

CITATION: Harper v. American Medical Systems Canada Inc., 2019 ONSC 5723

COURT FILE NO.: CV-15-527760-00CP

COURT FILE NO.: CV-15-529000-00CP

DATE: 2019/10/04

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**SHARON HARPER and GERALD
HARPER**

Plaintiffs

- and -

**AMERICAN MEDICAL SYSTEMS
CANADA INC., AMERICAN MEDICAL
SYSTEMS INC., and ENDO
PHARMACEUTICALS**

Defendants

AND BETWEEN:

**LINDA-SUE MIDDLETON and
HOWARD BOSSCHER**

Plaintiffs

- and -

**AMERICAN MEDICAL SYSTEMS
CANADA INC., AMERICAN MEDICAL
SYSTEMS INC., and ENDO
PHARMACEUTICALS**

Defendants

Proceeding under the *Class Proceedings
Act, 1992*

*Charles M. Wright, Jill S. McCartney, and
Daniel E. H. Bach for the Plaintiffs*

Jill M. Lawrie for the Defendants

HEARD: October 4, 2019

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*,¹ Class Counsel and the Representative Plaintiffs seek approval of a \$21.0 million settlement and approval of Class Counsel's fees in two certified class actions; namely: *Harper v. American Medical Systems Canada Inc.* (Court File No.: CV-15-527760-00CP) and *Middleton v. American Medical Systems Canada Inc.* (Court File No.: CV-15-529000-00CP).

[2] Class Counsel seeks approval of fees in the amount of \$4,170,000, plus applicable taxes, plus disbursements incurred up to September 11, 2019 in the amount of \$255,006.83, plus applicable taxes. In addition, Class Counsel seeks leave to bring future applications for an additional \$1.0 million in legal fees and disbursements incurred subsequent to September 11, 2019, plus applicable taxes.

[3] Class Counsel will ask that \$500,000 of the additional fee be paid when Class Members' claims are paid after the Initial Claim Deadline and the other \$500,000 will be requested at the conclusion of the administration of the settlement.

[4] Class Counsel also seeks approval for the payment of honoraria to the Representative Plaintiffs, Sharon Harper and Gerald Harper of \$10,000 and \$5,000 to Linda Sue-Middleton and Howard Bosscher.

[5] For the reasons that follow, the motion is granted.

B. Factual Background

1. The Parties

[6] The Defendants in both class actions are American Medical Systems Canada Inc., American Medical Systems Inc., and Endo Pharmaceuticals (collectively "AMS" or the "Defendants"). The Defendants manufactured transvaginal mesh devices, which the parties describe as Women's Pelvic Mesh Devices.

[7] The Defendants designed, marketed and sold medical devices that incorporate transvaginal mesh for the treatment of: (1) stress urinary incontinence ("SUI"); and (2) pelvic organ prolapse ("POP"), which are different conditions and different treatments. The medical devices contain synthetic, polypropylene mesh that is surgically inserted for the purpose of providing support for pelvic floor muscles. The Representative Plaintiffs allege that the Defendants' transvaginal mesh devices are unsafe. The Defendants deny all of the Representative Plaintiffs' allegations.

[8] The principal Plaintiffs in the two class actions are women who were implanted with devices designed to treat SUI and POP, respectively.

[9] Before 2015, AMS was reorganized as American Medical Systems, LLC, a wholly owned indirect subsidiary of Endo International pie. During 2015, American Medical Systems LLC and certain subsidiaries of Endo Health Solutions Inc., which engaged in its men's health business,

¹ S.O. 1992, c. 6.

were sold to Boston Scientific Corporation. A new entity, Astora Women's Health, LLC, assumed liability for the women's health business of American Medical Systems, LLC and its subsidiaries, including any liabilities related to Women's Pelvic Mesh Devices.

[10] Although a corporate relationship now exists between AMS and Boston Scientific Corporation, both it and Boston Scientific Ltd. are named defendants in a separate transvaginal mesh class action entitled *Vester v. Boston Scientific Ltd.* The *Vester Action* was certified by this court in February 2017. The settlement in the immediate case does not release claims asserted in the *Vester Action*.

[11] The Defendants ceased sales of Women's Pelvic Mesh Devices in Canada in 2016. About 53,856 devices were sold in Canada - including unused or disposed of product. Studies indicate that the rates of reoperation for mesh complications are in the 3.29% to 4.8% range. There has been extensive media coverage of the *Harper Action* and other class actions involving transvaginal mesh products. Class Counsel is aware of approximately 430 Class Members who are eligible to claim under the proposed settlement. Class Counsel estimated that between 450 and 500 women will be eligible to make claims

[12] Class Counsel are a consortium of Siskinds LLP, Rochon Genova LLP, Siskinds Desmeules s.e.n.c.r.l., and the Merchant Law Group LLP.

[13] Class Counsel were retained pursuant to contingency fee retainer agreements. Class Counsel did not apply to third-party funding or for the support of the Class Proceedings Fund. Class Counsel undertook to indemnify the Representative Plaintiff for adverse costs consequences.

2. Pre-Settlement Procedural Background

[14] The Representative Plaintiffs entered into contingency fee retainer agreements which were executed on May 11, 2012 (by Sharon and Gerald Harper) and on May 25, 2015 (by Linda-Sue Middleton and Howard Bosscher). The retainer agreements provide that in the event of success through trial or settlement, Class Counsel would seek this Court's approval for payment of a fee in an amount up to 30% of the recovery achieved for the Class, plus disbursements and all applicable taxes.

[15] On May 11, 2012, Sharon and Gerald Harper commenced an action against American Medical Systems claiming damages on behalf of all women in Canada implanted with a Women's Pelvic Mesh Device manufactured and distributed by the Defendants. The action advanced claims on behalf of women who were implanted with the devices designed to treat stress urinary incontinence ("SUI") and pelvic organ prolapse ("POP"). The Harpers alleged that the devices were unsafe and caused harm. The Defendants denied the allegations.

[16] Following completion of cross-examinations in the *Harper Action*, the parties agreed to divide the class action into two separate actions; the *Harper Action* would be certified for SUI, and a separate action, *Middleton v American Medical Systems Inc.* (the "*Middleton Action*") would be certified for POP.

[17] On consent, on May 28, 2015, the two actions were certified on a national basis.

[18] Around 40 individuals opted out of the class action after the Notice of Certification was published.

3. Settlement Negotiations

[19] Settlement negotiations began in earnest in November 2018.

[20] Throughout the negotiations, which were extensive, provincial health insurers were appraised of and participated in some of the discussions. The provincial health insurers respectively support the settlement as finally negotiated.

[21] The proposed Settlement Agreement was finalized on June 19, 2019 and executed on June 25, 2019.

[22] The Representative Plaintiffs in the *Harper Action* and in the *Middleton Action* recommend approval of the Settlement Agreement.

[23] Class Counsel recommend approval of the Settlement Agreement as being in the best interests of the Class Members.

4. Terms of the Settlement

[24] The main terms of the Settlement Agreement are as follows:

- a. The Settlement provides that \$20,858,488.48 be paid to Class Members, less payments to provincial health insurers, settlement administration costs including Notice, and Class Counsel's legal fees, disbursements, and applicable taxes all if and as approved.
- b. The Settlement provides compensation to all women in Canada with an American Medical Systems Women's Pelvic Mesh Device, regardless of whether implanted for SUI or POP and regardless of whether they have experienced medical complications.
- c. The *Family Law Act* claimants will release their claims to allow for greater benefits to be payable to the women implanted with the Defendants' device.
- d. The Net Settlement Amount will be paid pursuant to a Compensation Protocol.
 - i. The Compensation Protocol provides for 80% of the net settlement funds to be paid into the Initial Compensation Pool and the remaining 20% to be reserved for a second round of claims (the "Supplemental Compensation Pool").
 - ii. The Initial Compensation Pool will be allocated to Eligible Claimants on a *pro-rata* basis based on the severity of injury.
 - iii. The Initial Claim Deadline will expire 120 days from the date of Notice of Approval. This will permit individuals to obtain any medical records required to support their claim. Once claims are evaluated, a 60-day "deficiency period" will permit claimants an opportunity to obtain evidence in support of their claims.
 - iv. The Supplemental Claim Deadline will expire 2 years from the expiry of the Initial Claim Deadline.

- v. To claim compensation, a Settling Claimant must provide implant evidence and, if claiming compensation for surgeries or treatment, surgical or treatment evidence in a manner satisfactory to the Claims Administrator.
- vi. The Claims Administrator is afforded this discretion to ensure that Class Members who are able to provide evidence that their mesh implant is more likely than not to have been manufactured by the Defendants will be entitled to compensation in the absence of perfect evidence of product identification.
- vii. Compensation is determined based on a total of points awarded to a claimant. Points will be determined by the individual circumstances of the claimant, however all claimants with the Defendants' women's pelvic mesh implant will be awarded points and be eligible for compensation.
- viii. Class Members will be entitled to compensation if they have had the Defendants' device implanted with or without a revision or removal surgery, with certain other factors such as chronic infection, fistula, abscess and age at implant factoring into the points allocation.
- ix. The Compensation Protocol contains a chart that outlines the number of points to be allocated in respect of a claimed injury.
- x. The claims of Class Members with a device implanted but no qualifying treatments are capped at \$4,000 each.
- xi. Point values will be equal as between the Initial Compensation Pool and the Supplemental Compensation Pool, to ensure fairness among Class Members regardless of the timing of their injuries or related claim.
- xii. If additional funds remain after the first claim deadline as a result of uncashed or stale dated cheques, those funds will be added to the funds payable in the second round.
- xiii. If in the second round more claimants come forward than anticipated, point values will be decreased on a pro-rata basis.
- xiv. Depending on the amount of any funds not claimed following the Supplemental Claim Deadline, residual funds will be prorated across all approved claimants and cheques will be reissued.
- xv. If insufficient funds remain to make a further payment to approved claimants economical (for example, where administration costs would exceed the value of the cheques), residual funds will be paid *cy près*.
- xvi. Class Counsel recommend BC Women's Health Foundation as the *cy près* recipient. The Foundation proposes to apportion any money to a current annual grant program jointly offered between it and the Women's Health Research Institute, which awards funding to research focused on integrated gynaecology.

- e. Provincial and Territorial health insurers are entitled to payment based on a percentage of approved claimant eligibility. The Compensation Protocol provides that for each payment of an Approved Claimant's claim, the Claims Administrator shall apportion a payment as follows: 7.32% for Level 1 and Level 2 Approved Claimants; and 12.06% for Level 3 Approved Claimants.
- f. There is a third proposed class action in Ontario that was commenced by Caroline and Jim Snyder with respect to POP treatment devices. The *Snyder Action*, which was not pursued, was duplicative of both the *Harper Action* and the *Middleton action*. The parties seek to discontinue the Snyder action as a term of the settlement.
- g. There are four parallel class actions in other provinces; *i.e.*, one in British Columbia (the "*Koehn Action*"), one in Alberta, (the "*Boshman Action*"), one in Saskatchewan (the "*Maximovich Action*"), and one in Québec (the "*Frechette Action*"). The Settlement aims to resolve all claims in Canada relating to the Defendants pelvic mesh devices.
 - i. Dismissals of the parallel actions have been sought in each jurisdiction except Québec where an Order of Recognition and Enforcement will be sought subject to this Court granting an Order approving the settlement. Madame Justice Soldevila, the case management judge in the *Frechette Action* has indicated she is available on November 22, 2019 to hear Counsel for the Québec Recognition and Enforcement Order
- h. The Notice Plan provides that Class Counsel may apply to the Court on notice to the Defendants for approval to make any further distribution of Notices to Class Members as may be deemed necessary to facilitate their interests in the Settlement.
- i. The Parties have agreed on the form and content of a short form and a long form Approval Notice, as well as an Approval Press Release.
- j. The Notice Plan for distributing the Approval Notice was previously approved in the context of approving the Approval Hearing Notice. The Notice Plan was designed in a manner to achieve maximum reach across Canada. It provides that the Approval Notice will be disseminated on a national basis, through a number of channels, including direct mailings and both French and English newspapers, as well as web postings, e-mails, and bilingual press releases.
- k. In addition to the Notices that will be distributed through print and digital media, Notice of Settlement Approval and Notice of the Supplement Claim Deadline will be sent directly by email or mail to all Class Members, including the 430 Class Members already identified by Class Counsel, and to any new Class Members who contact the Claims Administrator or Class Counsel to receive updates.

5. Post-Settlement Background

[25] On June 25, 2019, I granted Certification Amendment Orders in both the *Harper Action* and the *Middleton Action*. The amendments expanded the class period to the date of the amended order and added women Class Members with certain additional Women's Pelvic Mesh Devices manufactured by the Defendants.

[26] RicePoint Administration Inc. was provisionally appointed as Claims Administrator in accordance with the Settlement Hearing Notice Order granted by this Court on June 25, 2019. In choosing a claims administrator Class Counsel sought competing proposals from three similarly qualified claims administrators in both Canada and the U.S.

[27] The Notice of Certification and Settlement Approval Hearing was distributed in accordance with the Notice Plan. Opt-out rights were described for the Expanded Class Members. To date no opt-outs have been received.

[28] No objections to the proposed Settlement were received from Class Members.

[29] If Class Counsel's fee request is approved, they ultimately will receive 25% of the Settlement funds. 20% of the fee is to be paid upon approval of the Settlement with a further 2.5% upon completion of the initial round of claims administration, and the final 2.5% upon completion of the second round of claims administration.

[30] Class Counsel's docketed time (exclusive of applicable taxes, as of September 11, 2019 in these matters is as follows:

(a)	Siskinds LLP:	\$1,968,853.00
(b)	Rochon Genova LLP:	\$ 353,726.25
(c)	Siskinds Desmeules s.e.n.c.r.l.:	\$ 92,371.25
(d)	Merchant Law Group LLP:	\$215,235.10
	TOTAL:	\$2,630,185.50

[31] The total fee requested represents a multiplier of less than 2.0 as of September 11, 2019 and does not include time and expenses related to individual Class Members' claims.

[32] Class Counsel's disbursements incurred in these matters up to September 11, 2019 (exclusive of taxes) are as follows:

(a)	Siskinds LLP:	\$162,981.48
(b)	Rochon Genova LLP:	\$51,882.69
(c)	Siskinds Desmeules s.e.n.c.r.l.	\$7,068.47
(d)	Merchant Law Group LLP:	\$33,074.19
	TOTAL:	\$255,006.83

[33] In addition, Class Counsel proposes to pay from the Class Counsel Legal Fees the amounts of \$50,000 to Klein Lawyers and \$150,000 to Motley Rice LLC in recognition of their contributions to the resolution of the litigation.

[34] Class Counsel remain responsible for future work after approval of the Settlement Agreement, including coordinating with the Claims Administrator, responding to Class Member inquiries, formalizing all Settlement Approval Orders, obtaining dismissal orders and the Québec Recognition and Enforcement Order, updating Class Counsel's websites, implementing the Notice Plan, monitoring the implementation of the Settlement Agreement and addressing any questions or issues raised by the Claims Administrator and attending this Court to report on the administration of the Settlement Agreement as it progresses.

[35] The Representative Plaintiffs support Class Counsel's request for fees. No objections to the fee were received from Class Members.

C. Discussion and Analysis

1. Settlement Approval

[36] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

Discontinuance, abandonment and settlement

29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[37] 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.²

[38] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation.³

[39] 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.⁴ An objective and rational assessment of the pros and cons of the settlement is required.⁵

[40] In mandating that settlements are subject to court approval, the class action statutes place an onerous responsibility to ensure that the class members interests are not being sacrificed to the interests of Class Counsel who have typically taken on an enormous risk and who have a great deal to gain not only in removing that risk but in recovering an enormous reward from their contingency fee. The incentives and the interests of class counsel may not align with the best interests of the class members, and, thus, it falls on the court to seriously scrutinize the proposed settlement both in its making and in its substance.⁶

[41] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.⁷ A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.⁸

² *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.).

³ *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.); *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69; *Fakhri v. Alfalfa's Canada, Inc.*, 2005 BCSC 1123.

⁴ *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

⁵ *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

⁶ *Welsh v. Ontario*, 2018 ONSC 3217; *Perdikaris v. Purdue Pharma*, 2018 SKQB 86; *McIntyre v. Ontario* 2016 ONSC 2662 at para. 261; *Sheridan Chevrolet Ltd. v. Furukawa Electric Co.*, 2016 ONSC 729; *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532 at paras. 3-17; *(T.) v. Alberta (Director of Child Welfare)*, 2015 ABQB 815 at para. 11; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at para. 30 (Gen. Div.).

⁷ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.); *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).

⁸ *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.).

[42] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.⁹

[43] In my opinion, the settlement in the immediate case is a good settlement and all of fair, reasonable and in the best interests of the Class Members. I approve the Settlement Agreement.

2. Distribution Plan

[44] The Courts authority to approve Distribution Plan or Compensation Protocols is grounded in its jurisdiction to approve settlements.¹⁰ Subject to court approval, Class Counsel are required to develop a distribution scheme that is in the best interests of the class.¹¹ A Plan will be appropriate if it is fair, reasonable, and in the best interests of the class.¹² Deciding what is fair and reasonable can involve considerations of what is economical and practical on the facts of a particular case.¹³

[45] The test for approving a Distribution Plan is analogous to the test that the Court applies when deciding whether to approve a settlement.¹⁴ A settlement must fall within a zone of reasonableness to be approved.¹⁵ The zone of reasonableness assessment allows for variation between settlements depending upon the subject matter of the litigation and the nature of the damages for which settlement provides compensation.¹⁶ A settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.¹⁷

[46] In my opinion, the Compensation Protocol in the immediate is within the zone of reasonableness, and is fair, reasonable, and in the best interests of the class. It should be approved and I approve it.

⁹ *Welsh v. Ontario*, 2018 ONSC 3217.

¹⁰ *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493.

¹¹ *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para. 108.

¹² *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59.

¹³ *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936 at para 34; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891.

¹⁴ *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59; *Eidoo v Infineon Technologies AG*, 2014 ONSC 6082; *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para 74.

¹⁵ *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 at para 12; *Leslie v. Agnico-Eagle Mines*, 2016 ONSC 532 at para. 8.

¹⁶ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

¹⁷ *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para 80 (S.C.J.).

3. Cy-près Awards

[47] Where a *cy-près* award is an aspect of a settlement, the principles that underlie the approval of a settlement apply.¹⁸ From a policy perspective, *cy-près* awards fulfill the compensatory and access to justice purposes of the *Class Proceedings Act, 1992*, and they also fulfill the behaviour modification policy goals of the *Act*.¹⁹

[48] A *cy-près* distribution should be justified within the context of the particular class action for which settlement approval is being sought, and there should be some rational connection between the subject matter of a particular case, the interests of class members, and the recipient or recipients of the *cy-près* distribution.²⁰

[49] Where the expense of any distribution among the class members individually would be prohibitive in view of the limited funds available and the problems of identifying them and verifying their status as members, a *cy-près* distribution of the settlement proceeds is appropriate.²¹ Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a *cy-près* distribution to recognized organizations or institutions that will benefit class members.²²

[50] In the immediate case, the design of the Compensation Protocol makes a *cy-près* distribution somewhat remote but should the need for a *cy-près* arise, I agree with the recommendation made by Class Counsel that the recipient be BC Women's Health Foundation.

4. Fee Approval

[51] 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.²³

[52] 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

¹⁸ *Carom v. Bre-X Minerals Ltd.*, at para. 141.

¹⁹ *Damage v. Ontario*, 2017 ONSC 4178; *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 at para. 123; *Alfresh Beverages Canada Corp. v. Hoescht AG*, [2002] O.J. No. 79 at para. 16 (S.C.J.).

²⁰ *O'Neil v. Sunopta, Inc.*, 2015 ONSC 6213 at para. 16; *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at para. 43; *Serhan Estate v. Johnson & Johnson*, 2011 ONSC 128 at para. 59.

²¹ *Park v. Nongshim Co.*, 2019 ONSC 1997; *Ali Holdco Inc. v. Archer Daniels Midland Co.*, 2019 ONSC 131; *Damage v. Ontario*, 2017 ONSC 4178; *Serhan v. Johnson & Johnson*, 2011 ONSC 128 at paras. 57-59; *Elliott v. Boliden Ltd.*, [2006] O.J. No. 4116 (S.C.J.).

²² *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 at para. 16 (S.C.J.); *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79 (S.C.J.).

²³ *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).

opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.²⁴

[53] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.²⁵

[54] 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 in the immediate case should be approved.

D. Honorarium

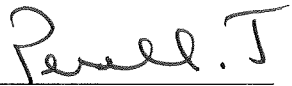
[55] Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by an honorarium.²⁶ However, the court should only rarely approve this award of compensation to the representative plaintiff.²⁷ Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.²⁸

[56] 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.²⁹

[57] In my opinion, the honorarium requests in the immediate case should be granted.

E. Conclusion

[58] For the above reasons, I grant the motion.


Perell, J.

Released: October 4, 2019

²⁴ *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233.

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

²⁶ *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 at para. 28 (Gen. Div.).

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

²⁸ *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.

²⁹ *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

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**ONTARIO
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BETWEEN:

SHARON HARPER and GERALD HARPER
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- and -

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- and -

**AMERICAN MEDICAL SYSTEMS CANADA
INC., AMERICAN MEDICAL SYSTEMS INC., and
ENDO PHARMACEUTICALS**

Defendants

REASONS FOR DECISION

PERELL J.

HARPER ET AL v AMERICAN MEDICAL SYSTEMS CANADA INC, ET
AL.
MIDDLETON ET AL v AMERICAN MEDICAL SYSTEMS CANADA
INC, ET AL.

Court File No.: CV-15-527760-00CP

Court File No.: CV-15-529000-00CP

October 4, 2019.

This is a motion for settlement
approval, for approval of a
distribution plan and for related
relief. The motion is on consent
unopposed. For written reasons to
follow, the motion is granted.
I have signed the orders.

P. J. J.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at London, ON
Transferred to Toronto, ON

Proceedings under the *Class Proceedings Act, 1992*

MOTION RECORD OF THE PLAINTIFFS
SETTLEMENT APPROVAL, COMPENSATION PROTOCOL
APPROVAL AND NOTICE APPROVAL

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