Certification of Class Proceedings in Nova Scotia

(An overview of Martin v. Lahey et. al)

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On September 10, 2009 Justice David Macadam certified the class action **Martin v. Lahey et al.** The claim was the first class action certified under Nova Scotia's Class Proceedings Act. I have been asked to provide an overview of the requirements for certification under the Act.

OVERVIEW

1. **Martin v. Lahey et al** is an action for damages arising from sexual assaults by priests of the Diocese of Antigonish.

2. Ronald Martin is the proposed Representative Plaintiff for the class which is defined as all individuals who were sexually assaulted by a priest of the Diocese of Antigonish between 1950 and September 10, 2009, including the Estates of all such persons now deceased. Ron Martin was sexually assaulted by Father Hugh Vincent MacDonald.

3. Three priests who sexually assaulted members of the Plaintiff class have been criminally convicted. Hugh Vincent MacDonald died while facing charges of sexual assault involving more than a dozen people. Other priests against whom allegations have been made died before charges were laid. Still others are alive but have never been charged.

4. It is anticipated that virtually all members of the class are Catholic and present or former members of the Roman Catholic Diocese of Antigonish.

5. The parties were able to reach a settlement for which Court approval was sought and granted by Justice MacAdam on September 10, 2009.

6. The Settlement Agreement creates an expedited, confidential claims process under which individual members of the class may make a claim for compensation arising from the sexual

assault(s). If a claimant's claim cannot be settled by consent, validation and determination of quantum will be determined by a retired judge of the Nova Scotia Supreme Court, Justice Walter Goodfellow.

7. The settlement establishes a Damages Fund of $12 million the payment of which is secured by a floating debenture covering the real property of the Diocese.

8. Expenses associated with the claims process will be paid by the Defendants and the claims process is subject to the ongoing supervision of the court.

9. The settlement is conditional in that both parties have a *trigger clause* which they may use to void the settlement:

(a) If there are any opt outs, the Defendants have the right within 70 business days of the conditional certification order to elect not to proceed with the settlement; and,

(b) If more than 70 Class Members identify themselves to Class Counsel, whom Class Counsel in good faith believe are bona fide Class Members, then Class Counsel has the right within 70 business days of the conditional certification order to elect not to proceed with the settlement.

10. If either condition is met, the party for whose benefit that condition was made must elect whether to waive the condition. If the conditions are not met, or if either party waives the condition(s), the settlement and certification are final and binding. If they do not waive the conditions, then the settlement and conditional certification are voided as if they had never occurred and the parties will go back to the contested litigation that existed before the settlement.

11. Recent media attention surrounding criminal charges against former Bishop Raymond Lahey has lead one class member to opt out of the class action. The criminal charges have also created tremendous interest and support for the class action resulting in an avalanche of applications.

12. In short, it appears that conditions will exist on December 4, 2009 that will allow either party to void the settlement, should they chose to do so.

CERTIFICATION

General Principles

13. The Nova Scotia *Class Proceedings Act* received Royal Assent on December 13, 2007. The legislation is comparable to class proceedings legislation in other provinces albeit with some differences.

Class Proceedings Act, N.S.S. 2007, c. 28

14. Since **Martin v. Lahey** was the first certification hearing in Nova Scotia, there is no Nova Scotia caselaw on point. However, the legislation is similar in many respects to legislation in place in other provinces, so it is safe to assume the courts in Nova Scotia will look to other jurisdictions when they interpret our legislation.

15. The oft-cited goals of class action legislation are:

(a) Judicial economy;

(b) Access to justice; and,

(c) Deterrence or behaviour modification.

> *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 at 549-50.
>
> *Hollick v. Toronto,* [2001] 3 S.C.R. 158 at Para 15.
>
> *Condominium Plan No. 0020701 v. Investplan Properties Inc.*, [2006] A.J. No. 368 (Q.B.) Para 30.
>
> *Walls v. Bayer Inc.*, [2004] M.J. No. 4 (Q.B.) Para 16, Leave to Appeal Refused [2005] M.J. No. 286 (C.A.).
>
> *Sorotski v. CNH Global N.V.*, [2006] S.J. No. 258 (Q.B.) Para 79.

16. It is not necessary that all of these goals be present in any particular action in order for the matter to be certified as a class proceeding. However, to the extent that these goals are realized, there is a greater likelihood that the matter will be certified.

17. Class proceedings legislation is remedial in nature and a purposive approach should be taken to its construction and application.

> *Interpretation Act*, R.S. c. 235, Section 9(5).
>
> *Bywater v. Toronto Transit Commission* [1998] O.J. No. 4913 (S.C.J.) Para 22.

Certification Test

18. Unlike the Ontario or B.C. legislation, the Nova Scotia *Class Proceedings Act* expressly provides for a settlement class. Section 6 of the *Class Proceedings Act* states:

> "Where as a condition of settlement between a Plaintiff and Defendant certification of a proceeding as a class proceeding is being sought in order that the settlement will bind the class members, the class members constitute a settlement class."
>
> *Class Proceedings Act*, supra, Section 6.

19. Although Ontario and B.C. do not have a comparable provision in their legislation, the Courts in those provinces have recognized and even encouraged the settlement of class proceedings prior to certification.

> *Dabbs v. Sun Life Assurance Co. of Canada*, Unreported (July 3, 1998), Toronto 96-C.T.-022862 (Ont. Gen. Div.).
>
> *Munro v. Bausch & Lomb Canada Inc.*, Unreported (October 17, 1997), London 22610/96 (Ont. Gen. Div).
>
> *Romanchuk v. Sun Life Assurance Co. of Canada*, Unreported (November 28, 1997), Vancouver C964248 (B.C.S.C.).
>
> *Haney Ironworks Ltd. v. The Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) Paras 11, 13 and 14.

20. Courts have held that where a consent certification is sought in order to give effect to a proposed settlement, the requirements for certification may be applied less rigorously than where the motion to certify the action is contested.

> *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.) Para 27.

21. The test for certification is stated in paragraph 7(1) of the *Class Proceedings Act* as follows:

> "The Court shall certify a proceeding as a class proceeding on an Application under Section 4, 5 or 6 if, in the opinion of the Court,
>
> a) The pleadings disclose or the Notice of Application discloses a cause of action;
>
> b) There is an identifiable class of two or more persons that would be represented by a representative party;
>
> c) The claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> d) A class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and,

e) There is a representative party who:

i. Would fairly and adequately represent the interests of the class,

ii. Has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding; and,

iii. Does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members."

Class Proceedings Act, supra, Section 7(1).

22. The *Act* requires that all five components of the test be met in order to certify; however, if those criteria are met, the Court must certify.

Class Proceedings Act, supra, Section 7(1).

Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3rd) 734 (Gen. Div.) at 744.

Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3rd) 453 (Gen. Div.) at 461.

23. Certification is a fluid, flexible procedural process. Certification is not a ruling on the merits. The certification order is not a final order; it is interlocutory and may be amended, varied or set aside at any time.

Class Proceedings Act, supra, Section 8(2), 11(4) and 13(1).

Bendall v. McGhan Medical Corp., supra, at 747.

24. The certification stage is not meant to test the merits of the action. Rather, the certification stage focuses of the form of the action.

25. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.

Hollick v. Toronto, supra, Para 16.

26. To certify an action as a class proceeding, the Court requires only a modest evidentiary base. As Mr. Justice Sharpe observed in *Taub v. Manufacturers' Life Insurance Co.*:

> "At a minimum, the Court must be satisfied that there is a class of more than one person and that the issues raised by the members of the class satisfy the requirement that they raise common issues, and that a class proceeding would be the preferable procedure for the resolution of the common issues. **In most class proceedings, these factual matters may well be obvious and require little evidence. Most class proceedings arise situations where the fact of widespread harm or complaint is inherent in the claim itself.**" [Emphasis added]
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> *Taub v. Manufacturers' Life Insurance Co.* (1998), 40 O.R. (3rd) 378 (Gen. Div.) at 381, affirmed (1999), 42 O.R. (3rd) 576 (Div. Court).

a) Cause of Action

27. The appropriate test for determining whether the cause of action requirement has been met under class proceedings legislation is whether the pleadings would survive a motion to strike for disclosing no reasonable cause of action.

> *Kumar v. Mutual Life Assurance Company of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.) Para 36.
>
> *Hoffmann v. Monsanto Canada Inc.*, [2005] W.W.R. 665 (Sask. Q.B.) at Para 27.
>
> *Sorotski v. CNH Global NV*, supra, Paras 45-46.

28. The allegations of fact pleaded in the claim must be accepted as proven unless they are patently ridiculous and incapable of proof, and the Statement of Claim must be read generously, with a view to accommodating inadequacies of form.

> *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321 (S.C.C.) at Paras 30-33.

Nash v. The Queen (1995), 27 O.R. (3rd) 1 (C.A.) Page 6.

29. In **Martin v. Lahey** we submitted that the Amended Statement of Claim disclosed the following causes of action: negligence, breach of fiduciary duty, breach of a non-delegable duty, battery, and intentional infliction of mental suffering.

b) Identifiable Class

30. In *Bywater v. Toronto Transit Commission*, Justice Winkler (as he then was) described the purpose of the class definition as follows:

> "The purpose for the class definition is threefold:
>
> a) It identifies those persons who have a potential claim for relief as against the Defendant;
>
> b) It defines the parameters of the lawsuit so as to identify those persons who are bound by its results; and lastly,
>
> c) It describes who is entitled to notice pursuant to the *Act*.
>
> Thus, for the mutual benefit of the Plaintiff and the Defendant, the class definition ought not to be unduly narrow nor unduly broad."
>
> *Bywater v. Toronto Transit Commission*, (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div) at 175.

31. The definition of the Class must be by reference to objective criteria such that a given person can be determined to be a member of the Class without reference to the merits of the action. A class definition that depends on the determination of an issue in the action is unacceptable because the merits are not to be decided at the certification stage. The class must have boundaries in the sense that it is not unlimited.

> *Hollick v. City of Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.) at Para 17.

Robertson v. The Thomson Corporation (1999), 43 O.R. (3rd) 161 (Gen. Div.) at 169.

32. In addition, the criteria for membership must bear a rational relationship to the asserted common issues.

Western Canadian Shopping Centres Inc. v. Dutton, supra, at 554.

33. It is not uncommon that the exact number of members of the Class are unknown at the date of certification; this is particularly so when the nature of the claim relates to allegations of sexual abuse. In such cases, victims are often reluctant to come forward to identify themselves as abused.

Hollick v. City of Toronto, supra, at Paras 19-21.

34. Section 10(d) of the *Act* expressly provides that the Court shall not refuse to certify a class proceeding by reason that the number of class members or identity of class members is not ascertained or may not be ascertainable.

Class Proceedings Act, supra, Section 10(d).

35. The evidence in **Martin v. Lahey** disclosed that there were substantially more than two individuals who were sexually assaulted by priests of the Diocese. There are already a number of criminal convictions in place against three priests of the Diocese. Thus, the numerosity requirement was satisfied.

36. In addition, the class definition is objectively verifiable; that is, an individual reading the definition would be able to self-identify himself or herself as fitting within the class.

c) Common Issues

37. Section 2(e) of the *Class Proceedings Act* defines common issues as:

> "i. common but not necessarily identical issues of fact, or
>
> ii. Common but not necessarily identical issues of law that arise from common but not necessarily identical facts."
>
> *Class Proceedings Act*, supra, Section 2(e).

38. This definition is identical to that in the Ontario legislation where the Courts have held that it "represents a conscious attempt by the Ontario Legislature to avoid setting the bar for certification too high". The common issues need only to "advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of a particular legal claim…is not required". The underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact finding or legal analysis."

> *Class Proceedings Act*, 1992, S.O. 1992, c. 6, Section 1.
>
> *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3rd) 236 (C.A.) at Paras 40-41.
>
> *Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at 683.
>
> *Western Canadian Shopping Centres v. Dutton*, supra, Para 39.

39. The proposed class proceeding must raise issues of fact or law in common to the Class such that litigating the common issues will decide and dispose of some aspect(s) of the case, and materially advance the case.

> *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at 198-204.
>
> *Condominium Plan No. 0020701 v. Investplan Properties Inc.*, supra, Paras 61-63.

Campbell v. Flexwatt Corporation, [1997] B.C.J. No. 2377 (C.A.) at Para 53.

Jameson Livestock Ltd. v. Toms Grain & Cattle Co., [2006] S.J. No. 93 (C.A.) at Paras 31-35.

Enge v. North Slave Metis Alliance, [1999] N.W.T.J. No. 139 (S.C.) Para 14.

40. The settlement of **Martin v. Lahey** effectively resolved many of the common issues which the Plaintiffs sought to certify including:

(a) Whether the Defendants owed a duty of care?

(b) Whether the Defendants owed a fiduciary duty?

(c) Whether the Defendants owed a non-delegable duty?

(d) Whether the Defendants are directly or vicariously liable for the sexual assaults of priests of the Diocese?

Cloud v. Canada (Attorney General), [2004] O.J. No. 4924 (C.A.) Paras 58-60.

41. The settlement requires the individual claimant to testify as to the fact of the assault which, if accepted, constitutes the act in breach of the duty of care and/or in breach of the fiduciary or non-delegable duty thereby causing damages which are determined by the judge and payable by the Defendants.

42. The settlement disposed of a number of the common issues thereby eliminating the litigation that would ordinarily result if the action was certified on a contested basis and went to a common issues trial.

d) Preferable Procedure

43. In determining whether the class proceeding is a preferable procedure, the inquiry is directed to whether the class proceeding would be a fair, efficient and manageable method of advancing the Class, and whether the class proceeding would be preferable to other procedures available.

> *Rumley v. British Columbia*, supra, Para 204.
>
> *Ayrton v. PRL Financial (Alta) Ltd.*, [2005] A.J. No. 466 (Q.B.) Paras 94-98.
>
> *Walls v. Bayer Inc.*, supra, Paras 65-76.
>
> *Vitapharm Canada Ltd. et al. v. F. Hoffmann-LaRoche Ltd.*, [2005] O.J. No. 1118 (S.C.J.) Paras 37-41.
>
> *Walton v. Mytravel Canada Holdings Inc.*, [2006] S.J. No. 373 (Q.B.), Paras 71-80.

44. In *Carom v. Bre-X*, Justice Winkler outlined the conditions present whenever a class proceeding is the preferable procedure:

> "A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining a common issue which arises from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and modification of behaviour of wrong-doers."
>
> *Carom v. Bre-X Minerals Ltd.*, supra, (S.C.J.), Page 239.

45. One of the goals of the legislation is litigation efficiency or judicial economy to enable the Court to deal effectively with the large number of claims arising from the same events or

series of events. Another goal is to encourage access by victims to the Court system. Thus, it is said that the legislation is "anchored in the principles of access to justice and judicial economy".

Carom v. Bre-X Minerals Ltd., supra (C.A.), Paras 4-6.

46. Section 7(2) of the *Class Proceedings Act* states:

> "In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the Court shall consider:
>
> a) Whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> b) Whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> c) Whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> d) Whether other means of resolving the claims are less practical or less efficient;
>
> e) Whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief was sought by other means; and,
>
> f) Any other matter the Court considers relevant.
>
> *Class Proceedings Act*, supra, Section 7(2).

47. The settlement in **Martin v. Lahey** and the certification of the settlement class was the preferable procedure in that:

(a) The settlement resolves or eliminates issues which might otherwise have had to proceed to trial on a contested basis;

(b) It significantly advances the timetable for the determination of individual issues;

(c) It eliminates the risk of a contested certification hearing;

(d) It provides members of the Class with a confidential process in which very personal and painful claims may be asserted;

(e) It provides a more expeditious and less adversarial method for the validation of claims and quantification of damages;

(f) If the action were not certified and individuals were required to pursue individual actions, such actions would be more expensive, more adversarial, and more time consuming;

(g) This confidential process is more likely to encourage victims of these sexual assaults to come forward for compensation;

(h) The majority of class members who have retained counsel to date have engaged class counsel and support a class proceeding;

(i) The issues which are resolved by this settlement are material and do advance this litigation;

(j) The claims process in the Settlement Agreement is a reasonable one and is subject to ongoing Court supervision.

48. Certification of **Martin v. Lahey** met the twin objectives of judicial economy and access to justice as:

(a) The settlement avoided a contested certification motion and resulting appeals;

(b) The settlement avoided a common issues trial which would only take place after extensive examinations for discovery and production of documents. That trial would likely last 6-10 weeks;

(c) The Defendants bear the expense of the claims process which relieves the Court of the burden of determining individual issues following the common issues trial;

(d) If the action was not certified, the Court faced the prospect of dozens of individual actions;

(e) The Diocese does not have unlimited resources. By proceeding in this manner, it avoids a race between class members to obtain judgment in advance of the Diocese declaring bankruptcy;

(f) The settlement process dispenses with some defences that would be advanced by the Diocese in a common issues trial or individual actions;

(g) The claims process is less time consuming and less costly;

(h) The claims process has confidentiality safeguards that are more likely to safeguard the privacy of the individual claimants than the regular court system; for example, the hearings are private and are not conducted in a public forum such as a court house;

(i) These safeguards for confidentiality make it more likely that those who were sexually assaulted will come forward;

(j) But for a class proceeding, many victims would not be psychologically or financially able to bear the rigours of ordinary litigation.

49. The concept of deterrence must be looked at in a broader sense. It is not limited to the specific Defendant before the Court, nor is it restricted to the particular product which is the subject matter of the action. Rather, on a motion for certification, the Court examines whether a class proceeding would act as a deterrent to the kind of behaviour which the Plaintiff seeks to impugn in the action.

Wilson v. Servier Canada Inc. et al. (2000), 50 O.R. (3rd) 219.

50. With respect to the goal of behaviour modification or deterrence, the fact of the settlement and the process that it provides has received tremendous publicity. It can only be hoped that this settlement will act as a deterrent to other organizations and entities similar to that of the Defendants and encourage policies and practices necessary to prevent these abuses from occurring.

e) Representative Plaintiffs

51. In assessing whether the proposed representative is adequate, the Court had to consider, inter alia,

(a) The motivation of the Representative Plaintiff; and,

(b) The competence of the representative's counsel.

Western Canadian Shopping Centres v. Dutton, supra, Page 555.

The proposed representative need not be "typical" of the Class, nor the "best possible representative". The Court should be satisfied that the proposed representative will vigorously and capably prosecute the interests of the Class.

52. In **Martin v. Lahey** the proposed Representative Plaintiff, Ronald Martin, was sexually abused as a child by Father Hugh Vincent MacDonald. His brother was also sexually abused by Father MacDonald. His brother suffered significant psychological trauma as a result of those sexual assaults and, regrettably, took his own life.

53. Mr. Martin steadfastly advanced his desire to see justice for those who were victimized by priests of the Diocese of Antigonish. He retained experienced and capable counsel to act on his behalf and that of the Class. He familiarized himself with his obligations as the Representative Plaintiff and kept himself fully informed and involved through the negotiations which led to the settlement in fulfillment of his role as Representative Plaintiff.

54. Justice MacAdam agreed that Ronald Martin would fairly and adequately represent the interests of the Plaintiff Class and approved Mr. Martin as the representative plaintiff.

Approval of Settlement Agreement

55. In order to approve a settlement, the Court must find that it is fair, reasonable and in the best interests of the Class as a whole.

> *Class Proceedings Act*, supra, Section 38(1)(a) and (3).
>
> *Dabbs v. Sunlife Assurance Co of Canada* (1998), 40 O.R. (3rd) 429 (Gen. Div.) at Page 8, Affirmed (1998), 41 O.R. (3rd) 97 (C.A.), Leave to Appeal to S.C.C. Refused [1998] S.C.C.A. No. 372.

56. The resolution of complex litigation through compromise of claims is encouraged by the Courts and supported by public policy.

> *Sparling v. Southam Inc.* (1998), 66 O.R. (2nd) 225 (H.C.J.), Page 5.

57. Where a class proceeding settlement is negotiated at arms length by counsel for the Class, there is a strong, initial presumption of fairness. To reject the terms of the settlement and require the litigation to continue, a Court must conclude that the settlement does not fall within a range of reasonable outcomes.

> *Vitapharm Canada Ltd. v. F. Hoffmann – La Roche Ltd.*, supra, Paras 113-114.
>
> *Dabbs v. Sunlife Assurance Co. of Canada*, supra, Page 440.

58. In assessing a proposed settlement, the Court must consider the impact on the Class as a whole, and not from the perspective of individual class members:

> "In the context of a class proceeding, this requires the Court to determine whether the settlement is fair, reasonable and in the best interest of the Class as a whole, not whether it meets the demands of a particular member."
>
> *Parsons v. Canadian Red Cross Society* [1999] O.J. No. 3572 (S.C.J.) Para 69.

59. Courts have confirmed that the applicable tests of whether a particular Settlement Agreement is "fair" is based on the recognition of the realities of negotiation and compromise:

> "[A]ll settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation."

Dabbs v. Sunlife Assurance Co of Canada, supra, at 444.

60. It is not the Court's role to dissect the settlement. To be approved, a settlement must simply fall within "a zone or range of reasonableness".

Ontario New Home Warranty Program et al. v. Chevron Chemical Co. (1999), 46 O.R. (3rd) 130 (S.C.J.), Page 152, Para 89.

Nunes v. Air Transat (2005), 20 C.P.C. (6th) 93, Para 7.

61. On a settlement approval motion, the Court is required to balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes which fall within the "zone or range of reasonableness" as all settlements are the product of compromise and fairness is not a standard of perfection.

Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., supra, at Para 115.

Dabbs v. Sunlife Assurance Co. of Canada, supra, at 440.

62. The Court must remain flexible when presented with a settlement proposal for approval. The zone or "range of reasonableness" test is not a static valuation with an arbitrary application to every class proceeding but rather it is an objective standard which permits for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is intended to provide compensation.

Parsons v. Canadian Red Cross Society, supra, Para 70.

63. While it is not open to the Court to merely "rubber-stamp" a settlement proposal, it is not the Court's function to substitute its own judgement for that of the negotiating parties nor is it the Court's function to litigate the merits of the action.

Sparling v. Southam Inc., supra, at 230.

64. In determining whether a settlement should be approved, Courts have taken the following factors into consideration:

(a) The likelihood of recovery or success;

(b) The amount and nature of discovery, evidence or investigation;

(c) The proposed settlement terms and conditions;

(d) The recommendation and experience of counsel;

(e) The future expense and likely duration of the litigation;

(f) The recommendation of any neutral parties;

(g) The number of objectors and the nature of objections;

(h) The presence of arms-length bargaining and the absence of collusion;

(i) The information conveying to the Court the dynamics of and the positions taken by the parties during the negotiations; and,

(j) The degree and nature of communications by counsel and Representative Plaintiff with class members during the litigation.

Dabbs v. Sunlife Assurance Co. of Canada, supra, at Para 13.
Parsons v. Canadian Red Cross Society, supra, at Paras 71-72.

65. Where there is significant risk involved for class members in establishing liability during the class period and such litigation would be protracted and complex, “it is in the best interest of the class members to have a timely and prompt payment”.

McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474 (S.C.J.), Para 18.

Likelihood of Recovery or Success

66. The Settlement Agreement in **Martin v. Lahey** eliminates the risk associated with a common issues trial and a contested certification hearing. The Defendants waived some defences, moderated the adversarial process, provided confidentiality safeguards, expedited the process, and diminished the degree of proof required in some cases, and ensured consistency and transparency through common experts, the use of a retired judge of this Court and the ongoing reporting obligations to class counsel and the Court.

67. The settlement remains conditional. If either party avails itself of it's *trigger clause* to void the settlement, the parties will proceed with a contested certification hearing. Even if certified, the action will have to proceed to a common issues trial. The litigation carries substantial risks for both sides.

Litigation Risks and Expenses

68. The settlement negotiations took place early in the life of the action; however, Mr. Martin had been pursuing earlier litigation and negotiations with the Diocese on a more restricted basis for almost five years.

69. As Representative Plaintiff, Mr. Martin placed himself at great personal risk of any adverse award of costs. The case law for other jurisdictions show that certification costs awards can be significant, reaching into the hundreds of thousands of dollars. The resources of the Defendants' are such that protracted litigation could very well bankrupt the Diocese.

Negotiations and Participation of the Representative Plaintiff

70. There have been cases where the proposed representative plaintiff was not approved by the court. In those cases the courts appear to have been concerned that the proposed representative plaintiff was a straw man or puppet of class counsel.

71. Mr. Martin was not a mere bystander in the negotiations that led to the Settlement Agreement in **Martin v. Lahey**. He was directly involved in the negotiations and was kept informed by class counsel throughout the negotiations. His advice and direction was sought regularly on issues that threatened to derail those negotiations. He participated in a Judicial Settlement Conference and the certification motion itself.

CONCLUSION

72. Martin v. Lahey was a landmark case because it marked the first time that the Catholic Church admitted it's responsibility to compensate survivors of priest sexual abuse. The Settlement Agreement creates a novel means of validating and compensating sexual abuse claims in a safe and confidential manner.

73. However, the certification is conditional and it remains to be seen whether the case will be fully and finally certified after December 4, 2009.Stay tuned.

List of Authorities Referred to:

1.	*Western Canadian Shopping Centres v. Dutton,* [2001] 2 S.C.R. 534 at 549-50
2.	*Hollick v. Toronto,* [2001] 3 S.C.R. 158 at 170
3.	*Condominium Plan No. 0020701 v. Investplan Properties Inc.*, [2006] A.J. No.

	368 (Q.B.) Para 30
4.	*Walls v. Bayer Inc.*, [2004] M.J. No. 4 (Q.B.) Para 15, Leave to Appeal Refused [2005] M.J. No. 286 (C.A.)
5.	*Sorotski v. CNH Global N.V.*, [2006] S.J. No. 258 (Q.B.) Para 79
6.	*Bywater v. Toronto Transit Commission* [1998] O.J. No. 4913 (S.C.J.) Para 22
7.	*Dabbs v. Sun Life Assurance Co. of Canada*, Unreported (July 3, 1998), Toronto 96-C.T.-022862 (Ont. Gen. Div.)
8.	*Munro v. Bausch & Lomb Canada Inc.*, Unreported (October 17, 1997), London 22610/96 (Ont. Gen. Div)
9.	*Romanchuk v. Sun Life Assurance Co. of Canada*, Unreported (November 28, 1997), Vancouver C964248 (B.C.S.C.)
10.	*Haney Ironworks Ltd. v. The Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) Paras 11, 13 and 14
11.	*Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (S.C.J.) Para 27
12.	*Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3rd) 734 (Gen. Div.) at 744
13.	*Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3rd) 453 (Gen. Div.) at 461
14.	*Taub v. Manufacturers' Life Insurance Co.* (1998), 40 O.R. (3rd) 378 (Gen. Div.) at 381, affirmed (1999), 42 O.R. (3rd) 576 (Div. Court).
15.	*Kumar v. Mutual Life Assurance Company of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.).
16.	*Hoffmann v. Monsanto Canada Inc.*, [2005] W.W.R. 665 (Sask. Q.B.) at Para 27.
17.	*Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321 (S.C.C.) at 979
18.	*Nash v. The Queen* (1995), 27 O.R. (3rd) 1 (C.A.) Page 6
19.	*Bywater v. Toronto Transit Commission*, (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div) at 175
20.	*Hollick v. City of Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.) at Para 17
21.	*Robertson v. The Thomson Corporation* (1999), 43 O.R. (3rd) 161 (Gen. Div.) at 169
22.	*Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3rd) 236 (C.A.) at Paras 40-41

23.	*Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at 683
24.	*Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at 198-204
25.	*Campbell v. Flexwatt Corporation*, [1997] B.C.J. No. 2377 (C.A.) at Para 53
26.	*Jameson Livestock Ltd. v. Toms Grain & Cattle Co.*, [2006] S.J. No. 93 (C.A.) at Paras 31-35
27.	*Enge v. North Slave Metis Alliance*, [1999] N.W.T.J. No. 139 (S.C.) Para 14
28.	*Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.)
29.	*Ayrton v. PRL Financial (Alta) Ltd.*, [2005] A.J. No. 466 (Q.B.) Paras 94-98
30.	*Vitapharm Canada Ltd. et al. v. Degussa-Huls C.G., et al.*, [2005] O.J. No. 1118 (S.C.J.) Paras 37-41
31.	*Walton v. Mytravel Canada Holdings Inc.*, [2006] S.J. No. 373 (Q.B.), Paras 71-80
32.	*Dabbs v. Sun Life Assurance Co of Canada* (1998), 40 O.R. (3rd) 429 (Gen. Div.) at Page 8, Affirmed (1998), 41 O.R. (3rd) 97 (C.A.), Leave to Appeal to S.C.C. Refused [1998] S.C.C.A. No. 372
33.	*Sparling v. Southam Inc.* (1998), 66 O.R. (2nd) 225 (H.C.J.), Page 5
34.	*Parsons v. Canadian Red Cross Society* [1999] O.J. No. 3572 (S.C.J.) Para 69
35.	*Ontario New Home Warranty Program et al. v. Chevron Chemical Co.* (1999), 46 O.R. (3rd) 130 (S.C.J.), Page 152, Para 89
36.	*McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.), Para 18
37.	*Nunes v. Air Transat A.T. Inc*., (2005), 20 C.P.C. (6th) 93, Para 7.
38.	*Wilson v. Servier Canada Inc. et al.* (2000), 50 O.R. (3rd) 219.