KING'S BENCH FOR SASKATCHEWAN

Citation: **2022 SKKB 214**

Date: **2022 09 23**
Docket: QBG-RG-01073-2012
Judicial Centre: Regina

BETWEEN:

LORRAINE ELIZABETH CARRUTHERS, EXECUTRIX OF THE ESTATE OF DEMETRIOS PERDIKARIS,

PLAINTIFF

- and -

PURDUE PHARMA, PURDUE PHARMA INC., PURDUE FREDERICK INC., THE PURDUE FREDERICK COMPANY INC., AND PURDUE PHARMA L.P.,

DEFENDANTS

Counsel:

Plaintiffs:

E.A. Anthony Merchant, K.C. Evatt F.A. Merchant, K.C.	class counsel for the plaintiff, Lorraine Elizabeth Carruthers, Executrix of the Estate of Demetrios Perdikaris
Raymond F. Wagner, K.C. Kate Boyle	class counsel for the Nova Scotia Proceedings
Joel P. Rochon Michael G. Robb	class counsel for the Ontario and Quebec Proceedings

Defendants:

Jason W. Morhbutter Allison Graham Cynthia Clarke Barry Glaspell	for Purdue Pharma, Purdue Pharma Inc. and Purdue Frederick Inc. [Purdue Canada]
David R. Byers Lesley Mercer	for The Purdue Frederick Company Inc. and Purdue Pharma L.P. [Purdue US]

Governmental Agencies:

Reidar Mogerman, K.C. Luciana P. Brasil	for the Canadian Governments

Rita V. Bambers Sonal Gandhi Matthew Chung	for Ministry of the Attorney General of Ontario

Objectors:

David Sterns Michelle Logasov Adil Abdulla Jody Brown	for Jordan Francis Charlie
Andrew Eckart	for Joan Frame
Mark S. Meland Margo R. Siminovitch	for Jean-Francois Bourassa

Also appearing:

David Bish	Court Appointed Independent Information Officer [Ernst & Young] in *CCAA* proceedings

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JUDGMENT
September 23, 2022

POPESCUL C.J.K.B.

I. INTRODUCTION

[1] Opioid medications have been available for several decades to treat moderate to severe pain. Until the early 1980s they were available only in an immediate release dosage. This was less than ideal because such drugs could only control pain for four to six hours at a time.

[2] Research and development led to the creation of OxyContin® and OxyNeo® [Oxy], which are controlled-released semisynthetic opioid analgesics. Initially approved by Health Canada in 1996, and available by prescription to the general public, Oxy was sold and marketed in Canada by Purdue Pharma, Purdue Pharma Inc. and Purdue Frederick Inc. [Purdue Canada]. Oxy was advertised as an "extended release" or "time release" oral formulation of oxycodone hydrochloride

which is designed to manage moderate to severe pain when a continuous around-the-clock analgesic is needed for an extended period of time.

[3] It is alleged that Purdue Canada and their United States counterparts, The Purdue Frederick Company Inc. and Purdue Pharma L.P. [Purdue US] [defendants], engaged in a deceptive marketing plan that sought to eliminate concerns regarding Oxy's addictive potential.

[4] Oxy was widely prescribed. Many individuals who were prescribed Oxy by their doctors for legitimate pain conditions became addicted to it.

[5] Demetrios Perdikaris [Mr. Perdikaris] commenced a putative class action, as a representative plaintiff, on behalf of all persons who were prescribed Oxy, in Saskatchewan, Alberta, Manitoba, the Northwest Territories, Nunavut and the Yukon. The claim seeks damages and compensation for those who became addicted after ingesting Oxy that they were prescribed, their family members who suffered loss as a result of their addiction and Provincial Health Insurers [PHIs] who expended considerable public resources on medical care.

[6] Mr. Perdikaris passed away on May 30, 2019, and the lawsuit has been continued in the name of the executrix of his estate, Lorraine Elizabeth Carruthers [plaintiff].

[7] This action is one of four actions in Canada which alleges that Purdue Canada and Purdue US breached their duty to warn consumers of the addictive properties of Oxy, which the defendants manufactured, marketed and/or sold or otherwise thrust into the stream of commerce in Canada. In addition to the Saskatchewan proceedings, the following are three actions in Canada that relate to this issue:

- The Ontario Superior Court of Justice Action, File No. 07-CV-343201CP, in which Tim Reid and Sabine Reid are the plaintiffs includes the provinces of Ontario and British Columbia [Ontario Proceeding];

- The Superior Court of Quebec Action, File No. 200-06-000080-070, in which Claude Larose, Francois Michaud and Leo Michaud are the petitioners [Quebec Proceeding]; and

- Supreme Court of Nova Scotia Action, File Hfx. No. 285995, in which George Bellefontaine and Stephen MacGillivray are the plaintiffs, includes the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador [Nova Scotia Proceeding].

Collectively, the Ontario Proceeding, the Quebec Proceeding, the Nova Scotia Proceeding and the Saskatchewan Proceeding are referred to as the "four actions".

[8] A National Settlement Agreement [Settlement Agreement], which provides for the settlement of all four actions (plus several other claims in which accommodations have been reached) was negotiated between the class participants and the defendants. Implementation of the Settlement Agreement is contingent upon Court approval in all four actions.

[9] The Settlement Agreement has already received Court approval in the Ontario, Quebec and Nova Scotia proceedings. The only remaining approval outstanding is from Saskatchewan.

[10] This decision relates to a third attempt to obtain approval of the Settlement Agreement commenced in this putative class action, pursuant to s. 38 of *The Class Actions Act*, SS 2001, c C-12.01 [*Act*], approval of the fees, disbursements and

applicable taxes of class counsel and approval of honorariums for representative plaintiffs.

[11] In consideration of this reapplication, four issues must be considered:

1. whether Joan Frame [Ms. Frame], a resident of Ontario, should be granted leave to participate in the Saskatchewan-based settlement approval hearing;

2. whether the proposed Settlement Agreement is fair and reasonable;

3. whether the fees, disbursements and applicable taxes requested by class counsel should be approved;

4. whether the honorariums should be paid to the representative plaintiffs.

[12] For the reasons set out in this decision, I deny Ms. Frame's application to intervene in this Saskatchewan proceeding and approve the Settlement Agreement and class counsel fees, disbursements and applicable taxes. I also approve the honorariums requested for the representative plaintiffs.

II. STYLE OF CAUSE

[13] At the settlement approval hearing, counsel for the plaintiff brought an application to amend the style of cause due to the death of Mr. Perdikaris. Since no draft order was filed with the application, he was given an opportunity to file a draft order. The draft order that was subsequently filed directed that the plaintiff would henceforth be recognized and referenced as "Lorraine Elizabeth Carruthers, on behalf of the Estate of Demetrios Perdikaris". There was no opposition to the form or content of the draft order filed and the order was granted.

[14] Upon further reflection, I have found that the current style of cause is

improper and should be revised.

[15] Rule 13-20(3)(c) of *The Queen's Bench Rules* provides that each document filed with the Court must begin with, *inter alia,* the names of the parties and "the capacity in which a party sues or is sued". Part 17 of the Rules provides that a "style of cause" means the names of the parties and the capacity in which a party sues or is sued, if it is in a representative capacity.

[16] The Canadian Citation Committee [CCC] provides further guidance on the proper citation for matters brought or continued on behalf of an estate. The CCC created a formatting and citation standard for judicial decisions in 2009 in support of the Canadian Judicial Council's standardization efforts: Frédéric Pelletier, Ruth Rintoul & Daniel Poulin, "The Preparation, Citation and Distribution of Canadian Decisions": (7 May 2009) [Citation Guide]. Appended to the Citation Guide are Case Naming Guidelines. When an executor/executrix is acting in an official capacity, Rule 33, example 142 of the Case Naming Guidelines provides the following example as the proper citation format: "Adrian Thompson, executor of the estate of Gerald Anderson".

[17] The appropriate phrasing of a style of cause when a matter is continued by an estate was considered by Megaw J. in *Eichelberg Estate v Eichelberg,* 2016 SKQB 326 [*Eichelberg*]. In *Eichelberg,* the petitioner passed away prior to the matter being resolved and her interest was carried on by an entity called the "Estate of Evelyn Eichelberg". Megaw J. noted that the entity identified did not have legal standing to continue the action. As a preliminary issue, he ordered the petitioner to submit a draft order "amending the style of cause to reflect the proper name of the petitioner as those acting in their capacities as executors of the estate of Evelyn Eichelberg".

[18] In a subsequent decision, *Eichelberg Estate v Eichelberg,* 2017 SKQB 57, Megaw J. again considered this issue, holding the following:

> 18 The petitioner was not named properly in the style of cause. Following the death of Evelyn Eichelberg, the name substituted for the petitioner was "Estate of Evelyn Eichelberg". Of course, that name is not a legal entity. The direction given was for the solicitor for the petitioner to submit a draft order amending the style of cause to reflect the proper name as those acting in their capacities as executors of the estate of Evelyn Eichelberg.
>
> ...
>
> 22 ... The petitioner's proper legal status must, however, be amended in accordance with the direction provided in the original judgment. This can be done now and should be completed immediately.
>
> [Emphasis added]

This passage underscores the importance of identifying a petitioner/plaintiff's proper legal status in the style of cause.

[19] In sum, the current style of cause naming the plaintiff as *Lorraine Elizabeth Carruthers, on behalf of the Estate of Demetrios Perdikaris*, fails to identify the capacity in which Ms. Carruthers sues, which is contrary to Rule 13-20(3)(c) and Part 17 of *The Queen's Bench Rules* and is inconsistent with the guidance provided in the CCC's Case Naming Guidelines. It is not a proper style of cause.

[20] Therefore, the style of cause is hereby amended to read, *Lorraine Elizabeth Carruthers, Executrix of the Estate of Demetrios Perdikaris v Purdue Pharma, Purdue Pharma Inc., Purdue Frederick Inc., The Purdue Frederick Company Inc., and Purdue Pharma L.P.* This format both identifies the capacity in which Ms. Carruthers sues and accords with the CCC's Case Naming Guidelines.

III. PROCEDURAL BACKGROUND

[21] The events leading up to this third settlement approval hearing have been reviewed and outlined in detail by Ball J. in *Perdikaris v Purdue Pharma,* 2017 SKQB 287, 14 CPC (8th) 402 [*Perdikaris 2017*], by Barrington-Foote J. (as he then was) in *Perdikaris v Purdue Pharma,* 2018 SKQB 86, 17 CPC (8th) 119 [*Perdikaris 2018*], and

by this Court in *Perdikaris v Purdue Pharma,* 2019 SKQB 281 at paras 3 to 15 [*Perdikaris 2019*].

[22] As mentioned, a number of putative class actions were commenced in Canada by several representative plaintiffs against the defendants relating to the manufacturing, marketing, sale, distribution, labelling, prescription and use of Oxy. Four law firms coordinated the class action litigation in Canada. A Settlement Agreement, contingent upon the approval by all four Courts (the Ontario Superior Court of Justice, the Supreme Court of Nova Scotia, the Superior Court of Quebec and what was then the Saskatchewan Court of Queen's Bench), was negotiated and concluded on March 8, 2017.

[23] The Settlement Agreement stipulates that the defendants would pay $20 million, inclusive of all interest, taxes and costs, to compensate the approved claimants, the claims of the PHIs, class counsel legal fees and disbursements, and any honorariums to representative plaintiffs.

[24] The PHIs' claim was negotiated in the Settlement Agreement to be $2 million (less class counsel fees of $150,000). This would leave $18 million to satisfy the costs of administrating the settlement, the legal costs of class counsel, the approved claims of all class members and the honorariums to representative plaintiffs.

[25] Class counsel has asked this Court to approve legal fees totalling $4.65 million plus disbursements of $537,049.41 and applicable taxes. The $4.65 million in fees is made up of $4.5 million (equal to a 25 percent contingency fee on $18 million) plus $150,000 on the $2 million paid to the PHIs. Class counsel will also pay approximately $400,000 to other law firms representing other plaintiffs in several other putative class actions commenced in Canada in order for those actions to be discontinued.

[26] Conditional certification orders were granted by all four Courts and approval of the Settlement Agreement and the Class Counsel Fee Agreement was granted by the Courts in the Ontario Proceeding, the Quebec Proceeding and the Nova Scotia Proceeding. The final step is the approval of this Saskatchewan proceeding.

[27] An approval hearing was held before Ball J. in 2017. After acknowledging in para. 32 of *Perdikaris 2017*, that "Approval of the Settlement Agreement in the Ontario, Quebec and Nova Scotia Proceedings means that approval in the Saskatchewan Proceeding would undoubtedly promote coherence, efficiency and principles of comity in these multi-jurisdictional proceedings", Ball J. concluded that he was not able to grant the sought-after approvals based on the evidence and submissions before him. He then outlined in detail the shortcomings that prevented him from granting the approvals. This included the observation that the Settlement Agreement purported to compromise the statutory claims of the PHIs without the statutorily required ministerial consent. Rather than dismissing the application, Ball J. provided the parties with three options, one of which was to reapply for approval of the Settlement Agreement with supplementary materials addressing the concerns raised in his decision, with notice to the PHIs. Ball J. retired from the Court shortly after *Perdikaris 2017* was released.

[28] The plaintiffs chose to reapply for approval of the Settlement Agreement. Supplementary materials were filed and notice was given to the PHIs. That reapplication came before Barrington-Foote J., who had been designated as the replacement for Ball J. He, too, declined to approve the Settlement Agreement for the reasons set forth in *Perdikaris 2018*. Although the parties had provided supplementary material in response to the concerns raised by Ball J. in *Perdikaris 2017*, Barrington-Foote J. found them to be insufficient for a variety of reasons. These reasons included that he was not satisfied that the material before him demonstrated that the

Settlement Agreement was fair, reasonable and in the best interests of the class, nor was he satisfied that the PHIs had consented to the Settlement Agreement as required by applicable subrogation legislation.

[29] However, Barrington-Foote J. specifically left open the possibility of a further reapplication, "with supplementary material addressing the concerns raised in his decision …". In the alternative, he opined that the plaintiff may wish to apply for certification. He concluded his decision with the *obiter dictum* statement that, although he neither approved nor rejected the fees and disbursements requested by class counsel, he "would be strongly inclined to give [his] approval in the event that the Settlement Agreement is finally approved … [and] would also be inclined to approve payment of an honorarium to Mr. Perdikaris".

[30] Shortly after Barrington-Foote J. rendered his decision, he was appointed to the Court of Appeal. I then took over from him.

[31] A number of procedural matters were addressed by this Court in *Perdikaris 2019* which paved the way to this third approval hearing.

[32] Since the decisions in *Perdikaris 2017, Perdikaris 2018* and *Perdikaris 2019*, a number of very significant developments have occurred.

[33] First, the issue respecting the PHIs has been resolved.

[34] On August 29, 2018, the Province of British Columbia commenced a proposed class action on behalf of all federal, provincial and territorial governments and agencies seeking recovery of health care costs that resulted from opioid use and side effects, including addictions. The defendants were named alongside numerous other opioid manufacturers and distributors.

[35] On October 31, 2018, the Province of British Columbia enacted the

Opioid Damages and Health Care Costs Recovery Act, SBC 2018, c 35. That legislation seeks to, among other things, enable the recovery of damages caused by the opioid crisis by defining statutory causes of action and procedures, and by removing common law individual causation and proof of damage requirements. The legislation also purports to override the Settlement Agreement pending before this Court.

[36] On May 17, 2022, after lengthy negotiations, the defendants entered into an agreement with the federal government and the provincial and territorial governments entitled the "Canadian Governments Opioid Health Care Costs Recovery National Settlement Agreement" [National Settlement Agreement]. The National Settlement Agreement provides for the payment of $150 million in monetary benefits to the Canadian governments, plus additional benefits including access to information and documents relevant to the lawsuit. Of particular significance, in the context of these proceedings, is that all Canadian governments as the principals for the PHIs, have withdrawn their opposition to the Settlement Agreement and now support it. In fact, the National Settlement Agreement states that "Obtaining the Final OxyContin Approval is a foundational term of this Settlement Agreement, the failure of which renders this Settlement Agreement voidable at Purdue Canada's sole and exclusive discretion".

[37] The National Settlement Agreement works in tandem with the Settlement Agreement with respect to the negotiated $2 million payment to the PHIs for their subrogated claims and legal fees to class counsel in the amount of $150,000. In other words, the PHIs would collectively receive the $150 million from the National Settlement Agreement, plus the $2 million (less legal fees of $150,000) from the Settlement Agreement.

[38] The second major development is that Purdue US and related companies have encountered significant financial difficulties.

[39] A number of entities related to Purdue Canada, but based in the United States, commenced Chapter 11 Proceedings with the United States Bankruptcy Court for the Southern District of New York. That proceeding incited proceedings in Canada pursuant to Part IV of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], in the Ontario Superior Court of Justice. On December 31, 2019, Hainey J. of the Ontario Superior Court of Justice granted a motion brought under the *CCAA* to stay certain actions brought against the defendants, including the within action. The process, insofar as the within action is concerned, was stalled.

[40] On September 21, 2021, Conway J. of the Ontario Superior Court of Justice, granted the plaintiffs' motion to lift the stay "… solely for the limited purpose of granting the Saskatchewan Plaintiff leave to bring or continue an application in the Saskatchewan Proceeding for an order approving the Settlement Agreement dated March 8, 2017 entered into by, among others, Purdue Pharma L.P. and the Saskatchewan Plaintiff".

[41] With the stay lifted, the impediments caused by the insolvency proceedings in Canada and the United States were removed.

[42] Third, the defendants set up a trust to ensure that the amounts set forth in the Settlement Agreement would be paid as promised.

[43] As a result of the events occurring in the United States respecting entities related to the defendants, a deed of trust [Purdue Pharma Claimants Trust] was created on August 23, 2019. The purpose is to provide independent comfort to the Court, class counsel and class members, that the funds payable pursuant to the Settlement Agreement would be available upon Court approval.

[44] The Purdue Pharma Claimants Trust was initially set up with a payment of $19 million ($1 million having already been provided to the claims administrator

under the Settlement Agreement), plus an additional $1,260,767.12 representing a notional post-judgment interest that would accrue on the $19 million payable from March 8, 2017 to August 31, 2019. The concept of notional post-judgment interest was negotiated to take into account and monetarily compensate the plaintiffs and other class members for the delay between when the settlement monies became payable pursuant to the Settlement Agreement and when they were actually paid.

[45] The Purdue Pharma Claimants Trust was originally set to terminate on or before August 31, 2020. It was recreated and extended several times. It is now set to terminate on December 31, 2022.

[46] The Trustee of the Purdue Pharma Claimants Trust was empowered to invest the funds held in trust. As a result, interest is being earned on the settlement funds being held in trust.

[47] The market value of cash and securities held by the Purdue Pharma Claimants Trust as of June 30, 2022 is $20,503,486.30. The defendants have undertaken to continue to provide notional post-judgment interest in recognition of the passage of time since the Settlement Agreement was signed. This means that they would "top up" the interest actually earned within the trust to ensure that the total payment includes the notional post-judgment interest from March 8, 2017 to the date of approval. According to the affidavit of David Blais, general counsel for, and a director of, Purdue Pharma Inc., sworn on July 15, 2022, the total gross amount that would ultimately be paid pursuant to this understanding, assuming a September 30, 2022 approval date (for illustration purposes), would be $22,639,178.08 ($19 million outstanding + $2,639,178.08 notional post-judgment interest + $1 million already paid = $22,639,178.08).

IV. SHOULD THE OBJECTORS BE GRANTED STATUS TO INTERVENE?

[48] Prior to the commencement of this third application to approve the Settlement Agreement, three persons sought leave to intervene pursuant to Rule 2-12 of *The Queen's Bench Rules*. The three persons are: Jean-Francois Bourassa [Mr. Bourassa], Jordan Francis Charlie [Mr. Charlie] and Joan Frame [Ms. Frame]. Mr. Bourassa is a resident of Quebec, while Mr. Charlie and Ms. Frame are residents of Ontario.

[49] In order to avoid further delays in this proceeding, I granted all three persons conditional leave to participate in the Settlement Agreement approval hearing on the understanding that they could fully participate in the hearing with respect to both whether they should be granted intervenor status and whether the Settlement Agreement should/should not be approved, but that I would subsequently rule on whether intervenor status would or would not be granted. The other parties to this action were permitted to present argument with respect to whether they should be granted intervenor status.

[50] At the outset of the proceeding before me, counsel for Mr. Bourassa informed the Court that an "Interpretation Agreement" had been entered into with counsel for the plaintiff and the defendants and that the concerns that caused Mr. Bourassa to seek intervenor status had been satisfied. On this basis, counsel for Mr. Bourassa withdrew their application to intervene.

[51] Counsel for Mr. Charlie was permitted the opportunity to make full submissions respecting both the issue of leave to intervene and whether the Settlement Agreement should be approved. Following the conclusion of the hearing, and within the time set by the Court to file supplementary materials, the Court was notified that after further negotiations with the relevant parties, Mr. Charlie had entered into an

agreement and his, "objection to the settlement may be considered to be resolved".

[52] Given the resolution of the concerns of both Mr. Bourassa and Mr. Charlie, the only remaining person seeking intervenor status is Ms. Frame. As was the case with Mr. Charlie, counsel for Ms. Frame was permitted, on a conditional basis, to provide full argument respecting both her request to intervene and the reasons why she objects to the Settlement Agreement.

[53] Rule 2-12 of *The Queen's Bench Rules* authorizes a non-party to seek intervenor status:

> 2-12 On application, the Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

[54] The decision to grant leave to intervene is within the discretion of the Court: see *567687 Saskatchewan Ltd. v Prince Albert (City of)* (1987), 63 Sask R 241 (CA), affirming (1987), 60 Sask R 42 (QB). In exercising this discretion, courts have recognized a number of factors that should be considered. Brown J. in *Saskatchewan v Saskatchewan Government Employees Union*, 2016 SKQB 250, outlined a number of considerations that come into play. At para. 41, he said this:

> **41** The granting of intervenor status is discretionary and should be exercised sparingly. Within the ambit of that discretion, … an applicant seeking to be made an intervenor in this Queen's Bench matter pursuant to Rule 2-12 should be prepared to address the following:
>
> a. A sufficient interest in the outcome of the matter must be shown such that their involvement is warranted. An outcome that adversely affects them may well be considered sufficient to meet this criterion;
>
> b. There must exist the reasonable prospect that the process will be advanced or improved by their addition as an intervenor. This includes demonstrating that, as an intervenor, they will bring a new perspective or special expertise to the proceedings that would not be available without their participation. Merely

> echoing the position of one or more of the parties indicates they will not provide the requisite value;
>
> c. As an intervenor they cannot seek to increase the number of issues the parties themselves have included in the proceeding;
>
> d. Adding them as an intervenor must meet the goals and objectives identified by Rule 1-3 such that the issues raised by the litigation will be heard with reasonable dispatch and the matter will not be overwhelmed with procedure by virtue of their inclusion as an intervenor;
>
> e. Adding them as an intervenor must not unduly prejudice one of the parties;
>
> f. The intervention should not transform the court into a political arena; and
>
> g. The court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the proceeding.

[55] Ms. Frame is a resident of Ontario who was prescribed Oxy in Ontario. She did not participate in the Settlement Agreement approval hearing in Ontario, although she could have done so. Further, she did not opt out of the conditionally certified class action in Ontario by the deadline of July 12, 2017, as required by the order of the judge in the Ontario Proceeding. As a consequence of that failure to opt out, she is part of the class conditionally certified in Ontario.

[56] At some point, Ms. Frame decided that she was not satisfied with the Settlement Agreement that had been negotiated and approved in Ontario (and Quebec and Nova Scotia) and sought a method to register her objection. Since the Settlement Agreement has not been approved in Saskatchewan, and is contingent upon approval in all four class action proceedings, Ms. Frame seeks to object to the Saskatchewan action in the hope that the Settlement Agreement is not approved here, which would result in the nullification of the approval given in the Ontario Proceeding (and, for that matter,

the Quebec and Nova Scotia Proceedings, too).

[57] I am not prepared to grant leave to Ms. Frame to intervene in this Saskatchewan Proceeding. She is clearly a person who fits within the Ontario Proceeding. Had she wished to voice an objection and present argument as to why the Settlement Agreement ought not be approved, she could have done so within the Ontario Proceeding. She also could have opted out. She did neither.

[58] Instead, she is attempting to launch a collateral attack on the approval already granted by the judge in the Ontario Proceeding. Granting leave in these circumstances would amount to authorizing Ms. Frame to register her objections to the Settlement Agreement already approved in Ontario long after the time for her to do so has expired.

[59] Great mischief could result in permitting class members from parallel proceedings to participate in other proceedings where they are not part of the class. Efficiency would suffer if class members from other jurisdictions were permitted to participate outside their jurisdiction in other proceedings. Also, one can easily contemplate how permitting a class member from one jurisdiction to object/participate in another jurisdiction could be used to gain unfair tactical advantage.

[60] Although, technically speaking, approval of the Settlement Agreement in Saskatchewan would affect Ms. Frame because it would remove all the conditions precedent to the Settlement Agreement coming into effect, she is not affected to the extent where leave should be granted. She had her opportunity to object in Ontario and she did not do so.

[61] Accordingly, I decline to grant Ms. Frame status to intervene in this action. The submissions and evidence submitted by Ms. Frame will not be considered in the determination of whether the Settlement Agreement should be approved.

V. IS THE SETTLEMENT AGREEMENT FAIR, REASONABLE AND IN THE BEST INTERESTS OF THE CLASS AS A WHOLE?

A) The Law: Approving Class Action Settlements

[62] The law with respect to approval of class action settlements was succinctly and accurately set forth by Barrington-Foote J. in *Perdikaris 2018*, at paras. 14-20. I see no utility in reframing what he has already said. Instead, I will simply adopt his statements as my own:

> 14 The test to be applied on an application to approve a class action settlement pursuant to s. 38 of the Act [*The Class Actions Act*] is uncontroversial. Laing C.J.Q.B. (as he was then) summarized that test in *Driediger v Ashley Furniture Industries Inc.*, 2010 SKQB 437, 364 Sask R 130 [*Driediger*]. As he there noted, the court must be satisfied that the settlement is fair, reasonable, and in the best interests of the class as a whole. As he also noted, citing *Parsons v Canadian Red Cross Society* (1999), 40 CPC (4th) 151 (Ont Sup Ct), the issue is not whether the settlement meets the demands of a particular member of the class. Nor is it whether the settlement is perfect, but whether it falls within a "zone of reasonableness".
>
> 15 Similarly, as Sharpe J. (as he then was) noted in *Dabbs v Sun Life Assurance Co of Canada* (1998), 40 OR (3d) 429 (WL) (Ont Ct J):
>
> > 30 ... settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.
>
> 16 The need for serious judicial scrutiny, to protect the rights of the many class members not before the court, also underpinned the following comments by Belobaba J. in *Sheridan Chevrolet Ltd. v Furukawa Electric Co.*, 2016 ONSC 729 [*Sheridan Chevrolet*]:
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> > 10 ...The boiler-plate for settlement approval comes down to something like this: "We're experienced class counsel; we know what we're doing; there were lots of litigation risks; we negotiated the best possible deal for the class members; trust us." [emphasis in original]
> >
> > ...

> 12 If class action judges are to do their job (and be more than rubber-stamps) in the settlement approval process, and ensure that the settlement amount is indeed fair and reasonable and in the best interests of the class (and not just class counsel) then at the very least class counsel should provide affidavit evidence explaining why the actual settlement amount is fair and reasonable or more specifically, clear reasons why the settlement amount is in the "zone of reasonableness."

17 I agree. Further, I agree with the following statement by Belobaba J. in *Leslie v Agnico-Eagle Mines Ltd.*, 2016 ONSC 532, 90 CPC (7th) 201:

> 12 I agree with American jurist Richard Posner that "a high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes." However, as Posner goes on to explain, a "ball park valuation" is nonetheless achievable and he urges the settlement approval judge to make every effort to "translate his intuitions about the strength of the plaintiff's case and the range of possible damages ... into numbers that would permit a responsible evaluation of the reasonableness of the settlement. [footnotes omitted]

18 *Middlemiss v Penn West Petroleum Ltd.*, 2016 ONSC 3537 [*Middlemiss*], and *Sheridan Chevrolet* are to the same effect. In both of those cases, Belobaba J. required the production of further evidence before approving a settlement. In *Middlemiss*, he also noted that "[e]arly stage settlements understandably attract more judicial scrutiny than, say, settlements achieved in the eve of the common issues trial". In one sense, this is not an early stage settlement, as the Ontario, Québec and Nova Scotia claims were all filed in 2007. However, the settlement was concluded before any application for leave or certification was heard.

19 Courts have proposed various non-exclusive lists of criteria that may assist in determining whether a settlement is reasonable. *Driediger* dealt with this issue as follows:

> 13 In *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69, 68 B.C.L.R. (4th) 317 (B.C. S.C.), Groberman J. at para. 18 noted the factors to be considered in approving a class proceeding settlement are now well established. He went on to recite them as follows:
>
> 1. Likelihood of recovery or likelihood of success;
> 2. Amount and nature of discovery, evidence or investigation;
> 3. Settlement terms and conditions;
> 4. Recommendations and experience of counsel;
> 5. Future expense and likely duration of litigation;

6. Recommendations of neutral parties, if any;
7. Number of objectors and nature of objections; and
8. The presence of arms-length bargaining and the absence of collusion.

At paras. 19 and 20, Groberman J. went on to note:

> 19. In *Fakhri v. Alfalfa's Canada Inc.*, 2005 BCSC 1123, 20 C.P.C. (6th) 70 (B.C. S.C.) at para. 8, Gerow J. added two additional factors to this list:
>
> 9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation; [and]
> 10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.
>
> 20 In *Reid v. Ford Motor Co.*, 2006 BCSC 1454 (B.C. S.C.), at paragraph 11, Gerow J. produced a slightly different list, this time adding the following as a factor:
>
> 11. if counsel fees were negotiated in the settlement, and if so, how big a factor are they; ...

At para. 28, Groberman J. summarized the foregoing factors as follows:

> 28 In summary, then, the court must consider four broad questions before approving the settlement of a class actions:
>
> * Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?
>
> * Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?
>
> * On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and
>
> * Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement.

B) Analysis: Approval of the Settlement Agreement

[63] One of the major stumbling blocks encountered by the parties in the two previous applications to approve the Settlement Agreement in Saskatchewan pertained

to difficulties surrounding the PHIs. However, this impediment has been overcome. The PHIs, who at one point opposed the approval of the Settlement Agreement, now fully support it.

[64] That then leaves the question of whether the Settlement Agreement is fair, reasonable and in the best interests of the class as a whole. As a starting point, I have carefully reviewed the comments of Barrington-Foote J. in *Perdikaris 2018*, where he described in considerable detail the reasons why he concluded that the material before him, in 2018, was insufficient and prevented him from concluding that the Settlement Agreement was fair, reasonable and in the best interests of the class as a whole: see paras. 62-69, *Perdikaris 2018*. Instead of dismissing the application, Barrington-Foote J. granted the plaintiff the opportunity to reapply, "... with supplementary material addressing the concerns raised in this decision".

[65] The plaintiff has, indeed, filed supplementary materials. The evidence and submissions contained in the supplementary materials submitted adequately address the concerns raised by Barrington-Foote J. Further, the significant financial difficulties encountered by the defendants and the related United States entities create a considerably different lens from which to view the overall circumstances. The landscape has shifted markedly since the issue of Settlement Agreement approval was last before the Court.

[66] After careful review of the very substantial supplementary materials filed in this application and upon hearing the helpful and articulate submissions from counsel for all parties involved, I am satisfied that the Settlement Agreement is fair, reasonable and in the best interests of the class as a whole.

[67] I will elaborate.

[68] As mentioned previously, this is the third attempt by the parties to have

the Settlement Agreement approved. The action was commenced in 2012, over a decade ago, and was conditionally settled on March 8, 2017. If approved, $20 million, plus notional post-judgment interest, is to be paid by the defendants. This is by no means a paltry sum. Further, the approval of the Settlement Agreement would have the effect of removing the last condition remaining in the National Settlement Agreement which would result in a further payment of $150 million from the defendants to the Canadian governments.

[69] On the other hand, declining to approve the Settlement Agreement could mean that the conditional certification would be cancelled and that class counsel would, if they were still inclined to do so, be required to seek certification and, if successful, proceed to a trial. Further, as mentioned previously, the $150 million National Settlement Agreement would be in jeopardy because approval of the Settlement Agreement is a "foundational term" of the National Settlement Agreement, "... the failure of which renders this [National] Settlement Agreement voidable at Purdue Canada's sole and exclusive discretion". What is a relatively certain outcome would be cast into the realm of the unknown. The class members in the present action could quite conceivably end up with nothing.

[70] I am very mindful of the responsibility of the Court to seriously scrutinize the Settlement Agreement in order to protect the rights of the many class members, none of whom, with the exception of the representative plaintiff, are before the Court. I have, indeed, approached the Settlement Agreement with "some suspicion", especially being mindful of the fact that this is the third, and likely the final, time the issue of the approval of the Settlement Agreement has come before this Court.

[71] I fully acknowledge that the sum of $20 million (plus notional post-judgment interest) does not come close to fully compensating the class members who have suffered loss, injury or death as a result of problems encountered after being

prescribed Oxy. The theory behind damages is to attempt to place the injured party in the position they would have been in had the injury not occurred, so far as this can be done with money. This theory implicitly acknowledges the obvious shortcoming with monetary damages in that one can never replace a lost life with money or return lost years to those who suffered tremendously due to addictions. This shortcoming is magnified when a compromise resolution is reached which comes nowhere near adequately and properly compensating class members for the actual loss that has been suffered.

[72] The sum of $20 million (plus notional post-judgment interest) is an amount that falls well below that which would become payable to the total number of potential class members if each and every one of them pursued their case individually and were wholly successful in asserting their claim. However, practically speaking, such a scenario would be unlikely because many, if not most, would not pursue their individual claim. Further, the potential factual and legal impediments faced by each potential claimant are large. Contributory negligence and the possibility of other third parties being responsible for the loss, are but two of the many real and legitimate issues that would be encountered by claimants.

[73] The Settlement Agreement was the culmination of years of work. The material filed with the Court details the processes followed by the parties in assessing best case and worst case scenarios and how the negotiations and mediations ultimately resulted in the Settlement Agreement. While one could argue that $20 million (plus notional post-judgment interest) is a small amount to receive for a class of the size anticipated, it is also accurate to state that it is a relatively large amount to pay -- even for large corporations.

[74] Also of significance is the U.S. Bankruptcy Proceeding, which has influenced the current action as demonstrated by the stay order granted, and then lifted

to permit this application to be heard. The evidence before this Court is that over 614,000 claimants have filed proofs of claims in the U.S. Bankruptcy Proceeding. Recently, Justice McMahon of the United States District Court, Southern District of New York, noted that just 10 percent of the claims filed would give rise to over $140 trillion in aggregate liability, which is more than the whole world's gross domestic product.

[75] Class counsel have demonstrated that they have spent significant time and resources evaluating the implications of this insolvency proceeding in the United States. Strategic decisions were made, which included the application to lift the stay in Canada in order to permit this application to go forward.

[76] The insolvency proceeding in the United States is a real and legitimate concern for the class members within the proceeding. While it is true that Purdue Canada is not alleging that they are insolvent, their relationship with the United States entities that are in insolvency protection cannot be ignored. It would be naïve to suggest that such a major event south of the border should be disregarded simply because these are "Canadian companies".

[77] Experience teaches that there are many reasons to be cautious and one can never be sure that events happening elsewhere will not have a negative impact here. Simply put, to reject the Settlement Agreement and hold out for more is an unreasonably risky move that could result in class members getting nothing. Taking a case all the way to trial versus accepting a negotiated resolution is always a difficult call to make. There are many factors – known and unknown – that go into the mix. Reasonable, considered and intelligent assessment is required. Here, counsel for the plaintiff and the defendants have made that assessment and have concluded that the Settlement Agreement represents a reasonable compromise when all factors, including litigation hazard, are factored in. My task, as the judge from whom approval is sought,

is to carefully review all of the circumstances and weigh potential outcomes, if the matter proceeded to trial, against the settlement achieved. After having applied this judicial scrutiny to the facts before me, I find that this evaluation supports approval of the Settlement Agreement.

[78] In this case there is an extensive record, including cross-examinations, upon which to base the Court's assessment of the overall fairness of the Settlement Agreement. The benefits to the class must be weighed against the risks, delays and expense of continuing the litigation.

[79] The class faces significant litigation risks if the Settlement Agreement is not approved. These risks are present at the certification stage (at this point the certification is conditional) and, if certified, at trial and the subsequent individual issues stage that would follow. The defendants intended to oppose certification. The materials filed revealed that the defendants planned to challenge the common issues, preferrable procedure and representative plaintiff criteria. As in the case of any certification application, all the defendants need to do is be successful on any one of these challenges to deal a fatal blow to the plaintiff's case for certification.

[80] If certified, a common issues trial would follow. One of the plaintiff's key arguments was that the warnings of addiction were inadequate. However, the defendants were prepared to argue that each product monograph for Oxy was sufficient because this monograph did, on some level, refer to or warn about tolerance, physical dependence, psychological dependence or addiction, as required by Health Canada.

[81] The defendants also argue that any admitted improper activity in the United States did not occur in Canada. Further, the defendants planned to argue that the addicted class members were contributorily responsible for their own problems and that the physicians prescribing the medications were also jointly liable.

[82] Although both sides presented argument as to the pros and cons of their respective positions, it is recognized that there are constraints on the extent to which parties can fully disclose the strengths and weaknesses of their case because of the possibility that litigation would continue if the Settlement Agreement was not approved.

[83] Further, even if the plaintiff was successful at the common issues trial and proceeded to the individual issues stage, class members could still face the risk that their individual claims would fail because the defendants could continue to dispute liability on a case-by-case basis.

[84] It is a given that some individuals would be able to prove damages in excess of what they would receive as a class member if they chose to proceed to a trial with respect to their peculiar case. However, Winkler J. (as he then was) cautioned against the temptation to assess personal injury settlements against what an individual could possibly recover in tort. In *Parsons v Canadian Red Cross Society* (1999), 40 CPC (4th) 151 (Ont Sup Ct) at paras 82 & 84, he said this:

> 82 An award of damages in personal injury tort litigation is idiosyncratic and dependent on the individual plaintiff before the court. ...
>
> 84 ... in the absence of evidence of the individual damages sustained by class members, past precedents of damage awards in personal injury actions cannot be applied to this case to assess the reasonableness of the settlement for the class.

[85] Another factor to be taken into account is delay. Continued litigation would be the inevitable result of a rejection of the Settlement Agreement. This case has already been ongoing for more than a decade and there have been more twists and turns than most could have anticipated. Sending the matter off for certification and, if certified, to a trial would consume many more years. Parties not satisfied with rulings have the right to appeal, further adding to the complexity of the situation and the time

it would take to have the claims finally resolved, as well as the overall cost of the process.

[86] In conclusion, I find that the Settlement Agreement represents a reasonable settlement when all factors are taken into account, including the significant and very real risks of litigation and the prospect that class members could end up with nothing should the Settlement Agreement not be approved. The settlement funds are currently sitting in trust and are ready to be paid out to class members who have been waiting for monetary compensation for years. The approval of the Settlement Agreement facilitates resolution.

[87] Before leaving this aspect of the analysis, it is worthwhile to address what could be regarded as an indicator that the present Settlement Agreement is inadequate. As referred to above, when the initial Settlement Agreement first came before Ball J. in 2017, $2 million of the $20 million total, was earmarked for the PHIs. The Settlement Agreement was not approved at that time for a variety of reasons, including, perhaps most notably, that the PHIs were purporting to compromise their claims and accept an amount less than the full amount to which they would be entitled. Statutorily, before they could do so, consents from the various health ministers from each jurisdiction across the country were required. Because those consents were absent, approval of the Settlement Agreement was not possible.

[88] What followed, eventually, were further negotiations between the PHIs and the defendants that resulted in a significant further settlement payment. Instead of just receiving a gross settlement of $2 million, the PHIs and/or their respective governments, were to receive an additional $150 million. This circumstance -- the settlement amount for the PHIs exploding from $2 million to $150 million -- could give rise to the suggestion that the $18 million being proposed to settle the claims of the class members is woefully inadequate. As appropriately acknowledged by class

counsel, the National Settlement "… has had the paradoxical effect of both smoothing the settlement approval path, while at the same time creating a stark comparator to the quantum of the [Settlement Agreement] and challenging former assumptions of Purdue Canada's financial status and capacity to pay". Should this circumstance be considered to be a persuasive indication that the Settlement Agreement amount of a mere $18 million for the class members is inadequate?

[89] A superficial consideration of this circumstance could cause some to jump to the conclusion that the $18 million settlement amount is inadequate because, with a bit more push, the PHIs were able to move their amount payable from a mere $2 million to a much more significant $150 million. However, the circumstances that paved the way to enable the PHIs to negotiate the considerably larger sum are, to say the least, unusual.

[90] Subsequent to the Settlement Agreement being negotiated and signed in March 2017, the Province of British Columbia, on August 29, 2018, commenced a putative class action, as a representative plaintiff on behalf of all Canadian, federal, provincial and territorial governments and agencies that sought recovery for health care costs resulting from opioid use and side effects including addiction. Then, on October 31, 2018, the Province of British Columbia passed the *Opioid Damages and Health Care Costs Recovery Act* that purports to, among other things, enable recovery for the opioid crisis by defining causes of action and by removing common law individual causation and proof of damages requirements. This "legislative assist" was not available to the class members at the time the action was commenced in 2012 nor at the time the Settlement Agreement was negotiated in 2017.

[91] Further, and of significance, there are substantial differences in the scope of the claim that led to the National Settlement Agreement. In particular, there are significant differences in respect to the causes of action advanced and bases of liability,

the time frame of the claims covered and compensated under the respective settlements and the ultimate beneficiaries of the compensation. Also of importance is the magnitude of the massive amount of health care resources expended to respond to the opioid crisis.

[92] Therefore, notwithstanding that a larger settlement was negotiated with the same defendant, this circumstance does not negate the many reasons why the Settlement Agreement should be approved since it is a considerably different claim.

[93] After considering all of the circumstances, I am satisfied that the settlement reached with the class members as set forth in the Settlement Agreement is fair, reasonable and in the best interests of the class as a whole. While the Settlement Agreement is far from perfect, it is by far preferrable to the alternative - which is protracted litigation with uncertain results. The settlement proceeds are being held in trust for the benefit of the class and will deliver real and concrete benefits on claims that are both complex and uncertain. It is, in my view, a last opportunity for the class members to receive some compensation for the significant harms that have been caused by opioid addiction in connection with Oxy's prescription and use.

VI. SHOULD THE FEES OF CLASS COUNSEL BE APPROVED?

A) Law: Approval of Class Counsel Fees

[94] Article 15.1 of the Settlement Agreement stipulates that class counsel is to bring a motion for the approval of class counsel fees. This is consistent with s. 41 of the *Act* which reads, in part, as follows:

> (2) An agreement respecting fees and disbursements between a lawyer and a representative plaintiff is not enforceable unless approved by the court, on the application of the lawyer.
>
> (3) An application pursuant to subsection (2) may:
>
> (a) unless the court orders otherwise, be brought without notice to the defendants; or

> (b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.
>
> ...
>
> (5) If an agreement is not approved by the court, the court may:
>
> (a) determine the amount owing to the lawyer respecting the fees and disbursements;
>
> (b) direct an inquiry, assessment or accounting pursuant to *The Queen's Bench Rules* to determine the amount owing; or
>
> (c) direct that the amount owing be determined in any other manner.

[95] As stated by Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic & Alison Warner in *The Law of Class Actions in Canada* (Toronto: Thompson Reuters, 2014) at 399:

> At its core, the fairness and reasonableness of the fees 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. [Footnote omitted]

[96] Factors which have been found by courts to be worthy of consideration when determining whether a fee is fair and reasonable include:

1. the factual and legal complexities of the claim;
2. the risks undertaken, including the possibility that the action might not succeed;
3. the degree of responsibility of class counsel;
4. the monetary value of the matters at issue;
5. the degree of skill and competence demonstrated by class counsel;
6. the result achieved; and
7. the contingency fee agreement.

See *Sweetland v Glaxosmithkline Inc.*, 2019 NSSC 136 at para 28.

[97] Although the decision of whether a settlement agreement should be

approved is a separate evaluation from whether the fees of class counsel should be approved, it is common practice for both applications to be brought at the same time.

B) Analysis: Approval of Class Counsel Fees

[98] While not bound by the *obiter dicta* comments of Barrington-Foote J. in *Perdikaris 2018*, I do note that he concluded his decision with these remarks:

> 72 I have, given this decision, neither approved nor rejected the fees and disbursements requested by class counsel. I have, however, reviewed the evidence and representations of counsel, and would be strongly inclined to give my approval in the event that the Settlement Agreement is finally approved. ...

[99] A number of class actions were commenced by several representative plaintiffs against the defendants. Four law firms coordinated the class action litigation: Merchant Law Group LLP, Rochon Genova LLP, Siskinds LLP and Wagners. The representative plaintiffs entered into retainer agreements with the various law firms on a contingency basis. The retainer agreements state that the class action proceedings would be prosecuted on a contingency fee basis and that fees and disbursements would be payable only in the event of success, including judgment or settlement. The contingency rates varied somewhat with the lowest rate being 25 percent. Class counsel agreed that they would seek the lowest percentage number - that being 25 percent. A 25 percent contingency fee has been found to be "a reasonable standard fee agreement in class proceedings litigation" by many courts: see *Helm v Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at para 22, 40 CPC (7th) 310.

[100] Class counsel involved in the four proceedings where court approvals have been sought have also negotiated resolutions with other counsel representing other potential representable plaintiffs, in order to satisfy the terms of the Settlement Agreement.

[101] The Settlement Agreement provides a total settlement benefit of $20 million. Of this amount:

a) $2 million is allocated to settle the subrogated claims of the PHIs. Of this sum $150,000 is proposed to be paid as class counsel fees;

b) $18 million is to be allocated to settle the claims of the class members, claims administration costs, class counsel fees, disbursements, taxes and the representative plaintiffs' honorariums. In this respect, class counsel fees are requested to be $4,650,000 (plus taxes and disbursements) calculated as follows:

i)	$18 million x 25% =	$ 4,500,000.
ii)	PHI fees	150,000.
		$ 4,650,000.

[102] Class counsel has represented that their docketed time, as of March 3, 2022, inclusive of tax, amounts to $8,079,763.00, broken down as follows:

i)	Rochon Genova LLP	$2,288,011.87
ii)	Siskinds LLP	1,876,361.61
iii)	Wagners	2,190,085.99
iv)	Merchant Law Group	1,725,303.53
		$ 8,079,763.00

[103] It is acknowledged that considerably more time has been expended since March 3, 2022, including the time associated with preparing for and participating in the present application process.

[104] The litigation has been ongoing for over 10 years. It was complex and hard-fought. There were a number of setbacks and hurdles placed in the way of class counsel -- but they persisted. Class counsel has expended considerable resources both

in time and by financial outlay. Disbursements that have been incurred by class counsel are stated to be $537,049.41. The risk that class counsel undertook was considerable. There were times along the litigation journey when the prospect of resolution appeared bleak. Overcoming the significant hurdle of obtaining consents from all the various provincial and territorial governments was very much up in the air until very recently when the National Settlement Agreement was achieved.

[105] Often times in cases where courts are asked to approve settlements a question arises with respect to whether counsel should be rewarded beyond what they have actually expended in docketed fees in order to compensate them for the risk that they had taken by proceeding on a contingency basis. Here, such a consideration is not necessary because the docket fees of over $8 million far exceed the $4,650,000 sought. The settlement was achieved through a concerted and diligent effort on the part of experienced class counsel at the four law firms that led the litigation.

[106] The Settlement Agreement provides real compensation in monetary terms to class members which is "guaranteed" by having the funds already in place.

[107] Given the time expended by class counsel, the legal complexity of the case, the degree of skill and competence demonstrated by class counsel, the risks undertaken by class counsel and the results achieved, among other factors, I arrive at the same conclusion as did Barrington-Foote J., which is that the fees of class counsel are fair and reasonable.

[108] Further, I find that the disbursements, verified by affidavit in the amount of $537,049.41, are also fair and reasonable.

[109] There is also the question of whether class counsel should be able to share in the "notional" post-judgment interest that has been accruing in the Settlement Trust Account. As mentioned previously, in order to protect the class members from the

possibility that funds available to pay the settlement would become unavailable due to unforeseen circumstances, including those relating to the related United States entities, a trust fund was established. It has earned interest since it was established. The question to be addressed is whether class counsel should share in the interest earned on the same 25 percent contingency basis.

[110] In my view, class counsel are entitled to a 25 percent share in the notional post-judgment interest earned on the money held in trust (with the exception of that portion of the trust funds that have been designated to be paid to the PHIs because class counsel fees payable by the PHIs were capped at $150,000). This is because the retainer agreement contemplates class counsel sharing in the monies recovered which would, of course, include the additional amount described as notional post-judgment interest. Further, this additional settlement amount was negotiated by counsel on behalf of the class members. Had they not addressed their minds to the concept of "notional" post-judgment interest this additional amount would not have accrued to the benefit of the class. Finally, as a matter of fairness, it stands to reason that class counsel should share in this amount because it represents compensation for the delay in payment that they had negotiated in 2017.

VII. APPROVAL OF HONORARIAMS

[111] Class counsel has requested that an honorarium of $10,000 be paid to the estate of Mr. Perdikaris, the representative plaintiff in the within action. Mr. Perdikaris passed away on May 30, 2019. Further, they request that payments of $2,000 be approved for two other representative plaintiffs in two other actions that were settled by the terms of the Settlement Agreement, namely, Adolph Stan Juchacz in QBG-SA-01163-2008 (Saskatoon), and Lindsay Black in Court of King's Bench of Alberta Court File No. 0801-08716.

[112] It is well accepted that courts will grant honorariums to representative plaintiffs when appropriate. In *Robinson v Rochester Financial Ltd.*, 2012 ONSC 911, [2012] 5 CTC 24, Justice Strathy (as he then was), at para. 43, provided a non-exhaustive list of factors to consider when granting honorariums, which include:

> (a) active involvement in the initiation of the litigation and retainer of counsel;
>
> (b) exposure to a real risk of costs;
>
> (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation;
>
> (d) time spent and activities undertaken 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.

[113] The Courts in Ontario and Nova Scotia have already approved honorariums of $10,000 for each of four representative plaintiffs in parallel proceedings and $2,000 each for four other representative plaintiffs whose class proceedings were resolved by the Settlement Agreement. I note, as well, that Barrington-Foote J. in *Perdikaris 2018*, stated, in *obiter dictum*, that he "... would also be inclined to approve payment of an honorarium to Mr. Perdikaris".

[114] There was no honorarium awarded in the Quebec proceeding because payment of honorariums are not permitted in Quebec: see *Attar c. Fonds d'aide aux actions collectives*, 2020 QCCA 1121.

[115] In *Hello Baby Equipment Inc. v Bank of Montreal*, 2021 SKQB 316 [*Hello Baby*], I adopted the approach taken by Weatherill J. in *Coburn and Watson's Metropolitan Home v Bank of Montreal*, 2021 BCSC 2398 [*Metropolitan Home*], being that honorariums in a multi-jurisdictional class action, involving the Province of Quebec, would not be approved because it would not be fair to approve compensation for representative plaintiffs in other parts of the country when the Quebec representative

plaintiff was not eligible to receive an honorarium: see *Metropolitan Home* at paras 31-33. However, the dilemma facing the Court at this juncture is that honorariums have already been approved for payment to representative plaintiffs in Ontario and Nova Scotia. In an effort to promote comity and in the interests of fairness, I am prepared to depart from the position previously taken in *Hello Baby* and award the honorariums requested.

[116] The evidence before this Court easily establishes that Mr. Perdikaris was actively involved in the initiation and advancement of the litigation. He provided affidavits in which he detailed personal information respecting his struggle with addiction. He spoke publicly on behalf of the class and participated in various stages of the litigation, including discovery and settlement negotiations. In my view, it is unquestionably appropriate for Mr. Perdikaris to have received the honorarium. Unfortunately, he did not live long enough to receive the benefits of his efforts and, therefore, the honorarium of $10,000 will be paid to his estate.

[117] The evidence also discloses that the two other representative plaintiffs for whom honorariums are sought also participated, although to a lesser extent than Mr. Perdikaris, in the initiation and advancement of their respective putative class actions. I find it appropriate for each of them to be awarded $2,000 as an honorarium.

VIII. CONCLUSION

[118] Accordingly, I am prepared to make the following order:

1. Having found that the Settlement Agreement dated March 8, 2017 is fair, reasonable and in the best interests of the class as a whole, the Settlement Agreement is approved pursuant to s. 38 of *The Class Actions Act*.

2. An honorarium in the amount of $10,000 is to be paid to Lorraine

Elizabeth Carruthers, executrix of the Estate of Demetrios Perdikaris, an honorarium of $2,000 is to be paid to Adolph Stan Juchacz, and an honorarium of $2,000 is to be paid to Lindsay Black, such funds are to be paid from the proceeds received pursuant to the Settlement Agreement.

3. Subject to compliance with Rule 10-4 of *The Queen's Bench Rules*, the order approving the Settlement Agreement and the honorariums may issue in the terms of the draft order filed by class counsel.

4. Class counsel legal fees in the amount of $4,650,000 (25% of $18,000,000, plus 15% of $1,000,000), plus applicable taxes of $558,378.56, excluding interest, are approved as fair and reasonable.

5. Additionally, class counsel legal fees in the amount of 25 percent of 90 percent of the total interest, including all notional post-judgment interest, accrued on the settlement fund as of the date of payment into the Escrow Account [Total Interest], (being the *pro rata* portion that will accrue for the benefit of the class and family class), plus applicable taxes thereon, are approved as fair and reasonable. For greater certainty, class counsel shall not earn any legal fees on 10 percent of the Total Interest that will accrue for the benefit of the Provincial Health Insurers.

6. Disbursements in the amount of $537,049.41, inclusive of applicable taxes, are approved as fair and reasonable.

7. Subject to compliance with Rule 10-4 of *The Queen's Bench Rules*, the draft order approving fees and disbursements and taxes may issue in the terms of the draft order filed by class counsel.

C.J.K.B.
M.D. POPESCUL