CITATION*: Parker v. Blackberry Limited*, 2025 ONSC 4446
COURT FILE NO.: CV-17-71659-CP
DATE: 2025 07 2025

SUPERIOR COURT OF JUSTICE – ONTARIO
Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 as amended

RE: David Parker, Plaintiff

AND:

Blackberry Limited, Defendant

BEFORE: C. MacLeod RSJ

COUNSEL: Janice Payne, Andrew Montague-Reinholdt, Karine Dion & Rhian Foley, for the Plaintiff

Arlen Sternberg, Colette Koopman & Ryan Lax for the Defendant

HEARD: July 30, 2025

APPROVAL OF SETTLEMENT

[1] This is a motion to approve the settlement of a class proceeding and to approve the proposed fees and other amounts to be charged against the settlement prior to distribution. I will note at the outset that in this proceeding, all members of the class can be readily identified and all class members (except for the four who opted out) were given the opportunity to object to the settlement or the proposed distribution plan as well as the proposed fees. No notices of objection were filed and none of the approximately 8 members of the class who attended the hearing asked to address the court although they were given an opportunity to do so.

[2] While the approval or lack of objection by the class members militates in favour of approval, the court is still required to perform its supervisory role. Approvals are not automatic.

[3] Pursuant to s. 27.1 of the *Class Proceedings Act*, any settlement of a Class Proceeding is binding only with court approval and once approved it binds every member of every class or subclass who has not opted out. A settlement may only be approved if the court determines that it is in the best interests of the class or classes and is fair and reasonable.

[4] In addition to approving the settlement, the court is also obligated to review and approve the retainer agreement and the actual fees and disbursements to be charged by class counsel. Again, the court must be satisfied that the proposed fees and disbursements are fair and reasonable and are appropriate having regard to factors set out in the statute. That is particularly important when the parties have arrived at an "all inclusive" settlement because the fees will be deducted from the amount of the settlement.

[5] In this case the Plaintiffs also seek an honorarium to be paid to each of the named plaintiff and the three other members of the class who agreed to indemnify him for costs and who participated in instructing counsel. That raises other considerations.

Background

[6] By way of background, the litigation arose in connection with a series of agreements between Blackberry Limited and Ford Motor Company negotiated in 2016. Blackberry had been providing software engineering services to support the development of software and architecture for autonomous vehicles. Ford wished to bring engineering expertise in house and as part of the agreement between Blackberry and Ford, Ford was permitted to make employment offers to employees of Blackberry who were working on this project.

[7] The agreement was structured so that Ford was not acquiring Blackberry's business and employees accepting offers at Ford had to resign from Blackberry. The Plaintiff was of the view that the effect of this agreement with Ford was to deprive the Blackberry employees who resigned of entitlements they would have received had Blackberry terminated their employment. In essence, the plaintiff contended that Blackberry had arranged matters to avoid its obligations as an employer and had acted in bad faith. It was also alleged that Blackberry had shared confidential information relating to the class members without their consent.

[8] I will not set out the facts in further detail because some of the information is proprietary to Ford (which is not a party) and there was a sealing order and confidentiality agreement in respect of certain sensitive business information. The allegations are described in more detail in the original reasons for granting certification. (See 2019 ONSC 3185)

[9] What is significant for the purpose of this motion is the fact that the litigation was highly contentious. The plaintiff's theory that the actions of Blackberry constituted a form of constructive dismissal was a novel claim that both parties agree is not addressed by any jurisprudence from any court in Canada. It was however, rejected by two decisions of employment standards officers in Ontario when that argument was advanced in claims under the *Employment Standards Act, 2000.* (Claims 70187615-0 and 70199922-0).[1]

[10] The other aspects of the claim involved a theory that Blackberry misled its employees, manipulated events to provide the affected employees with little choice, and acted in bad faith. Blackberry vigorously defended the litigation and opposed certification. The certification motion itself took three days to argue and when certification was granted, Blackberry sought leave to appeal. Subsequently, there were lengthy disputes about production and discovery. The production ultimately involved upwards of 7,000 documents.

[11] Blackberry has always maintained that the employees who accepted employment with Ford benefitted from the arrangement and remained employed at Ford throughout the period that this litigation was pursued. Blackberry denied that there was any termination of employment, any entitlement to damages or that the plaintiffs suffered any loss or damage of any kind. It was the defendant's position that it had no intention of terminating the employees and they were under no compulsion to accept offers with Ford beyond the obvious fact that Blackberry was in financial difficulty, was restructuring its business and could not guarantee indefinite employment to anyone.

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[1] The two claimants who advanced ESA complaints are excluded from the class as certified.

All members of the class resigned from Blackberry and accepted employment with Ford in early 2017.

[12] As noted earlier, the certification motion was argued in 2019 and there were subsequent motions and case conferences dealing with production, discovery and procedure. Matters were also delayed by the COVID epidemic. The action was ultimately ordered to trial and the trial of the common issues had been scheduled to start in June of this year. Had it proceeded, the trial was expected to take a month. It would have involved many of the class members being called as witnesses.

[13] Earlier this year, following a mediation and two judicial pre-trials, the parties reached a tentative settlement and pursuant to that agreement, I approved a plan for notice to the class members. This date was scheduled for a hearing of the approval motion.

[14] The proposed settlement is without any admission of liability. It is important to underscore the fact that statutory entitlements to severance or common law entitlements would only have arisen if employment with Blackberry had been terminated and some but not all of the claims for damages would have been subject to a duty to mitigate. On the other hand, had Blackberry transferred its business unit to Ford and had Ford become a successor employer, the claim for severance or common law notice would only have arisen if Ford had subsequently terminated the employment of the class members. The question of whether or not there was any liability on the defendant and whether or not there was any significant claim to damages was hotly contested and would have been the subject of the trial had it proceeded.

[15] This very brief summary of the issues and the positions of the parties does not do justice to all of the complex and nuanced arguments that would have been advanced at trial. Suffice to say that the litigation was hotly contested on both sides and had been before the court for more than 7 years. There was no guarantee that the plaintiffs would have been successful at trial but equally it was not a case where the court could conclude that the claim was frivolous. Both parties were at risk had they proceeded to trial and the costs involved in the taking the matter to trial would have been significant.

[16] Ultimately the parties have agreed on an all inclusive settlement of $4 million dollars. By all inclusive, it is intended that this amount covers damages, interest, HST if any and costs. It is a gross settlement amount in exchange for which any liability of Blackberry to the class members arising from these circumstances will be released. It is anticipated that after payment of the counsel fee, honoraria for the four instructing class members, costs of administration and taxes, just over $2 million will be available for distribution to the class members.

[17] There were 289 members of the class. Of these, four opted out and another four are considered ineligible because they had worked for Blackberry for less than three months at the time they resigned their employment. Class members who opt out of a class proceeding, retain their own rights of action (if any) and are no longer members of the class. They have no right to speak in favour of the settlement or to object to it. Nor are they bound by it.

[18] It is proposed that the settlement funds be distributed to the class members prorated to the number of years of service with Blackberry. It is proposed that a greater share be paid to class members who had more than 5 years of service. It appears that other than the excluded members, the class member with the least service had worked for 1.81 years and the class member with the most service had worked for 17.32 years. The compensation for the former is proposed at $789.15

and for the latter at $15,141.19. It is also proposed that these payments be distributed as general damages rather than as pay in lieu of notice or severance pay.

[19] This is consistent with the claims advanced for misuse of personal information, negligence in advising employees of their ESA and other rights and the allegation of bad faith. While fully acknowledging that Blackberry had defences to these claims and is settling for economic reasons, I am satisfied that if there was liability, it would likely have related to these claims and not the claim that the transfer of employment to Ford was a form of constructive dismissal. It is therefore entirely reasonable for counsel for the plaintiffs to characterize the payment as damages and not as severance.

Approval of the Settlement

[20] As noted, this litigation has been highly contentious and the defendant denies liability. It is impossible to say that the plaintiffs would have been successful at trial but to the extent the claim has merit, there was no process that would have obtained compensation for the class members other than the tenacious efforts of class counsel and their willingness to take the matter to trial. Under the circumstances, the settlement of all claims, interest and costs for $4 million is both a reasonable compromise and is in the best interests of the class members. I have no hesitation in approving the settlement as both fair and reasonable.

Approval of the Fees and Disbursements

[21] This case was advanced on behalf of the class under a contingent retainer agreement. The nature of the retainer was such that the representative plaintiff or the class would incur no liability for legal fees or disbursements unless the case was successfully prosecuted. Unlike some contingency agreements, however, counsel did not propose to take a percentage of the recovery. Rather, the agreement provided that the counsel fee would be calculated "on a base fee determined by reference to the time spent … plus a multiplier as determined and approved by the Superior Court of Justice". The hourly rates of the various counsel are then set out in the retainer.

[22] Although a percentage of recovery is a common term of contingency fee agreements, the retainer in question complies with s. 33 of the Act. S. 33 specifically authorizes an agreement for payment only upon success in the class proceeding. It also specifically authorizes such a retainer to provide for the use of a "base fee" and "multiplier" model. This model, although authorized by the legislation, has been criticized especially in the context of "mega-fund settlements" but that is not this case. Here, there was no litigation funding and no costs indemnification. I do not consider a base fee with the possibility of a court approved multiplier to be inappropriate for this particular action.[2]

[23] The question then is whether the docketed time and hourly rates are reasonable to calculate the base fee and whether or not to approve a requested multiplier. According to the affidavits filed and the costs outline, the total fees calculated on an hourly basis up to the date of the settlement would have been $1,539,681.72. To this would be added HST. The firm had also incurred disbursements of $49,089.80 plus HST. This totals $1,794,980.93. Another $100,000 is the estimated cost of work required to finalize the settlement and administer the settlement.

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[2] See *Fresco v. Canadian Imperial Bank of Commerce,* 2024 ONCA 628 @ para 90

[24] The proposal by class counsel is for approval of a combined amount for all fees, disbursements, taxes and administration costs totalling $1.9 million.[3] If this amount includes a multiplier at all, it is a modest multiplier of at most 1.13% and given that the proposed judgment would cap the costs, there is some risk that additional unanticipated work involved in the settlement administration would have to be absorbed by the firm.

[25] Another way to look at this is that Nelligans invested over $1.5 million in docketed time in this case and funded disbursements of $55,140.61 (inclusive of HST). There was a considerable risk that this amount could not be recovered if the litigation was unsuccessful. A base fee calculated on the hourly rates set out in the retainer ($600 per hour for Ms. Payne and $235 or $250 per hour for more junior counsel) is not unreasonable. As submitted by counsel, these are the hourly rates that would have been charged for other work that the firm could have pursued had the lawyers not invested the time that they did in pursuing this action.

[26] While the costs will consume almost 50% of the gross settlement amount, it must be remembered that there would have been no recovery at all but for the efforts of counsel to pursue the matter and the settlement was inclusive of costs, interest and disbursements. In addition, there was no objection to the proposed fee by any of the class members. Applying the factors set out in s. 32 (2.1) of the Act, I am prepared to approve the proposed fee.[4]

[27] To reiterate, there would have been no recovery but for the tenacious and vigorous pursuit of this matter by counsel. There was a high degree of financial risk for the law firm in doing so. The fees are consistent with the retainer. The time spent is reasonable for a matter that was on the eve of trial and the result obtained is a very good result for the class members under the circumstance. The proposed amount of $1.9 million is approved.

Honoraria

[28] The matter of honoraria for the named class plaintiffs is not specifically provided for in the *Class Proceedings Act.* It is however an expense which the court may approve in the exercise of its discretion and has been the subject of some controversy in the jurisprudence. As I observed in *Forbes v. Toyota Canada Inc.,* "it is not the purpose of the *Class Proceedings Act* to encourage a category of plaintiffs for hire." "On the other hand, payment of a modest honorarium encourages plaintiffs to be involved in the litigation in a meaningful way".[5]

[29] In *Fresco v. CIBC,* the Court of Appeal summarized some of the reasons courts have rejected automatic awards of honoraria to representative plaintiffs, concluding that "exceptional circumstances should exist to justify the award of an honorarium". The court went on to describe circumstances that might qualify as exceptional which "could include exposure to a real risk of costs or significant personal hardship".[6]

[30] In *Berg v. Canadian Hockey League,* Justice Perell refused an honorarium where the plaintiff was at no real risk of a costs award because he had been indemnified by the fund.[7] In

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[3] This is net of costs awarded and paid following the certification motion. It includes fees paid to outside counsel.
[4] As I have in previous decisions approving settlements, I would also rely upon the criteria summarized in *Nunes v. Air Transat A.T. Inc.,* [2005] O.J. No. 2527; 2005 CarswellOnt 2503; 20 CPC (6th) 93 (SCJ). I would also adopt the recent analysis in respect of counsel fees in *Mattina v. Virtus Capital,* 2025 ONSC 4082.
[5] 2018 ONSC 5369 @ para 31
[6] Supra @ note 2 see paras 110 - 112
[7] 2024 ONSC 1573

Cannon v. Funds for Canada Foundation, by contrast, Justice Belobaba approved a $50,000 honorarium where the representative plaintiff was the "only one willing to take on the role of representative", where he spent more than 280 hours working on the case, put himself at risk financially, and gave up certain other substantive rights.[8]

[31] In my view, this case falls somewhere between the two poles established by these decisions. The evidence establishes that Mr. Parker was the sole member of the class willing to put his name to this action and he was subject to considerable risk of a costs award. The only indemnity he received was from the other three instructing class members (for whom honoraria are also sought) who agreed to bear any costs award equally between the four of them. The evidence also establishes that the four members of the class who instructed counsel did spend considerable time in pursuing the matter.

[32] All four instructing class members signed the retainer agreement, provided affidavit evidence, provided important information to class counsel, reviewed documents, assisted in assembling productions, and subjected themselves to cross examination. They also participated in mediation and the pre-trial conferences. Mr. Parker was discovered and provided answers to undertakings. All of them incurred costs, spent time, took time of work and incurred travel costs.

[33] None of the other class members objected to the proposed honoraria.

[34] I am prepared to approve an honorarium of $15,000 to Mr. Parker. While the other instructing class members agreed to share the costs risk, instructed counsel and participated in the litigation in a meaningful way, they were not the face of the litigation in the way that Mr. Parker was. I agree, however, that a modest honorarium is appropriate. I would approve $5,000 for each of Mr. Veniot, Brar and Dawson.

[35] With this minor modification to the proposed honoraria, the proposed fees and honoraria are also approved.

Summary and Conclusion

[36] In conclusion the settlement of $4,000,000 is approved. Upon payment of this amount by the defendant to counsel for the plaintiff in trust, all claims against the defendant by the members of the class will be satisfied without admission of liability. The action will be dismissed without costs.

[37] In accordance with the draft order, a total counsel fee of $1.9 million is approved and may be paid out of the settlement funds. This amount includes all claims by class counsel for fees, disbursements, administration costs and taxes.

[38] An additional amount may be paid out of the settlement by way of honoraria to the named plaintiff and the three other class members involved in instructing counsel. As discussed above, those amounts are $15,000 for Mr. Parker and $5,000 each for Mr. Veniot, Mr. Brar and Mr. Dawson.

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[8] 2017 ONSC 2670 @ paras 14 - 17

[39] Counsel may proceed with the proposed distribution protocol as outlined in the materials. This includes a process for class members to submit claims, verify the accuracy of their dates of employment, an initial distribution, a holdback and a final distribution.

[40] In accordance with s. 27.1 (16) of the Act, a report will be due 60 days after the final distribution of the settlement funds. Class counsel may also seek direction from the court on any matter relating to settlement administration should that be necessary.

[41] Because the motion for approval was made with the consent of the defendant and the proposed draft orders were part of the material, it will not be necessary to obtain approval as to form and content of the orders. Class counsel may provide clean copies of the proposed orders amended with respect to the honoraria to my office by email and I will sign them.

[42] I commend all counsel for the high degree of professionalism that characterized all of their dealings with each other and with the court.

July 30, 2025

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