CITATION: Paus v. Concord Alex Developments Corp., 2025 ONSC 4098
COURT FILE NO.: CV-12-463822-00CP
DATE: 20250710

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DALE PAUS and GLEN WOO, Plaintiffs

AND:

CONCORD ADEX DEVELOPMENTS CORP., TODDGLEN CONSTRUCTION LIMITED, and TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1438, Defendants

BEFORE: Justice Glustein

COUNSEL: *Theodore P. Charney, Caleb Edwards, and Sumaiya Akhter* for the plaintiffs

John Teal for the defendant Toddglen Construction

HEARD: July 4, 2025

REASONS FOR DECISION

NATURE OF MOTION AND OVERVIEW

[1] The plaintiffs, Dale Paus ("Paus") and Glen Woo ("Woo") bring this motion to:

(i) approve the settlement agreement executed as of April 10, 2025 (the "Settlement Agreement"),

(ii) approve the contingency fee agreement between the representative plaintiffs and Class Counsel (Charney Lawyers PC and Strosberg, Wingfield, Sasso LLP),

(iii) fix and approve Class Counsel fees and disbursements in the amount of $525,000 for legal fees, $68,250 for HST applicable to legal fees, $183,811.33 for disbursements inclusive of HST ($87,066.24 to Charney Lawyers PC and $96,745.09 to Strosberg, Wingfield, Sasso LLP), and

(iv) approve the payment of an honorarium of $2,500 to each of Woo and Paus.

[2] Following the hearing, I granted the order (with reasons to follow) and allowed the relief sought except the honoraria for the representative plaintiffs.

FACTS

Nature of the action

[3] The action arises out of various "balcony guardrail failures" occurring in 2011 in the "Matrix Towers" located at 361 and 373 Front Street in the City of Toronto.

[4] On or about March 1, 2011, less than ten years after the buildings were first occupied, a balcony guardrail assembly in Unit 1111 on the 11th floor failed, dislodged from the building and fell down to the third floor terrace area. As a result of that incident, all the balconies of both Matrix towers were sealed while the cause of the problem was investigated. Eventually, the balcony guardrails on both Matrix towers were removed and replaced.

[5] Class members were locked out of their balconies for up to three and a half years, from March 1, 2011, to September 15, 2014 (averaging 28 months).

[6] The plaintiffs allege that the balconies dislodged due to premature corrosion caused by inadequate design and poor choice of materials. The plaintiffs further allege that the defendants failed to design, construct and install balcony guardrails that adhered to specific railing loads, wind loads and other load combinations.

Relevant evidence on liability

[7] The plaintiffs rely on several reports to establish liability on the part of the defendants, including:

(i) a report by Exp Services Inc. ("Exp") dated June 3, 2011, prepared for Mr. Joseph Ryan from Fine & Deo Barristers and Solicitors which concluded that the main proximate causes of the failure of the balcony guardrails were the inadequate structural design of the balustrade shoes and the selection and poor quality of the cast aluminum balustrade shoe,

(ii) an expert report prepared by Mr. Edward Poon ("Poon"), a consulting engineer, on behalf of the plaintiffs. Poon concluded, *inter alia*, that (a) multiple entities, including the general contractor, subcontractors, and subconsultants, played a role in the deterioration and eventual failure of the balcony guardrails, (b) a misinterpretation of the *Ontario Building Code* led to a flawed design, particularly in the classification of service loads, (c) the balustrade shoe, a critical component of the guardrail system, was structurally inadequate and did not meet project specifications, (d) the cast aluminum alloy used in the balustrade shoe did not meet applicable industry standards, (e) the defendants omitted to apply two coats of elastomeric deck coating which were required on the balcony floor slabs to prevent water infiltration, (f) the combination of poor original design and inadequate maintenance necessitated the complete replacement of the balcony guardrails

significantly earlier than expected, and (g) properly designed guardrails should have a service life of 50-100 years, consistent with the lifespan of the building, and

(iii) an expert report prepared by Dr. Vince Aleo ("Aleo") on behalf of the plaintiffs. Aleo concluded, *inter alia*, that (a) the most probable cause of the balcony railing failure was the fatigue failure of one of the cast aluminum shoes, (b) the design of the railings did not comply with the *Ontario Building Code 1997*, and (c) multiple deficiencies spanning design, testing, documentation, and oversight, led to the railing failure at the Matrix Towers, arising from significant lapses in professional responsibility, failure to comply with building codes, and failure to adhere to engineering best practices.

[8] The plaintiffs also rely on the findings of AJW Engineering, retained by Concord Adex to review the reports produced by Exp, who, *inter alia*, (a) found no significant errors or omissions with the assumptions presented in "Structural Review of Balcony Guards" by Exp, (b) agreed that the existing guardrail system was found to have insufficient strength to resist the loading required by code even at service loading, and (c) agreed that the shoe base was found to be of poor design and manufactured of an unsatisfactory brittle material.

Class claims and composition

[9] The causes of action advanced by the plaintiffs are breach of contract/breach of warranty and negligence – all resulting from the falling balcony guardrail incidents.

[10] The class is defined as those persons, excluding the defendants and their senior officers and directors, who owned, rented, and/or ordinarily resided in a residential condominium unit at the premises municipally known as 361 Front Street West (East Tower) and 373 Front Street West (West Tower) in the City of Toronto, during the period or periods of time when access to or use of the balcony associated with the residential condominium unit was restricted, during the period commencing on March 1, 2011 to and including September 15, 2014.

[11] Balcony occupancy was revoked around early April 2011, and restored on or around September 2014, after the balcony guardrails on both Matrix Towers were removed and replaced. Therefore, this claim is made on behalf of the owners and occupiers of each of the units for the losses they have suffered as a result of being deprived of the use and enjoyment of their balconies during the approximately 28 months required to replace the balcony guardrails.

Certification and notice to class

[12] Following delivery of their motion record for certification on April 3, 2013, and cross-examinations in September 2013, the parties attended a certification motion before the case management judge, Justice Perell, on August 12, 2015.

[13] The certification order was granted by order dated August 12, 2015. Justice Perell certified common issues in negligence and breach of contract.

[14] Notice of the certification was published in the Toronto Sun and was delivered to every unit at the Matrix Towers.

Examinations for discovery

[15] The parties exchanged affidavits of documents. The defendants produced hundreds of documents.

[16] Examinations for discovery took place in September and November 2017. Paus and Woo were examined.

[17] Subsequent to examinations for discovery, the plaintiffs served the Poon and Aleo reports.

Mediation and negotiations leading to the Settlement Agreement

[18] Once the plaintiffs served all expert reports and were ready to proceed to trial, the parties agreed to mediate the case. The mediation was conducted by Mr. W. Andrew McLauchlin, an experienced mediator and lawyer practicing construction litigation. It was held in person in Toronto on October 9, 2024, but was unsuccessful.

[19] The parties then began preparing for a four-week trial which was scheduled to start in late April 2025.

[20] When Class Counsel reached out to class members to participate in the trial, only four of the 42 individuals contacted responded. This raised a concern since aggregate damages was not certified as a common issue. The minimal response from the class, coupled with the take-up rates in recent settlements of other condo tower class actions suggested that very few class members would be motivated to come forward and testify at the common issues trial (let alone bring a claim for individual damages after the common issues trial). If class members did not come forward after trial to prove their individual claims, any award after trial would be modest at best.

[21] Because of these concerns, Class Counsel continued negotiations with the defendants' counsel which were extensive and at arm's-length. The parties reached a settlement through these subsequent negotiations.

The Settlement Agreement

[22] The settlement is based on a payment/award for each condominium unit for the periods in which occupants were excluded from their balconies and their access was impacted by the mesh. The award is made without consideration for the number of persons living in each unit or the size of the balcony.

[23] Under the Settlement Agreement, the defendants will pay $1,750,000.00 inclusive of costs and disbursements to settle this matter (the "Settlement Fund") including the legal fees, disbursements and the costs of administering the settlement.

[24] If every unit makes a claim on the Settlement Fund (i.e. a 100% take-up rate), the estimated recovery per unit will be approximately $1,500 (after deduction for fees, disbursements, and administration costs).

Evidence as to comparator settlements in balcony lockout cases

[25] Class counsel in this proceeding was class counsel in three other balcony lockout cases which recently settled: "Murano", "One Bedford", and "Festival Tower".

[26] In *Murano*, a condominium with two towers, residents of one tower were excluded for significantly longer than residents of the other tower. The settlement was crafted so that units that were excluded for between 14 and 20 months received payments of $3,000 (or more), while units that were excluded for between 8 to 15 months received payments of at least $1,600 (provided take-up was 100%).

[27] In *One Bedford*, residents were all excluded from their balconies for 13 months. They received payments of about $2,400 (assuming complete take-up), which was intended to reflect the exclusion period and the fact that the balconies in *One Bedford* were slightly larger than those in *Murano*.

[28] In *Festival Tower*, balconies were only fully locked for six weeks on average and wrapped in mesh for an average of 12 months, leaving an 'exclusion' time of approximately 13.5 months. Units in the Festival Tower received approximately $1,200 (assuming 100% take-up).

[29] The present case differs from the above cases in that the underlying defect in the balconies in the present case was not the glass, but the design (and installation) of the "shoe" that held the balcony railings to the balcony. Unlike the other three cases, where the time residents were locked out was directly tied to the repairs, there was a period of time in this proceeding where residents were locked out while the developer and the condominium corporation worked to find out the issue and determine who was responsible for repairs.

Distribution of the Net Settlement Funds

[30] The settlement aims for "rough justice" between the units by awarding a lump sum per unit based on a division of the net settlement funds.

[31] Class Counsel's calculation of the net settlement fund is based on the following deductions from the gross settlement payment of $1.75 million by the defendants under the Settlement Agreement: (i) $525,000.00 for legal fees based on a contingency fee of 30%, (ii) $68,250.00 for HST on the legal fees of 13%, (iii) $87,066.24 for disbursements (inclusive of taxes) to Charney

Lawyers PC, (iv) $96,745.09 for disbursements (inclusive of taxes) to Strosberg, Wingfield, Sasso LLP, and (v) $103,910.00 for estimated claims administration fees.

[32] Based on the above, $869,028.67 is the net settlement amount available to class members.

[33] There are 578 units with a balcony. Class members were locked out of their balconies for an average of 28 months. For settlement purposes, it was decided to treat the units each equally. The settlement is based on a division of the net settlement funds among all units with valid claims.

[34] The net award for units will be approximately $1,500 per unit if each of the 578 units participates.

Take-up rate

[35] Given the passage of time since the events occurred, many units will no longer be occupied by the same owners or tenants. The building is located in the core of downtown Toronto. There are also owners who have sold their units since the lockouts.

[36] Based on the experience of Class Counsel in the three prior settlements, it is expected the take-up rate will be significantly less than 100%. Class Counsel is of the view it will likely be less than 20%, given the take-up rates in *One Bedford* (9%), *Murano* (17%) and *Festival Tower* (9%). At a 17% take-up rate the average net recovery for class members becomes slightly more than $8,800. At 9%, class members would recover slightly more than $16,700 each.

Notice and objections

[37] The claims administrator, Verita, disseminated the notices by direct email, publication in newspapers in Toronto and publication online. Upon approval of the Settlement Agreement, Verita will implement the claims programs in accordance with the Settlement Agreement, including, but not limited to, overseeing administration of the settlement funds, administering the claims processes, and distributing compensation.

[38] The objection deadline was June 27, 2025. As of July 2, 2025, Verita received two objections to the Settlement Agreement.

[39] In the first objection, delivered by email dated June 27, 2025, Norm Sweeny seeks "a higher compensation amount" because he was "the landlord of a unit that was significantly larger than the average unit at the Matrix building which had a 250+ sq ft terrace (one of just a few terraces in the building that came at premium cost and are over 80% larger than the average balcony in the building)".

[40] In the second objection, also delivered by email dated June 27, 2025, Richie Nanan advises that he is the legal owner of the specific unit whose falling balcony guardrail led to the litigation and that he does not think that (i) "the settlement terms are fair or reasonable considering how long

Concord Adex Development Corp and Toddglen Construction Ltd. have effectively delayed their actions into both rectifying and resolving this matter and court proceedings" and (ii) the proposed compensation is not "fair, especially to myself as this case materials facts are closely related to my particular unit".

Evidence relevant to Class Counsel fees

[41] The representative plaintiffs entered into contingency fee retainer agreements with Class Counsel, providing that Class Counsel is to be paid only in the event of a successful settlement or judgment. The contingency fee retainer agreements provide that Class Counsel will be paid 30% plus HST and disbursements from any recovery in the action, including interest earned on the Settlement Fund.

[42] The fee therefore comes to $525,000.00 plus HST and Class Counsel's share of any interest earned on the gross settlement fund. The amounts owing to Class Counsel will be paid from the Settlement Fund, after the approval order becomes final.

[43] Class Counsel took all reasonable steps to notify class members of the proposed legal fees, including disseminating the notices of certification and notices of the settlement approval hearing.

[44] The docketed time and value at regular hourly rates spent up to October 9, 2024, by Class Counsel is 1,250 hours for a total value of $686,170.50 (before taxes) plus $89,202.17 in HST. This is significantly more than the $525,000.00 sought as counsel fees and does not include the time spent in the weeks preparing the settlement approval materials and on the notice program. Nor does it include the time Class Counsel will spend after approval dealing with claims administration and responding to inquiries.

Evidence relevant to honoraria

[45] Class Counsel is seeking approval of an honorarium of $2,500 to be awarded to each of Paus and Woo. Class Counsel relies on the evidence in Woo's affidavit filed in support of this motion.

[46] In his affidavit, Woo states that his "support for the settlement is not based on the payment of the honorarium" and that "I understand from speaking with counsel that I may not be paid an honorarium at all."

[47] The only evidence related to Woo's involvement in the class action is that (i) he has been the proposed representative plaintiff "since around 2013" and (ii) he was examined for discovery on November 1, 2017 which "required me to schedule time off work to prepare for the examination and participate in it".

[48] Paus filed no affidavit evidence on this motion. While Class Counsel advised that Paus supported the financial terms of the settlement, Paus did not respond to inquiries from Class

Counsel since Paus wanted additional internal disputes between himself and the condominium board to be resolved as part of this class action, which was not a term of the Settlement Agreement.

ANALYSIS

[49] There are three issues before the court: (i) approval of the Settlement Agreement (including the distribution plan), (ii) approval of the contingency fee agreement and the fees and disbursements sought by Class Counsel and (iii) approval of the honoraria sought by Paus and Woo.

[50] I address each of these issues below.

Issue 1: Approval of the Settlement Agreement (including the distribution plan)

[51] I address the applicable law and then apply that law to the present case.

The applicable law

[52] I summarize the general principles on settlement approval as set out in the plaintiff's factum:

(i) Section 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*") requires court approval for the settlement of a class action. Section 29(1) of the *CPA* provides that a settlement of a class proceeding is not binding unless approved by the court.

(ii) To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Redublo v. CarePartners*, 2022 ONSC 1398, at para. 53.

(iii) I rely on my analysis of the relevant factors set out in *Robinson v. Medtronic Inc.*, 2020 ONSC 1688, 150 O.R. (3d) 328, at paras. 63-68.

Application of the law to the present case

[53] I find the proposed settlement to be fair, reasonable, and in the best interests of the class. I rely on the factors reviewed below:

(i) The Settlement Agreement is the result of good faith, arm's-length bargaining and the absence of collusion

[54] Class Counsel and counsel for the defendants engaged in extensive arm's-length negotiations.

(ii) The proposed settlement terms reflect the risks of litigation

[55] There were significant risks of obtaining damages given the unavailability of aggregate damages and the strong reluctance of individual class members to participate in trial (only four of 42 class members responded when contacted by Class Counsel to prepare for a late April 2025 trial).

[56] Further, given that the defendants' settlement offer of $1.75 million could well have exceeded any collective recovery on individual damage claims, there was a further risk of cost consequences if the settlement offer was not accepted.

[57] When this action was commenced, there was a real risk as to whether it could be prosecuted successfully, given the contentious legal issues arising from the state of the law on the standard of care for aluminum shoes, the type of aluminum and balcony design under the applicable building code. The defendants do not admit liability in the settlement, and they deny that they have violated any law or engaged in any wrongdoing. Acceptance of the plaintiffs' expert evidence was not certain.

[58] In his decision from August 12, 2015, Justice Perell certified common issues in negligence and breach of contract. The case involved three defendants, the condominium corporation, the developer and the builder. The claim in contract was against the developer, while the claim in negligence was against the builder. The developer claimed that it did not breach the contract with class members, instead alleging fault (if any) against the builder or its sub-contractors for the choices that led to the balcony failures. Both the developer and builder also blamed the condominium corporation for some of the delay in repairing the balconies. I review the strength of each of these causes of action below.

(a) The claim in breach of contract

[59] The plaintiffs submitted that every purchaser of a unit entered into a standard form agreement of purchase and sale, which included a section adopting the warranties required under section 13 of the Ontario *New Home Warranties Plan Act*, R.S.O. 1990, c. O.31. Unlike negligence, the contract claim is more amenable to certification and a trial verdict because it does not require a standard of care analysis.

[60] Much of the parties' evidence was aimed at the question of whether the balconies, as constructed, met the warranty requirements. However, a finding of a breach of contract would then require individual findings on damages, which could be difficult for the reasons set out below.

(b) The claim in negligence

[61] Developments in the law of pure economic loss have made claims in negligence much more problematic particularly in terms of the law of compensable damages. A claim for loss of use and enjoyment was advanced in circumstances where the cost to repair the dangerous defect was not

paid by class members. The law of compensable damages for pure economic loss is typically confined to the cost of repairs of an imminent risk of harm. The question of whether general damages for the loss of use of the balcony during repairs constitutes compensable damages and falls under an exception to pure economic loss is novel.

(c) The claim for damages in negligence

[62] The above position raised concerns on the negligence claim as to the availability of compensable damages, the failure to certify aggregate damages, and damages claimed for loss of use and enjoyment. I address these issues below.

1. Compensable losses

[63] The defendants argued that the class members did not suffer compensable damages and that the balcony repairs were done at no expense to the class members. To recover damages in negligence (should the pure economic loss exception apply), the defendants submitted that the class members would have to show a mental state that met the test in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 9.

ii. Aggregate damages

[64] In the context of a shoddy construction case, it is uncertain whether aggregate damages can be established at trial for breach of contract or negligence, and if so for what heads of damages. The certification motion judge did not certify aggregate damages. If they could not be established at a common issues trial, each class member would face an additional hurdle as they would be required to prove their own damages. For instance, not all class members would have used their balconies to the same extent, some would be away in the winter and others would not use their balconies in the winter months. This would make recovery a more difficult and fraught process.

iii. Damages for loss of use and enjoyment

[65] The jurisprudence on loss of use and enjoyment is set out below. Although promising, Class Counsel was unable to locate definitive authority awarding ‘loss of use’ damages for lack of access to a balcony. Even if loss of use was found at trial, it would still require individual calculations of damages for each unit owner or renter. This would be a complicated process and could deter potential claimants from pursuing awards for individual damages.

(iii) The proposed settlement is consistent with other similar cases

[66] A claim for damages arising from a balcony lockout is novel and the amount of damages available for a successful claim is uncertain. However, the individual awards are in line with awards for loss of use and enjoyment in parallel situations, especially when the novelty of claiming loss of use for a balcony is considered.

[67] This is, fundamentally, a "loss of use and enjoyment" case. The gross awards in prior loss of use litigation range from $7,000 - $11,000 per year of exclusion: see *Caplin v Gill*, 1977 CanLII 253 (BC SC) ($5,000 for 6 months of backyard flooding); *Tucci v City Concepts Construction Ltd.* [2002] O.J. No. 1723 ($15,000 for deficient house construction); *McKercher v Renovation Store Ltd.*, [2015] A.J. No. 1282, ($20,000 for substandard home renovations); *Brunning v. Cummings*, 2020 BCSC 31 ($20,000 for water damage to a house).

[68] The above awards are gross awards before legal fees and expenses and are made after a trial.

[69] Further, the above cases typically involve residential homes or parts of the home as opposed to a balcony. For example, loss of use of a backyard (*Caplin*), a basement (*Brunning*), a home (*Tucci*) or emotional damage from issues related to the defendants' actions (*McKercher*).

[70] In an analogous case, a tenant claimed a rent abatement for lack of access to the balcony of the apartment he rented. The balcony was inaccessible because the landlord was renovating it, including removal of the safety railings: *TST-31406-12 (Re)*, 2012 CanLII 74705 (ON LTB), at para. 4.

[71] In *TST-31406-12 (Re)*, the tribunal noted that the loss might have varied in the winter months due to reduced need to access the balcony. However, the tribunal noted that "the loss of the amenity was continuous in a significant degree at all times." The tribunal awarded a rent abatement of 5% (explicitly rejecting the landlord's suggestion that the abatement should be limited to "the proportion which the area of the balcony bears to the area of the unit") because the loss to the tenant extended beyond the balcony and included the loss of space to interior storage while the balcony was being repaired. The tenant was out for almost a year and received a total rent abatement of $673.36 or about $56 a month: at paras. 5, 9, 11.

[72] The class members experience in this case is similar as the case above and comparable to that in the other three falling glass cases.

[73] Here, claimants in this action are likely to receive a net award of something more than $1,500, possibly significantly more depending on the take-up rate. This recovery, achieved before a trial, is comparable with awards achieved after litigation.

(iv) The two objections do not demonstrate an unreasonable settlement

[74] With respect to the first objection, the decision to distribute settlement funds on a per unit basis rather than by the size of the balcony is within the zone of reasonableness. Each class member lost the enjoyment of the use of the balcony. That loss is based on the same inability of owners and renters to enjoy being outside and to use the amenities offered by a balcony.

[75] For the above reasons, distribution on a per unit basis is within the zone of reasonableness, and reflects the similar loss that any owner or renter would suffer, regardless of the size of the balcony.

[76] With respect to the second objection, as I discuss above the $1,500 amount obtained in the Settlement Agreement on a per unit basis reflects the average 28-month period that the balconies were unavailable.

[77] Further, the fact that it was the failure of the objector's balcony which led to the litigation does not give rise to additional damages. All class members suffered damages for the same loss of enjoyment and use of the balconies.

[78] For the above reasons, I do not accept the objections. The very limited number of objections supports approval of the Settlement Agreement.

(v) Discovery, evidence and likelihood of success

[79] In this case, the parties had the benefit of discovery as well as various expert reports (from the plaintiff and defendants' sides). Class Counsel developed a full appreciation of the strengths and weaknesses of their case in order to make an informed decision about the settlement.

(vi) Recommendations and experience of counsel

[80] Class Counsel, who is experienced in litigating and settling complex class actions, endorses the settlement as fair, reasonable and in the best interests of class members. The representative plaintiffs have accepted the recommendations of Class Counsel.

(vii) Future expenses and likely duration of litigation and risk

[81] The risks, expense, complexity and likely duration of further litigation support settlement approval. Courts have recognized that a payment to class members now is a factor in support of a settlement: *Condon v. Canada*, 2018 FC 522, at para. 58.

[82] If the action had not settled at this stage, it would have proceeded to trial. As I discuss above, there was no guarantee that the plaintiffs would win at trial. However, even if the plaintiffs succeeded at the common issues trial, there would likely be appeals which could take years to resolve, followed by individual claims for damages, which could require separate court hearings or arbitration. It is unlikely that class members would have much interest in participating in individual assessments to prove their claims by that point. Class Counsel made inquiries to assess interest in participating in the common issues trial and found only four individuals who were interested in participating.

(viii) Conclusion on approval of the Settlement Agreement

[83] For the above reasons, the Settlement Agreement falls within the zone of reasonableness. It is fair and in the best interests of class members. The distribution plan is based on a fair approach that treats each unit owner or tenant on an equal basis for the loss of enjoyment and use of their balconies, regardless of the size of the balcony or whether it was used on a more or less frequent basis. By avoiding individual trials which would increase costs and run the risks of a lack of success, the settlement ensures that all class members receive the same payment to reflect the fact that each of them lost the use of their balcony.

[84] Consequently, I approve the Settlement Agreement including the proposed distribution plan.

Issue 2: *Approval of Class Counsel fees and disbursements and the contingency fee agreement*

[85] I first review the applicable law and then apply the law to the present case.

The applicable law

[86] I rely on the law as I set out in *Faiz v. Canadian All Care Inc.*, 2025 ONSC 3217 (29 May 2025), Toronto, CV-23-00709415-00CP (Ont. S.C.), at para. 42:

(i) Contingency fees are a well-established feature of class action litigation. The courts approve of this approach on the theory that it increases access to justice and gives lawyers the necessary economic incentive to take the case in the first place and do it well. In general, a contingency fee of 33% of the recovery has been held to be presumptively valid: *Emond v. Google LLC*, 2021 ONSC 302, at para. 41; *Rizzi v. Handa*, 2021 ONSC 1004, at para. 24.

(ii) Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Maggisano*, at para. 23, *Sayers*, at para. 37.

(iii) Factors relevant in assessing the reasonableness of the fees of Class Counsel include: (a) the factual and legal complexities of the matters dealt with, (b) the risk undertaken, including the risk that the matter might not be certified, (c) the degree of responsibility assumed by Class Counsel, (d) the monetary value of the matters in issue, (e) the importance of the matter to the Class, (f) the degree of skill and competence demonstrated by Class Counsel, (g) the results achieved, (h) the ability of the Class to pay, (i) the expectations of the Class as to the amount of the fees, and (j) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation and settlement: *Maggisano*, at para. 24, *Sayers*, at para. 38.

(iv) Relevant factors in the court's exercise of discretion when making an order for costs generally include: (a) novel legal issues, (b) public interest, (c) success, (d) the importance of the issues, and (e) the overall fairness of making costs payable forthwith as opposed to making costs payable to the successful party in the cause: *Speers v. Reader's Digest Assn. (Canada) ULC*, 2009 CanLII 38491 (ON SC), at paras. 12-15.

Application of the law to the present case

[87] I approve the contingency fee agreement and conclude that the fees and disbursements sought are reasonable. In summary:

(i) There were significant litigation challenges including liability and damages which increased the risk assumed by Class Counsel.

(ii) Damages may have been extremely limited if class members were required to participate in individual trials, particularly given the lack of interest in participation.

(iii) Class Counsel's fee request is less than the time Class Counsel has already expended on the matters. Class Counsel spent a considerable amount of time to achieve this proposed settlement and there is still more work to do.

(iv) The disbursements incurred by Class Counsel are reasonable, particularly given the two expert reports filed on behalf of the plaintiffs.

Honoraria

[88] I first review the applicable law and then apply the law to the present case.

The applicable law

[89] I rely on my analysis in *Faiz,* at para. 45:

(i) Payment of an honorarium is "exceptional and rarely done". "[C]ompensation should not be awarded simply because the representative plaintiff has done what is expected of him or her. It should be reserved for cases…where the contribution of the representative plaintiff has gone well above and beyond the call of duty": *Baker Estate v. Sony BMG Music (Canada Inc.)*, 2011 ONSC 7105, at paras. 93, 95; *Fresco v. Canadian Imperial Bank of Commerce*, 2024 ONCA 628, at para. 110.

(ii) "[I]t is not generally appropriate for a representative plaintiff to receive a payment for fees or for time expended in the pursuit of the action": *McCarthy v. Canadian Red Cross Society*, 2007 CanLII 21606 (ON SC), at para. 20.

(iii) Factors that might qualify as exceptional circumstances could include exposure to a real risk of costs or significant personal or financial hardship in connection with the prosecution of the action: *Fresco*, at para. 111; *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323 (Div. Ct.), at para. 92.

(iv) A representative plaintiff should be committed to fulfilling their responsibilities without seeking added compensation. One of those responsibilities is being actively involved in every step of the litigation, including the settlement of the litigation. An additional payment should be available only where the representative plaintiff can demonstrate a level of involvement and effort that is "truly extraordinary": *Doucet*, at paras. 70-71, 92; *Fresco*, at para. 112.

(v) An honorarium may be appropriate in cases where the representative plaintiff puts their personal experience forward, reliving their trauma, while relieving other class members from having to do so: *Doucet*, at paras. 57-58, 92.

(vi) An honorarium may be appropriate where the case is about money such that complete success would lead to only a tiny monetary remedy for each class member or none at all: *Doucet*, at paras. 59, 92.

(vii) The quantum of the requested payment, if any of the above criteria are met, must be modest both in general terms and in relation to the remedies available to the class members in the settlement: *Doucet*, at para. 92.

Application of the law to the present case

[90] The evidence on this motion does not support a payment of an honorarium to Paus or Woo.

[91] Paus filed no evidence on the motion. Consequently, there is no basis for an honorarium for him.

[92] The only evidence is that Woo was required "to schedule time off work to prepare for the examination and participate in it". That is insufficient evidence to establish the extraordinary circumstances required for an honorarium.

[93] There is no evidence of any personal or financial hardship (let alone at a significant level) to Woo in acting as a representative plaintiff. The action is a claim for damages for breach of contract and negligence and does not lead to any trauma in providing evidence. The recovery of $1,500 or more is not "tiny". Woo was not at risk of an adverse costs award. There is no evidence of "extraordinary" work as a representative plaintiff.

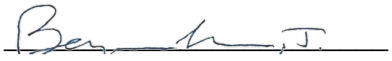
[94] There is no dispute that Woo acted responsibly and diligently as a representative plaintiff. He is to be commended for taking on the important role as a representative of the class members. However, under the established law in *Fresco* and *Doucet*, Woo is not entitled to an honorarium

solely for being a thorough and competent representative plaintiff. The exceptional circumstances outlined in *Fresco* and *Doucet* do not arise in the present case.

[95] For the above reasons, I do not order the payment of an honorarium to Paus or Woo.

ORDER AND COSTS

[96] For the above reasons, I grant the relief sought except the honoraria for the representative plaintiffs.



Justice Glustein

Released: July 10, 2025

CITATION: Paus v. Concord Adex Development Corp., 2025 ONSC 4098
COURT FILE NO.: CV-12-463822-00CP
DATE: 20250710

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DALE PAUS and GLEN WOO

Plaintiffs

AND:

CONCORD ADEX DEVELOPMENTS CORP., TODDGLEN CONSTRUCTION LIMITED, and TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1438

Defendants

REASONS FOR DECISION

Justice Glustein

Released: July 10, 2025