Court of King's Bench of Alberta

Citation: Singh v GlaxoSmithKline Inc, 2025 ABKB 136

Date: 20250307
Docket: 1201 12838
Registry: Calgary

Between:

Fiona Singh
and
Muzaffar Hussain, by his litigation representative Fiona Singh

Plaintiffs

- and -

GlaxoSmithKline Inc,
GlaxoSmithKline LLC, and
GlaxoSmithKline PLC

Defendants

Reasons for Decision on the Costs Application
of the
Honourable Justice EJ Sidnell

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1. Introduction

[1] This decision relates to three broad issues arising in the context of a class action settlement brought under the *Class Proceedings Act*, SA 2003, c C-16.5 (*CPA*):

(a) What is the appropriate quantum of the legal fees, disbursements and applicable taxes (collectively, Legal Costs) to be paid to counsel acting for the representative plaintiffs, Fiona Singh and her son, Muzaffar Hussain (collectively, Ms. Singh), and the class?

(b) How should the Legal Costs be allocated among counsel?

(c) Is Ms. Singh entitled to an honorarium?

[2] The unusual circumstances of this case have resulted in a battle for Legal Costs among several well-known members of the class action bar.

[3] Given the complex factual context, the circumstances giving rise to the dispute are set out as succinctly as possible, but at length, before the issues are addressed. The introduction and issues sections of this decision are followed by sections: providing a calculation based on assumptions, setting out the next steps, and directing how costs are to be addressed.

1.1 Approval Application

[4] This action was commenced on October 12, 2012, and the pleadings, amended, allege that:

(a) the medication Paxil® and Paxil CR™ (collectively, Paxil) cause or increase the likelihood of certain congenital malformations in children born to women who took those medications while they were pregnant; and

(b) the defendants (collectively, GSK), failed to provide an appropriate warning of the risk described above.

[5] The class proceeding was certified on November 17, 2022: ***Singh v Glaxosmithkline***, 2022 ABKB 762 (***Certification Decision***). GSK appealed the certification order. GSK denies that it is liable and contends that it has a reasonable defence to the action. Notwithstanding this denial, counsel for Ms. Singh negotiated a settlement of the class claim with GSK.

[6] On September 24, 2024, Ms. Singh and GSK brought a joint application for the approval of a proposed settlement (Approval Application) on the basis that it was fair, reasonable and in the best interests of the class members.

[7] At the Approval Application, I was asked to approve the proposed settlement in the form of a comprehensive settlement agreement (the Proposed Settlement Agreement), which included:

(a) a global settlement with GSK in the amount of $7,500,000 and a full release of GSK;

(b) the appointment of a "Claims Administrator" to, among other things, manage the website for potential class members, serve materials related to the action, distribute the settlement funds, and make payment of certain Claims Administrator's fees;

(c) a "Distribution Protocol" whereby individual claims would be considered by a medical professional and allocated points based on symptoms so that:

(i) individual claims could be determined to be valid or invalid based on specified criteria, and

(ii) each valid claimant would be allocated points that would translate to a percentage of the settlement funds available for class members (Eligible Claimants);

(d) a settlement with provincial and territorial health authorities;

(e) the content and means of giving notice of settlement approval;

(f) the Legal Costs for:

(i) current counsel for Ms. Singh and the class, who were specified as:

(A) Casey Churko, in the amount of $850,000, plus GST, and payable to KoT Law Professional Corporation (KoT PC); and

(B) Clint Docken, KC, in the amount of $50,000, plus GST, and payable to Clint Docken Professional Corporation (Docken PC);

(ii) former counsel for Ms. Singh and the class, who was specified as:

(A) EF Anthony Merchant, KC, in the amount of $1,100,000, plus GST, payable to Merchant Law Group LLP (Merchant Law);

(iii) counsel engaged by individual Eligible Claimants, who were not specified; and

(g) an honorarium for Ms. Singh.

[8] For the reasons I gave at the Approval Application, I approved those aspects of the Proposed Settlement Agreement addressing points (a) to (e) in the paragraph above.

1.2 Adjournment of Legal Costs at the Approval Application

[9] At the Approval Application, Mr. Churko and Mr. Docken advised the Court that they were jointly representing Ms. Singh and the class.

[10] Mr. Churko initially asserted that the Court had an obligation to consider the Proposed Settlement Agreement as an all-or-nothing settlement, which included wording to that effect in clause 3.2. At the Approval Application, I raised concerns regarding proceeding with the Proposed Settlement Agreement as an all-or-nothing settlement, including that:

(a) courts cannot be forced to consider an all-or-nothing settlement as that could lead to a conflict between a settlement with a defendant that is reasonable and in the best interests of the class and an award of Legal Costs which are not reasonable nor in the best interests of the class; and

(b) the *CPA* authorizes the Court to approve a settlement on terms and conditions that the Court considers appropriate.

[11] Mr. Churko subsequently acknowledged that an all-or-nothing settlement proposal could result in a situation where a good settlement is held hostage to a proposal on Legal Costs.

[12] Before the Approval Application commenced on its merits, Mr. Churko, Mr. Merchant and Mr. Sutton agreed that the issue of the Legal Costs and honorarium would be adjourned and heard separately (the Costs Application).

[13] At the beginning of the afternoon session of the Approval Application, Mr. Docken asserted that:

(a) despite his requests, Mr. Churko had not provided him with a copy of the Proposed Settlement Agreement;

(b) the Proposed Settlement Agreement did not reflect the legal counsel fees that had been agreed to at the mediation where the settlement with GSK was reached and which had been set out in an earlier unsigned settlement agreement with GSK (the Draft Settlement Agreement); and

(c) an adjournment was required.

[14] Mr. Docken withdrew his application for an adjournment when he understood that the Costs Application was already adjourned.

[15] While the fracturing position of current and former class counsel was evident at the Approval Application, it came into full force with the filing of materials for, and at the hearing of, the Costs Application.

1.3 Procedural steps and parties

[16] To prepare for the Costs Application, the parties who attended the Approval Application were requested to attend a procedural hearing, which was eventually held on November 8, 2024. At that procedural hearing, there were two possible dates discussed for the Costs Application: December 6, 2024, and January 27, 2025, and, in the end, both dates were used. Deadlines were set with the input of Mr. Docken, Mr. Churko and Mr. Merchant. I issued four procedural Endorsements dated October 22, October 29, November 13, and November 15, 2024.

[17] In ***Singh v Glaxosmithkline Inc***, 2021 ABQB 316 (the ***Change of Representation Decision***), ACJ Rooke (ret), the former case management justice for this litigation, approved Ms. Singh's filed Notice of Change of Representation from Merchant Law to the "Consortium" of "Guardian Law and KoT Law": at para 2. The Notice of Change of Representation was filed on May 3, 2019 and, pursuant to Rule 2.28, that notice was effective when it was filed and served. I have no information as to the date of service and, for the purpose of this decision, assume that it was served on or around May 3, 2019: ***Change of Representation Decision*** at paras 2, 10-11.

[18] The ***Change of Representation Decision*** reflected the names of the legal representation noted in the Notice of Change of Representation:

> ... from E.F. Anthony Merchant, Merchant Law Group LLP to Casey R. Churko of KoT Law and Clint G. Docken of Guardian Law Group LLP.

[19] Even though Ms. Singh was represented by the law firm of Napoli Shkolnik Canada at the Approval Application, the only Notice of Change of Representation that was filed was that on May 3, 2019, which was approved by the ***Change of Representation Decision***.

[20] The November 13, and November 15, 2024 procedural Endorsements required notice to be given to the former partners of Guardian Law Group LLP, a law firm that ceased operating in 2022 (Guardian Law). Counsel for Guardian Law submitted, and I accept, that there is now another law firm operating under the banner of "Guardian Law" that is a different firm than the one which was a member of the Consortium. In these reasons, all references to Guardian Law are to the law firm which was a member of the Consortium and which has now ceased operating.

[21] As discussed in further detail below, there were serious allegations made among counsel who have a vested interest in the quantum and allocation of the Legal Costs.

[22] Because the lawyers and the firms involved are relevant to these reasons, the following is context regarding each of the parties who were granted standing at the Costs Application:

(a) Mr. Churko:

  (i) formerly a lawyer with Merchant Law until mid-January 2019 (***Change of Representation Decision*** at para 10) who had been working on this class action from 2017;

(ii) the sole director, officer and shareholder of KoT PC, of the Ontario and Saskatchewan bars; and

(iii) through KoT PC purports to be a partner in Napoli Shkolnik Canada and asserts that he continues in that role in representing Ms. Singh;

(b) Mr. Docken, who was a partner of Guardian Law, and later a consultant to Napoli Shkolnik Canada, represented in the Costs Application by Ross Nasseri LLP;

(c) Mr. Merchant, through Merchant Law, was counsel of record for Ms. Singh until the filing of the Change of Notice of Representation on May 3, 2019: ***Change of Representation Decision*** at paras 10-11;

(d) Napoli Shkolnik Canada, which asserts it is represented in the Costs Application by Ross Nasseri LLP and not Mr. Churko, and filed affidavits sworn by Mario D'Angelo, a lawyer licensed to practice in New York, who identified as an agent of McIntyre Law PC, and who worked on the class action for a number of years; and

(e) Guardian Law, which is represented in the Costs Application by Jonathan Denis, KC.

[23] In the Costs Application, a number of agreements among counsel were attached to affidavits, but there was no evidence that these were all of the pertinent agreements:

(a) KoT PC and McIntyre Law PC (of the Oklahoma State Bar) entered into an International Law Partnership Agreement, dated January 31, 2019 (the First Collaboration Agreement), to create and participate in "KOT Law", also referred to as "KoT Law" in the documentation;

(b) Mr. Churko, on behalf of KoT PC, and Mr. Docken on behalf of Guardian Law, both signed an agreement with McIntyre Law PC, dated April 25, 2019 (the Second Collaboration Agreement), to "co-counsel" with Guardian Law to bring all "Paxil litigation to an end via a successful settlement of all cases including the pending class action case"; and

(c) KoT PC, McIntyre Law PC, and Napoli Shkolnik PLLC, entered into an International Law Partnership Agreement, dated October 2, 2019 (the Third Collaboration Agreement), to create and participate in Napoli Shkolnik Canada.

[24] The First Collaboration Agreement, Second Collaboration Agreement, and Third Collaboration Agreement, all arose in 2019 after Mr. Churko's departure from Merchant Law.

[25] I refer to the law practice created by the First Collaboration Agreement as "KoT Law 2019". Neither the application before ACJ Rooke nor the ***Change of Representation Decision*** identified what "KoT Law" meant. Given that KoT Law 2019 was created on January 31, 2019, Ms. Singh filed a Notice of Change of Representation on May 3, 2019, and the ***Change of Representation Decision*** was issued in 2021, I find that when ACJ Rooke granted the Consortium the right to continue with the class action he was referring to Guardian Law and KoT Law 2019, as it may have been modified by the Second Collaboration Agreement and Third Collaboration Agreement.

1.4 Contingency Fee Agreement

[26] Ms. Singh signed a contingency fee agreement with Merchant Law, dated August 22, 2018 (the Contingency Fee Agreement). In her February 7, 2020 affidavit, Ms. Singh swore that she was never served with a copy of the Contingency Fee Agreement, which is a requirement under the *CPA*, s 38(5).

[27] None of the parties rely directly on the validity of the Contingency Fee Agreement. Mr. Churko suggests that the Contingency Fee Agreement sets out the expectation of Ms. Singh and the class as to Legal Costs. This expectation, however, must be considered in light of Ms. Singh's February 7, 2020 affidavit, where she disavowed portions of the Contingency Fee Agreement:

> ... I am not now (and nor was I ever) willing to represent the class on the basis that:
>
> (a) all costs awarded against GSK in my favour are paid to Mr. Merchant, while all adverse costs awarded to GSK go against me (and particularly adverse costs resulting from the Merchant Law Group's misconduct); and
>
> (b) if successful, I stand to receive the same compensation I would receive in an ordinary action, but if unsuccessful, become liable for additional costs incurred only in a class action, while
>
> (c) Mr. Merchant receives millions of dollars in fees and all costs awarded if successful, but pays no adverse costs awards on failure (including those resulting from poor representation-the *2014* and *2016 Costs Decisions*, for example).

[28] I find that the Contingency Fee Agreement does not meet the requirements of the *CPA*, and is not a valid contingency fee agreement for the purpose of this class action.

1.5 "Lawyers' Fees" under Individual Retainers

[29] To support his position there should be a portion of the Legal Costs set aside for lawyers with an Individual Retainer, Mr. Churko asserts that, by allocating the Lawyers' Fees to counsel acting under an Individual Retainer, "there is sufficient incentive to induce them to help claimants and to do it right".

[30] During the hearing on January 27, 2025, counsel for Mr. Docken and Napoli Shkolnik Canada, sought to rely on information that they had obtained from the Claims Administrator regarding the claims which had been received by the claims deadline. This information was in the form of an email from the Claims Administrator to counsel. Mr. Churko objected to this information being relied upon. I determined that the information from the Claims Administrator, who had been appointed by court order, contained probative evidence which outweighed any prejudice. However, I only permitted it on the express undertaking of Mr. Block to file the email as an attachment to an affidavit of the Claims Administrator, which he gave after being given an opportunity to telephone the Claims Administrator. However, when I enquired about the affidavit on February 13, 2025, I was provided with a copy sworn that same day. Undertakings to the Court must be taken seriously. Counsel, as officers of the court, have a privileged position that is, in part, premised on the understanding that if they give an undertaking to a court it will be fulfilled promptly and completely.

[31] The Claims Administrator has received 114 unique claims from potential class members. Of those 114 claims, 55 were submitted by counsel (Individual Retainers). Counsel for these potential class members are:

(a) Mr Churko at Napoli Shkolnik Canada – 5 claims;

(b) Mr. Docken and Mr. D'Angelo at Napoli Shkolnik Canada – 32 claims; and

(c) Merchant Law – 18 claims.

[32] There was affidavit evidence from Mr. Churko and Mr. D'Angelo regarding the number of anticipated claims, and how many potential class members had signed retainer agreements, together with which law firms. However, I make no determination as to whether these retainer agreements are valid as that question is not before me.

[33] The representation of potential class claimants by counsel plays a significant role as the parties seek to have a portion of the Legal Costs allocated to "Lawyers' Fees" relating to the Individual Retainers. Further, where there is no Individual Retainer, it is proposed that counsel for the class would receive what would otherwise have been paid as Lawyers' Fees.

[34] Counsel for Mr. Docken and Napoli Shkolnik Canada rely on ***Brazeau v Canada (Attorney General)***, 2020 ONSC 7229, which was a joint decision together with ***Reddock v Canada (Attorney General)***, 2020 ONSC 7232, and ***Gallone c Procureur général du Canada***, 2020 QCCS 3992 (collectively, referred to as ***Brazeau***) for the proposition that the Individual Retainers and payment of Lawyers' Fees were appropriate.

[35] In ***Brazeau***, global settlements had been reached and the individual claims were to be assessed in one of three tracks. At para 160, Perell J and Masse J acknowledged that, at the individual issues stage, class members are not confined to representation by class counsel:

> Once the class action reaches the individual issues stage, the individual Class Member, is free to hire the lawyer of his or her choice. Although hiring a lawyer other than Class Counsel is rarely done and likely would be a foolish decision, given what Class Counsel knows and has learned about the particular class action; nevertheless, in law and in practice, a Class Member is free to hire another lawyer to prosecute the individual issues phases of the action.

[36] Unlike the scenario noted in ***Brazeau*** where a potential class member might engage a lawyer who is unfamiliar with the class action, the evidence at the Costs Application was that all of the counsel who have entered into Individual Retainers have knowledge of the underlying class action.

[37] However, I am of the view that the proposed allocation of Lawyers' Fees is as much, or more of, a method of reallocating the Legal Costs among counsel as it is a method of ensuring that potential class claimants receive legal support in the claims process. Indeed, Mr. D'Angelo swore that considerable efforts had been made to find potential class members with a verifiable claim and to obtain the necessary documentation before the ***Certification Decision*** and the Approval Application. If this is the case, it is not clear what work would be required under the Individual Retainer other than to submit the results of the previously performed due diligence.

[38] In ***Northwest v Canada (Attorney General)***, 2006 ABQB 902 at paras 81-85, McMahon J also addressed the fees of lawyers pursing the individual claims for class members. At para 82, McMahon J noted that "there can be no double recovery".

[39] If the Lawyers' Fees were approved as set out in the Proposed Legal Costs, KoT PC and Docken PC, as "Class Counsel", would be entitled to a percentage of unrepresented Eligible Claimants' compensation as the Lawyers' Fees, without undertaking any additional responsibility, resulting in inappropriate compensation or double recovery. If the Lawyers' Fees were approved as set out in the Alternate Legal Costs, Napoli Shkolnik Canada, as "Class Counsel", would have a similar entitlement.

[40] Counsel have not substantiated why allocating a portion of unrepresented Eligible Claimants' compensation as Lawyers' Fees to the benefit of "Class Counsel" is justifiable.

[41] In ***Brazeau***, at para 167, the jurisdiction of the Court over legal fees payable by individual class members was clear:

> ... the jurisdiction to regulate the lawyer and client relationship and the fees of Class Counsel, or the fees of a new lawyer retained by an individual Class Member. The court could, for instance, specify that if a new lawyer was retained, the new lawyer would be obliged to share the fee recovered for the individual issues phase of the proceeding, much like an undertaking to protect a lawyer's account when there is a change of lawyer during a regular action.

[42] There is no provision in the *CPA* dealing with individual retainers or the responsibility of class counsel to represent all members of the class but there is jurisprudence that class counsel represents all members of the class: see ***Berry v Pulley***, 2011 ONSC 1378 paras 73, 74, 79-80, 83, and 90-91; ***Singh v RBC Insurance Agency Ltd***, 2020 ONSC 5368 at paras 39, 42; ***Smith v Lafarge***, 2022 ABQB 289 at para 22. As a result, depending on the issues, class counsel may have a duty to act for potential class members even as the action moves into the individual claim assessment phase.

[43] In this case, I find that potential members of the class are at liberty to engage any counsel under an Individual Retainer to pursue their individual entitlement under the Distribution Protocol. However, the Consortium, including any successor, remains counsel for Ms. Singh and the class and has the concomitant obligations to act on behalf of the class, as required.

1.6 *Change of Representation Decision*

[44] On January 3, 2019, Mr. D'Angelo swore an affidavit supporting the certification application brought by Merchant Law. However, within weeks, Mr. Merchant and Mr. Churko were at odds, and this led to Merchant Law and the Consortium also being at odds. Further, Mr. D'Angelo, moved from supporting the class action led by Merchant Law, to making it clear that he and his colleagues would no longer work with Merchant Law as they had aligned with the Consortium. These tensions continued from mid-January 2019 to at least the date of the ***Change of Representation Decision***, April 21, 2021.

[45] As set out in the ***Change of Representation Decision***, the Consortium, with the backing of Napoli Shkolnik Canada, forcefully, and successfully, defended against Merchant Law's applications to retain the class action and to substitute a new representative plaintiff.

[46] Guardian Law ceased operating as a law firm and, in April 2022, Mr. Docken joined Napoli Shkolnik Canada as a consultant. However, at the Approval Application, on September 24, 2024, the disconnect between Mr. Churko, on the one hand, and Mr. Docken and, ostensibly, Napoli Shkolnik Canada became apparent. I use the term "ostensibly" because Mr. Churko continues to assert that he appears before the Court as a partner of Napoli Shkolnik Canada. Mr.

Churko continues to put Mr. Docken's name on documents that Mr. Churko files with the Court. Mr. Docken says he takes umbrage with Mr. Churko for including his name because he does not consent to Mr. Churko doing so, especially as many of the documents assert a position contrary to his own.

[47] The disconnect between Mr. Churko and Mr. Docken was coincident with, or perhaps caused by, a reconciliation between Mr. Churko and Mr. Merchant whereby they worked in concert regarding the Proposed Settlement Agreement. There is no evidence about how Mr. Churko and Mr. Merchant have worked together; however, Mr. Churko and Mr. Merchant now jointly submit that the quantum and allocation of the Legal Costs described in the Proposed Settlement Agreement (the Proposed Legal Costs) should be approved. Mr. Merchant submits that he has made concessions in agreeing to the Proposed Legal Costs.

[48] As noted in the ***Change of Representation Decision*** at para 9, ACJ Rooke had "received all of the written and oral submissions necessary for the certification decision in this case by January 8 and 9, 2019, and had [his] decision as to the certification merits on reserve". The ***Change of Representation Decision*** at paras 10-19, sets out some of the background leading to that decision, including:

(a) Merchant Law's claim for Ms. Singh to pay (or secure payment for) Merchant Law's Legal Costs to the date of the change of representation;

(b) Ms. Singh's October 16, 2019 application seeking to withdraw as the representative plaintiff;

(c) GSK's claim against Ms. Singh for thrown-away Legal Costs;

(d) Ms. Singh's February 7, 2020 affidavit where she indicated her desire to continue as representative plaintiff and to be represented by the Consortium;

(e) Merchant Law's application to remove Ms. Singh as representative plaintiff and appoint a substitutional representative plaintiff; and

(f) that the ***Certification Decision*** would not be issued until the parties resolved the representation dispute themselves or brought an application, which ACJ Rooke said "was delayed by the parties not consenting and not taking timely appropriate steps, and the intervening Covid-19 pandemic": at para 18.

[49] Rooke ACJ dismissed the application of Merchant Law to replace Ms. Singh as the representative plaintiff: ***Change of Representation Decision*** at para 49. Rooke ACJ also awarded costs to Ms. Singh as against Merchant Law and stated "that if costs were not resolved between the parties, either of them could apply within 30 days (unless extended by the Court on application within the 30 days)" for the costs to be determined: ***Change of Representation Decision*** at para 46. There is no evidence these costs were ever determined.

[50] In the materials filed in relation to the application leading to the ***Change of Representation Decision***, there are serious allegations made against the groups of counsel now seeking an allocation of Legal Costs. Those allegations were broad in scope and I have only included a few which are relevant to the Costs Application:

[51] The Consortium submitted:

(a) through the affidavit evidence of Ms. Singh:

(i) that Ms. Singh was treated poorly as a client by Mr. Merchant and some of the lawyers at Merchant Law, excluding Mr. Churko, and not made aware of her obligations or rights as a representative plaintiff;

(ii) GSK attributed misconduct to Merchant Law for "four proposed class actions commenced by Merchant Law"; and

(iii) on September 17, 2020, the Consortium agreed to indemnify Ms. Singh for any costs awarded against her, and as a result, she was willing to remain as representative plaintiff; and

(b) through the affidavit evidence of Mr. D'Angelo, that:

(i) by 2018 Merchant Law had not determined whether there were potentially significant claimants in Canada;

(ii) Mr. D'Angelo was involved in running a social media campaign to identify claimants;

(iii) Mr. D'Angelo was involved in retaining outside contractors skilled at investigating older medical claims and obtaining corroborative medical records;

(iv) Mr. D'Angelo reviewed the medical records obtained to classify the 43 potential claims;

(v) Mr. D'Angelo was "perplexed" by the Legal Costs claimed by Merchant Law and the "number of lawyer hours utilized"; and

(vi) Mr. Merchant's financial resources did not compare with the financial resources of Napoli Shkolnik Canada.

[52] Merchant Law submitted, through the affidavit evidence of Merchant Law's proposed substitutional personal representative:

(a) that the indemnity granted to Ms. Singh could not be relied upon because recovery would be thwarted by the following:

(i) Mr. Churko did not have the financial capability to carry on with the action, going so far as to attach a copy of the title to Mr. Churko's home to evidence his personal circumstances;

(ii) Guardian Law was a partnership of partners, most of whom, practised as professional corporations; and

(iii) Mr. D'Angelo and another named lawyer were not residents of Canada;

(b) Guardian Law did not have the bench strength necessary to pursue the action and that the "most skilled class actions lawyer in Guardian Law is Mr. Merchant's senior", which appears to be a veiled reference to Mr. Docken; and

(c) the proposed substitutional personal representative would be "indemnified against costs in the future".

[53] The affidavit evidence of Merchant Law's proposed substitutional personal representative included an email from Mr. D'Angelo to Mr. Merchant sent April 2, 2019:

> ... You are advised that we will no longer assist your firm in the prosecution of the Paxil class action.
>
> With respect to the claims that we identified and developed, you are further advised that they retained our Canadian firm to represent them.
>
> We have advised them that they not participate in the class action and should exercise their right to opt out should a class be certified. These claims will be filed as individual cases outside of the class proceeding.

[54] The position taken by Mr. D'Angelo in April 2019 is concerning as he was clearly working with then class counsel, Merchant Law, but appears to have given, or was prepared to give, advice to potential class members to opt out of the class action and pursue individual claims. This position may have put Mr. D'Angelo in a conflict of interest between the class and individual claims: ***Persaud v Talon International Inc***, 2022 ONSC 6359 at para 116, even though he is not a lawyer licensed to practice in Canada. This situation appears to have been driven by:

(a) the departure of Mr. Churko from Merchant Law;

(b) Ms. Singh's decision to carry on with legal representation by Mr. Churko, and by extension KoT Law 2019; and

(c) Merchant Law's opposition to Ms. Singh's change in representation, or alternatively, Merchant Law's application to replace Ms. Singh as the representative plaintiff.

[55] However, I make no finding on whether Mr. D'Angelo was in a conflict of interest because, as it turned out, Ms. Singh changed her legal representation and Mr. D'Angelo continued to work with the Consortium. Further, there was no evidence that any of the potential class members opted out of the class action on the advice of Mr. D'Angelo. In any event the point was not argued on the Costs Application and is only relevant as a background to the alignments and re-alignments between counsel which resulted in their respective positions taken on the Costs Application.

[56] After Ms. Singh's change of representation was approved, the Consortium participated in mediation with GSK.

[57] The falling out among counsel came to a head at the Approval Application as a result of the Proposed Legal Costs. Mr. Churko takes umbrage with the role of American lawyers in this action, though he was aligned with them previously.

[58] Mr. Docken and Napoli Shkolnik Canada oppose the Proposed Legal Costs and submit that the quantum and allocation of Legal Costs, based on the Draft Settlement Agreement (the Alternate Legal Costs), should be approved.

1.7 The Fees Undertaking

[59] Merchant Law claimed entitlement to Legal Costs in the event that it was no longer representing Ms. Singh, and the Consortium agreed. At para 38 of the ***Change of Representation Decision***, ACJ Rooke noted that the Consortium gave an undertaking to Merchant Law (the Fees Undertaking), as follows:

> ... an undertaking from the Consortium to pay fair and reasonable fees and disbursements under the contingency agreement between Merchant Law, and [Ms. Singh], at the end of the action, if [Ms. Singh] is successful. Alternatively, absent consent between [Ms. Singh] and Merchant Law, [Rooke ACJ] will entertain the Charging Application on its merits if necessary.

[60] To support the Fees Undertaking, Mr. Churko also relies on a letter, dated May 27, 2021, in which ACJ Rooke wrote to counsel:

> It appears not to be disputed that the [Consortium] will be required to pay costs to [Merchant Law], although the amount appears not to be agreed. If that is the case then I suggest that the matter be set down for an assessment before the Assessment Officer to determine that. The transfer of the file to [the Consortium] would be dependent upon that process being completed and an undertaking to pay the costs as determined by the Assessment Officer or any appeal thereon. Based on that the matter can proceed.

[61] In 2021, Merchant Law made an application to an assessment officer under the *Alberta Rules of Court*, AR 124/2010, to determine the quantum of disbursements to which it was entitled. However, the review officer decided at the outset that the disbursements would not be payable forthwith and would only be payable "on the successful accomplishment or deposition of the subject-matter" of the Contingency Fee Agreement. The assessment was adjourned *sine die* so an appeal could be taken. Merchant Law was unsuccessful on appeal and the disbursement assessment was never pursued.

1.8 Positions of the parties

1.8.1 Proposed Legal Costs

[62] The Proposed Legal Costs, as submitted by Mr. Churko and Mr. Merchant, would be subject to a cap (the Proposed Fee Cap), set out in clause 8.5 of the Proposed Settlement Agreement. The Proposed Fee Cap would be 33.33% of the sum of the settlement of $7,500,000, plus interest, which Mr. Churko estimated to be $144,420.66, which equals $2,547,885.41.

[63] The Proposed Fee Cap would include "Class Counsel Fees" and Lawyers' Fees (including disbursements and taxes on Lawyers' Fees only), with a proviso that the Class Counsel Fees would not deviate from $2,000,000.

[64] The Proposed Fee Cap would not include "Class Counsel Disbursements" of $175,000 for Napoli Shkolnik Canada and $175,000 for Merchant Law, plus GST (later revised as discussed in Appendix A). The Proposed Fee Cap would also not include the costs of the Claims Administrator or the Claims Officer.

[65] The Proposed Legal Costs would include Lawyers' Fees up to 35% of the "Compensatory Payments" paid to Eligible Claimants "represented by Class Counsel or another lawyer of their choosing who has a valid and enforceable retainer agreement"; however, Lawyers' Fees paid to lawyers other than Class Counsel would not exceed:

(a) 25% where the retainers were executed before the notice of Approval Application; or

(b) 10% where the retainers were executed after the notice of Approval Application.

[66] Where Eligible Claimants were unrepresented, Class Counsel would receive 15% of Compensatory Payments that are made to them.

[67] The Proposed Legal Costs does not contemplate any allocation to Guardian Law.

1.8.2 Alternate Legal Costs

[68] The elements of the Alternate Legal Costs, as submitted by Mr. Docken and Napoli Shkolnik Canada, can be summarized as:

(a) "Class Counsel Fee" of $500,000, plus GST, for "Class Counsel" who are defined as "Clint Docken, K.C. and Casey R. Churko";

(b) "Class Counsel Disbursements" in an amount to be determined based on "legitimate and reasonable disbursements incurred by or at the request of Class Counsel or Merchant Law ... between the filing ... and [September 24, 2024], except that disbursements ... claimed by Merchant Law ... [are] limited to those incurred before April 12, 2019 ... and shall be further reduced by the costs awarded against Merchant Law ... [in the ***Change of Representation Decision***]";

(c) Lawyers' Fees up to 35% of "Compensatory Payments" paid to Eligible Claimants "represented by Class Counsel or another lawyer of their choosing who has a valid and enforceable retainer agreement"; however, Lawyers' Fees paid to lawyers other than Class Counsel shall not exceed:

(i) 25% where the retainers were executed before the notice of Approval Application; and

(ii) 10% where the retainers were executed after the notice of Approval Application;

and where Eligible Claimants are unrepresented, Class Counsel will receive 15% of Compensatory Payments.

[69] The Alternate Legal Costs would have a cap on legal fees of 35% of the settlement of $7,500,000 or $2,625,000 (the Alternate Fee Cap). The Alternate Fee Cap does not include: disbursements, taxes, or the costs of the Claims Administrator or the Claims Officer.

[70] At the Costs Application, counsel for Mr. Docken and Napoli Shkolnik Canada also provided other iterations of the Alternate Legal Costs, including a scenario where the "Class Counsel Fee" (as described in paragraph [68](a)) would be increased to $750,000, plus GST.

[71] With regard to the allocation among counsel, counsel for Mr. Docken and Napoli Shkolnik Canada submit that Guardian Law is entitled to an amount described in the Second Collaboration Agreement as:

> 10% of the gross attorney fee of all attorney fees generated by the class action as well as 10% of the gross attorney fees earned by McIntyre/KoT for any and all of their individual cases whether they are settled within the class or by opt out.

1.8.3 Guardian Law's position

[72] Guardian Law acknowledges that the Second Collaboration Agreement provides for 10% of class counsel fees to be paid to it but asserts that allocation should be increased to 30% on the basis of *quantum meruit*. Guardian Law acknowledges that it is entitled to 10% of the Consortium's Individual Retainers.

1.8.4 Comparison of Proposed Legal Costs and Alternate Legal Costs

[73] Both Mr. Churko and counsel for Mr. Docken and Napoli Shkolnik Canada provided their own comparisons of the Proposed Legal Costs and Alternate Legal Costs; however, they contained different assumptions. To compare the Proposed Legal Costs and Alternate Legal Costs, I changed some amounts to accord with each party's stated position and to make the underlying assumptions the same for comparison purposes. In addition, based on the information from the Claims Administrator available on January 27, 2025, the number of claims that have been submitted is substantially larger than initially identified by counsel, and that increase potentially changes the cost of review and distribution from that relied on by the parties. With these changes in mind, Appendix A to these reasons is a comparison of the parties' positions, which must be read in conjunction with the accompanying notes.

1.9 Application for a charging order

[74] The Costs Application was heard on multiple dates with procedural and notice requirements being dealt with on November 8, 2024, and the bulk of the submissions being made on December 6, 2024 and January 27, 2025.

[75] At the commencement of the Costs Application hearing on December 6, 2024, Mathew Farrell, a lawyer, formerly with both Guardian Law and Napoli Shkolnik Canada, sought to make representations. Mr. Farrell asserts that, notwithstanding that he is no longer employed with Napoli Shkolnik Canada, he is still a partner of that firm. Given that Mr. Farrell was never counsel of record, I found that he did not have standing at the Costs Application. Notwithstanding my earlier ruling, after the mid-day break on December 6, 2024, Mr. Farrell reiterated his request to make submissions, which was denied for a second time on the basis of a lack of standing.

[76] On January 23, 2025, without leave of the Court, Mr. Farrell filed an Application returnable on January 27, 2025, the date set for the continuation of the Costs Application, seeking, among other things, a charging order for the portion of the legal fees to which he submits he is entitled.

[77] Mr. Farrell relies on Rule 10.4 of the *Rules*, which provides, in part:

> 10.4(1) On application by a lawyer, the Court may declare property specified in its order, including property that may be subsequently recovered in an action, to be subject to a charge as security for payment of the lawyer's charges.

[78] Notwithstanding that he was not given standing in the Costs Application, Mr. Farrell asserts he is entitled to a charging order, not based on value of the work he performed for Ms. Singh, but based on his agreement with Napoli Shkolnik Canada. In his affidavit, Mr Farrell said:

> It was understood that because we were engaged in a number of class actions, all of which bore some level of risk, that I would be entitled to 5% of any of the fees recovered by [Napoli Shkolnik] Canada, regardless of the amount of time I had on any given file. Although the file was not particularly active during my time at [Napoli Shkolnik] Canada, I did work on the file. ...

[79] Even if Mr. Farrell had standing, which he does not, it is my view that Rule 10.4 is not the appropriate method of addressing his contractual dispute with Napoli Shkolnik Canada. At the relevant time, the Consortium were the lawyers of record and only the Consortium would be able to assert a charging order for legal fees under Rule 10.4. Contractual disputes between

lawyers, partners and law firms should be dealt with in an action where the facts are pled and the applicable contractual relief is claimed. Mr. Farrell's claim against Napoli Shkolnik Canada is not before the Court on the Costs Application.

2. Issues

[80] The Costs Application raises four issues:

Issue 1: Does s 35(2) of the *CPA* authorize the Court to determine the global amount and allocation of Legal Costs?

Issue 2: What test should be applied to determine the quantum of Legal Costs?

Issue 3: What global quantum of Legal Costs is appropriate in this case?

Issue 4: How should the global quantum of Legal Costs be allocated in this case?

Issue 1: Does s 35(2) of the *CPA* authorize the Court to determine the global amount and allocation of Legal Costs?

[81] None of the parties rely on the Contingency Fee Agreement, and even if they had, the Contingency Fee Agreement is noncompliant with s 38 of the *CPA*, making s 39 of the *CPA* inapplicable.

[82] Section 37 of the *CPA* authorizes the Court to "award costs as provided for under the Rules of Court". This section has been used to award costs inter-parties: ***Turner v Bell Mobility Inc***, 2016 ABCA 188 at paras 10-11.

[83] The *CPA* empowers the Court to impose any terms or conditions that it considers appropriate in the context of approving a settlement of a class proceeding: *CPA* s 35(2). At the Approval Application, Ms. Singh sought the approval of the settlement with GSK (ultimately approved as described in paragraphs [7] and [8]) and the determination of the Legal Costs was adjourned to be heard after the Approval Application. The Approval Application and Costs Application are part of the same overarching approval of the settlement under s 35 of the *CPA*. Under s 35(2) of the *CPA*, the Court has the authority to impose terms or conditions and that authority extends to determining the Legal Costs to be paid and allocated among counsel. I find that s 35(2) of the *CPA* authorizes the Court to determine the global amount and allocation of Legal Costs in this case.

Issue 2: What test should be applied to determine the quantum of Legal Costs?

[84] It is trite law that the approval of Legal Costs must balance the best interests of the class, on the one hand, and the financial incentive that is provided to counsel who represent a class of litigants, on the other hand. Many potential class members do not have the ability to pursue an action individually because of the complexity and cost of an action, or because the recovery on an individual level would be such that the cost of litigation, regardless of complexity, makes an individual action prohibitive: ***Bancroft-Snell v Visa Canada Corporation*** 2016 ONCA 896 at para 40. The need to maintain this balance underlies the analysis of other aspects of assessing legal costs.

[85] All of the parties, except for Guardian Law, submit that the test to be applied is whether the proposed Legal Costs are fair and reasonable. Guardian Law proposes that its entitlement to Legal Costs should be considered on a *quantum meruit* basis. The cases that Guardian Law relies

on are not class action cases, except for ***Welsh v HMQ Ontario***, 2019 ONSC 4204, aff'd 2020 ONCA 210. ***Welsh*** is a class action case where the fair and reasonable test was applied. Class proceedings have a developed jurisprudence regarding the test to apply on a costs application and I find that the fair and reasonable test should be applied in this case.

[86] The fair and reasonable test to determine whether proposed Legal Costs are approved is mandated under the *Class Proceedings Act*, 1992, SO 1992, c 6, s 32(2.1)-(2.3). A number of cases provide helpful commentary on the factors to be considered when applying the fair and reasonable test: ***Smith Estate v National Money Mart Co***, 2010 ONSC 1334 at para 24, rev'd on other grounds 2011 ONCA 233; ***Shah v LG Chem Ltd***, 2021 ONSC 396 at para 45; ***Fresco v Canadian Imperial Bank of Commerce***, 2023 ONSC 3335 (***Fresco ONSC***) at para 54, aff'd 2024 ONCA 628 (***Fresco ONCA***); ***Kuiper v Cook (Canada) Inc***, 2024 ONSC 2829.

[87] In ***Fresco***, at issue were the Legal Costs in the context of a "mega-fund settlement": ***Fresco ONCA*** para 23. Here, the pleadings were silent as to the amount that Ms. Singh sought as damages and the settlement was approved in the global amount of $7,500,000. This case does not relate to a mega-fund settlement but many of the principles set out in the ***Fresco ONSC*** and ***Fresco ONCA*** decisions are equally applicable.

[88] Other cases in jurisdictions not governed by the Ontario *Class Proceedings Act* also provide helpful commentary on the factors to be considered in applying the fair and reasonable test: ***Breckon v Cermaq Canada Ltd***, 2024 FC 225 at para 127; ***Manuge v Canada***, 2013 FC 341 at para 28.

[89] The *CPA* only imposes the fair and reasonable test in relation to the approval of a contingency fee agreement under s 39, which does not apply in this case. In ***Northwest*** at para 69, in considering the approval of legal fees, McMahon J applied a test of "whether the fees sought are reasonable". In the context of legal fees for the independent assessment process for individual claims, McMahon J referred to a fair and reasonable test and a modification of the process set out in s 39 of the *CPA*: at para 82. This approach was followed in ***Adrian v Canada (Minister of Health)***, 2007 ABQB 377 at paras 13-19.

[90] In ***TL v Alberta (Director of Child Welfare)***, 2015 ABQB 815 at para 31, Thomas J relied on the fair and reasonable test and the factors articulated in ***Smith Estate***. The ***Smith Estate*** factors were recently reviewed in ***Fresco ONSC*** and upheld in ***Fresco ONCA***.

[91] There has been some criticism of the ***Smith Estate*** factors. In ***Welsh*** at para 10, Belobaba J said the ***Smith Estate*** analysis contained many factors that were "irrelevant and unhelpful". Belobaba J also relied on ***Lavier v MyTravel Canada Holidays Inc***, 2013 ONCA 92 at para 27, where MacPherson JA said:

> ... There is no reason here to depart from the test in *Gagne*, the leading decision from this court on the approval or fixing of class counsel fees, which is that the particular fee arrangement be fair and reasonable. Courts determine whether a fee is fair and reasonable by assessing the risks assumed by class counsel and the results achieved for the class, and always in light of the objectives of class proceedings: *Gagne*, at p. 423.

[92] In this case, I find that considering the ***Smith Estate*** factors is a helpful starting point. While I recognize the particular importance of considering the risks assumed by counsel and the results achieved by the class, for the reasons that follow, I also find the expectations of the

parties to be of particular importance here. To best suit the circumstances of this case, I have re-ordered and combined some of the ***Smith Estate*** factors in my analysis below.

Issue 3: What global quantum of Legal Costs is appropriate in this case?

[93] Although I have found that the fair and reasonable test applies, this case is different from others in that, from a global perspective, I must consider both the Proposed Legal Costs and the Alternate Legal Costs. Further, it is only after I have determined the fair and reasonable quantum of global Legal Costs that I can consider the allocation among the lawyers.

[94] When applying the factors of the fair and reasonable test, understanding the quantum of the Proposed Legal Costs and the Alternate Legal Costs, in the context of the settlement, is helpful to both the consideration of the global fee proposals and the competing positions on the allocation of those Legal Costs among counsel.

3.1 Complexity and difficulty of the class action, and the results achieved

[95] Many cases compare the quantum of the initial claim against the amount obtained at final resolution. Here, the pleadings do not disclose the quantum that class counsel initially assessed for the claim and no evidence was provided as to the assessment of the claim.

[96] The claims, which GSK has not admitted, are that some of the children of mothers who took Paxil during pregnancy have significant congenital malformations. This is demonstrated by qualifying congenital malformations described in the Distribution Protocol:

(a) Anencephaly;
(b) Spina bifida;
(c) Encephalocele;
(d) Craniosynostosis;
(e) Cleft lip;
(f) Cleft palate;
(g) Structural cardiovascular defects;
(h) Diaphragmatic hernia;
(i) Gastroschisis;
(j) Omphalocele;
(k) Hypospadias;
(l) Undescended testes; and
(m) Club foot.

[97] Mr. Churko compares a potential average settlement for the claimants of $128,455.20 in this case to other settlements of class actions for pharmaceuticals. However, Mr. Churko's calculations are based on 30 Eligible Claimants sharing *pro rata*, rather than the 114 claims submissions received by the deadline. It is yet unknown how may of those 114 claims will be determined to be Eligible Claimants.

[98] At the Approval Application, the decision in ***Bartram v Glaxosmithkline Inc*** (27 March 2017), Vancouver Registry, S081441(BCSC) was relied on by Ms. Singh, just as it was at the hearing resulting in the ***Certification Decision***. ***Bartram*** was also a class action against GSK in relation to Paxil, though the scope of qualifying congenital birth defects was narrower. Except for ***Bartram***, the relative complexity, damages and litigation risks are different for each case, and

I find that the comparisons to other pharmaceutical class action settlements unhelpful to the analysis of the merits of the results achieved in this case.

[99] The settlement of $7,500,000, as compared to the severity of the potential congenital defects suffered by Eligible Claimants, is not high given that many of those Eligible Claimants will suffer from lifelong, or life limiting, effects. However, the settlement with GSK was approved, in part, because of the litigation risks related to establishing causality between Paxil and the congenital birth defects. Some of the competing expert evidence was described by ACJ Rooke in the ***Certification Decision*** at paras 14-18.

[100] Additionally, as Ms. Singh explained in her affidavit evidence, GSK changed the Canadian Paxil monograph to warn of congenital malformations in 2006, so the claims were dated by the time the Approval Application was heard in 2024. Some of the reasons for why the settlement took so long are discussed below.

[101] In summary, this class action is complex litigation with significant litigation risks. The causal link between Paxil and congenital birth defects rests on expert medical evidence. Further, there are factual challenges for the potential class members to prove entitlement due to the age of the claims and the requirement to prove a prescription for, and ingestion of, Paxil during pregnancy. While the class action was complex and difficult, overall, the results achieved were not remarkable given the alleged harm; however, the settlement was appropriate and was approved.

3.2 The risk undertaken by class counsel

[102] The risk undertaken by class counsel was the subject of particular focus in the submissions because of the claim against Ms. Singh for disbursements when she choose to leave Merchant Law and follow Mr. Churko. In the course of being pursued by Merchant Law for its fees and disbursements, Ms. Singh at one point suggested that she be replaced as representative plaintiff. However, when it became clear that a replacement representative plaintiff would not shield her from Merchant Law's claim for fees and disbursements, Ms. Singh chose to carry on as representative plaintiff.

[103] On September 17, 2020, Ms. Singh received an "indemnity for costs" from the Consortium. In 2021, when Merchant Law was unable to collect its disbursements from Ms. Singh immediately, it chose not to proceed with the assessment of the quantum of its disbursements.

[104] The risk undertaken, first by Merchant Law, and then by the Consortium, was that there might be no recovery at all and the time and effort invested in pursuing the class action would be wasted. However, after the settlement in ***Bartram***, on March 27, 2017, that risk of no recovery must have diminished. Merchant Law never abandoned its claim for disbursements. Napoli Shkolnik Canada, on behalf of the Consortium, took on the risk of indemnifying Ms. Singh for costs; however, the extent and nature of this indemnification was not in evidence.

3.3 The time and effort expended by class counsel

[105] Counsel has expended time and effort to reach a settlement in this case; however, the amount of time is difficult to ascertain based on the evidence at the Costs Application. In any event, the recording of hours, or the generation of a number of pages of transcripts, only focuses on quantum and not quality. The point is that a settlement was negotiated and approved by the Court. Whether that settlement came about because of brilliant legal work that did not take much

time, or many hours of diligent, detailed and time-consuming step-by-step investigation and analysis, or a combination of both, should not matter: ***Cannon v Funds for Canada Foundation***, 2013 ONSC 7686 at para 5.

[106] Here, not only is the data regarding the hours expended inadequate, but more importantly, the effectiveness of counsel is a concern.

[107] Merchant Law's claim for hours expended is large but inconsistent:

(a) Merchant Law claims in its brief to have "done $4.3 million worth of work"; and

(b) the affiant for Merchant Law swears that Merchant Law worked 6,553.58 hours from October 10, 2012 to April 12, 2019 and that the "value of that work totaled $2,456,685.95".

[108] Further, the efforts of Merchant Law have been challenged by Ms. Singh. As noted at paragraph [27], Ms. Singh raised concerns relating to a $16,800 costs award against her, in favour of GSK, from decisions on July 22, 2014 and June 27, 2016, which were confirmed in an Order granted October 20, 2016. It is to be noted, however, that under the Settlement Agreement, GSK agreed not to pursue those costs.

[109] In the ***Certification Decision*** at para 5, footnotes omitted, ACJ Rooke said:

> This action was commenced by Merchant Law ... by way of a Statement of Claim filed on October 12, 2012. [Merchant Law] had already initiated similar proceedings in Ontario in 2007 (the Roman action); in British Columbia in 2007 (the Wakeman action); and in Saskatchewan in 2008 (the Duzan action). Similar class proceeding were also initiated by different law firms in British Columbia in 2008 (the Bennison and Bartram actions). The history of those proceedings is set out in some detail in ***Duzan v Glaxosmithkline Inc***, 2011 SKQB 118, at paras 5-21, wherein Ball J. unconditionally stayed the Duzan action, holding (at para 21) that [Merchant Law] had engaged in a "[M]ultijurisdictional game of class action 'whack-a-mole'" amounting to an abuse of process, and had failed to comply with the Saskatchewan Court's scheduling directions.

[110] Ms. Singh swore in her February 7, 2020 affidavit that it was not until 2017, when she started working with Mr. Churko (who was at that time at Merchant Law), that she felt that any lawyer had explained "what was expected of [her], what [her] risks were, and what was going on with the case". Ms. Singh also agreed with a comment that she attributed to GSK in a court filed document that until Mr. Churko became involved that "the class actions were mismanaged" by Merchant Law.

[111] In an earlier affidavit Mr. D'Angelo swore that it is not the practice of American plaintiff counsel to record time; however, in an affidavit filed in support of the Alternate Legal Costs, Mr. D'Angelo provided information about time he had recorded in relation to this class action.

[112] It cannot be ignored that the Consortium, while ultimately successful in the ***Change of Representation Decision***, did not pursue it with dispatch: at para 18. As ACJ Rooke makes clear in the ***Change of Representation Decision***, the parties expended considerable effort on the representation and costs disputes.

3.4 The experience and expertise of class counsel

[113] All of the lawyers who had a significant role in this class action have extensive experience and expertise with class action litigation.

3.5 The expectations of the class

[114] Mr. Churko submits that the expectations of the class can be discerned from the invalid Contingency Fee Agreement, signed in 2018 with Merchant Law. I agree. There is a technical reason why the Contingency Fee Agreement does not meet with requirements of the *CPA* s 38. However, the Contingency Fee Agreement still reflected the agreement of the parties, even though, as described at paragraph [27], Ms. Singh did not understand the consequences of it: see ***Sutts, Strosberg LLP v Atlas Cold Storage Holdings Inc***, 2009 ONCA 690 at para 22.

[115] Ms. Singh swore two affidavits for the Approval Application and in each acknowledged her support of the Proposed Legal Costs. However, the Proposed Legal Costs differ in significant respects from the Contingency Fee Agreement. The Contingency Fee Agreement, while technically invalid, sets out clear provisions regarding how class counsel is to be compensated. Some of the differences between the Contingency Fee Agreement and the Proposed Legal Costs and Alternate Legal Costs are described below:

Description	Contingency Fee Agreement	Proposed Legal Costs	Alternate Legal Costs (1 and 2)
Percentage of fees upon settlement	33% of settlement, "plus the additional amounts provided for herein"	33.33% of settlement plus interest, plus additional amounts	Up to 35% of settlement, plus additional amounts
Additional amounts not included in the percentage fee	Disbursements, and tax on legal fees and disbursements	Disbursements, tax on legal fees and disbursements, Claims Administrator fees, disbursements and tax, Claims Officer, and honorarium	Disbursements, tax on legal fees and disbursements, Claims Administrator fees, disbursements and tax, Claims Officer, and honorarium

[116] After the Contingency Fee Agreement was signed in 2018, the certification application was argued, the disputes regarding the representative plaintiff and the costs to be paid were resolved, the ***Certification Decision*** was issued, GSK appealed, but did not pursue the certification appeal, and the parties negotiated a settlement. Other than the disputes that arose as a result of Mr. Churko leaving Merchant Law and Merchant Law trying to retain control of the action, against the wishes of Ms. Singh, the class action has followed the ordinary course, except that it has taken a very long time to reach a settlement. There has been nothing exceptional to raise the compensation for the lawyers beyond what was set out in the Contingency Fee Agreement.

[117] The Contingency Fee Agreement, while invalid, still provides an understanding of the expectations of the parties and was, from a financial perspective, reasonable in that it balanced the interests of the class to maximize recovery for the Eligible Claimants, while at the same time as rewarding the class lawyers with 33% of the settlement, plus disbursements, and tax. The disbursements and tax would have been unknown at the time of signing the Contingency Fee Agreement but if they were 10% of the 33% contingency fee, the Legal Costs paid by the class would amount to 36.3% (33% + 3.3%) of any settlement, which would leave 63.7% for the Eligible Claimants.

[118] If the Eligible Claimants could have reasonably expected to recover approximately 63.7% of the settlement proceeds, that amount can be contrasted with the lower proposed recoveries set out in Appendix A that correspond to the positions of the lawyers on the Costs Application:

(a) 57.39% based on the Proposed Legal Costs;

(b) 57.39% based on the Alternate Legal Costs 1; and

(c) 57.16% based on the Alternate Legal Costs 2.

[119] The lawyers provided no principled basis for taking a larger share of the settlement than was provided for in the Contingency Fee Agreement. Had the Contingency Fee Agreement not been invalid because of the lack of service, it would have been a contractual reason for limiting the Legal Costs to an amount below what is claimed in the Proposed Legal Costs and the Alternate Legal Costs. As a result, I find that the Contingency Fee Agreement, and Ms. Singh's expectations relating to it, to be a justifiable element of the analysis of what constitutes fair and reasonable Legal Costs in the circumstances of this case.

3.6 The degree of responsibility assumed by class counsel

[120] The administration of the settlement and the Distribution Protocol has been assigned to the Claims Administrator. These are administrative tasks that could be undertaken by class counsel but in this case are out-sourced. In ***Breckon*** at para 150, it was noted that class counsel were "assuming the responsibility for administering the disbursement protocol".

[121] The lawyers propose passing on the cost of the administration of the settlement to the Eligible Claimants. I note that I did not permit the Claims Administrator to hold the settlement funds pending their distribution as there was no evidence regarding the type of bank account that the funds would be held in, or of any safeguards to ensure that the funds would be held in trust on behalf of the Eligible Claimants. Counsel for GSK has agreed to hold the settlement funds in trust pending their distribution.

[122] The task of determining the relative *pro rata* shares based on the Distribution Protocol is assigned to the Claims Officer and is also proposed to be at the cost of the Eligible Claimants.

[123] Neither the Proposed Legal Costs nor the Alternate Legal Costs provide any basis for passing-off of the costs of administration and distribution of the settlement funds to the Eligible Claimants.

3.7 The ability of the class to pay the Legal Costs

[124] There is no evidence of the ability of the class to pay the proposed Legal Costs, except Ms. Singh's dated evidence that she had no assets. The Legal Costs will have to be carved-out of the settlement of $7,500,000.

3.8 The importance of the litigation to the plaintiff

[125] Ms. Singh has been the primary caregiver for Muzaffar since he was born with congenital birth defects. Muzaffar requires extensive care and is confined to a wheelchair. His care also requires numerous other medical supplies. Ms. Singh's father installed a special elevator in her home to accommodate the wheelchair and she has made other modifications inside and outside of her home to accommodate Muzaffar. In addition, Ms. Singh describes how her own earning capacity has been negatively affected by Muzaffar's extensive caregiving requirements.

[126] It is clear that this class action is important as the Eligible Claimants must show that they have either suffered serious congenital birth defects, or they are the mother of a child with serious congenital birth defects, and that Paxil was prescribed during pregnancy.

3.9 Decision on the global quantum of Legal Costs

[127] As compared to the invalid Contingency Fee Agreement, the Proposed Legal Costs and the Alternate Legal Costs increase the percentage of the settlement funds allocated to the lawyers and correspondingly decrease the percentage allocated to Eligible Claimants. The Proposed Legal Costs and the Alternate Legal Costs place the responsibility for paying for the Claims Administrator fees, disbursements and tax, Claims Officer and honorarium on the Eligible Claimants, even though this was not contemplated in the Contingency Fee Agreement.

[128] In ***Breckon*** at para 90, the Court noted that class counsel proposed reducing its portion of the settlement funds from 33% under a contingency fee agreement to 25%, in part, to account for the payment of a commission to a litigation funder. No such proposal was put forth in this case to reduce the percentage allocated to the lawyers to account for the costs of the Claims Administrator fees, disbursements and tax, Claims Officer and honorarium.

[129] I find that the costs of the Claims Administrator fees, disbursements and tax, Claims Officer and honorarium should not be borne by the Eligible Claimants. I further find that neither the Proposed Legal Costs nor the Alternate Legal Costs are fair and reasonable because they:

(a) fail to take into account the considerable costs of the Claims Administrator and Claims Officer;

(b) are not aligned with the expectations of the parties as evidenced by the invalid Contingency Fee Agreement; and

(c) in the case of Merchant Law, do not account for the concerns raised by Ms. Singh and the inconsistencies in the evidence.

[130] I find that the balance between the Eligible Claimants' and the lawyers' interests is best reflected in the invalid Contingency Fee Agreement. The class action is important to the Eligible Claimants and its settlement was fair and in the best interests of the class. The Contingency Fee Agreement reflects the expectations of Ms. Singh and her (then) lawyers, provides a reasonable balance between recovery for the Eligible Claimants and compensation for the lawyers, and does not transfer the cost of administrating the settlement to the Eligible Claimants.

[131] As a result, I find that it is fair and reasonable to set the global quantum of Legal Costs at the amounts described in the invalid Contingency Fee Agreement:

(a) legal fees, limited to 33% of the settlement of $7,500,000 for:

  (i) class counsel fees;

  (ii) Lawyers' Fees;

  (iii) Claims Administrator fees, disbursements and taxes; and

  (iv) Claims Officer fees, disbursements and taxes; plus

(b) disbursements incurred in connection with this action (and not other Paxil litigation, unless also incurred directly in relation to this action) in the nature of those set out in the invalid Contingency Fee Agreement: "filing fees, court costs, investigators' fees, expert witness fees, court reporter fees and transcript costs,

photocopying and printing, courier charges and postage, facsimile and long distance telephone charges, and travel"; plus

(c) applicable tax, which the lawyers represented was limited to GST, on:

(i) the class counsel and Lawyers' Fees described in paragraph (a); and

(ii) the taxable disbursements described in paragraph (b).

Issue 4: How should the global quantum of Legal Costs be allocated in this case?

[132] Both the Proposed Legal Costs and the Alternate Legal Costs provide for the Legal Costs to be split between class counsel and the lawyers with Individual Retainer. In the case of the Proposed Legal Costs, the payment to "Class Counsel" includes Merchant Law; whereas the Alternate Legal Costs do not allocate any particular amount to Merchant Law.

[133] I find that neither the Proposed Legal Costs nor the Alternate Legal costs proposed allocations are fair and reasonable because they focus compensation on the proponents in the following ways:

(a) the Proposed Legal Costs:

(i) are generous regarding Class Counsel fees, including Merchant Law's fees, but do not recognize Guardian Law's entitlement; and

(ii) minimize the Individual Retainers;

(b) the Alternate Legal Costs:

(i) minimize the Class Counsel fees, which affects Merchant Law and the Consortium's entitlement;

(ii) do not specifically recognize the Fees Undertaking given by the Consortium to Merchant Law; and

(iii) are generous to the Individual Retainers.

[134] To determine the appropriate allocation of the global Legal Costs, I will first consider several constituent elements: the role of Napoli Shkolnik Canada; the Fees Undertaking; the Guardian Law claim; and disbursements.

4.1 The role of Napoli Shkolnik Canada

[135] Counsel from Ross Nasseri LLP submit that they are acting for Mr. Docken and Napoli Shkolnik Canada, and assert that they have a mandate to act for both of their clients. Based on the fact that Mr. D'Angelo filed two affidavits in support of the position taken by Mr. Docken and, ostensibly, Napoli Shkolnik Canada, I understand that Mr. D'Angelo is at least one of the people instructing Ross Nasseri LLP. However, there was a dispute about who is a partner of Napoli Shkolnik Canada with authority to instruct counsel, and who has the authority to act for Napoli Shkolnik Canada.

[136] Mr. Churko submits that he and Mr. Farrell are Canadian partners of Napoli Shkolnik Canada and did not engage counsel for Napoli Shkolnik Canada to appear at the Costs Application. Further, Mr. Churko has consistently filed material on Napoli Shkolnik Canada branded documents and advised the Court that he is a member of that firm.

[137] Mr. D'Angelo asserts that Napoli Shkolnik Canada is KoT Law 2019's successor in the Consortium. That may be the case but there is an incomplete record before me to determine that issue, and it was not argued. It is also clear that a number of parties have unresolved interests in Napoli Shkolnik Canada. There is evidence of an action having been commenced by Napoli Shkolnik Canada (and another), in October 2024, in the Ontario Superior Court of Justice, against Mr. Churko and KoT PC.

[138] For the purpose of the Costs Application, I have given Napoli Shkolnik Canada standing, both through Mr. Churko and through Ross Nasseri LLP. However, I am unable to resolve the relative interests of the parties in Napoli Shkolnik Canada and recognize that litigation has already been commenced in Ontario, which appears to be the jurisdiction where Napoli Shkolnik Canada operates as a law firm. As a result, I make no finding about: who is a partner of Napoli Shkolnik Canada; who has authority to instruct counsel for Napoli Shkolnik Canada; and whether Napoli Shkolnik Canada is KoT Law 2019's successor in the Consortium.

4.2 Fees Undertaking

[139] The nature of the Fees Undertaking is disputed. Rooke ACJ described it as: "an undertaking from the Consortium to pay fair and reasonable fees and disbursements under the contingency agreement": ***Change of Representation Decision*** at para 38.

[140] Napoli Shkolnik Canada, through counsel, asserts that the undertaking is a private matter between Napoli Shkolnik Canada and Merchant Law. On the other hand, Merchant Law and Mr. Churko submit that the allocation of the Legal Costs to Merchant Law should be determined. I agree with Merchant Law and Mr. Churko that the amount of the Fees Undertaking should be set in this decision. However, as discussed in 4.6 Allocation below, I disagree with both the amount of legal fees and disbursements that those parties propose.

[141] In its brief, Napoli Shkolnik Canada and Mr. Docken say, quoting from ***Persaud*** at para 133, footnotes omitted:

> Merchant is not class counsel. Neither is it "former" class counsel. Merchant was counsel to the representative plaintiff prior to certification being granted; Churko, the primary timekeeper. Merchant's only entitlement to fees is by virtue of "…an undertaking from the Consortium to pay fair and reasonable fees and disbursements…". Significantly, this is not a "court-ordered undertaking". The Court merely identified that a professional undertaking flows from the Consortium to Merchant. This undertaking neither binds the class nor the defendant. The undertaking is not a necessary provision in the [Settlement Agreement]. It merely needs to be addressed as a counsel-to-counsel matter. Courts have specifically scrutinized the inclusion of Merchant Law's "former class counsel fees", saying that:
>
> > there is no reason that their settlement fund, from which the counsel fee is coming, should pay for services to a disqualified Class Counsel who no longer had carriage or responsibility or risk in prosecuting the class action and who did not negotiate the settlement.

[142] Napoli Shkolnik Canada's reliance on ***Persaud*** in relation to the Fees Undertaking is misplaced because in ***Persaud*** there was no undertaking given to another lawyer and the Court.

[143] In oral argument, counsel for Mr. Docken and Napoli Shkolnik Canada confirmed that the Fee Undertaking binds the Consortium and its "counsel-to-counsel" position, reiterating that Napoli Shkolnik Canada should receive the funds and then address with issue directly with Merchant Law. Given the litigation history, and evidence presented at the Costs Application, that is not a practical solution.

[144] The Law Society of Alberta Code of Conduct (Calgary: Law Society of Alberta, 2024) includes the following provisions pertaining to undertakings:

> 5.1-7 A lawyer must strictly and scrupulously fulfil any undertakings given and honour any trust conditions accepted in the course of litigation.
>
> . . .
>
> 7.2-14 A lawyer must not give an undertaking that cannot be fulfilled and must fulfil every undertaking given and honour every trust condition once accepted.

[145] Undertakings are enforceable promises to the Court and have the effect of an Order of the Court: ***Star Energy Canada Inc v Builders Energy Services Ltd***, 2023 ABKB 641 at para 24. An undertaking to the Court cannot be unilaterally revoked: ***Psychologists Association of Alberta v Schepanovich***, 1991 ABCA 11 at para 11. I agree with Malik J, in ***Star Energy*** at para 25, where he said: "not only does the person giving the undertaking owe an obligation to the Court to discharge the undertaking, but they are contractually bound to perform their obligation to the other party".

[146] Merchant Law and Mr. Churko negotiated a payment to Merchant Law of $1,100,000, plus disbursements of $175,000, together with a payment of $850,000 to KoT PC, $50,000 to Docken PC and disbursements of $175,000 to Napoli Shkolnik Canada. However, the other parties with an interest in these payments, notably, KoT Law 2019 (or its successor) and Guardian Law, did not participate in the negotiations.

[147] I find that the Fees Undertaking must be discharged as part of the outcome of the Costs Application and that a "counsel-to-counsel" solution is not appropriate in these circumstances.

4.3 Guardian Law claim

[148] Guardian Law acknowledges the Second Collaboration Agreement which entitles it to:

(a) 10% of the "gross attorney fee of all attorney fees generated by the class action"; plus

(b) 10% of the "gross attorney fees earned by McIntyre/KoT for any and all of their individual cases whether they are settled within the class or by opt out".

[149] The Costs Application only relates to the compensation for the Eligible Claimants and it does not address Legal Costs for any "opt out" cases. As already noted, where counsel act for both potential class members and claimants who have opted-out, counsel may find themselves conflicted out of acting for either group. However, that is not before the Court on the Costs Application.

[150] Counsel for Mr. Docken and Napoli Shkolnik Canada acknowledge Guardian Law's entitlement under the Second Collaboration Agreement.

[151] Guardian Law, which filed no evidence, submits that the allocation of fees among counsel should deviate from the Second Collaboration Agreement on the basis of *quantum*

meruit given the relative contributions of the lawyers. I find that there is insufficient evidence to deviate from the Second Collaboration Agreement and decline to do so.

[152] However, some comment is required as to the meaning of the Second Collaboration Agreement given my comments regarding the global Legal Costs and the Fees Undertaking.

[153] In ***Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc***, 2024 SCC 20 at para 65, quoting from ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 46, the Supreme Court of Canada directed courts "to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract". A court can derive meaning of the words in a contract from contextual factors, including the purpose of, and the nature of the relationship created by, the agreement. In ***Earthco*** at para 65, the Court referred to ***Sattva*** at para 58, which permits courts consider objective evidence illustrating the parties' knowledge at, or before, the time of their contract's formation, when interpreting a contract.

[154] I find that the objective intent of the parties to the Second Collaboration Agreement, based on the actual words used and the factual matrix surrounding it, is that Guardian Law would receive as its share of the Consortium's legal fees:

(a) 10% of the gross legal fees received by the Consortium (or its successor) as Class Counsel; plus

(b) 10% of the gross Lawyers' Fees received by the Consortium (or its successor) as the recipient of Individual Retainers.

[155] Guardian Law is not entitled to any portion of the legal fees paid to Merchant Law to fulfill the Fees Undertaking, or any Lawyers' Fees that Merchant Law may be entitled to as a result of any Individual Retainers. However, Guardian Law is entitled to 10% of the Legal Fees of the Consortium (or its successor) as the recipient of Individual Retainers. It is yet to be determined, however, whether Napoli Shkolnik Canada is the successor to the Consortium and which of the Individual Retainers are earned by Napoli Shkolnik Canada.

4.4 Disbursements

[156] Under the Proposed Legal Costs, Mr. Merchant and Mr. Churko negotiated the quantum of the disbursements without the input of any other lawyer from Napoli Shkolnik Canada, which would be the recipient of half of the proposed disbursement payment. There is insufficient evidence on the Costs Application to determine whether Mr. Churko had the authority to bind Napoli Shkolnik Canada and I decline to make any finding on that point.

[157] Ms. Singh's evidence on the negotiation of Merchant Law's disbursements does not support the allocation of $175,000 for disbursements to Merchant Law under the Proposed Legal Costs:

> ... After I was successful in the application to overturn my change in representation, [Merchant Law] then claimed that I also had to *immediately* pay all of its claimed disbursements of $285,758.92.
>
> My counsel successfully defended the demand for immediate payment, and the costs assessment was deferred but appealed (the appeal was adjourned by consent); but the process caused me considerable stress for months leading up to it. My position on the assessment was that the actual recoverable disbursements of

> [Merchant Law] were $123,500.95, which included disbursements incurred between October 10th, 2012 (the date the action was filed), and April 12th, 2019 (the date of the change in representation). The agreed upon compromise in the settlement agreement is $175,000.

[158] There was no evidence regarding the basis for Napoli Shkolnik Canada's disbursements, which Mr. Churko and Merchant Law propose to also settle for $175,000. Mr. Churko's evidence on the quantum does not support the Proposed Legal Costs:

> Approaching September of 2024, I repeatedly requested disbursement accounts from Mr. D'Angelo. I attach what he provided to me on September 4th, 2024 as Exhibit 6. Among other problems, they include time for trips that he and I took to meet with American lawyers near Baltimore in relation to the Roundup® class action and to Houston on SSRI autism cases. They included other disbursements that are not related to this Paxil® class proceeding. I asked for invoices, but he provided none. I do not believe they exist. I rejected his claimed disbursements, but used them to help estimate the $175,000 in disbursements at section 1(n) of the settlement agreement.

[159] In addition to Mr. Churko's comments above, Exhibit 6 to Mr. Churko's affidavit discloses claims for a number of items, which total $193,042.95 CDN. Those items appear in American funds and an "adjusted" Canadian dollar amount. Below are some items with their corresponding adjusted Canadian dollar amount:

(a) $481.14 for "dinner tickets to meet with Merchant/Casey";

(b) $247.04 for "grillFire dinner with Casey";

(c) $1,264.07, $910.45 and $436.02 for "american express" and "Capitol One" payments; and

(d) $823.34 for "Houston meeting to discuss Merchant Alliance".

[160] Merchant Law submits that disbursements are never assessed in class action cases. However, this is exactly what Merchant Law attempted to do in 2021 when it no longer represented Ms. Singh.

[161] I find that all of the disbursements must be reviewed by an assessment officer and that the only disbursements that are permitted are those incurred by either Merchant Law or the Consortium (or its successor), which are in the nature of the disbursements described in the invalid Contingency Fee Agreement: see paragraph [131](b).

4.5 Honorarium

[162] One of the considerations when determining whether to award a representative plaintiff an honorarium is the risk taken on by the representative plaintiff.

[163] In her February 7, 2020 affidavit, Ms. Singh said she felt bullied by Mr. Merchant to sign the Contingency Fee Agreement and afterward realised that it gave Merchant Law the benefit of any costs awards in her favour but left her exposed, without any indemnity, in the event that costs were awarded against her.

[164] This class action exposed Ms. Singh to:

(a) a dispute among lawyers seeking to carry on with the class action;

(b) the frailties of the Contingency Fee Agreement that did not indemnify Ms. Singh for the costs awards made in favour of GSK;

(c) a further claim by GSK for additional costs against her; and

(d) a claim to immediately pay the disbursements of her former counsel, Merchant Law, which was ultimately abandoned.

[165] Despite the stress caused by the disputes between lawyers, Ms. Singh participated in the litigation and did so with diligence. The Consortium never pursued the costs that she was awarded against Merchant Law. These costs would not have been covered by the Contingency Fee Agreement (even if valid), and would have been payable to Ms. Singh directly.

[166] In ***Doucet v The Royal Winnipeg Ballet***, 2023 ONSC 2323 at para 92, Matheson J, for the Divisional Court, discussed the test to be applied where honoraria are sought:

> 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.

[167] I find that, in these very particular circumstances, Ms. Singh is entitled to a modest honorarium to recognize the risk and stress that she incurred in this action as representative plaintiff.

[168] I am cognisant of the comments in ***Smith Estate***, at para 135, regarding the spectre of "fee splitting" where a representative plaintiff's honorarium is paid from lawyers' fees. However, a significant amount of the risk that Ms. Singh was exposed to arose from the disputes between counsel. Having the honorarium paid from what would otherwise be allocated to Legal Costs does not, in my view, create a fee splitting arrangement but rather recognizes that Ms. Singh's risk (and associated stress) related to the conduct of her own counsel. I find that it would be appropriate for the honorarium to be paid out of the 33% allocated to legal fees for all counsel because, although Merchant Law's actions affected Ms. Singh personally, the Consortium did not pursue costs on her behalf after they were awarded in the ***Change of Representation Decision***.

[169] Given all of the circumstances of this case, I find that the appropriate honorarium for Ms. Singh is $10,000.

4.6 Allocation of legal fees

[170] The reasonable and fair allocation of the legal fees must recognize the legal services provided by:

(a) Merchant Law;

(b) the Consortium, which includes both KoT Law 2019 and Guardian Law; and

(c) the lawyers with Individual Retainers.

[171] However, before the lawyers are entitled to share the fees, the costs incurred by the lawyers to implement the settlement must be recognized and paid. These are the costs for the Claims Administrator (fees, disbursements plus applicable taxes), the Claims Officer (fees, and to the extent there are any disbursements, plus any applicable taxes), and the honorarium of $10,000 for Ms. Singh. The Claims Administrator and Claims Officer costs are currently estimated and will have to be determined before the legal fees can be calculated to the dollar but do not need to be known to allocate the relative percentage of legal fees among counsel.

[172] I find that a fair and reasonable allocation of legal fees is one based on a percentage basis among: Merchant Law under the Fees Undertaking, the Consortium, and the lawyers with Individual Retainers. This allocation does not consider the hours allegedly spent by each of the three categories of lawyers but focuses on the results achieved. An allocation by percentage also recognises that the contest over the change of representation provided no value for the class: see a similar circumstance in ***Bancroft-Snell*** at para 24.

[173] Neither KoT PC nor Docken PC can be direct recipients of legal fees in the Costs Application. KoT PC and Docken PC may have claims against Merchant Law or the Consortium (or its successors), and may have Individual Retainers with claimants who are found to be Eligible Claimants. However, neither KoT PC nor Docken PC were lawyers of record for Ms. Singh and their position is equivalent to the position of Mr. Farrell.

[174] The Consortium appears to have evolved. Guardian Law is no longer actively practicing law and Mr. Docken now practices law with Napoli Shkolnik Canada. The First Collaboration Agreement, Second Collaboration Agreement, and Third Collaboration Agreement provide some

insight into the relationships between the parties and the creation of Napoli Shkolnik Canada. However, those agreements were not provided in full and the legal relationship between the parties under those agreements was not argued and, to some extent, is an issue raised in the Ontario litigation. For these reasons, I will allocate legal fees to the Consortium that, when the dollar amount is known, are to be held in trust by agreement of Napoli Shkolnik Canada, the partners of KoT Law 2019, and Guardian Law, or failing such agreement, are to be paid into the Court of King's Bench of Alberta to the benefit of this action, to be held in an interest bearing account. The legal fees allocated to the Consortium shall be held in trust until the allocation of the parties having an interest in those legal fees has been determined by a court of competent jurisdiction and a further order of this Court has been granted. I am not seized with this matter.

[175] In terms of the allocation among Merchant Law, the Consortium and the lawyers with Individual Retainers, it is important to recognize that they have, or will achieve, a significant element towards the Eligible Claimants receiving a portion of the settlement funds:

(a) Merchant Law argued the certification application that resulted in the ***Certification Decision***, even though it was issued after Ms. Singh had changed her representation to the Consortium;

(b) the Consortium negotiated a settlement with GSK which was approved; and

(c) the lawyers with Individual Retainers, to the extent that Eligible Claimants are not self-represented, will ensure that the documentation for each potential Eligible Claimant is gathered and submitted in accordance with the Distribution Protocol.

[176] Each element of the settlement process is important and, while different, each is a necessary step without which the final result could not be achieved. Certain steps might have taken longer but my analysis rests on the value of each element and not on the effort to attain it. Based on the value of each element being critical to the whole settlement, I find that it is fair and reasonable to allocate one third of the legal fees (after payment of the Claims Administrator, Claims Officer, and the honorarium) to each of the elements and therefore to each of Merchant Law, the Consortium (or its successors) and, subject to the following proviso, the lawyers with Individual Retainers.

[177] The amount payable to the lawyers with Individual Retainers is capped such that no one Eligible Claimant will pay more than 33% of that Eligible Claimant's compensation for all legal fees to Merchant Law, the Consortium, and the lawyer with the Individual Retainer. In the event that an Eligible Claimant is not represented by a lawyer with an Individual Retainer, then the amount that would have been otherwise paid to the lawyer under an Individual Retainer shall revert to the settlement funds for the class and shall be distributed among all Eligible Claimants.

3. Calculation based on assumptions

[178] As noted above, exact dollar figures cannot be calculated at this time because there are portions of the allocations that are unknown. However, if the same assumptions in Appendix A are relied upon, the following allocation can be used for illustration purposes:

	Line	Calculation (see Appendix A)	Calculation based on assumptions	% of Settlement (A)
Global settlement amount		=A	**$7,500,000.00**	**100.00%**
Legal fees, Claims Admin, Claims Officer, and honorarium	S	=Ax33%	-$2,475,000.00	33.00%
Disbursements, incl tax (estimated and to be assessed)		F	-$321,962.50	4.29%
Tax on legal fees	T	=S*0.05	-$123,750.00	1.65%
Total expended	U	=S+F+T	**-$2,920,712.50**	**38.94%**
Total available to class members	V	=A-U	**$4,579,287.50**	**61.06%**
- compensation to health authorities		=C	$525,000.00	7.00%
- compensation to Eligible Claimants		=V-C	$4,054,287.50	54.06%

[179] Using the assumptions for the disbursements and the costs of the Claims Administrator and Claims Officer, and further assuming that all of the Eligible Claimants are represented by lawyers with Individual Retainers, rounding to the nearest whole percentage:

(a) the class will share 61% of the settlement:

(i) health authorities will receive 7%; and

(ii) Eligible Claimants will share 54%; and

(b) the costs of achieving and distributing the settlement (Legal Costs, Claims Administration, Claims Officer, honorarium, disbursements, and tax on all of those items) will be 39% of the settlement.

[180] Based on the assumptions set out in Appendix A, but with a reduction in the honorarium as discussed above, the total available for legal fees, including tax, is $2,193,100 ($2,475,000 - $171,900 – $100,000 - $10,000). In this scenario, and if the Eligible Claimants are all represented by lawyers with Individual Retainers, then each of the three groups of (1) Merchant Law, (2) the Consortium and (3) the lawyers with Individual Retainers, will be entitled to legal fees in the amount of $731,033.33, inclusive of GST. However, the exact figure will be determined when the Claims Administration costs and the Claims Officer costs are known, together with how many of the Eligible Claimants are represented by counsel.

[181] I find that the above allocation based on the assumptions and any final allocation based on actual amounts will be fair and reasonable.

[182] I have not accounted for interest in the settlement funds in this illustration as the invalid Contingency Fee Agreement does not mention allocating interest and I find that any interest on the settlement funds should be for the benefit of the Eligible Claimants, who did not contribute to the significant delay in getting this litigation resolved.

4. Next Steps

[183] The next steps are as follows:

(a) The Claims Administrator will work with counsel for GSK, who holds the settlement funds in trust, to pay the health authorities their respective shares of the settlement funds.

(b) Merchant Law and the Consortium shall have 30 days from the issuance of this decision to file their documents supporting their respective disbursement claims which shall be determined by an assessment officer. If this deadline is not met,

without an extension granted by me before the deadline, then any party not filing shall be barred from claiming disbursements.

(c) The Consortium, or a party on its behalf, shall, if it has not already done so, engage the Claims Officer so that the evaluation of the claims that the Claims Administrator has determined have been made on behalf of Eligible Claimants, can be undertaken in accordance with the Distribution Protocol.

(d) When the Claims Officer has performed the category assessments for the Eligible Claimants, the Claims Administrator shall determine:

(i) the actual costs of the Claims Administrator, based on s 5.4 of the Settlement Agreement;

(ii) the actual costs of the Claims Officer; and

(iii) which Eligible Claimants have a lawyer with an Individual Retainer.

(e) Once the disbursements are assessed, and the items described in paragraph (d) are determined, the distribution of the settlement funds among counsel, disbursements, taxes and all Eligible Claimants (other than health authorities who should have already received payment) can be calculated by the Claims Administrator.

(f) Once all Eligible Claimant appeals have been addressed, the Claims Administrator shall determine each Eligible Claimant's compensation taking into account:

(i) the actual amount calculated for the Eligible Claimants in accordance with paragraph (e);

(ii) that any interest on the settlement funds which accrues to the benefit of the Eligible Claimants; and

(iii) any amount that will not be paid to a lawyer with an Individual Retainer because an Eligible Claimant is self-represented and which accrues to benefit all Eligible Claimants.

(g) At the same time that the compensation is distributed to the Eligible Claimants, the Claims Administrator shall pay:

(i) the actual costs of the Claims Administrator, based on s 5.4 of the Settlement Agreement;

(ii) the actual costs of the Claims Officer;

(iii) the disbursements to Merchant Law and the Consortium, as assessed;

(iv) the legal fees as set out in this decision, together with GST, to:

(A) Merchant Law;

(B) the Consortium, as follows:

(1) 10% of the Consortium's entitlement of class counsel fees to Guardian Law;

(2) 90% of the Consortium's entitlement to be held in accordance with paragraph [174]; and

(C) the lawyers with Individual Retainers in accordance with paragraph [177], except that 10% of the amounts owed to lawyers with Individual Retainers, except Merchant Law, shall be held in trust for a potential claim by Guardian Law, which depends on a determination of who the successors to the Consortium are, and if they filed any Individual Retainers, which funds are to be held trust in accordance with paragraph [174].

5. Costs of the Costs Application

[184] In the event that the parties do not agree to the costs of the Costs Application by April 9, 2025, then such costs shall initially be addressed in written submissions.

(a) No later than noon on April 23, 2025, any party seeking costs against any other party (the Claiming Party) shall file and serve on all other parties, and submit to my office via email addressed to my Judicial Assistant:

(i) a written costs submission setting out the Claiming Party's position, which shall include:

(A) the party or parties against whom costs are sought (each a Respondent Party) and the amount of such costs;

(B) a draft proposed bill of costs pursuant to Schedule C of the *Rules*;

(C) the Claiming Party's position with respect to the factors set out in Rule 10.33; and

(D) a summary of the proposed reasonable and proper costs that the Claiming Party incurred in respect of the action; and

(ii) if they choose, one affidavit containing evidence of:

(A) legal fee invoices, disbursements and taxes; and

(B) any applicable formal offer or other settlement offer the Claiming Party wishes to be considered.

(b) No later than noon on May 7, 2025, each Respondent Party shall file and serve on all other parties, and submit to my office via email addressed to my Judicial Assistant:

(i) a written reply setting out the Respondent Party's costs position, which shall include:

(A) the Respondent Party's response to the costs submissions against the Respondent Party;

(B) the Respondent Party's position with respect to the factors set out in Rule 10.33;

(C) if they wish, a draft proposed bill of costs pursuant to Schedule C of the *Rules*; and

(D) if they wish, their submission on the reasonable and proper costs for which they should be responsible and to whom; and

(ii) if they choose to do so, one affidavit containing evidence of any applicable formal offer or other settlement offer they wish considered.

[185] All written submissions shall be in letter format and shall:

(a) be a maximum of two pages, excluding authorities and any proposed bill of costs;

(b) have 1.5 line spacing;

(c) have no less than 2.5 cm margins; and

(d) have font not smaller than 12 pt Times New Roman.

[186] After I have received the written submissions, I will advise the parties whether an oral hearing is also required.

[187] Unless a deadline is extended by me in advance of the deadline occurring, if any party does not provide their costs materials by the deadlines set out above, that party shall be deemed to have no submissions.

Heard on the 8th day of November, 2024 and the 6th day of December, 2024 and the 27th day of January, 2025.
Dated at the City of Calgary, Alberta this 7th day of March, 2025.

E.J. Sidnell
J.C.K.B.A.

Appearances:

Casey R Churko
for Applicant, Ms. Singh as proponent

EF Anthony Merchant, KC
for Respondent, Merchant Law

Eric Block, Eric Brousseau and Viktor Nikolov
for Respondents, Mr. Docken and Napoli Shkolnik Canada

Jonathan Denis, KC
for Respondent, Guardian Law

Randy Sutton
for the Defendants

Appendix A
see paragraph [73]

Description	Line	Calculation	Proposed Legal Costs	% of Settlement (A)	Alternate Legal Costs 1	% of Settlement (A)	Alternate Legal Costs 2	% of Settlement (A)
Settlement	A		$7,500,000.00		$7,500,000.00		$7,500,000.00	
Administration costs paid to Claims Administrator	B	Note 1	-$59,325.00		-$59,325.00		-$59,325.00	
Health insurer claims	C	Note 2	-$525,000.00		-$525,000.00		-$525,000.00	
Class counsel fees	D		-$2,000,000.00		-$500,000.00		-$750,000.00	
GST on Class counsel fees	E	=Dx5%	-$100,000.00		-$25,000.00		-$37,500.00	
Class counsel disbursements	F	Note 3	-$321,962.50		-$321,962.50		-$321,962.50	
Honorarium	G		-$50,000.00		-$50,000.00		-$50,000.00	
Subtotal (to be held in interest bearing account)	H		**$4,443,712.50**		**$6,018,712.50**		**$5,756,212.50**	
Interest assumed to be 3.25% for 6 months	I	Note 4	$72,210.33		$97,804.08		$93,538.45	
Compensation Fund (Proposed Settlement Agmt def'n)		=H+I	**$4,515,922.83**		**$6,116,516.58**		**$5,849,750.95**	
Post-settlement Claims Administrator costs	J	Note 5	-$87,575.00		-$87,575.00		-$87,575.00	
Claims Administrator expenses	K	Note 6	-$25,000.00		-$25,000.00		-$25,000.00	
Claims Officer's fees (estimated 40 x $2,500)	L	Note 7	-$100,000.00		-$100,000.00		-$100,000.00	
Compensatory Payments (Proposed Settlement Agmt def'n)		=J+K+L	**$4,303,347.83**		**$5,903,941.58**		**$5,637,175.95**	
Payments to lawyers with Individual Retainers	M	Note 8	-$523,817.70		-$2,125,000.00		-$1,875,000.00	
Summary								
Global settlement amount		=A	$7,500,000.00	100.00%	$7,500,000.00	100.00%	$7,500,000.00	100.00%
Estimated interest		=I	$72,210.33	0.96%	$97,804.08	1.30%	$93,538.45	1.25%
Total funds available	N	=A+I	**$7,572,210.33**	100.96%	**$7,597,804.08**	101.30%	**$7,593,538.45**	101.25%
Legal costs incl GST and disbursements	O	=D+E+F+M	-$2,945,780.20	39.28%	-$2,971,962.50	39.63%	-$2,984,462.50	39.79%
Claims Administrator fees, including tax	P	=B+J+K	-$171,900.00	2.29%	-$171,900.00	2.29%	-$171,900.00	2.29%
Claims Officer's fees		=L	-$100,000.00	1.33%	-$100,000.00	1.33%	-$100,000.00	1.33%
Honorarium		=G	-$50,000.00	0.67%	-$50,000.00	0.67%	-$50,000.00	0.67%
Total expended	Q	=O+P+L+G	**-$3,267,680.20**	43.57%	**-$3,293,862.50**	43.92%	**-$3,306,362.50**	44.08%
Total available to class members	R	=N-Q	**$4,304,530.13**	57.39%	**$4,303,941.58**	57.39%	**$4,287,175.95**	57.16%
- compensation to health authorities		=C	$525,000.00	7.00%	-$525,000.00	7.00%	-$525,000.00	7.00%
- compensation to Eligible Claimants		=R-C	$3,779,530.13	50.39%	$4,206,163.50	56.08%	$4,193,663.50	55.92%

Note 1: As set out in s 5.4 of the Proposed Settlement Agreement: Notice of Certification $25,000, plus Notice of settlement approval hearing $27,500, plus HST $6,825.

Note 2: The health authority claims were approved in the aggregate at $525,000 at the Approval Application.

Note 3: The amount assumed is $350,000, less $28,037.50, to account for the amount paid by class counsel to the Claims Administrator which now incorporated in administration costs (Line B).

Note 4: Mr. Churko included interest on the settlement funds pending distribution in calculations and allotted a portion to counsel; Counsel for Mr. Docken and Napoli Shkolnik Canada did not include interest on the settlement funds in any of their calculations. Mr. Churko made the assumption of 3.25% interest and I have set the period for comparison purposes at 6 months.

Note 5: As set out in s 5.4 of the Settlement Agreement, the Claims Administrator is entitled to fees based on the number of Eligible Claimants. The information provided on January 27,2025 is that there are 114 claims; however, the Claims Administrator has not yet determined how many of the 114 claims are Eligible Claimants. Because the number of Eligible Claimants is unknown, I have used 40, which is the number proposed by Mr. Churko for this element of the calculations as no party took any issue with it.

Note 6: Mr. Churko estimated $25,000 for this element of the calculations as no party took any issue with it.

Note 7: At the Approval Application, it was proposed that the Claims Officer could be retained for $2,500 for each of the assumed 40 Eligible Claimants.

Note 8: The Proposed Legal Costs calculation is based on a maximum of 33.33% of the settlement. The Alternate Legal Costs 1 is based the proposal that the aggregate amount of Class Counsel fees and fees under Individual Retainers is a maximum of 35% of the settlement and Individual Retainer fees are not limited to "Napoli submitted cases" as indicated on Mr. Docken's and Napoli Shkolnik Canada's revised submissions.