Court Approval of Settlements. Overview: Panel speakers will share best practices for preparing materials to obtain court approval of settlements in cases involving parties under disability (including minors). You will hear key dos and don'ts for litigators, top tips from the helpful guides published by the Court and a law association, and insights on regional differences to keep in mind.

Rule 7.08(1) of the *Rules of Civil Procedure* requires that any settlement involving an incapable person must be approved by a judge before it is binding on the incapable person, regardless of whether or not litigation has been commenced. See Schedule A for Rule 7.08.

The requirement to obtain court approval of settlements involving persons under disability is derived from this court's *parens patriae* jurisdiction: *Wu Estate v. Zurich* (2006), 2006 CanLII 16344 (ON CA), at para. 10.

The Court's duty is to protect the party under disability and to ensure that the settlement is in the best interests of that party: *Giusti v. Scarborough Hospital*, 2008 CanLII 22555 (ON SC), at para. 10, citing Wu, Re, *supra*.

When Will a Court Approve a Settlement?

The Courts will *only* review a settlement when one (or more) of the parties to the settlement is a "person under disability".

A person under disability is defined as a minor or someone deemed mentally incapable under the *Substitute Decisions Act*, whether the person has a guardian or not, or an absentee within the meaning of the *Absentees Act*. See Rule 1.03 (Definitions), definition of "disability".

Sub-rule 7.08(1) reads:

> 7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

Role of the Court

In *Wu, Re*, 2006 CanLII 16344 (ON CA), the Court of Appeal summarized the role of the court on a motion to approve a settlement at paragraph 10, as follows: "The duty of the court is to examine the settlement and ensure that it is in the best interests of the party under disability … The purpose of court approval is plainly to protect the party under disability and to ensure that his or her legal rights are not compromised or surrendered without proper consideration."

More recently, Regional Senior Justice Firestone summarized the role of the court on a motion to approve a settlement in *Spicer v Wawanesa Mutual Insurance Company*, 2023 ONSC 3221 (CanLII) at paragraph 14:

> When considering whether to approve the proposed settlement, the test is whether the settlement is in the best interests of the person under disability. Approval does not depend on a comparison of what would have been awarded at trial, but rather an assessment of whether the settlement is reasonable and in the party's benefit given the risks of litigation and the desire of the party to settle: Garry D. Watson & Derek McKay, *Holmested and Watson: Ontario Civil Procedure*, e-looseleaf (Toronto: Thomson Reuters, 2023), at § 22:23. See e.g. *Oliveira v. Tarjay Investments Inc*., 2006 CanLII 8870 (Ont. C.A.), at para. 4.
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> [15] Although it is the litigation guardian's duty to be satisfied of the fairness and reasonableness of the lawyer's fees, the court must be satisfied that the fees, along with the rest of the proposed settlement, are for the person under disability's benefit: *Franklin* (*Litigation guardian of) v. Neinstein & Associates,* [2000] O.J. No. 4192 (Ont. C.A.), at para.8. Where the Children's Lawyer or Public Guardian and Trustee is involved and endorses the settlement, the court should give the recommendation considerable weight absent evidence suggesting any impropriety or lack of skill: *Rivera*, at para. 35.

Materials Required for Court Approval

Sub-rule 7.08(4) sets out the information required on an approval motion:

> (4) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application,
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> (a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;
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> (b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;
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> (c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and
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> (d) a copy of the proposed minutes of settlement.

Where the Public Guardian and Trustee or the Children's Lawyer is acting as litigation guardian for the incapable party, they are only required to file one affidavit in support of the motion to approve the settlement (pursuant to sub-rule 7.05(3), only the Public Guardian and Trustee and the Children's Lawyer do not need to be represented by a lawyer).

Regional Senior Justice Firestone explained the need for a fulsome motion record in *Spicer v Wawanesa Mutual Insurance Company*, 2023 ONSC 3221 (CanLII) at paragraph 16 as follows:

> As a general principle, an assessment of whether a proposed settlement is in the best interests of a person under disability requires full and frank disclosure on the merits of a settlement. The court cannot properly exercise its parens patriae jurisdiction and make a meaningful and expeditious assessment of the proposed settlement without sufficient evidence on all the material issues, including conflicting evidence …

In deciding to approve a settlement on behalf of an incapable party, the court is performing a balancing act between the public policy reasons for encouraging settlement and ensuring that the settlement adequately protects the needs of the incapable party. If the settlement is not something

that a reasonable person would agree to for themselves, the court will order the parties back to the negotiating table or to move forward with the litigation.

Resources from Superior Court of Justice

Best Practice's Guidelines and Checklist for Rule 7 Motions & Applications — Guidelines & Checklist for Counsel: https://www.ontariocourts.ca/scj/practice/regional-practice-directions/toronto/t/guidelines-checklist/

The required materials for such motions are:

- sworn affidavit of litigation guardian
- sworn affidavit of lawyer
- if the minor plaintiff is over the age of 16 years, a signed consent
- executed minutes of settlement
- copy of any contingency fee agreement or other fee arrangement
- copies of pleadings
- copies of important damages and liability reports
- if the judgment includes a structure, a printout of the structure proposal must be appended
- draft Judgment with executed consents; a term of the judgment should be service on the Children's Lawyer for minors or the Public Guardian and Trustee for incapable adults

Regarding lawyer's affidavit, the Court provides the following guidance on the information to provide:

- the reasons lawyer is of the view that the proposed settlement is advantageous as opposed to proceeding to trial
- if there is a serious liability issue, that must be addressed, along with the evidence, expert and otherwise, that bears on this issue

- if there is a limitation on the available insurance monies which impacts counsel's view of the quantum of settlement, this information must be set out along with relevant evidence concerning the ability of the defendant personally to pay a judgment
- if there is a legal issue or point of law which is relevant to counsel's assessment of the case, that must be articulated with reference the applicable case law
- on the issue of damages, lawyer must include important medical reports, including defence medical examination reports, and must address issues such as causation, pre-existing medical problems, and the credibility of the plaintiff
- if the motion seeks approval of a proposed settlement of a personal injury claim for a minor, there must be a medical opinion which contains a prognosis for the future
- the allocation of settlement funds among multiple plaintiffs
- details of any companion actions
- the proposed legal fees, including a summary of the work done and the hourly rates charged, a list of the solicitor/client disbursements to be paid, and the partial indemnity costs received from the defendant
- the risk undertaken by the solicitor
- the proposed management of funds for the party under disability

Resource from County of Carleton Law Association:

Guide to Court Approval of Settlements - Personal Injury Litigation and Accident Benefits Claims (January, 2021): https://cdn.ymaws.com/www.ccla-abcc.ca/resource/resmgr/pp-civlit/20217.08checklisten.pdf

Cases Relevant to Rule 7.08 dealing with the materials required for approval, amongst other things

Rivera v. LeBlond, 2007 CanLII 7396 (ON SC).

In *Rivera*, Justice J.A. Thorburn dealt with a motion seeking the approval of a settlement of the claims of an adult plaintiff and *Family Law Act* claimants, including two minor children. Her Honour, at paragraphs 27 and 28, reiterated that the party seeking approval of the settlement must "… provide sufficient evidence to demonstrate that:

> a) an appropriate investigation with respect to both liability and damages has been completed;
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> b) an appropriate assessment of liability issues has been made;
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> c) an appropriate assessment of damages issues has been made; and,
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> d) the fees and disbursements which the plaintiff's lawyers propose to charge are reasonable in all the circumstances.

Her Honour, at paragraph 29, went on to observe that a party under a disability has no ability to look after his or her own interest and other family members and litigation guardians may have little means of properly assessing such accounts. The court must be careful to ensure that funds are being appropriately apportioned both among the plaintiffs and with respect to costs paid.

Justice Thorburn, at paragraphs 30 and 31 further observed:

> … there is a potential conflict of interest between the lawyers and the person under disability with respect to such costs, it is incumbent on the lawyer to exercise particular care in making full and candid disclosure of the evidence and information material to the assessment of such legal expenses. This is true whether or not the lawyer wishes to charge amounts in excess of the costs to be paid by the defendants.
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> There should also be disclosure of the apportionment of the settlement funds to persons who are not under a disability so that the court can determine whether the apportionment of funds to the person under a disability is appropriate with full knowledge of the circumstances of the negotiation of the proposed settlement.

Ramcharran v. Fuchs et al., 2022 ONSC 3555 (CanLII).

In *Ramcharran*, Justice J. Wilson, at paragraph 12, provided a checklist of the required materials before Her Honour will review a file to assess the reasonableness of the proposed settlement and proposed legal fees, based on a letter that Her Honour used with counsel when assigned to review a proposed settlement, pursuant to Rule 7.08.

Grier v. Grier, 2020 ONSC 4799 (CanLII).

In *Grier*, Fowler Byrne J. dealt with the "unique incursion on solicitor-client privilege" that occurs in the context of an infant settlement.

Her Honour, at paragraphs 25 though 30, citing *Boone v. Kyeremanteng*, 2020 ONSC 198 (CanLII) at paragraphs 21 and 26, citing *Rivera v. LeBlond*, [2007] O.J. No. 889, concluded that nothing in rule 7.08(4)(a) and (b) required the disclosure of privileged information on a motion or an application for court approval of a settlement, but that substantive evidence must be submitted that demonstrates: (a) an appropriate investigation with respect to both liability and damages has been completed; (b) an appropriate assessment of liability issues has been made; (c) an appropriate assessment of damages issues has been made; and (d) the fees and disbursements which the plaintiff's lawyers propose to charge are reasonable in all the circumstances.

Ali et. al. v. Zaatar et. al., 2023 ONSC 1796 (CanLII).

In *Ali*, Justice M. Rahman adjourned a motion to approve a settlement of a minor plaintiff where there was no evidence of the work done by the lawyer and other information necessary to determine whether the fee was fair and reasonable.

In specific, His Honour stated at paragraph 7:

> The motion record is silent on the foregoing factors, other than explaining the result achieved. At a minimum there should be a description of the work done for the client on the file, preferably in the form of a contemporaneously maintained set of dockets showing how much time was spent on the minor's claim, and what work was done. This is not a

> novel requirement, and it has been referred to in other reported decisions of this court: *Lau (Litigation guardian of) v. Bloomfield*, [2007] O.J. No. 3200 (S.C.) at paras. 35-37; *Fairweather v. Davies*, 2017 ONSC 705, at para. 23; *Mounce v. Rae*, 2017 ONSC 2288, at para. 22; *Karwal v. Karwal*, 2017 ONSC 5485, at para. 24; *Ellen Yebin Park v. Pembridge Insurance Company*, 2022 ONSC 4944, at para. 21; *C.D. v. A.S.*, 2022 ONSC 5570, at paras. 48-49.

Examples of Settlements Approved or Refused

C.D. v. A.S., 2022 ONSC 5570 (CanLII).

In *C.D.*, Justice V. Christie found that "[s]etting aside the legal fees being charged, the overall settlement in this case is a reasonable one in the best interests of the minor Plaintiffs. It is likely that there will never be any more money available from the Defendant A.S. other than the limits of his insurance policy, which is $2 million." After having considered a number of cases to determine the appropriate legal principles to be considered in the context of approving a settlement for a minor, and more specifically, in approving the legal fees requested, Her Honour, at paragraph 57, refused to approve a 25 percent contingent fee and instead awarded 15 percent where there was little risk and the result was predictable. Based on this decision, a newly structured settlement, which reflected these legal fees, was to be provided to the Court for approval.

Mohamed v. TD Insurance Meloche Monnex, 2020 ONSC 3320 (CanLII).

In *Mohamed*, Justice J. Wilson, at paragraphs 3 through 8, found two problems with the application for approval of a accident benefits settlement. Namely, that information filed about the plaintiff's present situation was very stale-dated, with the most recent medical reports being from 2015, and that despite the lengthy materials filed, "counsel failed to produce any docket entries or disbursements to substantiate the reasonableness of the claim for fees and disbursements." His Honour observed, at paragraphs 11 and 13, that "[t]he failure to provide dockets, disbursements and written retainer agreements is a common oversight. Dockets and disbursements must be produced by all counsel in any section 7.08 approval application for a minor or person under

disability, whether or not the fee arrangement is based upon a contingency fee. Similarly, any written retainer agreement also must be produced. This disclosure is crucial, mandatory information in all Rule 7.08(1) motions and should be standard practice. Failure to make this essential disclosure causes delays and increases costs." This is regardless of whether the case was conducted under a contingent fee agreement or on a fee-for-service basis.

In this case, involving a fee-for-service retainer where the dockets were approximately $115,000, Justice Wilson awarded fees of $150,000 based on a recovery of $1.6 million.

Lim v. Jennings, 2021 ONSC 467 (CanLII).

Lim demonstrates that materials prepared in support of obtaining court approval of a settlement should not be taken lightly. A judge should be able to review the materials and determine whether the proposed settlement is reasonable and in the best interests of the minor plaintiff.

Usually, a defendant has limited involvement in the court approval process when the plaintiff is a minor. Rarely does a defendant even receive the materials in support of such a motion or application. However, insurers and defence counsel can take steps to protect their clients' interests and encourage finality of a claim.

In a case involving both minor plaintiffs and adult plaintiffs, an agreement can be reached whereby if the court finds the amounts allocated to the minor plaintiffs to be too low, the adult plaintiffs will agree to allocate a greater portion of their settlement amount to the minor plaintiffs.

In *Lim*, the Court addressed an application for court approval of a settlement involving a minor, which was refused.

Yebit Lim, a minor plaintiff, was 8 years old when a dog bit him on the face in May 2019. He sustained lacerations to his cheek and eyebrow resulting in facial scarring.

Hyun Jin Cho, the minor plaintiff's mother, acted as his litigation guardian in a personal injury claim against the dog owners, Daniel Jennings and Jennifer Slauenwhite.

The parties reached an agreement to settle the claim for $155,000, all-inclusive, subject to court approval.

The lawyer for the minor plaintiff agreed to reduce his contingency fee agreement from 33 percent to 25 percent, which would have resulted in the minor plaintiff receiving a lump sum of $107,916.84.

Justice Chalmers refused to approve the minor plaintiff settlement because he was unable to determine whether the settlement was in the best interest of the minor plaintiff, based on the record before him.

His Honour stated that he required further evidence as to the appearance of the minor plaintiff's scarring and his prognosis. At minimum, he required current photographs of the minor plaintiff's face to be submitted.

In reaching this conclusion, Justice Chalmers referred to the expert report of plastic surgeon, Dr. Sel Krajden, which had been served by the lawyer for the minor plaintiff and was included within the application materials. Dr. Krajden provided an opinion that the minor plaintiff's facial scars were unsightly and that the proposed treatments would not completely ameliorate his scarring.

Justice Chalmers also stated that he required the retainer/contingency fee agreement ("the Agreement"), a detailed summary of the legal work carried out, and the time dockets which set out the hours each professional worked on the file and their hourly rates. His Honour stated that the onus is on the lawyer to establish that the Agreement is fair and reasonable.

Justice Chalmers ordered an adjournment to allow the lawyer to deliver additional materials in support of the application. His Honour remained seized of the matter.

Note, there are no further reported decisions arising from this decision.

A Local Example

Orr v. Sepulveda, 2023 ONSC 5394 (CanLII) (Leach, J.), citing:

- *Leonard v. Saint-Vincent Hospital*, 2018 ONSC 370 (CanLII) (Corthorn, J.), for the proposition that an application (not a motion) to approve a settlement must be heard orally, not in writing; and,
- *Dickson v. Kellett*, 2018 ONSC 4920 (CanLII) (Corthorn, J.), for the proposition that the court requires compelling evidence to dispense with service of the motion record for settlement approval on the defendant.

In *Orr*, the Court addressed a motion for court approval of a global settlement involving a adult person under disability, which was refused on procedural grounds.

Donald Orr was involved in a collision with a farm tractor, while operating a motorcycle, on July 15, 2015. He sustained significant orthopaedic injuries, which required extensive surgical care.

Mr. Orr suffered a hemorrhagic stroke, secondary to cerebral venous thrombosis (i.e., a blockage by a clot of a vein in the brain), brought about by the extensive surgeries. The stroke left Mr. Orr with non-fluent aphasia, apraxia of speech, impaired auditory comprehension, and significant resulting receptive and expressive language deficits. As a result of same, he was no longer capable of managing his property (financial affairs) or instructing counsel, and therefore mentally incapable under *Substitute Decisions Act*.

The cumulative effect of his physical and psychological injuries was found to meet the definition of catastrophic impairment, within the meaning *Statutory Accident Benefits Schedule*.

After reading the motion materials, filed, Justice Leach, with some reluctance, concluded that "the motion was procedurally deficient in a fundamental way." His concluded that a motion for approval of a settlement, in the context an application made under Rule 38, must proceed by way of an oral hearing.

His Honour relied on *Leonard*, in which the Court held that applications for approval of a settlement were required to be heard orally. This conclusion was based in large part on a strict reading and application of the *Rules*. According to the Court, a party could be exempt from the

requirement for an oral hearing only by tendering sufficient evidence that an application in writing was "necessary and in the interests of justice."

Justice Leach held that "[f]urther steps should be taken to separate the requests for judicial approval of the proposed tort settlement and judicial approval of the proposed benefits claim settlement, at which point the former may be addressed in writing by a motion in writing brought pursuant to Rule 37.12.1, and the latter addressed in writing by an application heard orally pursuant to Rules 7.08(3) and 38. In the alternative, further appropriate steps can be taken, (as also contemplated and addressed in *Leonard v. Saint-Vincent Hospital, supra*), to seek formal relief from the requirement of the latter application having to be heard orally."

In response of the above-noted Endorsement, Mr. Orr's lawyer amended the Notice of Motion, and filed it for consideration by a judge. See Schedule B.

Orr v. TD General Insurance Company, 2023 ONSC 5668 (CanLII) (Grace, J.).

Justice Grace dealt with the amended application and motion for approval of the settlement. His Honour decided that it was "time to put a stake through" the reasoning in *Leonard*. According to His Honour, *Leonard* applied an overly technical interpretation and rigid application of the *Rules*.

Justice Grace reasoned that the requirement that an application for court approval of a settlement be heard orally defies "common sense," as it does not promote judicial economy, does not yield a more just result, does not better serve the administration of justice, and does not confer any benefits on the parties that an application in writing could not just as well provide.

His Honour concluded that if anything, allowing an application for court approval to proceed in writing promotes judicial economy and better serves the administration of justice, as it gives the judge hearing the matter "adequate time to read, digest and critically consider the material." Moreover, dispensing with the need for an oral hearing will reduce delay, as it can take many months to schedule the hearing of the application; and will save on costs, as there will be no need for the parties' lawyers to prepare for, attend, and make oral submissions at the hearing.

As *Orr* suggests, there is a judicial preference in Ontario for motions and applications for approval of a settlement to be heard in writing. While an oral hearing may be necessary in some situations, such as when one of the parties opposes the motion or application, generally it is more cost-effective to proceed in writing.

The *Orr* decision has been included in the *Rules of Civil Procedure*, Chapters, General Matters, Rule 1 - Citation, Application, "Liberal and Just interpretation", R.1.04, 2nd ed, 2022 CanLIIDocs 979:

> *Orr (Litigation guardian of) v TD General Insurance Co*, 2023 ONSC 5668
>
> Rule 1.04 Argue against the rigid interpretation requiring oral hearings
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> The Plaintiff, a person with a disability, sought court approval for a settlement. This case dealt with the matter of a post motor vehicle accident tort claim and dispute concerning statutory accident benefits. A prior decision mandated oral hearings for such approvals, but the judge disagreed with this requirement based on Rule 1.04(1), which emphasizes a fair, efficient, and flexible interpretation of procedural rules. Oral hearings for these applications are seen as impractical and inefficient, especially given their complexity and volume. Handling these applications in writing promotes judicial economy, allowing judges to thoroughly review voluminous materials without the pressures of a busy oral hearing schedule. In addition, written applications avoid unnecessary expenses and delays for the parties, ensuring a more efficient and just resolution. The judge stated "In my respectful view, the technical interpretation and rigid application of procedural rules concerning the method of hearing to matters of this kind is simply not appropriate. Parties and their counsel are put to further expense and may be exposed to further delay. The quality of the justice that is dispensed is not better" (para 12).

Availability of a Sealing Order

In *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII), a case involving the privacy rights of individuals affected by a probate file, where the estate trustee sought a sealing orders related to the probate of the estates of a prominent couple, the Supreme Court of Canada refined the common law test for the granting of sealing orders in civil matters and, in particular, recognized privacy as an important public interest that may warrant sealing relief.

Courts have long recognized the importance of the open court principle in preserving the constitutionally protected rights to freedom of expression and freedom of the press under section 2(b) of the *Charter of Rights and Freedoms*.

Courts, however, have the jurisdiction to order that documents or information filed in court proceedings, be sealed from the public record in certain circumstances. In determining whether to grant such relief, referred to as a "sealing order", courts must weigh the positive effects of protecting confidential or sensitive information against the negative effects arising from restricting access to court files.

The test for the granting of a sealing order was established by the Supreme Court of Canada in Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (CanLII), which requires a party seeking a sealing order to show that: 1) a sealing order is necessary to prevent a serious risk to an important interest, including a commercial interest, because alternative measures would not prevent the risk; and, 2) the positive effects of the sealing order outweigh the negative effects, including the public interest in open court proceedings.

In the *Sherman Estate*, the Ontario Superior Court of Justice motion judge granted the sealing orders for a period of two years, finding, among other things, that the harmful effects of the sealing orders were outweighed by their beneficial effects on the privacy of the affected individuals, including the beneficiaries of the estates. The decision was appealed by a journalist and the newspaper he wrote for, arguing that the sealing order violated the open court principle and the constitutional rights of freedom of expression and freedom of the press.

The Ontario Court of Appeal [2019 ONCA 376], unanimously lifted the sealings orders. In doing so, the court concluded, among other things, that the privacy concerns of the estate trustees were insufficient to justify the sealing orders that had been granted.

In *Sherman Estate*, the Supreme Court found that the *Sierra Club* test requires that three "core prerequisites" be established in order to obtain a sealing order: 1) court openness poses a serious risk to an important public interest; 2) the sealing order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and, as a matter of proportionality, the benefits of the sealing order outweigh its negative effects.

Justice N. Kasirer, writing for a unanimous panel of the court, at paragraph 34, cautioned that the presumption in favour of open courts cannot be overcome lightly, and reasoned that the public interest in preserving individual dignity will only be at risk where the information sought to be protected: "…strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings." His Honour went on, at paragraph 77, to note that examples of such sensitive information include stigmatized medical conditions, stigmatized work, sexual orientation, and subjection to sexual assault or harassment.

Applying the above framework, the Supreme Court dismissed the appeal on the basis that, among other things, the information at issue in the probate files was not of such a highly sensitive character that it engaged the dignity of the affected individuals. Justice Kasirer remarked, at paragraph 105, that even if a serious risk to a privacy interest had been established, it would likely not have justified a sealing order because alternative measures, such as a publication ban, would likely have prevented this risk.

At the end of 2023, the Ontario Court of Appeal in *S.E.C. v. M.P.*, 2023 ONCA 821 (CanLII) clarified the extent to which a motion for settlement approval involving a party under disability is subject to the open court principle.

The appeal stemmed from two separate motions involved the approval of a settlement under Rule 7.08, and the Orders arising from them, which were made by judges from this region (Nicholson and Raikes JJ.). The lawyers for the moving parties / appellants included Barbara Legate of Legate Injury Lawyers.

The moving parties had sought a sealing order in order to protect the parties from the disclosure of motion materials, filed, from the public. It was argued that this would protect lawyer-client privilege, and keep sensitive settlement information out of the public eye.

The appeals required the Court to consider three related issues: 1) Whether settlement approval motions in writing are subject to the open court principle; whether the Court's *parens patriae* jurisdiction (i.e., the best interests of the party under disability can be an overriding factor when the Court is asked to seal a Rule 7.08 settlement approval motion; and, 3) Whether the open court presumption displaced because the common law test in *Sherman Estate* has been satisfied with respect to the public interest in the appellants' (i) right to privacy, (ii) protection as a person who requires a litigation guardian, and (iii) right to solicitor-and-client privilege?

On the first issue, the Court answered in the affirmative. Justice L. Sossin, for the panel, relied on the Supreme Court's decision in *Sherman Estate*, wherein Kasirer J. wrote that all judicial proceedings are engaged by the open court principle and will remain presumptively open to the public no matter the nature of the proceeding.

On the second issue, Justice Sossin explained, at paragraph 37, that the open court principle protects parties with a legal disability on a systemic level. The Court has express jurisdiction to maintain oversight over settlement proceedings involving parties under a disability, including minors. Therefore, where harm could be at play, the open court principle provides the Court with judicial discretion to limit public access. As such, the overriding factor was deemed unnecessary.

On the third and final issue, Justice Sossin observed, at paragraph 52, that "[t]he *Sherman Estate* test was not developed out of whole cloth by the Supreme Court. Rather, it reflected an incremental step in the Court's jurisprudence on the open court principle and its limits." In applying the test to the fact of the appeal, the Court concluded that the appellants had not met the requirements for a sealing order, for the following reasons: a) with the first prong of the test, privacy is not, by itself, an important public interest and it was not at significant risk in these appeals [see paragraphs 62 to78]; b) protection of parties under a disability, including minors, is an important public interest, but it is not at serious risk in these appeals [see paragraphs 79 to 83]; and, lawyer-client privilege is an important public interest, but it is not at risk in these appeals [see [see paragraphs 84 to 103]. The Court concluded, at paragraph 103, that "[i]n short, fulfilling the requirements of settlement approval under r. 7.08 and the *Solicitors Act* generally does not compel

the infringement of solicitor-client privilege, and where the specific circumstances of a settlement do necessitate the sharing of otherwise privileged communications, this may be resolved either through the waiver of the privilege by the client, or by the partial redaction of the record as a discretionary remedy by the judge hearing the motion."

The Court observed, at paragraph 102, that "… no party is compelled to bring a r. 7.08 motion. Plaintiffs (or, in this context, litigation guardians) choose to initiate litigation, and may choose to settle. Rule 7.08 is a protective provision to ensure settlements are in the interests of the minors or parties under disability. Rule 7.08, properly construed, is a benefit to the parties to the litigation, not a burden on litigation guardians and counsel."

The Court noted that judges have adequate discretion under Rule 7.08 to invoke orders and remedies to protect sensitive information if such is required, such as the power to: 1) order the anonymization of the parties (i.e., using initials instead of parties' names) in the pleadings; 2) order a publication ban; 3) order some material be redacted; or, 4) order a portion, or all, of the record be sealed.

In relation to the issue of preserving lawyer-client privilege in the context of the lawyer preparing their supporting affidavit, Justice Sossin, at paragraph 98, stated:

> While this concern strikes me as well-founded, it does not lead to the conclusion that motion records under r. 7.08 should be presumptively sealed. Rather, it speaks to the need for counsel to be guided by this concern in how they prepare affidavits for r. 7.08 motions, so as to minimize the disclosure of privileged information, and the basis on which they may seek specific redactions in the context of specific cases where such disclosure is viewed as necessary to obtain judicial approval. Further, where there is a basis for a concern that a settlement may not be finalized in the circumstances of a particular case, a motion judge has the option of ordering a temporary sealing order, which would end once the settlement is finalized.

More recently, in *Muslim Association of Canada v. Canada (Attorney General)*, 2024 ONCA 663 (CanLII), the Court of Appeal heard the appeal of the appellant association of an order dismissing their Charter challenge to the audit of their charitable status. In the context of the appeal, the parties sought to introduce fresh evidence through sworn affidavits.

The appellant association sought a sealing order in respect of the fresh evidence, arguing a serious risk of harm to the dignity and/or physical safety of its members, and all Muslim Canadians should the fresh evidence not be sealed. The Court of Appeal, while dismissing the application for a sealing order, it did order that the parties prepare a redacted version of the fresh evidence. The Court stated, at paragraph 16, that "[t]he parties shall file with the Registrar both an unredacted and the redacted version of the Fresh Evidence. The redacted version will form part of the public record, while the unredacted version shall not be inspected by any person without leave.

In this instance, the Court of Appeal, at paragraph 12, having considered the presumption in favour of open courts, reiterated the finding of the motion judge "… that where (as in this case) there are serious allegations of government wrongdoing, it is essential that such allegations be litigated in public, since "[w]here government misconduct is alleged, sunlight remains the best of disinfectants."

Money to be Paid into Court?

Rule 7.09 (1) provides that "[a]ny money payable to a person under disability under an order or a settlement shall be paid into court, *unless a judge orders otherwise*."

With a minor, it is important to remember that there are only two options under the law in Ontario for monies payable to a minor under an Order or Judgment in a personal injury action. Pursuant to rule 7.09(1) of the *Rules*, such monies shall be paid into court unless a judge orders otherwise. Should a judge exercise discretion to order otherwise, in the case of a minor, it must be pursuant to the guardianship provisions in sections 47 to 60 of the *Children's Law Reform Act*, RSO 1990, c C.12, as amended.

Section 51 of the *CLRA* provides an exception, where the minor is entitled to a total amount of money of $35,000 or less, and there is no appointed guardian of the child's property, the money can be paid to a parent with whom the child resides, a person who has lawful custody of the child, or to the child if they have a legal obligation to support another person.

The *CLRA* provides the statutory framework for the appointment of a person to have charge of and be responsible for the care and management of the property of a minor.

Of note, with a minor, a parent is not automatically guardian of property for the minor. In addition, as observed by Justice Gordon in *O'Connell v Synder*, 2002 CarswellOnt 1954 (SCJ), at paragraph 5: "… a litigation guardian is only for the purposes of the litigation. An appointment of a guardian of the property of the child is mandatory, pursuant to *sections 47 to 60 of the Children's Law Reform Act*."

In W.F. Elkin, *Current Issues in Settlements for Parties Under Disability* (2011), [published on firm website], the author, a practicing lawyer, explored the historical role of the Accountant of the Superior Court of Justice and the paradigm shift that occurred in 2006 with the amendment of the *Public Guardian and Trustee Act*, R.S.O. 1990, c. P.51, as amended ("the *PGTA*").

Elkin undertook a review of the applicable case law, including, but not limited to: *Hoad v. Giardano*, 1999 CarswellOnt 607; and, *Martin v. Robins*, 2006 CanLII 7027 (ON SC).

In *Martin*, Justice Quinn, at paragraph 17, explained the reasons behind Rule 7.09: "Historically, the settlement funds of a minor were paid into court for two principal reasons: (1) a conservative, yet secure, rate of return was guaranteed; and (2) upon attaining the age of majority, the minor was guaranteed to receive his or her money plus interest."

As Elkin stated, at page 9, "[o]nce funds are ordered to be paid into Court, they are paid to the Accountant of the Superior Court of Justice (the Accountant) who manages the funds. The Accountant is the trustee for all monies paid into Court. The Accountant operates as a division of the Office of the Public Guardian and Trustee (the OPGT)."

Elkin explored the paradigm shift that occurred since the amendment of the *PGTA*, which resulted in: 1) the removal of the restrictions that required the Accountant to invest the monies paid into Court into fixed income securities. The Accountant now has the ability to invest the monies in the equity market (otherwise known as the stock market); and, 2) The ability of the Accountant to charge fees in respect of the management of the monies paid into Court.

Elkin identified, at page 13, the options available to the Accountant when investing monies paid into Court, which include

> … three different types of investment funds: (1) the **Fixed Income Fund**, (2) the **Canadian Income and Dividend Fund**, and (3) the **Ontario Public Guardian and Trustee Diversified Fund**. There are no other investment options available. Once the settlement monies have been paid into Court, the Accountant has complete discretion over the management of those monies including which fund the monies will be deposited to. [emphasis added]

Elkin goes on to explore each fund, their pros and cons; including, but not limited, that all investment decision are made exclusively by the Accountant, none of the funds offer a fixed or guaranteed rate of return, and that a modest element of risk now exists.

Elkin noted, at page 23, that "[t]he Accountant's fees are as follows:

> Fees are charged both on capital and on transactions.
>
> Fees are charged monthly.
>
> • No fee is charged upon payment of money into Court for a minor
>
> • A fee of 3.0% is charged on investment income credited to the minors account each month (referred to as receipts)
>
> • A fee of 3% is charged on all payments out of Court, including interim payments and final distribution to the minor at age 18 or date of entitlement (referred to as disbursements)
>
> • A care and management fee of 3/5 of 1% (or 0.6% annually) is charged monthly calculated as 1/12th of 0.6% on the monthly balance in the minor's account • HST applies on all fees

He observed that "… there is a "cap" on fees such that the fees can never reduce the capital paid into Court, even if the fees exceed all the interest earned on the investment."

Elkin expressed the belief, at page 25, that not "… counsel and Judges are aware of the fees and the effect of the fees on the earnings of funds paid into Court." He cited Justice Quinn from the *Martin* decision, in which Honour made a footnote wherein he stated:

> In my little corner of the judicial world it was unknown to me that the accountant charged fees in relation to money paid into court for minors and I admit to being surprised by the

> knowledge. I understand that the charging of fees started in May 2000 but I expect that the practice is not widely known by members of the judiciary.

Elkin went on to explore the alternatives to payment into Court. At page 28 through 39, he identified and discussed the following options:

1. **Structured Settlements**

In support of this option, Elkin cited *Sandhu v. Wellington Place Apartments*, 2008 ONCA 215 (CanLII), the Court of Appeal, recognized that that Rule 7.09 offers no guidance as to what type of investment strategy is appropriate, and suggested that the focus of trial judge's ought to be on section 116 of the *Courts of Justice Act*, RSO 1990, c C.43, which provides the Court with the discretion to order periodic or structured payments in respect of personal injury or *Family Law Act* claims.

2. **Guaranteed Investment Certificates (GICs) held in trust for the disabled party**

In support of this option, Elkin cited *Martin*, *supra*, Justice Quinn, considered a motion to depart from the routine practice of paying money into court for minors, and to allow the settlement money to be placed in a GIC. After having considered the pros and cons of same, His Honour granted the motion, having concluded, at paragraph 34, that:

> … on a balance of probabilities, I do not think that payment into court of the settlement of this minor is for her benefit. The proposal of Mr. Elkin is in the best interests of the minor plaintiff. The key features of the proposal are twofold: (1) The GIC will pay significantly more to the minor at the age of 18 than will her settlement if paid into court; and (2) Mr. Elkin will be trustee of the funds. Had this motion requested that the mother hold the GIC or otherwise invest the funds I would have required, as mentioned above, comprehensive safeguards. Not intending any disrespect to the mother, periodic sojourns in Family Court have left me dehydrated of confidence that parents can always be trusted to act in the best interests of their children.

3. **Registered Education Saving Plan (RESP) investments**

In support of this option, Elkin cited *Abu-Yousef v. Foster*[1] (an unreported decision of Granger J.), where in the Court, aware of the potential conflict between the litigation guardian and the minor plaintiffs, approved the investment of the settlement funds of the minors in RESPs because the funds were to be held by counsel in trust until the money could be paid into the RESPs, with the understanding that the litigation guardian would have no access to or interest in the funds of each minor.

The reticence of the Court to adopt this option can be found in the decisions of *Asselin v. Fournier*, 2017 ONSC 5035 (CanLII), *Blackwood v Doe*, 2017 ONSC 4276 (CanLII) and *Abi Khalil v. Kamlo Co-Tenancy*, 2019 ONSC 3795 (CanLII), wherein each presiding justice declined to depart from the requirement of Rule 7.09 (1).

Most recently, in *Santella v. Bruneau (Litigation Guardian of)*, 2020 ONSC 2937 (CanLII), involving an estate proceeding, and in specific, what should happen to a minor's share of the inheritance from his late father's estate, Justice S. Corthorn expressed concern that a RESP would not be treated as an asset of the child. In specific, at paragraphs 28 and 29, Her Honour stated:

> [28] For several reasons, there is a risk that a minor, upon reaching age 18, will not receive monies invested in an RESP. Those reasons include the conflicting case law as to whether monies so invested are protected in the same way as are funds held in trust for a minor.
>
> [29] The conflicting case law arises in family law and bankruptcy law, with the outcomes varying from province to province. In family law, see *McConnell v. McConnell*, 2015 ONSC 2243 at para. 123 and *Vetrici v. Vetrici*, 2015 BCCA 146 at paras. 36, 39. In bankruptcy law, see *Re Payne*, 2011 ABQB 894 at paras. 13-14 and *Re Vienneau*, 2007 NBQB 332 at para. 11. Each of those cases, either by reason of the discussion therein or the determination made, highlights that an RESP will not always be treated by the courts as an asset of the child for whose benefit the plan is opened. The

[1] The unreported decision is cited incorrectly as being *Foster v. Foster* by the author.

decisions also highlight the potential for the subscriber parent to withdraw money from the plan before the minor requires funding for post-secondary education.

In all of the circumstances, Justice Corthorn conluceded that it was in the minor's best interests that the inheritance be paid into court, to the credit of the Accountant for the Superior Court of Justice.

4. **Registered Disability Savings Plan (RDSP) investments**

A RDSP offers deferral of tax and allows eligible individuals to receive matching Canada Disability Savings Grants of $3,500 per year, and up to $70,000.00 over the lifetime of the beneficiary. The amount of the grant is based on the beneficiary's adjusted family net income.

In addition, the plan may be eligible for Canada Disability Savings Bonds of up to $1,000 per year, up to age 49, with a lifetime limit of $20,000.00.

There is a 10-year repayment rule during which repayment of the grants and bonds will be required if the RDSP is terminated; the plan ceases to be an RDSP; the beneficiary loses disability tax credit approval before the age of 60 and the holder chooses to close or withdraw amounts from the RDSP; or, the beneficiary dies.

In order to be eligible for the RDSP, a medical doctor must first certify on a Form T2201, Disability Tax Credit Certificate, that the party has a severe and prolonged impairment of a physical or mental function. The form must then be approved by the Canada Revenue Agency, and a determination made that the plaintiff is eligible for the disability amount / disability tax credit.

The monies held in a RDSP are exempt from being considered as an asset or income when determining eligibility for provincial disability and income assistance benefits. As such, RDSP savings and withdrawals generally do not impact eligibility for these benefits.

In *Hall v. Tehseen*, 2020 ONSC 3610 (CanLII), Justice L. Sheard, in considering a motion in writing for the approval of a modest settlement involving a minor plaintiff, explored whether the plaintiffs' request that the balance of the settlement funds be paid into a RDSP. Given that Her Honour was unable to discern whether, and to what extent, the minor's situation would attract government matching grants and bonds, Justice Sheard ordered the net settlement funds be paid into court. This was done prejudice to the future right of the litigation guardian or other authorized

person to seek a payment out of court for the benefit of the minor, including the purchase of a RDSP.

5. **Management of funds by an expert relative of the disabled party**

Elkin, at page 35, observed that paying the funds to a well-qualified independent financial advisor to invest in the best interests of the party under disability may be viable option in the right circumstances.

Elkin noted that in *Hoad v. Giardano*, 1999 CarswellOnt 607, Justice Quinn, at paragraph 8, set out the test to be applied when it is proposed to have the settlement funds managed by the litigation guardian: "In all of the circumstances, has the litigation guardian established, on a balance of probabilities, that it is in the best interests of the minor that payment be made to the litigation guardian rather than into court?" In deciding the motion before the court, His Honour posed the following questions:

> (a) Why is the litigation guardian opposed to payment of the funds into court?
>
> (b) Is there evidence that the litigation guardian has the ability to manage the funds?
>
> (c) What are the financial circumstances of the litigation guardian including his or her income and expenses, and the number of dependents for whom he or she is responsible?
>
> (d) What is the plan advanced by the litigant guardian for the management of the funds?
>
> (e) What are the merits and demerits of the plan?
>
> (f) What criteria will be employed for periodic encroachments, if any?
>
> (g) What is the likelihood that the funds (or the remaining balance, if there have been encroachments), plus accrued interest, will be secure until the minor attains his or her majority?
>
> (h) Does the plan permit a transfer to the minor of the balance of the funds immediately upon the attainment of his or her majority?
>
> (i) What is the amount to be managed?
>
> (j) What is the duration of the plan?

> (k) Should the litigation guardian be required, at some point, to pass accounts in respect of his or her management of the funds?
>
> (l) Should the litigation guardian be required to post a bond as security for the performance of his or her duties in the management of the funds?
>
> (m) What are the views of the child (to the extent that he or she is of an age where such views can reasonably be ascertained)?
>
> (n) If there is a request for part of the funds to be transferred to the litigation guardian now (with the balance to be paid into court), are the requested funds to be used for the direct and reasonable benefit of the child and in circumstances where the parents of the child are unable to meet the expense involved?

Justice Quinn ultimately declined the request made by the litigation guardian, who was also the minor plaintiff's father. This individual swore an affidavit in which he claimed to have knowledge of investments on a personal and professional level and indicated he would consult with financial planners to invest settlement proceeds on behalf of the minor, including into a RESP. His Honour, however, at paragraph 10, stated:

> In my opinion there is too much uncertainty and too few safeguards associated with the plan put forward by Mr. Hoad. In the result, I am not persuaded that I should exercise my discretion and depart from the sound and usual practice of requiring that the settlement funds be paid into court. I think it requires an *exceptional set of circumstances* to prompt the court to exercise its discretion under rule 7.09(1). [emphasis added]

After having explored the different options available, in addition to a payment into court, Elkin, at paragraph 37, observed:

> [i]t is not the job of counsel to endorse a particular option from a financial perspective. Instead, counsel should attempt to provide as much information and documentation to the litigation guardian as possible to ensure that he or she can make an informed, prudent decision that is in the best interest of the party under a disability.

Elkin concluded his paper by urging best practices when documenting the options available to a party under disability with the litigation guardian; including, but not limited to, encouraging the

individual to conduct their own investigation into all of options available, and/or seeking the advice of professionals (including a structured settlement broker) who could assist in making an informed decision on behalf of the party under disability.

Prepared by: Adrien P. Cameron
Frauts Lawyers
London, Ontario.

Schedule A - Rules 7.08 and 7.09

Approval of Settlement

Settlement Requires Judge's Approval

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (1).

(2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (2).

Exception

(2.1) This rule does not apply to a settlement or judgment respecting the appointment under the *Substitute Decisions Act, 1992* of a guardian of property or guardian of the person. O. Reg. 281/16, s. 3 (1).

Where no Proceeding Commenced

(3) Where an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced in respect of the claim, approval of a judge shall be obtained on an application. R.R.O. 1990, Reg. 194, r. 7.08 (3).

Material Required for Approval

(4) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application,

(a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;

(b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;

(c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and

(d) a copy of the proposed minutes of settlement. R.R.O. 1990, Reg. 194, r. 7.08 (4); O. Reg. 69/95, s. 18; O. Reg. 575/07, s. 10.

(4.1) If there is no litigation guardian and the settlement that is the subject of the motion or application is in respect of a matter under the *Substitute Decisions Act, 1992* to which this rule applies, the affidavit referred to in clause (4) (a) shall be provided by the moving party or applicant (as the case may be), and the affidavit referred to in clause (4) (b) shall be provided by his or her lawyer. O. Reg. 281/16, s. 3 (1).

Children's Lawyer or Public Guardian and Trustee

(5) On a motion or application for the approval of a judge under this rule, the judge may,

(a) direct that material filed on the motion or application be served on the Children's Lawyer or on the Public Guardian and Trustee; and

(b) direct the Children's Lawyer or the Public Guardian and Trustee, as the case may be, to make a written report stating any objections he or she has to the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement. O. Reg. 281/16, s. 3 (2).

Money to be Paid into Court

7.09 (1) Any money payable to a person under disability under an order or a settlement shall be paid into court, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.09 (1).

(2) Any money paid to the Children's Lawyer on behalf of a person under disability shall be paid into court, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.09 (2); O. Reg. 69/95, s. 19.

Schedule B – Sample Notice of Motion for approval of a settlement

Court File Nos: 247/17 and 1858/23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DONALD ORR by his Litigation Guardian, DARRAN EBERTH

and JEAN WATSON

Plaintiffs

- and -

CARLOS SEPULVEDA, WILLIAM HUFFMAN and

WILLIAM HUFFMAN JUST A HOBBY FARM INC.

Defendants

BETWEEN:

DONALD ORR by his Litigation Guardian, DARRAN EBERTH

Applicant

- and -

TD GENERAL INSURANCE COMPANY

Respondent

<u>AMENDED</u> NOTICE OF MOTION

The Plaintiffs / Applicant will make a motion in writing, without notice, to the Court, on _____day, the _____th day of September, 2023, at 10:00 a.m. or as soon after that time as the motion can be heard in writing at the Court House, 80 Dundas Street, London, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing under subrule 37.12(1) because it is made on consent, and without notice.

THIS MOTION IS FOR:

1. A Judgment dispensing with service of the Motion Record upon the Defendants and the Respondent;

2. A Judgment granting leave for the lawyer for the Plaintiffs / Applicant, Adrien P. Cameron, as affiant, to remain as lawyer of record in this motion;

3. A Judgment approving the settlement of the within tort action on behalf of the adult Plaintiff under disability, Donald Orr, in accordance with the Minutes of Settlement, filed at Tab G of the Motion Record;

4. A Judgment approving the settlement of the claim to *Statutory Accident Benefits* ("AB Claim") on behalf of the adult Applicant under disability, where no proceeding has been commenced in respect of this claim;

5. A Judgment directing part of the settlement proceeds due to the adult Plaintiff / Applicant under disability will be paid into two settlement structures, placed by McKellar Structured Settlement; and into non-structured investments with TD Canada Trust;

6. A Judgment approving the payment of costs to the lawyers for the Plaintiffs / Applicant lawyers, pursuant to the Retainer Agreement, signed by Donald Orr before he became an adult person under disability;

7. A Judgment dismissing both the action and the application, on consent, without costs;

8. A Judgment that the Motion Record and its contents be sealed upon approval of the settlements by this Honourable Court;

9. In the alternative, a Judgment that the Motion Record and its contents be sealed in the event that this Honourable Court does not approve one or both the settlements;

10. A Judgment dispensing with the requirements of Rule 38.09 (Materials for Use on Application), requiring the Applicant to serve and file a factum in the within ~~motion~~ application, and for the Respondent to serve and file both a record and a factum; ~~and,~~

11. A Judgment dispensing with the requirement for an oral hearing of the application, bearing Court File Number 1858/23, for court approval of the settlement of the AB Claim reached; and,

12. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Re. Court Approval of the Global Settlement

1. Rules 1.04, 2.03, 7.08, 7.09, 37.11, 37.07 and 38.09 of the *Rules of Civil Procedure* ("the *Rules*");

2. Sections 135 and 137 of the *Courts of Justice Act*;

3. Section 52 of the *Evidence Act*;

4. Section 5.2-1 of the Law Society of Ontario's *Rules of Professional Conduct*;

5. Section 6 of the *Substitute Decisions Act*;

6. The Defendants and the Respondent have waived service of the within Motion Record, and approved as to the form and content of the Judgment sought;

7. The Plaintiff / Applicant, Donald Orr, was injured in a motorcycle – farm tractor collision, which occurred on July 30, 2015;

8. The Plaintiff / Applicant suffered serious orthopaedic injuries to his left lower and upper extremities;

9. On February 21, 2017, as a consequence of the repeated surgeries which he underwent in treatment of the orthopaedic injuries, he suffered a haemorrhagic stroke, which left him with an acquired brain injury;

10. The Plaintiff / Applicant, who is an adult, is a party under disability as defined in the *Rules*, and is represented by his Attorney for property as Litigation Guardian because he was deemed to lack capacity to manage his property and financial affairs, as well as to give evidence and instruct counsel, by a designated capacity assessor;

Re. Conditional Settlement of the *Tort* Action

11. A tort claim was commenced on behalf of the Plaintiff / Applicant, and his great aunt, by Statement of Claim, issued February 1, 2017;

12. The different stages of the litigation have been completed;

13. A pre-trial conference was held on May 25, 2023, and the action is scheduled for trial during the first long trial sitting in March, 2025;

14. Two private mediations were held, first in November, 2020 and last in July, 2023;

15. During the second mediation, the parties to the within action reached an agreement with respect to the settlement of his tort claims, in accordance with the Minutes of Settlement, filed at Tab G of the Motion Record;

Re. Conditional Settlement of *Statutory Accident Benefits* Claim

16. In addition, during the second mediation, the Applicant, by his lawyer, reached an agreement with respect to the settlement of his claim to Statutory Accident Benefits

("SABs"), in accordance with the Settlement Disclosure Notice, prepared by the Respondent insurer, TD Insurance, filed at Tab H of the Motion Record;

17. No prior legal proceeding was commenced in respect of the Applicant's claim to SABs. As such, an application for approval of the settlement was necessary;

Re. Two Conditional Settlements

18. The two settlements are subject to court approval because the adult Plaintiff / Applicant, Donald Orr, is a person under disability due to lack of capacity to manage his property and financial affairs, as well as his lack of capacity to instruct his lawyers;

19. The Plaintiff's Litigation Guardian, Darran Eberth, seeks to manage Mr. Orr's share of the settlement money in accordance with the management plan, filed;

20. The Consent of the parties, by their representatives;

Re. Retainer Agreement

21. The Plaintiff / Applicant, Donald Orr, retained Adrien P. Cameron and the law firm of Frauts Lawyers (formerly Frauts Dobbie, Barristers), before becoming a person under disability. Mr. Orr entered into a standard Retainer Agreement with his lawyers on August 14, 2015, filed at Tab C of the Motion Record;

22. As the retainer agreement is not a contingency fee retainer agreement, no approval of its terms is required;

Re. Sealing Order

23. Section 137(2) of the *Courts of Justice Act*;

24. In the event that this Honourable Court *does* approve the settlement, a sealing order is required in order to protect private and confidential information relating to the settlement for the Plaintiffs / Applicant;

25. In the event that this Honourable Court *does not* approve the settlement, a sealing order is required in order to protect private and confidential information relating to the settlement negotiations and the ground(s) for settlement by Plaintiffs / Applicant which would identify shortcomings in the claims of the adult person under disability; ~~and,~~

Re. Waiver of Rule 38.09

26. Rules 1.04(1), 2.03, 38.09(4) of the *Rules of Civil Procedure*;

27. It is necessary and in the interest of justice to dispense with the requirements of Rule 38.09 in relation to the application;

28. It is also necessary and in the interest of justice to dispense with the requirement for an oral hearing of the application;

29. The purpose of the application and the within motion is obtain court approval of the settlement of the AB Claim;

30. The affidavit evidence, filed, contains private and confidential information relating to the settlement negotiations and the ground(s) for the settlement by the Applicant which would identify shortcomings in the claims of the adult person under disability; and,

31. Such further and other grounds as Counsel may advise this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Motion Record, including the following:

   a) the Affidavit of Adrien P. Cameron, sworn September 1, 2023, including exhibits;

   b) the Affidavit of Darran Eberth, sworn September 2, 2023, including exhibits; and,

   c) the Supplementary Affidavit of Adrien P. Cameron, sworn September 29, 2023, including exhibits; and,

2. Such further and other documentary evidence as Counsel may advise this Honourable Court may permit.

Date: September 6, 2023

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