COURT OF APPEAL FOR ONTARIO

CITATION: Fresco v. Canadian Imperial Bank of Commerce, 2024 ONCA 628
DATE: 20240823
DOCKET: COA-23-CV-0745

Pepall, Roberts and Sossin JJ.A.

BETWEEN

Dara Fresco

Plaintiff (Appellant)

and

Canadian Imperial Bank of Commerce

Defendant (Respondent)

Jonathan C. Lisus, Zain Naqi, Davis Ionis, David F. O'Connor and Louis Sokolov, for the appellant Dara Fresco and Class Counsel

Sarah Whitmore and Lauri Reesor, for the respondent Canadian Imperial Bank of Commerce

Jeffrey Leon and Ethan Schiff, appearing as *amicus curiae*

Heard: March 14, 2023

On appeal from the judgment of Justice Paul Perell of the Superior Court of Justice, dated June 2, 2023, with reasons reported at 2023 ONSC 3335.

Pepall J.A.:

A. INTRODUCTION

[1] This appeal involves the fees to be paid to class counsel following the settlement of a class action concerning unpaid overtime work. Class counsel is a

consortium of three law firms: Goldblatt Partners LLP, Roy O'Connor LLP, and Sotos LLP.

[2] The motion judge awarded class counsel $25 million in fees for obtaining a $153 million settlement over the course of over 15 years. After other deductions, this left $106 million to be allocated to the class.

[3] The appellant class counsel request a $19 million increase for a total of $44 million in class counsel fees. This amount would reduce the class portion of the settlement to $86 million for 31,000 class members.

[4] Class counsel and the representative plaintiff, Dara Fresco, (the "appellants") also appeal from the motion judge's refusal to grant Ms. Fresco a $30,000 honorarium for her efforts as the representative plaintiff.

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

B. BACKGROUND FACTS

[6] The motion judge set out in some considerable detail the facts relating to the fee request. I will repeat much, but not all, of his synopsis.

[7] In 2006, Ms. Fresco, an employee of Canadian Imperial Bank of Commerce ("CIBC"), contacted Sack Goldblatt Mitchell LLP ("SGM", now Goldblatt Partners LLP) about an employment law claim.

[8] At its own expense, the firm, which is known for its expertise in employment law, began investigating the viability of advancing as a class proceeding

Ms. Fresco's claim about CIBC's overtime practices and policies, which appeared to be contrary to the *Canada Labour Code*, R.S.C. 1985, c. L-2. The firm invested $167,595 in docketed time in the course of preparing legal and factual research to investigate the foundation for a proposed class action.

[9] In June 2007, Ms. Fresco entered into a retainer agreement to prosecute a proposed class action against CIBC. The agreement provided for a contingency fee of 30 percent plus GST or a contingency fee multiplier of 4.0 times the ordinary hourly rates of counsel.[1] Class counsel did not provide Ms. Fresco with an indemnity but did secure an indemnity and initial disbursement funding from the Class Proceedings Fund of the Law Foundation of Ontario. This indemnity protected Ms. Fresco from any future adverse cost awards. In addition, the risk of paying for disbursements to pursue the action was assured by the Class Proceedings Fund, although for periods of time class counsel financed the disbursements.

[10] On June 18, 2007, Ms. Fresco commenced her proposed class action on behalf of all current and former CIBC front-line employees at retail branches who worked unpaid overtime from 1993 to 2009. The estimated class size was 31,000

[1] Fee agreements in class proceedings are unenforceable absent approval by the court: s. 32 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*Class Proceedings Act*"). Sections 32 and 33 of that *Act* are attached as Appendix "A" to these reasons. (The *Act* was subsequently amended by the *Smarter and Stronger Justice Act,* 2020, S.O. 2020, c. 11.)

CIBC employees. The statement of claim sought $600 million in general, aggravated, and punitive damages.

[11] Class counsel served its certification motion record in November 2007, and CIBC delivered its responding motion record in May 2008. On June 18, 2009, the late Lax J. dismissed the certification motion. She awarded CIBC costs of $525,000.

[12] Ms. Fresco unsuccessfully appealed Lax J.'s decision to the Divisional Court, and subsequently successfully sought leave to appeal to this court. On June 26, 2012, this court allowed the appeal and certified the class action. Ms. Fresco received $613,000 in costs from CIBC plus disbursements in respect of the certification motion and related appeals.[2] In March 2013, CIBC unsuccessfully sought leave to appeal to the Supreme Court and Ms. Fresco abandoned a conditional cross-appeal.

[13] On February 27, 2014, CIBC delivered its statement of defence and in June 2015, Ms. Fresco brought the first of several production motions.

[14] In October 2015, Ms. Fresco moved for summary judgment with the motion scheduled for September 2017. Examinations and production issues delayed the hearing of the motion. In August 2019, CIBC also brought a cross-motion for summary judgment on limitations and constitutional issues.

[2] This sum was deducted from the ultimate award of fees awarded by the motion judge to class counsel.

[15] The late Belobaba J. heard the summary judgment motions in three phases on December 12, 2019, June 29, 2020, and October 9, 2020, respectively. In three separate decisions dated March 30, August 10, and October 21, 2020, Belobaba J. held, as summarized by the motion judge, that: (a) CIBC's overtime policies contravened the [*Canada Labour Code*] and its pre-approval requirement was unlawful; (b) CIBC breached its duty to record actual hours worked; (c) the *Canada Labour Code* imposed a duty of care on the CIBC to prevent unpaid overtime and CIBC's overtime policies breached this duty; (d) some class members had worked uncompensated overtime hours during the sixteen-year class period of February 1, 1993 to June 18, 2009; and (e) CIBC had breached its employment contracts with the class but had not breached its contractual duty of good faith and did not lie or knowingly mislead class members.

[16] He dismissed the claims for punitive damages, restitution, and unjust enrichment, and held that the class members only had claims for damages for breach of contract. He certified aggregate damages as an additional common issue, deferred CIBC's limitations and constitutional questions to be determined at individual issues trials, and ordered that the class members' claim for aggregate damages would have to be proven on the merits at a subsequent hearing.

[17] CIBC appealed the liability order to this court. The appeal was dismissed on February 9, 2022. This court confirmed that the issue of aggregate damages could be determined at a common issues trial, but that it was open to CIBC to challenge

Ms. Fresco's methodology as an unavailable means to aggregate damages because of the principle established in this court's decision in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, which limited the use of statistical sampling evidence in the calculation of aggregate damages. This court confirmed that the matter of CIBC's limitation period defences was a matter to be determined at individual issues trials. This court did not decide the issue of the constitutionality of applying s. 28 of the *Class Proceedings Act* extraterritorially; this issue remained open.

[18] In August 2022, the parties agreed to mediation. Ultimately, on October 3, 2022, the parties reached an agreement in principle to settle for $153 million, all-inclusive. On December 28, 2022, the parties signed a formal settlement agreement and attended before Belobaba J. on March 3, 2023 for approval of the settlement, the retainer agreement or, in the alternative, determination of class counsels' fees pursuant to s. 32 of the *Class Proceedings Act*. Class members were given notice but there were no objections.

[19] As described by the motion judge in para. 39 of his reasons, the principal terms of the settlement were that CIBC would pay $153 million all inclusive; a formula would be used to calculate a class member's entitlement based on length of tenure, the presumptive limitation periods, position(s) held, and average wages; the net settlement funds would be allocated on a *pro rata* claims-made basis with a 50% discount for claims for potentially time-barred periods; and there would be

no reversion to CIBC. Belobaba J. approved the settlement but adjourned the motion for fee approval.

[20] The motion judge summarized what happened before Belobaba J., at paras. 41 and 42 of his reasons:

> During the hearing, Justice Belobaba questioned Class Counsel about the lodestar.[3] In adjourning the motion for fee approval, he requested Class Counsel review and analyze the time expended on the case, to determine what adjustment to the lodestar, if any, should be made having regard to overlap and/or duplication of work by the consortium of law firms.
>
> In compliance with Justice Belobaba's inquiry, Class Counsel undertook a detailed "sharp pencil" review of their dockets and prepared additional submissions in support of their request for fee approval. Class Counsel reported that they had expended $16.52 million in straight time to prosecute this case, with a further $1.0 million in expected future legal expense to see the case through the settlement phase. At various times, Class Counsel carried millions of dollars in disbursements. Making adjustments to address and remove any concerns about unnecessary duplication or overlap, they reduced the lodestar by approximately $3.0 million to $13.5 million. This lodestar would represent a discount of more than 18% from Class Counsel's total actual fees….

[21] Tragically, Belobaba J. died before delivering a decision or any reasons on the request for fee approval. The motion judge took over carriage of the proceedings and therefore was required to decide the issue of fees.

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[3] As described by the motion judge at para. 3 of his reasons, "The lodestar method uses a multiplier of class counsel's reasonable hourly rates and reasonable number of hours expended, which base fee American lawyers call "the lodestar", to calculate the appropriate fee."

[22] Before the motion judge, class counsel sought a 30 percent contingency fee, amounting to $44 million and equivalent to a multiplier of 2.66 on their docketed time to that date. They also sought reimbursement of disbursements and taxes on their fees, none of which is in issue on this appeal. As well, the appellants sought a $30,000 honorarium.

[23] In their materials filed before the motion judge, among other things, the appellants acknowledged that this was a mega-fund settlement and that, in these circumstances, courts have held that: class counsel fees should be decided on a case-by-case basis; the fees should not necessarily be awarded on the basis of contingency percentage if the fee would be disproportionate to the risks incurred and returns generated by class counsel, akin to a windfall or lottery win; multipliers should be used as a cross-check; and the total dollar amount or premium over the time incurred cannot be so large as to be unseemly so as to impact the integrity of the legal profession.

[24] The motion judge gave extensive reasons for decision. He was mindful of the fundamental goals of class proceedings being access to justice, behaviour modification, and judicial economy and wrote at length on the challenges associated with settlement and counsel fee approval motions. Ultimately, he concluded that class counsel did very admirable legal work and achieved a good result but he declined to characterize it as excellent. He described the risks as being high but overstated. He awarded a contingency fee of 17 percent, amounting

to $25 million. (This was equivalent to a multiplier of approximately 1.5 times the time docketed of $16.5 million (or roughly 1.85 times the time docketed of $13.5 million following class counsel's review)). He denied the request for an honorarium.

C. GROUNDS OF APPEAL

[25] The appellants do not take issue with the motion judge's description of the principles applicable to fee approvals in class proceedings. Rather, the appellants submit that the motion judge's decision discloses four distinct errors:

(i) attributing self-interest to class counsel absent an evidentiary basis and allowing his subjective views and presumptions to dominate his analysis of the fee request;

(ii) failing to properly analyze the relevant factors, including the risks and results achieved, and failing to assign them appropriate weight and consideration;

(iii) determining that the "appropriate" fee was $25 million absent any objective, principled criteria, while expressly disregarding comparators and cross-checks; and,

(iv) failing to apply the facts to the applicable law on the request for an honorarium.

[26] CIBC did not participate in this appeal. In the absence of any adversary, on September 6, 2023, *amicus curiae* was appointed pursuant to the order of Hourigan J.A.

[27] It is *Amicus*' position that the appeal should be dismissed in its entirety.

[28] I will begin by addressing the appropriate standard of review. I will then consider the grounds of appeal advanced relating to the fees of class counsel. Lastly, I will address the request for an honorarium.

D. STANDARD OF REVIEW

[29] The approval of fees to be paid to class counsel following a settlement of a class proceeding is a discretionary decision. The appellants do not take issue with that proposition. However, the appellants argue that a court must properly weigh the relevant factors on a fee approval motion and that, even if a motion judge considers the applicable factors, it will be a reversible error if the judge fails to weigh them properly or ignores elements of the risk and result achieved. In this regard, the appellants state that they rely on *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, 359 D.L.R. (4th) 713.

[30] The appellants also submit that deference to a motion judge on fee approval is generally predicated on their long-standing involvement in, and deep familiarity with, the case. As the motion judge here only became involved at the fee approval stage, his decision does not carry the same hallmarks of deference.

[31] On the first point, as stated in 2017 by the Supreme Court in *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205, at para. 36, a discretionary decision is entitled to deference. The court wrote:

> As regards the exercise of discretion, "appellate intervention is warranted only if the judge has clearly misdirected himself or herself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice." *P. (W.) v. Alberta*, 2014 ABCA 404, 378 D.L.R. (4th) 629, at para. 15; *Balogun v. Pandher*, 2010 ABCA 40, 474 A.R.258, at para.7. As this Court has said, where the judge had given sufficient weight to all relevant considerations and the exercise of discretion is not based on an erroneous principle, appellate reviewers must generally defer. [Citations omitted.]

[32] This standard of review is not an open invitation to reweigh the evidence and *Lavier* should not be read as suggesting otherwise. As Laskin J.A. wrote in *Reeves v. Brand*, 2018 ONCA 263, 8 R.F.L. (8th) 1, at para. 23:

> The exercise of discretion involves the weighing of relevant considerations…To accede to the submission that an appeal court should intervene because it would have given more weight to a relevant consideration is to abandon discretion altogether. To be justified in interfering, an appellate court would have to be satisfied that the trial judge's exercise of discretion was unreasonable. [Citations omitted.]

[33] Similarly, in *O'Brien v. Chuluunbaatar*, 2021 ONCA 555, 461 D.L.R. (4th) 113, this court held that the appeal judge below had erred in law in interfering with the trial judge's discretionary decision on the basis that she had given insufficient

weight to a relevant consideration. As Gillese J.A. explained "[a]n appeal court is not to reweigh the relevant considerations": at para. 48.

[34] In sum, appellate courts should review discretionary decisions with a posture of deference and may not interfere absent the parameters described by the Supreme Court in *Fontaine*.

[35] Dealing with the appellants' second point on the absence of any long-standing involvement by the motion judge in this particular case, I do not agree with this submission. Repeatedly, the Supreme Court has instructed that the standard of review of a discretionary decision is deferential: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 27; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 83. The concept of deference is deeply embedded in the hierarchical structure of the courts. It is not confined to cases with which the judge has long-standing or deep familiarity. As this court said of reviewing discretionary decisions in *Cowles v. Balac*, 83 O.R. (3d) 660 (C.A.), at para. 41:

> Appellate deference for the exercise of discretion by lower courts is justified on several bases: it serves to recognize the expertise of the lower court; it promotes the integrity and autonomy of the proceedings in the lower court; it limits the number, length and costs of appeals; and, in some cases (not this one), it recognizes the advantage that the lower courts have from firsthand observation of the evidence.

[36] I turn now to the appellants' grounds of appeal.

E. DISCUSSION

[37] In Part 1, I will discuss the three grounds of appeal relating to the fee approval decision. In Part 2, I will address the challenge to the honorarium decision.

Part 1. FEE APPROVAL

(1) Evidentiary Basis and Subjective Views and Presumptions

[38] First, the appellants submit that the motion judge erred in allowing his subjective views and presumptions to dominate his analysis of the fee request and in attributing self-interest to class counsel absent an evidentiary basis. The appellants submit that the motion judge's commentary ─ such as fee approval motions being "fertile ground" for the "seven deadly sins" and "cringeworthy arguments" ─ overwhelmed and animated his decision. The appellant asserts that the motion judge presumed self-interest and "tricks" on the part of class counsel without any evidence, thus warranting appellate intervention.

(a) Challenges facing Motion Judges deciding Fee Approval Motions

[39] The context in which fee approval motions present themselves in class actions is not without significant challenges. Indeed, this court has frequently noted the obstacles facing judges hearing such motions. This is because class counsel fees may serve to reduce the size of the pool available to the class and because frequently there is no adversary to advance opposing submissions on an

appropriate fee. In *Bancroft-Snell v. Visa Canada Corporation*, 2016 ONCA 896, 133 O.R. (3d) 241 ("Bancroft-*Snell 2016*"), Blair J.A. wrote, at para. 40:

> It is well-accepted that courts are charged with a broad supervisory role over the conduct of class proceedings, including the approval of settlements and the approval of fees and disbursements to be paid to class counsel. It is also well-accepted that the potential reward for class counsel must be sufficiently attractive to provide an incentive for counsel to take on such challenging cases, with their attendant risks. However, underpinning the court's broad supervisory mandate is the need to ensure that the members of the class are protected and that outcomes are fair and reasonable and in their best interests in circumstances where the interests of class counsel and defendants may conflict with those of the class and there is no one to speak for the interests of the class.

[40] In *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37, Juriansz J.A. addressed different approaches to preserving fairness in the approval of class counsel fees. He discussed in detail the possible appointment of *amicus curiae*, a monitor, a *guardian ad litem*, or independent counsel. He closed his discussion, at para. 33 with:

> It seems to me that counsel who bring and proceed with a motion without ensuring that an independent perspective is put forward have little cause for complaint if the court departs from the passive role it traditionally plays by raising new issues, dealing with arguments not advanced and actively challenging the uncontradicted evidence. A court, though, should not appear confrontational. The line between a sceptical and confrontational approach may be difficult to navigate for a court that bears the full responsibility for testing the merits of the position put forward by counsel in order to fulfill its responsibility to protect members of the class.

> Courts should not be reticent in resorting to one of the strategies discussed above when they consider that confrontation of counsel's unopposed position would be helpful and reasonably warranted in the circumstances. Such resort is, of course, discretionary. Appointment of *amicus* or a guardian is neither necessary nor desirable in every case.

[41] Again, as noted by *Amicus* on this appeal, a motion judge's difficulty is exacerbated by the nature of the evidence advanced by class counsel. Here, the evidence before the motion judge consisted of two affidavits from members of class counsel and one from the appellant which, perhaps not surprisingly, extolled the virtues of counsels' efforts. As no one opposed the motion, there was no cross-examination on the affidavits. In sum, motion judges are put in a position where they must assume a protective role in such a non-adversarial forum. As stated in *Smith Estate*, they must tread a fine line between scepticism and confrontation.

[42] To this, I will add two additional challenges faced by motion judges in these circumstances.

[43] First, cases abound on the need to provide compensation that is sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: see e.g., *Gagne v. Silcorp* (1998), 41 O.R. (3d) 417 (C.A.), at p. 422; *Lavier*, at para. 35; and *Sutts*, *Strosberg LLP v. Atlas Cold Storage Holdings Inc*, 2009 ONCA 690, 311 D.L.R. (4th) 323, at paras. 27-28.

[44] However, this is not an easy estimation. The law and the practice relating to class proceedings have evolved considerably since the *Class Proceedings Act*

was enacted in 1992. *Amicus* submits that there is now a large, sophisticated class action bar that has developed a business model that spreads risk over multiple firms, frequently engages in hotly contested carriage motions, and relies on funding from the Class Proceedings Fund. He submits that there is no impediment to incentivizing good lawyers to pursue class actions.

[45] Economic incentive is a function of a variety of factors, including legal compensation in comparable markets and the availability of alternative legal work to comprise any "lost opportunity". Lawyers' compensation in Ontario is, in large measure (though not entirely), a reflection of fees representing billable hours multiplied by billable rates. Quite apart from the assumptions that docketed billable hours accurately reflect the time spent and that lawyers' time is spent efficiently, the fee assessment process assumes that the billable rates are appropriate measures of acceptable charges. For instance, is an appropriate hourly rate $1,500, $1,000, $500, or less and for what seniority and expertise? In this regard, there is limited information to assess whether the rates charged are fair and reasonable. Moreover, as *Smith Estate* discussed, the court is not well-equipped to investigate dockets and rates: at para. 36. (See also: *McCarthy v. Canadian Red Cross Society* (2001), 8 C.P.C. (5th) 349 (Ont. S.C.), at para. 21.)

[46] Second, the concepts of "economic incentive" and "opportunity cost" assume a never-ending flow of available legal work. There are many new players in the legal marketplace albeit in a society that demands more legal services in an

increasingly complex legal environment. The tools provided to the court to assess economic incentive and opportunity cost are limited. Thus, in assessing whether the fees proposed for class counsel are fair and reasonable, the judge deciding the case faces real difficulty in considering in a meaningful way factors that are burdened with unchallenged assumptions, namely the lodestar, economic incentive, and its close relative, opportunity cost. It is within this context that motion judges are required to engage in a determination of a fair and reasonable fee for class counsel.

(b) The Motion Judge's Assessment was not Animated or Overwhelmed by his Subjective Views and Presumptions

[47] The motion judge had deep and long-standing experience with class actions. This is not to say that an experienced judge with particular expertise in an area is infallible or that experience may trump the analysis. On the other hand, judges are entitled to rely on their reservoir of experience so long as they decide each case on its own individual merits. In addition, it is open to them to share the benefit of their experience, especially in an evolving field such as class actions, in order to "send a message", to use the phraseology applied in *Bancroft-Snell* 2016, at para. 73. That said, again, the judge must ensure that each decision is based on its own unique facts.

[48] The question raised in this appeal is whether the motion judge did decide this case objectively on its unique facts or whether he permitted his fee

assessment to be animated or overwhelmed by his subjective views and presumptions as argued by the appellants.

[49] When reading the motion judge's reasons, it is clear that much of his commentary is a synopsis of his experience with class actions and not a commentary on class counsel in this particular case. The motion judge commenced his discussion by stating that the motion provided him with an opportunity to review the law, the practice, and the reality of settlement and fee approval motions in class actions and to examine the methodologies used in cases with "multi-mega million dollar settlement funds".

[50] However, at para. 73, the motion judge expressly instructed himself to consider all the circumstances of the case and then asked himself "as a matter of objective – not subjective – judgment," whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.

[51] At para. 3, he stated:

> In the immediate case, Class Counsel were forthcoming in addressing the court's concerns; however, the motion does raise many of the *Emperor's New Clothes'* challenges associated with settlement and counsel fee approval motions. In particular, this motion raises issues about the dysfunctionality of using the lodestar method to set or to cross-check what is the appropriate counsel fee. A contingency fee awards a percentage of the class's recovery, and the lodestar method uses a multiplier of class counsel's reasonable hourly rate and reasonable number of hours expended, which base fee American lawyers call the "lodestar", to calculate the appropriate fee; however, both methodologies are just fodder for the

> weavers of tall tales. Most significantly, this motion raises the question of how to incentivize Class Counsel to prosecute class actions while protecting what has been called "the integrity of the profession."

[52] Unquestionably, the motion judge's language was strong and frankly at times inflammatory. For example, it would have been preferable had he not used the analogies of the *Emperor's New Clothes* or the *Charge of the Light Brigade* to frame his comments about the challenges associated with class action fee approvals.

[53] That said, for the most part, a close reading of his reasons reflects a discussion and review of the challenges facing judges in approving counsel fees in class actions in general rather than this case in particular.[4] He conducted an overall review followed by an analysis of the case before him. The concerns the motion judge expressed, though sometimes couched in unnecessarily provocative and unfortunate language, were not improper and no one can reasonably debate many of the challenges he identified in the fee approval exercise. Indeed, the motion judge is not alone in expressing frustration with some elements of class action practice. For example, in *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, the late Belobaba J., another very experienced and respected class

[4] See, for example, para. 119, where he addresses an argument "which was not made in the immediate case."

action judge, stated that docket-padding and over-lawyering were pervasive problems in class action litigation.[5]

[54] Reading the motion judge's reasons as a whole, I am not persuaded that his subjective views and presumptions dominated or overwhelmed his analysis.

[55] In addition to his self instruction at para. 73 of his reasons, at paras. 53 and 54, he described the need to approve fees that are fair and reasonable and the factors to consider:

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

[56] At para. 82, he described the task before him:

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[5] In that case, he proposed a percentage-based legal fee that would be judicially accepted as presumptively valid, but subsequently retreated from this approach in cases involving large mega-fund settlements that are in the $100 million range or higher: see *MacDonald v. BMO Trust Company*, 2021 ONSC 3726, at para. 21, and *Brown v. Canada (Attorney General)*, 2018 ONSC 3429, at para. 48.

> In the discussion below, I shall examine six interconnected topics in the following order. First, I shall examine the results achieved in the immediate case. Second, I shall quantify, in monetary terms, the value of the settlement in the immediate case. Third, I shall examine the matter of quantifying the monetary value of Class Counsel's work in the immediate case. Fourth, I shall examine the matter of risk and the incentives in this case and risk and incentives generally under the class actions regime. Fifth, I shall examine the matter of the so-called integrity of the profession as a factor in fee approvals in this case and generally. Sixth, and finally, I shall integrate these topics and examine the fairness and reasonableness of a $44.0 million fee in light of the risk undertaken by Class Counsel in prosecuting the litigation in the immediate case and in light of the degree of success achieved and the integrity of the profession.

[57] He did just that, all the while exhibiting the scepticism described by this court in *Smith Estate*.

[58] In conclusion, I do not accept that the motion judge allowed his subjective views and presumptions to dominate or overwhelm his analysis of the fee request. Stated differently, the exercise of his discretion was not infected by considerations untethered to the facts before him. This is particularly evident from consideration of the remaining grounds of appeal to which I will shortly turn.

[59] I also reject the submission that the motion judge improperly attributed self-interest to class counsel in this case. Self-interest denotes a focus on the interests of oneself. In the context of a fee approval motion, class counsel will already have done what they can for the class and are now looking for payment of their legal fees. As such, an element of self-interest is embedded in the process. Indeed, it is

often inherent in the request for fees. There was no suggestion of the sort of self-interest comment that was criticized in *Smith Estate*. Indeed, at para. 128 of his reasons, the motion judge noted that class counsel in this case were "talented lawyers worthy of considerable respect."

(2) Relevant Factors

[60] The second ground of appeal advanced is that the motion judge failed to properly analyze relevant factors, including the risks and results, and failed to assign them appropriate weight and consideration.

(a) Risks Taken

[61] Starting with the issue of risk, the appellants advance numerous complaints. They submit that the motion judge treated this fee approval like every other fee approval when the case should have been evaluated on its own terms. Moreover, the risk of non-certification was high and certification was denied at two levels of court. They protest the motion judge's statement, at para. 107 of his reasons, that the risk of non-certification was not "so high as to dissuade or deter Class Counsel from taking the retainer."

[62] The appellants also argue that the motion judge failed to evaluate the risks when the litigation was commenced and as it continued; failed to consider the likely result at a contested hearing, and the risk that Ms. Fresco's methodology would be rejected such that no aggregate damages would be awarded and, if awarded, the decision would be appealed; and improperly treated the high-water mark of

damages as probable while making no findings in that regard. The appellants also submit that the motion judge failed to address the "significant professional opportunity cost required to successfully prosecute a case of this length, scale and complexity."

[63] *Amicus* takes issue with these submissions, contending that the motion judge properly evaluated the risks of the class action and committed no error that would justify appellate interference. *Amicus* argues that the appellants are inviting this court to reweigh the evidence yet there is no error that would justify appellate interference.

[64] I agree with *Amicus* that there is no basis to interfere with the motion judge's assessment of risk.

[65] The motion judge addressed risk in detail. He recognized that each class action is unique. He found that class counsel had done very admirable legal work and had achieved a good result in the face of high-risk litigation. He noted that the risk of a class proceeding includes risks relating to liability and recovery, and the risk that an action will not be certified as a class proceeding.

[66] The motion judge acknowledged that he had to assess the risks over the period between the commencement of the action in June 2007 and the fee approval motion. He considered the case of individual class members against CIBC to be strong. He described the risks as being essentially fourfold: would the court truncate the class size because of limitation periods; would the court refuse

to certify the action because the class members' claims were idiosyncratic and there was no meaningful common issue; would the court certify aggregate damages as a common issue, which would obviate the need for individual issues trials; and if the claim was certified, would CIBC's argument that it had the right to pre-approve overtime prevail over the Ms. Fresco's arguments of systemic negligence and contravention of the *Canada Labour Code* arguments.

[67] The motion judge found that these heads of risks were significant but that the risk was significantly reduced once the action was certified and significantly reduced again when Belobaba J. granted summary judgment on liability and certified aggregate damages as a common issue. At paras. 107 and 108, he analyzed these risks stating:

> In 2007, there were indeed significant risks, but none of the four risks would threaten the economic viability of the retainer. The truncation of the class size for limitation periods would still leave a large class size, and truncation for limitation periods was unlikely given that the likely outcome would have been that discoverability would be treated as an issue for the individual issues trials. In 2007, employment law class actions were novel, and the risk of non-certification was high. However, the risk of non-certification was not so high as to dissuade or deter Class Counsel from taking the retainer, particularly because the case for individual liability was so strong and there was a reasonably strong case that there were meaningful common issues. The risk in the case that the court would certify the action but not certify aggregate damages as a common issue would entail that apart from costs awards for certification and for a successful common issues trial, the remunerative work would only occur at individual issues trials.

> Although the risks in the immediate case attenuated over its fifteen-year duration, the immediate case quali[f]ies as high risk litigation for which Class Counsel undoubtedly deserves a commensurate fee that recognizes the good work that was done and the good result that was achieved in the face of those risks.

[68] Having accepted that this class action was high-risk litigation, he explained why he considered that class counsel had still overstated the risks. The motion judge noted that, even truncated by limitation periods, the class would remain large. Moreover, the risk was attenuated because refusal to certify aggregate damages would leave counsel with remunerative damages work at the individual level. As for CIBC's defence, the motion judge was of the view that the individual cases against CIBC were very strong from the outset, further attenuating the overall risk of the action. That said, having considered the risks, he found no reason to begrudge class counsel from receiving a premium for their achievements.

[69] Contrary to the appellants' arguments, the motion judge evaluated the fee approval request on its own merits. He considered the risk of non-certification and the changes in risk as the proceeding progressed. He also noted that class counsel thought the class had damages of $650 million (but noted that CIBC had exposure in excess of $426 million), a class size of 31,000 claimants with strong individual claims, and a Schedule A bank as a defendant. He did reference the various methodologies for calculating potential outcomes advanced by the appellants, just not in the detail that the appellants wanted. He also considered the issue of

aggregate damages. He noted that Belobaba J. had certified aggregate damages as an additional common issue that would have to be proven on the merits at a subsequent hearing. The motion judge further noted that any progress in the substantive law or the forensics of aggregate damages remained to be determined.

[70] I have already touched upon some of the difficulties that motion judges face in assessing incentive. Here, the motion judge noted opportunity cost as a factor and stated that he did not find it likely that the full $44 million fee award was needed to incentivize class counsel to pursue this case rather than taking alternative cases. This was not a case of class counsel foregoing all other opportunities and putting all its resources into a risky case. The motion judge addressed the issue of incentive, stating at para. 112(c):

> [O]bjectively speaking, Class Counsel did not need to be incentivized by a 30% contingency fee. They had invested over a $100,000 in lawyer time and thoroughly investigated the merits of Ms. Fresco's individual case before they launched the litigation. They had instructions from Ms. Fresco and they had interviewed hundreds of other employees. Class Counsel thought that the class had damages of $650 million. In the case at bar, the actual incentives were strong individual claims, a class size of 31,000 claimants with strong individual claims, and a Schedule A bank as a defendant.

[71] It was reasonable for the motion judge to consider that payment on account of docketed time based on unquestioned hourly rates coupled with a premium of $8.5 million would not act as a deterrent to incentivizing counsel. As stated in

Lavier, at para. 63, “the viability of the class action regime does not depend on an overly generous award being approved in every case.”

[72] Importantly, the motion judge’s finding also achieved a fair and proportional balance between class counsel fees and the class settlement fund. Such proportionality serves to protect the integrity of the profession in the face of a request by class counsel that, by its nature, operates to reduce the funds available for class members. This is a particularly important principle in the context of mega-fund settlements and supports the objectives that animate the *Class Proceedings Act.*

[73] In conclusion, I would dismiss this ground of appeal as it relates to the motion judge’s assessment of factors relating to risk.

(b) Results Achieved

[74] As for consideration of the results achieved, the appellants advance three arguments. I will address each in turn.

[75] First, they assert that the motion judge’s view of the results was based on speculation about what Belobaba J. might have thought of the settlement and that this was an error in principle. I do not view the comments made by the motion judge in the context of Belobaba J.’s untimely passing as placing reliance on what his views might have been. A fair reading of the relevant section of the motion judge’s reasons suggests that his comment was of limited, if any, significance.

[76] Second, the appellants submit that the motion judge's comparison of the settlement to a $426 million damages figure was not an appropriate benchmark for assessing the quality of the result and that the outcome had to be considered on a risk-adjusted basis, bearing in mind the realistic scenario at a contested hearing. They assert that the motion judge did not engage with the report of the Fresco appellants' expert, its criticisms, or class counsel's assessment of what they realistically expected to achieve at an aggregate damages hearing.

[77] I disagree. As I have already touched upon, the motion judge summarized the damages models that a court could apply at trial as described in the report of the Fresco appellant's expert, Stefan Boedeker. He then concluded that class counsel had achieved a good result when compared to the alternative of taking the matter to judgment about aggregate damages. He compared the result to the settlement in *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743, 69 C.P.C.(7th) 134, and 2016 ONSC 1576, a similar class action, and determined that that settlement was more favourable. In *Fulawka*, the settlement was achieved sooner (in approximately six and a half years), and the defendant bank's liability payment was undiluted by legal fees and disbursements, and taxes on those amounts, which were paid separately by the bank. Here, the $153 million settlement took over 15 years to achieve and was diluted by legal fees and other deductions.

[78] As for the submission that the motion judge did not sufficiently analyze the likelihood of other potential outcomes at a damages trial, this goes back to the

evidence before the motion judge. As *Amicus* notes, the assessment of what class counsel realistically expected to achieve that was contained in their affidavits was subjective in nature. The motion judge considered the settlement objectively, as he was required and instructed himself to do. Moreover, Mr. Boedeker stated in his report that model three was "the most reasonable and appropriate model for the calculation of aggregate damages" and that the maximum that the class would receive under that model was $542 million. The motion judge considered that a $153 million settlement was good, not excellent. In fact, the motion judge described the maximum recovery as being $426 million, which was to the benefit of class counsel.

[79] In addition, the appellants argue that the motion judge failed to account for various facts in his decision. I reject that contention. For example, and contrary to the submissions of the appellants, the motion judge addressed opportunity cost, some coverage for class members with potentially expired limitation periods, the absence of any need for class members to prove their claims, and the fact that no portion of the settlement would revert to the CIBC.

[80] As part of his analysis on success achieved, the motion judge also considered other cases that saw earlier approved settlements in comparable employment law areas in Canada and the employment class actions in the United States dating back to the 1970's. This, he found, undermined class counsel's suggestion that this case marked groundbreaking success in employment class

actions. These findings were open to him and demonstrate his considered analysis of the success achieved in the settlement.

[81] For these reasons, I would dismiss this ground of appeal as it relates to the motion judge's assessment of results.

(c) Integrity of the Profession

[82] The appellants' next argument under this second ground of appeal relates to the absence of an anchor for the motion judge's finding that the requested fee was contrary to the integrity of the profession.

[83] The motion judge found that an award of $44 million would call the integrity of the profession into question. He stated, at para. 128:

> From the Class Members' perspective, the potential price of achieving discounted access to justice in the immediate case [would be] 56% of the $153.0 million settlement fund [if $44 million were awarded] when disbursements, a contingency fee of 30%, a Class Proceedings Fund levy of 10%, the costs of administering the settlement and government taxes are taken into account.

[84] He stated that it was unfortunate that the case law has used the phrase the "integrity of the profession", which connotes dishonesty. Rather, that description connotes a fee that is not champertous. He recognized that the court must examine a host of factors in the absence of an adversary and decide whether the contingency fee has crossed into the field of champerty. This, he emphasized, is an objective examination of the circumstances of the case by strictly adhering to

the directives of the *Class Proceedings Act*. The purposes of the *Class Proceedings Act* are for the class members and, in terms of social utility, the public at large. The lawyers and the court are only "the means and not the end of those purposes": at para. 132.

[85] Although the section in his reasons entitled "The Integrity of the Profession Factor" is not as long as other sections of his reasons, the subject is addressed throughout his reasons. For instance, he stated at para. 112(b):

> … Class Counsel overstated the risks and the results in the immediate case and, generally speaking, the incentives for Class Counsel should not be set so high as to unduly impact on the access to justice and the compensation needs of the class members, whose plight should not be lost sight of.

And, at para. 63, he stated:

> Put bluntly, Class Counsel has far, far more to gain than the individual class members, including the representative plaintiff. This is true in every class action. For example, in the immediate case, approximately 100 lawyers of three law firms seek to divide $44.0 million, $440,000 *per lawyer capita*, and assuming a 100% take up, the 31,000 class members would recover approximately $2,800 *per capita*.

[86] He decided that the appropriate contingency fee was 17 percent, which would yield a fee of $25 million. He did not regard that fee as champertous, saying at para. 134: "Class Counsel achieved a good settlement, but the appropriate reward for taking on that risk and achieving the good result that was achieved does

not justify a counsel fee of greater than $25.0 million plus taxes and disbursements."

[87] In conclusion, the appellants accept that the motion judge identified the proper test but takes issue with his application of that test. In my view, this is an inaccurate characterization. Reading his reasons as a whole, the motion judge considered the relevant factors to assess the reasonableness of the fees. The existence of a discretion typically implies that different decision makers can reasonably arrive at different results. The appellants may not like the result reached by the motion judge in the exercise of his discretion, but he considered the relevant factors and the decision was open to him to make. The motion judge had discretion to balance, as he did, proportionality and considerations about incentivizing future class counsel with the needs of class members in the immediate case. In his discretion, he considered that a $25 million fee, including a premium of $8.5 million, provided such incentive. I see no reason to interfere with his assessment on the basis of the appellants' second ground of appeal.

(3) Determination of Appropriate Fee

[88] Turning to the third ground of appeal, the appellants submit that the motion judge determined that $25 million was an appropriate fee in the absence of any objective, principled criteria. The appellants argue that his approach was tainted by two errors, namely what the appellants say was his disclaimer of the utility of

objective criteria, including comparators and cross-checks, and his misapprehension of the *Fulawka* settlement as a benchmark.

[89] The motion judge noted that the lodestar methodology and comparisons to other class actions are used as cross-checks although he expressed concern about their reliability. He concluded, among other things, that the multiplier method was problematic for mega-fund settlements such as this one, a view endorsed in *Moushoum v. Canada (Attorney General)*, 2023 FC 1739, at paras. 102-103, and *MacDonald v. BMO Trust Co.*, 2021 ONSC 3726, at paras. 27, 37. He reasoned that each case turns on its own facts. As mentioned previously in these reasons, in their materials filed before the motion judge, the appellants acknowledged that this was a mega-fund settlement and that in these circumstances courts have held that class counsel fees should be decided on a case-by-case basis.

[90] In oral submissions, the appellants' counsel argued that the motion judge's rejection of multipliers as an apt comparator was contrary to s. 33(7) of the *Class Proceedings Act* and the principles in *Gagne*. Under the *Class Proceedings Act*, the use of multipliers is not mandatory but discretionary. *Gagne*, an early decision in the development of the law and practice on class actions, was not pointed at mega-fund settlements. The use of multipliers for such settlements has been criticized by class action judges other than this motion judge. For instance, in *MacDonald*, a class action dealing with hidden foreign exchange fees on currency conversions in registered accounts settled for $100 million. Belobaba J. rejected

the 25% contingent fee provided for in the retainer agreement on the basis that in a large recovery or mega-settlement, the legal fees approved had to take into account not only the risks incurred and results achieved but also the need to maintain the integrity of the legal profession. On multipliers, he said, at para. 37: "[A]s I have said in other decisions, I am not a fan of multipliers. I agree with the observation of a Federal Court colleague that in the context of mega-settlements, 'the use of percentages and multipliers to assess class action legal fees is appropriate, but mainly to test their reasonableness and not to determine absolute entitlement.' In other words, their value is mainly in their use as cross-checks and guardrails." He ultimately awarded a counsel fee of $20 million. In *Moushoom*, Aylen J. stated, at para. 102, that she was skeptical of the reliability of a multiplier, even in such a limited role as a check and balance.

[91] Nonetheless, the motion judge did consider numerous other cases that involved mega-fund settlement awards. This included *Fulawka* which, as mentioned, the motion judge found resulted in a better, faster result. At para. 116 of his reasons, the motion judge described other cases and how, as the settlement fund (the multiplicand) increases, the percentage in the contingency fee agreement may lose its relevancy. In arguing that comparators and cross-checks should not be ignored, the appellants cited five cases in their factum, three of which were decided by the motion judge in this appeal. I do not propose to review each of the cases cited by the appellants and *Amicus*. The parties' positions on these five

cases highlight the different interpretations often available for comparators and illustrate that although comparators and multipliers are of assistance, fee approvals are ultimately fact driven and case specific.[6] Also, it is to be expected that as experience with class actions matures, the approach to fee approvals will evolve, as it has with respect to mega-fund settlements.

[92] I would also note that the motion judge identified that the fee he awarded was a multiplier of 1.5 times the base fee of $16.5 million. Although Belobaba J. had asked class counsel to review the $16.5 million in docketed time, which resulted in class counsel reducing that figure to $13.5 million, the motion judge indicated that he would not have pursued that exercise. He accepted class counsel's initial base fee of $16.5 million even though, at Belobaba J.'s urging, they had revisited that number for duplication and had come up with docketed time or a base fee of $13.5 million. If that lower figure had been used, the multiplier to reach the $25 million fee would have been 1.85. Similarly, he addressed *Fulawka* and other cases as comparators. Contrary to the appellants' submission, his reasoning was not unanchored or lacking in objective criteria.

[93] Furthermore, the motion judge considered that a common practice in contingency fee approval motions is to deduct from the settlement fund a notional sum (typically 10%) for likely cost awards, which would have served to reduce the

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[6] See also *Sutts, Strosberg LLP v. Atlas Cold Storage Holdings Inc.*, 2009 ONCA 690, 311 D.L.R. (4th) 323, a decision of this court where the result achieved was probably the best that could be achieved, and class counsel's fees were set at 16 percent of the gross recovery.

settlement amount to $132 million. Nonetheless, the motion judge exercised his discretion and opted to apply the $147 million figure, which was to the benefit of class counsel.

[94] In conclusion, I am not persuaded that the motion judge erred with respect to his use of comparators and cross-checks in this case.

[95] Turning to the motion judge's reliance on *Fulawka*, he noted that a contingency fee of 17 percent was lower than the 20 percent in *Fulawka*, which was appropriate given that it was arguable that the *Fulawka* settlement was modestly better and achieved much sooner.

[96] The appellants submit that the motion judge misapprehended the evidence as the effective contingency fee in *Fulawka* was 24 percent and not 20 percent. Furthermore, the appellants submit that the settlement in this case was better than in *Fulawka* because it provided compensation for presumptively time-barred periods, the identities of the class members did not have to be revealed for take up of a settlement amount, the settlement was non-reversionary and the quantum was three times that of *Fulawka*, included interest and was as good as, if not better than, what the class would reasonably have achieved by way of a damages award. In addition, the appellants argue, that the timing on certification was very different for each of these cases.

[97] As noted, one of the reasons the motion judge compared *Fulawka* favourably to this case was that the *Fulawka* settlement was achieved much

sooner than the settlement in this case. The motion judge was well aware of the time and steps taken in both, including those relating to certification.

[98] Timeliness in achieving settlement is a relevant consideration: *Wein v. Rogers Cable Communications Inc.*, 2011 ONSC 7290, 38 C.P.C. (7th) 304, at paras. 24, 36; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, 97 C.P.C. (6th) 169, at para. 29; *McDonald v. Home Capital Group*, 2017 ONSC 5195, 13 C.P.C. (8th) 213, at paras. 18, 22. That said, a quick settlement does not automatically lead to the conclusion that the result achieved was better. Consideration of whether the quick settlement was in the interests of the class remains essential to understanding the impact of this factor in the particular case: see for example, *Clegg v. HMQ Ontario*, 2016 ONSC 2662, at paras. 28-31; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324, at paras. 53, 55. The motion judge was entitled to consider timeliness as a factor in the exercise of his discretion and did so without error. He did not assume that quicker automatically meant better.

[99] Second, the motion judge considered the *Fulawka* settlement to be "modestly better" than the settlement in this case. In that regard, he emphasized that the *Fulawka* settlement amount for the class was not diluted by legal fees and disbursements. These were paid separately by the bank. This was a reasonable and significant distinction.

[100] The appellants submit that the motion judge erred in finding that the *Fulawka* settlement was uncapped. I do not see this as a material error. The key distinction drawn by the motion judge was that the *Fulawka* settlement was undiluted by legal fees and disbursements, unlike this case. In addition, it would appear that at one point in his reasons, the motion judge misstated the contingency fee percentage in *Fulawka*. That said, at another point, he correctly stated *Fulawka's* contingency fee percentage. Even if this was a palpable error, I do not consider it to be overriding.

[101] In conclusion, the $25 million fee awarded by the motion judge to class counsel was fair and reasonable in the circumstances. The motion judge closed his decision on counsel fees by stating at para. 137:

> When I apply the factors used to assess the reasonableness of the fees of class counsel and to protect the integrity of the profession, the numbers I arrive at are: $25.0 million Class Counsel, $11.8 million for the Law Foundation of Ontario, and $106.0 million for the Class Members, which is a result that Class Counsel can be proud of and that is consistent with the purposes of the *Class Proceedings Act, 1992*.

[102] I see no reason to interfere with the motion judge's decision in this regard.

[103] In closing my discussion on the grounds of appeal relating to class counsel fees, I make one other comment. Consistent with this court's statements in *Smith Estate,* in the absence of an adversary and an independent perspective, class counsel should consider seeking the appointment of *amicus* for the purposes of fee approval motions. Although as noted in *Smith Estate*, appointment of amicus

is neither necessary nor desirable in every case, it would be of particular assistance when dealing with mega-fund settlements with large attendant proposed class counsel fees. To a degree, the appointment of *amicus* would serve to alleviate some of the current challenges associated with requests for approval of counsel fees and would serve to assist the court in its consideration of proportionality.

Part 2. HONORARIUM

[104] Class counsel sought a $30,000 honorarium for Ms. Fresco on the basis that this was consistent with her many years of assistance and courage. They requested that it be paid from class counsel's fees and not from the class recovery. The motion judge refused the request.

[105] In appealing from that decision, the appellants submit that the motion judge made two errors in refusing to grant her an honorarium. First, they submit that the motion judge did not give sufficient weight to the courage she displayed and the risk taken on by her. Second, they assert that the motion judge's decision was contrary to precedent as other courts have awarded honoraria to plaintiffs who were less extensively involved over shorter periods of time and who faced less personal risk.

[106] *Amicus* opposes the request stating that it amounts to improper interference with the motion judge's exercise of discretion to refuse to award an honorarium. Relying on *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323 (Div. Ct.),

Amicus submits that honoraria should be reserved for exceptional cases where such an award will serve access to justice. I agree with this submission.

[107] In *Doucet*, in determining that an honorarium requires exceptional circumstances, the Divisional Court undertook an extensive review of the jurisprudence on honoraria.

[108] In *Baker Estate v. Sony BMG Music (Canada Inc.)*, 2011 ONSC 7105, Strathy J., as he then was, emphasized that this type of payment "is exceptional and rarely done… It should not be done as a matter of course." He held, at para. 95, that "compensation should not be awarded simply because the representative plaintiff has done what is expected of him or her. It should be reserved for cases…where the contribution of the representative plaintiff has gone well above and beyond the call of duty."

[109] In *Sutherland v. Boots Pharmaceutical Plc.*, (2002), 21 C.P.C. (5th) 196 (Ont. S.C.), at para. 22, Winkler J., as he then was, observed that "where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class member." He held that while the work of the representative plaintiffs in that case was commendable, the extra compensation gave rise to an appearance of conflict of interest between the representative plaintiffs and other

class members. In *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.), at para. 20, Winkler J. held that "it is not generally appropriate for a representative plaintiff to receive a payment for fees or for time expended in the pursuit of the action."

[110] I agree with this commentary and that exceptional circumstances should exist to justify the award of an honorarium to a representative plaintiff.

[111] Factors that might qualify as exceptional circumstances could include exposure to a real risk of costs or significant personal hardship in connection with the prosecution of the action. The latter can be seen in the example provided by the Divisional Court in *Doucet* of a representative plaintiff in an abuse case who "put their personal experience forward, reliving their trauma, while relieving other class members from having to do so": at para. 58.

[112] As the Divisional Court stated at para. 70, a representative plaintiff should be committed to fulfilling their responsibilities, including active involvement in every step of the litigation including the settlement of the litigation, without seeking added compensation. An additional payment should be available only where the representative plaintiff can demonstrate a level of involvement and effort that is "truly extraordinary": at para. 71.

[113] Turning to this appeal, I am unable to conclude that the motion judge's decision on the honorarium was unreasonable or infected with error.

[114] The motion judge described Ms. Fresco as “admirable, praiseworthy, courageous, diligent and helpful” but declined to award her an honorarium. He reasoned that she was under no exposure to a real risk of costs; there was no significant personal hardship or inconvenience in connection with the prosecution of the litigation; and although she was commendably actively involved in the initiation and prosecution of the litigation and in communicating with class members, her involvement was not so extraordinary to justify an honorarium.

[115] In oral argument, the appellants accepted that the motion judge accurately outlined the principles governing the award of an honorarium and also acknowledged that none of the factors relied upon by the motion judge were inaccurate.

[116] It was well within the motion judge’s discretion to determine that an honorarium was not justified. The grounds of appeal advanced by the appellants do not lead to a contrary result. The fact that other judges have seen fit to award honoraria based on the facts before them is a function of the exercise of a discretion. Here, the motion judge sufficiently considered the relevant factors and exercised his discretion in declining to award an honorarium on the facts of this case. I see no reason to interfere with that determination and therefore would dismiss this ground of appeal.

F. DISPOSITION

[117] For these reasons, I would dismiss the appeal.

Released: August 23, 2024 “S.E.P.”

“S.E. Pepall J.A.”
“I agree. L.B. Roberts J.A.”
“I agree. Sossin J.A.”

APPENDIX “A”

Fees and disbursements

32 (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

Determination of fees where agreement not approved

(4) If 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 a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

Agreements for payment only in the event of success

33 (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

Interpretation: success in a proceeding

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members.

Definitions

(3) For the purposes of subsections (4) to (7),

“base fee” means the result of multiplying the total number of hours worked by an hourly rate; (“honoraires de base”)

“multiplier” means a multiple to be applied to a base fee. (“multiplicateur”)

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member.

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may 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; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee.

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding.