construction of the Act is contrary to the policy of the statute, one of the purposes of which is to promote judicial economy. A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in

> [*Nantais v. Telectronics Proprietary (Canada) Limited et al.* (1996), 28 O.R. (3d) 523 (Gen. Div.)], is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this court the settlement averted a seven to ten day trial. Fee arrangements which reward efficiency and results should not be discouraged.

[20] Counsel goes on to submit that "[r]ecent decisions" have called for upholding the validity of class counsel fees of 33 percent; the authority cited is *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, [2013] O.J. No. 5825, where Belobaba J. said, at paras. 4-8:

> I initially approved class counsel's legal fees at the 25 per cent level (rather than the full one-third that had been agreed to in the retainer agreement) because, frankly, that's what other judges were doing. I reviewed several of the decisions, expecting to find persuasive reasons for capping the legal fees at say, 20 to 25 per cent and not allowing the 30 per cent or one-third that had been agreed to in the retainer agreement. What I found, instead, were well-intentioned judicial efforts to rationalize legal fee approvals by discussing arguably irrelevant or immeasurable metrics such as docketed time (irrelevant) or risks incurred (immeasurable.) By using these metrics, judges felt comfortable building up a reasonable legal fees award that was capped at the 20 to 25 per cent level, sometimes 30 per cent but rarely, if ever, approved at the one-third level.
>
> I couldn't understand this reasoning. Why should it matter how much actual time was spent by class counsel? What if the settlement was achieved as a result of "one imaginative, brilliant hour" rather than "one thousand plodding hours"? If the settlement is in the best interests of the class and the retainer agreement provided for, say, a one-third contingency fee, and was fully understood and agreed to by the representative plaintiff, why should the court be concerned about the time that was actually docketed? This only encourages docket-padding and over-lawyering, both of which are already pervasive problems in class action litigation.
>
> If "risks incurred" was something judges could really measure on the material provided, then this metric might make sense. Everyone understands that class counsel accept and carry enormous risks when they undertake a class action. But I don't understand how a judge, post-hoc and in hindsight, confronted with untested, self-serving assertions about the many risks incurred, can measure or assess those risks in any meaningful fashion and then purport to use this assessment as a principled measure in approving class counsel's legal fees. And why are we approaching legal fees approval as a building blocks exercise to begin with, working from the bottom up rather than from the top down? Why not start at the top with the retainer agreement that was agreed to by the clients and their solicitor when the class action began?

> In my view, it would make more sense to identify a percentage-based legal fee that would be judicially accepted as presumptively valid. This would provide a much-needed measure of predictability in the approval of class counsel's legal fees and would avoid all of the mind-numbing bluster about the time-value of work done or the risks incurred.
>
> 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.

[21] Counsel says the fee requested falls within the range of reasonableness set out by the existing authorities. In *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, [2011] O.J. No. 5781, Strathy J. stated that "a contingent fee retainer in the range of 20% to 30% is very common in class proceedings, as it has been in other kinds of litigation in this province for some years" (para. 63). In *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602, [2012] O.J. No. 2081, the contingency fee agreement between class counsel and the representative plaintiffs called for a fee of 25 percent of the recovery, plus disbursements and taxes; Strathy J. called this "a reasonably standard fee agreement in class proceedings litigation" (para. 22). While the amount sought constituted "a significant premium over what the fee would be based on time multiplied by standard hourly rates", Strathy J. commented, in approving the fee, that the class counsel "are serious, responsible, committed and effective" and would "likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here" (para. 26).

[22] Counsel also cites the Newfoundland decisions in *Rideout v. Health Labrador Corp.*, 2007 NLTD 150, [2007] N.J. No. 292, where the court approved a settlement agreement and allowed class counsel to recover fees equivalent to 31.29 percent of the total recovery (paras. 151, 172-173), and *Doucette v. Eastern Regional Integrated Health Authority*, 2010 NLTD 29, [2010] N.J. No. 46, where counsel sought approval of fees amounting to just under 30.5 percent of the recovery; in both cases, the fee agreements provided for recovery of up to 33.3 percent, but counsel applied for the lower amount. In *Doucette*, Thompson J. noted that "[t]he technical evidentiary issues, the uncertainty of liability, the defences available, the time required to advance the case, the patient claims that would

ultimately have to be assessed on an individual basis and the financial exposure of class counsel would have made this less than attractive to counsel and presented a daunting undertaking" (para. 82). Accordingly, the court found that there were "no features presented by which I can conclude that the contingency fee historically used in this Province in individual proceedings and accepted by this Court in a class proceeding in *Rideout* … and within the range accepted nationally and internationally in class proceedings should be reduced in this case" (para. 84).

[23] In *Manuge v. Canada*, 2013 FC 341, [2013] F.C.J. No. 363, Barnes J. determined fees under Rule 334.4 of the Federal Court Rules, which provides that "[n]o payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge." He said:

> At the heart of the application of Rule 334.4 is the requirement that legal fees payable to class counsel be fair and reasonable: see *Parsons et al v Canadian Red Cross Society et al*, 49 OR (3d) 281, [2000] O.J. No. 2374... In determining what is fair and reasonable the Court must look at a number of factors including the results achieved, the extent of the risk assumed by class counsel, the amount of professional time actually incurred, the causal link between the legal effort and the results obtained, the quality of the representation, the complexity of the issues raised by the litigation, the character and importance of the litigation, the likelihood that individual claims would have been litigated in any event, the views expressed by the class, the existence of a fee agreement and the fees approved in comparable cases. Some authorities have also recognized a broader public interest in controlling the fees payable to the legal profession: see *Endean v Canadian Red Cross Society*, 2000 BCSC 971, at para 73, 2000 B.C.J. No. 1254 [*Endean*].

[24] Barnes J. accepted that a contingency fee agreement between "counsel and a representative plaintiff in a proposed class proceeding may be a relevant and, sometimes, a compelling consideration in the final assessment of legal fees. It strikes me, nonetheless, that such a fee agreement will not necessarily be a primary consideration because it is most often executed at an early point in time when very little is known about how the litigation will unfold" (para. 43). He noted that the fee agreement (for 30 percent of the recovery) was made before it was known the certification issue would reach the Supreme Court of Canada, that liability would be decided on agreed evidence, and that the respondent would abandon a partial limitations defence in settlement negotiations (para. 44).

[25] Barnes J. concluded that the contingency fee agreement was not significant, as counsel and the representative plaintiff had essentially abandoned it and were

now requested approval of fees amounting to about 7.5 percent of the gross value of the settlement, which was valued at some $887 million (paras. 7 and 45). He went on to consider the relevance of percentages and multipliers, stating that their use "is appropriate, but mainly to test their reasonableness and not to determine absolute entitlement" (para. 47). He cited, *inter alia*, the comment from *Killough v. Canadian Red Cross Society*, 2007 BCSC 941, [2007] B.C.J. No. 1486, that "while counsel must be fairly and reasonably compensated for the risk assumed by and the work done on behalf of any class, the assessment of fairness and reasonableness is ultimately more subjective than it is objective" (*Killough* at para. 48). Counsel notes (citing *Gagne* at para. 14) that a percentage-based fees and multiplier-based fees may be cross-checked against one another, depending on which approach is being used.

[26] In *Manuge* Barnes J. rejected the defendant's submission that the "relatively low value of professional time expended by class counsel" called for a "typical multiplier of 1.5 to 3.5"; he described this as "overly simplistic and largely insensitive to the factors favouring a premium recovery. The efficiency of counsel in getting to an excellent result is something to be rewarded and not discouraged by the rigid application of a multiplier to the time expended" (para. 49). He concluded, at para. 50:

> It can be equally unhelpful to look for guidance from authorities where legal fees have been approved as a percentage of the amounts recovered. A reasonable fee should bear an appropriate relationship to the amount recovered: see *Endean*, above, at para 80. Cases that generate a recovery of a few million dollars may well justify a 25% to 30% costs award. It is more difficult to support such an approach where the award is in the hundreds of millions of dollars. Presumably that is the reason why class counsel are not relying on the initial contingency fee allowance of 30%. That is also the reason that the three authorities that represent the strongest comparators to this case in terms of amounts recovered fall at the bottom of the scale of costs awarded in percentage terms: see *Baxter v Canada (Attorney General)*, [2006] O.J. No. 4968, 83 OR (3d) 481; *Endean*, above, and *Killough*, above. These comparable decisions do not support an award of costs in this case of approximately 7.5% or, in financial terms, $65 million.

[27] Ultimately, Barnes J. allowed fees at "in an amount equal to eight percent of the retroactive refunds payable to class beneficiaries", which was approximately four percent of the total value of the settlement (para. 51).

[28] Barnes J. considered class counsel fees again in approving a settlement in *Buote Estate v. Canada*, 2014 FC 773, [2014] F.C.J. No. 804. In that case the court

approved a settlement in the amount of about $70 million. Justice Barnes approved fee deduction of eight percent on the retroactive refund portion of the settlement, which appears to have been something under half of the total. Barnes J. commented that "[g]enerally speaking, in very large or megafund settlements, the greater the amount recovered the lower the percentage that will be justified for legal fees. Notwithstanding the substantially lower amount recovered in this case on behalf of the Class, counsel propose a legal fee recovery that is consistent with the amount approved in *Manuge*" (para. 21). After referencing the approach to the determination of whether fees were fair and reasonable that he had described in *Manuge*, he approved the fees and disbursements as requested. There was "no serious opposition to the proposed fees. Class counsel assumed considerable risk by taking this case on and have worked hard and ably to obtain a generous recovery on behalf of the Class. They are entitled to a reasonable recovery for their efforts particularly where the impact of legal fees on the recoveries payable to members will not be disproportionate" (para. 23).

[29] As between the presumption suggested by Cannon J., and the less deferential approach suggested by Barnes J., I prefer the latter. As Barnes J. explained, when the fee agreement is made, it is not known how matters will develop. That is not to say that the fee agreement is not a significant consideration, nor that it is not the starting point in the analysis. However, the Act makes it clear that such an agreement is unenforceable without court approval. Moreover, by its nature, where fee approval follows a settlement, and counsel's recovery will be out of the settlement fund, there is no party to oppose it. This is not an adversarial proceeding like a motion for determination of costs as between parties. As such I interpret the Act as imposing upon the court a duty to ensure that fees and disbursements are fair and reasonable, in view of the objectives and purposes of the Act and in view of the fee agreement with the representative plaintiffs.

Evidence on fees

[30] In his affidavit, Mr. Wagner recounts the evolution of the various proceedings. After being approached by outside counsel in respect of some former residents in early 1998, Mr. Wagner says, he considered the viability of the claims and eventually took carriage of them. There followed several years of preparatory work: meeting with the former residents, preparing pleadings, researching the legal basis for potential claims, and, beginning in late 2000, filing Notices of Intended Action and commencing the individual actions. He suggested that he considered a representative action under the *Civil Procedure Rules (1972)* as early as 2001.

[31] The preparatory work during the years when class counsel was commencing the individual actions included responding to interrogatories and demands for particulars from the defendants, including travelling to meet clients, and responding to summary judgment applications. Around 2004 Mr. Wagner and other lawyers in his firm discussed the possibility of advancing test cases, and began gathering information respecting potential test case clients to that end, including assembling medical, educational and employment histories. He also contacted potential medical, psychological, and psychiatric experts. Dealing with pleadings, particulars, and the possibility of test cases (an idea which was ultimately dropped) occupied a good deal of time.

[32] Mr. Wagner's affidavit reconstructs the work done on the various individual proceedings up to the end of 2006. He goes on to say that between 1998 and the present, "our pursuit of the claims of the former residents … has been a strain on the firm's limited resources," adding that "we have turned down a large number of cases due to the fact that our resources were pushed to the limit working on the claims of the former residents." This work was done without knowing whether the firm would ever receive any remuneration.

[33] In support of the claim for fees, Class counsel have provided an affidavit by Michael Dull, a lawyer with the Wagners firm. Mr. Dull sets out the background of Mr. Wagner and his firm as class proceeding practitioners in Nova Scotia. There is no question that Mr. Wagner and his firm have gained significant experience in this area. Mr. Dull states that the time records indicate that class counsel has been providing legal services to former residents of the Home since January 7, 1998. Mr. Dull's affidavit includes as an exhibit the contingency fee agreement between the firm and the individual plaintiff Tracey Dorrington-Skinner, dated March 31, 2003.

[34] Mr. Dull's affidavit recounts, in a general way, the work undertaken on the various individual claims and the class proceeding: commencing the various proceedings, gathering documentation and preparing lists of documents, interviewing former residents of the Home in order to address demands for particulars and interrogatories, responding to an application to strike and three summary judgment proceedings, receipt and review of defences and defence lists of documents, conducting discoveries and assisting former residents through defence discoveries, date assignment conferences, advancing motions for production, and dealing with the unsuccessful Supreme Court of Canada

proceeding. In addition, he notes, class counsel undertook the research, preparation work and dealings with clients that would be expected in the circumstances.

[35] Mr. Dull expresses the belief that "the substantial work done between … 1998 and 2012 (both by Class Counsel and the individual former resident [*sic*] who came forward early to file actions) laid the groundwork for the class proceeding and the eventual settlement. Stated another way, I do not believe that a settlement would have been achieved but for those early efforts. The work performed on the individual actions is subsumed by the class action." Neither the settlement agreement with the Home (which was approved July 11, 2013), nor that with the Province, provided for the fees and disbursements arising from individual proceedings to be subsumed into the class proceeding.

[36] Upon filing of the proposed class proceeding in February 2011 and, a year later, the motion for certification, class counsel undertook additional historical research. The eventual certification hearing involved multiple days of hearings, leading to the decision of December 2013, followed by the negotiations with the provincial government that led to the 2014 settlement. Mr. Dull confirms that notice of the proposed settlement has been given to the class members, and that none of the former individual plaintiffs have opted out of the class proceeding, nor have any other former residents. There have been no opt-outs. There was no formal notice of this fee approval proceeding given to the class.

[37] Mr. Dull's affidavit includes as exhibits the contingency fee agreements concluded between class counsel and the three representative plaintiffs between 2011 and 2013. He notes that counsel undertook the work on a contingency basis notwithstanding the risk of never being paid. The agreements with the representative plaintiffs provide for fees to be calculated on the following scale: a fee of 25 percent of the first $10 million of a settlement, 20 percent of the second $10 million, and $15 percent of any remainder. Applying this scale to the total settlement of $34 million, this amounts to total fees of $6.6 million, representing 19.4 percent of the total settlement.

[38] Mr. Dull's affidavit includes a list of the personnel involved with the proceedings over time; this includes some ten lawyers, two paralegals, a legal analyst, an articled clerk, and a summer student. He also states his belief that the reasonableness of the fee sought is supported by time records. This is problematic.

[39] Class counsel substantially relied on hours worked and unbilled fees for the period 1998 to 2006, in combination with recorded hours and unbilled fees

between 2007 and 2014, in representing to the court that the fees requested represented 1.2 times the total of the hours and unbilled fees. I refer specifically to paras. 35-46 of Mr. Dull's affidavit, and the various references to the issue in class counsel's submissions.

[40] Mr. Wagner subsequently indicated that there were, in fact, "reconstructed" time records available for the period 1998 to 2006, which had not been prepared prior to Mr. Dull's affidavit. It is agreed that Mr. Dull did not refer to these reconstructed time records. As I understand it, these reconstructed time records consisted of a review of the various individual client files and assignment of time values for the various matters appearing therein..

[41] There are serious gaps and deficiencies in the materials offered to verify class counsel's claims about the specific numbers of hours worked on the individual actions. According to Mr. Dull's original affidavit, between the beginning of work on proceedings involving former residents in January 1998 and late 2007, counsel kept no time records, with the exception of one lawyer, Fiona Imrie, Q.C. Her records span January 1999 to December 2008. Mr. Dull extrapolated the overall time spent by counsel from Ms. Imrie's records, a "review of the work product generated and procedures undertaken (and by whom)", and conversations with the lawyers on the file at that time. He stated that he reviewed the records kept from 2007 forward and believed them to be "fairly accurate," though he believed that "if anything, the records understate the time actually spent…" Like Mr. Dull, Anna Marie Butler, another lawyer who worked on the file and who provided an affidavit, believes that the chart probably underestimated her time, in her case by upwards of 100 hours per year.

[42] Mr. Dull estimated the actual time spent on the file, in terms of total fees between 1998 and 2014, at about $5.4 million. Attached to his affidavit is a chart showing the estimated hours spent by each lawyer on, year-by-year, beginning in 1998. Individual lawyers are indicated by initials (which can be checked against the list of their names that appears earlier in the affidavit). The chart indicates the number of hours and the total fees for each lawyer each year, though it does not indicate hourly rates. Thus, for instance, for 1998 the chart shows as follows:

LAWYER	**HOURS**	**AMOUNT**
RFW	153.7	$61,480.00

SLH	300	$60,000.00
TOTAL	453.7	$121,480.00

[43] Based on the names listed elsewhere in the affidavit, RFW would be Mr. Wagner, while SLH would be Sarah L. Harris. The fees appear to be calculated on a scale of $400.00 per hour for Mr. Wagner, and $200.00 per hour for Ms. Harris. Mr. Wagner's own affidavit indicates that this was indeed his hourly rate between January 1998 and March 2006. Similarly, Ms. Harris's own affidavit indicates that her hourly rate as an associate at the firm was $200.00 (she left the firm in 2008). However, Ms. Harris also states that she commenced articling at the firm in 2001, and was called to the bar in June 2002; this begs the question of why class counsel's fee estimates show Ms. Harris working on this matter for a total of 1800 hours between 1998 and 2001, with total fees estimated at $360,000.00. During these years Ms. Harris was obviously not a lawyer at the firm. Such an error illustrates the unreliability of counsel's time estimates.

[44] Another inconsistency arises in relation to Ms. Imrie's time records. As noted above, Mr. Dull states that Ms. Imrie's time records commence on January 18, 1999. The chart attached to his affidavit shows her working 23.9 hours in 1999, 1.2 hours in 2000, 19 hours in 2001, and 406.4 hours in 2002, a total of 450.5 hours, with total billables of $220,200.00. This works out to about $488.00 per hour. However, Ms. Imrie's own affidavit indicates that she began working for Mr. Wagner's firm in May 2002, and that until April 2007 the firm billed her time to clients at $400.00 per hour. She attaches her own contemporaneous time records respecting work performed on behalf of former residents (records referred to in Mr. Dull's original affidavit, but not attached as an exhibit). These records commence with entries for January 9, 2003. Thus there are inconsistencies respecting when Ms. Imrie worked at the firm, when she worked on the residents' files, and her hourly rate.

[45] After these discrepancies were raised in the hearing, counsel checked firm records and reported that Ms. Harris in fact spent the summers of 2000 and 2001 at the firm as a summer student (given her call to the bar in June 2002, she would actually have been an articled clerk in the summer of 2001, as indicated by her affidavit). Counsel also suggested that Ms. Imrie appeared to have started at the firm "informally" (whatever that might mean) around June 2002. In each case,

where the lawyer's affidavit contradicts the information provided by class counsel as to when the lawyer joined the firm, I accept the lawyer's evidence. In neither case does the new information offer much assistance in addressing the questions raised by the information originally provided by counsel.

[46] Additionally, where there are discrepancies as to hourly rates being charged between the contingency fee agreements and the affidavits (as there are in some cases), I would rely upon the rates in the agreements. Ms. Harris was at the firm as a summer student in 2000, an articled clerk in 2001, and an associate in 2002. The figures provided indicate that she was being billed at $200.00 in each of those years. I note that in Ms. Dorrington-Skinner's 2003 fee agreement, her rate is indicated as $125.00. In the period 2006 to 2014, hourly rates at the Wagner firm increased twice. In the case of Mr. Wagner, in 2006 his rate increased to $600.00, and in 2013 to $750.00. Other lawyers in the firm also saw increases, though not at this level, given that they would have less experience.

[47] I have already described my view as to the broad parameters of how the court should approach a determination of whether class counsel's fees are fair and reasonable. In supplemental submissions, Mr. Wagner has provided argument in support of his position that the fee sought is fair and reasonable. He frames the relevant considerations as they were set out in *Sparvier v. Canada (Attorney General)*, 2006 SKQB 533, [2006] S.J. No. 752, affirmed at 2007 SKCA 37. In that case, Ball J., operating under a provision of the Saskatchewan legislation similar to s. 41 of the Nova Scotia *Class Proceedings Act*, said, at para. 44:

> Fees payable to plaintiffs' counsel in class actions are determined by reference to factors established by judicial authorities. Those factors are often said to be:
>
> (a) time expended by the solicitor;
>
> (b) the legal complexity of the matters;
>
> (c) the degree of responsibility assumed by the solicitor;
>
> (d) the monetary value of the matters at issue;
>
> (e) the importance of the matter to the client;
>
> (f) the degree of skill and competence demonstrated by the solicitor;
>
> (g) the results achieved and the contribution of counsel to the result;

(h) the ability of the client to pay; and

(i) the client's expectations as to the amount of the fees.

[48] In terms of time actually spent, class counsel points the various affidavits which collectively indicate that lawyers in the firm worked more than 14,000 hours over some 16 years. Of this amount, some 7200 hours are post-2007, when class counsel began to keep more reliable time records. Further, even if the hitherto unrecorded pre-2007 time – which counsel subsequently indicated was in fact reviewable in reconstructed records – receives no weight, the fees requested would amount to a multiple of 1.65 compared to the records. This, it is argued, would be within the range of reasonable multiples. (I note that the original time estimates were submitted in support of a fee claim in a multiple of 1.2.)

[49] As will be clear from the comments above, the time actually spent by counsel is a matter of some concern to the court in this case. There can be no question that the class proceeding (as well as the predecessor individual proceedings) involved a great deal of effort by multiple lawyers over an extended time. I am reluctant to place as much reliance on the records as Mr. Wagner initially suggested I should, but I am prepared to accept that thousands of hours were spent by Mr. Wagner and others in his firm in the course of the class proceeding and the predecessor individual proceedings. I would add that such material was not originally sought by the court. Class counsel provided specific time estimates for individual lawyers with the first set of submissions. It was these estimates that raised concerns, which were exacerbated by the affidavits provided later.

[50] Having relied on specific claims of numbers of hours worked and hourly rates, counsel is in no position to object when the court scrutinizes it, particularly when it is found to contain inaccuracies, and improbabilities (such as significant time attributed to lawyers who were not with the firm at the time). Counsel has referred me to, *inter alia*, *Murphy v. Mutual of Omaha Insurance Co.*, 2000 BCSC 1510, [2000] B.C.J. No. 2046, where class counsel had not kept contemporaneous time records, and instead attempted to reconstruct the time spent. Holmes J. commented that “absent some basis to suggest impropriety or other unusual circumstance regarding the evidence as to the claimed time expended, it should not be necessary for counsel to produce their detailed time records to the opposing party” (para. 42). Counsel has not, however, cited the next two paragraphs, where the court said:

> 43 That said however, class counsel could reveal more general information summarized from their time records that would assist the Court in considering the complexity of their work, the seniority and abilities of counsel providing services, the nature of the services undertaken, hourly rates, efficiency of time expended and like matters. That would not breach any privilege nor unfairly require disclosing sensitive information to an opponent.
>
> 44 Showing the proposed fee to be reasonable is upon the applicant and a failure of helpful detail will in the end result be to the disadvantage of the applicant who bears that onus of proof.

[51] Generally speaking, I have some difficulty with the notion that specific records of time actually spent on the file are of more than marginal interest in assessing the reasonableness of a contingency fee agreement. I find myself in agreement with Murphy J. in *MacQueen v. Sydney Steel Corp.*, 2012 NSSC 461, where class counsel sought to recover costs of $1.5 million from two defendants after a mainly successful certification motion. This amount was 50 percent of counsel's estimate of the actual value based on hourly rates for lawyers and staff working on the file. Justice Murphy declined to award costs on the basis of hourly rate-based calculations. Noting that class counsel were actually being compensated on the basis of a contingency fee agreement, rendering the hourly rates a "fiction" (para. 24). Further, he said, at para. 26,

> And the final reason why I am not proceeding on the basis of the formula put out by the plaintiffs is that the hourly rates are unrealistic in my view for fixing costs in this case. They're beyond any amount which I'm aware has been approved by this Court; they're beyond what the Ontario Rules Committee sets as ranges for costs submissions; in fact, in some places they're more than double those amounts. I have to say, I find it disingenuous for the plaintiffs to continually invoke the 'access to justice' argument as a reason for certification and in support of class proceedings -- as really the guiding principle that the Court should apply in assessing whether a class action is the preferred procedure -- and then suggest that the time devoted to accessing justice warrants compensation up to $775 an hour. I recognize that there are clients in this country who are prepared to pay such amounts for certain legal services and look, I'm not critical of that. But I'm not going to determine reasonable party/party costs using those sorts of rates in a case involving damages that allegedly were suffered by the people of Sydney, Nova Scotia. I just don't think that's an appropriate scale on which to assess costs payable by opposing parties.

[52] Justice Murphy ultimately awarded lump sum costs of $400,000.00. I am mindful that the legal and procedural context was quite different in *MacQueen*;

that case involved a costs order against a different party, not recovery of fees out of a settlement fund. However, I believe Justice Murphy's comments about reliance on actual fees is relevant here.

[53] There is an additional concern, on a more purely legal question. It is not clear that the fees and disbursements authorized by the *Class Proceedings Act* automatically subsume the fees and disbursements incurred in the forerunner individual proceedings. Counsel argues, essentially, that the dismissal (without costs) of the individual proceedings leads directly to the inclusion of their related fees and disbursements in those of the class proceeding. Nothing in the settlement documents (with either defendant) appears to contemplate that this would occur; there are no terms of conditions giving any indication of what occurs with respect to fees and disbursements arising in the individual proceedings. The settlement agreements permitted class counsel to have fees and disbursements settled by the court, but there was no specific provision for retaining jurisdiction over the individual actions.

[54] There is precedent for a large-scale settlement to encompass fee recovery for individual actions alongside those of the class proceeding; see, for instance, *Sparvier v. Canada (Attorney General)*, 2006 SKQB 533, affirmed at 2007 SKCA 37, and *Baxter v. Canada (Attorney General)*(2006), 83 O.R. (3d) 481, [2006] O.J. No. 4968 (Ont. Sup. Ct. J.). In these cases, of course, the relevant settlement agreements specifically contemplated that those fees would be taken into account. That is not the case here. I note also *White v. Canada (Attorney General)*, 2006 BCSC 561, where a class action settlement included the extinguishment of other claims and causes of action. The court permitted the inclusion of disbursements from corresponding individual actions (para. 25). Unlike the present case, it appears that the individual proceedings in *White* were still active. In *Sparvier*, it appears, counsel ultimately opted not to pursue disbursements specifically, and instead took a lump sum representing fees and disbursements collectively.

[55] I am prepared to accept in principle that the fees incurred in the parallel individual proceedings – which were provided to the court in supplementary filings – may be taken into account in assessing the global claim made by class counsel.

[56] As noted above, in this case, counsel has not pointed to any contractual basis for incorporating fees from the various individual actions into the global amount for the class proceeding. That being said, I am satisfied that the work done in those individual proceedings would have contributed to the eventual certification of the

class action, and to the settlement. I am convinced that it would be an injustice to deny recovery of a reasonable proportion of fees relating to the individual proceedings, or rather, to refuse to consider those amounts in determining whether the fee claimed is fair and reasonable. I am concerned, however, that there is likely to be a certain amount of duplication of effort in that multiplicity of proceedings. In considering what constitutes a reasonable fee it may be necessary to discount certain amounts out of a concern about excessive duplication of effort between the individual and class proceedings.

[57] I will now consider the various factors set out in *Sparvier* (having already addressed the consideration of time expended by class counsel):

Complexity of issues

[58] As to the complexity of the legal issues, counsel submits that the litigation was contentious and that it raised complex legal issues. In particular, the fact that the Home was a private institution, rather than a government-run one, complicated the legal issues (although I would query the suggestion that this situation was unique in the caselaw; see, for instance, *Broome v. Prince Edward Island*, 2009 PECA 1, affirmed at 2010 SCC 11). Additionally, counsel was required to address such issues as declaratory relief against the Crown for equitable claims, vicarious liability, non-delegable duty, and the application and interpretation of private statutes. The legal issues were made more complex by the passage of decades since the relevant events occurred. Class counsel were required to undertake a significant amount of historical research in addition to conventional legal research. Moreover, the Province strongly resisted certification prior to the decision to negotiate a settlement.

Responsibility assumed by counsel

[59] There appears to be no dispute that class counsel assumed all responsibility for the proceeding, funding all disbursements and working on a contingency fee basis. Counsel also guaranteed a third-party loan in order to obtain a lower interest rate. Counsel also signed an indemnity agreement with the representative plaintiffs, indemnifying them against any award of costs.

Monetary value

[60] Counsel submits – and I accept – that the settlement total of $34 million is a significant monetary value for the class, and that it would not have been achieved but for class counsel assuming significant risk. It appears that the number of former residents who can claim compensation numbers in the hundreds, certainly under 1000. By comparison, counsel points to another recently-settled institutional abuse case, relating to the Huronia Regional Centre, where a class action with some 3700 living former residents was settled for $35 million.

Skill, competence, counsel's contribution, and results achieved

[61] I further accept that class counsel skilfully navigated this class proceeding, involving certain novel points of law and strong opposition from the Province throughout most of its duration, through to a successful settlement, with the attendant possibility that the matter might have gone to a contested trial. Counsel was essential to achieving a result that was highly favourable to the class. I take judicial notice that there was a change in government policy which also played a role in bringing about the negotiated settlement with the Province; I note the comments in *Endean* to the effect that "it is necessary, in considering the reasonableness of the fee in relation to the results achieved, to consider the causal relationship between the efforts of class counsel and the benefits conferred on the class claimants by the resulting recovery" (para. 41). This does not nullify counsel's role, but it is a relevant part of the background to the eventual settlement.

Importance to the client, client expectations, and ability to pay

[62] I am satisfied that Mr. Wagner and his team of lawyers professionally and competently negotiated settlements with both the Home and the Province. This matter was of profound importance to class counsel's clients, the former residents of the Home. I accept that they would not have been able to fund the proceeding on their own. As to the clients' expectations of the amount of fees, it is clear that the plaintiffs would be aware of the contents of the contingency fee agreement. It is also accurate to say that there is no evidence of any complaints from plaintiffs about the fees sought. Indeed, several plaintiffs provided post-hearing affidavits in support of class counsel's request for fees. With respect, however, that is not the decisive consideration. Counsel acknowledges that the fee must be approved by the court as being fair and reasonable. That said, the analysis is not one of determining in the abstract what would be a fair and reasonable fee, but rather whether the fee sought is fair and reasonable.

Conclusion on fees

[63] In this case, the requested fee of $6.6 million amounts to 19.4 percent of the total recovery. Counsel submits that none of the factors reviewed above point to the conclusion that the fee requested is not fair and reasonable. I am satisfied that the percentage of fees requested is close to an appropriate range. I note, for instance, as a comparator, the fees of 15 percent approved in *King* and the eight percent in *Buote*. I have also accepted that a reasonable amount of the fees attributable to the individual proceeding could be subsumed into the class proceeding fees; I do have some concerns about potential repetition of work. Further, the ultimate settlement was, as previously mentioned, partly attributable to a change in government policy; this allowed a settlement to occur in the course of the certification stage, well short of trial. In view of all of these considerations, I conclude that a reasonable class counsel fee in this case is 17 percent of the total recovery.

Disbursements

[64] In addition to fees, class counsel seeks recovery of various disbursements out of the settlement funds. Counsel have submitted two affidavits of Richard Crossman, a paralegal and accounting assistant with their firm, in support of the disbursement claim. Counsel seeks to recover disbursements totalling $502,479.00, consisting of $457,831.53 plus applicable HST of $44,647.47. These disbursements relate to the class proceeding as well as the individual proceedings.

[65] The specifics of disbursements claimed for general administration and supplies are as follows:

Disbursement	**Amount claimed**
Postage	$4,047.84
Couriers	$2,240.40
Prints (black and white + colour)	$1,729.10
Photocopies	$11,373.20 (113,732 pp. at 10 cents per page)

Faxes	$1,259.50
HST at 15% on items above	$3,097.51
Filing fees and Law Stamp charges (62 individual actions + class proceeding)	$13,499.07 ($11,687.82 fees + $1,575.00 law stamp + $236.25 HST at 15%)
Service fees for individual actions and class proceeding	$963.81 ($838.10 + $125.71 HST at 15%)
Investigative services	$5,613.48 ($4,881.29 + $732.19 HST at 15%)
Search fees	$414.00 ($360.00 + $54.00 HST at 15%)
Contracted legal services (e.g. swearing out-of-province affidavits in support of certification motion)	$453.77 ($394.59 + $59.18 HST at 15%)
Production of medical records	$7,609.82 ($6,617.24 + $992.58 HST at 15%)
Discovery costs (court reporters and transcripts)	$6,126.07 ($5,327.02 + $799.05 HST at 15%)
Total (general administration and supplies)	**$58,427.57**

[66] Counsel also claims extensive disbursements related to witnesses' attendance at discovery and cross-examination, both in-court and out-of-court. These expenses include costs related to travel and accommodation for five plaintiffs, in-court and out-of-court cross-examination of several plaintiffs, consultations of four plaintiffs with a psychiatrist, Dr. G.E. Robinson, and one plaintiff's consultation with Sandra Preeper, a rehabilitation consultant. These consultations, it appears, were found to be necessary for some plaintiffs to allow them to come forward and take part in the proceeding. A partial, though incomplete, breakdown is as follows:

Disbursement	**Amount claimed**
Discovery costs (travel and accommodation costs for five plaintiffs)	$8,171.56 ($5,345.70 air fare + $2,825.86 hotels)
Out-of-court cross-examination of three plaintiffs	$5,845.31 ($3,551.87 air fare + $2,293.44 hotels)
In-court cross-examination of three plaintiffs	$5,109.53 ($2,525.87 air fare + $2,583.66 hotels)
Consultations with Dr. G.E. Robinson (psychiatrist) (four plaintiffs)	$3,679.51 ($2,784.68 air fare + $894.83 hotels)
Consultation with Sandra Preeper (Rehabilitation consultant)(one plaintiff)	$1,785.09 ($1,001.59 air fare + $783.50 hotel)
Total	**$24,591.00**
Total of all relevant invoices as per counsel's affidavit	**$39,801.84**

[67] The specific figures cited here are derived from Mr. Crossman's first affidavit. In his second affidavit, Mr. Crossman goes on to state that in addition to these expenses, counsel paid additional travel, meal, and accommodation expenses for plaintiffs. However, in Mr. Crossman's second affidavit, he attaches copies of invoices that he says total $36,074.49, plus applicable HST of $3,727.35, for a total of $39,801.84. This is a lower figure than the overall total stated in the first affidavit.

[68] Counsel also claims various disbursements related to retaining and obtaining the assistance of experts (this is in addition to the services provided by Dr. G.E. Robinson and Sandra Preeper referred to above).

Disbursement	**Amount claimed**
Dr. Charles Hayes (psychologists)(six	$40,822.50 ($29,022.50 + $10,000.00

invoices)	retainers on four invoices + $1,800 "additional fee" on one invoice)
Sandra Scarth (expert in child welfare standards)(seven invoices)	$35,925.62
Sandra Preeper (rehabilitation consultant)(two invoices)	$6,953.85
Dr. G.E. Robinson (psychiatrist)(one invoice)	$8,575.00
Jessie Gmeiner (actuary)(one invoice)	$9,960.00
Total (experts)	**$117,572.51 ($102,236.97 + $15,335.54 HST at 15%)**

[69] Other expenses for which counsel seeks recovery include the following:

Disbursement	**Amount claimed**
Jane Earle (counselling services)	$18,400.00 ($16,000.00 + $2,400 HST at 15%)
Expenses for appeals to SCC (*Borden* and *Smith*)	$73,906.50 ($64,266.53 + $9,639.97 HST at 15%)
Translation of decision for SCC leave application	$3,220.00 ($2,800.00 + $420.00 HST at 15%)
Costs paid to defendants after unsuccessful appeals	$12, 343.75 ($12,100.62 + $243.13 HST at 15%)
Interest (18%) on Bridgepoint Financial Services loans taken out on 12 individual claims between November 2008 and September 2011 in the total amount of $130,201.25	$126,788.31

Posting notices of settlement in four newspapers	$52,018.53 ($45,233.51 + $6,785.02 HST at 15%

[70] As I indicated in the hearings, I have given considerable thought to the possibility of including all the disbursements, including those incurred in the individual proceedings. I was skeptical of my jurisdiction to do so. Based on what has been put before the court, I am unable to agree with class counsel that these disbursements are simply subsumed in the class action.

[71] Regrettably, the settlement agreements reached between the representative plaintiffs and the Home, as well as that between the plaintiffs and the Attorney General, provided for the dismissal with cause and without costs of all of the individual proceedings. These are no longer live actions before the court. Any disbursements incurred in them would be attributable to those individual actions, not the class proceeding.

[72] It is evident that that many of costs claimed as disbursements were costs incurred before and after commencement of the class proceeding. They were not incurred in the class proceeding. They were specific to the individual proceedings. Costs incurred in the class proceeding are indeed recoverable, and I am prepared to order their payment, plus appropriate taxes.

[73] I know that some of the costs, such as general office expenses (e.g. postage, couriers, prints, photocopies, faxes, and search fees, are mixed between the class and individual proceedings. I am prepared to allocate 20 percent of this total as recoverable disbursements in the class proceeding. Filing fees, service fees, and contracted legal services will similarly be allowed at 20 percent, unless I am provided with satisfactory evidence or authority that this should be allowed at a higher rate. I also allow the cost of production of medical records. Discovery costs are allowed in part, with the exception of amounts relating entirely to the individual proceedings.

[74] The discovery costs, out-of-court cross-examination of three plaintiffs, and in-court cross-examination of three plaintiffs are allowed in full. Costs associated with Dr. G. Robinson and consultations with Sandra Preeper are recoverable if they relate to the class proceeding. Travel costs of the representative plaintiffs, including accommodation, are allowed on the same grounds.

[75] The cost of expert reports are not allowed, with the exception of reports prepared for the class proceeding. Costs relating to services provided by Ms. Earle, and the costs of the leave application to the Supreme Court of Canada are not recoverable. Interest on the Bridgepoint Financial loan is not recoverable as a disbursement, as it related to 12 individual claims. The cost of posting notices of the settlements is allowed.

[76] All allowable disbursements also permit recovery of applicable HST.

[77] Those are my determinations on disbursements on the basis of the material before me. Should counsel wish to provide further legal argument with respect to the recoverability of the disbursements incurred in the individual proceedings, I will accept submissions in writing within two weeks.

[78] Counsel suggested that the individual plaintiffs would have been left with personal responsibility for disbursements in those proceedings if I did not allow them to be included. I wish to make clear that class counsel should not seek to recover these expenses from the class members. It should not be the client's responsibility if counsel fails to ensure that the relevant fee agreements allow for inclusion of those disbursements.

Conclusion

[79] Accordingly, class counsel's fees and disbursements are approved in the amounts and on the terms set out above.

[80] Class counsel has undertaken to carry out any further work on the file without charge; this may include, for instance, assisting in the ongoing assessment and payout processes. As security against any unforeseen circumstances that might make class counsel unavailable or unable to carry out such duties, class counsel will be required to hold $150,000.00 in a trust account. This may be reduced by $50,000.00 at the conclusion of the common experience payment process, and the remaining $100,000.00 may be released upon the final report of the claims adjudicator being approved by the court. Any interest accumulating on these funds shall be to the credit of class counsel.

[81] This court will retain supervisory jurisdiction to determine any disputes arising from the interpretation or enforcement of the settlement agreements.

LeBlanc, J.