CITATION: Doucet v The Royal Winnipeg Ballet, 2023 ONSC 2323
DIVISIONAL COURT FILE NO.: 130/22
DATE: 20230420

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BACKHOUSE, MATHESON & KURZ JJ.

BETWEEN:	
SARAH DOUCET and L.K. Appellants	*Margaret L. Waddell*, for the Appellants
– and –	
THE ROYAL WINNIPEG BALLET (carrying on business as the Royal Winnipeg Ballet School) and BRUCE MONK Respondents	No one appearing for the Respondents *Eliot N. Kolers, Amicus Curiae, assisted by Muzhgan Wahaj* **HEARD at Toronto:** January 26, 2023 (by videoconference)

REASONS FOR DECISION

Matheson J.:

[1] This appeal, with leave,[1] challenges one aspect of the decision of Perell J. dated February 11, 2022 (the "Decision").[2] The Decision primarily addressed the approval of a class action settlement and the approval of class counsel fees. That relief was granted and is not under appeal. However, the class proceedings judge refused to approve certain additional payments to the representative plaintiffs and some additional class members, totaling $70,000. It was proposed that those class members receive payments from the settlement fund above and beyond the compensation provided to all class members under the settlement.

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[1] 2022 ONSC 2210
[2] 2022 ONSC 976

[2] The respondents took no part in the appeal proceedings. The court therefore appointed *Amicus Curiae* to assist the court in having full argument in the absence of a respondent.

[3] This appeal relates to the practice of awarding what are called "honorariums" to representative plaintiffs in class proceedings. The class proceedings judge expressly departed from a practice of commonly approving these payments. He correctly observed that these payments have become routine despite the jurisprudence holding that they should be rare. The appellants also propose to depart from the prior jurisprudence, submitting that these payments should be routine.

[4] For the reasons set out below, the appeal is granted in part, with respect to the lead representative plaintiff Ms. Doucet, and denied with respect to the other four proposed recipients of these payments. The principles arising from the prior jurisprudence that these payments should be rare, not routine, and should be modest, foster the goals of class proceedings while addressing significant concerns about an apparent conflict of interest between recipients of these payments and other class members. These principles have long been established and should be followed.

Background

[5] I adopt this brief description of the underlying class action from the Decision:

> [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. … 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.
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> [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*, 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. …
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> [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.

[6] The parties settled just prior to trial. The Royal Winnipeg Ballet agreed to pay a settlement fund of $10 million, all inclusive, and to give an apology.[3] There is a claims administration process and the most affected members of the class fall within a group called the Student Class. Based on an estimate of about 250 claims against the fund, each Eligible Student Class Member would receive, at the high end of compensation, about $88,000. Class counsel sought approval of their contingency fee as agreed to by the representative plaintiffs, under which 25% of $9 million plus the $1 million that the agreement contemplated for costs, be paid to class counsel from the fund. The class proceedings judge approved both the proposed settlement benefits and the class counsel fees.

[7] Class counsel also sought approval for additional payments from the fund to the two representative plaintiffs and to three class members who had supported the initiative including as witnesses. The request was for the following payments: $30,000 to Ms. Doucet, $10,000 to her common-law partner/co-representative plaintiff, and $10,000 to three other class member/witnesses. The class proceedings judge declined to approve these payments, giving rise to this appeal.

Decision

[8] The class proceedings judge found that the requested payments totaling $70,000 caused him to reconsider the practice of paying honorariums in class proceedings. He concluded that the practice should be stopped as a matter of principle. The class proceedings judge fairly summarized the then law on honorariums in Ontario class proceedings at para. 58 of the Decision, as follows:

> 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. However, the court should only rarely approve this award of compensation to the representative plaintiff. 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.
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> 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

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[3] The respondent Monk also agreed to pay $10,000, which was based upon his means to make a monetary contribution.

> 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. [Emphasis added; citations omitted.]

[9] The class proceedings judge set out the principles based upon which he denied the requested payments, at para. 61, as follows:

(i) awarding an honorarium to a litigant (whether or not represented), 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 litigants are not paid for providing legal services;

(ii) awarding an honorarium to a litigant for such matters as being a witness is for obvious reasons contrary to the administration of justice;

(iii) 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 they represent;

(iv) 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;

(v) practically speaking, there is no means to test the genuineness and the value of the representative plaintiff's or class member's contribution;

(vi) the practice of awarding an honourarium for being a representative plaintiff in a class action "is tawdry... [it] dishonours more than honours the bravery and contribution of the representative plaintiff";

(vii) the practice of awarding a honourarium to a representative plaintiff in one case creates "a repugnant competition and grading" of the contribution of the representative plaintiffs in other class actions and "may be an insult" to representative plaintiffs in other cases where lesser awards were made.

[10] The class proceedings judge concluded the same paragraph as follows: "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."

[11] Much of the Decision is grounded in precedent. Litigants are not normally paid to advance their claims. There is the potential for a conflict of interest. There is the absence of the adversarial process. Comparisons between cases are difficult. Further, these payments have become commonplace despite the jurisprudence providing that they should be exceptional. The class proceedings judge would resolve the issues and the current routine approval of these payments by discontinuing them altogether. The appellants also seek to depart from the prior jurisprudence.

Issues and Standard of Review

[12] The issue in this appeal is whether the class proceedings judge erred in failing to approve the additional payments, from the fund, to the two representative plaintiffs and three class member/witnesses.

[13] The standard of review is as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. On questions of law, the standard is correctness. On questions of fact, the standard is palpable and overriding error. For questions of mixed fact and law the standard is palpable and overriding error except that, where there is an extricable legal principle, the standard of review for the legal principle is correctness.

[14] Further, it has long been established that decisions of an experienced class proceedings judge are entitled to substantial deference and the intervention of the court should be limited to matters of principle, especially where the decision involves an exercise of discretion: *Fantl v. Transamerica Life Canada*, [2008] 244 O.A.C. 183 (Div. Ct.), at paras. 13 – 14.

[15] In my view, the overarching question is a matter of principle: should there ever be an honourarium awarded to a representative plaintiff or other class member/witness in a class action settlement? The class proceedings judge recognized the contrary law and said no. The related question is, if there is the possibility of such an award, what principles should apply? The standard of review for a discretionary decision does not arise here because the class proceedings judge did not go on to exercise his discretion given his decision on the overarching issue. I therefore conclude that the standard of review is correctness bearing in mind the expertise of the class proceedings judge. As it happens, the leading cases are also decided by expert class proceedings judges, as discussed below.

Analysis

[16] In our legal system, plaintiffs are not normally paid to bring forward their lawsuit, even though they will devote considerable time and resources to do so. Further, they are normally required to relive the factual history that gives rise to their claim and have it tested through an adversarial process. They do not receive an extra payment for doing so.

[17] There is no question that any plaintiff advancing a civil claim for sexual abuse is embarking on a difficult, emotional journey in order to pursue that claim forward to a hoped-for successful outcome. Similarly, any witness who is testifying about that type of conduct, whether it be in criminal or civil or administrative proceedings, must endure the reliving of the experience and other consequences of the court or administrative process, including cross-examination. None of this is in question. Indeed, a number of class proceedings arise from profoundly hard life experiences that must be relived and tested through court processes. I agree with the class proceedings judge's characterization of the people who put themselves forward as representative plaintiffs in these cases as heroes.

[18] The question for us is whether representative plaintiffs and other class members/witnesses should be paid for what they do in the class proceedings litigation, beyond the damages and other remedies the class receives if successful in the litigation, and beyond the amounts received for legal costs. This type of payment gives rise to a number of issues in the justice system.

[19] The early consideration of these issues concluded with a finding that a payment to a representative plaintiff should be rare (let alone a payment to a class member/witness). However, over time, the approval of these payments to representative plaintiffs in class action settlements has become commonplace.

[20] Class counsel submits that these payments should remain commonplace and asks us to depart from the weight of the authority, which provides that they should be limited to exceptional cases. The class proceedings judge, seeing the request made in this case (which is large in both monetary terms and in the inclusion of class member/witnesses), would stop the practice altogether.

[21] Another important backdrop to this issue is that it ordinarily arises in the context of a class action settlement. There is therefore a lack of the adversarial process that our justice system relies upon to test evidence and the fairness of proposed payments. As put in *Smith Estate v. National Money Mart Company*, 2011 ONCA 233, 106 O.R. (3d), at para. 15, "[o]ur system of justice is based on the basic tenet that the court will be able to reach the most informed, considered, impartial and wise decision after presiding over the confrontation between opposing parties, in which each side can identify issues, lead evidence, cite law, discuss policy considerations and seek to undermine the position of the other. Motions for the approval of settlements....in class proceedings depart from this basic tenet as a matter of routine. ... the court is placed in a difficult position without "the dynamics of the adversary system where opposing views are heard"."

[22] The appellants and class counsel are obviously not in an adversarial relationship on this issue. Class counsel is putting forward the evidence and arguments in favour of their clients. The respondents have settled and, not surprisingly, are staying well out of this issue. No one is cross-examining on the evidence put forward in support of these payments. This lack of a true adversarial process is one of the issues raised by the class proceedings judge.

[23] There is also no doubt that the goals of class proceedings are relevant considerations. In this case, the appellants focus on access to justice and behaviour modification. They submit that without this added monetary incentive, people will not come forward and pursue relief in class

proceedings. This submission is problematic. These payments are not requested in every case, yet those other claims were brought and pursued through to a settlement. However, a potential monetary incentive may serve the goals of class proceedings in other cases.

[24] The appellants submit that the class proceedings judge erred in law by failing to follow the jurisprudence under which payments have previously been approved and by failing to approve the requested payments in this case. The prior jurisprudence is the starting point for this appeal.

Prior jurisprudence

[25] To the extent that the Ontario jurisprudence, pre-Decision, addresses this issue in detail, it concludes that these payments should be rare. They should be reserved for exceptional cases. These payments give rise to conflict of interest and other issues, especially where the amounts are not small.

[26] In the early decision of *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369, [1996] O.J. No. 2897, R. Sharpe J., as he then was, awarded a $4,000 "incentive payment" to the representative plaintiff in a class proceeding after a successful trial. As set out in paras. 27-28, he did so on the basis that such awards should be limited to "special circumstances" – they "should not be seen as routine."

[27] In *Windisman*, at para. 28, Sharpe J. held that where a representative plaintiff could show that they rendered active and necessary assistance in the preparation or presentation of the case and the assistance resulted in monetary success for the class the representative plaintiff may be compensated on a quantum meruit basis. Although Sharpe J. did not give a list of potentially relevant factors, in that case he noted that the representative plaintiff had taken a very active part, had assumed the risk of costs, had devoted an unusual amount of time and effort communicating with other class members, had acted as a liaison in assisting counsel, and kept careful records of her time and effort.

[28] There are a series of more recent decisions by other expert class proceedings judges who discuss these payments in the context of a class action settlement. They also do not treat them as routine. A number of the cases highlight one of the main problems with these payments – conflict of interest.

[29] In *Sutherland v. Boots Pharmaceutical Plc.*, [2002] O.J. No. 1361 (S.C.J.), a $20,000 payment to each representative plaintiff was sought, based upon paying $200 and hour for their time spent. At para. 22, Winkler J., as he then was, observed that "where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class member". He held that while the work of the representative plaintiffs in that case was commendable, the extra compensation gave rise to an appearance of conflict of interest between the representative plaintiffs and other class members. He denied the request.

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

[31] Two decisions of G.R. Strathy J., as he then was, discussed the principles that should apply to these requests for payments in a class action settlement: *Baker Estate v. Sony BMG Music (Canada Inc.)*, 2011 ONSC 7105, [2011] O.J. No. 5781 and *Robinson v. Rochester Financial Limited*, 2012 ONSC 911.

[32] In *Baker Estate*, Strathy J. set out the following principles applicable to this type of request, at para. 93, emphasizing that this type of payment to a representative plaintiff "is exceptional and rarely done… It should not be done as a matter of course."

[33] Strathy J. held, at para. 95, that "compensation should not be awarded simply because the representative plaintiff has done what is expected of him or her. It should be reserved for cases…where the contribution of the representative plaintiff has gone well above and beyond the call of duty" (citations omitted).

[34] Strathy J. noted that even though the representative plaintiffs were "exemplary" and they had earned the gratitude of the class, it was not one of those rare and exceptional cases that called for the payment of the requested $3,000 to them.

[35] Strathy J. reinforced the above in *Robinson*. He canvased several cases at paras. 26-43 including British Columbia cases that take a less stringent approach. He concluded that there should be no added payment of $5,000 to each representative plaintiff despite the fact that they spent over 300 hours assisting class counsel and would only receive a modest award of about $6,000 in the settlement.

[36] Strathy J. noted, at para. 31, that these payments bring into play conflict of interest issues, as previously discussed by Winkler J. in *Sutherland*.

[37] At para. 43, Strathy J. commended the work of the representative plaintiffs but declined to approve the requested payments. He held that requests for compensation for the representative plaintiff were becoming routine, and agreed with Sharpe J., in *Windisman*, that they should be reserved for exceptional cases.

[38] In *Robinson*, Strathy J. set out a list of factors that "might be appropriate for consideration in determining whether the contribution of a representative plaintiff has been exceptional" at para. 43, as follows:

(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.

[39] Strathy J. acknowledged the contribution made by the representative plaintiffs in *Robinson*, commending them for the work that they had done to bring the matter to a successful conclusion. Much of what they did fell within the factors listed above. Yet he did not approve the payments. He noted, at para. 43, that requests for compensation for the representative plaintiff were becoming routine, and instead should be reserved for cases where the contribution was exceptional.

[40] In the Decision, the class proceedings judge noted the above principles and factors from *Robinson* in his summary of the current law at para. 59, quoted above.

[41] Despite the principles set forth in the above cases, the approval of these payments has become routine. *Amicus Curiae* provided a very helpful review of authorities in the more than 25 years since *Windisman*. A list of over 100 cases has been provided to the court. The review shows that in Ontario these payments have been approved in more than 80% of the class action settlements where they have been claimed. In addition, the quantum sought has risen substantially in some cases.

[42] Most cases have approved these payments with little discussion, which is not surprising because usually this request is a small part of a large settlement approval decision. Instead, they may include a brief reference to the above factors and sometimes refer to the need for the payment to be exceptional or rare: e.g., *Mallette v. Bank of Montreal*, 2021 ONSC 2922; *Bourque v. Cineflix*, 2021 ONSC 8464; *Bannister v. Canadian Imperial Bank of Commerce*, 2021 ONSC 2925; *Sheridan Chevrolet et al v. Valeo S.A.*, 2021 ONSC 7375; *Renk v. Audi Canada*, 2020 ONSC 7998; *Vester v. Boston Scientific Ltd.*, 2020 ONSC 3564; *Kafai (Litigation guardian of) v. Nature's Touch Frozen Foods Inc.*, 2019 ONSC 167; *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090; *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2018 ONSC 6818.

[43] The class proceedings judge appealed from is among the judges who have approved these payments, prior to the Decision. For example, in another abuse case this class proceedings judge approved a payment as a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice: *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528, at para. 43.

[44] The Decision was considered, and not followed, in the more recent case of *Redublo v. CarePartners*, 2022 ONSC 1398. That class action arose from an online privacy breach regarding health care and employee records. Akbarali J. approved $5,000 payments to the two representative plaintiffs. This case is discussed further below.

[45] The appellants put forward two cases to show some appellate consideration. First, they refer to *Garland v. Enbridge Gas Distribution Inc.*, 2006 CanLII 36243. At the settlement approval stage, the class proceedings judge raised the issue of conflict of interest but still approved

a (reduced) payment to the representative plaintiff. An appeal was brought and was resolved on consent without addressing the merits: 2008 ONCA 13.

[46] The second case relied upon is *Smith Estate*. In *Smith Estate*, the class proceedings judge reduced class counsel fees to about half of the claimed $27.5 million. A payment of $3,000 to the representative plaintiff was also approved but ordered to be paid from class counsel fees. The reduction of class counsel fees was appealed, along with the order that the payment to the representative plaintiff come from counsel's fees. The Court of Appeal was not called on to consider the issue of when such payments should be approved. The Court of Appeal noted that there were different approaches, concluding as follows, at para. 135: "This court has never dealt with the issue."

[47] On the issue that was before the court in *Smith Estate*, the court concluded, at para. 136 that "in the absence of any reason for providing otherwise" the payment should be made from the fund, not from class counsel fees, to avoid the spectre of fee splitting.

[48] Approaches elsewhere vary. At one end of the spectrum, these payments are prohibited in Quebec: *Attar c. Fonds d'aide aux actions collectives*, 2020 QCCA 1121, leave to appeal refused, [2021] S.C.C.A. No. 39373. As summarized at paras. 10-13 of *Attar*, before 2014, the Court of Appeal for Quebec had found that the *Code of Civil Procedure*, R.L.R.Q. c. C-25.01did not permit any compensation or renumeration for class representatives. The 2014 amendments to the *Code* permitted very limited compensation only, for legal costs, fees and disbursements: *Attar*, at paras. 14-17. The appellant argued unsuccessfully for a $5,000 payment as symbolic renumeration, based on the approval of these payments in other provinces: *Attar*, at para. 19. The Court of Appeal held that the Legislature had taken a firm stand and did not permit these payments: *Attar*, at para. 31.

[49] In contrast, the British Columbia Court of Appeal has taken a more permissive view, as set out in *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311, [2010] B.C.J. No. 1184. In that case, the Court of Appeal concluded that exceptional service was not required. As set out in para. 19, it was sufficient that the representative plaintiff fulfilled their duties and the award was not disproportionate to the benefits derived by the class members or the effort by and risks assumed by the representative plaintiff. The Court of Appeal considered the request for a $10,000 payment and reduced it to $3,500. However, the British Columbia Supreme Court recently refused to approve such a payment in a multi-jurisdictional class action settlement because it could not be done for the Quebec case that formed part of the settlement: *Coburn and Watson's Metropolitan Home v. Bank of Montreal*, 2021 BCSC 2398. Courts in other provinces have approved these payments.

[50] The appellants put forward some United States law, which shows that what are called "incentive payments" to representative plaintiffs have been common in the United States although there has recently been a change in direction in the 11th Circuit: *Johnson v. NPAS Sols.*, LLC (2022 U.S.C.A. 11th Cir.).

[51] The appellants have also put forward some *ad hoc* case law from other jurisdictions. The appellants rely on *Lee v. Bank of Queensland Limited*, [2014] F.C.A. 1376, quoting from *Darwalla*

Milling Co Pty Ltd and Others v. F Hoffman-La Roche and Others (No 2), (2006) 236 A.L.R. 322. In *Darwalla*, at paras. 75 - 76, the court noted that there were reasons for a court to pause before approving these payments, including that the claimants had chosen to renumerate themselves ahead of the distribution to class members and because of the lack of an adversarial process. However, the court allowed for the payment as some degree of compensation and reimbursement given that the amounts were modest and there should be some encouragement for people to assume the role of lead plaintiff. In *Redublo*, the court notes that in Australia, representative plaintiffs are compensated for the time they spend performing the role of representative plaintiff for the benefit of others but not the work they do to pursue their own claim: at para. 108, citing *McKenzie v. Cash Converters International Ltd. (No. 4)*, [2019] F.C.A. 166, at paras. 25-26.

[52] The prior jurisprudence reflects a number of the issues raised by the class proceedings judge in his Decision. The issues of incentives, conflict of interest and self-interest are relevant considerations on this appeal, as discussed below.

Incentive payments

[53] The appellants submit that the prospect of this payment is a significant incentive for a representative plaintiff. They submit that a payment of $5,000 to $10,000 is a tremendous incentive. These submissions underscore the issue raised by the motions judge about a payment that creates a financial incentive and the potential for a conflict of interest. This submission also runs contrary to the appellants' submissions regarding the need for a modest quantum especially when considering the $30,000 payment claimed here. These issues are discussed separately below, under conflict of interest.

[54] The appellants' submissions about incentive relate to two stages in class proceedings:

(1) an incentive to commence a class proceeding; and,

(2) an incentive to maintain an active role as representative plaintiff after the action is commenced.

(i) Incentive to commence an action

[55] The appellants argue that there needs to be a monetary incentive for people to take on the role of representative plaintiff. While I do not doubt that money can motivate some people, I am not persuaded that the possibility of a small payment upon success will be material. A plaintiff may be seeking to right a wrong, seeking justice, not motivated because they may receive a small, monetary award in addition to the remedies awarded to other members of the class. By way of example, as noted by the class proceedings judge, the representative plaintiff in the Residential Schools institutional abuse class action did not ask for such a payment: Decision, at para. 61.

[56] It is not the purpose of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, to encourage a category of plaintiffs for hire: *M.M. v. Family and Children's Services of Lanark, Leeds and Grenville*, 2021 ONSC 3310, at para. 23; *Pabla v. Caterpillar of Canada Corporation*, 2022 ONSC 732, at para. 31.

[57] The appellants submit that this potential payment is more significant in certain types of cases. I agree that access to justice may be served by permitting these payments in certain types of cases.

[58] Abuse cases are a ready example. In those cases, the representative plaintiff puts their personal experience forward, reliving their trauma, while relieving other class members from having to do so: e.g., *C.S. v. Ontario*, 2021 ONSC 6851, at para. 74; *Brazeau v Attorney General (Canada)*, 2019 ONSC 4721, at paras. 34-35. That service, for the class, is more than simply encouraging plaintiffs for hire.

[59] The other example put forward is a claim where the individual monetary relief claimed is very small. Where the case is about money and the individual damages are very small, a possible additional payment may be justified to encourage someone to undertake the role of representative plaintiff. For example, *Garland* was a case about the interest rate charged on late payment penalties. The class was so big, and the individual amounts so small, that the settlement benefits were *cy pres* payments. The class members did not receive a monetary benefit in the settlement. At the settlement approval stage, the court raised the issue of conflict of interest but still approved a payment to the representative plaintiff.

[60] Further, some cases show that representative plaintiffs have endured additional financial harm from taking on that role: e.g., *McDonald v. BMO Trust Company*, 2021 ONSC 3726, at para. 57, *Kalra v. Mercedes Benz*, 2022 ONSC 941, at paras. 34-40; *Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670, at paras. 15 and 17; *Aps v. Flight Centre Travel Group*, 2020 ONSC 6779.

[61] The exposure to an adverse costs order is also relevant. All parties in civil litigation bear the risk of an adverse costs order if unsuccessful. However, the representative plaintiff takes on that financial risk for the whole class, unless someone else steps in. In class proceedings, class counsel often give an indemnity (as occurred here) mitigating that risk. Further, the Class Proceedings Fund may take on that risk (as occurred here). But this does always happen.

[62] The above financial consequences may also support approving a payment to a representative plaintiff.

[63] The class proceedings judge gives reasons against compensating plaintiffs for providing legal services as one reason to stop these payments: Decision, at para. 61. I would not describe these payments as analogous to compensation for the provision of legal services. I disagree with the class proceedings judge that self-represented persons cannot seek some (albeit limited) compensation in ordinary litigation. However, I do not see the analogy as apt in any event. Plaintiffs in class proceedings are not self-represented, quite the opposite. They are represented by class counsel who themselves have responsibilities to the class and to move the matter forward. And class counsel have the prospect of very large fees for doing so.

[64] In conclusion, these payments are not justified in all cases based upon access to justice. However, in some cases, the prospect of this additional payment may serve the purposes of class proceedings.

(ii) Incentive for representative plaintiffs to remain active participants

[65] In contrast, I do not agree that these payments should be available to ensure that representative plaintiffs remain active participants throughout the class proceeding.

[66] For a class representative to adequately represent the class, the court should be satisfied that the proposed representative will vigorously and capably prosecute the interests of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, 201 D.L.R. (4th) 385, at para. 41; *Redublo*, at para. 39, citing *Rosen v. Nesbitt Burns Inc.*, 2013 ONSC 2144, [2013] O.J. No.. 3805, at paras. 73-74.

[67] Fulfilling this role does not lead to extra compensation: *Robertson v. ProQuest Information and Learning LLC*, 2011 ONSC 2629, at para. 73.

[68] The appellants submit that these payments should be approved when the representative plaintiff demonstrates that they are more than a "figurehead". This suggests that a representative plaintiff, after putting themselves forward for that role, could choose not to fulfill the responsibilities of that role except if paid more to do so. That would be unacceptable.

[69] A number of cases have recognized that as a general rule, representative plaintiffs do not receive additional compensation for doing their job as class representative: e.g., *Robertson v. ProQuest Information*, at para. 76; *Kalra*, 2022 OSC 941, at para. 34; *Casseres v. Takeda Pharmaceutical Company*, 2021 ONSC 2846, at para. 10; *MacDonald*, 2021 ONSC 3726, at para. 55; *Aps*, at para. 43.

[70] To put themselves forward, the proposed representative plaintiff should be committed to fulfilling their responsibilities, including active involvement in every step of the litigation including the settlement of the litigation, without seeking added compensation.

[71] An additional payment should be available only where the representative plaintiff can demonstrate a level of involvement and effort that is "truly extraordinary". I do not agree with the appellants' submissions that we should permit these payments "while doing away with the concept of "exceptionality" expressed by Strathy J. in *Robinson*."

[72] The phrase "active and necessary assistance" is often used to describe the activities of the representative plaintiff when seeking approval of these payments. That phrase comes from *Windisman*. It is often taken out of the context in *Windisman*, where the court ruled that these payments should be rare, not routine. Instead, it is often used to describe the necessary steps that all representative plaintiffs must take to fulfill their responsibilities.

[73] The appellants submit that because *Windisman* does not use the phrase "extraordinary efforts", it did not require that the contribution be exceptional. This overlooks Sharpe J.'s finding that these awards should be limited to "special circumstances" – they "should not be seen as routine": at para. 28.

[74] I therefore conclude that the contribution made by the representative plaintiff must go beyond what is normally expected for that role.

Rewarding representative plaintiffs

[75] The appellants also submit that these payments should be made because they "recognize and reward" representative plaintiffs for the efforts that they have expended for the benefit of the class beyond what would be required of a plaintiff in individual litigation. They submit that these payments acknowledge a "job well done". The appellants rely on *Redublo*, at para. 112e, and submit that it is for the claimants to decide if they would be honoured or dishonoured by such a monetary payment.

[76] In *Redublo*, at para. 112e, the class proceedings judge observed that the civil justice system does not have "trophies", only monetary awards. With respect, I have two difficulties with this observation. First, courts can and do commend the contribution of participants in the justice system. For example, in *Baker Estate*, Strathy J. said that the representative plaintiffs were exemplary and had earned the gratitude of the class. I would hope that this would be meaningful to at least some people. Second, I disagree with the suggestion, by the appellants, that there should be a "trophy" in monetary form.

[77] One need only turn to the criminal justice system and ask why victims are not given monetary awards for their participation, reliving traumatic events and having those experiences tested and challenged in the course of the administration of justice. They may be compelled to testify. They may be subjected to aggressive cross-examination. Their testimony is critical to the workings of the criminal justice system. They get no monetary trophy.

[78] In my view, the concept of a monetary trophy does not have a place in the civil justice system. The focus should be on compensation and fostering the goals of class proceedings.

Conflict of interest/self-interest

[79] As emphasized in the prior jurisprudence of Winkler and Strathy JJ., the potential for conflict of interest is a significant concern. This issue demands that these payments not be routine and that, when approved, they be modest in amount.

[80] As put by Winkler J. in *Sutherland* and underscored by C. Horkins J. in *Robertson v. ProQuest Information*, the extra compensation gives rise to an appearance of conflict of interest between the representative plaintiff and other class members. Even the British Columbia Court of Appeal's decision in *Parsons*, which took a more permissive approach, found at para. 19 that there was "no doubt that a representative plaintiff could be tempted to act in self-interest, contrary to the interest of class members, where the potential exists for substantial preferential treatment in the terms of the settlement."

[81] "A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims": *Tesluk v. Boots Pharmaceutical PLC*, 2002 CarswellOnt 1266, at para. 22, per Winkler J.

[82] Further, a representative plaintiff must oversee entrepreneurial class counsel. The court must have confidence that the representative plaintiff's instructions are not tainted by self-interest: *Redublo*, at para. 112b.

[83] The appellants acknowledge that many courts have identified that these payments could lead to the appearance of a conflict of interest between the recipients and the other class members, particularly when the amounts are too high. The appellants therefore submit that the court must be vigilant to ensure that the payment is proportionate. The appellants submit that it must be a "token payment". However, the amounts sought in this case are neither modest nor token.

[84] I agree with the appellants that ensuring that the quantum is not high is of some assistance in addressing conflict of interest issues. However, the information provided by *Amicus Curiae* shows that a few of the amounts claimed have been far from modest, including not only the amounts claimed here but much higher amounts.

[85] The appellants acknowledge that in Ontario payments have been approved in larger amounts than British Columbia's modest awards. They note that typical awards are now as much as $10,000 where there have been no extraordinary efforts or risks taken on and no additional trauma or harm. This shows that we have moved beyond the token awards needed to mitigate the concern about conflict of interest.

[86] *Redublo* suggests that comparisons with other cases are of some assistance. A high-level comparison shows that some of these payments have exceeded token or modest amounts, as discussed above. A more case-specific comparison is difficult, as underscored by the class proceedings judge in his Decision. There is usually only a brief discussion in each decision. And, as noted in the Decision, the judge is left to compare "heroes": Decision, at para. 61 .

[87] The appellants submit that the conflict of interest concern is also addressed by the need for compelling evidence and court approval, relying on *Redublo*, at para. 112c. I agree that there must be compelling evidence, but it remains the case that there is no adversarial process to test that evidence. Court approval is relevant as well, with the same caveat. Further, the appellants' position that these payments should be routine undermines the role of court approval. If that becomes the law, the role of court approval is diminished.

[88] In *Redublo*, the class proceedings judge suggested that the conflict of interest issue could be addressed, at least in part, by disclosing the proposed payments in the notice of settlement approval. Class members could come forward and object.

[89] It would be better if class members had notice. These payments were not disclosed in the *Doucet* notice, and there is no suggestion that it has been the practice to include them in notices. But it would not go far in addressing the conflict issue. First, the notice would have to be prominent so as not to be lost in the myriad of details about the settlement. Second, class members who wished to object would be put in a position of conflict. They would have to risk an adverse impact on the rest of the settlement approval if they objected to these payments. They may not want to risk losing the settlement benefits. This is a choice class members should not have to make.

[90] To address the apparent conflict of interest, it is also important that the payment is not added compensation for the harms that are the subject of the claim itself. Any such payment should respond only to additional efforts or harms that do not form part of the claimed remedies. Otherwise, the representative plaintiff is receiving a better remedy for the wrong than the other class members, which should not occur.

[91] Thus, the need for evidence, and court approval, does not sufficiently mitigate the concerns about conflict of interest. However, the need for an extraordinary basis for the claimed payment, and ensuring the amounts are small, do mitigate those issues.

Established test should be followed

[92] I conclude that the principles set out in the prior jurisprudence, which provide that a modest payment to the representative plaintiff could be available in exceptional circumstances, should be followed. Those principles provide that these payments should be rare, not routine, and should be modest. They should foster the goals of class proceedings while addressing significant concerns about an apparent conflict of interest between recipients of these payments and other class members. Summarizing that jurisprudence, as it has developed, the court addressing these proposed payments should have regard to the following factors in the exercise of their discretion to approve or disapprove requests for these payments:

1. The nature of the case, including whether the representative plaintiff brings forward a claim (such as for sexual abuse) in which they expose themselves to re-traumatization for the benefit of the class.

2. The nature of the remedies available for the cause of action asserted, particularly cases where even complete success would lead to only a tiny monetary remedy for each class member or none at all.

3. The steps taken by the representative plaintiff, who must do more than taking an active role and fulfilling the normal steps required in class proceedings, achieving a settlement. Exceptional circumstances include enduring significant additional personal or financial hardship in connection with the prosecution of the class proceeding.

4. The rationale for the requested payment, which must not be added compensation for losses or damages that fall within the potential remedies available for the causes of action asserted in the claim itself or for the necessary steps to fulfill the responsibilities of a representative plaintiff.

5. The exposure to a real risk of an adverse costs award.

6. The quantum of the requested payment, which must be modest both in general terms and in relation to the remedies available to the class members in the settlement.

[93] I would therefore not uphold the Decision of the class proceedings judge or the position of the appellants. Both advocate for a significant departure from the established principles.

Non-representative plaintiff class members

[94] There is then the question about the proposed payments to class members where a settlement is reached pre-trial. The appellants submit that these payments should be approved where class members take on roles substantially similar to representative plaintiffs.

[95] In this case, the payments are sought for three class members who assisted the representative plaintiff Ms. Doucet in the activities taken in furtherance of the hoped-for criminal proceedings and continued to assist in the later class action. Among other things, they helped with the search for the photos and the students as well as with the media initiatives. They provided affidavits in support of the certification motion, on which they were cross-examined. One of the three class members was willing to be the representative plaintiff if needed but did not assume that role.

[96] The conflict of interest issue is heightened where it is proposed that additional class members, beyond the representative plaintiff, should also receive additional payments. There could be many class members who, in different ways, support the effort to move a class action forward to a successful conclusion. The representative plaintiff takes on added legal obligations and financial risks. Other class members do not do so. This gives rise to the question of why a select few other class members would receive an additional monetary award. It increases the perception of favouring some class members over others.

[97] Broadening the group of class members who may receive such a payment is also contrary to the principle that, even for representative plaintiffs, these payments should be rare.

[98] One of the main steps taken by the three proposed recipients in this case is their role as fact witnesses. They each put forward an affidavit on the certification motion and were cross-examined on their affidavits. In our justice system, fact witnesses do not get paid for their testimony. They do not need a monetary incentive to testify. They may choose to do so. They may be compelled to do so. Further, it could undermine the credibility of the witness's testimony by raising the question of whether the witness was motivated to give a particular factual account because of the expectation of an additional payment of money. A payment for testifying is at odds with the role of fact witnesses in our justice system.

[99] There is little precedent for these proposed payments. The appellants put forward *Loewenthal v. Sirius XM Holdings, Inc.*, 2021 ONSC 8220, a privacy case about pre-owned vehicles. A payment of $5,000 was approved to both the representative plaintiff and another class member who was prepared to assume that role (but did not do so) and helped with the litigation. I respectfully disagree with that decision insofar as it relied on the class member's willingness to assume the risks in support of the requested payment. Nor does it appear that the class member made an exceptional contribution.

[100] The appellants also put forward *Anderson v. Canada (Attorney General), 2016 CanLII 76817* (NL SC). This was a mid-trial settlement in an institutional sexual abuse class action on

behalf of Indigenous students in schools, dormitories and orphanages in Newfoundland and Labrador. After the case for the class was completed, the parties settled. In the course of approving the settlement, the court approved of the payment of $10,000 to the representative plaintiff and $1,000 to each of the survivor witnesses who testified at trial. The trial judge approved of these payments with emphasis on the nature of the case and noted the difference between being examined for discovery and having to testify about such personal matters at a public trial. While I accept that some of the commentary in *Anderson* overlaps with this case, given that this too is a sexual abuse case, that decision does not address the issue of conflict of interest.

[101] *Amicus Curiae* has also brought *Heyder v. Canada (Attorney General)*, 2019 FC 1477 to our attention. It is a class action settlement arising from the External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces. At para. 98, the court observed as follows: "Ordinarily, honoraria may be paid only to representative plaintiffs in class proceedings that are included in the Court's certification order. However, exceptions may be made in unusual cases, such as these, where the named Plaintiffs in the related Provincial Actions also made significant contributions to advancing the claims across multiple jurisdictions." (emphasis added). Thus the class members were also plaintiffs, albeit not representative plaintiffs. The court did not address the issue of conflict of interest. The court concluded, at para. 99, that because the payments had been agreed to by the Attorney General, and were relatively modest, there was "no reason why they should not be approved."

[102] The appellants also rely on the Australian decision in *Smith v. Commonwealth of Australia (No 2)*, [2020] FCA 837, dealing with the settlement of a group of class actions arising from the use of firefighting foam and resulting damage to property. In one of those cases, the court was asked to approve payments to twelve people "for their time, trouble and expenses incurred in representing the class". The court approved reduced yet still substantial payments without a discussion that would permit an analysis of the differences between Australian and Ontario law on this issue.

[103] These few cases do not address the issues in a thorough way, and do not compel the expansion of these payments to other class members on the basis proposed by the appellants. Further, considering the heightened spectre of conflict of interest for these claims, it is not enough to say they should be rare and small.

[104] Class members should not be faced with distinctions with various other class members that are not based on the merits of the claim. They should not be faced with a distinction based on what would be an *ad hoc* assessment of the relative contributions made by some people in support of the prosecution of the class action. They should not be obliged to object and risk the approval of the settlement. They should not be faced with these distinctions in a non-adversarial context. And if a class member is a witness, there should not be a risk that their evidence would be undermined by the prospect of receiving more money. Even if a payment was permitted, the amounts would have to be so small, given these issues, that the appearance of a conflict should not be permitted to arise at all.

[105] I therefore conclude that payments to non-representative plaintiffs should not be permitted on the proposed basis. I note that this case does not involve a request for payments to class

members who testified at a public trial of the sort that transpired in *Anderson*. Although I expect that there would be the same or similar issues about such a payment to witnesses, and conflict of interest would need to be addressed, that category of request is not at issue on this appeal. I therefore do not purport to decide it. It is best left to a case where the issue is front and center.

Application to this case

[106] The appellants ask that this court decide the question of whether the requested payments should be approved in this case, rather than sending the matter back. In the circumstances of this case, we are prepared to do so. As set out below, I conclude that there should be an award in favour of Ms. Doucet. The second representative plaintiff fulfilled their responsibilities as representative plaintiff for the family class admirably but that participation did not extend well beyond the steps that needed to be taken to reach the successful conclusion. As discussed above, I would not approve an award to the other three class members. I commend their commitment to right a wrong and assist the representative plaintiffs and class counsel in this case.

[107] The evidence shows that although Ms. Doucet is one of two representative plaintiffs, it is she who has been the main proponent of this class action. Her common-law partner joined at a later stage, to represent the *Family Law Act* claimants, and has been much less involved.

[108] There is no suggestion that these representative plaintiffs needed an additional monetary incentive to bring forward this claim. The steps taken after photos were discovered were focused on hoped-for criminal charges. Among other activities, Ms. Doucet and others sought out the photos and other affected students and went to the authorities and the media in relation to the potential criminal charges. If there had been criminal charges, Ms. Doucet and others may have faced a highly contested defence and aggressive cross-examinations and they still moved forward.

[109] The lack of criminal charges led to the commencement of the class proceedings, in order to get justice for the students affected by the abusive conduct. Initially, Ms. Doucet was the sole plaintiff. Her common-law partner was then added to represent an added family class.

[110] The subject matter of this case – sexual abuse – is a factor that favours approving of a payment to Ms. Doucet. Ms. Doucet has had to relive her trauma for the benefit of the class and has protected the rest of the student class from being re-traumatized in the same way (excepting the three other class members who agreed to do so by becoming affiants). The appellants submit that they were subjected to aggressive cross-examination (but not improper cross-examination). This is part of the reliving of the trauma that favours a finding that this case is rare, especially for Ms. Doucet.

[111] I agree that difficult public/social media exposure could also be a factor in favour of treating this as an exceptional case. In this case, public steps had already been taken in the hoped-for criminal proceedings. That bridge had been crossed. However, public steps did continue after this action was commenced. Perhaps because her name had already been made public in the criminal context, Ms. Doucet did not seek to sue using a pseudonym in the civil litigation. That relief was given to her common-law partner. The representative plaintiff endured significant additional personal hardship seeking justice.

[112] There was no substantial risk of costs exposure in this case. Initially, there was an indemnity from class counsel. Later on, the Class Proceedings Fund assumed that risk.

[113] I accept that Ms. Doucet's common-law partner/co-representative plaintiff fulfilled their responsibilities in that role, provided emotional support to Ms. Doucet and to some extent had to expose otherwise private family matters. The level of engagement was commendable. However, it did not extend well beyond the required active participation of a representative plaintiff and rise to the level needed to be exceptional. I would not approve a payment in this instance.

[114] However, I do find that bearing in mind all considerations, Ms. Doucet should receive a modest payment. She was a victim of the abuse that founds this claim. She put her claim forward for all of the students who were abused. She re-lived her trauma for the benefit of the class. She faced the forum of social media and its consequences without any protection of her identity. Her dedication to and work to move this matter forward to a successful conclusion was exceptional.

[115] There is then the question of quantum. The claimed amount of $30,000 is not modest. The appellants agree that the amount sought is high yet submit that it is justified. While the analysis will be driven by the circumstances of the class proceeding, a quantum will be modest where it takes into consideration the factors justifying a payment, is not disproportionate in comparison to the benefits the class will receive and avoids a perceived conflict of interest between the representative plaintiff and the other class members.

[116] While there is no approved "range", the detailed review done by *Amicus Curiae* shows that the majority of these awards are less than $5,000 although there is no doubt that larger amounts are becoming more frequent. Of the 115 cases where these payments were approved in Ontario as of the time of this appeal, there are almost 50 that have approved an amount between $5,000 and $15,000. Many cases that award large amounts do not confront the resulting conflict of interest issues.

[117] Here, the quantum should also be compared to what benefits the class will receive when considering whether it is modest. Looking at the high end of monetary benefits for the student class, which average around $80,000, the claimed amount of $30,000 does not compare well.

[118] As discussed above, large amounts underscore the problem with a perceived conflict of interest between this representative plaintiff and the other class members. These payments would come from the fund that is intended to be divided between class members based upon the merits of their claims, not some large added compensation for a select class member. The amount claimed is far from modest.

[119] Bearing in mind all relevant factors, I would approve a payment to Ms. Doucet of a modest amount, specifically $7,500. The other requested payments are not approved.

Disposition

[120] I would therefore grant this appeal in part, approving a payment to Ms. Doucet of $7,500. No costs are requested or ordered. The court thanks *Amicus Curiae* for the tremendous assistance provided on this appeal.

[redacted]
Justice Matheson

I agree [redacted]
Justice Backhouse

I agree [redacted]
Justice Kurz

Released: April 20, 2023

Doucet v. The Royal Winnipeg Ballet, 2023 ONSC 2323
DIVISIONAL COURT FILE NO.: 130/22
DATE: 20230420

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SARAH DOUCET and L.K.

BETWEEN:

THE ROYAL WINNIPEG BALLET (carrying on business as the Royal Winnipeg Ballet School) and BRUCE MONK

REASONS FOR DECISION

Released: April 20, 2023