CITATION: Cavanaugh v. Grenville Christian College, 2023 ONSC 6520
COURT FILE NO.: 08-CV-347100-00CP
DATE: 20231120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
LISA CAVANAUGH, ANDREW HALE-BYRNE, RICHARD VAN DUSEN, MARGARET GRANGER and AMANDA AYLESWORTH THE EXECUTOR FOR THE ESTATE OF TIM BLACKLOCK Plaintiffs	*Sabrina Lombardi, Chanèle Rioux-McCormick,* and *Valerie A. Edwards* for the Plaintiffs
- and -	
GRENVILLE CHRISTIAN COLLEGE, THE INCORPORATED SYNOD OF THE DIOCESE OF ONTARIO, DONALD FARNSWORTH AND BETTY FARNSWORTH FOR THE ESTATE OF CHARLES FARNSWORTH, BETTY FARNSWORTH, JUDY HAY THE EXECUTRIX FOR THE ESTATE OF J. ALASTAIR and MARY HAIG Defendants	*David Boghosian* for the Defendants
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: November 16, 2023

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is an action under the *Class Proceedings Act, 1992*.[1]

[1] S.O. 1992, c. 6.

[2] After a common issues trial, an appeal to the Court of Appeal, and while in the process of setting a procedure for an individual issues phase to determine the compensation for Class Members, the parties have reached a settlement that will resolve the claims of all students who: (a) have not validly opted out, and (b) attended and boarded at Grenville Christian College between September 1973 and July 1997 (excluding children and grandchildren of Charles Farnsworth and/or Alastair Haig).

[3] This is a motion by the Plaintiffs, on consent of the Defendants, seeking an Order: (a) approving the Settlement Agreement as being fair, reasonable and in the best interests of the Class Members; (b) approving the retainer agreements entered into with the Representative Plaintiffs, Lisa Cavanaugh, Andrew Hale-Byrne, Richard Van Dusen, Margaret Granger, and Tim Blacklock; (c) approving Class Counsel's Fees of $3,122,187.50, inclusive of legal fees, taxes, and disbursements. (d) approving payment of the Class Proceedings Fund's levy of $736,531.25, and (e) approving honoraria payments of $7,500 each to the five Representative Plaintiffs.

[4] For the reasons that follow, save for the granting of honoraria, the motion is granted as requested.

B. Factual Background

[5] The factual background is as follows.

[6] This class action involves students who attended and resided at Grenville Christian College between September 1973 and July 1997 (excluding children and grandchildren of the individual Defendants). While students at the school, the Class Members suffered damages arising from systemic and pervasive physical, sexual, and psychological abuse by the College's staff.

[7] Grenville Christian College closed in **July 2007** and sold most of its assets (buildings and land) in 2008, to satisfy its various debts. For present purposes, it shall be pertinent to keep in mind that it is without any assets save for liability insurance policies. And more significantly: (a) the insurance coverage over the Class Period was provided by multiple insurers; (b) the coverage was erratic and temporally allocated; and (c) the policies only provided coverage for approximately sixty percent of the Class Period. The policies were occurrence-based, and all policies excluded punitive damages.

[8] The plaintiffs commenced this action on **January 15, 2008**.[2]

[9] Before the commencement of the action, the Plaintiffs signed contingency fee retainer agreements with the consortium of firms that acted as Class Counsel. The contingency fee agreements satisfy the formal requirements of s. 32 (1) of the *Class Proceedings Act, 1992.*

[10] The retainer agreements between Class Counsel and the Representative Plaintiffs stipulated that Class Counsel, upon favourable judgment or settlement, may recover the greater

[2] The Representative Plaintiffs retained Cohen Highley LLP and Torkin Manes LLP, formerly Torkin Manes Cohen Arbus LLP. These firms entered into Co-Counsel Agreement with Haber & Associates, which had been retained to act in a parallel action, which was stayed. When Russell Raikes (now Justice Raikes) moved his practice to McKenzie Lake Lawyers LLP, that firm joined the Class Counsel team. Following Justice Raikes' elevation to the bench, Michael J. Peerless and Sabrina Lombardi assumed carriage along with Loretta P. Merritt of Torkin Manes and Christopher Haber of Haber & Associates. Recently (March 7, 2023) upon Loretta P. Merritt's elevation to the bench, Valerie A. Edwards of Torkin Manes joined the Class Counsel team.

of: (a) percentage of 25% of the total recovery; or (b) the product of a "base fee" and a "multiplier" of at least 3.0; and that in any event the Firms shall be entitled to a minimum fee of $400,000. The terms of the retainer agreements are similar to other retainer agreements that have been approved in class proceedings.

[11] On **December 3, 2009**, shortly after commencing the Action, the Representative Plaintiffs applied for and obtained indemnification for adverse costs awards and funding from the Class Proceedings Fund of the Law Foundation of Ontario. With this assurance and with a contingency fee arrangement, the Representative Plaintiffs were protected from any financial risks associated with prosecuting the class action.

[12] Pursuant to s. 10(3) of O. Reg. 771/92 under the *Law Society Act*,[3] the Class Proceedings Fund is entitled to a levy in the amount of 10% of the net settlement amount to which one or more Class Members is entitled, plus $175,773.55 for financial support (for disbursements) provided to the Plaintiffs under s. 59.3 of the *Law Society Act*. In the immediate case, the 10% levy owing to the Class Proceedings Fund is $736,531.25.

[13] I was assigned to case manage the action. The certification motion was heard in 2012, and on **May 23, 2012**, I dismissed that action against the Incorporated Synod of the Diocese of Ontario and I dismissed the certification motion as against the co-defendants.[4]

[14] On **March 8, 2013**, the Ontario Court of Appeal affirmed the dismissal of the claim against the Diocese.[5]

[15] On **February 24, 2014**, the Divisional Court reversed my decision and certified the action as a class proceeding.[6]

[16] Although there were several efforts to settle the action, it proceeded through examinations for discovery, and the action was set down for a common issues trial in the fall of 2019.

[17] Before the trial, there were concerted efforts to settle the litigation. Settlement negotiations began in **March 2015**, when the Plaintiffs delivered an Offer to Settle, which was followed, in **May 2016**, with more details respecting the proposed settlement structure. A counter offer was presented and rejected, which brought negotiations to a close until a mediation in **December 2018**. The December 2018 mediation was cut short by the mediator, after the first day, and ended with the Plaintiffs providing an all-inclusive offer of settlement that was open for thirty days. No response to this offer of settlement was received within the timeframe.

[18] In **May 2019**, the parties attended a pre-trial conference, where the Defendants made an offer of settlement which the Plaintiffs rejected, and in **July 2019**, a few months before the commencement of the common issues trial, the parties again met to discuss the possibility of settlement, with no success.

[19] The trial commenced on **September 26, 2019** before Justice Leiper. There were twenty-

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[3] R.S.O. 1990, c. L.8.
[4] *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2995.
[5] *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139
[6] *Cavanaugh v. Grenville Christian College*, 2014 ONSC 290 (Div. Ct.).

three days of evidence and then argument.

[20] On **February 26, 2020**, Justice Leiper released her decision, The Plaintiffs were successful on the common issues. There was no aggregate damage, and Justice Leiper remanded the case for the determination of individual issues.[7]

[21] Justice Leiper found that while the standard of care owed to the students varied over time, the defendants nevertheless failed to fulfil and/or were grossly negligent in fulfilling their fundamental obligations to Class Members during the entirety of the Class Period and that this could cause harm. The plaintiffs proved systemic negligence. Justice Leiper further found that the defendants breached their fiduciary duties to the students and that there should be an award of punitive damages.

[22] The trial judgment was affirmed by the Ontario Court of Appeal on **October 26, 2021**.[8] In dismissing the defendants' appeal, the Court of Appeal stated in its judgment at paragraph 65:

> 65. The appellants admitted that they owed a duty of care to the Class members to take reasonable steps, among other things, to protect them from actionable physical, psychological or emotional harm. The trial judge concluded that the appellants were systemically negligent in the operation of Grenville. She identified practices that she found were in breach of the standards of the day and were harmful. The trial judge considered whether, as the appellants argued at trial, the harms had been "one-offs", that is isolated incidents of excessive discipline that were responsive to individual student conduct. She concluded instead that the practices, which were part of the "culture" of the school, aligned with its philosophy and embedded in its operational policies to enforce its norms, rules and expectations, were systemic. Grenville lacked policies or controls to ensure that students would not suffer harm. The harms flowed from the Class members' exposure to discipline that was imposed arbitrarily or excessively, even if not all Class members were singled out for punishment. All of the Class members were subject to Grenville's disciplinary practices during the Class Period. This is the basis on which the trial judge found that there was systemic negligence. She did not reason that harm to a single student constituted harm to the Class.

[23] After the appeal, the parties engaged in a labour-intensive effort to establish a procedure for the individual issues phase of the class proceeding and to set an Individual Issues Litigation Plan.[9]

[24] Pausing here in the narrative of the factual background, notwithstanding that the Plaintiffs' success in having the action certified and notwithstanding their success at the common issues trials, the litigation was far from over. There were enormous litigation risks because of the spotty insurance coverage and the superadded difficulty of not only proving individual damages but proving them in such a way as to be covered by insurance.

[25] In late March 2023, the parties attended a successful two-day mediation presided by the Honourable Todd Archibald. The parties signed a Memorandum of Understanding to settle the Action, which was followed by a Settlement Agreement dated July 13, 2023.

[26] The key terms of the Settlement Agreement include:

a. The Settlement Amount is $10,875,000.00, inclusive of: (a) $6,628,781.25 for the Settlement Fund for payment of Eligible Claims; (b) $3,122,187.50 for Class Counsel

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[7] *Cavanaugh et al. v. Grenville Christian College et al*., 2020 ONSC 1133.
[8] *Cavanaugh v. Grenville Christian College*, 2021 ONCA 755.
[9] *Cavanaugh v. Grenville Christian College*, 2022 ONSC 5405; Case Management File Direction, dated February 22, 2023.

fees, disbursements and taxes; (c) $736,531.25 to pay the CPF Levy for having funded the litigation; (d) $350,000 for Administration and Notice Costs; (e) $37,500.00 to be shared by the Representative Plaintiffs as honoraria.

b. All Eligible Claimants - no matter the insurance coverage during their respective attendance and boarding at the school - will be entitled to participate in the Claims Program.

c. The Claims Program is paper-based, unless the Claims Administrator determines that additional information is required from the claimant to reasonably assess the claim, at which point, the claimant may provide the information in writing, through additional documentation or by a personal interview to take place by telephone or video conference.

d. Eligible Claimants may receive compensation through Group A and Group B compensation categories. Class Members or their Estates, may submit claims for both compensation levels.

e. Group A "Common Experience Claims" are determined and paid based on the length of time a Class Member attended and boarded at the school. For Group A compensation, a claimant must solemnly declare that he/she/they were harmed. They do not have to provide details. Payments in Group A will be based on the length of time the Class Member boarded at the school.

f. Group B "Severe Psychological and/or Physical Harm and/or Sexual Abuse" are determined, in the case of Physical and Psychological Harm claims, based on medical procedures or diagnoses and medical documentation relating to same, along with Impact Statements, and in the case of Sexual Abuse claims, determined based on Impact Statements. These claims are paid based on a Points-System. This second level of compensation is available to Class Members that can provide details of severe psychological and/or physical harm relating to their experiences at Grenville Christian College or that claim sexual abuse during the Class Period. Payments in Group B will be awarded based on a Points-System.[10]

g. It is anticipated that compensation will range from $1,500 up to $74,000 per successful Eligible Claimant.

h. The Settlement Fund will be paid out to all Eligible Claimants on a *pro-rata* basis.

i. There is no reversion. If the total value of the payments awarded to all Eligible Claimants is less than the total Settlement Fund, all Claimants will share in the excess, on a *pro-rata* basis, conversely, if the total value of the payments awarded to all Eligible Claimants exceeds the Settlement Fund, all Eligible Claimant payments will be *pro-rated* downwards accordingly.

j. The Claims Program is non-adversarial, and Claimants are presumed to be acting

[10] The compensable psychological harms were informed by Dr. Rosemary Barnes' reports, dated March 20, 2018 and March 2, 2022, outlining the potential psychological impacts of the abuses perpetuated at Grenville Christian College on Class Members, and by the case law in other similar individual cases and class actions. The compensable physical harms and sexual abuse claims were informed by the case law in other similar individual cases and class actions.

honestly and in good faith.

[27] Under the Settlement Agreement, McKenzie Lake Lawyers has taken on the role of Settlement Class Counsel. The law firm, with the Claims Administrator, undertakes the responsibility of supporting and overseeing the fair and efficient distribution of the Settlement Fund throughout the life of the Claims Program and Distribution Protocol.

[28] There are approximately 1,360 Class Members who may be eligible to submit a Claim for compensation. To date, Class Counsel have been in direct communication with 385 Class Members who have indicated an interest in participating in the proposed Settlement.

[29] Class Counsel strongly recommend the Settlement as fair, reasonable, and in the best interests of the Class Members.

[30] The Representative Plaintiffs have instructed Class Counsel to seek approval of the settlement as in the best interests of the Class Members.

[31] The parties agreed upon the form and content of the short-form and long-form First Notice and the Notice Distribution Plan for their dissemination. On **July 20, 2023**, I approved the Notice Distribution Plan and appointed Epiq Class Action Services Canada Inc as the Notice Administrator.[11] Epiq consented to this appointment. It has extensive experience and expertise in providing notice and other class action administration services.

[32] The First Notice provides Class Members with information regarding the background and status of the action, the Settlement Agreement, the Settlement Approval Hearing, and the objection process and deadlines, along with information about how to contact Settlement Class Counsel and the Notice Administrator for more information.

[33] Out of a class of over a thousand, there were only four objectors.

a. Ms. W attended the school between September 1976 and June 1981 (during uninsured and partially insured years). She submitted that the quantum with respect to the psychological and emotional harms she suffered during her time at the school were insufficient given the long-lasting impact of the harm.

b. Mr. S attended the school between 1977 and 1980 (during uninsured and partially insured years). He submitted that the settlement amount is grossly insufficient to adequately compensate Class Members. He submitted that his individual circumstances should have entitled him to other categories of compensation, beyond those for general damages/psychological harm. He objected to the barriers associated with claiming compensation under Group B claims, specifically with respect to the requirement of providing medical evidence. He objected to the lack of a Court-run dispute mechanism, after the reconsideration process provided for in the distribution protocol.

c. Mr. M attended Grenville Christian College in September 1990. He submitted that the quantum and the claim compensation categories available were inadequate. In particular, he submitted that the Group A "Common Experience Payments" were unfairly low.

d. Ms. A attended Grenville Christian College between 1989 and 1990, and then again

[11] *Cavanaugh v. Grenville Christian College*, 2023 ONSC 4263.

between 1991 and 1993. She objected to the release of claims against the Defendants. She objected to the payment of an honoraria to one of the Representative Plaintiffs.

[34] I pause here to say that the Court is very much assisted and much appreciates receiving the views of Objectors. I thank Ms. W, Mr. S, Mr. M, and Ms. A for sharing their pain and the indignities they suffered while students at Grenville Christian College and for telling the Court about their concerns about the settlement in the immediate case. Their concerns are legitimate; however, as I shall explain below, all of the criteria that the Court uses when deciding whether to approve or reject a settlement favour approving the settlement in the immediate case.

[35] As noted above, Class Counsel claims fees in the amount of $3,122,187.50, inclusive of legal fees, taxes, and disbursements. The fee is broken down as follows: (a) $2,716,303.13 for the fee (being 25% of the Settlement Amount); (b) $353,437.50 for HST on fees; and (c) $50,000.00 for disbursements, inclusive of taxes.

[36] The amount requested for fees is approximately 86% of Class Counsel's time to date, without taking into account the work associated with implementing the settlement, which is currently estimated at $350,000.

[37] As of October 31, 2023, Class Counsel's unpaid disbursements are $24,985.92, inclusive of applicable taxes. The Class Action Fund reimbursed Class Counsel for $175,773.55 towards its disbursements, which amount was re-paid out of the costs award obtained from trial and appeal of the trial of the common issues.

C. Analysis: Settlement Approval

[38] Section 27.1(1) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[12]

[39] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[13]

[40] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement

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[12] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

[13] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).

and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[14] An objective and rational assessment of the pros and cons of the settlement is required.[15]

[41] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[16] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[17]

[42] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the scheme of distribution under the proposed settlement.

[43] The settlement in the immediate case is undoubtedly fair, reasonable and in the best interests of the Class Members. It is a settlement to which both Class Counsel and Counsel for the Defendants are to be commended.

[44] The genuine defendants to this litigation are judgment proof. For all practical purposes, the defendants in this litigation were the insurers of the defendants.

[45] In the immediate case, the insurers acted very honourably in agreeing to a settlement providing compensation to all Class Members regardless of whether there was insurance coverage for the wrongs. The insurance coverage was very spotty both in amounts available and years of coverage. In the immediate case, the insurers did the right thing in negotiating a settlement that was fair, reasonable, and in the best interests of all Class Members.

[46] But for a settlement, there was the reality (not just a risk) that recovery would ultimately be limited to Class Members who could prove they attended Grenville Christian College at a time when there was insurance coverage. The reality is that the school maintained various insurance coverage over the Class Period, provided by multiple insurers. But for a settlement, coverage was available for only approximately sixty percent of the Class Period.

[47] Moreover, even if a Claimant were able to establish that they were enrolled during the relevant insurance coverage periods, there was a risk that the Defendants would be successful in defending the individual assessments of some Class Members, in part or entirely.

[48] The presumption of good faith in the settlement agreement and the lack of a requirement

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[14] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).
[15] *Al-Harazi v. Quizno's Canada Restaurant Corp*. (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).
[16] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).
[17] *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd*., [2002] O.J. No. 2383 at para. 13 (S.C.J.).

to testify and be cross-examined are significant benefits to Class Members, who would otherwise face full scrutiny of their allegations, as well as their personal and medical circumstances and conditions. It is only when the Claims Administrator determines that additional information is required to reasonably assess a claim that it may request that the claimant provide more information in writing, through additional documentation or witness statement, or through a personal interview to take place by telephone or video conference.

[49] Confronted with these coverage difficulties and the challenges of individual issues trials, a settlement is far and away a better outcome than the alternative of continuing litigation that would take years to complete.

[50] Moreover, an analysis of all of the settlement criteria point to approving the settlement. The Plaintiffs succeeded in hard fought litigation and hard fought settlement negotiations.

[51] I, therefore, approve the settlement and the requests for ancillary relief.

D. Analysis: Fee Approval

[52] Section 32(2) of the *Class Proceedings Act, 1992* stipulates that an agreement respecting fees and disbursements between class counsel and a representative plaintiff is not enforceable unless approved by the court.

[53] 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.[18] The actual take-up rate as a measure of the success of the settlement is a relevant factor in determining an appropriate counsel fee.[19]

[54] 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.[20]

[55] The risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding.[21]

[56] Fair and reasonable compensation must be sufficient to provide a real economic incentive

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[18] *Smith v. National Money Mart,* 2010 ONSC 1334 at paras. 19-20, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).

[19] *Lavier v. MyTravel Canada Holidays Inc*., 2013 ONCA 92.

[20] *Smith v. National Money Mart,* 2010 ONSC 1334, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

[21] *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35; *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 t para. 17 (C.A.).

to lawyers to take on a class proceeding and to do it well.[22]

[57] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved.[23] Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee.[24] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[25]

[58] I am satisfied that in all of the circumstances of the immediate case that the contingency fee agreement should be approved and Class Counsel's fee should also be approved.

[59] Put simply, Class Counsel confronted very high litigation risks and achieved a very good result for the Class Members. Class Counsel earned their fee.

[60] The motion for approval of Class Counsel's fee is approved.

E. The Request for Honorarium

[61] Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by a modest honorarium.[26] However, the court should only rarely approve this award of compensation to the representative plaintiff.[27] Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.[28]

[62] Under the current law about honorarium, in determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and

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[22] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61(S.C.J.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.).

[23] *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.

[24] *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at para. 92.

[25] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (C.A.).

[26] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323 (Div. Ct.); *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090; *Brazeau v. Attorney General (Canada)* 2019 ONSC 4721; *Houle v. St. Jude Medical Inc.*, 2019 ONSC 4560; *Dolmage v. HMQ*, 2013 ONSC 6686; *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528 at para. 43; *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26–43; *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at paras. 133–136; *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *Windisman v. Toronto College Park Ltd*., [1996] O.J. No. 2897 at para. 28 (Gen. Div.).

[27] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Sutherland v. Boots Pharmaceutical plc*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).

[28] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323 (Div. Ct.); *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.

activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.[29]

[63] In the immediate case, Class Counsel made a concerted effort to persuade me of the virtues and necessity of awarding honorariums to fulfil the mandate of a class proceedings regime and of the extraordinary and invaluable contribution to the litigation of each and every of the Representative Plaintiffs in the immediate case. Citing academic literature and the numerous cases in which honorariums have been awarded, Class Counsel argued passionately that the five Representative Plaintiffs should each receive $7,500.

[64] It was, however, a one-sided, blind-sided, unbalanced, submission without any reference to the counterarguments for not making honorariums a routine feature of every institutional abuse case.

[65] There is no empirical evidence that the presence or absence of honorariums are a necessity for the success of this class action or any class action. What goes on between solicitor and client is a matter of solicitor and client privilege. While I believe Class Counsel in their extolling the contribution made by their clients, I have no way of testing the truth of the praise that Class Counsel have for their clients.

[66] My own view, which I expressed in *Doucet v. The Royal Winnipeg Ballet*,[30] is that the better argument is that honorariums are inimical to the class action regime for many reasons, including the necessity that there should be a voice to give unbiased and unbribed instructions to Class Counsel about what is in the best interests of the class members. Settlement approval is a very-very difficult task because the court is charged with protecting the Class Members.

[67] There is also the necessity that the Class Members themselves be disabused of any notion that their representative is better treated than they are. In the immediate case, there will be Class Members who will have equally distressing and traumatic experiences at Grenville Christian College who are going to recover $1,500, while the Representative Plaintiffs will likely be receiving more compensation for the distribution plan plus an additional $7,500 by way of an honorarium.

[68] But my view, which would outlaw honoraria, is not the law. What is the law is set out in the Divisional Court's judgment in *Doucet*, where honorariums were awarded. I shall follow that law in the immediate case.

[69] In the immediate case, all of the Representative Plaintiffs are to be commended for their contribution to this litigation and their personal bravery. I have no doubt that the Representative Plaintiffs were actively involved and made a valuable contribution to the success of this class action. I have no doubt that they would have recommended the settlement notwithstanding that they were also recommending a personal honorarium. I have no doubt that they were not motivated by the prospect of an honorarium, and I have no doubt that they will and should feel proud of what has been accomplished in the immediate case without the added success of honorariums in addition to what they recover as Class Members.

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[29] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323 (Div. Ct.); *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.
[30] *Doucet v. The Royal Winnipeg Ballet*, 2022 ONSC 976.

[70] That all said, the current law is that honorariums are rarely to be awarded and I am not satisfied that honorariums should be awarded in the immediate case.

F. Conclusion

[71] For the above reasons, save for the granting of honorarium, I grant the Plaintiffs' motion as requested.

Perell, J.

Released: November 20, 2023

CITATION: Cavanaugh v. Grenville Christian College, 2023 ONSC 6520
COURT FILE NO.: 08-CV-347100-00CP
DATE: 20231120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LISA CAVANAUGH, ANDREW HALE-BYRNE, RICHARD VAN DUSEN, MARGARET GRANGER and AMANDA AYLESWORTH THE EXECUTOR FOR THE ESTATE OF TIM BLACKLOCK

Plaintiffs

- and -

GRENVILLE CHRISTIAN COLLEGE, THE INCORPORATED SYNOD OF THE DIOCESE OF ONTARIO, DONALD FARNSWORTH AND BETTY FARNSWORTH FOR THE ESTATE OF CHARLES FARNSWORTH, BETTY FARNSWORTH, JUDY HAY THE EXECUTRIX FOR THE ESTATE OF J. ALASTAIR and MARY HAIG

Defendants

REASONS FOR DECISION

PERELL J.

Released: November 20, 2023