File No. CV-09-00376927-CP00

ONTARIO

SUPERIOR COURT OF JUSTICE

MARILYN DOLMAGE AS LITIGATION GUARDIAN OF MARIE SLARK and JIM DOLMAGE AS LITIGATION GUARDIAN OF PATRICIA SETH

V.

HER MAJESTY THE QUEEN

S E T T L E M E N T A P P R O V A L H E A R I N G

BEFORE THE HONOURABLE MADAM JUSTICE CONWAY

on December 3, 2013 at TORONTO, Ontario

APPEARANCES:

R. Ratcliffe — Counsel for the Crown

K. Baert — Counsel for the Defence

SUPERIOR COURT OF JUSTICE

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TUESDAY, DECMEBER 3, 2013

REPORTER'S NOTE: Court is in session when recording of the proceedings begins 10:32:59 a.m.

THE COURT: I am asking Mr. Baert, therefore, please, on behalf of the class, to tell the court about the history of Huronia and the background to this class action.

I am also going to give an opportunity for the representative plaintiffs, Ms. Slark and Ms. Seth, to make a brief prepared statement to this court.

In terms of process, I'm going to first hear submissions from Mr. Baert, class counsel. Then, I'm going to hear from Mr. Ratcliffe, counsel for the Crown, Her Majesty the Queen in Right of Ontario.

After the lawyers have made their submissions, I'm going to hear from any class members who wish to object to the settlement. I've already seen some of the objections in writing that have been filed with the court.

And, in addition, any class member who was in court today, and wishes to object to the settlement, will have the opportunity to speak. What I will do is, as well, as, after Mr. Baert

and Mr. Ratcliffe have made their submissions, I will recess court so that the class members who wish to speak can identify themselves to Mr. Baert and give him their names.

I will ask Mr. Baert to please prepare a list of those who wish to speak and after the recess I will ask Mr. Baert to provide me with that list.

You will then be able to come up to the counsel podium when I call your name and tell the court why you object to the settlement.

Because of the time constraints, I am going to give each person a maximum of five minutes to speak. This time limit will be the same for everyone who is objecting to the settlement. We will be consistent.

Finally, after I have heard from any objectors, Mr. Baert will have the opportunity to address those objections by making brief reply submissions.

So, with that, I am going to call on Mr. Baert, asking him to speak clearly, loudly, so that everyone can hear.

SUBMISSIONS BY MR. BAERT:

MR. BAERT: Thank you, Your Honour. I'll do my best and I'll move the microphone as close as I can.

I'm conscious of the time constraints and I want to make sure that we have enough time available to hear from class members and objectors, so I intend to move fairly crisply with respect to the first item on the list, which is the history of HRC.

Now, as everyone here knows, the trial of this matter was scheduled to commence on September the 16th of this year, but on that very day, the settlement of this litigation...
UNIDENTIFIED PERSON FROM THE BODY OF THE COURT: A little louder, please. Louder.
MR. BAERT: ...was reached. This is a....
THE COURT: I see hands being putting up and people asking to keep the voice up.
MR. BAERT: I'm going to move it even closer, perhaps, even hold it. Maybe I'll just hold the, how's that?
UNIDENTIFIED PERSONS FROM THE BODY OF THE COURT: That's better. Yes, that's better.
MR. BAERT: All right. Well, it's sort of the Las Vegas show style of legal submissions. That's a bit too loud for me.

Beginning again, after 133 years, Huronia finally closed its doors on March 31, 2009. Throughout its tenure as an institution to ostensibly care for individuals with disabilities, Huronia quickly became, the plaintiffs say, an unsafe and unhealthy

warehouse for some of this province's most vulnerable persons.

Despite all the calls for improvement over many decades, urgings to adhere to minimal standards of care and public shamings of its failures in the media and in other reports, for many decades its residents were left to fend for themselves, often without having their most basic needs met, that of their health and their safety.

Although this matter did not proceed to trial in the end, we think it is clear that the pattern of the province's knowledge and failures in acting to secure the most basic of human environments was clear.

The institution was originally designed for caring, educating and habilitating its residents. Unfortunately, none of those goals were properly met for many, many years. In other words, it was operated in a sub-standard and, we say, deeply toxic way. Many residents were worse off when they were discharged than on the day that they arrived.

In 1876, Huronia was founded as the Orillia Asylum for Idiots. That was the name that was used at that time. Obviously, our views have changed for the better. It was operated under the inspector of asylums, prisons and public charities until 1930. And, I think that's

telling in that this institution was grouped together with prisons and asylums even though the people who were supposed to be in Huronia were neither convicted of anything, nor insane.

In 1890, it was renamed the Orillia Hospital for Idiots, and then the Hospital for the Feeble-Minded in 1911.

In 1936, the institution was again renamed as the Ontario Hospital School to reflect its alleged educational component. We think that the evidence is clear that there was no real educational component to Huronia, for many, many decades.

In 1972, the Centre came under the direction of the Ontario Department of Health and then the Ontario Ministry of Health. Its admission area covered the regions of Halton, Peel, York, Simcoe, Muskoka and Perry Sound.

After 174, it operated under the direction of the Ministry of Community and Social Services, under the *Developmental Services Act*.

It was closed in 2009.

No matter what time period we're discussing, at the very least, up until the 1980's, every aspect of Huronia residents' lives was dictated, controlled and provided for by the Crown. It

was, in effect, what has come to be known as a "total institution," that phrase being created by the Law Commission of Canada in its report, Restoring Dignity 2010, Responding to Child Abuse in Institutions.

Total institutions are marked by a series of characteristics, whether they be prisons or institutions such as Huronia. In such institutions, the opportunities to make choices, or provide any input into your own life, are extremely limited if not non-existent. The vulnerability of the individuals in Huronia, as a result of their placement in the institution, which would have been difficult for any person, was compounded by the fact that many of them were developmentally challenged and children.

As the Law Commission of Canada stated in its report about total institutions, and I quote:

> These children can be even more vulnerable to abuse than other children. Isolation and powerlessness are more marked in their case because the disability itself may cause or contribute to those conditions.
>
> This is, the very characteristic that makes institutionalization more necessary for children with disabilities, also makes them easier targets for abuse, once they are there.

I could go on for many hours about specific examples of mistreatment but I will just give a few examples that we were able to uncover in the five years that we worked on this case.

At many times, residents were left to aimlessly walk or crawl around Huronia, often without any clothing. Residents were not often bathed or cleaned as often as would have been appropriate. There was very little attempt to supervise or program activities which would be of interest to residents to help them develop.

Residents were often organized into work details to perform routine and ordinary tasks of running the institution, yet were paid almost nothing for doing so.

Admissions and procedures contained very little opportunity for pre-admission visits, and communication between residents and family members were made difficult, if not impossible.

Unfortunately, notwithstanding that this institution was dealing with people who were vulnerable, and young people, as well, there was a serious shortage of professional staff, falling far behind, sometimes as much as 30 percent of the appropriate industry and professional standard.

There was a total lack of personal attention, a total lack of privacy. Wards and rooms were unnecessarily locked, creating an environment which was more like a prison. Lavatories lacked doors and often toilet seats.

For their physical labour in and around the institution, residents were either paid nothing at all or were paid minimal or completely unrealistic wages in the range of four to eight cents per hour - not a pretty picture. And, I could go on.

The ministers of the Crown, during the relevant time periods, and they were of all political parties, had knowledge of these problems and the mistreatment and abuse, as early as 1956 and likely earlier.

Various reports, official and otherwise, were prepared over the years, documenting the abuse and the neglect the residents suffered and proposing recommendations. Notwithstanding these many reports and recommendations over a period of some years, no adequate safeguards were put in place to deal with the problems that I have just described.

All of the steps that were taken were piecemeal and inadequate. Even when some of the measures were followed, they were implemented over such a

long time period that they had no real effect on the lives of those who were actually there.

The constant and chronic failures of the province to ensure the institution adhered to these reasonable population levels and maintain adequate staff, gave rise to an environment chronically amenable to violence, abuse and mistreatment.

One of our experts who would have testified at trial, Professor, Sobsey, put it this way, and I quote:

> By 1945 the administration at Huronia knew or should have known that admitting residents to Huronia would result in harm. They also knew that residents admitted to Huronia were almost certain to experience assault, whether by other residents or staff members, and that they were unwilling or unable to reasonably protect residents against these assaults.
>
> By the 1970's, practice standards in the field made it clear that residents who carried out work in the institutions that contributed economic benefit to the institution, should be fairly compensated, and were entitled to the same compensation and benefit as other workers.

> Administrators at Huronia certainly knew, or should have known this.
>
> By the early 1970's, if not well before, the administration was aware that conditions at Huronia were so unsanitary that any resident who was admitted would be exposed to hepatitis, parasites and other infectious diseases.

In 1970, parents of a developmentally disabled child wrote to their Member of Parliament, Mr. Tim Reid, in a letter dated June 2nd, 1970, after they had visited their son at the institution. They said as follows:

> It was as if we'd stepped back in time 70 years or more. I have seen criminals housed in better conditions than these poor creatures. Dormitory conditions for adult inmates were atrocious. Bathroom facilities, from what we saw of them, were dickensian. Corridors and dormitories stunk. Even in the hospital unit we visited, young children brought tears to our eyes at the general conditions, housing and dress.

In March 1979, the then Minister of Community and Social Services, the Honourable Keith Norton, made a statement that the Crown recognized that it would have been most

effective to address the underlying environmental and systemic causes of abuse rather than merely issuing proclamations prohibiting abuse. And, he stated:

> By that time, if not long before, it should have been clear that a change in direction was needed to protect the residents of Huronia from harm.

The minister identified the problem and plan to address these issues, as vital to protecting the residents from harm. However, the policies, procedures and practices following the minister's statement do not reflect any change in the institution's efforts to address these issues.

During most of its history, Huronia was large, over-crowded, under-staffed, and suffered from poor conditions.

The Crown admitted in its expert report filed in this case that putting large numbers of often helpless and sometimes violent and vulnerable people of both sexes in immense, aging, under-staffed institutions created an environment that could lead to abuse.

Over the years, the press, parents and government policy makers noted that Huronia fell short of the prevailing standards and appealed

to the government to set things right. But, unfortunately, nothing or very little was done.

In a number of respects, and it was clearly one of the defences raised by the province in this case, the argument was made that this is the way all institutions were run throughout Canada and that Ontario was no worse than any of its counterparts.

First of all, that is not a proper excuse, in my view. The fact that more people were doing something that was wrong doesn't make it any more right. But, more importantly, we say that Huronia was operating at a level which was lower than many of its Canadian counterparts, and that institutions in what was clearly then Canada's richest province should have been much better.

In an English case in 1933, the House of Lords was asked to consider this argument of whether the fact that all institutions were equally bad is somehow a legal excuse. And, this is what the English judge said:

> I do not think this is a sound argument. The practice, on its very fact, is inconsistent with precautions against a known risk, and the mere fact that it is the usual and long established method is not a sufficient justification.

> It cannot be justified as an excuse, simply because, in the part by good fortune, no harm seems to have happened.

He goes on:

> The defendant cannot escape liability by clinging to old or outmoded techniques and practices.

I would suggest that the situation is all the worse because at many times in the 1950's, 60's, and 70's, it was publicized.

In 1954, the superintendant of Huronia, Mr. Horne, complained that he was handicapped by a shortage of staff.

In 1956, the inspector of Ontario Hospitals reported that the medical was far below that accepted as adequate.

A 1956 inspector's report on Huronia provided that in some of the areas where patients were confined to single rooms, no adequate provision had been made to supply heat. And, he suggested that they be placed in more desirable accommodation.

A 1958 brief for the Ontario Association for Retarded Children, to the premier and the

cabinet, noted the alarming proportions of over-crowding at Huronia.

During the 1960's, there was a crippling shortage of professional staff at Huronia.

In 1960, Pierre Burton authored an article entitled, "What's Wrong at Orillia: Out of Sight, Out of Mind," in which he described gross failings at Huronia, including extreme over-crowding.

Ultimately, Mr. Burton's article led to a parliamentary debate where Huronia was called a "hell hole" and Huronia's cottages were called, "buildings for human storage."

According to the Toronto Globe and Mail, in 1960, after a visit to Huronia, Provincial CCF leader, Donald MacDonald asserted that the institution should not even be called a hospital, but rather, a building for human storage. He said that the institution looked like a solid mass of beds with as many as 80 or 90 sleeping no more than 18 inches apart.

In 1969, Dr. Martin Shulman, who was a member of the legislative assembly, made the following statement in the Ontario Legislature:

> Everyone in this House is aware of why members are allowed to visit the mental

> institutions on pre-arranged, whitewashed tours. It is because of the glaring inadequacies which were exposed when I toured a number of these institutions, discovering inadequacies, neglect, abuse, inter-patient violence, under-staffing and low staff morale.

In 1970, a parent of a resident of Huronia, as I mentioned earlier, complained to their local Member of the Legislative Assembly. And, that member of the Legislative Assembly passed that letter on to the Minister of Health, Thomas Wells.

Further complaints were then made to that same MLA about Huronia. And, one of the complaints said:

> On entering, you have the feeling that you've been transferred back to an insane asylum in the 18th century and you are overcome by a smell that I can't describe.
>
> You pass through a door that is quickly locked behind you, and are bombarded by the poor creatures that live there. As you get braver and your stomach settles a bit, you look around and notice the poor soul asleep on the cold tile floor, and you see some sitting on the floor rocking, and still others banging their heads on the floor.

> We desperately need a residence in our own area where our own children could be treated like human beings and not like prisoners or animals.

There were a series of reports in 1971, the Williston Report. At that time, Mr. Williston who was an eminent barrister in Toronto, as of 1971, he said that Huronia was at least 12 years behind in where it was needed to be, and that it would fall further behind if steps were not taken. He made a number of recommendations.

There were further reports commissioned in the 1970's which recommended that a number of major changes be made.

As late as 1989, students from a local college alleged that there were still problems at Huronia relating to dining conditions, sorry, eating conditions, staff eating clients' food, same spoon being used to feed a number of residents, meals left until cold before they were served to residents, et cetera:

Person hygiene issues where clients' clothing was not changed for two or three days, improper ridicule and derision emanating from staff or being called obscene or profane names, being sworn at or being made to recite nursery rhymes that were obscene, clients left in restraints

for up to five hours without being released, and prescribed inappropriate treatments, and residents being left unattended while staff sit in staff rooms or watch television.

Again, this trial was scheduled to go on for four months and most, if not all of what I'm describing, comes from documents that were uncovered in the course of this law suit.

So, there's no dispute. There can't be any dispute that these things happened since they were recorded in writing at the time.

It was not a question, even if there was such a question, of people coming forward decades later to complain about things that happened many years ago, that no one knew about. These things were all known. They were all recorded in writing, in reports, many of which made it up through various levels of government, to the various cabinet ministers of the day.

Generally speaking, the excuse that's been given for these things occurring is under-funding. If you are going to take on the responsibility of caring for vulnerable people, especially when they're children, you have a responsibility, morally and legally, to do what's necessary to protect them. And, it's not an excuse in 1913, 1963 or 2013, for a government to take on a task

and then not do it properly on the grounds of lack of funding.

If it can't be done properly, then it should be turned over to someone else who can do it properly.

Huronia, at one point, had more than 2,800 residents, the peak being reached, I believe, in the 1970's, late 1970's. And, it was only when new residents stopped being admitted that the ratio of staff to residents began to become close to what was appropriate.

It was not any real change on the part of government policy, but simply attrition and the discharge or death of residents which led to the right number of people working there in the first place.

It's clear from different types of cases from all over the world, whether they involve orphanages, asylums, institutions for the disabled, residential schools, prisons, whatever they may be, that where vulnerable people are isolated from their family and from any connections with the rest of society, that the atmosphere will likely lead to a toxic environment and to abuse.

And, not withstanding that these types of things have happened at many different Canadian

institutions, we continue to act as if it's surprising that these things occurred and that they're one-offs.

That's not my personal view, having many involved in many of these different types of cases in many different parts of Canada. The story seems to be the same over and over again, just with a different name on the institution. So, there will probably be many more of these types of cases, unfortunately, but that is better, I think, than that what happened at these types of places remain a secret.

And, it's important that those who were at Huronia know that, at least in their case, ultimately, the truth did come out and that what they had been complaining about for many years is finally coming to light.

I'd like to turn to the history of the litigation.

Now, despite the fact that the events I've been described occurred over many years, 1945 through 2009, it wasn't until 2008 that this case was commenced. And, but for the passage of the *Class Proceedings Act*, in 1993, this case would have been impossible.

And, class proceedings have many critics who attribute many characteristics to them that are

negative. But, I think it's clear that in this case, without that vehicle, this group of worthy claimants would never have been able to get inside this courtroom. Because, it was only by acting together that they were able to take on an adversary as large as the Province of Ontario.

And, so, in discussing the test for settlement approval, and the history of the litigation, I will attempt to continually emphasize how important it is that courts recognize that without allowing groups of vulnerable people to act collectively then many worthy claims will not make it to court.

The case was started in 2009. And, ultimately, Justice Cullity heard a motion for certification in 2010. The hearing for certification was contested and Justice Cullity, who is now retired, had the foresight, in my opinion, to see that these types of claims against government, brought by vulnerable people, are the very types of cases that those who passed the *Class Proceedings Act* intended to proceed as class proceedings. Because, but for that tool, there would be no way for them to get to court.

He certified a class made up of two groups. The first was the resident class of all persons who resided at Huronia between January 1, 1945 and March 31, 2009. March 31, 2009 was chosen

because that was the date the institution closed. January 1, 1945 was chosen because that was the earliest date on which we had evidence that a member of the class who had contacted us had suffered harm while at Huronia.

The other important element to the certification order was that a person had to have been alive as of April 21, 2007, in order to have been a member of the class. And, that's because, in Ontario at least, you have two years from the date of death to bring an action, to bring a law suit, and if it's more than two years then your claim dies with you.

So, since the claim was issued on April 21, 2009, only people who were alive two years before that date were able to make a claim in this case. So, I'll talk about this more when I talk about the settlement itself, but, only estates of those persons who were alive as of April 21, 2007, but are deceased now, are eligible to make a claim in this settlement.

Justice Cullity made a number of legal rulings which I won't go into, but what important decision that he did make was that, for the period 1945 to 1963, the time period for which the Crown argued that they were immune from a claim for negligence, they could still be sued for breach of fiduciary duty.

And, he made that decision, notwithstanding that there was a decision of the British Columbia Court of Appeal that said the opposite. So, without that decision of Justice Cullity, everyone who was at Huronia between 1945 and 1963, would have had no claim. And, the Crown sought to appeal that decision, but lead to appeal was denied by Justice Herman.

In November of 2011, the plaintiffs moved to have the action placed on the long trial list in Toronto, on an expedited basis. Now, people who aren't lawyers, who are sitting in this courtroom, may not know that in Toronto there's about a two-year wait to get on the long trial list, but Justice Moore granted our request because of the importance of this case and the fact that approximately 100 class members per year were passing away. And, so he allowed us to jump the queue and fix the trial date of September 2013.

The period between early 2011 and fall 2013 was occupied with getting this case ready for trial. And, I'll just give, I know Your Honour has this information in the factum, but I want to give those who are here an idea of how much information there actually was on Huronia, leading up to the trial.

There were more than 63,000 documents representing more than 230,000 pages, so almost

a quarter million pages of documents produced by the province in that two-year period. And, 100,000 individual resident file documents, representing another 200,000 pages.

Many, many days of examinations for discovery of the plaintiffs and the defendant, 688 written questions, 21 experts reports from 13 different experts, 5 motions, 9 different days of mediation and settlement discussions with 3 judges, different judges.

And, then finally, in the months leading up to the trial, when it was under the management of Justice Horkins, the parties agreed that we do a trial with only 16,000, only, I say, 16,856 documents.

And, I have to mention, at this point, that in preparing for the trial, the Crown very sensibly agreed that all of those documents would go in on consent and for the truth of their contents, so we didn't have to have a witness to talk about documents from 100 years ago.

The plan was that the trial would start on September 16th and last till December 20th. The settlement agreement was signed on September 17, 2013, I believe, at 3:30 in the morning, 6 hours before the second day of trial.

Before we ask Pat and Marie to make their statements, I just want to give everyone a list of the main elements of the settlement.

First of all, and most importantly, the province will apologize to all former residents of Huronia. And, so far as we know, this is the first time that, as part of a settlement agreement in a lawsuit, a defendant, let alone a government, has agreed to apologize to those who brought a law suit against it.

And, that was a very important element of the settlement, because one thing I learned from working on this case for five years was that, more important than compensation, more important than publicity, more important than other initiatives, was that the premier or some other person of high rank with the province, apologize and say they were sorry for what had happened at Huronia.

THE COURT: Mr. Baert, I see that there is a reference to the *Apology Act*. Perhaps you could just explain...

MR. BAERT: Certainly.

THE COURT: ...the implications of that.

MR. BAERT: Sure. Apologies are rare in law suits because, be they large corporations or governments, the concern is that by apologizing to a group of people you are admitting legal responsibility for what occurred and, as a

result, governments never apologized when they made mistakes.

Now, the *Apology Act* was passed to allow governments to apologize without taking on a legal liability by doing so. So, because this is a settlement, the government is not admitting that everything that I've just described occurred, although most of it comes from their own documents, but they will apologize for what did occur. And, they can do that without opening themselves up to hundreds more law suits about the same subject.

So, the apology is, obviously, very important, and I remember many times in meetings with my clients, being told by the plaintiffs is that all they really want is for the government to say that they're sorry and to acknowledge that these things happened.

Secondly, there is a $35 million settlement fund.

Thirdly, the government will pay for the cost of notice to the class, both prior to this hearing today, and afterwards, and for the administration of the claims process.

The claims process is entirely paper-based and does not require, and I want to emphasize this, and I'll talk more about it after Pat and Marie

speak, does not require former residents to testify or appear in person. And, they need only fill out a form and describe what happened to them in order to be eligible for compensation.

And, that claims process will be overseen by a retired justice of the Supreme Court of Canada, Ian Binnie.

So, we've done our best to make the claims process friendly to those who have to use it. Under that process, a claimant can receive up to $42,000. That amount will not be subject to any taxes, nor will it impact any social service, be it ODSP or housing or the equivalent administered by the province.

So, that money is free and clear of any government attempts to attach it in any way.

Finally, all of the documents that were produced in this case, the 65,000 documents I talked about earlier, will become publicly accessible for use by scholars and others so that the monumental amount of work that's been done uncovering these documents will not be wasted, because these documents would have come out at the trial, but they did not because of the settlement.

Finally, there are a number of commemorative initiatives which will be undertaken. There will be a commemorative plaque placed on the grounds of Huronia. There will be an opportunity for access to the facility. There will be proper maintenance of the cemetery and a cataloguing of those who are buried there.

Many of the people in this room will be aware that many of those graves are not currently marked or are hard to read or are overgrown with grass. All of that will be fixed to the best of the ability of the province and an attempt will be made to make a list of those who are interred there.

Finally, scholars will have an opportunity to attend an archive, artifacts from Huronia itself.

It's 11:28 a.m. Perhaps this would be a good time, if Pat and Marie are ready to come to the podium, to hear from them.

THE COURT: Certainly. We'll hear from them and then we'll take a 15-minute break.

MR. BAERT: Okay. Thank you, Your Honour.

THE COURT: Ms. Slark and Ms. Seth.

MR. BAERT: I'll just hold the mike here.

SUBMISSIONS BY MS. SLARK and MS. SETH:

MS. SLARK: So, I'm ready. My name is Marie Slark. My friend, Patricia, said, who is here

beside me, and I, are the lead plaintiffs in the Huronia Regional Centre class action.

We have had the honour to represent all those other people who lived at HRC.

We hope the settlement is approved today.

Most class actions are about things or money. This one is about people. Everyone who suffered at Huronia, we have had no power over our lives. Finally, we have a voice. The government and the public are listening to us. We thank the lawyers for that.

I am glad the court is listening now. It was really hard for me to speak up for myself. Like others, I was taught in the institution to keep quiet or else I would get hurt. It has been difficult to tell people about how I suffered and how this continues to limit my life, but I know that other class members are much less able to speak and understand than I am.

The claim form must be easy to use and people will need help to make claims. The people who were most likely to be harmed at HRC are going to need the most help to make their claims.

I hope other class members will get the chance I have had to tell their stories. Some will use

words and some will find other ways to communicate.

This case brings to light serious injustice. We are asking the court to make sure everyone gets justice.

Pat and I want to continue to be involved to make sure people make claims and get their money.

I would like everyone to know that I never expected a $25,000 payment. I am proud of the hard work I have done on this class action, but I don't want anyone to think I would take money that should be going to other class members.

MS. SETH: First.

MS. SLARK: Pat and I will only accept the honorarium if there's money left over.

We appreciate the apology but no amount of money will give us our lives back. The survivors should get as much money as is possible. I wish there was more.

Maintaining the cemetery will honour those who died. Remembering the stories and sharing the documents will tell people this must never happen to people with disabilities again. Thank you.

MS. SETH: Thank you, so much.

THE COURT: Thank you, very much, Ms. Slark and Ms. Seth, and Ms. Domage.

We're now going to take a break for 15 minutes and then we will continue with this settlement approval hearing. Thank you.

R E C E S S

U P O N R E S U M I N G

THE COURT: Mr. Baert.

MR. BAERT: Thank you, Your Honour. I've obviously filed a 38-page written brief on settlement approval and I'm, obviously, not going to go through all of that with you. But, I do want to go through certain elements of it out loud for the benefit of the members of the class and all those who are attending today, perhaps, in laymen's terms.

When we brought this case in 2009, there weren't many other cases like this that have been brought. Certainly, there hadn't been many brought against governments alleging negligence and breach of fiduciary duty over six decades of time, on behalf of thousands of people.

And, although our legal system has done its best to evolve to deal with new types of claims, claims of this type on behalf of many thousands of people who may have been abused, over many,

many years, present certain practical difficulties.

And, so, my job in deciding whether to conclude a settlement was to weigh all of the benefits of getting something that was sure and immediate and guaranteed through a settlement so that we could begin compensating, paying money to the harmed people as quickly as possible, hopefully within the next three to four months.

If there had not been a settlement, then even as we stand here today, this trial still would have been going on, because it was scheduled to last until December 20th. And, there is no guarantee that the plaintiffs would have been successful.

The trial would have been four months long with hundreds, if not thousands, of documents, many witnesses and many, many uncertainties. Even if the plaintiffs had been successful in proving that the government did something wrong, the trial judge still would have had to decide how much compensation should be paid to the residents.

And, in our system of justice, that normally requires that each and every person come forward, one at a time, and prove by testifying that something happened to them for which our law provides a remedy. And, simply, the fact that you may have been harmed during the time

you were resident in a government institution does not automatically mean that if you were in a court you will be successful.

And, so we had to decide whether it was better to try and get $35 million, an apology, and all of the other things that are part of the settlement, now or wait three to five years, going through a trial, waiting for a decision, an appeal of that decision, waiting for the decision of the Court of Appeal, all the while, while approximately 100 class members per year are dying.

And, so we thought it best, taking into account all the risks, that a settlement made more sense. And, the court's job on the motion, on this motion, is to decide if the deal that we reached with the province is a fair one, fair to everyone as a group, given the risks of going ahead without a settlement. Now, there were a number of risks involved in this case that made a settlement a good idea.

First of all, in any case where you are seeking to attack the decision of a government about events that occurred more than 50 years ago, you're going to have difficulty.

The allegations in this case involve more than 65 years of facts and documents. There are thousands of class members who are of advanced

age or who have died, or whose memories have faded.

In addition, not all the documents from the longer-ago time periods are available. And, not every person who was harmed is willing to testify. And, even if they are willing, testifying in a court is always a difficult process, even for people who are not discussing allegations of abuse that happened to them.

And, so one thing that weighed very heavily on my mind was that, by a settlement, no one would be required to come to this courtroom and testify under oath, and relive all of the horrible experiences that they went through many, many years ago.

When you testify in a court, you are subject to being cross examined by counsel for the Crown and, so, as we all know, there are two sides to every story, and it would not simply have been a matter of people coming to testify and having everything that they say be accepted as gospel.

The Crown's lawyers would have had an opportunity to test those memories using our rules of evidence and our law. And, that is only fair in that we have a system where you have to prove that what you say is true. And, it's always the burden of the plaintiffs to prove that what we're saying is correct.

And, so we would have had to prove all those things that I've described earlier, that those things actually happened.

In addition, in every case, trials are an uncertain process. Witnesses don't always provide the evidence that you expect. Sometimes the documents that you're relying on don't go as far as you'd like. And, sometimes the arguments that you make to the judge and to the court aren't accepted.

And, so there are those general risks that apply to every case that always make settlement, when it's a good settlement, be a good idea.

Another risk involved in this case was the fact that it's being pursued as a class action, because unless we had been able to convince the court that the court could award damages to the entire group in one global number, then each and every person would have had to come forward to prove their loss. That would have taken years, if not a decade, to do so.

And, so the plaintiffs could have proven everything that we say about what the Crown did, and at the end of the process we'd still be left with something that required every individual to come and testify about what happened to them.

That would have meant that the people who come to testify, who aren't believed, would have received nothing, and those who didn't testify at all would have received nothing. And, only those who would have been believed and could prove what their loss was financially, would have been awarded anything.

And, of course, in a case like this where many of the members of the class are, suffer from severe disabilities, they're the ones who were most likely to have been mistreated. Yet, they are the very people who are the least able to come and testify for themselves at a trial. So, the more vulnerable you are, the more likely it is that something bad happened to you. Yet, at the same time, the harder it is for you to use our legal system to get compensation.

Another problem with this case is that in our country you only have a certain number of years after something happens to bring a law suit. And, so, unless you fall into some very limited exceptions, you can't wait, normally, 40 to 50 years after an event, to complain about it.

And, so there was a very real risk that every single person in this case, who was a resident of Huronia more than six years before this case was commenced in 2009, would have received absolutely nothing because the claim was brought too late.

And, it doesn't matter how strong your claim is and it doesn't matter what the defendant did and it doesn't matter how much you would have been entitled to, if the claim is brought too long after the time it happened. A judge is entitled to dismiss your claim.

And, so, if we had not been able to convince the trial judge that we fall into some of these exceptions about the time limits, and even if we had proved everything, the claim still would have been dismissed for virtually all of the class.

Another risk is that, as I outlined in my submissions earlier, there was an evolving situation at Huronia. And, although it was never great, it was clearly worse at some time periods than others.

Not surprisingly, it was the worst the further back in time one goes. So, those with the best case are those who were there the longest time ago, which then runs into the very problem I described before, which is they may be out of time. Or, their memories have faded or the documents may not exist anymore, and so on.

Those with the stronger claims would, therefore, have been at risk of not getting anything, but for a settlement.

Now, even if we had overcome all of these things that I have described, in our country, the trial judge, in other words, the judge sitting in a courtroom like this, at the Superior Court level, doesn't have the final say. And, we have Appeal courts who are free to come to a different conclusion than the trial judge.

And, so even if we had gone through a four-month trial and waited for six months for the decision, and won on every issue, I have no doubt that the province would have appealed that decision, as is their right. That appeal probably wouldn't have been heard until 2015 or so, maybe later, and, given all the risks of that case, that appeal would have likely been a flip of a coin.

And, because there are no other cases like this case for our Court of Appeal to look at and say, this is just like another case we've already decided. So, everything would have been new.

In my view, it didn't make a lot of sense to subject the claims of the class members to a flip of a coin. And, it's always better to agree to settlement, if you can.

Now, even if we had overcome all those obstacles, there's no guarantee that the trial judge would have awarded us more than $35

million. There have been no successful trials of any class action which has been brought against a government in this country, alleging decades of abuse, which has resulted in a trial decision where judgment has been granted to a group involving thousands of people.

So, this case is a first in many respects, but when you're the first, and you go to trial, you run the risk of being told that that is simply not our system, and each person has to come one at a time.

The other problem is, is that, in Canada, when damages are assessed, one of the factors that a court looks at is, what did the person loose in terms of income as a result of being damaged or harmed by the defendant? And, for this particular group of people, or a large majority of them, proving a loss is very, very difficult.

And, the fact that it's difficult doesn't mean that you don't have to prove it. You still do. So, those individual assessments of damages would have been adversarial, not like the settlement. They would have taken a long time to complete, unlike the settlement. They would have required lawyers to be present all the time, and a judge, unlike the settlement. They would have required class members to testify orally and be cross examined, unlike the settlement.

Most importantly, they would have limited recovery to those former residents who were able to communicate well enough to testify in a courtroom, thereby creating a barrier to justice for those class members who can't.

By our calculation, without a settlement, it would have been at least three years from now before all of these issues would have been resolved, with no guarantee of success. So, within that three years, another 300 people or so, would have died.

And, litigation is always a gamble, but this was not a bet that it would have been responsible to make, given the nature of this case and the facts which I've described.

We took it right up to the day the trial was supposed to commence, which means we had a very good idea of all of the pluses and minuses of our case. And, that is unusual in the class action settlement world. Most cases don't go to the first day of trial, and therefore, the lawyers representing the plaintiff aren't in as good of a position to assess whether they would have won or lost.

And, although I believe, based on all the work that all of the other members of our team did,

that we ultimately would have won, there is no guarantee.

Now, just by way of a contrast, in British Columbia there was a similar proceeding commenced about an institution called Woodlands, a similar vulnerable group that was bringing a law suit. And, they reached a settlement. But, unlike in this case, each person would have to come forward individually, through a claims process, which would require them to give evidence.

So, they skipped all the trial about whether the province was responsible and just went straight to the individual assessment process, and in the last three years they've done nine claims, nine. So, that's one claim every four months. At that rate, they will never finish. This is at paragraph 65 of our factum.

And, so, that told me two things. First of all, if we have an individual assessment as part of the trial, it's going to take a long time for the members of this class to have their claims adjudicated. And, given that this class size is four times the size of the Woodlands class, it would have taken all that much longer.

Similarly, in designing the settlement, we wanted to make sure that people would not be required to come forward in person, as they have

to in the Woodlands case, but that they would only have to fill in certain forms. Because, as Justice Winkler said in a number of cases, where he approved class action settlements, the important question for the court to ask is, how easy is it going to be for the class members to actually get the funds?

There's no point in designing a settlement, as was done in Woodlands - that the people who were supposed to benefit from it, can't use. So, the settlement is, one of the reasons why we say it's fair and reasonable, is because it's user friendly.

Now, in deciding whether to approve a settlement, the court has to look at a number of factors, which are listed at paragraph 32 of our factum. The first one is the likelihood of recovery or success.

Now, I've talked about this a little bit. I don't know any lawyer who's in court on any kind of regular basis, who's able to predict with certainly how a particular case will turn out. Sometimes you win cases that you thought you'd lose. Sometimes you lose cases that you thought that you'd win.

The point is, is that our system of justice is not perfect and no case is ever for sure a winner.

Secondly, unlike many other cases, this case has been exhaustively investigated for the last five years. Over 12,000 hours have been spent by members of our firm over the last five years, litigating this case. And, at the end of those 12,000 hours, we think we know it pretty well. And, we're aware of all of its flaws and all of its positives.

But, one very important factor, that the case, as clearly mentioned - is that the amount and nature of discovery evidence and investigation done by counsel, is an important factor.

A related factor is the recommendation and experience of counsel who are recommending the settlement. And, we put before you an affidavit of a partner in our firm who exhaustively, more exhaustively than I have on today's hearing, goes through all the reasons why we recommend this settlement.

And, our firm, and in particular, the group of people who worked on this case, have worked on many other institutional abuse cases that have been brought, either against the Province of Ontario, the Government of Canada, or private entities. And, it is our recommendation to you, based on all of the circumstances, and all of our experience, that this is the best outcome that is achievable at the current time, and,

that other outcomes are more risky and could result in the former residents receiving absolutely nothing.

And, when you settle a case, and perhaps I'll put it a different way, if on the day before the trial, the Crown had said, we'll pay you $35 million and apologize and do all the other things that are now in the settlement, and we had said, no, and then we have the trial and we lose, we don't get to go back to the day before the trial and say, thank you, we'll now accept the offer you were making us the day before the trial starts.

You either settle the case or you go to trial. There's no in-between and in offering to settle a case, the Crown is not in any way admitting that they did it or that they owe anything. So, if we didn't accept their offer, we'd go through a long trial and an appeal and then disaster occurs, they don't have to pay a penny.

And, so making a $35 million wager along with risking not having the apology and all the documents come to light, and all the other things in the settlement, it's simply too big a risk to take.

Now, I'll deal with some of the objections after we've heard from any objectors, but I want to mention a couple points about some of the

objections, which is, there are a number of objectors who say, well, you shouldn't have accepted $35 million because there's no amount of money that could possibly make up for what we went through.

And, they're right. There isn't. And, there's no settlement that I know of that can go back in time and make these things not have happened. So, this is the best we can do many decades after the fact, to try to do something for those people.

And, although, obviously more is always better, we have to look at what is achievable in reality and I think it's fair to say, without getting into the objections themselves that we extracted every possible dollar and concession that we could, from the Province of Ontario in this settlement.

And, I venture to say that under many scenarios, this settlement is better than what might have happened if we had done the trial and won the case, because, even if we had gone to trial and won, we wouldn't have gotten an apology. We would have had a judgment of a judge say what the defendant did was wrong, but that's not the same as them admitting that they did something wrong, or apologizing for it.

Most people, I think, would rather have the person who did something wrong to them apologize, than to have a third party say they did something wrong. And, you can't get an apology from a judge.

So, even if we had gone to trial and won everything, I am not convinced that the result we would have obtained, in terms of dollars, an apology, it being tax-free and claw back-free, along with all the other features that we could have even done better. So, it makes no sense to take that risk when you've achieved almost everything you wanted to achieve through a settlement.

Now, one of the other factors you have to consider is, did the parties make enough of an effort to settle this case on good terms? So, in this case there were four different neutral people involved, at various stages. Early on in the case, a Justice Cumming was involved, a then sitting judge of the Superior Court. He was not successful.

Later, Justice Murray was involved. He was not successful.

Justice Archibald, who's the head of the long trial list here, we had three three-hour-long pre-trials with him. He was not able to get us to a deal.

And, then finally, only when both sides were looking at the start of the trial, in mid-September, did the gap between the sides begin to narrow, through the involvement of Ronald Slaght, Q.C., who is a very senior member of the bar, with over 40 years experience as a lawyer.

So, every possible effort was made, over many years, to resolve this case at various stages. And, that bargaining was in good faith and it was very hard fought, and it was done at arm's length. And, there was no collusion.

And, I know of no better method to focus the mind of a lawyer on settling a case than to know that the next day, he or she is about to start a four-month trial where victory is not certain. And, that's what happened in this case.

In the decision of *Serhan v. Johnson & Johnson*, and I'm at paragraph 33 of the factum, Justice Horkins said:

> Where the parties are represented [as they are in this case], by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement, and that class

> counsel is staking his or her reputation and experience on the recommendation.

And, we do.

To reject a settlement, according to Justice Cumming in the *Vitapharm* case, which is in our book of authorities, at Tab 3:

> A court must conclude that the settlement does not fall within the range of reasonable outcomes.

In other words, you would have to find that it is unreasonable, and that no rational plaintiff or class counsel representing that plaintiff would have made this deal.

So, it is, no settlement is perfect, but the answer to that is, it doesn't have to be. So long as it's fair and reasonable, then it should be approved.

In the *Dabbs* case, in 1998, which is a decision of Justice Sharpe, he said:

> All settlements are a product of compromise and a process of give and take. Settlements rarely give all parties exactly what they want. Fairness is not a standard of perfect. Reasonableness allows for a range of possible resolutions.

> A less than perfect settlement may be in the best interests of those affected by it, when compared to the alternatives of the risks and costs of litigation.

I would go further. In this case, I would say and emphasize that, in my submission, this settlement is better than what the outcome of litigation would have been, because of the avoidance of individual assessments and the apology.

And, as Justice Winkler said, in the *Red Cross* case, the tainted blood case, these tests are not static. They're not something where you divorce them from a context of the case and who the people are. And, this is not a settlement about securities fraud or a defective product, or something much more antiseptic.

This is a case where vulnerable, sometimes extremely vulnerable, will have an opportunity to receive compensation by filling out a form which will be based on their word. And, their word is to be accepted unless there are reasonable grounds to the contrary.

That, again, in my submission, is an unusual aspect of this settlement. The tie goes to the resident when they're making a claim.

I want to emphasize, talk a little bit about the claims process because it's up to me to convince you that it's a fair process. And, there are three factors which I'm going to say weigh in favour of it being fair.

First of all, there are two types of claims that a person can make in this settlement. One is called a Section A claim, and that only requires that the former resident sign a form that, in effect, promises that they were harmed at Huronia. And, they don't have to provide any further details. And, if they do that, they can receive up to $2,000.

A person who wishes to make more than the minimum claim can make what's called a Section B claim. And, that requires you to provide details of the harm or abuse that you suffered. But, it's not required that you have any other evidence other than your own word and what you say in the form about your claim.

I don't think I'm overstating it if I say that that is basically unheard of in litigation generally, and in class action settlements, specifically.

Even in the Resident Schools settlement, which was a very good settlement, class members who wished to make what I would call a Section B claim, have to attend a hearing, be cross

examined by the adjudicator, and have documentary evidence as backup, expert evidence. None of that is required here.

The administrator will then look at all of the claims and assign points to all the claims and award the highest points to those who have the strongest claim for the most harm. And, I accept responsibility for the concept that those who suffer more harm should receive more compensation.

Another option would have been to just pay everyone the same amount, no matter how long they were there or how much harm they suffered. That would be simpler, but it would not be fairer, because those who suffered more harm should receive more compensation.

And, so, everyone's points will be weighed relative to everyone else's. I think that is far, as well, in the sense that whoever has the most and largest claim to the most harm will receive the most compensation and everyone else will receive less than that person.

Now, the administrator of the settlement, Crawford's Class Action Services, has been involved in many, many of the largest settlements in this country, including the Residential Schools settlement. But, to assist them, the Honourable Ian Binnie, who is a former

justice of the Supreme Court of Canada, will oversee the claims process.

And, Mr. Binnie, with the assistance of Crawford's, will assess these claims. And, so he will decide, having, seeing all of the claim forms and all of the information submitted by all of the claimants, what is fair to award each person, obviously, the most important decision being what to award the person with the largest claim, since everything works from that.

The details of Mr. Binnie's retainer, obviously, have to be finalized, but the Crown is responsible for paying all of his bills. So, that doesn't come out of the settlement. Nor do the bills of Crawford's, or any of the notice that's been ordered already, and which may be ordered.

And, if we take those four things together, based on the estimates that we have so far, Your Honour, the pre-approval notice cost is in the range of a quarter of a million dollars. The post-approval notice, if the plaintiff has its way, will cost another three quarters of a million dollars. The work of Crawford will cost three quarters of a million dollars.

And, as for Mr. Binnie's bill, I wouldn't want to try and estimate what a retired judge of the Supreme Court of Canada will charge to review

thousands of claims, one at a time, but I think it will be a lot.

And, so those four expenses are all going to be borne by the province, which add up to at least another two million dollars in value for the settlement. But, the good thing about the settlement is, the Crown's responsible for paying those costs no matter what they are. And, it's ultimately up to you to decide how much notice is to be given in the event you approve the settlement and what it will cost, and none of that comes out of the settlement fund.

So, whatever it costs, it costs. And, the Crown has to pay. That is an unusual feature, again, of, many settlements have all of those costs coming out of the pot. This one doesn't.

Now, there wouldn't be a lot of point in having a settlement for a case like this if the claim form wasn't three things, in my submission. And, on another day when we appear before you to debate that issue, you'll hear me, see what I'm about to emphasize now, which is that the claim form must be simple. It must be accessible and it must be easy to complete by former residents, or those who assist them.

The question is not whether it's easy to complete for lawyers or retired Supreme Court

justices, but whether the people who have to make a claim can understand it. And, the claim form that is before you in the motion record was prepared and has had input by many, many different people, but it still can be improved.

Kinsella Media, who's an expert in plain language notice, prepared the original drafts. It was then vetted by lawyers at our firm. It was sent to the ARCH Disability Law Centre, and you have affidavits from them, who provided revisions with a view to making the form accessible and clear, because they have the experience dealing with persons operating with a developmental challenge much more than I do.

And, obviously, ARCH and the litigation guardians and the plaintiffs, along with the other organizations who have sworn affidavits on this motion, are in the best position to know what words on the form will work best for this group.

And, this is always a compromise. The form has to simultaneously be short, while still telling everyone everything they need to know to fill it out properly and to make sure that they get what they're entitled to. And, our job, meaning as class counsel, is to ensure that every single person who is a member of this class gets what they are entitled to under this settlement agreement, and we will. I assure you.

And, we're not going to have a settlement where there's lots of words spread here and there about how great it is, and then when it ultimately comes to administering it and paying out the money by way of a claims form, that we throw up another barrier to the claims of already vulnerable people.

So, ultimately it will be up to the court, after hearing from both sides, on another day, how this claim form will be worded. But, just to alert those in the room, because I've been asked this already today, on the assumption that Your Honour approves this settlement at some point, then we will come back and see you on another day. The form will be finalized and it will be publicized.

So, no one in the room need worry that the time is already ticking because the time will only start to tick once the claim form is finalized and notice begins of settlement of claims being made.

And, so no one is at risk right now if they don't take any steps because they will be advised later about how to make a claim. And, there will be ample information available through our firm and through the media and through notice and through Crawford's, to make

sure that everyone has access to whatever the form ends up being.

Crawford's has agreed, well, let me start out by saying that they have 40 offices across the province and class members will be able to access any of those offices, either by phone or in person. They will have 10 full-day workshops across various locations during the claims period either to ask questions or assist class members. The dates of those will be set and will be publicized. ARCH has also agreed to help in that regard, as have other community organizations and our firm.

And, so with the joint effort of class counsel and the litigation guardians, the plaintiffs, ARCH, Crawford's, People First and Community Living Ontario, hope I haven't left anyone out, every effort will be made to ensure that as many claims as possible are made.

And, I wish to emphasize that, and although it will be a painful experience for most if not all, in order for Mr. Binnie to award a person a substantial amount of money under the Section B claim, a person has to describe what occurred, painful as that may be. And, so I urge everyone to be as detailed as possible in their claim form in order to ensure that they receive what's coming to them.

Now, obviously, there's a possibility that not every person will come forward. I hope they do, but that doesn't always happen. So, in the event that not all of the funds are used up through the payment to class members, the defendant has agreed to make an investment of up to $5 million into programs that will benefit individuals with a developmental disability, and their families.

So, it could be less than $5 million if more of the money is paid to claimants, but it could be up to $5 million if less money goes to claimants.

We won't know how much that is until all the claims are done. And, no money will be paid out to any one claimant until all the claims are processed, because, as I explained earlier, everyone's claim runs off the highest award. So, until we've assessed them all, and unless I'm missing something, then there cannot be payment.

The parties have agreed on some guidelines about where this $5 million would go. And, the purpose of this investment would be to enhance the ability of individuals with a disability, to guide and influence decisions affecting them from a systemic and personal point of view.

There are three potential recipients, or groups of recipients. The first is People First Ontario. The second will be an allocation of the 5 million to organizations that offer support to survivors to tell and document their stories. And, a third part of the money will go to funding to person-directed planning, which will support individuals with disabilities to build lives in their communities by helping them to identify their life vision and goals.

In addition, we hope that some of that money will go to scholars who present properly researched plans to tell the story of what occurred at Huronia and what happened to the survivors while they were there.

Several independent writer's groups and film producers have already expressed interest in assisting survivors of Huronia to document and share their story.

And, that's important because, if there's one regret I have about this case not being tried, it's that at the end of the four months and the reserve, we didn't have a, I'm sure, very well written 200 or so page decision from the trial judge describing all of this in detail. And, that would have been an important, of historical information about this case. But, for the reasons expressed already, settlement made more

sense. But, we hope to do that through another route that's non-confrontational.

I've already talked about the apology. I do want to mention the issue of the documents that were produced in this action. Approximately 63,000 documents....

THE COURT: Before you move on, Mr. Baert, and you may be dealing with this at another time in your submissions, but when you're talking about the monetary compensation piece of it, perhaps you can speak to the proposed deductions from the fund before allocations are made...

MR. BAERT: Right.

THE COURT: ...to those who, the class members, in particular, legal fees.

MR. BAERT: Yes.

THE COURT: And, I know you're going to speak to the issue of the honorarium...

MR. BAERT: Yes.

THE COURT: ...with respect to the representative plaintiffs...

MR. BAERT: That's right.

THE COURT: ...and some of what they said about that in their remarks to the court this morning.

MR. BAERT: Yes. But, perhaps I'll - that's quite a few things. I probably can't do it in four minutes, so I'll try to do the last one first, which is the question of the honorarium.

Now, you heard from Ms. Seth and Ms. Slark that they didn't ask for this, and I want to confirm

that that's true. It's me who's stubbornly insisting on this point. And, I'm not afraid to point that out. I think it's important for everyone in the court to know that that's the case.

Secondly, it's also their wish that it not be paid until the end of the process, and only if there's money left over. I feel two ways about that. I hope there isn't any money left over because that'll mean that it's gone to all the people who made claims. But, in the event that we have $50,001 left, we propose that each of Ms. Slark and Ms. Seth receive $25,000.

THE COURT: Where do you rank that, Mr. Baert? The way it's structured now is after payment of the claims to class members. If there's money left over there's that Section D funding, the $5 million.

MR. BAERT: Right.

THE COURT: So, where are you proposing that the honorarium fit in? After the Section D funding or before?

MR. BAERT: I would say it should be out of the $5 million fund. Now, let me just work through this mathematically.

THE COURT: You can think about it...

MR. BAERT: Okay.

THE COURT: ...over the lunch hour, if you'd like.

MR. BAERT: All right, to make sure I get that right. It's a sequencing question. But, just

dealing with the question of whether it should be paid at all, first of all, these types of honoraria are rarely awarded by judges. So, I have to convince you that there was something extraordinary and important about this particular case and the roles of Ms. Seth and Ms. Slark.

And, I think it's clear from what we say in our factum, beginning at paragraph 85, that these two plaintiffs went far beyond what most, if not all, representative plaintiffs in these types of cases. They were the face of this case to the public.

And, to be a representative plaintiff in an action is not easy, but in one like this, it takes a great deal of courage to put your name on the statement of claim, to be cross examined, to potentially, to have to testify at trial, to attend hundreds of meetings with your lawyers and with your litigation guardians.

We lost, we attempted to catalogue all of the time they spent in meeting with the media. That begins at paragraph 90. To have gone through the abuse that they did, and then have to describe it in the statement of claim and in their affidavits, and be cross examined on those affidavits, and attend in court, and in countless meetings with their lawyers,

preparations to give oral testimony at the common issues trial.

And, let's not forget that we all thought this trial was going to start on the 16th and they would have had to testify right near the beginning, and they were prepared to do that. And, then to do dozens of interviews with radio and television and newspapers, all over Ontario and Canada, and attend conferences, this is far beyond what plaintiffs, let alone representative plaintiffs, normally do.

And, this is one of those special cases where, I submit, that that is exceptional and to put it another way, without them, there would be no case.

And, being a representative plaintiff in a case like this, in my submission, is exactly - let me put it a different way, these two persons carried out their duties exactly the way one would hope and expect and wish for. And, in the grand scheme of things, five years of work for $25,000 beyond what they'll get through the settlement, is a pittance compared to the work that was done and the risk they took, but most importantly, the public exposure. And....

THE COURT: Mr. Baert, I see that it's just after one o'clock.

MR. BAERT: All right.

THE COURT: We're going to recess for lunch until 2:15 sharp. You can continue to speak on the issue of the honorarium, the question that I posed to you, the quantum you're proposing and how that dovetails with that precedent in the case law.

MR. BAERT: Yes. All right.

THE COURT: And, then we will continue at 2:15.

MR. BAERT: Thank you, Your Honour.

THE COURT: Thank you.

R E C E S S

U P O N R E S U M I N G

THE COURT: Mr. Baert.

MR. BAERT: You asked me about the math, and then I'll turn to the cases. So, my understanding is that, let's assume that all the claims are paid for everyone who makes a claim and there's still $50,001 left, if they were each awarded $25,000 then they would receive those funds.

So, another way of saying it is, they'll only get paid if there's enough money left over to pay them. And, if there isn't, then they don't get anything, or, some portion of this could be pro-rated. But, another way of saying that is, the money that would be paid to them won't be taken out of the pockets of the class members who make a claim because there will only be

money left over if not all the money's been used up. So....

THE COURT: In other words, after all the claims have been paid but before any Section Schedule D funding, you would deduct it at that point, and then if there was money left over, that would go into the Schedule D funding?

MR. BAERT: Right. Right. That's what I should have said the first time. But, so, in my respectful submission, that's another factor in favour of the honorarium being awarded, apart from the ones I've already outlined to you in my submissions and which are dealt with in our factum at paragraphs 85 to 96, which is that even what we've both just talked about, there's no possible way that class members will be short-changed as a result of this honorarium being paid.

And, so it'll only be at the end, not at the beginning. So, it's not a deduction off the top. It's really just if there's a residue that exceeds that amount, or some part of it.

Now, I'd like to turn, just briefly, to the case law on the question of whether the honorarium should be paid. And, if you have the book of authorities of the plaintiffs....

THE COURT: Just a technical matter...

MR. BAERT: Yes.

THE COURT: ...the settlement agreement as it's drafted, does not contemplate that deduction.

The way it works is you deduct the legal fees and expenses, then the claims of the class members and then you go straight to the Schedule D funding.

MR. BAERT: Right.

THE COURT: How does it work in the scheme of the settlement agreement which doesn't provide for that deduction?

MR. BAERT: Well, I would say a couple things about that. First of all, the settlement agreement, until it's approved by you, isn't binding and it's the order that you will make that is the final word on the matter.

And, we've provided for this payment in that order. And, in my submission, it's within your discretion that you have under section 29 of *the Class Proceedings Act*, and section 12 of the *Act*, as well, to make such an award.

Typically, settlement agreements don't deal with the amount of this payment because it's something that's ultimately up to the judge to decide what is going to be awarded or not, on the recommendation of class counsel because the defendant is completely uninterested in the subject, legally.

So, it's really a matter of whether you think that they've gone beyond the normal expectation of what a plaintiff should do in a class proceeding. And, that appears to be the test

that Justice Cullity first outlined in the *Garland v. Consumers Gas* case, which is at Tab 15 of our authorities. And, so the words that you would need to find are, "exceptional" and "engaged."

So, that case is at Tab 15, and in *Garland*, Justice Cullity awarded the representative plaintiff, Mr. Garland, $25,000, which is the exact amount that we're seeking here. I believe that's the high-water mark.

And, I would simply point out that, in my respectful submission, representing the class in a case relating to criminal interest over-charges by a utility is not in the same realm as taking on what the representative plaintiffs had to take on in this case.

Simply, because of the nature of the claim and all of the public exposure of what happened to the representative plaintiffs at Huronia, which they were forced, in effect, to go through as a consequence of being a plaintiff, and as a consequence of being interviewed by the media so many times about the settlement.

And, there's no doubt that the case law is that compensation for rep plaintiffs is to be awarded sparingly. And, the operative test is that the functions of the representative plaintiff must result in success for the class, which they

clearly did here, and they must not be in excess of an amount which would be purely compensatory.

I think that, given the evidence we've put before you about the role of the two representative plaintiffs in this case, and the amount of work that they did, certainly this involvement was beyond the normal. It's certainly beyond any of the cases with which I have dealt in my experience in doing this since 1995.

So, awards to representative plaintiffs should be rare. They should not be so large that they bring the case of the settlement into disrepute. They shouldn't encroach on payments that would be going to people who were harmed.

Yet, at the same time, we do want to encourage people like Ms. Slark and Ms. Seth to agree to be representative plaintiffs and we also want to encourage them to be the face of, the public face of the case, because it is their case and that of the class, not the case of counsel or counsel's firm.

I don't know what more that I can add on that, other than to say if Mr. Garland was awarded 25,000 by Justice Cullity, then the amount being sought for Ms. Seth and Ms. Slark is modest, indeed, in terms of the real contribution to this case and I will leave it at that.

Now, I thought it would be an opportune time, unless you have questions for me about any other aspect of the settlement or the test for proving the settlement, to go through the settlement approval order and make it clear what is being determined today, if it is, or subsequent to today, and what is being put off till later, and what those matters are, including notice, the legal fees, the levy, et cetera.

THE COURT: Well, just on that note, Mr. Baert, one of the terms of the settlement agreement that you're seeking approval for, is that, off the top, before there's any distribution to class members, the legal fees of class counsel would be deducted.

MR. BAERT: Right.

THE COURT: So, maybe you can speak to that.

MR. BAERT: Okay. So, there is a separate motion before you, which is not being heard today, but which will be heard, I understand, on February 24, 2014, in open court, where counsel will seek to have their fees taken out of the $35 million pot which has been agreed to be paid by the defendant.

So, under the *Class Proceedings Act*, the court has the power to decide what is fair and reasonable for the lawyers to get paid out of the settlement. And, only if you are persuaded that the amount we are seeking is fair and reasonable, does it get awarded. So, it's not

up to me. It's not up to the defendant. It's not up to the plaintiffs. The court, meaning the judge, decides how much the lawyers get paid for doing their work.

Now, in this case, there was a retainer agreement executed at the outset of the litigation in 2008, which provided for a certain formula and that formula would have resulted in a certain fee which we're not seeking, which would have been even greater, based on the length of time that it took to do this case.

So, it was agreed with the representative plaintiffs at the time the settlement was reached, that class counsel would seek a fee of $8.5 million.

THE COURT: To be clear, that's the fee, exclusive of HST...

MR. BAERT: Right.

THE COURT: ...and disbursements. Correct?

MR. BAERT: Right. I'm going to....

THE COURT: And, also to be clear, that you propose would be deducted before any of the allocation to the class members?

MR. BAERT: Right. Right. There's a couple of aspects of that. First of all, section 32 of the *Class Proceedings Act* provides that the fees of class counsel are a first charge on the settlement fund. So, a first charge means they get paid off the top.

Secondly, governments, including the defendant, charge tax on that, so approximately $1 million in HST would be owing to the provincial and federal governments for taxes. I have no control over that.

And, then there's a further close to $1 million in expenses, disbursements that our firm incurred over the course of the case, paid out of our own pocket, in order to get to this stage and we wish to be paid back for that expense.

On the motion on February 24th, but not today, a fuller argument will be presented on that issue and anyone who's here or anyone who's not here, is free to object to the amount of the legal fees, or the disbursements, obviously, not to the amount of the taxes because we don't control those.

And, at that time, based on another set of written materials that you now have, argument will be presented to you about what that amount should be. Whatever the amount is, ultimately determined to be, is subtracted from the $35 million and then the balance of that money is disbursed to the class.

Now, the Class Proceedings Fund is also entitled to a levy which again is not under the control of the plaintiffs or class counsel, because it's fixed by statue in the *Law Society Act*.

So, just to explain a little bit about what they do, and why they're entitled to something, in Ontario we have a system whereby if you bring a law suit, as you know, and you are unsuccessful, then the loser may be ordered to pay the winner's legal fees.

And, in a case of this size, obviously, the defendant would have run up many millions of dollars in time that they spent defending the case. If they spent even half of what the plaintiff did, that would be many millions of dollars of time. I'm sure they spent as much, or more, in terms of hours.

And, so there's a real disincentive for people to be plaintiffs in this type of litigation because if they do the case and lose, they could lose their life savings by being a representative plaintiff. So, the Class Proceedings Fund was created in order to allow for a fund which would, in effect, back stop plaintiffs who agree to be representative plaintiffs. And, so what the fund does is twofold.

First of all, they provide an indemnity, in effect, a shield for the plaintiffs so that if the case fails, the fund pays the winner's legal fees, not the plaintiffs. So, the plaintiffs don't get wiped out by an unsuccessful case.

And, secondly, the Class Proceedings Fund provides assistance in an amount which they set in their absolute discretion as to disbursement assistance, so, anywhere between one dollar of assistance and infinity.

And, in order to get funding, you must convince the Class Proceedings Fund that your case is a worthy case and that it's a matter of public interest, and that it has a good chance of success because they, paradoxically, only want to back the cases that are going to be successful because they don't want to have to pay if they're unsuccessful.

So, a hearing was held in this case where the plaintiffs and the litigation guardians attended. I believe all four of them did, before the fund, and the fund agreed to provide funding to this case.

So, over the course of the case, the fund lent the plaintiffs and class counsel a certain amount of money which has to be paid back at the end, and they provided this shield. In return, for those two things, they get 10 percent of the net proceeds of the settlement.

The 10 percent is not negotiable. It's in the *Law Society Act* and in the regulation passed pursuant to that *Act*.

And, there is no ability on my part or anyone else's, to depart from that percent. And, we've provided you with the text of that in the factum on the approval.

So, the mathematics are that if you take the $35 million and you subtract the amounts awarded for class counsel for fees, disbursements and taxes, then you substract, if necessary, the $5 million that is going cy-près, if it is. So, the minimum that the Class Proceedings Fund can get is either 10 percent of the amount before the 5 million's paid, or if all of that is paid out to the class, 10 percent of that amount.

THE COURT: You lost me.

MR. BAERT: Do you want me to say that again?

THE COURT: You lost me there because the 5 million cy-près...

MR. BAERT: Yes.

THE COURT: ...which is the Schedule D funding, that's only after, if there's anything left after...

MR. BAERT: Right.

THE COURT: ...payments are made to the claimants?

MR. BAERT: Right.

THE COURT: That does not come into play until class members get there share.

MR. BAERT: Right. Okay. So, let's say, let's take a situation where after deducting class counsel fees, we then do all the claims and all

the money is paid out and there is no 5 million, that all gets used up paying the claimants. Then, whatever the amount of 35 million minus "X," calling class counsel fees "X," times 10 percent, is what the fund gets.

If, however, not all of the money is paid out, the fund, at least on my reading of the statute, can't get 10 percent of the amount of what's paid for the programs because their levy only applies to amounts that are payable to class members, not amounts payable at large.

That is the distinction that I was trying to make. It would be easier if we had the actual numbers but we don't yet.

THE COURT: All right. So, just one more time, walk me through the process of deducting 35 less "X."

MR. BAERT: Okay. Thirty-five less "X," "X" being the amount of class counsel fees that you award on or after February 24th. "Y," we're using "X," "Y," and "Z." "Y" would be the amount of taxes applicable to "X," whatever 13 percent of that number is, and "Z" would be the amount of the expenses or disbursements.

That would then leave you with a net settlement amount and, on the assumption that all of that is paid out to the class, the fund would get 10 percent of that number before it's paid, or, it would be set aside as it was administered.

So, the only point I was making to you about the 5 million is if not all the money is paid out and some part of it goes cy-près, they don't get 10 percent of that because I intend to persuade them, and if necessary, convince you, if we have to, that they don't get 10 percent of that because it's not subject to the levy, the way I read the *Law Society Act*. So, they shouldn't get 10 percent of the programming money because that money's not going to the class members.

THE COURT: So, Mr. Baert, if I were to approve the settlement and if you were to persuade me that you're entitled to those fees that you're requesting, and given the numbers of members in the class...

MR. BAERT: Yes.

THE COURT: ...do you have a sense for what the average amount would be?

MR. BAERT: Well, I can try and do that in my head. It would depend on....

THE COURT: I guess it varies.

MR. BAERT: There's a couple of reasons why that's....

THE COURT: Actually, I'm going to rephrase that.

MR. BAERT: Okay.

THE COURT: In your materials, you say that Schedule A claims would get $2,000...

MR. BAERT: Right.

THE COURT: ...per claim and Schedule B claims will depend on the amount of, the value through

the point system allocated to the level of harm claimed.

MR. BAERT: Right.

THE COURT: But, no more than 35,000 with a bump up to $42,000?

MR. BAERT: Right.

THE COURT: If you deduct the fees that you're looking at, is there any possibility of hitting those numbers still?

MR. BAERT: Well, I would say that there is because, on the assumption that you, just doing the math roughly in my head, there would be somewhere in the range of $22 million left over after paying the Class Proceedings Fund and for the approved fees, disbursements and taxes.

That would mean that if there were 500 claims at the maximum that would use up the entire amount. If there were 1,000 claims at half the maximum it would use up that amount.

But, the distinction that I think is necessary to draw is that there's no way to know what the maximum payment will be right now because we don't know how many points will be awarded to the strongest claimant. All we know is that whatever the strongest claimant is, that person can't get more than 42,000 and then everyone works off them.

So, if your question is, if every person made a claim and every person got the maximum, or just

slightly less, then there is the potential that the fund could run out of money. That would assume that there would be in the order of a 1,000 claims that are approaching the maximum number.

We don't have any way of knowing how many people will make a claim, other than to look at the number of people we've heard from so far, which we've tried to describe for you in the affidavits provided by Crawford's, in terms of how many calls they've received, how many calls our office has received, et cetera.

So, the fact that someone makes a call to our firm, or to Crawford's, doesn't mean that they end up ultimately filing a claim. I hope they do.

I just wanted to find the exact number of people we've heard from so far since the notice program began. So, our firm has heard from 388 new people according to the affidavit of someone in our communications department and I believe that Crawford's has received, I believe, it was 1,100 phone calls since the notice program began. And, I will confirm those numbers.

So, another way of saying it is the more claims there are that are serious, the greater the chance there is that all the funds will be used up. If there are a small number of claims,

period, or a small number of serious claims, then there's less of a chance of that.

THE COURT: And....

MR. BAERT: Sorry. Obviously, the best result is that all the money is used up and everyone is paid exactly what they would have asked for if they were just making one claim. There's no way to know that in advance. Obviously, the more serious claims will get more money and the more of those there are, the less there is left over for the less serious claims.

THE COURT: But again, in terms of legal fees, that is something that is to be approved by the court quite apart from the settlement itself. And, anyone who wants to speak to that would be entitled to attend on February 24th and speak to the quantum of legals?

MR. BAERT: Yes. And, that is one of the reasons for court approval of legal fees in class proceedings. It's because you have a large pot of money that's been created for the benefit of a large group, most of whom have had no contact with class counsel, and therefore, the safeguard is that the judge is the final determiner of what is fair and appropriate in the circumstances, having regard to the risk undertaken and the success achieved in the case.

So, we're not dealing with that today for a number of reasons, but we will be dealing with that on February 24th, in the event that the settlement is approved. And, just to confirm

for everyone in the room, Your Honour is free to award the amount we're requesting or any amount below that amount, but not more.

I'll have more to say about that on the 24th, so it's probably best to not belabour it.

So, unless you have any further questions about that, I'd like to turn to the settlement approval order, which I believe you have a copy of. If not, I know it was being revised.

THE COURT: I don't know. I'd like to see the most updated copy that your....

MR. BAERT: I believe it was being revised right up until about 8:45 this morning.

THE COURT: Actually, Mr. Baert, just before we move onto this, can you just recap for me the method of giving notice of this settlement hearing...

MR. BAERT: Yes.

THE COURT: ...for today, to bring it to the attention of anyone who might have something to say about it?

MR. BAERT: Yes, I can. So, we filed an affidavit of Kinsella Media, which is at Tab 5 of Volume 2 of the motion record. And, just to introduce them, they're an American company headquartered in Washington D.C., and their specialty is the design and implementation of notification programs.

So, they have experience, which they outline in their affidavit, of being involved in dozens of class actions of every type involving securities and anti-trust cases. But, they also were the notice experts in the Residential Schools litigation that we were involved in that involved notice to over 90,000 class members. So, they're a very experienced company dealing with notice and designing notice.

So, as part of the program for today, an order was issued by Your Honour requiring that notice be published in many different newspapers all around the province. There were also letters sent to every person for whom we had an up-to-date address from the defendant's records.

Subsequently, it became clear that that list was not quite up to date, and another mailing was done after that list was cross-referenced with as many of the government data bases that are possible that it could be cross-referenced against, to make sure that everyone got notice of today's hearing.

Now, when I go through the order, I will explain what's going to happen in the next phase.

THE COURT: And, was notice provided through some community organizations?

MR. BAERT: Yes.

THE COURT: Over 300, I believe.

MR. BAERT: Yes. And, I just want to find the actual order regarding notice for today. Just a moment, Your Honour. And, we're finding which tab the order's under.

THE COURT: I don't think it's in the record. It's a record of September 25th.

MR. BAERT: Yes. The order that you made on the other motion. So, it may not be in this record, but Your Honour is aware of it. But, just to make it clear to everyone who's....

MR. RATCLIFFE: If it assists Your Honour, we attached that September 25th order to our responding record...

THE COURT: Thank you.

MR. RATCLIFEE: ...of the Crown defendant.

MR. BAERT: I knew I'd seen it somewhere. So, yes, that's at Tab A, Your Honour's order of September 25th.

So, if I can call today's hearing the fairness hearing, there was a long form notice prepared which was mailed and emailed to the community agencies that you described. The administrator also mailed the notice to anyone who certification notice had been given to, and which had not been yet returned.

There were many ads placed in various weekend editions of a number of newspapers, the list of which is attached to your order of September 2th, which is a very extensive list. In addition, the notice was posted on the

administrator's website. It was posted on our website. The administrator issued a press release announcing today's hearing. Our firm issued a press release.

There was a toll-free number created to ask about today's hearing. And, then subsequent to that, another mailing was done in late November, after the defendant did further cross-referencing of the records, which you're aware of it.

And, perhaps Mr. Ratcliffe could describe in a little bit more detail than I can because it's in his responding record, which we received last night. But, suffice it to say, we tried to give as much notice as is reasonably possible, of today's hearing.

The other thing I would add, and it's not an easy thing to quantify, but I think we're all aware that after the September 16, 17 announcement of the settlement, there were dozens of news stories about the settlement, many of which announced today's date as the hearing date for settlement approval because that is something that reporters were consistently asking the plaintiffs, the litigation guardians and lawyers at our firm. So, I....

THE COURT: So, Mr. Baert, as class counsel then, are you satisfied that the efforts made to

notify the class of today's fairness hearing were adequate?

MR. BAERT: Yes. Yes, I am. And, I think the number of people who attended today is a testament to that. I think it's more than the usual number who would attend a settlement approval hearing in a class proceeding, and I think there's been a high level of interest in this hearing date. But, that doesn't mean that we can't do a better job at the next date, which is when it really counts, to make sure everyone gets notice of the claims deadline.

So, if Your Honour has the order handy, and you should have an order that has 18 paragraphs and four pages.

THE COURT: Um-hmm.

MR. BAERT: So, just for your benefit, and also for the benefit of those who are here, a number of things I want to emphasize. First of all, nothing in the settlement, that I've spent a large part of today describing, comes into effect unless you approve it.

So, unless there's court approval, then there is no settlement. And, if there is approval, that order takes effect 31 days after the date you make the order. That's to allow for the time that's allowed for appeals to the Court of Appeal. So, that's in paragraph one. The court approval date means the later of....

THE COURT: I don't think that's quite right. The way it's drafted here, it's not the date of approval of the settlement. It's the notice....
MR. BAERT: Yes. I'm sorry.
THE COURT: Is that what you intended?
MR. BAERT: Yes.
THE COURT: Yes. Okay.
MR. BAERT: That's what we intended and that's what I meant to say...
THE COURT: Um-hmm.
MR. BAERT: ...is that we changed that recently. Thirty-one days after the date that you determine the notice of approval of settlement should go out is when it becomes effective. And, this changes the definition that's in the settlement agreement. Originally, it was 31 days from today, or the day you approved it.

So, the next important step after approval is the notice of approval of settlement which would be where Your Honour has determined that the amount of notice that we're giving of the next phase is appropriate, after hearing from counsel, and then that starts the clock ticking for the claims process.

So, I'll explain that in greater detail. In this order under the release section, I just want to explain this. The releasees are Her Majesty the Queen in Right of Ontario, in other words, the province and each of her employees,

servants, agents, ministers, members of the cabinet, insurers, representatives and assigns.

So, that means if this settlement is approved and someone is a member of this class, they are not free to bring their own law suit against the province in respect of these matters because, by virtue of this settlement, those claims will have been released, in other words, erased.

And, a person's claim will be released whether or not they make a claim through the claims process. So, that's another reason why it's important that class members make claims, because if they don't, they're going to lose their opportunity to obtain compensation for being at Huronia during the relevant time period.

In order to sign this order, you have to determine that it's fair, reasonable and in the best interests of the class. That's paragraph two.

Under paragraph four, again, on the assumption that the settlement is approved, the claims of the class would be dismissed. That's a fancy way of saying erased. And, again, because of that, and the release, no one who is a member of the class would be able to bring their own separate law suit against the province.

Your Honour's order is binding on everyone who is in the class, including those who are under disability. And, that's true whether or not they make a claim.

Under paragraph seven, and this is definitely worth mentioning, so that everyone understands it. Class proceedings are court supervised at every step, and under paragraph seven, the court continues to have supervisory jurisdiction over the action, the plaintiffs, all the class members, for the purposes of implementing the settlement agreement.

So, if something comes up after today that requires Your Honour's intervention, then under paragraph seven that can be done.

The next stage, under paragraph nine, is that the form and content of notice of approval of this settlement, its method of dissemination or distribution, and the form and content of the claims form, shall be determined by further order in the new year, or such other date prior to that or after that as it's ultimately determined.

And, so what that means is that between the approval date and the date notice begins, we will re-attend before you to finalize the content of the notice of the claims process.

And, you'll note that in our notice of motion for settlement approval we say that we think further updating and cross-referencing of these class member lists should be done and that it's only when we're all satisfied that we have the best possible list of class members that the notice process will begin, because in the next phase it's crucial that people get notice because otherwise they'll run out of time to make a claim.

The claims process will be 120 days long, from whatever date is fixed as the date that it begins. So, that time is not running yet, but will start to run sometime in the new year, once notice is finalized.

THE COURT: Just so I understand that...

MR. BAERT: Yes.

THE COURT: ...the 120 days, then, which would typically start from the date the court approves this settlement, will be pushed back, if I were to approve this settlement, and not begin until the court, myself, is satisfied with the form of notice and the claims form and the manner of disseminating the notice to the class?

MR. BAERT: Correct.

THE COURT: Correct?

MR. BAERT: Correct. So, that's an additional safeguard that we added later once we saw the notice process go forward for this hearing because we want to be very sure that, given the class membership we have, and given that we're

talking about events that occurred a long time ago where people may have moved many times since they left Huronia, that every effort is made to find them so that they can make a claim.

And, only then does the time start to run. So, if we don't satisfy you, that we've made enough effort to find these people, then it's not going to start to run until we do.

And, I think that's a good innovation in this case that you don't often see, but this case has unique characteristics which we've tried to recognize.

Under paragraph 12, sorry, under paragraph 11, the legal fees are to be determined on February 24th, or such other date as ends up being convenient. It could be sooner or later, depending on what other events are happening. The same will apply with respect to the Law Foundation levy but that is, of course, dependent on how much is paid out. So, that happens later in the process after you've determined the legal fees.

It's important to mention paragraph 13, which is that Crawford Class Action Services is being appointed as claims administrator. This means that they're subject to the court's supervision, so, since you are appointing them under paragraph 13, you can remove them if they don't

perform as they're supposed to. And, they're, in effect, serving at your direction and if something arises, we can come to you to ask you to make an order.

Paragraph 14 makes it clear that all the administration costs are to be paid by the defendant. All the notice costs are to be paid by the defendant, and those are separate and apart from the $35 million and don't encroach on the 35 million.

We've also provided that, in paragraph 17 and 18, that we are to report back to you on the administration of the settlement and the settlement agreement. I expect it'll be more often than what's described in this order, while, at the same time, not wanting to burden Your Honour with every daily issue that arises.

But, the concept is the settlement is court supervised and it's our job on this side of the divide to confirm to you that the settlement is doing what we said it would.

THE COURT: I don't understand why 17 wouldn't mirror 18.

MR. BAERT: It seems somewhat repetitive. I agree with you. So, I think saying it once would be better than saying it twice.

THE COURT: Well....

MR. BAERT: The only additional one in 18 is that it's every six months thereafter, as well

as in the first four months. So, 17 would have, it would appear to be caught by 18.

THE COURT: If you add the word, "plaintiffs."

MR. BAERT: Yes.

THE COURT: And, I see that you've provided for the honoraria...

MR. BAERT: Yes.

THE COURT: ...in paragraph 15?

MR. BAERT: Yes.

THE COURT: And, you would clarify that to mirror what you've said about that. That would be paid after amounts are paid to the class members.

MR. BAERT: Right. There'd be two *caveats* there, if there's money available and the timing, which is at the end.

So, we can prepare a revised order once we hear from Your Honour about whether this settlement is approved.

I'm just going to take a moment to consult with my colleagues and see if there's any major areas that I've left uncovered, because I'm conscious of leaving the objectors time to - just a moment.

I'll turn it over to Mr. Ratcliffe to make the submissions of the defendant. Thank you, Your Honour. Thank you for your patience.

THE COURT: Thank you, Mr. Baert.

SUBMISSIONS OF MR. RATCLIFFE:

MR. RATCLIFFE: Thank you, Your Honour. I'll be quite brief. Mr. Baert, this morning spent considerable time setting out the history of Huronia with all of its flaws.

There is another side to the story he's presented. The matter settled and didn't go to trial. The Crown had 30 witnesses ready to go, including former employees and family members of residents that would have provided a very different perspective.

In terms of one area of concern, abuse, I mean, the ministry and the facility had numerous policies dealing with abuse and there was zero tolerance for abuse. Yes, some residents were abused and that is certainly why the Crown is prepared to enter into this, and did enter into this settlement agreement, so that those residents that were abused could be properly compensated.

The Crown has agreed to the proposed settlement that provides compensation for those former residents who suffered harm.

Mr. Baert made reference to the Huronia Regional Centre being built in 1876 and operating through until March 31 of 2009.

It's easy, I guess, to look in the rear view mirror, but throughout that period, institutions like Huronia provided a desperately needed resource to care for a family member when nothing else was available in the community. During that chapter in history, institutional care was the norm and was the only available care for persons with a developmental disability.

There were no community supports or community services available, and in the regular usual case, the majority of residents were admitted by their families. Families were oftentimes large or there were circumstances which prevented the family from being able to provide for the child who had a developmental disability.

Overall, Huronia's history differed little from other similar institutions across North America. There was an eventual change in society's thinking that involved moving away from institutional care. Society shifted from serving individuals in institutions to the care and community-based model of service delivery that promotes independence and inclusion of those people.

Ontario was part of the first wave of reform when government in North America adopted the institutionalization, and what was referred to as normalization, and began to move towards the

institutionalization earlier than many provinces and states in the United States.

Huronia and all similar facilities in Ontario were eventually closed, of course.

During the time that Huronia was in operation, the vast majority of the staff working there were dedicated individuals who provided excellent care and support to the residents living there. Unfortunately, some residents were harmed during the time that they resided at Huronia.

And, in terms of the settlement, the parties to this litigation have worked and did work very long and hard to reach a resolution. The parties have agreed to the proposed settlement that provides compensation for those former residents who suffered harm. The settlement provides for a simple process to allow class members to access compensation easily, would be our submission.

The proposed settlement also includes an apology to those who were harmed, as well as providing for a copy of approximately 65,000 documents that were produced in the litigation, as you've heard earlier from Mr. Baert, to be transferred to the Archives of Ontario for scholarly research.

The Archives have already begun to work on this project, and in this regard, the Archives will organize the records. A team of archivists will be assigned to review, describe and categorize the documents in an organized manner that will facilitate research.

THE COURT: Mr. Ratcliffe.

MR. RATCLIFFE: Yes.

THE COURT: With respect to the apology...

MR. RATCLIFFE: Um-hmm.

THE COURT: ...who will make it and has the content, the actual wording of that apology been crafted?

MR. RATCLIFFE: My understanding is the plan is to have the premier make that apology and in terms of the final wording, I can't say whether it has been finalized at this point in time. Certainly, work has been done on the apology, but as to whether it's in final form or not, I can't say.

THE COURT: And, will the apology extend to even people who lived at Huronia who may not fall within the definition of the class? For example, somebody who was not alive as of April 21, 2007, would the apology extend to the residents of Huronia at large, or simply to those who are in the class?

MR. RATCLIFFE: My understanding is that it would extend to those that were in the class, Your Honour.

THE COURT: I may want Mr. Baert to - I'm not sure. I don't think I asked that question

before. Perhaps, you can elaborate why it would be restricted.

MR. RATCLIFFE: Well, again, I'm not sure that I had turned my mind to this particular question that Your Honour is asking. Certainly, it would extend to the class members that are members of the class.

Again, I haven't seen the, you know, the apology in draft form, or, you know, I can't say exactly what the status of that is to say whether or not it goes beyond just the class members. I can find out, certainly, and inquire but I don't have an answer for you on that right now.

Access to the records will be provided through, again, this is for scholars through research agreements entered into between the Archives and individual researchers. We expect it will take about six months for the work to be completed, enabling scholars to access those documents at the Archives.

In addition to making the documents available at the Archives for scholarly research, the Ministry of Community and Social Services will also go further by making these documents available to the public. This step will be carried out in a manner that safeguards both the historic integrity of the documents to make sure that an accurate picture of what the history of Huronia was like, is there in the documents, as

well as the privacy interests of those individuals involved.

Given the large volume of and the complexity is certain, of the records, I mean, oftentimes they deal with very sensitive personal matters and personal information. It will take up to three months for the records to be reviewed and personal information redacted, where appropriate, from the records.

In the interim, the intention is to post an index to the collection online within 24 hours of the court's approval of the settlement, if the settlement is approved.

Individuals will be able to request copies of their resident file under the *Freedom of Information* at no cost to the residents. There will be no charge for that request.

In summary, the Crown's position is that the proposed settlement is a fair and reasonable resolution of this litigation and should be approved by the court, and the Crown submits that Your Honour should move forward and approve the settlement as soon as possible.

THE COURT: Thank you. Before you sit down, Mr. Ratcliffe, I think I may be able to shed some light on my own question.

MR. RATCLIFFE: Um-hmm.

THE COURT: In the settlement agreement...

MR. RATCLIFFE: Yes.
THE COURT: ...Schedule C...
MR. RATCLIFFE: Um-hmm.
THE COURT: ...one of the things that the parties have agreed to is to erect a free-standing plaque on the grounds of the Huronia site.
MR. RATCLIFFE: Yes.
THE COURT: And, the parties have agreed that the language on the plaque would read as follows:

> From 1876 to 2009, many thousands of children and adults with developmental disabilities and other conditions resided in the wards called "cottages" of this institution.
>
> In 2013, the Government of Ontario issued an apology to the former residents for the conditions over time.

It suggests to me that it's an apology at large.
MR. RATCLIFFE: At large, to the class.
THE COURT: To anybody who lived at Huronia...
MR. RATCLIFFE: Certainly, yes. Yes, sorry. That's what I mean. Yes.
THE COURT: ...regardless of when they may have died...
MR. RATCLIFEE: Yes.
THE COURT: ...or didn't get in before the cut-off.

MR. RATCLIFFE: Okay.
THE COURT: Or, what have you.
MR. RATCLIFFE: Did you have any other questions, Your Honour? Is that....
THE COURT: Well, I would ask Mr. Baert, would you confirm that that's....
MR. BAERT: Well, we're looking at the same page and it actually was one of my colleagues who passed it to me and I believe that's at the request of one of our litigation guardians who were very involved in the drafting of Schedule C. I thank her for that. So, yes, the idea behind the plaque is to provide a permanent memorial that Huronia was there.

And, so certainly it's our view that, given the wording of the plaque, the apology that comes from the premier should be to all former residents, not just those who were able to file a claim in the class proceeding, because that's constrained by different considerations where as it's all of the former residents who should receive the apology.

And, I would submit that that's clearly implied from the agreement, as to what the plaque will say.
THE COURT: Okay. Mr. Ratcliffe, on that note, when would the premier be issuing, if I were to approve the settlement, when would the premier be issuing this apology?

MR. RATCLIFFE: My understanding is it would be very soon after the settlement but I don't have the exact date. I can't say, certainly, what date it is. I think the expectation is that it's important to have that move forward very quickly, however, after you, you know, if you approve the settlement.

THE COURT: Before the end of this year?

MR. RATCLIFFE: Oh, I think so.

THE COURT: Absolutely?

MR. RATCLIFFE: Yes.

THE COURT: One would hope before even the holidays. One more question...

MR. RATCLIFFE: Oh, would you like....

THE COURT: ...for you Mr. Ratcliffe is, I've done a little bit of reviewing of your materials with respect to the size of the class. Perhaps, you just want to....

MR. RATCLIFFE: Which document are you looking at, Your Honour?

THE COURT: Well, how many people would you say are in the class that you would expect to be the pool from which claims are to be made?

MR. RATCLIFFE: Well, there's been, different numbers have come out during the course of this process and my understanding, and I stand to be corrected, was that we think that there's about 3,700 former class members still alive at this point in time.

THE COURT: Well, on that note, though, if someone is not alive, their estate can file a claim form. Is that correct?

MR. RATCLIFFE: Sorry. If I could just add one point, Your Honour. If I could draw you to Volume 1 of the motion record...
THE COURT: Um-hmm.
MR. RATCLIFFE: ...of the plaintiffs, there is a conclusion that was prepared. This is the affidavit of Dan Doyle who was one of the witnesses.
THE COURT: Um-hmm.
MR. RATCLIFFE: This is at Tab....
THE COURT: "R."
MR. RATCLIFFE: Yes. There, it says projected residents alive at April 21, 2007, population adjusted was 4,338.
THE COURT: And, just to be clear, the class would include, if anyone passed away after 2007, their personal representatives would be able to make a claim on their behalf. Is that right?
MR. RATCLIFFE: Yes. After that date, that April date in 2007, that's correct.
THE COURT: Right.
MR. RATCLIFFE: Okay.
THE COURT: So, a class member would not have to be alive today in order to seek compensation under this settlement?
MR. RATCLIFFE: No. Not given that....
THE COURT: All right. Would you agree with Mr. Baert that this would be the first instance of an apology being given by a government in a class proceeding of this sort?

MR. RATCLIFFE: There was an apology given in Woodlands, out in British Columbia, was there not?

MR. BAERT: No. It's news to me.

MR. RATCLIFFE: I, you know, I can't say with certainly. I know that, certainly, there have been apologies given in certain kinds of proceedings, and so on, but in terms of that particular point, I can't say one way or another, Your Honour.

THE COURT: Well, I guess you could say, though, that if the premier apologizes to the residents of Huronia, that's a big, big step.

MR. RATCLIFFE: It certainly is, Your Honour. That's true.

THE COURT: Thank you. All right. We've not reached the stage where I said I was going to take a recess and I don't know, Mr. Baert, have people already or are there more people, perhaps, that want to put their names on a list and speak to the court about why they object to this settlement?

MR. BAERT: Yes. So, over the course of the day, I think my colleagues have been reconnoitering the group and I believe we're now at eight.

THE COURT: Eight?

MR. BAERT: Eight persons who are on the list, and we can call them up after you take the afternoon break. Perhaps, we'll get them sitting nearby and then you can hear from them.

There were more before and it's now dropped down to eight.

THE COURT: All right. We will take a 15-minute break and at the end of that break, I will start hearing from people, only again, people who may have an objection to this settlement and again, for a maximum of five minutes per person.

MR. BAERT: Thank you, Your Honour.

R E C E S S

U P O N R E S U M I N G

THE COURT: Mr. Baert.

MR. BAERT: Yes.

THE COURT: Do you have a list for me?

MR. BAERT: Yes. I do. Just a couple of follow-up points because you asked Mr. Ratcliffe about class size, and so, at page 317 of the motion record, to 337, there's a 20-page report filed by the defendant's expert about class size. And, so there's various figures given to various dates but predicted to be currently alive as of 2013, with reduced life expectancy, which is a term in the report, 3,470. And, he explains his methodology. That's Mr. Doyle who is with Price Waterhouse.

THE COURT: That wouldn't include the personal representatives of anyone who is in the class who passed away after 2007, though?

MR. BAERT: Right.

MR. RATCLIFFE: Excuse me. Which report was that?
THE COURT: That's in R, I believe. Tab R.
MR. BAERT: Tab S.
MR. RATCLIFFE: Sorry. By whom? Who's it by?
MR. BAERT: Doyle.
MR. RATCLIFFE: No.
THE COURT: Tab S is not Doyle.
MR. BAERT: I'm sorry. Tab....
THE COURT: That's a Ministry report.
MR. BAERT: Yes. I'm sorry.
THE COURT: Tab R is Mr. Doyle.
MR. BAERT: Yes.
MR. RATCLIFFE: Yes.
MR. BAERT: Correct.
THE COURT: Thank you.
MR. BAERT: But, in any event, that's the number, of which there are many different ones, but that's the best one that we've got.
THE COURT: Well, it could be slightly higher than that if there are personal representatives...
MR. BAERT: Right.
THE COURT: ...of people who have passed away.
MR. BAERT: Right. That's the number of living people we think there are.
THE COURT: Right. So....
MR. BAERT: There's probably around 4,300 potential claimants including estates.
THE COURT: Thank you.
MR. BAERT: Now, there's also a volume of affidavits and statements of the representative

plaintiffs and the two litigation guardians which I'd like to hand up to you. I don't think you have that because it was only prepared last night.

So, I'm not going to go through that now, other than to file it because, as Your Honour said, that you would hear from the two plaintiffs speaking together. But, it's set out in writing there, something similar to what you heard but slightly different, and also, from the two representative plaintiffs. And, I'm going to give my friend a copy, as well, hot off the press...

MR. RATCLIFFE: Thank you.

MR. BAERT: ...from last night.

THE COURT: Thank you.

MR. BAERT: So, we have a total of, I think six objectors now.

THE COURT: Um-hmm.

MR. BAERT: It's dropping. One person who was on the list, Eileen Carter, wanted to file this with you instead of making her objection. But, as I read it, it seems to be more of a description of what occurred rather than an objection. So....

THE COURT: Well, that's fine. You can certainly pass it up...

MR. BAERT: Yes.

THE COURT: ...to me. I'll have it in the file even though it may not be technically an objection.

MR. BAERT: Right.

THE COURT: Thank you.

SPEAK TO'S BY OBJECTORS TO SETTLEMENT APPROVAL:

MR. BAERT: The first two people on the list are persons whose objections are found in the motion record, but they still wanted to address you. And, the first one is David Houston. And, so, if you were to go to Volume 2 of the motion record, Tab 4H, you would find Mr. Houston's objection. So, is Mr. Houston here?

THE COURT: 4H.

MR. BAERT: It's a....

THE COURT: Mr. Houston. Yes.

MR. BAERT: Yes. It's a single page letter.

THE COURT: Um-hmm.

MR. BAERT: So, sir, if you could take the microphone and....

THE COURT: Good afternoon, sir.

MR. HOUSTON: So, I'd just state my case right now?

THE COURT: Yes. Please.

MR. HOUSTON: Okay. I'm objecting to, what my objection is, I'm objecting to the lawyer's fees, the disbursements, the taxes, et cetera, all the fees coming out of the $35 million.

I think, myself, that the settlement of $35 million should be just that, $35 million should go to the claimants, the residents of Orillia and not end up with 22 million, or whatever is left over.

I was going to stand here and discuss my years up there in the institution, but I'm, I've decided I'm not going to go there. I'm not going to say that.

I also was going to object to the settlement as a whole, in its entirety, but after listening to this gentleman here tell everybody what the dangers could be if the settlement's rejected, what the pitfalls could be, I've decided not to object to that part.

So, my only objection is to what I said, that the lawyer's fees and all other fees be taken out of the settlement. I feel that it should have been, or that it should be, or should have been awarded costs and so the government should pay all those fees. So, that's pretty much what I wanted to say.

THE COURT: Thank you, very much, Mr. Houston.

MR. HOUSTON: Thank you.

MR. BAERT: Thank you, sir. The next person on the list is Madeleine Spilak. And, I apologize in advance if I've mispronounce anyone's name.

MS. SPILAK: Am I going to reach the mike? Yes. Thank you.

MR. BAERT: There you go. I'll be your assistant.

MS. SPILAK: Oh, I was just going to ask you to do that, sir.

THE COURT: May I get your last name, please?

MS. SPILAK: Spilak.
MR. BAERT: S-P-I-L-A-K.
THE COURT: Thank you.
MR. BAERT: And, the objection is already found in the same motion record, Your Honour, at Tab J, so, the next one, two after the one you were just on.
THE COURT: Thank you.
MS. SPILAK: Good afternoon. My objection is to the year that it started, 1945. I was at the institution when I was two years old, in 1935, but I left two years prior to '45, so that would be 1938.

I was there from the ages of two to ten years of age, and it was quite frightening, not exciting - difficult to face the world when I came out again. It's taken a lot of courage, for myself and many people here, to speak.

I want to thank you, Mr. Baert, for putting that in the paper. That's when I became aware of it. I live in Hamilton.

Mr. Ratcliffe, I didn't agree with all your statements. I know you meant well, but you really don't know the real issues.

Your Honour, I'm pleased that I've been accepted to speak and I hope you will consider my point. I am one of the oldest ones, I guess, and I'm okay. Why was I sent there? Because I was born

without a hand, and I'm putting it up. It's taken courage, and, one foot missing.

I've survived. I faced an awful lot there. I don't know how I survived it. Well, I didn't know any better. That was my home. Formative years were spent there. Other little children, on the floors, I saw it all. I thought that was normal.

Finally, my family took me home. I became a person? No. It took a long time. But, I was lucky, people. I survived. I went to school. I was intelligent. I did well. I have a couple of degrees from university.

I'm still living at 80. My mind's still good, but, I, just to tell you a few little things that I did see there. I never thought about it. Am I overtime?

THE COURT: Actually, well, it's not that you're out of time. I just want to hear what it is that you object to...

MS. SPILAK: Oh, I'll say it again.

THE COURT: ...about the settlement and I understand it's...

MS. SPILAK: I'll say it again. I'm sorry.

THE COURT: ...the year.

MS. SPILAK: The year. I think I would like...

THE COURT: It's the year.

MS. SPILAK: ...to have it extended to my year that I left, which would be 1943. No, that' not

right. Three years less, my math is going. Yes, '43.

But, what can I say about that? I didn't know about this sooner or I would have approached him, 'cause I spoke, I listened to Mr. Baert speaking to explain why it was stopped at 1945. They couldn't find anyone else.

Well, I didn't want to admit it. I did not admit up there where I'd been. I would be frowned upon. It was named the mental institution and people accepted that.

And, here I came out in the world and I, I had a hard fight, but I'm standing here. I can't believe I'm standing here in this place and I'm having a chance to express things, and I hope it helps other people.

THE COURT: Thank you, so much, Ms. Spilak.

MS. SPILAK: Thank you for listening to me, and hopefully, you will consider me. It's up to you.

THE COURT: Thank you, very much.

MR. BAERT: Thank you, Ms. Spilak. Charles Fannon, F-A-N-N-O-N. Go ahead.

MR. FANNON: Maybe up here would be better. [Spoken in an alternate language.] My name's Charles and I arrived in Orillia, April 4, 1967, and I'm not sure of the date that I left, but it was in 1974.

UNIDENTIFIED SPEAKERS FROM THE BODY OF THE COURT: Can't hear. Can't hear.
MR. FANNON: Sorry about that. I have several objections. One of the objections is the amount of time that I get to speak, and to tell you all. I am not a number. I'm not a label. I'm a human being, and have to remind myself of that every single day.

I can't tell you about the impact on my life, but I will tell you some of the other objections. David Houston said it right on, man. Thirty-five is thirty-five, and that's what it should be. And, all legal fees should be paid by the defendant.

And, there should not be taxation on a claim for pain and suffering. As for the apology from Minister Wynne, no thank you. I doubt that it would be sincere.

Accountability is what we want. And, I heard from others in here who don't want to hear an apology either. An apology doesn't take care of us.

And, the other objection that I want to get out before I forget it, there's other things more important than money. Hard to believe, but I'd like to have the little that I had when I, but there were other reparations in the way of a compensation that I was interested in. The

reality is I'm 56 years old, just had my first hip replacement. Man, that sucks. I know the weather real good.

But, having to apply for something medical, whether it's emotional, mental or physical, it takes a long time to get, especially when you're on disability. It would be nice if we didn't have to wait so long for something like that.

I had a question for both sides. The funds, who looks after them while you're waiting for somebody to come and claim? What happens to those funds? Do they sit in the bank and accrue interest? And, who gets that interest? What happens to that?

And, who actually doles it out? I would hope that it would be a disinterested third party.

And, seriously, the amount, just not enough. It's not going to cover it for everybody if you're going to financially compensate people. Financial compensation isn't really the best for us. Money would be nice, help us out of a small little few problems that we have, put, fill the fridge up with some GMO food. But, looking after our bodies would be more important. So, I think that should have been included.

I'd like to take the time to thank you all for hearing my words.

THE COURT: Thank you, very much, Mr. Fannon.
MR. FANNON: [Spoken in an alternate language.] Who said that? Who said that?
THE COURT: I said thank you, very much, Mr. Fannon.
MR. FANNON: Oh, okay. I thought it came from over there. Have a good day.
MR. BAERT: Now, Your Honour, as you know, I think that the best way for us to proceed is for me to address all the objections afterwards, which I'm more than happy to do. So, the next gentleman on the list is Richard Paul Bailey.
MR. FANNON: Go, Paul.
MR. BAILEY: All right. I'm Ricky Bailey. Ricky Paul Bailey. I was in Orillia for approximately six years. There's whether, where my father had me put in. And, of course, I should have never been there. I should have been in a home that would take care of me.

Anyway, I was. And, when I was in there, I took a lot of abuse, a lot of sexual abuse, a lot of mental abuse, along with physical. I've been raped several times against my will, both by patient and staff.

I had nobody there to come to see me. I had nobody. And, nothing was done about this. And, I just, I don't know why these things have to go on so long and so much in these institutions.

Now, what was done today with having the courts, should have been done a long time ago, a long time ago. And, it needs to be done with all institutions 'cause it don't.

I often said to myself when I was in there, if walls had ears and could speak, what stories they'd have to tell, and it's true.

There was a gentleman here, apparently, that thinks we had it pretty good in there. Well, I can tell you, we didn't. And, it's not the place of good care. It wasn't a place of pleasure. It was a place of hell, at least for me. And, I'm sure there's others here that would share that.

So, I just want to thank everybody here for the opportunity of speaking. And, I just hope that this, having this case here with Huronia, will help others in the future. Thanks.

THE COURT: Thank you, very much, Mr. Bailey.

UNIDENTIFIED PERSON: Your Honour, may I come up to the mike? I have a question.

THE COURT: We're going to go in order. Certainly, I will hear from everyone who has an objection. Perhaps, you want to give your name to Mr. Baert and add it to the list.

UNIDENTIFIED PERSON: Do you want me to come up there, sir, or....

MR. BAERT: Well, I think we're going to go in order. The next person is Percy Morrison.

MR. MARRISON: Marrison.

MR. BAERT: Oh, Marrison.

MR. MARRISON: Yeah.

MR. BAERT: Sorry.

MR. MARRISON: Your Honour, I was in Orillia Hospital from 1945 till '68, when I left. I seen things that happened in the institution. One of the staff kill one of the patients, his name, Harold Roger. I saw the whole thing in front of the table when I was sitting at the breakfast.

And, then I saw, I heard about the other patient, commit suicide, hang himself, because they were going to send him away to Kingston.

And, the next one, and he ran away in the wintertime. He froze to death. Those, all my friends, they were missing and that, them, I wish I could put up a, I couldn't put up with it anymore, but I was there.

But, the reason we do what we're told, we get a, a strap from the leather sole of a shoe across our hand five or six times. Yeah, they could put a mark on your hand so bad.

And, I seen a lot of patient got a strap across the backside, about 150 whacks and that's, that's hurt so bad. I didn't know what to say about it. That's the only thing. I know all

about this place. I hope I'm, never hear anymore about it.

THE COURT: Thank you, very much, Mr. Marrison.

MR. MARRISON: Okay.

MR. BAERT: The next person on the list is Gail Blais, B-L-A-I-S. Perhaps, she's outside. While we search for her, perhaps, Mr. Rodriquez, you could make your objections.

MR. RODRIQUEZ: Good afternoon. My name is George Rodriquez. I do not have an objection here, but what I'd like to find out is, according to Mr. Baert, what he was elaborating on before.

There was a funding that he said where the money would run out. So, if it does run out, where are we going to get that money afterwards? After like, when the money's all put together, like what he's going to get, as far as the lawyers are concerned, and everybody else?

THE COURT: Mr. Baert, I'll ask you, when you respond to the objections, to elaborate and please explain that so that Mr. Rodriquez can hear your answer...

MR. BAERT: Okay.

THE COURT: ...and, the whole court can hear you.

MR. BAERT: Yes. I'll do that.

THE COURT: Thank you, Mr. Rodriquez.

MR. RODRIQUEZ: Okay.

MR. BAERT: The bane of the existence of cell phones. I believe that's everyone on the list.

There were a couple of people who were on the list who....
THE COURT: Oh, there is another gentleman who has his hand up.
MR. BAERT: Oh, come on.
MR. CALLAGHAN: Good afternoon, Your Honour.
THE COURT: Good afternoon.
MR. CALLAGHAN: I, I was in the institution for 17 years and I was almost murdered there by one of the other residents. And, I was harm emotionally, physically and sexually abused, and rob, as well.

I object that that, the money should not be coming from the 35,000, from us. It should be from the government. Thank you, Your Honour.
THE COURT: Thank you, very much.
MR. BAERT: Just for the record, that was Mr. Callaghan, correct? Michael Callaghan.

Interestingly, a couple of the people who you've heard from were scheduled to be witnesses at the trial, but that did not happen. Was there anyone else who wishes to come forward and voice an objection?

THE COURT: There was one woman that you were, has put her name down on the list?
MR. BAERT: Yes. Gail Blais. We were looking for her, but she's not here anymore.

All right. Well, let me deal with a couple of the points that were raised. First of all, I stand corrected, Your Honour.

MR. GOODRIDGE: My name's John Goodridge. I was in. Dr. Diamond used to look after that place. Then somebody else came after him. Now, there was, if you can't walk, well, there was kids, there was guys in the baby crib. And, they can't walk and they in the baby crib. They still can't walk.

And, I had to wash the bed, wash them, like that. I got abused. And, you know, the thing is, we all got to stand up for what we believe in and make our minds. We try to not let things get to you, but my sister wants to say something. Go ahead.

MR. GOODRIDGE'S SISTER: Hi, Your Honour. John's a little bit scared to say too much, but he was sexually assaulted by the teacher and he also was told to walk around with his pants down, putting his thumb in his mouth.

And, they did take shoes and smash them onto the hands and they poured cold water, ice cold water on him under the shower.

And, he also was sedated at night and he was also, had, what do you call it, you can't have children? It was without the parents' permission, or and he went through and they just

did it, so he couldn't have a proper life, or family.

Now, he went to Queen Street Mental Institution after it was all over, to try to get away from all the horror he was put through. And, he had to have, excuse me, he had to have shock treatments to try and get rid of his horror, anger and physical, mental and he couldn't handle it. That's why he went to Queen Street. They have shock treatments. I think that's about it, John?

MR. GOODRIDGE: Well.

MR. GOODRIDGE'S SISTER: Was there anything, then?

MR. GOODRIDGE: Well, I had, abused. I was abused. I got the strap every day. I had a cold shower.

I was working in the infirmary looking after bed patients but these weren't bed patients. And, one way they were adults in the baby cribs, and so how you going to, how you going to look after?

There was one staff, I thought one staff killed this one guy, but I had the police come to my place and he asked me, "What happened up there?" I said, first I know, one staff killed this guy but the police said, "No." He said there was more, police killed, more staffs killed this guy because he was too strong. When you're too strong, you shouldn't kill nobody.

We're all supposed to be human beings. We all supposed to have a heart. We all supposed to treat people as you would human beings. Not just stabbed them, not just kicked them, or whatever. No. That's not right.

THE COURT: Thank you, so much, sir.

MR. GOODRIDGE: Everybody got to speak their mind on what they believe in.

THE COURT: Thank you.

MR. GOODRIDGE: And, God bless you and thank you, very much. Thank you.

UNIDENTIFIED PERSON: And your two brothers.

MR. GOODRIDGE: And, my two brothers, yeah. Wayne and Brian were there, too. I forgot about Wayne and Brian, my two brothers who also were there.

SUBMISSIONS IN REPLY BY MR. BAERT:

MR. BAERT: Your Honour, obviously, it was very important that we hear from everyone today who wanted to say something about the settlement and about Huronia. And, I think those comments of the people who were there speak far more eloquently, in volumes far better than I could ever do. So, I won't try to improve on them.

With respect to Ms. Spilak's request that the class period be amended to go back before 1945, speaking from our side of the table, we have no objection to that. That's not the settlement that we have, so, obviously, it would require

the defendant to agree that the date by moved backward in order to allow for Ms. Spilak to make a claim, which we'd not oppose.

So, perhaps, perhaps we can deal with it this way, which is, the Crown can - I don't expect them to be able to answer it today, but, perhaps they can think about it, and let me know, and I can let you know.

THE COURT: Well, Mr. Baert, the certification order, the class, it has been defined already two years ago, three years ago.

MR. BAERT: Yes. So....

THE COURT: And, that's what starts at 1945. Justice Cullity...

MR. BAERT: Right.

THE COURT: ...was the one who defined that. So....

MR. BAERT: Right. Well, what would have to happen is...

THE COURT: Um.

MR. BAERT: ...in the notice of settlement approval, it would, the class definition would have to be amended to widen the class to be of 1943 and later, as opposed to '45.

Alternatively, my friends can just voluntarily agree to pay Ms. Spilak the same amount that she would get if she was a claimant under the settlement, and just do that unilaterally.

That would mean that we wouldn't have to amend the certification order or the settlement agreement. So far as I know, unless my colleagues who have more contact with the class members than I do in terms of the dates, I don't believe we've heard from any other person with a date that is prior to 1945, prior to hearing from Ms. Spilak.

So, the simplest thing to do would just be for the Crown to just treat her the same way as any other person, as if she had been a claimant in the class proceedings.

That's the best I can offer. I accept Your Honour's point, which is, the class is what's been certified. Notice has been given. The settlement class is the settlement class. But, if we had heard from Ms. Spilak in 2009, the date would have been earlier. But, we didn't. So, I can't do much more than propose that.

I believe it was Mr. Rodriquez, and I apologize if I have it wrong, but there was a question about whether there is going to be interest. So, first of all, under the settlement agreement, paragraph five, on page five, "Interest accrues at two percent per year beginning on the court approval date," which is defined, of course, in the order and in the settlement agreement.

And, that becomes part of the fund, and that's over and above the 35 million. And, that money, under the settlement agreement, accrues to the benefit of the class.

And, the second point made by that same gentleman was that he hoped that the money was held by someone reputable and disinterested. So, first, the money is under that same paragraph, paragraph five, of the settlement agreement. The defendant is to segregate and hold such settlement fund apart with the interest accrued at two percent per year, commencing on the court approval date, until such time as the payments required by this agreement have been made.

Obviously, then, once the claims have all been assessed by Crawford's and by Mr. Binnie, then the Crown would pay the money to Crawford's who would then issue the cheques and send them to the class members.

So, I think his concern is a valid one. But, first the money will be held by the Crown, separate and apart with interest, and then it'll be paid over to the administrator who is a reputable company who has administered over 60 over class actions in the last decade or so, including the Indian Residential Schools settlement which involvement payments in the range of $3 to $4 billion.

They're also under your supervision, under the order. And, so we will make sure that they do what they are supposed to do.

Another gentleman raised the issue of there not being tax, no HST on the legal fees. All I can say to that is that's it's out of my control but it's not out of the province's control. And, if they want to let us know that they don't wish to receive their portion of the 13 percent, in writing, then they're free to waive that.

The GST part of the 13 percent, obviously, goes to the Government of Canada, who is not a party to the settlement. I don't think there's anything we can do about that, unless we attempt to convince the Minister of Finance or the Prime Minister to waive that tax, as well.

We can try, because it is a lot of money. Those two amounts together, and we could give that out to the class members instead, which I would suggest, would be a better use of the money than where it might otherwise get spent.

THE COURT: Are you proposing that that be something that is addressed before the court on February 24th, Mr. Baert?

MR. BAERT: The issue of the taxes?

THE COURT: Yes.

MR. BAERT: Well, we can look into it in the meantime. I mean, from the law firm's point of

view, we're just a conduit. The money will come from the defendant and we will then have to pass it on to the province, who's the very person who just paid us the money in the first place. So, it would be simpler if they just agreed to not want that money.

But, this is the first I've heard of this today, that this be proposed. So, I'm simply saying that we'll try to do something about it. I can't guarantee that we'll succeed but between the HST and the GST, it's close to a $1 million.

So, certainly, in Your Honour's Reasons - let me put it this way, under the jurisprudence that has been heretofore arrived at by various judges about approval under the *Class Proceedings Act*, clearly the court has to either approve or disapprove the settlement. There's nothing stopping you in your Reasons for making any suggestions that you might have that, along the lines of what I just described, to either or both levels of government about their being paid this $1 million in sales tax.

THE COURT: So, if I understand what you're saying, Mr. Baert, you're asking me to approve the settlement as is, but give a hint to the government?

MR. BAERT: Sure. Yes. That....

THE COURT: Or, are you suggesting that I don't approve this settlement and that the parties go back to the - given that I am not, I don't have

the ability or jurisdiction to rewrite any settlement, the choices would be to approve it or to disapprove it and let the parties go back and continue to negotiate.

MR. BAERT: No. I'm suggesting that you approve it and that you make a suggestion to the Province of Ontario that they waive payment of their portion of the tax since the money is going in a circle. It doesn't happen otherwise.

And, they've heard what I have said, and I'm sure they'll consider it. But, it's not a reason to not approve the settlement, in any event, because the GST and HST, like it or not, are part of our tax system and they apply to legal fees and that is the reality. And, they are charged on every legal fee, charged by every lawyer, every day.

So, this settlement is no different and this case is no different, in that respect. It's just a lot more because of the quantum.

The last point I would make is that the amount in total is not enough. I think I addressed that earlier. And, my point would only be that no amount would probably be enough because, given what we've heard being described today by those who spoke, and also from the affidavits that have been filed throughout this case, there isn't any amount of money which could possibly make up for what has occurred here.

But, we've done our best to try and get the largest possible amount we can from the defendant, and all I can do is assure Your Honour and those who are here that, given that we went until 3:30 in the morning of the day the trial was supposed to start, every possible dollar that the defendant was willing to pay, was paid. And, requiring another dollar would have meant a four-month trial and all of the risks that we've described.

THE COURT: I think, Mr. Baert, the objection as I heard it, wasn't simply the number but it was the fact, the term that the legal fees come out of that number and not be paid by the government on top of the 35 million.

MR. BAERT: Right. I think that was, I have that as a separate item, the comment being, I believe, 35 million should be 35 million, was the way it was expressed, so, no taxes and no legal fees. I think that's a slightly different way of saying that the total amount is not enough and that it should be 43.5 as opposed to 35.

Obviously, 43.5 would have been better than 35. We all know that. But, if the person who's the one you have to settle with is not willing to pay 43.5 unless they go through a four-month trial and an appeal of 18 months, then that was not an option that was on the table.

It's a variant of the point I just made, which is without revealing all of the negotiations which occurred, all I can do is assure everyone here and you, that $35 million was the absolute most we could get out of the Province of Ontario in September 2013, along with many other things that you can't put a value on, such as the apology.

And, I'd like to finish with that, because you did ask my friend about that. The only other case that I know of where there was an apology was in the Indian Residential Schools case where the prime minister apologized. But, that was not part of the settlement agreement.

We attempted to get that as part of the settlement agreement in that case, and Canada said, "No. We'll apologize if we think we are going to apologize, but we'll decide if, when and how we're going to do that."

In this case, we insisted that it be part of the settlement agreement and it's actually after the definition section in the settlement agreement, the very first thing that's listed. So, to my knowledge, it's the only case, certainly in Ontario, most likely in the country, where the apology was part and parcel of the settlement agreement.

And, it's always been the first point in every letter we sent to the other side, listing what we wanted by way of settlement. And, to their credit they agreed to it. And, hopefully, it'll happen soon.

But, I would emphasize to those who did object, that we did our very best over the last five years to get the most compensation that we could for them, and to get them the best possible claims process that we could, one that was easy for them to navigate. I think we succeeded in that.

Yes, there are always things that you could do that would have made it better, but we achieved, I think, pretty much everything we sought to achieve in the negotiations and I think that, overall, this is a fair settlement and given all the risks, it's a reasonable settlement.

And, most importantly, it's in the best interests of the group that I tried to do my best to represent over the last five years.

THE COURT: Thank you. Mr. Ratcliffe, did you have anything you wanted to say about the pre-1945 claim, the proposal that Mr. Baert referred to in the case of...

MR. RATCLIFFE: Well, certainly, Your Honour. That's...

THE COURT: ...Ms. Spilak.

MR. RATCLIFFE: ...come up as an issue. I think that, you know, re-opening the class period doesn't make sense but I'm prepared to go back and see if we can get instructions or some direction, I guess, regarding, you know, these instances where probably there aren't that many that do, you know, do fall before that 1945 beginning period. I don't, I mean, I can't provide anything more to the court today.

THE COURT: All right.

MR. RATCLIFFE: Just on the GST issue, Your Honour, or HST, sorry, I think it's important that the settlement, you know, that Your Honour go ahead with the settlement if you're prepared to approve it. And, I wonder if Mr. Baert wants to raise that as an issue, if February 24th isn't maybe the better place to, you know, raise that as an argument.

I'm not familiar with the legislation. I don't know to what extent there's any discretion whatsoever in terms of doing that. But, it seems to me that that's not really part of this hearing today.

THE COURT: Okay. All right. I will recess court. It's close to 4:30 when we would ordinarily be recessing for the day but under the circumstances, the staff, the court staff, has graciously agreed to stay here for a little while and I will take a break for about 10 minutes and we will resume after that. Thank you.

R E C E S S

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U P O N R E S U M I N G

R U L I N G

CONWAY, J:

Ladies and gentlemen, thank you. It's been a long day. But, today I have listened. I have heard the history of Huronia and the background to this litigation from Mr. Baert.

I've heard from Ms. Seth and Ms. Slark. I've listened to every objector who has filed a written objection or has spoken in court today.

I have heard from Mr. Ratcliffe for the Crown.

I've considered the law on settlement, on approval, and the factors that the court must consider in determining whether or not to approve a settlement.

I will provide fuller reasons in due course, quite shortly, actually, but today, I want to tell you that considering those factors, I approve the settlement on the terms set out in the settlement agreement.

The settlement agreement is multi-dimensional. Its terms reflect the sensitive nature of this litigation and the unique circumstances of the class members in the following ways:

It provides both financial compensation and non-monetary benefits to class members. It recognizes that some class members may not wish to provide details of harm suffered. For those who do, the structure reflects the varying levels of harm through the points allocation system.

Importantly, the claims process is a simplified and paper-based one that avoids class members having to provide oral accounts and relive their experiences at Huronia.

The apology from the Crown is a vital and extraordinary component of this settlement. The commemorative plaque at the Huronia site will constitute an enduring public record of that apology.

The numerous other non-monetary benefits recognize the dignity of the Huronia residents and enable the history of Huronia to be recorded and preserved.

There is no doubt that, without a settlement, the proceedings will be protracted, the outcome uncertain and, even if successful the class members will not receive compensation for years. Given the advancing age of class members and the historical nature of this litigation, the

benefits of an immediate and certain settlement cannot be overstated.

A settlement is a compromise that reflects the risk, delay and expense of continuing with litigation. In my view, this settlement, viewed as a whole, fairly achieves that compromise. It recognizes that class members are entitled to financial compensation but that a discount is appropriate to reflect the realities of continued litigation.

The significant non-monetary terms will benefit all residents of Huronia and their families.

I have concluded that the settlement is fair, reasonable and in the best interests of the class members and I will approve it.

I will also deal, today, with the request of an honorarium for Ms. Slark and Ms. Seth. Their efforts in advancing this litigation, bringing this case to court, publicizing the story of Huronia, and speaking in court today, have been exceptional, indeed. They have gone well beyond what could ever be expected of representative plaintiffs, in a particularly difficult case.

I award them each an honorarium of $15,000 to be paid only if there are funds remaining, and at the time that payments of the claims of class members have been completed.

I am available now, if class counsel wants to have me sign the order today, in court. I'm happy to do it and make any amendments now and then you can provide a clean copy.

I do not want to hold this up. I am approving the settlement. There's no reason that any apology needs to be delayed. I want to get on with it and start seeing that this settlement agreement is implemented in all its forms.

MR. RATCLIFFE: Thank you, Your Honour. I don't see a problem with signing the order today if we're in agreement, in terms of the wording.
MR. BAERT: That's fine.
MR. RATCLIFFE: So, if we could do that, that would be great.
THE COURT: All right, if someone has a clean copy for me, please.

I'm filling in paragraph 15, with $15,000, and I'm going to add the wording, "after all claims of class members have been paid." Maybe I will just say, "remaining, to come from the settlement fund remaining after all claims of class members have been paid."
MR. BAERT: Yes. I think that covers the intent.
MR. RATCLIFFE: That's fine, Your Honour.
THE COURT: And, the only other thing is that I'm going to delete paragraph 17 and I'm going

to add in the words, "The court orders that the plaintiffs and the claims administrator," and it can be a combined filing on the part of the plaintiffs and the claims administrator.
Were there any other wording changes?
MR. BAERT: I don't believe so, Your Honour. I think those were the only ones that we discussed while I was making my submissions.
THE COURT: And, I'd remind everyone in this courtroom that the issue of legal fees will be dealt with on a separate motion before me on February 24, 2014. Anyone in this courtroom or anyone else involved with this litigation is more than welcome to come back and speak to it on February 24th.

Counsel, is there anything before we recess today?
MR. BAERT: I think not, Your Honour. We've covered everything, I believe and I thank you for your patience today and for dealing with the matter at the end of the day today while all the class members were here. Thank you.
MR. RATCLIFFE: Thank you, Your Honour.
THE COURT: Thank you. Thank you to counsel, and thank you to everyone who has been in attendance today.

A D J O U R N E D

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FORM 2

CERTIFICATE OF TRANSCRIPT Evidence Act, Subsection 5(2)

I, Debbie Knight

Certify that this document is a true and accurate transcription of the recording of the matter of MARILYN DOLMAGE AS LITIGATION GUARDIAN OF MARIE SLARK AND JIM DOLMAGE AS LITIGATION GUARDIAN OF PATRICIA SETH v. HER MAJESTY THE QUEEN in the ONTARIO SUPERIOR COURT OF JUSTICE held at 330 University Avenue, TORONTO, ONTARIO, on Tuesday, December 3, 2013 taken from Recording 4899_5-0_20131203_103236__10_CONWAYBA which has been certified in Form 1.

Dec 13/13

Date

Signature of Authorized Person