

CITATION: Doucet v. The Royal Winnipeg Ballet, 2022 ONSC 976
COURT FILE NO.: CV-16-564335CP
DATE: 20220211

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
Sarah Doucet and L.K.)	
)	<i>Margaret L. Waddell, Tina Q. Yang, and</i>
Plaintiffs)	<i>Maria Naimark for the Plaintiffs</i>
)	
– and –)	
)	
The Royal Winnipeg Ballet (carrying on business as the Royal Winnipeg Ballet School) and Bruce Monk)	<i>Elizabeth Bowker and Andrea LeDrew for</i>
)	<i>the Defendant The Royal Winnipeg Ballet</i>
)	
Defendants)	<i>Baktash Waseil for the Defendant Bruce</i>
)	<i>Monk</i>
)	
)	
)	HEARD: February 11, 2022

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a certified class action under the *Class Proceedings Act, 1992*.¹ The action was within weeks of a three-week trial of the common issues, when after years of on-and-off settlement negotiations, the action settled. There are two motions before the court. The first is a motion for court approval of the settlement. The second motion is for approval of Class Counsel’s fee.

[2] On the first motion, the Plaintiffs request that this Court make an Order:

- a. declaring the Settlement Agreement to be fair, reasonable and in the best interests of the Class, and approving it pursuant to the *Class Proceedings Act*;

¹ S.O. 1992, c. 6.

- b. dismissing the claims of the Class Members and the subrogated claims of the Provincial Health Insurers (PHIs), with prejudice and without costs;
- c. approving the Notices of Settlement substantially in the form at Schedule “E” to the Settlement Agreement;
- d. appointing Epiq Class Action Services as the Claims Administrator, as defined in the Settlement Agreement, to carry out the duties assigned to that role in the Settlement Agreement, including in the Distribution Protocol;
- e. approving a cy-près distribution to the Dancer Transition Resource Centre for any unallocated or unclaimed amounts from the Settlement Fund six months after the final distribution of the Settlement Fund, once all cheques are stale-dated; and
- f. awarding honoraria to be paid from the Settlement Fund in the following amounts:
 - i. to the Plaintiff Sarah Doucet - \$30,000;
 - ii. to the Plaintiff L.K. - \$10,000; and
 - iii. to each of the Class Member witnesses V.M., S.M. and A.J. - \$10,000.

[3] On the fee approval motion, Class Counsel seek the following Order:

- a. approving the contingency fee agreement respecting fees and disbursements made between the Plaintiffs and Class Counsel dated as of October 16, 2018;
- b. approving Class Counsel’s fees in the amount of \$2,250,000, plus HST of \$292,500, and its disbursements to be incurred in providing notice of the settlement to the class in the estimated amount of \$10,000 to be paid from the Settlement Fund; and
- c. authorizing payment to the Class Proceedings Fund of its levy in the total amount of \$716,500, being 10% of the net settlement fund after deduction of legal expenses and the estimated claims administration and notice expenses.

[4] For the reasons that follow, save for the honoraria which I do not approve, I approve the settlement and Class Counsel’s fee.

B. Procedural and Factual Background

[5] The Plaintiff, Sarah Doucet, was a student at the ballet school operated by the Defendant, the Royal Winnipeg Ballet. The Plaintiff, L.K., is Ms. Doucet’s common-law partner. V.M., S.M. and A.J. are Class Members; *i.e.*, they are former students at the ballet school. The Defendant, Bruce Monk, was employed as a member of the dance company as an instructor/teacher and also as a photographer at the ballet school.

[6] In this certified class action, Ms. Doucet and L.K. allege that between 1984 and 2015, Mr. Monk photographed students of the school in private settings; and because of his misconduct at those photo shoots, he and the Royal Winnipeg Ballet perpetrated a variety of statutory and

common law wrongdoings. Pursuant to s. 61 of the *Family Law Act*,² they also allege that Mr. Monk and the Royal Winnipeg Ballet's wrongdoings support derivative claims for damages suffered by the family members of the students.

[7] The action was commenced by Notice of Action on November 17, 2016, by Sarah Doucet, against the Royal Winnipeg Ballet and Mr. Monk. Ms. Doucet was a student at the school between 1981 and 1991. L.K. is her common-law spouse.

[8] Class Counsel are Waddell Phillips Professional Corporation, a law firm with expertise in class actions and Gillian Hnatiw & Co., a law firm with expertise in sexual assault litigation.

[9] Ms. Doucet alleged three core wrongdoings: (1) by his conduct of taking intimate photographs in the private settings, Mr. Monk sexually assaulted the students he photographed; (2) Mr. Monk's taking of intimate images of the students was a breach of fiduciary duty by abusing his position of power and trust; and (3) Mr. Monk's disseminating and selling the intimate photographs without the students' consent was a breach of a variety of statutory and common law privacy and confidentiality torts. The Plaintiffs asserted that the Royal Winnipeg Ballet was vicariously liable for Mr. Monk's misdeeds, and that it was negligent in failing to supervise Mr. Monk and failing to take action when it knew about Mr. Monk's misconduct.

[10] The action was certified on June 27, 2018, following a hotly contested motion.³

[11] The action was certified for a Student Class and a Family Class as follows:

(a) a Student Class consisting of "all persons who attended the [RWB School] from 1984 to 2015 and who, while enrolled at the School, were photographed by Bruce Monk in a private setting", including the Privacy Subclass consisting of Student Class members "whose intimate photographs taken by Bruce Monk were posted on the internet, sold, published or otherwise displayed in a public setting"; and

(b) a Family Class consisting of "all dependents of members of the Student Class, as defined by s. 61 of the *Family Law Act*, RSO 1990, c. F.3".

[12] Ms. Doucet was appointed as the representative plaintiff for the Student Class, while L.K. was appointed to represent the Family Class.

[13] Twenty-three common issues were certified. These common issues correlate to the plaintiffs' claims in negligence as against Mr. Monk and the Royal Winnipeg Ballet; in breach of fiduciary duty and breach of trust as against Mr. Monk and the Royal Winnipeg Ballet; in breach of contract as against the Royal Winnipeg Ballet; in breach of confidence as against Mr. Monk; in intrusion upon seclusion as against Mr. Monk; in the tort of public disclosure of private facts as against Mr. Monk; in breach of privacy legislation as against Mr. Monk; in vicarious liability as against the Royal Winnipeg Ballet for Mr. Monk's wrongful conduct; and for punitive damages from both Mr. Monk and the Royal Winnipeg Ballet.

[14] After the certification motion, the action proceeded through discoveries and on-going periodic settlement discussions.

² R.S.O. 1990, c. F.3.

³ *Doucet v. The Royal Winnipeg Ballet*, 2018 ONSC 4008

[15] Following certification, the parties proceeded through the discovery process, and began to prepare for trial, which was scheduled to commence February 14, 2022. The plaintiffs delivered three expert reports for use at trial pertaining to: (1) the standard of care for a dance school; (2) the social and legal implications of the non-consensual distribution of intimate images; and (3) the psychological effects on a student of the student-teacher relationship in an intense dance program resulting in the inability to provide uncoerced consent. Requests to Admit and Responses to Requests to Admit were exchanged.

[16] A mediation took place on September 24, 2021, with Linda Rothstein acting as mediator.

[17] After detailed review of all available evidence, including information provided by dozens of Class Members, and the files of the Winnipeg Police Service, which were obtained on a consent Wagg motion, Class Counsel came to the conclusion that, on average, as many as 10 students per year of the class period were photographed by Mr. Monk in a private setting. In other words, it is estimated that there are approximately 250 Eligible Student Class Members.

[18] A proposed settlement was reached on the brink of the planned three-week common issues trial.

[19] On December 7, 2021, the parties executed a Settlement Agreement, effective November 15, 2021.

[20] Class Counsel recommended the Settlement to the plaintiffs as fair, reasonable, and in the best interests of the Class, and the plaintiffs agree.

[21] The Plaintiffs gave instructions to accept the settlement.

[22] Notice of the settlement was given to the Class Members. There are no objectors to the settlement or to Class Counsel's fee request.

C. The Settlement

[23] Under the Settlement, the Royal Winnipeg Ballet has agreed to pay a Settlement Fund of \$10 million to resolve this action on a full and final basis, inclusive of a contribution of \$1.0 million towards the legal costs of the proceeding.

[24] After payment of Class Counsel fees as approved, and payment of the levy to the Class Proceedings Fund, the remaining funds will be transferred to the Claims Administrator, who will hold the funds in an interest-bearing account with interest accruing to the benefit of the Class, until disbursed.

[25] Mr. Monk is paying \$10,000 to the Royal Winnipeg Ballet, which payment is unrelated to the Royal Winnipeg Ballet's payment obligations. The Royal Winnipeg Ballet was satisfied, during the course of the mediation, that Mr. Monk has limited funds available.

[26] The Settlement Fund will be distributed as follows:

- a. \$50,000 to settle the subrogated claims of the provincial & territorial health insurers ("PHIs"), to be distributed in accordance with the Distribution Protocol;
- b. \$1,000,000 to be applied towards the total legal fees payable to Class Counsel, as determined by the Court; and

- c. \$8,950,000 to compensate the Class Members, to be distributed in accordance with the Distribution Protocol.
- d. Further deductions will be made for any additional court-approved Class Counsel fees, the levy payable to the Class Proceedings Fund, any court-approved honoraria, and the costs of administering the settlement (which are estimated to be \$245,292, on the assumption of approximately 250 claimants).
- e. The Net Settlement Fund is the Settlement Fund, inclusive of all accrued interest, and after deduction of the above-listed amounts. It will be distributed to all Student Class Members who file a claim on a timely basis (and their designated FLA (*Family Law Act*) recipients, if applicable, in accordance with the Distribution Protocol.

[27] The key terms of the planned distribution of the Net Settlement Fund are as follows:

The Health Services Fund

- a. \$500,000 of the Net Settlement Fund will be allocated to the Health Services Fund;
- b. any Eligible Student Class Member may make a request for a single payment of \$1,000 from the Health Services Fund, and they do not have to establish that they suffered any harm from the photo shoot experience. It compensates for the breach of fiduciary duty;
- c. the intended (but not required) use of payments from the Health Services Fund is to compensate Eligible Student Class Members for past or future counselling or health service expenses related to being photographed by Mr. Monk in a private setting;
- d. the \$1,000 payment will be paid immediately to each Eligible Student Class Member who requests a payment from the Health Services Fund, until such time as the Health Services Fund is fully disbursed, or until all Eligible Student Class Members have been finally determined by the Claims Administrator, whichever is first; and
- e. if any amount of the Health Services Fund has not been disbursed once all Eligible Student Class Members seeking this payment have been finally determined by the Claims Administrator, then the balance of the Health Services Fund will be added to the Student Fund.

The FLA (Family Law Act) Fund

- a. \$500,000 of the Net Settlement Fund will be allocated to the FLA Fund;
- b. any Eligible Student Class Member may make a request for compensation for that claimant's associated FLA Class Members and, if a request is made, the designated associated FLA Class Member (the "designated FLA recipient") will automatically qualify to receive a single lump sum payment of no more than

\$2,500, to be distributed by the designated FLA recipient to their family members as the designated FLA recipient deems fit;

- c. the FLA payments will be paid once all Eligible Student Class Members have been finally determined by the Claims Administrator, and the total number of valid FLA claims can be determined;
- d. in the event that there are more than 200 Eligible Student Class Members with an associated designated FLA recipient, then the FLA Fund shall be distributed to the designated FLA recipients on a *pro-rata* basis; and
- e. in the event that there are fewer than 200 Eligible Student Class Members with associated designated FLA recipients, then each designated FLA recipient will be paid the maximum amount of \$2,500, and the remaining balance of the FLA Fund will be added to the Student Fund.

The Student Fund

- a. the Student Fund is the remainder of the Net Settlement Fund (including any unpaid balances from the FLA Fund and the Health Services Fund);
- b. the Claims Administrator and the Claims Evaluators will assess each claim to determine if the claimant is an Eligible Student Class Member. If they are, the Claims Administrator and the Claims Evaluators will assess each claim to determine the number of points allocable to the Eligible Student Class Member's claim;
- c. points will be allocated on the following basis:
 - i. if the Eligible Student Class Member was touched by Mr. Monk in the genital, buttock, and/or breast areas during the photo shoot while they were either unclothed or partially unclothed, and their photos were published on the internet or elsewhere without the Eligible Class Member's consent: 7 points;
 - ii. if the Eligible Student Class Member's intimate photos were published on the internet or elsewhere without the Eligible Class Member's consent: 6 points;
 - iii. if the Eligible Student Class Member was touched by Mr. Monk in the genital, buttock, or breast areas during the photo shoot while they were either unclothed or partially unclothed: 6 points;
 - iv. if Mr. Monk took photos of the Eligible Student Class Member while they were unclothed, or partially unclothed, or while they were clothed but the photographs were intimate, and the Eligible Student Class Member has suffered a severe degree of harm as a result of the photo shoot, such that it has impacted on their quality of life, employability, family relationships or otherwise: 5 points;
 - v. if Mr. Monk took photos of the Eligible Student Class Member while they

were unclothed, partially unclothed, or while they were clothed but the photographs were intimate, and the Eligible Class Member has suffered a significant degree of harm as a result of the photo shoot, which has impacted on their quality of life, employability, family relationships or otherwise: 3 points;

- vi. if Mr. Monk took photos of the Eligible Student Class Member while they were unclothed, partially unclothed, or while they were clothed but the photographs were intimate, and the Eligible Student Class Member has suffered a moderate degree of harm as a result of the photo shoot, which has impacted on their quality of life: 1 point;
- d. the Claims Administrator and Claims Evaluators will have full discretion to determine the level of harm each Eligible Student Class Member has endured; and
- e. once all Eligible Student Class Members' claims for a payment from the Student Fund have been finally assessed and the points allocated, the Claims Administrator will disburse the Student Fund by dividing the total number of points allocated to all Eligible Student Class Members who made such claims into the total Student Fund to determine the value of one point, and will then pay the value of the total points awarded to each Eligible Student Class Member, accordingly.
- f. If the Claims Administrator finds that a claimant does not qualify as a Student Class Member, the claimant has the right to request reconsideration of that decision by the Claims Administrator and may provide further information to support their claim.
- g. If an Eligible Student Class Member disagrees with the points allocation assigned to their claim, they will have up until 30 days following the expiry of the Claims Period to provide additional information to support their claim, and the Claims Administrator will reconsider the claimant's points allocation based upon the additional submissions.
- h. There is no right of appeal following any reconsideration by the Claims Administrator. (This provides finality and avoids additional delays in the distribution of the Net Settlement Fund.)

[28] The Claims Period will run for 12 months, with discretion for the Claims Administrator to accept claim forms for an additional 30 days in exceptional circumstances or if the claimant has a disability, which should provide ample time for Class Members to prepare their claims for compensation.

[29] Class Counsel will be available for the entire Claims Period to provide assistance with completing claim forms, at no cost to the Class Members.

[30] The plaintiffs and Class Counsel propose that Epiq Class Action Services ("Epiq") be appointed as Claims Administrator. The claims administration process will be overseen by Laura Bruneau as the head Claims Evaluator. Ms. Bruneau is a lawyer trained in providing trauma-informed adjudication of sexual abuse cases. She acted as the claims administrator in the

settlement of the institutional abuse class action involving the Nova Scotia Home for Coloured Children (*Elwin v. Nova Scotia Home for Coloured Children*).

[31] The Distribution Protocol anticipates that six months after the Net Settlement Fund is distributed, a small residual amount of funds may remain undistributed or cheques may have become stale-dated. In this situation, the Settlement contemplates distribution of the remaining funds to the Dancer Transition Resource Centre, as a *cy-près* award.

[32] Class Counsel recommends the Dancer Transition Resource Centre as an appropriate recipient that will benefit the Class Members. This is a national charitable organization that provides compassionate support and practical services, including counselling, to dancers at all stages of their careers.

[33] The compensation amounts to be distributed from the Student Fund will depend on the number of claims made. The Net Settlement Fund can be roughly calculated as follows: \$10,000,000 - \$50,000 PHIs payment - \$2,250,000 legal fee request (or as fixed by the court) - \$292,500 taxes on legal fees - \$10,000 projected disbursements - \$716,500 Class Proceedings Fund levy - \$70,000 requested honoraria (or as fixed by the court) - \$245,292 estimated Administration Expenses = approximately \$6,365,708.

[34] Thus, if the Student Fund totals approximately \$6,300,000 (rounded), and if a total of 500 points are awarded, then each point will have a value of \$12,600, so that each Eligible Student Class Member awarded 7 points (the highest level) would be paid \$88,200 (+ \$1,000 from the Health Services Fund + \$2,500 from the FLA Fund if requested), each Eligible Student Class Member awarded one point would be paid \$12,600 (+ \$1,000 from the Health Services Fund + \$2,500 from the FLA Fund if requested), and so forth.

[35] Based on Class Counsel's estimate of 250 claims made, Epiq's estimate of the Administration Expenses totals \$245,292.

[36] The Royal Winnipeg Ballet will issue an apology which acknowledges the harm that the student class members suffered.

D. Retainer and Counsel Fees

[37] In August 2015, Sarah Doucet retained Gillian Hnatiw at Lerner LLP to investigate commencing a class action against the Royal Winnipeg Ballet and Mr. Monk. Shortly after the action was commenced, Margaret Waddell assumed carriage of the action, with Ms. Hnatiw assisting. Ms. Waddell provided a personal undertaking to pay adverse costs pending obtaining funding from the Class Proceedings Fund. Gillian Hnatiw ultimately formed her own firm, Gillian Hnatiw & Co.

[38] On March 13, 2017, the Plaintiffs entered into a contingency fee agreement with Ms. Waddell at Phillips Gill LLP, anticipating that carriage of the action would be transferred to Waddell Phillips PC as of June 1, 2017. The Retainer Agreement called for counsel to be paid 25% of the recovery to the class, plus disbursement and taxes. The Plaintiffs entered into an amended retainer agreement with Waddell Phillips PC as of October 16, 2018 on the same terms as the original retainer agreement.

[39] The Plaintiffs brought an application for funding to the Class Proceedings Fund in July

2017 and were approved for funding on October 12, 2017.

[40] To date, Class Counsel, including Lerner LLP, has expended approximately \$1.6 million in docketed time prosecuting this action for the benefit of the Class.

[41] Class Counsel anticipates expending another 200 to 250 hours of time, with a value of \$110,000 to \$175,000, to complete the administration of the settlement.

[42] Costs of a motion brought against Mr. Monk were fixed in the amount of \$1,000 and paid to Waddell Phillips PC, in trust. Costs of a refusals motion were paid to counsel for Mr. Monk in the amount of \$3,446.10 by the Fund. The costs of the certification motion of \$135,000 were paid to Waddell Phillips PC, in trust.

[43] The costs received by Waddell Phillips PC have been disbursed: (a) to re-pay the funds advanced by the Class Proceedings Fund; (b) to pay for the notice of certification; (c) to pay for the costs of the cross-examinations and examinations for discovery; (d) to pay for three experts for the trial; (e) to pay for the mediation; (f) to pay court costs and all other disbursements incidental to the prosecution of the action. As of the date of this motion, approximately \$6,000 remains in trust. Class Counsel will put the funds remaining in trust towards the payment of any further disbursements incurred for notice costs and completion of the settlement.

[44] Class Counsel seeks approval of the Contingency Fee Agreement dated as of October 16, 2018.

[45] Class Counsel requests an order approving its fees in the amount of \$2,250,000, plus HST of \$292,500, and its disbursements to be incurred in providing notice of the settlement to the class in the estimated amount of \$10,000 to be paid from the Settlement Fund.

[46] The requested legal fees are 25% of the \$9 million Settlement Fund payable to the Class as damages, or 22.5% of the total \$10 million Settlement Fund, including the \$1 million to be allocated toward the total legal costs. This is equivalent to a multiplier of 1.27 on Class Counsel's estimated total docketed time.

E. Settlement Approval

[47] Section 29(2) 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.⁴

[48] 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

⁴ *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.).

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.⁵

[49] 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 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.⁶ An objective and rational assessment of the pros and cons of the settlement is required.⁷

[50] 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.⁸ A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.⁹

[51] The settlement in the immediate case satisfies all of the relevant factors for approval. It achieves all of the purposes of the *Class Proceedings Act, 1992* and provides meaningful access to justice to the Class Members.

F. Fee Approval

[52] 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.¹⁰ 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

⁵ *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.).

⁶ *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

⁷ *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

⁸ *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.).

⁹ *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.).

¹⁰ *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 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.).

expenditure of time in pursuit of the litigation and settlement.¹¹

[53] These 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.¹²

[54] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well.¹³

[55] 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.¹⁴ 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.¹⁵ 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.¹⁶

[56] In the immediate case, in my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request should be approved. The legal services provided were of the highest quality. Class Counsel brought a hard-fought, complex, significant legal risk action to an outcome that provides meaningful benefits to the Class Members in a settlement that is reasonable and in the best interests of the Class Members. Class Counsel earned their fee in this hard-fought litigation, and the fee should be and is approved.

G. Honorarium

[57] In the immediate case, Class Counsel recommend that the Court approve the payment of a \$30,000 honorarium to Ms. Doucet, a \$10,000 honorarium to L.K., and \$10,000 honoraria to each of the class member witnesses, V.M., S.M., and A.J.

[58] The request in the immediate case for \$70,000 in honorarium caused me to reconsider the matter of the court's extraordinary discretion to pay a litigant a stipend for prosecuting a civil claim. And having thought about it, in my opinion, the practice is wrong, and it should be stopped as a matter of principle. As I shall explain below, I have nine reasons for stopping the practice.

[59] The current law about honorarium is as follows:

¹¹ *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

¹² *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.).

¹³ *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.).

¹⁴ *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.

¹⁵ *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 at para. 92.

¹⁶ *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (C.A.).

- a. 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 an honorarium.¹⁷ However, the court should only rarely approve this award of compensation to the representative plaintiff.¹⁸ 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.¹⁹
- b. Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. 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 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.²⁰

[60] In the immediate case, Class Counsel’s support for the honorarium is set out in paragraphs 117-124 of the settlement approval factum as follows:

117. Class Counsel recommends that the plaintiffs and the class member witnesses V.M., S.M., and A.J. be awarded honoraria for their efforts in furtherance of this action and settlement.

118. A representative plaintiff(s) may receive an honorarium, on a *quantum meruit* basis, where they “rendered active and necessary assistance in the preparation or presentation of the case and ... such assistance resulted in monetary success for the class”. Such an award of compensation is made upon evidence of an “exceptional contribution that has resulted in success for the class”. When determining whether to award an honorarium and the amount of such an honorarium, the court may consider, among other factors: (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 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.

119. As set out in the facts section above, and in the evidentiary record, all of the proposed honoraria recipients have gone well above and beyond the normal course in order to assist in the prosecution and settlement of this action. They have all been instrumental in obtaining a benefit

¹⁷ *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.).

¹⁸ *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.).

¹⁹ *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.

²⁰ *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

for the class as a whole, and their exceptional efforts should be recognized.

120. Sarah brought this action years ago knowing that she would have to endure the notoriety of litigating against a prestigious institution, as well as re-live her traumatizing experiences with Mr. Monk over and over again, through written evidence, cross-examinations, discovery and trial. Despite the steep personal cost, Sarah has devoted an extraordinary amount of time and energy to helping to lead this litigation. Unlike many other lawyer-driven class actions, this truly is Sarah's action.

121. L.K. has also made exceptional contributions as the representative plaintiff of the Family Class. In her role, she gave voice to the Student Class Members' loved ones who were also impacted by Mr. Monk's conduct – demonstrating the wide-ranging impact that sexual abuse has on the victim and their loved ones. Like Sarah, L.K. was subjected to invasive and painful cross-examination on her affidavit sworn in support of certification. And, like Sarah, L.K. was an active and insightful participant at the mediation which ultimately led to the Settlement.

122. While, typically the court does not award honoraria to class members who are not representative plaintiffs, this practice is not unprecedented. It is justified when the class members have been de facto representative plaintiffs, and their actions would warrant an honorarium if they were the representative plaintiff.

123. Just like Sarah, these class members “exposed themselves to re-traumatization at great personal cost, but done for the collective benefit of the class members.” They were instrumental in the commencement and the prosecution of the action, and in communicating with class members. They suffered the same re-traumatization as did Sarah.

124. It is submitted that these extraordinary circumstances justify the granting of honoraria to V.M., S.M., and A.J., who acted essentially as additional representative plaintiffs, and whose assistance was instrumental to both the inception and the settlement of this action.

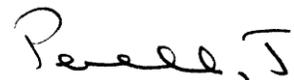
[61] My reasons for concluding that as a matter of legal principle honorarium should no longer be granted in class proceedings are as follows:

1. Awarding a litigant on a *quantum meruit* basis for active and necessary assistance in the preparation or presentation of a case is contrary to the policy of the administration of justice that represented litigants are not paid for providing legal services. Lawyers not litigants are paid for providing legal services.
2. *A fortiori* awarding a represented litigant on a *quantum meruit* basis for active and necessary assistance in the preparation or presentation of a case is contrary to the policy of the administration of justice that self-represented litigants are not paid for providing legal services. Lawyers not litigants are paid for providing legal services.
3. Awarding a litigant for such matters as being a witness on examinations for discovery or for trial is for obvious reasons contrary to the administration of justice.
4. In a class action regime based on entrepreneurial Class Counsel, the major responsibility of a Representative Plaintiff is to oversee and instruct Class Counsel on such matters as settling the action. The court relies on the Representative Plaintiff to give instructions that are not tainted by the self-interest of the Representative Plaintiff receiving benefits not received by the Class Members he or she represents.
5. Awarding a Representative Plaintiff a portion of the funds that belong to the Class Members creates a conflict of interest. Class Members should have no reason to believe that their representative may be motivated by self-interest and personal gain in giving instructions to Class Counsel to negotiate and reach a settlement.

6. Practically speaking, there is no means to testing the genuineness and the value of the Representative Plaintiff's or Class Member's contribution. Class Counsel have no reason not to ask for the stipend for their client being paid by the class members. The affidavits in support of the request have become *pro forma*. There is no cross-examination. There is no one to test the truth of the praise of the Representative Plaintiff. Class Members may not wish to appear to be ungrateful and ungenerous and it is disturbing and sometimes a revictimization for the court to scrutinize and doubt the evidence of the apparently brave and resolute Representative Plaintiff.
7. The practice of awarding an honourarium for being a Representative Plaintiff in a class action is tawdry. Using the immediate case as an example, awarding Class Counsel \$2.25 million of the class member's compensation for prosecuting the action, makes repugnant awarding Ms. Doucet \$30,000 of the class member's compensation for her contribution to prosecuting the action. The tawdriness of the practice of awarding a honourarium dishonours more than honours the bravery and contribution of the Representative Plaintiff.
8. As revealed by the unprecedented request made in the immediate case, the practice of awarding a honourarium to a Representative Plaintiff in one case is to create a repugnant competition and grading of the contribution of the Representative Plaintiff in other class actions.
9. The practice of awarding a honourarium in one case may be an insult to Representative Plaintiffs in other cases where lesser awards were made. For instance, in the immediate case, I cannot rationalize awarding Ms. Doucet \$30,000 for her inestimably valuable contribution to this institutional abuse class action with the \$10,000 that was awarded to the Representative Plaintiffs who brought access to justice to inmates in federal penitentiaries and who themselves experienced the torture of solitary confinement. I cannot rationalize awarding any honourarium at all when I recall that the Representative Plaintiff in the Indian Residential Schools institutional abuse class action did not ask for a honourarium and he did not even make a personal claim to the settlement fund. Having to put a price tag to be paid by class members on heroism is repugnant.

H. Conclusion

[62] For the above reasons, save for the honoraria which I do not approve, I approve the settlement and Class Counsel's fee and the ancillary relief.



Perell, J.

CITATION: Doucet v. The Royal Winnipeg Ballet, 2022 ONSC 976
COURT FILE NO.: CV-16-564335CP
DATE: 20220211

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Sarah Doucet and L.K.

Plaintiffs

– and –

**The Royal Winnipeg Ballet (carrying on business as
the Royal Winnipeg Ballet School) and Bruce Monk**

Defendants

REASONS FOR DECISION

PERELL J.

Released: February 11, 2022