IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Watt v. Health Sciences Association of British Columbia,* 2020 BCSC 280

Date: 20200302
Docket: S-134066
Registry: Vancouver

Between:

Nina Watt and James Hensman

Plaintiffs

And:

Health Sciences Association of British Columbia, Reid Johnson, Valerie Avery and Bruce MacDonald in their capacity as the Trustees of The Health Sciences Association of B.C. Trust Fund and the said The Health Sciences Association of B.C. Trust Fund, Reid Johnson, Bruce MacDonald and Marg Beddis in their capacity as the Trustees of the HSA LTD Trust No. 2, and the said The HSA LTD Trust No. 2, Reid Johnson, Bruce MacDonald, Valerie Avery and Marg Beddis in their capacity as the Trustees of the HSA LTD Trust No. 3, and the said The HSA LTD Trust No. 3, and Reid Johnson, Bruce MacDonald, Valerie Avery and Marg Beddis

Defendants

- And -

Docket S-120334
Vancouver Registry

Between:

Health Sciences Association of British Columbia ("HSA"), Reid Johnson Val Avery and Joan Magee, in their capacity as the Trustees of the Health Sciences Association Long Term Disability Trust for members of the HSA who became disabled between March 1, 1989 and February 28, 1999; Reid Johnson, Bruce MacDonald and Joan Magee in their capacity as the Trustees of the HSA LTD Trust No. 2 for members of the HSA who became disabled between March 1, 1999 and August 3, 2006

Plaintiffs

And:

Hewitt Associates Corp., carrying on business as "AON Hewitt", Peter Muirhead

Defendants

And:

The Trustees of the Healthcare Benefit Trust

Third Party

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiffs:	D.P. Church, Q.C.
Counsel for the Defendant: Health Sciences Association	C.A.B. Ferris, Q.C., A.M. Nathanson
Counsel for the Defendant: Trustees in Class Action and Hewitt Action	L.A.E. Blake and K. Vimalesan
Place and Date of Hearing:	Vancouver, B.C. September 30, 2019 and October 1, 2019
Place and Date of Judgment:	Vancouver, B.C. March 2, 2020

Introduction

[1] In this class action the plaintiffs seek approval of a settlement agreement (the "Proposed Settlement") and related orders including approval of plaintiffs counsel's, Church & Company's ("Class Counsel"), fees and disbursements.

[2] The defendant Trustees seek orders under the *Trustee Act,* R.S.B.C. 1996, c. 464, respecting the Proposed Settlement and the application of the plaintiffs' contingency fee agreement ("CFA") with Class Counsel to certain funds payable under the settlement agreement.

[3] The Health Sciences Association ("HSA") consents to the Trustees bringing their application for advice and directions and takes no position regarding the relief sought by the Trustees in relation to Church & Company's legal fees.

Background

[4] This class action was commenced by Notice of Civil Claim on May 31, 2013. A detailed history of the class action is found in the Certification Reasons reported at 2015 BCSC 1290 and the Court of Appeal reasons found at 2016 BCCA 325, hence I will not review the background in detail.

[5] The action relates to three trusts (the "Trusts") and their respective funds (the "Trust Funds") which provide long-term disability ("LTD") benefits to the Trusts' beneficiaries who are the class members. The beneficiaries of Trust #1 and Trust #2 were affected by the LTD reductions and early retirement program (both effective June 30, 2012) imposed by the Trustees to prevent the three Trusts from going bankrupt.

[6] In February of 2008 the Trustees became aware the Trusts were underfunded. This resulted in the Trustees of Trust #1 and Trust #2, in January of 2012, commencing Action S-120334 against their former actuary, AON Hewitt, seeking damages for negligence and breach of contract for the incorrect valuations conducted by AON Hewitt (the "Hewitt Action"). The basis for the claim is summarized in the Hewitt Action pleadings:

> 6. The loss suffered by the Plaintiffs is the amount by which the actuarial liabilities of the Plans were understated in the 2006 Update or, in the alternative, the 2005 Valuation, as a result of the breaches of the Agreement and the negligence of Muirhead. But for those breaches and that negligence, the true extent of the underfunding of the Plans in March, 2006 would have been known to the Plaintiffs and they would have obtained a higher LTD Stabilization Grant from the employers in the collective agreement of March, 2006. That LTD Stabilization Grant would have been higher by at least the amount of the understatement in the liabilities caused by Hewitt's breaches of the Agreement and Muirhead's negligence.

[7] The Trustees have and will continue to pay for all the legal costs and expenses of the Hewitt Action out of the Trust Funds, hence that action is in effect funded by the beneficiaries of the Trusts.

[8] The certification application was heard between December 8 and 11, 2014. Supplemental submissions on the class definitions were provided to the Court in

March and April 2015. Reasons for Judgment granting certification were issued on July 24, 2015 (2015 BCSC 1290). The defendants appealed and the British Columbia Court of Appeal on July 25, 2016 narrowed the claims available to the class (2016 BCCA 325). The trial was set for 20 days commencing September 16, 2019. The terms of settlement were negotiated between June and July 2019 and on July 22, 2019 a proposed settlement agreement was reached.

The Proposed Settlement

[9] The plaintiffs summarize the Proposed Settlement:

> a) The payments below will be distributed amongst the 221 individuals who were beneficiaries of the Trusts as of June 1, 2012, not just those who opted in/or were deemed to have opted in, to the class in 2017. The manner of distribution of the funds has been determined by the Trustees of Trusts 1, 2 and 3 and their current actuary and legal counsel, in consultation with Plaintiffs' counsel (the **"**Settlement Formula").
>
> b) There will be an up-front payment of $2,000,000, of which the HSA will contribute $1.25 million and the Trusts will contribute $750,000. This amount will be payable by the Defendants within 30 days of the Court's approval of both the settlement and the Trustees' Section 86 Petition (as defined below).
>
> c) Payment of the entire settlement proceeds, or judgment proceeds, of the "Hewitt Action" (BCSC Action No. S120334, Vancouver Registry), including any appeal therefrom, within 30 days of receipt, in accordance with the Settlement Formula.
>
> d) The Trusts will fund the prosecution of the Hewitt Action and the Trustees will continue to pursue the Hewitt Action as they are obliged to do in their fiduciary role. The Trusts will also provide the Court with a copy of the expert report served by the Plaintiffs in the Hewitt Action as part of the formal settlement documentation before the Court, which expert report shows a claim figure of $7,238,000 which, when prejudgment interest is added, comes to a total of at least $8,668,234.43.
>
> e) The Trusts will make payment in accordance with the Settlement Formula of any net surplus remaining in the Trusts once the final payment to all existing beneficiaries is made.
>
> f) It is anticipated that those beneficiaries of the Trusts currently receiving disability payments from the Trusts will be treated in the same manner as other beneficiaries of the Trusts following the 2012 reductions and will continue to receive benefits as they are currently and will be treated in the same manner for Municipal Pension Plan purposes. However, the Trustees cannot guarantee that future events

will not affect their ability to maintain benefits at current levels. The Trustees will make all reasonable efforts to ensure that this will happen and they are not currently aware of any concerns that may have a negative effect of benefits. The Trustees cannot fetter their discretion to seek amendments to the terms of the Plans, if necessary. This applies to the beneficiaries' rights under the Municipal Pension Plan, to the extent that the Trustees require, as part of their administration of the Trusts, that they be exercised by the beneficiaries. The Trustees do not have the ability to change the eligibility criteria, or to prevent changes to the eligibility criteria, for benefits under the Municipal Pension Plan.

g) Concurrently with the application for approval of the settlement, the Trustees will bring a Petition before Justice Punnett for advice and directions under either or both of section 86 of the *Trustee Act* and the inherent jurisdiction of the Court (the "Section 86 Petition") to permit the Trustees to enter into the settlement of the class action. If approval is granted, then the Trustees will amend the Trust Deeds to provide that any surplus remaining in the trust funds on termination of the Trusts will be distributed to the beneficiaries of the settlement. This amendment will not be changed by the Trustees.

h) On the hearing of the Section 86 Petition and at the settlement approval hearing, the Trustees may ask the Court for an order denying Church & Company any fees from the funds that are payable under this settlement from the Trusts or the Hewitt Action. Church & Company and the class plaintiffs will be entitled to take a contrary position. Whatever the outcome of the Court's decision on this issue, it shall not preclude a settlement, provided that the Trustees are granted the ability to enter into the settlement.

i) The Court will be asked to permit the representative plaintiffs to receive an honorarium, as approved by the Court, of up to $5,000 each, to come off the top of any settlement funds. The Defendants have said that they will take no position on this application.

j) The parties will ask the Court to order that the net amount payable under item (a) above be paid in respect of the plaintiffs' "non-pecuniary" claims and that further monies received by the payees be ordered to be paid in connection with the loss of benefits. The Defendants will not be responsible for any tax consequence that the payees may incur as a result of receiving these contemplated distributions from the Trust Funds, nor for any attendant consequences on the Plaintiffs' entitlement to CPP benefits and/or entitlement to the Municipal Pension Plan.

CHURCH & COMPANY'S FEES and DISBURSEMENTS

22. Church & Company originally entered into a contingency fee agreement with each of the representative plaintiffs in May, 2013… to pursue the litigation on a contingency fee basis. The agreements are largely identical and provide for a contingency fee of 33 1/3%. During the course of the litigation, Church & Company has not otherwise received payment for its legal services. Church & Company's actual

time recorded on the file to the end of August, 2019, including the appeal of the certification decision, is $825,176.50 over the course of the six-year period. This amount is calculated before the applicable taxes.

23. In addition to bearing its own legal fees, Church & Company has paid certain disbursements on behalf of the class and has not been reimbursed for the same. The disbursements claimed by Church & Company, together with taxes thereon, total $22,216.58.

24. Church & Company seek to have the Court award it the full 33.33% on monies received by the class. However, it proposes that such monies will only be paid to Church & Company as each tranche of the settlement is received and distributed. In that regard, Church & Company's interests will be aligned with that of the class.

25. Even if Church & Company is awarded the full 33 1/3% contingency sought, its recorded time will still exceed the recovery by approximately $150,000. It is only if there is recovery on the second tranche of the case (ie. the Hewitt Action) that Church & Company will be made whole.

Positions of the Parties

[10] There are two applications before the Court.

[11] The Trustees in their Notice of Application, filed September 16, 2019, seek an order for the opinion, advice and directions of the court under s. 86 of the *Trustee Act* as to these questions:

a) Are the Trustees entitled to use the Trust Fund to settle the Class Action with the Plaintiffs (who are already the beneficial owners of the Trust Fund); and

b) Are they entitled to use the Trust Fund to settle the Class Action with the Plaintiffs, notwithstanding the position of Plaintiffs' counsel ("Class Counsel") that they are entitled to claim a contingency fee on all funds to be distributed pursuant to the Proposed Settlement including but not limited to any net recovery successfully obtained by the Plaintiffs in the Hewitt Action (after payment of all necessary expenses) (the "Hewitt Recovery")?

[12] The Trustees also seek an order that Class Counsel may not claim a contingency fee on the initial damage payment of $750,000 from the Trust Fund; and/or any Hewitt Recovery; and/or the final distribution of any funds remaining in Trusts #1 and Trust #2/#3 after all LTD benefits have been paid.

[13] Neither the plaintiffs nor HSA take a position regarding the s. 86 order sought, although the plaintiffs see it as unnecessary. It was however required by the Trustees in order to reach the Proposed Settlement. Likewise, normally a defendant has no standing to appear on an application for approval of a settlement and Class Counsel's fee but the Trustees also required such standing as a term of the settlement.

[14] The plaintiffs' Notice of Application filed September 17, 2019 seeks approval of the Proposed Settlement and related orders to facilitate the settlement, orders addressing the settlement or final judgment in the Hewitt Action, and approval of Class Counsel's fees and disbursements.

[15] HSA takes no position on Class Counsel's contingency fee.

[16] The sole contentious issue is the plaintiffs' application for Class Counsel's fees from the Trust Funds and potential Hewitt Recovery.

[17] I will first address approval of the Proposed Settlement, then the funds subject to the contingency fee of Class Counsel, and finally the s. 86 relief sought.

Plaintiffs' Application for Approval of Settlement Agreement

[18] Court approval of a class proceeding settlement is required for a binding settlement.

[19] The plaintiffs' application is made under s. 35 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (*"CPA"*):

> 35.(1) A class proceeding may be settled, discontinued or abandoned only
>
> (a) with the approval of the court, and
>
> (b) on the terms the court considers appropriate.
>
> (2) A settlement may be concluded in relation to the common issues affecting a subclass only
>
> (a) with the approval of the court, and
>
> (b) on the terms the court considers appropriate.

> (3) A settlement under this section is not binding unless approved by the court.
>
> (4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.
>
> (5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the notice should include
>
> (a) an account of the conduct of the proceeding,
>
> (b) a statement of the result of the proceeding, and
>
> (c) a description of any plan for distributing any settlement funds.

[20] In *Wilson v. Depuy International Ltd*., 2018 BCSC 1192, Branch J. summarized the law on approval of settlement of class proceedings:

> [58] The *CPA* does not provide a specific test for settlement approval. Rather, the test has been developed by the courts. The guiding principle is that a settlement must be "fair and reasonable and in the best interests of the class as a whole": *Cardozo v. Becton, Dickinson and Company***,** 2005 BCSC 1612 at para. 16. While each class member is likely to have their own individual views of any settlement, the court is required to consider the collective interest when reviewing a settlement.
>
> [59] The law was summarized as follows in *Bodnar v. The Cash Store Inc.***,** 2010 BCSC 145:
>
> > [17] The standard for approval of a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interest of the class as a whole. The court need not dissect the proposed settlement with an eye to perfection. Rather, the settlement must fall within a range or zone of reasonableness to be approved....
> >
> > [18] The court must consider the risks and benefits associated with continuing the litigation in deciding whether to approve the settlement. The question for determination is whether there are any disadvantages to the settlement that justify its rejection....
> >
> > [19] The court is not entitled to modify the terms of a negotiated settlement. Its power is limited to approving or disapproving the settlement reached by the parties....
> >
> > [20] The recommendation and experience of counsel are significant factors for consideration on an approval application. There is a presumption of fairness when a proposed settlement is negotiated at arm's length by class counsel and presented to the court for approval....

> [21] The court may take into account evidence of expected participation in the settlement by class members when determining the sufficiency of available settlement funds...
>
> [Citations omitted.]
>
> [60] Public policy favours the settlement of complex litigation. There is a strong presumption of fairness where a settlement has been negotiated at arm's length. Experienced class counsel is in a unique position to assess the risks and rewards of the litigation and his or her recommendations are given considerable weight by the reviewing court: *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O. R. (3d) 758 (S.C.J.) at paras. 111-114, 144.
>
> [61] Factors to consider when assessing the reasonableness of a settlement are set out in *Fakhri v. Alfalfa's Canada, Inc.,* 2005 BCSC 1123 at para. 8:
>
> 1. the likelihood of recovery, or the likelihood of success;
> 2. the amount and nature of discovery evidence;
> 3. settlement terms and conditions;
> 4. recommendations and experience of counsel;
> 5. future expense and likely duration of litigation;
> 6. recommendations of neutral parties, if any;
> 7. number of objectors and nature of objections;
> 8. presence of good faith and absence of collusion;
> 9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;
> 10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

[21] I turn to the factors that are relevant in this proceeding.

Likelihood of Recovery or Success

[22] The outcome of the litigation was uncertain. The Court of Appeal both cut back the scope of the litigation and also noted the considerable challenges the plaintiffs faced in succeeding with their claim, both factually and in law. As the plaintiffs note, such comments would be expected to "embolden the Defendants regarding their prospects for success, either at trial or, if not, on any appeal."

[23] The litigation can be described as an “all or nothing” case with little prospect for a mixed result given that either the contracts claimed to have been established would be found to exist or they would not.

[24] In addition, it was not certain that, if successful, recovery of damages would occur. HSA’s insurance covers defence costs only and the Trusts have no independent assets other than the funds held on behalf of the beneficiaries.

Amount and Nature of Discovery Evidence

[25] There were over 50,000 pages of documentary disclosure, seven days of examinations for discovery and one and one-half days of cross-examination of the defendants’ representatives on their affidavits filed. In addition, lengthy affidavits were filed by all parties on the certification application. All parties had sufficient information to assess and weigh the prospects of a likely outcome had the matter gone to trial.

Settlement Terms and Conditions

[26] The Proposed Settlement provides for an immediate payment to the class members of approximately 12.6% of their estimated pecuniary losses before legal fees are accounted for. The unusual aspect of the Proposed Settlement is the contingent nature of the Hewitt Action which accounts for a significant portion of the expected recovery (up to a further 50% of the estimated pecuniary loss). Class Counsel are of the opinion there is “some indication from the discovery evidence of Ms. Stewart, that such a claim has a good chance of success.” In addition, any surplus at the end of the lives of the Trusts, will also go to the class members. As part of the terms of the Proposed Settlement, the Trust Deeds will be amended to guarantee that. Both of the representative plaintiffs recommend court approval of the settlement.

Degree and Nature of Communication by Counsel and the Representative Plaintiffs with Class Members during the Litigation

[27] There was a large degree of communication between the class and Church & Company. Church & Company posted copies of the pleadings and relevant legal decisions on their website. Further updates on the progress were provided on the website during the litigation.

[28] Church & Company also provided contact information on their website to permit class members to contact them for information. During the litigation, at least 150 inquiries were received from class members or prospective class members and answered by Church & Company lawyers or staff.

[29] Church & Company bore the expense of mailing out both the original notice to class members and the expense of mailing out the notice of the Proposed Settlement. It is intended that Church & Company will undertake the distribution of the settlement funds.

Recommendations and Experience of Counsel

[30] Church & Company recommend settlement of the class action on the terms of the Proposed Settlement. Three counsel had primary conduct on this case for the plaintiffs. They have over 90 years of legal experience between them, mostly in commercial litigation. They have also represented plaintiffs in class action proceedings from trial through appeal, including in *Cooper v. Hobart*, 2001 SCC 79, to the Supreme Court of Canada. Justice Paris of this court, in approving a settlement in another commercial class proceeding in *William Gerber et al. v. John Brian Johnston, Canaccord Capital Corp. et al.,* 2001 BCSC 687, recognized Church & Company's experience in class action proceedings, as do I.

Future Expense and Likely Duration of Litigation

[31] Given the history of this matter, had it proceeded to trial and the plaintiffs succeeded, an appeal by the defendants was probable. Any recovery to the class would be delayed. Many of the class members are older and during the litigation had

to take early retirement. As submitted by Class Counsel, an early settlement was preferable in such circumstances.

Recommendations of Neutral Parties

[32] This is not a factor as there are no neutral parties.

Number of Objectors and Nature of Objections

[33] Of the 210 actual class members, only three wrote to or phoned Church & Company to express concerns about the settlement. Counsel advise that those concerns were "a) the quantum of the settlement; b) the fact that the Trustees would not be required to apologize; and c) the fact that part of the settlement was contingent."

[34] Counsel submit, and I agree, that while the objections are deserving of consideration, given their nature and number, they do not provide a sufficient reason to not approve the settlement.

Presence of Good Faith and Absence of Collusion

[35] The settlement was negotiated in good faith. There was no collusion between counsel or the parties themselves. Counsel for the plaintiffs believe the settlement is the maximum recovery attainable without a trial. They note a trial would have additional risks to the class, including the risk of no recovery.

Information Conveying to the Court the Dynamics of, and the Positions Taken by the Parties during the Negotiation

[36] This factor raises solicitor-client privilege, hence limits counsel in what is conveyed to the court. What is clear is the action was vigorously defended and I accept Class Counsel's statement that the defendants also made it clear they would continue to do so if a settlement was not reached. I note that the settlement was negotiated between three respected law firms and respected counsel.

Conclusion on Approval of Proposed Settlement

[37] I am satisfied the Proposed Settlement reflects a reasonable assessment of the costs and benefits involved in this class action. Considering the circumstances, the Proposed Settlement should be approved. It is fair and reasonable to do so.

[38] I also find that the Proposed Settlement is in the best interests of the beneficiaries as the plaintiff class. It saves further litigation costs, provides immediate financial benefits to them, and they will benefit to a greater extent than they would have but for the class proceeding.

Payment of Fees, Disbursements and Taxes to Class Counsel

[39] Normally, a defendant does not appear on an application by plaintiffs in a class action for approval of their counsel's fees. However, in the unusual circumstances of this proceeding, plaintiffs have agreed to the Trustees appearing and opposing any counsel fee on funds contributed by the Trustees.

[40] The funds the Trustees dispute being included in the recovered funds subject to the Contingency Fee Agreement are the $750,000 available from the Trust Funds and the funds (if any) that may be recovered in the Hewitt Action. As counsel for the Trustees noted in their written submissions:

> The position advanced by Class Counsel puts the Trustees in an unusual situation - protecting the interests of the people who have sued them in the Class Action from the fees claims advanced by their counsel.

Position of the Plaintiffs

[41] Church & Company entered into a CFA with the representative plaintiffs in May 2013. During the litigation they have not otherwise received payment for legal services. They have also paid certain disbursements. They seek the full 33.33% recoverable under the CFA on monies received by the class, but such monies will be paid only as each tranche of the settlement is received and distributed. They note it is only on the second tranche of the case, the potential Hewitt Recovery, that Church & Company will be made whole. They submit that settlement is "fair and reasonable and in the best interests of the class."

[42] The plaintiffs also submit there was an issue whether the Hewitt Action would proceed absent the Proposed Settlement terms which they argue provide an impetus and written commitment that the Trustees will move the Hewitt Action forward. They also submit the Proposed Settlement guarantees the net proceeds (if any) of the Hewitt Action will go to the class members instead of being subject to the discretion of the Trustees who may have chosen to distribute any monies received in a different manner of lesser benefit to the class members.

Position of the Trustees

[43] The Trustees submit Class Counsel have "neither contributed to, participated in, nor paid for any steps taken by the plaintiffs in the Hewitt Action." They further submit that the Trustees' legal costs of the Hewitt Action "have been, and will be, paid out of the Trust Fund" and as a result, the "beneficiaries will be paying twice if Class Counsel's fee proposal is accepted," given the Trust Funds are beneficially the property of the class members. They note as well the Trustees, and through them the beneficiaries, have assumed all of the risk of the Hewitt Action while Class Counsel has assumed none. They submit Class Counsel have not "recovered" any funds that may eventually be realized in the Hewitt Action. They say there is no causal connection. They note as well the eventual amount recovered and the total fee to be paid is also unknown.

[44] The Trustees also submit the class proceeding delayed their pursuit of the Hewitt Action, arguing the class proceeding had implications for the Hewitt Action, including certain common issues, which required the Trustees to wait and see the outcome of the certification application. They submit the Hewitt Action has proceeded once the Trustees' application to join the proceedings was dismissed.

Law on Counsel Fees in Class Proceedings

[45] The Court must determine if the fee requested by Class Counsel is "fair and reasonable while also ensuring the Class Counsel is appropriately compensated since class action litigation can be challenging and risky": *Stanway v. Wyeth Canada Inc.,* 2015 BCSC 983 at para. 51.

[46] Section 38 of the *CPA* requires court approval of Class Counsel's fees:

> **Agreements respecting fees and disbursements**
>
> 38. (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must
>
> (a) state the terms under which fees and disbursements are to be paid,
>
> (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and
>
> (c) state the method by which payment is to be made, whether by lump sum or otherwise.
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.
>
> (3) An application under subsection (2) may,
>
> (a) unless the court otherwise orders, be brought without notice to the defendants, or
>
> (b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.
>
> (4) Interest payable on fees under an agreement approved under subsection (2) must be calculated
>
> (a) in the manner set out in the agreement, or
>
> (b) if not so set out, at the interest rate, as that term is defined in section 7 of the Court Order Interest Act, or at any other rate the court considers appropriate.
>
> (5) Interest payable on disbursements under an agreement approved under subsection (2) must be calculated
>
> (a) in the manner set out in the agreement, or
>
> (b) if not so set out, at the interest rate, as that term is defined in section 7 of the Court Order Interest Act, or at any other rate the court considers appropriate, on the balance of disbursements incurred as totalled at the end of each 6 month period following the date of the agreement.
>
> (6) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

> (7) If an agreement is not approved by the court or if the amount owing to a solicitor under an approved agreement is in dispute, the court may
>
> (a) determine the amount owing to the solicitor in respect of fees and disbursements,
>
> (b) direct an inquiry, assessment or accounting under the Supreme Court Civil Rules to determine the amount owing,
>
> (c) direct that the amount owing be determined in any other manner, or
>
> (d) make any other or further order it considers appropriate.

[47] Justice Gropper in *Stanway* referred to *Cordoza v. Becton, Dickinson and Company*, 2005 BCSC 1612:

> [25] In assessing the reasonableness of fees, courts have examined various factors (see *Fischer v. Delgratia Mining Corp*., [1999] B.C.J. No 3149 (Q.L.) at para. 22). These include:
>
> 1. the results achieved;
> 2. the risks undertaken;
> 3. the time expended;
> 4. the complexity of the matter;
> 5. responsibility assumed by counsel;
> 6. the importance of the matter to the client;
> 7. quality and skill of counsel;
> 8. the ability of the class to pay;
> 9. the client and the class' expectation; and
> 10. fees in similar cases.

[48] The Contingency Fee Agreement was entered into on May 9, 2013. The provisions relevant to the issues raised are:

> 2. The Client shall pay the Firm, as fees for its professional legal services, a percentage of <u>any settlement or compensation from any source</u> pertaining to the Case or any judgment obtained prior to trial or after any appeal. The fee shall be payable on all amounts, including prejudgment interest and post-judgment interest (amounts awarded by the Court for interest on the judgment before trial and after trial), but specifically excluding taxable party and party costs in the event that any are awarded (that a successful party in a lawsuit may be able to claim to offset legal fees), calculated as follows:
>
> 33 1/3% of any settlement or judgment obtained at any time payable by way of lump sum (the "Contingency Fee").

> The amount of the Contingency Fee payable shall be calculated after all case expenses incurred by the Firm have first been deducted.
>
> …
>
> 6. In the event of settlement or compensation from any source or judgment being obtained, the Client shall pay the Contingency Fee and any outstanding case expenses from the settlement or compensation from any source or judgment proceeds.
>
> …
>
> 8. The proceeds of any settlement or compensation from any source or judgment including partial or interim payments, shall be applied to pay all case expenses outstanding at the date of the payment. The Firm shall be entitled to the Contingency Fee calculated by the terms set forth in paragraph 2 on the proceeds of any payment.
>
> [Emphasis added.]

[49] There is no issue as to Class Counsel's entitlement to fees on the $1,250,000 payment by HSA. However, as noted, the Trustees challenge the inclusion in the proceeds of settlement of the $750,000 in Trust Funds and the possible Hewitt Action funds if recovered.

[50] I first turn to the question of those sums recovered or to be recovered and applying the CFA to them.

[51] In *Endean v. The Canadian Red Cross Society; Mitchell v. The Canadian Red Cross Society*, 2000 BCSC 971, Smith J. stated:

> [28] … At the outset of the retainer, counsel and clients knew that the enterprise would fail if certification were denied. The chance of success or failure at this stage was therefore a factor in the percentage fee initially agreed upon and, as well, by reason of the settlement agreement, in the lump sum fee that was later substituted for it. It would be wrong to use hindsight to give different weight to that risk than the lawyers and clients gave to it at the outset.
>
> ...
>
> [40] A second consideration arises from the unique nature of class proceedings. In a conventional action, the causal relationship between the lawyers' work and the result achieved is normally unquestioned. That is not necessarily so in class actions where the extent of the benefit brought about by the lawyer's work must be ascertained. This concept is illustrated in *In Re Prudential Ins. Co. of America Sales Litigation*, *supra*, where a class action was brought on behalf of millions of policyholders alleging deceptive sales practices by a life insurer. The Court held that class counsel should not be

> given full credit for the result when it was based, in part, on a compensation scheme implemented as a result of an investigation by the New Jersey Insurance Commissioner, who recommended a remediation plan to compensate affected policyholders, to prevent future violations, and to restore public confidence in the insurance industry. In remarks that are apposite here, the Court said, at p. 337:
>
> > While a party need not be the only catalyst in order to be considered a "material factor" and may be credited for extra-judicial benefits created, there must still be a sound basis that the party was more than an initial impetus behind the creation of the benefit. Allowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs' attorneys to "minimize the costs of failure ... by free riding on the monitoring efforts of others."
>
> [41] As I have already remarked, the American experience with class actions is instructive. I adopt that reasoning and conclude that it is necessary, in considering the reasonableness of the fee in relation to the results achieved, to consider the causal relationship between the efforts of class counsel and the benefits conferred on the class claimants by the resulting recovery.
>
> …
>
> [67] As already noted, Mr. Turriff argued that I must measure the relative contribution of class counsel in each province to the pan-Canadian settlement so that there will be no chance of counsel in one province being credited in fees for value contributed by counsel in other provinces. However, it is impossible in hindsight to unravel the many factors that influenced the ultimate outcome in this case. The efforts of counsel in the other provinces undoubtedly played a large role. As well, the voices of lobby groups and others heard through the media likely entered into the deliberations of the FPT Governments. It is not necessary to identify the discrete causal contributions and to measure their respective force. It is sufficient to ascertain whether the efforts of Mr. Camp and Mr. Lemer were a material cause of the result achieved to the extent that they should receive full credit in their fees for the outcome. I have concluded that they were.

[52] The Court must consider the degree to which counsel contributed to the result, as opposed to other forces that were at work: *Class Actions in Canada,* 2nd ed. (Toronto: Thompson Reuters Canada, 2019) at pp. 8-9, n 37.

The $750,000 in Trust Funds

[53] Under the terms of the Proposed Settlement, the class members are to continue to receive their disability payments and, while not guaranteed, the Trustees will make all efforts to see they do.

[54] While the Trust Funds are beneficially the property of the class, the representative plaintiffs do not oppose their inclusion in the recovered sums nor the application of the CFA to them. Nor is there evidence of any class members opposing such.

[55] The use of those funds is governed by the trust agreements. The agreement respecting Trust #1 provides sole discretion to the Trustees to authorize and make payments from the funds in furtherance of the purpose of the trust. In the event of the termination or winding up of the trust, the Trustees have the discretion to dispose of the residue of the fund by distribution to the members or payment to the union. Trust #2 contains similar terms and provides such funds to be used for funding health and welfare benefits for members of the HSA as determined by the HSA in its absolute discretion. Trust #3 is similar.

[56] As a result, the entitlement of the class members to the funds from the three Trusts is not absolute. Under the Proposed Settlement, their entitlement is acknowledged and confirmed. I am satisfied that such funds are included in the recovered sum due to the efforts of Class Counsel and, as a result, are subject to the CFA.

The Hewitt Action

[57] The Hewitt Action was commenced prior to this proceeding. It is not clear if the representative plaintiffs were aware of its existence prior to entering into the CFA. Like the Trust Funds discussed above, the representative plaintiffs agree the CFA applies to any funds recovered in the Hewitt Action.

[58] As noted above, the Trustees object to the CFA applying to any funds recovered in the Hewitt Action on the basis that Class Counsel have had no involvement whatsoever in the Hewitt Action, that is, the factors relevant to the assessment of reasonable fees are not satisfied. They also submit it is not reasonable that the class members, given they are funding the Hewitt Action from Trust Funds which they beneficially own, are being asked to pay two sets of legal fees.

[59] The Trustees are correct regarding Class Counsel's lack of involvement in the Hewitt Action; however, that is not the point. It is their work as Class Counsel in this class action and the recovery of funds on behalf of the class members that is relevant.

[60] Class Counsel, as part of the settlement, negotiated a term that the Trust Deeds will be amended to prevent payment of any surpluses, which may include the recovery in the Hewitt Action, from going to the HSA. Instead, any surplus monies will go to the class members and the use of such funds will no longer be within the discretion of the Trustees. As a result, the settlement provides a guaranteed benefit to the class members that they might never have otherwise received.

[61] Similarly, the Proposed Settlement provides that funds remaining at the end of the lives of the Trusts, which might include some portion of the proceeds from the Hewitt Action, will now go to the class members instead of being potentially distributed otherwise in accordance with the trust agreements described above.

[62] The Proposed Settlement also commits the Trustees to continue to move the Hewitt Action forward.

[63] I am satisfied the terms negotiated by Class Counsel have benefited the class, and the Hewitt Action may in fact be the most substantial source of recovery for the class. Those funds, if the Hewitt Action is successful, clearly fall within the terms of the CFA.

[64] I turn then to the factors in *Stanway* that are relevant to consideration of the reasonableness of the proposed fees.

Results Achieved

[65] The results achieved provide an immediate payment to the class members. Before legal fees are taken into account, the recovery is expected to be in the range of approximately 12.6% of the class members' estimated pecuniary losses.

[66] Assuming a recovery from the Hewitt Action, either by settlement or judgment, the total recovery before legal fees could be in the range of 65% for the expected pecuniary losses of the class. The Proposed Settlement is structured such that no fee is sought by Class Counsel on this second tranche of funds until such funds are actually obtained. Thus, the interests of the class members and Class Counsel are aligned.

[67] Finally, any surplus remaining at the end of the lives of the Trusts will be distributed to class members before the Trusts are wound up.

[68] As discussed earlier, there was no assurance the class would have received any of the above except for the efforts of Class Counsel in this proceeding.

Complexity of the Matter

[69] The case was complex, with both this Court and the Court of Appeal noting that some of the issues were either matters of first instance or ones in which the jurisprudence was developing.

Degree of Responsibility Assumed by Counsel

[70] Church & Company assumed full responsibility for this matter, including the payment of disbursements. As well, they undertook the role of issuing the notices and, if the settlement is approved, will undertake the role of distributing the settlement monies, avoiding the necessity of an administrator, saving the class that expense.

Time Expended

[71] Over the six-year history of this action, Church & Company's billing records indicate over 2,400 hours have been recorded on the file. They will continue to expend time as they undertake the distribution of the settlement monies as they are received.

Risks Undertaken

[72] I have previously referred to the risky, “all or nothing” nature of this proceeding. The Court of Appeal noted the obstacles that the plaintiffs faced in pursuing their claim. Church & Company undertook the full risk of this matter. They ran the risk of no recovery if the action failed. They also carried the payment of disbursements. The value of their recorded time as of August 31, 2019 is approximately $825,000. From the first tranche of the settlement funds, their expected fee is $667,000 being one-third of $2,000,000 ($1,250,000 plus $750,000). It is only if and when the second tranche of the settlement (the Hewitt funds) will they be made whole and begin the recovery beyond their billed time.

Importance of the Matter to the Client

[73] The class members were recipients of LTD benefits that were reduced and, as a result, they were vulnerable. The action was monetarily and morally important to them, given their view they were unfairly treated. Although the defendants have not admitted liability, this resolution by way of payment to the class members also addresses their perception of unfair treatment.

Quality and Skill of Counsel

[74] As noted earlier, Class Counsel are experienced counsel with extensive commercial litigation experience, including class proceedings.

Ability of the Class to Pay

[75] As is evident from the claim, the class members live on disability payments and were subjected to reductions in their benefits. The representative plaintiffs confirmed they could not have pursued the claim but for the CFA.

The Client and the Class’s Expectation

[76] While no doubt the class would have preferred to be made whole, the settlement does put an immediate payment in their hands with the possibility of further recovery from the resolution of the Hewitt Action. It also removes the risk of the litigation not succeeding and there being no recovery at all.

[77] That a fee would be sought on all monies received by the class members through either settlement or judgment, was disclosed in the original August 2017 notice approved by the Court. It was also disclosed in the recent notice issued to all 221 individuals at the end of July 2019 advising them of the potential settlement. As to the latter, its form was specifically agreed to by counsel for the Trustees.

Fees in Similar Cases

[78] Fees of 33 1/3% have been approved previously in other cases (see *Stanway* at paras. 52-55). In this instance, such an agreed upon fee on the $1,250,000 and $750,000 as recovered is reasonable as is such a fee on the second potential tranche from the Hewitt Recovery given the circumstances of this litigation.

Conclusion on Class Counsel's Entitlement to Fees

[79] Respecting the possible Hewitt Recovery, the circumstances of this part of the recovery are somewhat unusual. The fact the potential recovery of additional funds is contingent on separate litigation in which Class Counsel is not involved raises an additional factor to consider.

[80] In one sense, the cause of any actual recovery of funds in the Hewitt Action is not the result of Class Counsel's efforts. In addition, the costs of the Hewitt Action are being financed by the Trust Funds, and presumably if the Hewitt Action fails, the Trust Funds will be used to pay any costs awarded to the defendants. Any payment from the Hewitt Action to the class members will be net of the Trustees' legal fees.

[81] The Trustees argue that approving Class Counsel's fee on any Hewitt Recovery would result in the beneficiaries effectively paying two sets of legal fees for the Hewitt Action. Though at first glance this may appear to be the case, in my view the Trustees' legal fees in the Hewitt Action go to securing possible recovery for the Trusts, funds which absent the Proposed Settlement would become subject to the discretion of the Trustees. Class Counsel's legal fees on any potential Hewitt Recovery relate to securing payment of such funds to the class members without being subject to the Trustees' discretion. Class Counsel has ultimately negotiated a

settlement which ensures the class members receive the funds from any potential Hewitt Recovery.

[82] Of note, no class members dispute the payment of the CFA fee.

[83] In all of the circumstances, Church & Company should receive a fee on all sums received by the class, albeit only payable concurrently with the receipt of such sums to the credit of the class. Such an outcome is consistent with the goals of the *CPA***,** including that Class Counsel be properly compensated for taking on class proceedings on a contingency fee basis.

***Trustee Act*, Section 86 – Law and Analysis**

[84] The Trustees submit there are two legal questions that require the court's determination:

a) Whether the Trustees may enter into the Proposed Settlement; and

b) Whether they may do so notwithstanding the fact that the Proposed Settlement may dramatically diminish the funds available to the Beneficiaries by potentially diverting a portion of the Trust Fund and Hewitt Recovery to Class Counsel as fees.

[85] They submit, entering into the Proposed Settlement also raises these issues:

a) Settling of the Class Action with Trust funds already beneficially the property of the Beneficiaries knowing as well that Class Counsel seek 33 1/3% of those funds;

b) The inability of the Trustees to make payments from the Trust Funds to class members who are not beneficiaries of that respective Trust fund; and,

c) The potential tax consequences that may arise if the Trustees amend the terms of the three trusts.

[86] I turn to whether the Trustees are entitled to enter into the Proposed Settlement.

[87] A trust is a relationship, as described in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds., *Waters' Law of Trusts in Canada*, 4th ed., (Toronto: Carswell, 2012) at page 3:

> A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

[88] A trust involves the dual ownership of trustee and beneficiary; that is, while the trustee holds legal title to the property, it is managed for the benefit of the beneficiary: *Waters* at pp. 10-11. In *Pecore v. Pecore*, 2007 SCC 17, this dual ownership was described at para. 4:

> [4] … Equity, however, recognizes a distinction between legal and beneficial ownership. The beneficial owner of property has been described as "the real owner of property even though it is in someone else's name."…

[89] As a result, the trustee owes fiduciary obligations to the beneficiaries and must at all times act in their best interests: *Waters* at pp. 42-43.

[90] Section 86 of the *Trustee Act* provides:

> **Application for directions**
>
> 86. (1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.
>
> (2) The application under subsection (1) must be served on, or the hearing attended by all persons interested in the application, or by those that the court thinks expedient.
>
> (3) The costs of an application under subsection (1) are in the discretion of the court.

> **Effect and exception**
>
> 87. (1) The trustee, executor or administrator, acting on the opinion, advice or direction given by the court, is deemed, so far as regards his or her own responsibility, to have discharged his or her duty as trustee, executor or administrator in the subject matter of the application.
>
> (2) This Act does not extend to indemnify a trustee, executor or administrator in respect of an act done in accordance with the opinion, advice or direction referred to in subsection (1) if the trustee, executor or administrator has been guilty of fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction.

[91] Rule 2-1(2)(d) of the *Supreme Court Civil Rules* also provides that the Trustees may start a proceeding where:

> (d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee, or the determination of the persons entitled as creditors or otherwise to the trust property.

[92] The Trustees describe the situation and their concerns:

> Pursuant to the terms of the trusts (article 6.5 Trust #1, 6.4 Trust #2 and 5.4 Trust #3), and s. 9 of the *Trustee Act,* the Trustees are authorized to settle the Class Action. They are using the Trust Fund to do so, which funds are already beneficially owned by the Beneficiaries (who are the very Plaintiffs the Trustees are settling this Class Action with). As explained by Ms. Avery:
>
> > 52. I have discussed this with my co-trustee Marg Beddis and we are of the opinion that it is in the best interests of the Beneficiaries that we enter into this Settlement for the following reasons:
> >
> > (a) to eliminate the need for the Trustees to incur the further significant legal fees required to see the Class Action through to the completion of the scheduled three week trial (and any potential appeal), all of which would be paid out of the Funds and so would be borne by the Beneficiaries; and
> >
> > (b) to provide the immediate financial benefits to the Beneficiaries as a result of the payments proposed in the Settlement.
> >
> > 53. However, the Trustees will be settling the Class Action with the Trust Funds, which are already beneficially the property of the Beneficiaries. Further, class counsel for the Plaintiffs have made it clear that they will seek a contingency fee of 33 1/3% of not only the initial $750,000 payments by the Trustees, but also any net proceeds from the Hewitt Action and any funds left in either Trust #1 and Trust #2/#3 upon the eventual termination of those respective trusts.

> Accordingly, I seek the assistance of this court in these unique circumstances, to approve the fact that not only are the Trustees entitled to enter into the Settlement pursuant to the terms of the trusts themselves (and the statutory powers given to the Trustees) but that it is in the best interests of the 221 Beneficiaries that the Trustees do so.

[93] The relevant terms of the Trusts are:

> **Trust #1**
>
> **2.2 Purpose of the Trust**
>
> The income and capital of the Fund received by the Trustees shall be used by them for the purpose of providing health and welfare benefits as authorized under the terms of this Agreement and shall also be used to pay all costs and expenses of the Trustees incurred in the operation and administration of the Fund as provided for in this Agreement.
>
> …
>
> **6.2 Right to Obtain and Rely Upon Assistance**
>
> The Trustees are authorized and empowered to retain and follow the advice of professionals, including legal counsel, insurance and investment consultants, accountants, actuaries, and of administrative, clerical and other assistance or Union employees, as in their sole discretionary they find necessary or appropriate in the performance of their duties and to pay the costs incurred therefore out of the Fund.
>
> …
>
> **6.5 General Powers**
>
> The Trustees shall have the powers of Trustees in accordance with the laws of the Province of British Columbia, and those specific powers set forth as follows:
>
> …
>
> (b) To authorize and make payments from the Fund to fulfill the purpose of the trust as the Trustees in their sole discretion determine to be in furtherance of that purpose;
>
> (c) To do all acts, whether or not expressly authorized in this Agreement, which the Trustees deem necessary or useful to accomplish the purposes and general objectives of the Fund;
>
> …
>
> (p) To commence and defend any legal proceedings the Trustees in their discretion deem necessary to ensure preservation of the Fund, and to pay for the expenses incurred thereby, from the Fund;
>
> …

(s) To deal with the surplus upon termination of the Plan in a manner not inconsistent with, or prohibited by the *Trustee Act* or any other applicable statute, rule and regulation that may have been adopted by or promulgated by governmental authority having jurisdiction over the Fund and Plan.

…

7.4 Indemnification of Trustees

A Trustee or former Trustee shall be indemnified out of the Fund against all costs, charges, expenses and liabilities reasonably incurred by that person in the course of serving as a Trustee hereunder, including an amount paid to settle an action or satisfy a judgement in a legal proceeding to which the person is made a party because of being or having been a Trustee including an action in negligence. Notwithstanding the foregoing, no person may be indemnified out of the Fund from liability, obligation or debt arising out of that person's bad faith, gross negligence or willful misconduct.

…

9.7 Treatment of Surplus

In the event of termination or wind-up, the Trustees shall dispose of the residue of the Fund by distribution of the residue to the Members in an equitable manner or payment to the Union and in accordance with the provisions of this Agreement and the Plan.

Trust #2

2.2 Purpose

The Fund is established and is to be maintained, and the Trustees agree to receive the Fund and to hold and administer it, for the purpose of providing, to the extent the Fund permits, LTD benefits for Participating Employees, their eligible dependents, or eligible beneficiaries, if any, as authorized under the terms of this Agreement and in accordance with the Plan and for no other purpose except as specifically provided for in this Agreement.

…

6.2 Right to Obtain and Rely Upon Assistance

The Trustees are authorized and empowered to retain and follow the advice of professionals, including legal counsel, insurance and investment consultants, accountants, actuaries, and of administrative, clerical and other assistance, as in their sole discretion they find necessary or appropriate in the performance of their duties and to pay the costs incurred therefore out of the Fund.

…

6.4 General Powers

The Trustees shall have the powers of trustees in accordance with the laws of the Province of British Columbia governing trustees, and those specific powers set forth as follows:

…

(b) To authorize and make payments from the Fund to fulfill the purpose of the trust as the Trustees in their sole discretion determine to be in furtherance of that purpose;

(c) To do all acts, whether or not expressly authorized in this Agreement, which the Trustees deem necessary or useful to accomplish the purposes and general objectives of the Fund;

…

(p) To commence and defend any legal proceedings the Trustees in their discretion deem necessary to ensure preservation of the Fund, and to pay for the expenses incurred thereby, from the Fund;

…

(r) To deal with the surplus upon termination of the Plan in a manner not inconsistent with, or prohibited by the *Trustee Act* or any other applicable statute, rule and regulation that may have been adopted by or promulgated by governmental authority having jurisdiction over the Fund and Plan.

…

7.4 Indemnification of Trustees

A Trustee or former Trustee shall be indemnified out of the Fund against all costs, charges, expenses and liabilities reasonably incurred by that person in the course of serving as a Trustee hereunder, including an amount paid to settle an action or satisfy a judgement in a legal proceeding to which the person is made a party because of being or having been a Trustee, including without limitation an action in negligence, provided the person has complied with the applicable provisions of articles 7.1, 7.2 and 7.3. Notwithstanding the foregoing, no person may be indemnified out of the Fund from liability, obligation or debt arising out of that person's bad faith, gross negligence or wilful misconduct.

…

9.6 Treatment of Surplus

Upon termination, the Trustees shall forthwith apply or distribute the Fund, to the extent that assets are available, in accordance with the following order of priority:

(a) First, in payment of all reasonable and necessary expenses, including those in winding up the Plan and all outstanding premiums for policies then in effect;

(b) Second, and with the clear intent of winding up the business of the Plan, in payment of such premiums for such policies as the Trustees may in their discretion select for the purpose of extending the benefits provided under this Agreement; and

(c) Third, any balance remaining after payment of the foregoing shall be used for the purpose of funding health and welfare

benefits for members of HSA in any manner selected by HSA in its absolute discretion, provided that no Contributions or any part thereof and no portion of the Fund shall be paid or repaid to any Employer.

Trust #3

F. The HSA and the Health Employers Association of British Columbia have negotiated a new Health Sciences Professional Provincial Agreement for 2006-2010 … which provides for a payment of seventeen million dollars ($17,000,000) (the "LTD Stabilization Grant") by the Government of British Columbia to the HSA to be utilized for the purposes of eliminating the accrued deficiency in the Plans, related administrative costs and the provision of LTD benefit commitments known as at August 3, 2006 (which for greater certainty includes LTD claims which have then been incurred but not reported) which cannot be paid under the Plans due to actuarial deficiencies. To the extent made possible by the payment of the LTD Stabilization Grant.

2.2 Purpose

The Fund is established and is to be maintained, and the Trustees agree to hold and administer it, for the purposes set out in Recital E of this Agreement and for no other purpose except as specifically provided for in this Agreement in accordance with the terms and conditions of this Agreement.

…

5.2 Right to Obtain and Rely Upon Assistance

The Trustees are authorized and empowered to retain and follow the advice of professionals, including legal counsel, insurance and investment consultants, accountants, actuaries, and of administrative, clerical and other assistance, as in their sole discretion they find necessary or appropriate in the performance of their duties and to pay the costs incurred therefore out of the Fund.

…

5.4 General Powers

The Trustees shall have the powers of trustees in accordance with the laws of the Province of British Columbia governing trustees, and those specific powers set forth as follows:

…

(b) To authorize and make payments from the Fund to fulfill the purpose of the trust as the Trustees in their sole discretion determine to be in furtherance of that purpose;

(c) To do all acts, whether or not expressly authorized in this Agreement, which the Trustees deem necessary or useful to accomplish the purposes and general objectives of the Fund;

…

(q) To commence and defend any legal proceedings the Trustees in their discretion deem necessary to ensure preservation of

> the Fund, and to pay for the expenses incurred thereby, from the Fund;
>
> …
>
> (t) To deal with any surplus of the Fund upon termination of this trust in a manner not inconsistent with this Agreement.
>
> **6.4 Indemnification of Trustees**
>
> A Trustee or former Trustee shall be indemnified out of the Fund against all costs, charges, expenses and liabilities reasonably incurred by that person in the course of serving as a Trustee hereunder, including an amount paid to settle an action or satisfy a judgement in a legal proceeding to which the person is made a party because of being or having been a Trustee, including without limitation an action in negligence, provided the person has complied with the applicable provisions of articles 6.1, 6.2 and 6.3. Notwithstanding the foregoing, no person may be indemnified out of the Fund from liability, obligation or debt arising out of that person's bad faith, gross negligence or willful misconduct.
>
> **8.5 Treatment of Surplus**
>
> Upon termination, the Trustees shall forthwith apply or distribute the Fund, to the extent that assets are available, in accordance with the following order of priority:
>
> (a) First, in payment of all reasonable and necessary expenses, including those in winding up and all outstanding premiums for policies then in effect;
>
> (b) Second, in payment of such premiums for such policies or annuities as the Trustees may in their discretion select for the purpose of continuing the LTD benefits funded under this Agreement; and
>
> (b) Third, any balance remaining after payment of the foregoing shall be paid to HSA absolutely.

[94] Whether the Court should be involved or the matter left in the hands of the Trustees is in issue. The Trustees submit the application is neither "unnecessary" nor "made out of an overabundance of caution" as suggested by the plaintiffs. The Trustees further submit the application is a key part of the Proposed Settlement and note the beneficiaries will receive less from the Trust Fund than they would have if this matter had proceeded to trial and had the plaintiffs' claim been dismissed.

[95] The scope of the questions that may be asked of the court under a s. 86(1) application were considered by Pearlman J. in *Jones v. McLeod*, 2017 BCSC 1478:

> [30] The authorities provide some assistance on the scope of the questions which may be asked of the court on an application under s. 86(1).
>
> [31] In *Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.,* 2013 BCSC 2071, rev'd on other grounds, 2014 BCCA 227, Madam Justice Loo said this at para. 116:
>
> > [116] The seeking of legal advice on legal issues arising in connection with the trustee's obligations is an appropriate category of application under s. 86 of the Trustee Act . ..
>
> [32] In *Mansbridge and Roulston (In the Matter of),* 2004 BCSC 1605, Madam Justice Loo also discussed s. 86 of the *Trustee Act*. At para. 51 she said this:
>
> > [51] On an application for directions under s. 86 of the *Trustee Act,* the court should not exercise the trustees' powers, but rather confine itself to advice on any legal issues that arise in connection with the trustees' obligations. This principle is enunciated by Middleton J. in *Re Fulford* (1913), 29 O.L.R. 375 at p. 382:
> >
> > > It is suggested that some scheme should be devised by which the Court should approve of realisation in each particular case, taking the opinion of some advisory committee, if necessary, upon each particular transaction. I do not think that any such scheme can be authorized. The executors are protected from all liability if they honestly and with due care exercise the discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the Court. The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.
>
> [33] What I take from these authorities is that an executor or trustee may seek the advice, opinion or directions of the court on a legal question and then act on that advice.

[96] Where a trustee feels a real doubt exists as to their power to enter into a settlement under a statutory power, they may apply to the court for the court's opinion, advice or direction: *Re De Foras Estate* (1958), 26 W.W.R. 131 (Alta. C.A.) at pp. 136-137.

[97] Even where there is no such doubt as to the powers of the trustee and they have decided how they wish to exercise those powers, the Court may nevertheless make a declaration under its inherent jurisdiction. In *Toigo Estate (Re)*, 2018 BCSC 936, Shergill J. reviewed the authorities and discussed the exercise of the court's statutory and inherent jurisdiction:

> [13] The *Trustee Act*, R.S.B.C. 1996, c. 464, governs the court's exercise of powers in relation to a trust. Section 86(1) of the *Trustee Act*, permits an executor or administrator to seek the following by way of petition:
>
> > 86. (1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.
>
> [14] In addition, the court retains its inherent jurisdiction to supervise trusts despite statutory enactments on the matter. In *Public Guardian and Trustee v. Colwell,* 2004 BCSC 1622 at para. 32, Madam Justice Allan stated:
>
> > ... In addition, Donovan Waters (*Law of Trusts in Canada,* 2nd ed. (Toronto: Carswell, 1984) notes that Courts have retained their inherent jurisdiction to supervise trusts: "None of this legislation has taken away the inherent powers, so that the courts can fall back upon them should the statutory powers prove inadequate ..." (at 661).
>
> [15] The key principle governing the court's inherent jurisdiction is the welfare of the beneficiaries of a trust: *Colwell* at para. 33.
>
> …
>
> [26] In *Public Trustee v. Cooper,* [2001] W.T.L.R. 901 Ch (Eng) at 922-924, Mr. Justice Hart detailed categories of cases in which trustees can seek directions from the court. Relevant to this case in particular, he stated the following:
>
> > (2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. ... In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are *prima facie* in a much better position than the court to know what is in the best interests of the beneficiaries.

[27] The Royal Court of Guernsey ruled on a matter with similar circumstances to the case at bar in *In the matter of the Trusts (Guernsey) Law, 2007, and In the matter of an application by the Trustee of the LKM Discretionary Trust,* [34/2016] *[LKM]* — an anonymized decision dated July 20, 2016. The trustee in that case was asked to make a substantial distribution from trust assets to enable a beneficiary to satisfy the terms of a deferred prosecution agreement and a settlement agreement. The discretionary trust had been established conventionally such that the trustee had the power to make the distribution.

[28] Referring to the "momentous decision" category of cases set out in *Cooper*, the court in *LKM* noted at para. 17 that the test to be applied in these types of cases is that as outlined in *In re: F,* [32/2013], a decision of the Guernsey Court of Appeal:

> In the second type of application, however, the court is not exercising a discretion. What it is doing is in effect making a declaration that the trustees' proposed exercise of the power is lawful; in other words, that the proposed exercise is within the proper ambit of the power, that the trustees are acting honestly, and that in reaching their decision the trustees have taken into account all relevant matters, have taken into account no irrelevant matters, and have not reached a decision that no reasonable body of trustees could have reached. The effect is to protect the trustees from any challenge to their decision by persons interested in the trust, and to make clear that the trustees are entitled to indemnity from the trust assets in respect of the costs or other financial consequences of their decision. It is immaterial that the court, had it been exercising a discretion of its own, would have exercised it in a way different from that proposed by the trustees. ...

[29] After considering other authorities, the court in *LKM* summarized the relevant questions to be addressed at para. 19, being in substance as follows:

a) Does the trustee have the power under the trust instrument and the relevant law to make the "momentous decision"?

b) Has the trustee formed the opinion to do so in good faith and is it desirable and proper to do so?

c) Is the opinion formed by the trustee one that a reasonable trustee in its position, properly instructed, could have arrived at?

d) Is the Court certain that the decision has not been vitiated by any actual or potential conflicts of interest?

[30] At para. 20, the Court in *LKM* further noted that in considering whether or not the trustees have exercised their power properly, "the Court should exercise caution, and not act as a rubber stamp or take a lax approach".

[31] These legal considerations are consistent with s. 86(1) of the *Trustee Act* and Canadian jurisprudence in this area. I find them useful in my analysis in this case.

[98] Here the concerns are:

a) Is it lawful for the Trustees to enter into the Proposed Settlement?

b) Is to do so consistent with their fiduciary duties?

c) Is it in the best interests of the Beneficiaries, in particular because Class Counsel is seeking a portion of the trust funds and the potential proceeds of the Hewitt Litigation under their Contingency Fee Agreement?

[99] The Trustees submit these are legal questions falling under the scope of s. 86 of the *Trustee Act* and also raise an issue constituting a "momentous decision" that may be approved by this court under its inherent jurisdiction.

[100] I am satisfied that the order sought by the Trustees falls within the scope of s. 86 of the *Trustee Act* insofar as it relates to its legality and the exercise of their fiduciary duty. With respect to the settlement being in the best interests of the beneficiaries, in my view it falls within the scope of this court's inherent jurisdiction to supervise trusts as discussed in *Toigo Estate.*

[101] As a result, I am satisfied that the Trustees' decision to enter into the Proposed Settlement is lawful and consistent with the Trustees' fiduciary duties to the beneficiaries of the Trusts. For the reasons above, I am also satisfied that approving the settlement is in the best interests of the beneficiaries, despite Class Counsel's fees payable under the CFA.

Payment of Trust Funds

[102] Trust #1 has 61 beneficiaries entitled to receive distributions from Trust Fund #1 and Trust Fund #3 but not from Trust Fund #2. The 160 beneficiaries of Trust #2 are entitled to receive distributions from Trust Fund #2 and Trust Fund #3 but not from Trust Fund #1.

[103] Because the Trusts are in different financial positions and are expected to close at different times, the Trustees must make distributions from all three Trust Funds to all 221 beneficiaries under the Proposed Settlement. However, the Trustees cannot distribute funds to those who are not beneficiaries of a particular trust. There are also potential tax consequences which could arise if the Trustees amend the terms of the three Trusts as proposed in the Settlement Agreement.

[104] The Trustees propose as a solution to the distribution problem a charging order over all three Trusts. The Trustees consent to an equitable charging order to ensure that the intent of the Proposed Settlement is performed and to ensure they can comply with their fiduciary duties and obligations to the respective beneficiaries of each trust.

[105] A charging order allows a creditor to execute on a judgment where legal execution is impossible. An equitable charging order is available when there is an ascertainable fund that a debtor has a clear right to which can be charged: *Accredit Mortgage Ltd. v. Grealy*, 1999 CanLII 5698 (B.C.S.C.); *Canada (Deputy Minister of National Revenue, Customs, Excise and Taxation - M.N.R.) v. Millar*, 2007 BCCA 401 at paras. 21 and 22. The first distribution of $750,000 is an ascertainable fund. The next two distributions will be ascertained in the future. I am satisfied that such a charge is appropriate.

[106] By December 31, 2022 all health and welfare trusts must convert to an employee life and health trust. Section 144.1(2)(b) and (d) of the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.), will apply. These sections require that on wind-up or reorganization, the property of the trust may be distributed only to each remaining beneficiary of a trust (including if deceased, their spouse or common law partner, or someone related to the beneficiary and either a member of their household or dependent upon them). The Trustees, once orders on this application are made, will amend the Trust Deeds to conform with the requirements for a health and welfare trust under Income Tax Folio S2-F1-C1 and the applicable *Income Tax Act* provisions.

[107] To address these issues and to effect the Proposed Settlement, the Trustees consent to the following:

> 1. The Trustees of Trust #1, #*2* and #3 consent to an equitable charge over the funds of Trust #1, Trust #2 and Trust #3 (the "Trust Fund") (which equitable charge shall be traced into any merged or reorganized Trust or Trusts and the respective Funds), and the Trust Funds are jointly and severally charged with the obligation to pay out the following settlement amounts, on the following terms:
>
> a. an amount to secure the initial distribution of $750,000 from the Trust Fund, payable within 30 days of the Court's approval of the settlement and pronouncement upon the Trustees' s.86 Application;
>
> b. an amount to make an interim distribution of the Hewitt Damage Award from the Trust Fund (being either the settlement proceeds or judgment proceeds, net of legal costs), payable within 30 days of receipt; and
>
> c. an amount equal to the aggregate of all remaining funds in the Trust Fund at the time all LTD claims have terminated in accordance with the plan terms, or are otherwise satisfied by way of annuity, less windup costs, to be paid immediately prior to the wind up and termination of the 3 Trusts (which amount shall not form part of the surplus of Trust #1, #2 or #3);
>
> and each of the 221 Beneficiaries shall have a vested deferred interest in the corpus of the Trust Fund remaining after all benefit claims have been paid or satisfied net of wind-up expenses, in the proportion as determined by the Settlement Formula, which on the death of a beneficiary before the distribution in (c) above shall accrue to the benefit of that person's surviving married or common law spouse, failing which, shall be paid to the estate of that deceased beneficiary;
>
> 2. The amounts payable under the equitable charging order as set out in paragraph 1 shall be made to Church & Company, to be distributed to the 221 Beneficiaries, in accordance with the Settlement Formula (after first deducting such fees, disbursements and taxes of Church & Company as the Court may award with each tranche of funds) as follows:
>
> a. directly to the beneficiary;
>
> b. if the beneficiary has died, then to their surviving married or common law (as defined in the *Wills, Estates and Succession Act)* spouse; and
>
> c. if the beneficiary has died, and has no surviving married or common law spouse, then to the beneficiary's estate by way of payment to the beneficiary's personal representative;
>
> 3. Upon payment of each of the distributions as set out in paragraphs 1 and 2 above the Trustees shall be released and discharged from all claims or

> demands of all beneficiaries of the three Trusts regarding the funds distributed;
>
> 4. The Trustees shall have leave to apply to the Court for directions regarding any matter in connection with the Settlement Agreement and the within Consent Order arising out of their administration of the Trusts, including, without limiting the generality of the foregoing, whether there should be a further interim distribution of any surplus trust funds;
>
> 5. The Trustees will amend each of the three trust agreements to conform to the requirements for a health and welfare trust under Income Tax Folio S2-F1-C1 or the provisions of the *Income Tax Act* for employee life and health trusts as applicable, to provide for distribution of any surplus of each trust upon final wind-up to its beneficiaries so that the aggregate surplus in the 3 trusts net of wind up expenses is distributed to the 221 beneficiaries, or their surviving spouse or dependent related family members, on a pro rata basis, pursuant to the Settlement Formula either by direct distribution to the beneficiaries of each respective trust or indirectly by means of an inter-trust transfer of surplus as may be required to effect the said purpose.

[108] The Trustees will have leave to apply for directions regarding any matter with the Settlement Agreement and the Consent Order approving the Settlement Agreement, or arising out of their administration of the Trusts including whether an interim distribution should be made of any surplus trust funds.

Extension of "Opt In" Period

[109] The plaintiffs seek an extension of the "opt in" period to give effect to the Proposed Settlement.

[110] The court can amend provisions of a "certification order" which includes an order setting the time periods for opting in and out of a class proceeding. Section 8(3) of the *CPA* states:

> (3) The court, on the application of a party or class member, may at any time amend a certification order.

[111] The Court's order dated August 25, 2017 is a "certification order" for the purpose of s. 8(3) of the *CPA*.

[112] There were 221 people receiving LTD benefits when the reductions in those benefits occurred in the summer of 2012. Two hundred and nine (209) of the 221 people either opted into, or where deemed to have opted into, the class action by their residency in British Columbia.

[113] Twelve people opted out of the class proceedings, with seven doing so explicitly and five deemed to having done so. Since then, one of the latter individuals, Debbie Greene, has advised Church & Company she wished to opt in and had simply not received correspondence in time for her to do so due to her having moved. The defendants do not object to Ms. Greene's addition as a class member.

[114] Changes to the *CPA*, effective November 2018, abolished the concept of "opting in" for non-BC residents in favour of "opting out" provisions, although s. 44 of the *CPA* retains the opt in concept for class proceedings certified before that date as these proceedings were. However, during settlement negotiations, counsel for the Trustees clarified that the Trustees would only support a settlement if all 221 people, who were beneficiaries as of 2012, were included in the settlement, not just the 209 who either opted in or were deemed to have opted in. The representative plaintiffs accept that.

[115] Given the Proposed Settlement and the matters already referred to, I am satisfied that those who originally opted out of the proceedings, or who were deemed to have opted out, can opt back into the settlement so all class members can receive the benefits of the settlement. Such opting shall be recognized by the person cashing the settlement cheque delivered to them.

Honorarium for Representative Plaintiffs

[116] The request for an honorarium of $5,000 to each of the representative plaintiffs comes from Class Counsel, not the plaintiffs. It is proposed such amounts come off the top of the settlement funds. The Trustees and HSA take no position.

[117] In *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311 at para. 21, Saunders J. for the Court stated the test for exercising the court's discretion to award a representative plaintiff an honorarium for acting as such:

> [21] … I do not consider exceptional service is required. Rather competent service accompanied by positive results should be sufficient for recognition in

> this way, weighing in this factor the quantum of personal benefit achieved by the representative plaintiff with the overall benefit achieved for the class.

[118] The court in *Schimpf v. Samsung Electronics Co*. *Ltd*, 2015 BCSC 2154, made an award of $3,000 to the representative plaintiff. The representative plaintiff was active for three years and played an active role in the case. He was briefed and provided instructions to counsel at every step, made himself available for conversations and meetings, and provided nine affidavits in respect of the action. Justice Masuhara noted with reference to *Parsons*:

> [56] In setting compensation the Court in *Parsons* indicated that it should be modest. Modesty obviously should be viewed in the context of each case.

[119] Five Thousand Dollars ($5,000) is sought in this case because the representative plaintiffs met with counsel for the drafting and review of affidavits throughout, provided document discovery, and prepared for and attended at examinations for discovery which required they travel from their respective homes in the Fraser Valley and Vancouver Island, requiring overnight stays in Vancouver. While such active involvement is not unusual, each representative plaintiff is disabled, hence, they had to endure the normal rigours of litigation while suffering from factors beyond those endured by the average litigant. Their participation was more onerous than normal. I note as well that they have been active for six years.

[120] Further, the request for the honorarium was disclosed in the Notice of the potential settlement approved by the court and none of the class members has objected to such payments.

[121] Given the results obtained, the risks involved and the representative plaintiffs' lengthy involvement, despite their disabilities, I am satisfied $5,000 for each is, in this case, reasonable and modest.

Order

[122] The order shall go in the form attached as Schedule “A” to these reasons.

“The Honourable Mr. Justice Punnett”

SCHEDULE "A"

No. S134066
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Nina Watt and James Hensman

Plaintiffs

And:

Health Sciences Association of British Columbia, Reid Johnson, Valerie Avery and Bruce Macdonald in their capacity as the Trustees of the Health Sciences Association of B.C. Trust Fund and the said The Health Sciences Association of B.C. Trust Fund,

Reid Johnson, Bruce Macdonald and Marg Beddis in their capacity as the Trustees of The HSA LTD Trust No. 2 and the said The HSA LTD Trust No. 2,

Reid Johnson, Bruce Macdonald, Valerie Avery and Marg Beddis in their capacity as the Trustees of The HSA LTD Trust No. 3 and the said The HSA LTD Trust No. 3, and Reid Johnson, Bruce Macdonald, Valerie Avery and Marg Beddis

Defendants

ORDER MADE AFTER APPLICATION
REGARDING SETTLEMENT OF THE CLASS PROCEEDINGS

BEFORE	THE HONOURABLE MR. JUSTICE PUNNETT		February 26, 2019

ON THE APPLICATION of the Plaintiffs, Nina Watt and James Hensman and their counsel, Church & Company filed September 17, 2019, coming on for hearing at the Courthouse at 800 Smithe Street, Vancouver, British Columbia, on September 30, 2019 and October 1, 2019; and on hearing David P. Church, Q.C., counsel for the Plaintiffs, Craig A.B. Ferris, Q.C., and Amy M. Nathanson, counsel for the Defendant Health Services Association of British Columbia ("HSA); and Lauren A. Blake and Ken Vimalesan, counsel for the Defendants Reid Johnson, Valerie Avery, Bruce MacDonald and Marg Beddis (collectively, the "Trustees");

THIS COURT ORDERS that:

Approval of the Settlement Agreement and Related Orders

1. This action was certified as a class action pursuant to section 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*CPA*"), on behalf of a class (the "Class") defined as follows:

    a. HSA members who started receiving long term disability benefits between March 1, 1989 and February 28, 1999 and who were receiving such benefits as of June 1, 2012 (the "LTD Agreement #1 Subclass"); and

    b. HSA members who started receiving long term disability benefits between March 1, 1999 and August 3, 2006 and who were receiving such benefits as of June 1, 2012 (the "LTD Agreement #2 Subclass");

2. The common issues certified on behalf of the Class are set out in Schedule "A" to this Order;

3. The settlement agreement between the parties, as evidenced by letters dated July 15 and 22, 2019 between Church & Company and Lawson, Lundell LLP and emails dated July 22, 2019, (the "Settlement Agreement") is approved by the Court, pursuant to section 35 of the *CPA*, as fair and reasonable and in the best interests of those affected by it;

4. Pursuant to section 8(3) of the *CPA*, the Court's Order in this matter dated August 25, 2017 and, in particular, paragraphs 4 and 5 of that Order, be amended, such that the time to opt into these proceedings, for those people who originally opted out of the class proceedings, or who were deemed to have opted out of the class proceedings by virtue of them residing outside British Columbia and not formally having opted in, be extended until March 31, 2020, so as to allow those people to participate in the settlement;

5. The fact that an individual referenced in paragraph 4 has chosen to participate in the settlement of the class proceeding, may be evidenced by them cashing a cheque for settlement funds, rather than them actually having to write to Church & Company to inform the firm of their desire to formally opt into the class proceeding. Class Members and individuals who have chosen to participate in the settlement in accordance with the terms of this paragraph shall be referred to collectively as the "Settlement Class";

6. Each of the representative plaintiffs be entitled to receive an honorarium of $5,000, such monies to come from the first tranche of the settlement pool and to be awarded to them, before applying the "Settlement Formula" described below to the balance of the funds remaining for distribution amongst class members;

7. Upon receipt of funds from the defendants payable under the Settlement Agreement, Church & Company be entitled to distribute the first tranche of the settlement funds in the manner described in the Affidavit #1 of Jeremy Bell dated September 13, 2019 and filed September 16, 2019 and, in particular paragraphs 27 to 32 thereof (the "Settlement Formula"), after first deducting such fees, disbursements and taxes of Church & Company as set out in paragraphs 23 and 24 below and the amount of the honorarium awarded to the representative plaintiffs in paragraph 6;

8. The first tranche of settlement funds be, in keeping with the parties' agreement, ordered to have been received on account of non-pecuniary damages;

9. Upon the settlement or final judgment in the case of *HSA et al. v. Hewitt Associates Corp. et al,* B.C.S.C. Action No. S120334, Vancouver Registry (the "Hewitt Action"), and delivery of the net recovery in the Hewitt Action, if any, by the defendants to Church & Company under the Settlement Agreement, Church & Company be entitled to distribute those monies in accordance with the Settlement Formula, after first deducting such fees,

disbursements and taxes of Church & Company as the Court may award in connection with the second tranche of such funds;

10. Upon delivery of funds in respect of a balance remaining in either Trust #1 or Trust #2 and Trust #3, if any, by the Trustees to Church & Company under the Settlement Agreement, that Church & Company shall be entitled to distribute those monies in accordance with the Settlement Formula, after first deducting such fees, disbursements and taxes of Church & Company as the Court may award in connection with the third tranche of such funds;

11. In the event that a member of the Settlement Class has died, prior to cashing a cheque for some or all of their settlement funds, Church & Company is permitted to make payment of that person's share of the funds to that person's surviving spouse, or, there is no such person, to that person's personal representative, upon the provision of proof, satisfactory to Church & Company, in its discretion of the same, without further order of the Court;

12. One or both of the representative plaintiffs or Church & Company have leave to apply to the Court for directions regarding any matter in connection with the Settlement Agreement, including, without limiting the generality of the foregoing:

    a. the manner of making payment;

    b. the manner of dealing with any funds not claimed by a beneficiary under the Settlement Agreement;

    c. whether or not a given person is entitled to receive a payment; or

    d. whether there should be an interim distribution of surplus trust funds prior to the formal winding up of the Trusts;

13. Disputes arising over entitlement to the settlement funds will be determined by the Supreme Court of British Columbia, or such other person as this Court shall direct.

Binding Settlement and Release

14. The Settlement Agreement is binding upon the parties and upon all members of the Settlement Class, and the parties and all members of the Settlement Class shall comply with the terms of the Settlement Agreement and this Order;

15. The members of the Settlement Class release the Defendants and are precluded from proceeding with this class proceeding or from making any further claim or instituting any further court actions or other types of proceedings in connection with their claims in this class proceeding against the Defendants or any other person or corporation;

16. The members of the Settlement Class will, with respect to any other existing Court actions or other types of proceedings, at the first reasonable opportunity, advise the Court or other tribunal that they consent to the dismissal of the Court action or other proceedings against the Defendants and that they expressly waive any right to recover from any other person or corporation, any portion of the amount claimed in this class proceeding and that the Court or other tribunal may attribute to the fault, tort, negligence, negligent misrepresentation, breach of contract, breach of warranty, and/or breach of any equitable, common law or statutory duty of the Defendants;

Trustee and Trust-Related Orders

17. The Trustees of Trusts #1, #2 and #3 consent to an equitable charge over the funds of Trust #1, Trust #2 and Trust #3 (each a “Fund” and collectively the “Trust Fund”) (which equitable charge shall be traced into any merged or reorganized Trust or Trusts and the respective Funds), and the Funds are jointly and severally charged with the obligation to pay out the following settlement amounts, on the following terms:

a. an amount to secure the initial distribution of $750,000 from the Trust Fund, payable within 30 days of the Court's approval of the settlement and pronouncement upon the Trustees' s. 86 Application;

b. an amount to make an interim distribution of the recovery in the Hewitt Action from the Trust Fund (being either the settlement proceeds or judgment proceeds, net of legal costs), payable within 30 days of receipt; and

c. an amount equal to the aggregate of all remaining funds in the Trust Fund at the time all LTD claims have terminated in accordance with the plan terms, or are otherwise satisfied by way of annuity, less wind-up costs, to be paid immediately prior to the wind up and termination of the 3 Trusts (which amount shall not form part of the surplus of Trust #1, #2 or #3);

and each of the 221 Beneficiaries shall have a vested deferred interest in the corpus of the Trust Fund remaining after all benefit claims have been paid or satisfied net of wind-up expenses, in the proportion as determined by the Settlement Formula, which on the death of a beneficiary prior to the distribution in (c) above shall accrue to the benefit of that person's surviving married or common law spouse, failing which, shall be paid to the estate of that deceased beneficiary;

18. The amounts payable pursuant to the equitable charging order as set out in paragraph 17 shall be made to Church & Company, to be distributed to the 221 Beneficiaries, in accordance with the Settlement Formula (after first

deducting such fees, disbursements and taxes of Church & Company as the Court may award in connection with each tranche of funds) as follows:

a. directly to the beneficiary;

b. if the beneficiary has died, then to their surviving married or common law spouse (as defined in the *Wills, Estates and Succession Act*); and

c. if the beneficiary has died, and has no surviving married or common law spouse, then to the beneficiary's estate by way of payment to the beneficiary's personal representative;

19. Upon payment of each of the distributions as set out in paragraphs 17 and 18 above, the Trustees shall be released and discharged from all claims or demands of all beneficiaries of the three Trusts in respect of the funds distributed;

20. The Trustees shall have leave to apply to the Court for directions regarding any matter in connection with the Settlement Agreement and the within Consent Order arising out of their administration of the Trusts, including, without limiting the generality of the foregoing, whether there should be a further interim distribution of any surplus trust funds;

21. The Trustees will amend each of the three trust agreements to conform to the requirements for a health and welfare trust under Income Tax Folio S2-F1-C1 or the provisions of the *Income Tax Act* for employee life and health trusts as applicable, to provide for the distribution of any surplus of each Trust upon final wind-up to its beneficiaries so that the aggregate surplus in the 3 Trusts net of wind-up expenses is distributed to the 221 beneficiaries, or their surviving spouse or dependent related family members, on a pro rata basis, pursuant to the Settlement Formula either by direct distribution to the beneficiaries of each respective trust or indirectly by means of an inter-trust transfer of surplus as may be required to effect the said purpose.

Approval of Church & Company's Fees and Disbursements

22. That the contingency fee agreement, between Church & Company and the representative plaintiff, James Trevor Hensman dated May 8, 2013 and the contingency fee agreement between Church & Company and the representative plaintiff, Nina Carolin Watt dated May 9, 2013, (collectively the "Fee Agreements") be approved by the Court pursuant to section 38 of the *CPA*.

23. Church & Company be entitled to deduct the amount of $22,216.58, from the initial tranche of the settlement funds, in order to reimburse itself for disbursements and taxes thereon; and

24. Church & Company be entitled to receive fees in the amount of 33 1/3%, together with all taxes thereon, in connection with all monies received on behalf of the class members, pursuant to the Settlement Agreement, when such monies are received from the Defendants and to deduct such fees and taxes thereon before distributing the remainder amongst the class members in accordance with the Settlement Formula.

Reporting on Distributions

25. Within six months' following the receipt of any tranche of funds from one or more of the Defendants, for distribution to the Settlement Class, Church & Company will file an Affidavit or other document with the Court giving a summary of the total funds received, net of legal fees, disbursements and taxes. Such summary shall also show the amount of the cheques which have not yet been cashed by members of the Settlement Class. Church & Company will provide counsel for the Defendants with such document.

Dismissal

26. This Court orders that this action be and is hereby dismissed with prejudice.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Deputy Registrar
By the Court

APPROVED AS TO FORM:

David P. Church, Q.C.,
Counsel for the Plaintiffs

Craig A.B. Ferris, Q.C.,
Counsel for the HSA of BC

Lauren A. Blake,
Counsel for the Trustees

SCHEDULE "A" - COMMON ISSUES

1. Did HSA enter into a binding agreement with its members to provide various benefits, specifically though LTD Agreement #1 and LTD Agreement #2, as alleged in the Amended Notice of Civil Claim?

2. If HSA did enter into LTD Agreement #1 and LTD Agreement #2, what were the terms thereof?

3. Did HSA breach LTD Agreement #1 through one or more of the following, with respect to HSA members who became disabled between March 1, 1989 and February 28, 1999:

    (a) The reduction in long term disability benefits;

    (b) The imposition of early retirement and the concurrent discontinuance of long term disability benefits; and/or

    (c) The termination of group life insurance and AD&D insurance.

4. Did HSA breach LTD Agreement #2 through one or more of the following, with respect to HSA members who became disabled between March 1, 1999 and August 3, 2006:

    (a) The reduction in long term disability payments under the Index Removal;

    (b) The reduction in long term disability benefits; and/or

    (c) The imposition of early retirement and the concurrent discontinuance of long term disability benefits?

5. If the steps identified in paragraph 3, above, did not constitute a breach of LTD Agreement #1, on the basis that the terms thereof permitted HSA to undertake such actions:

    (a) Is LTD Agreement #1 "group insurance" within the meaning of the *Insurance Act;*

    (b) Is HSA an "insurer" within the meaning of the *Insurance Act*; and

    (c) Is HSA thus precluded from taking the steps identified in paragraph 3, above, by sections 58 and/or 116 of the *Insurance Act*?

6. If the steps identified in paragraph 4, above, did not constitute a breach of the LTD Agreement #2, on the basis that the terms thereof permitted HSA to undertake such steps:

   (a) Is LTD Agreement #2 "group insurance" within the meaning of the *Insurance Act*;

   (b) Is HSA an "insurer" within the meaning of the *Insurance Act*; and

   (c) Is HSA thus precluded from taking the steps identified in paragraph 4, above, by section 116 of the *Insurance Act*?

7. NA

8. Did the Trustees breach their fiduciary duty to the Disabled HSA Members by failing to actively support a referendum seeking support to raise HSA dues?

9. Do the trustees of Trust No. 1 and trustees of Trust No. 2 owe one or more of the following duties of care to the Disabled HSA Members, who are the beneficiaries of the Trusts:

   (a) To act reasonably in the administration of each trust; and/or

   (b) To act in accordance with sound business practices, custom, usage and applicable law in the administration of each trust?

10. Were the trustees of Trust No. 1 and Trust No. 2 negligent or grossly negligent or, in the alternative, did the trustees of Trust No. 1 and Trust No. 2 fail to act in accordance with sound business practice by failing to properly obtain, and utilize, actuarial advice in determining the amount of funds to be placed in Trust No. 3.

11. To the extent that the court concludes that there was a breach of contract (or contracts) on the part of or breach of fiduciary duty on the part of HSA and the Trustees and/or negligence on the part of the trustees of Trust No. 1 or Trust No. 2, what damages were suffered by the class members as a result thereof?

12. NA

13. Should punitive damages be awarded to the Class members against any of the Defendants? If so, in what amount?

No. S134066
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Nina Watt and James Hensman

PLAINTIFFS

And:

Health Sciences Association of British Columbia,

Reid Johnson, Valerie Avery and Bruce Macdonald in their capacity as the Trustees of the Health Sciences Association of B.C. Trust Fund and the said The Health Sciences Association of B.C. Trust Fund,

Reid Johnson, Bruce Macdonald and Marg Beddis in their capacity as the Trustees of The HSA LTD Trust No. 2 and the said The HSA LTD Trust No. 2,

Reid Johnson, Bruce Macdonald, Valerie Avery and Marg Beddis in their capacity as the Trustees of The HSA LTD Trust No. 3 and the said The HSA LTD Trust No. 3, and

Reid Johnson, Bruce Macdonald, Valerie Avery and Marg Beddis

DEFENDANTS

ORDER MADE AFTER APPLICATION
APPROVAL OF SETTLEMENT

Church & Company
900 - 1040 West Georgia Street
Vancouver, BC V6E 4H1
Telephone: 604 408-8277
Attention: David P. Church, Q.C.

Agent: Dye & Durham