

**012 04T 0180 CP  
2012 04T 0190 CP  
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION**

**BETWEEN:**

**BARBARA HYNES AND VALERIE DYKE**

**PLAINTIFFS**

**AND:**

**WESTERN REGIONAL HEALTH AUTHORITY**

**DEFENDANT**

*BROUGHT UNDER THE CLASS ACTIONS ACT  
BEFORE THE HONOURABLE MR. JUSTICE PETER BROWNE*

SUMMARY OF CURRENT DOCUMENTS	
Court File No.:	2012 04T 0180 CP 2012 04T 0190 CP
Date of Filing of Document:	June 11, 2024
Name of Filing Party or Person:	Bob Buckingham, Counsel for Plaintiffs (Applicants) and Andrew May, Co-Counsel for the Plaintiffs.
Application to which Document being filed relates:	Application for approval of settlement in these proceedings pursuant to Section 35 of the <b><i>Class Actions Act</i></b> and Rule 7A of the <b><i>Rules of the Supreme Court, 1986</i></b> .
Statement of purpose in filing:	To obtain the Court's approval of the proposed settlement; to approve the fees and disbursements of Class Counsel, to appoint Bob Buckingham Law as settlement administrator; to approve a proposed honorarium for Representative Plaintiffs.

**THE PLAINTIFFS' APPLICATION FOR APPROVAL OF SETTLEMENT**

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**THE PLAINTIFFS' INTERLOCUTORY APPLICATION**  
(Inter Partes)

**OVERVIEW**

1. The Applicants, the Plaintiffs herein, seek the following relief:
  - a. an Order pursuant to section 7A.10(1) of the **Rules of Court, 1986**, c. 42, Sch. D, Rule 7A. (the **Rules**) [Tab 1 – Plaintiff's Book of Authorities] and section 35 of the **Class Actions Act**, S.N.L. 2001, c. C-18.1 (the **Class Actions Act**) [Tab 2 – Plaintiff's Book of Authorities] approving a settlement reached between the parties,
  - b. an Order approving the fee arrangement for Class Counsel pursuant to section 38(2) of the **Class Actions Act**;
  - c. an Order to appoint Bob Buckingham Law to be the settlement administrator, pursuant to section 33 of the **Class Actions Act**;
  - d. and Order approving a \$2,500 honorarium to each Representative Plaintiff.
2. Representative counsel has filed a separate Application seeking the Court's approval to give Class members notice of the Plaintiffs' intention to file this application to approve the settlement. The intention in doing so is to provide Class Members, in advance of the hearing of this Application, details of the time and location of the hearing, the particulars of the proposed settlement and instructions on how to provide their own views on the merits of the proposed settlement.
3. In support of this Application, the Plaintiffs have filed the following:
  - a. Affidavit of Bob Buckingham
  - b. Affidavit of Andrew May
  - c. Affidavit of Barbara Hynes
  - d. Affidavit of Valerie Dyke

## PROCEDURAL HISTORY

4. As stated in the Defendant's Pre-Trial Conference Brief the chronology is as follows:
  - a. A Statement of Claim in matter 2012 04G 0180 was issued on August 17th, 2012, and a Statement of Claim in matter 2012 04G 0190 was issued on August 24th, 2012;
  - b. Western Health filed its List of Documents with respect to matter 2012 04G 0180 November 29th, 2013, and with respect to 2012 04G 0190 on May 9th, 2016;
  - c. A Consolidated Amended Statement of Claim was issued on July 22nd, 2013;
  - d. A motion for Certification of the was heard on February 6th and 7th, 2014;
  - e. A Consent Order was filed on February 25th, 2016;
  - f. Western Health filed its Statement of Defence to the Consolidated Amended Statement of Claim on or about February 20th, 2017.
  
5. Examinations for Discoveries were conducted as follows:
  - a. Ms. Sherri Tiller-Park was examined on November 7th, 2016;
  - b. Mr. Patrick Heptditch, Mr. Devon Goulding and Ms. Darlene Dicks were examined on November 8th, 2016;
  - c. Mr. Robert Kennedy was examined on November 9th, 2016;
  - d. Ms. Valerie Dyke was examined on April 14th, 2016;
  - e. Ms. Donna Colbourne was examined on April 20th, 2017;
  - f. Ms. Barbara Hynes was examined on May 30th, 2017.
  
6. A Certification Order was issued by this Honourable Court on February 7th, 2014.
  
7. On November 14th, 2014 it was determined by Goodridge J. that the pleadings disclosed a cause of action and that a class of 1,043 individuals was identifiable for breach of privacy based on statutory tort established under the Privacy Act, breach of privacy based on common law tort ("intrusion upon seclusion"), negligence, and breach of contract. Goodridge ruled that the identifiable class is those 1,043 individuals identified by the Defendant in its internal audit of its former employee Donna Colbourne. These 1,043 individuals were informed of the privacy breach by registered letter dated August 1st, 2012.

8. The Plaintiffs' List of Documents was filed on August 1st, 2017.
9. Western Health filed a Supplemental List of Documents on August 7th, 2017.
10. On August 6th, 2018 Goodridge J., as he then was, qualified the expert proposed by the Defendant but did not approve the expert (Keenan) tendered by the Plaintiffs.
11. On June 25th, 2021 Browne J. qualified Mr. Rick Klumpenhower as the expert proposed by the Plaintiffs.
12. Plaintiffs and the Defendant qualified witnesses intended to give expert evidence on the standards that existed in Canada at the relevant time for protecting privacy of electronic medical records, and for monitoring access to electronic medical records.
13. In October 12-14, 2021, the parties attended a mediation in an attempt to settle the matter. The mediation did not result in a settlement.
14. The trial was set down to be heard on October 3rd, 2022.
15. The parties reached a settlement in principle on September 30th, 2022.

## **MATERIAL FACTS**

16. In mid-May 2012, the Defendant ("Western Health") became aware of the possibility that an employee, Ms. Donna Colbourne ("Colbourne") may have been inappropriately accessing personal health information of patients. Western Health undertook an audit of Colbourne's activities.
17. On or around August 1st, 2012 1,043 patients of Western Health were notified that their personal health information had been inappropriately accessed. The information accessed included registration information including reason for medical visit, and a list of diagnostic and surgical procedures relating to the patients. The patients whose personal health information was variously accessed experienced a loss of confidence in Western Health, worry concerning the use of their personal health information that related inter alia to employment, mental health, and familial and other interpersonal relations. In some instances,

the concern related to their employment at Western Health or to ongoing Workers' Compensation proceedings, and other varied concerns. While it has not been proven that Colbourne shared the confidential personal health information to which she had inappropriate access, it has not been shown that she has not breached this confidence nor that she will not or may not breach it in the future. This question lingers for the class.

18. The audit was limited to the preceding eleven months. The audit showed that for many of the individuals involved there were multiple improper accesses of personal health information. It was determined that Colbourne often looked at health information of her family members, co-workers, and people from her home community on the Northern Peninsula. Counsel for the Plaintiffs and the Representative Plaintiffs themselves have encountered class members who had specific privacy concerns relating to their position in the community, mental health status, impact on their health status to do their work, confidence in the healthcare system, impact on family and work relations with associates of Colbourne, and generally speaking a significant amount of stress and shock relating to her access to their personal and health and medical information. Plaintiffs experienced worry about what use she may have made of their personal health information.
19. Western Health did provide privacy training to its employees and in the years prior to the discovery of the Colbourne breaches had been implementing plans to comply with new privacy legislation, most notably the Personal Health Information Act proclaimed on April 11th, 2011. However, Western Health failed to ensure that Colbourne attended training relating to patient confidentiality and appropriate access of personal health information. In general there was no follow-up for failure of Colbourne to attend training on patient confidentiality and access, and no consequence for Colbourne failing to attend. Prior to the complaint Western Health did not undertake any audits of Colbourne nor any other accounting staff with access to significant and meaningful personal health information. It appears that the privacy management at Western Health did not address MEDITECH billing codes or the role of the accounting department and had not focused its attentions outside of the clinical sphere. It was not until after the investigation of the whistleblower complaint relating to Colbourne that Western Health gave any consideration to the protection of its patients' personal health information in the realm of patient billing and financial accounting. Western Health failed to ensure that Colbourne completed her oath of confidentiality and access to information as a condition of continuing employment or having access to personal health information on the Meditech system.

Western Health failed to supervise Colbourne's access to personal health information. Western Health failed to review or oversee or even to define Colbourne's level of access to personal health information and failed to provide privacy and information access training tailored to her work responsibilities and environment. When Colbourne was promoted from accounting clerk 1 to accounting clerk 2, there was no review of her access to Meditech.

20. The investigation of Colbourne determined that most of her inappropriate access related to MCP files.
21. Colbourne's own evidence on Discovery indicated that she had not been directed to read Privacy Manager emails relating to confidentiality and access to patient information and had not done so, she had not been presented up dated oaths of confidentiality to sign, nor the associated policies related to confidentiality and the rules relating to access of patient information to read. Colbourne and her supervisor indicated that her work was not monitored or reviewed, and both confirmed that only Colbourne had Meditech billing expertise. Colbourne said that she believed the rules relating to privacy were for the clinical workers, and not for the non-clinical functions in the health care system. In her discovery Colbourne showed herself to be literate in some of the billing codes for various medical procedures and that she had access to billing dictionaries that permitted her to understand what each billing code for medical procedures represented and had been involved in preparing these dictionaries.
22. Western Health stores information on an electronic record system called Meditech. Western Health failed to install the "SAM" module that would have permitted it to adequately monitor Colbourne and other workers, despite the module having been available on the market since 2004 and other hospitals having installed it in as little as a week, and Meditech's characterization of this module as necessary and essential. The Plaintiffs' expert had been prepared to testify concerning the inadequacy of privacy protection by Western Health, and his report explains the basis for his conclusions. The Defendant's expert would have testified that the Defendant's level of privacy protection met the then prevailing standard within the public health care sector.
23. Colbourne was found guilty of a breach of s. 88(1)(a) of the ***Personal Health Information Act*** and sentenced on September 11th, 2014 and a fine of \$5000 was imposed.

## ISSUES

24. The issues before the Court in this application are the following:
- a. Is the proposed settlement fair, reasonable and in the best interests of the class as a whole?
  - b. Are the proposed fee and disbursements requested by Class counsel reasonable and should they be approved by the Court?
  - c. Should Bob Buckingham Law's request to be appointed settlement administrator be approved?
  - d. Is it appropriate to award a \$2,500 honorarium to the Representative Plaintiffs?

## SUMMARY OF THE PROPOSED SETTLEMENT

25. Pursuant to the Memorandum of Settlement executed on June 4<sup>th</sup>, 2024, the settlement proposed is as follows:
- The Defendants shall pay to the Plaintiffs a global sum of \$962,552.40.
  - The settlement funds are comprised of:
    - A per claimant amount of \$610 in general damages
    - Pre judgment interest totaling \$111,069.14
    - Legal fees, payable to Class Counsel, in the amount of \$164,284.79, representing 25% of the global per-claimant amount inclusive of pre-judgment interest.
    - An honorarium payable to each of the two Representative Plaintiffs in the amount of \$2,500.00 each.
    - Administration fees, payable to the Claims administrator, in the total sum of \$88,700.0
    - Disbursements, payable to Class Counsel, in the amount of \$52,428.47
26. Initially, Class counsel intended to use Trilogy Class Action Services (Trilogy) to administer the settlement. Trilogy prepared a formal quote to complete the task and the total cost was to be \$126,678.00. In an effort to increase Class Members' awards, Class Counsel advised they could administer the settlement themselves for less than \$126,678.00.



27. The parties agreed that Bob Buckingham Law would administer the settlement at a reduced fee in order to provide each Class Member with a top up of \$35.00 each for a maximum of \$610.00 in general damages, plus prejudgment interest. The Plaintiffs note that the Defendant insisted on a cap of \$610.00 for general damages.
28. The total estimated approximate cost for Bob Buckingham Law to administer the settlement is \$88,700.00, (taxes included), which is broken down as follows:

Website	\$ 1,000.00
Email Address	\$ 400.00
Online Portal	\$ 30,000.00
Cheques	\$ 600.00
Postage	\$ 2,000.00
Supplies	\$ 3,500.00
Public Trustee Application	\$ 120.00
Minors Administration Costs	\$ 700.00
Advertising reserve	\$ 5,750.00
Staff and Lawyer Fees	\$ 44,500.00
	\$ 88,700.00

29. Dr. Thomas Keenan was retained by the Plaintiffs to provide expert evidence. However, the Court dismissed the Plaintiffs Application to qualify him as an expert. The Defendant refuse to pay Dr. Keenan's invoices as a disbursement. The total cost of Dr. Keenan's services was \$32,770.97.
30. The Plaintiffs propose that the cost of Dr. Keenan's services be shared equally by the Class Members, except that Class Counsel shall take on a portion of the expense in order to round each Class Member's total payment to an even \$700.00 per Class Member.
31. As a result, each Class Member shall receive:

General Damages:	\$610.00
Prejudgment Interest:	\$125.22
Less portion of expert reports:	\$ 36.95
Plus round-up from Class Counsel:	\$ 1.73
<b>TOTAL:</b>	<b>\$700.00</b>

32. In the event that any Class Member does not accept their settlement or cannot be located, after a period of fifteen (15) months, the settlement funds will be donated to the Western Regional Hospital Foundation.
33. The distribution of the settlement will be carried out by Bob Buckingham Law, as Administrator, who has prepared an administration plan which will be addressed further in this application.

## LAW AND ARGUMENT

Issue 1: The proposed settlement is fair, reasonable and in the best interests of the class as a whole.

34. This is the primary issue in this application. For the reasons discussed below, the Plaintiffs submit the settlement is fair, reasonable and in the best interests of the class as a whole.
35. In 2022, Justice McGrath approved the settlement in the case of ***Jane Doe (#7) v. Newfoundland and Labrador***, 2022 NLSC 133 (CanLII) [TAB 3 of Plaintiffs' Book of Authorities]. In her decision, she made several helpful comments about the Court's role in approving a settlement in class proceedings (beginning at para 42)
  - a. The judge is acting outside the traditional role of determining disputes in an adversarial context.
  - b. In most cases the judge is acting on an incomplete set of facts and must make informed assumptions and rely on counsel's submissions;
  - c. Class members should expect the Court to scrutinize the proposed settlement with their rights in mind, while not attempting to enter into the fray and renegotiate the terms of settlement.
  - d. Settlements are by nature a compromise and should not be held to a standard of perfection, so long as the settlement falls within a range of reasonableness.

36. In the case of ***Anderson v. Canada (Attorney General)***, 2016 NLTD(G) 179 [TAB 4 of Plaintiffs' Book of Authorities], Justice Stack listed a number of factors that Courts have considered helpful when determining whether to approve a settlement:
- a. Likelihood of recovery, or likelihood of success;
  - b. Amount and nature of discovery evidence;
  - c. Settlement terms and conditions;
  - d. Recommendation and experience of counsel;
  - e. Future expense and likely duration of litigation;
  - f. recommendation of neutral parties, if any;
  - g. number of objectors and nature of objections;
  - h. presence of good faith and absence of collusion;
  - i. degree and nature of communications by counsel and Plaintiff with class members during the litigation;
  - j. information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation; and
  - k. the risk of not unconditionally approving the settlement.
37. These factors are to guide the process and invariably some factors will hold greater significance than others, depending on the case at hand. Weight should be attributed accordingly (See ***Parsons v. The Canadian Red Cross Society***, (2000) CanLII 22386 (ONSC) – Tab 5 of Plaintiffs' Book of Authorities).
38. Plaintiffs have an obligation to provide sufficient information to permit a court to exercise its function of independent approval. However, while a court requires sufficient information to exercise an objective, impartial and independent assessment of the fairness of the settlement in the circumstances, a court considering a settlement “need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. At minimum, a court must possess sufficient information to raise its decision above mere conjecture” [See ***Ford v. Hoffman-La Roche Ltd. (2005)***, 74 O.R. (3d) 758 (Ont. S.C.J.) at paras 113-118 – Tab 6 of Plaintiffs' Book of Authorities].
39. Moreover, in situations where the litigation may continue if the settlement is not approved, a Court must be mindful that there are constraints on the extent to which parties may fully disclose the strengths and weaknesses of their case [See ***Dabbs v. Sun Life Assurance Co. of Canada (1998)***, 40 O.R. (3d) 429 (Gen. Div.) at para 16 – Tab 7 of Plaintiffs' Book of Authorities].

a. **Likelihood of recovery, or likelihood of success**

40. A settlement in principle was reached between the parties 'on the courthouse steps' just prior to the beginning of the common issues trial in September, 2022.
41. Had the matter proceeded to trial, the Court would have heard from two qualified but opposing expert witnesses. There existed a risk for Class members that the Court would have accepted the Defendant's expert witness instead of the Plaintiffs'.
42. Furthermore, there existed general litigation risks, such as witnesses not providing sufficient evidence, the documentation not be sufficient and general uncertainty associated with the Court making findings of fact. Additionally, there existed potential delays due to possible appeals from the unsuccessful party.
43. In the well-known case of *Jones v. Tsige*, 2012 ONCA 32 (*Jones*) [Tab 8, Plaintiffs' Book of Authorities], the Ontario Court of Appeal recognized the need for a tort of intrusion upon seclusion, due to today's unprecedented ability to aggregate and store large amounts of personal information in digital form. The Court of Appeal in *Jones* reasoned that because these technologies permit highly sensitive personal information to be accessed with relative ease, the law must evolve to address their consequent risks to privacy. Health records were explicitly referenced by the Ontario Court of Appeal.
44. In *Jones*, Ms. Jones and Ms. Tsige were both employees of the Bank of Montreal. Ms. Jones did her own banking with the Bank of Montreal. Over a four-year period, Ms. Tsige accessed Ms. Jones' private banking records inappropriately on 174 occasions. Ms. Tsige was caught, disciplined by her employer and sued by Ms. Jones, who alleged Ms. Tsige had committed a common law tort of invasion of privacy. The lower court allowed Ms. Tsige's motion for summary judgment on the basis that there was no common law tort for invasion of privacy. The Ontario Court of Appeal overturned the lower court's dismissal, however, and recognized a new tort of 'intrusion upon seclusion'.
45. In *Power v. Mount Pearl (City)*, 2022 NLSC 129 (Canlii) [Plaintiffs' Book of Authorities, Tab 9], the Supreme Court of Newfoundland and Labrador held that the tort of intrusion upon seclusion is available in this jurisdiction, in addition to any relief available to Plaintiff's under the *Privacy Act*, RSNL 1990, c P-22.

46. In light of the above, and general principals of vicarious liability, the Plaintiffs submit that their case against the Defendant was strong. Class members' entitlement to damages, however, is less clear.
47. In *Jones*, the Ontario Court of Appeal gave a range of damages for the tort of intrusion upon seclusion of up to \$20,000.00. The Court also stated that absent of exceptional circumstances, the maximum ought not to be exceeded. The Court awarded the Plaintiff with \$10,000.00 for 174 breaches over the span of four years. The Plaintiff submits that the breached in this case likely do not warrant the same level of damages, and that \$610.00 is within a range of acceptable awards.
48. In further support of the quantum of \$700.00 being within the range of reasonable, the Plaintiffs refer the Court to the case of *Hemeon v. South West Nova District Health Authority* (citation unavailable) from the Nova Scotia Supreme Court. The facts in that case are similar to those in this case. There was no written decision approving the settlement in *Hemeon*, however in that case, each Class Member received \$1,000.00 total.
49. Located in the Plaintiffs' Book of Authorities at Tab 10 is the granted Order and Settlement Agreement from *Hemeon*, which the Plaintiffs' submit are assistance to the Court in this matter.

**b. Amount and nature of discovery evidence**

50. The parties conducted examinations for discovery of all pertinent witnesses, and exchanged relevant documents. All parties had indicated they were prepared to proceed to a trial on the common issues.
51. As a result, the parties were in a position to evaluate the totality of the evidence and the current state of law in order to assess the prospects of success. This supports the parties' submissions that this settlement is reasonable.

**c. Settlement terms and conditions**

52. The details of the settlement are outlined elsewhere in this Application.
53. Each Class Member will receive the same amount of compensation.

54. Class Counsel have expressed a willingness to complete the settlement administration themselves at a discounted rate in order to increase the per-Claimant general damages award to the maximum agreed upon amount of \$610.00. The Claimants will also receive prejudgment interest.
55. Class Counsels' view is that the conduct of the Defendant in the present case does not reasonably warrant an award of aggravated damages or punitive damages.
56. Taking into account the type of proceeding at hand – a class action on behalf of several hundred Class Members rather than an individual action, and with evidence of variability in the number of occasions each Class Members' individual records were improperly accessed, as well as the duration of the improper accesses, the damages award of \$610 per Class member is within the zone of reasonableness.
57. The reasonableness of the settlement is also confirmed in light of the inherent uncertainty associated with litigation, as discussed earlier in these submissions.

**d. Recommendation and experience of counsel**

58. The Plaintiffs were represented by experienced counsel, with prior experience in national class actions and breach of privacy law. This factor supports approving the settlement.

**e. Future expense and likely duration of litigations**

59. If this settlement is not approved, the matter will proceed to trial, resulting in significant cost and time for the parties.
60. There would also be an increase in expense should either party appeal a trial division decision at the common issues trial.

**f. recommendation of neutral parties, if any**

61. This is not a relevant factor.

**g. number of objectors and nature of objections**

62. At the filing of this application the number and nature of objections is unknown.

**h. presence of good faith and absence of collusion**

63. There is no evidence of bad faith or collusion. We note that like in **Anderson**, the Defendant in these proceedings is a government entity with no incentive to collude.

**i. degree and nature of communications by counsel and Plaintiff with class members during the litigation**

64. Notice of the Settlement approval hearing will be sent to all Class members.

65. Furthermore, there have been several press releases issued by Class Counsel, and the media has reported about the case at important milestones, such as when the matter settled prior to trial.

66. Given the fact that each Class member will receive the same amount of compensation, and there will be no individual assessments, the Plaintiffs submit that the level of correspondence to date has been sufficient. Should any Class members note their objection to the proposed settlement, Class counsel can provide further submissions on this point.

**j. information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation**

67. The parties retained a mediator to attempt to resolve this matter without success. The parties settled the action just prior to the beginning of the trial. Both parties paid for and intended to rely on expert evidence at trial. Both sides took firm positions throughout the conduct of these proceedings and were unwavering in their attempts to advocate for a resolution in their favour.

**k. the risk of not unconditionally approving the settlement**

68. If this settlement is not approved, these proceedings will continue, likely for a year or more, as the parties attempt to re-enter negotiations or proceed to trial. Many class members have died since the action was started, and more would likely die before this matter is concluded.

Issue 2: The proposed fee and disbursements requested are reasonable and should be approved by the Court.

69. In determining whether to approve the proposed fee and disbursements, the court must determine whether they are reasonable in the circumstances.
70. The case of ***Smith Estate v. National Money Mart Co.***, 2008 CanLII 45406 (ON SC) [Tab 11 of the Plaintiffs' Book of Authorities] lists several factors to be considered, and this list is relied upon by Justice Stack in ***Anderson***:
- a. The legal and factual complexities of the action;
  - b. The risks undertaken, including that the action might not be certified.
  - c. the degree of responsibility assumed by class counsel;
  - d. the monetary value of the matters at issue;
  - e. skill and competence demonstrated by class counsel;
  - f. the results achieved;
  - g. ability of the class to pay and the class expectations of fees;
  - h. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation
71. As Justice Stack said in ***Anderson*** [Tab 4], each case will turn on its facts and the factors listed above from *Smith* provide a guide only.
72. Copies of the contingency fee agreements entered into between Class counsel and Representative Plaintiffs were filed with this application. They state that fees shall be 25% plus HST plus disbursements if the matter settles before trial, or 30% plus HST plus disbursements if the matter settles after the trial begins.
73. Class counsel seeks approval to apply a fee of 25% on general damages and prejudgment interest. Disbursements have been agreed to be paid by the Defendant, with one exception, as outlined previously in this Application.
74. Case law reflects that a fee of 25% is reasonable, and in fact, it is less than typical fees in a class action (33.33%). Courts have also held that docketed hours are irrelevant in deciding whether a fee is reasonable (see paras 4-5 of ***Cannon v. Funds for Canada Foundation***, 2013 ONSC 7686 (CanLII)) [Tab 12 – Plaintiffs' Book of Authorities].



75. Class counsel took on this matter without any certainty of success. For example, the tort of intrusion upon seclusion was not recognized in this province until long after this action began. Class Counsel pursued the recognition of this new tort in this jurisdiction.
76. Class counsel has prosecuted the matter for over a decade to advance it to its present point. With few reported decisions valuing damages for a breach of privacy of the nature of the breach in this case, it was pure speculation that Class Counsel would recover their expenses incurred to move this matter along. Class Counsel took on approximately \$85,000 in disbursements to advance this matter.
77. Representative Plaintiffs have sworn affidavits indicating they were aware of the fees to be charged and believe they are reasonable.
78. The proposed fee and disbursements ought to be approved:

Legal Fees:	\$164,284.79
Disbursements:	\$ 52,428.47

Issue 3: Bob Buckingham Law should be appointed the settlement administrator.

79. Bob Buckingham Law has agreed to carry out the settlement administration.
80. The fee to be charged by Bob Buckingham Law will be \$100.00, including HST, per Class Member. This results in a total cost of administration of \$88,700.00.
81. A breakdown of the total cost of administration is provided earlier in this application.
82. A detailed claims administration plan has also been prepared and is included as an Exhibit in the affidavit of Bob Buckingham.
83. There is nothing inherently inappropriate about Representative Counsel taking on the role of Settlement Administrator. In fact, section 33 of the ***Class Actions Act*** [Tab 13 of the Plaintiffs' Book of Authorities] states the Court can direct the Defendant or any other person to distribute the funds. If it would be appropriate for the Defendant to administer a settlement, the Plaintiffs submit the Court should have no concerns with Class Counsel completing the task.

84. Given that all Class members are entitled to the same award, the calculation of the funds to be distributed is one of accounting, with no individual assessments required.

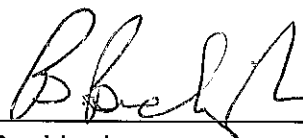
Issue 4: It is appropriate for the Representative Plaintiffs to receive a \$2,500.00 honorarium.

85. Courts have the discretion to grant a request for honorarium payments to Representative Plaintiffs, paid out of the settlement.
86. The Plaintiffs note that the terms of the settlement itself includes a modest \$2,500.00 honorarium for both Representative Plaintiffs. This amount is symbolic and is designed to recognize the Representative Plaintiff's involvement in initiating these proceedings and the personal hardship, stress and inconvenience in connection with the prosecution of the litigation.
87. Both Plaintiffs were examined for discovery, which was a stressful and unpleasant experience. Both Plaintiffs spent countless hours working with Class Counsel to advance this case, and both Plaintiffs were prepared to proceed to trial.
88. The honorarium proposed is modest and ought to be approved. Beginning at paragraph 79 of the Justice Stack's decision in **Anderson**, he summarizes past honorariums awarded in other cases, and the quantum proposed in this proceeding is significantly less than awarded in other cases (which is in part due to the nature of these proceedings compared to **Anderson**, for example, which related to childhood sexual abuse).

## RELIEF SOUGHT

89. The Plaintiffs repeat the foregoing and request an Order that:
- a. the settlement is approved;
  - b. the proposed legal fees and disbursements are approved;
  - c. Bob Buckingham Law is appointed settlement administrator;
  - d. the Representative Plaintiffs are entitled to receive an honorarium of \$2,500 each.
  - e. there shall be no order as to costs.

**DATED AT** St. John's, in the Province of Newfoundland and Labrador, this 11<sup>th</sup>  
day of June, 2024.



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**ISSUED AT** Corner Brook, in the Province of Newfoundland and Labrador, this  
\_\_\_\_\_ day of \_\_\_\_\_, 2024

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2012 04T 0180 CP  
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IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION

**BETWEEN:**

**BARBARA HYNES AND VALERIE DYKE**

**PLAINTIFFS**

**AND:**

**WESTERN REGIONAL HEALTH AUTHORITY**

**DEFENDANT**

*BROUGHT UNDER THE CLASS ACTIONS ACT*

**NOTICE TO DEFENDANT**

You are hereby notified that the foregoing application will be made to the Judge presiding in Chambers at the Supreme Court of Newfoundland and Labrador at 82 Mount Bernard Avenue, Corner Brook, Newfoundland and Labrador, on Wednesday, the 18<sup>th</sup> day of September, 2024 at 10:00 A.M or as soon thereafter as the application can be heard.

TO: Ms. Janet Carpenter  
and Ms. Ruth Trask  
Counsel for the Defendant  
Stewart McKelvey  
11th Floor, Cabot Place  
100 New Gower Street  
St. John's, NL A1C 5V3

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2012 04G 0180 CP  
2012 04G 0190 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION

**BETWEEN:**

**BARBARA HYNES AND VALERIE DYKE**

**PLAINTIFFS**

**AND:**

**WESTERN REGIONAL HEALTH AUTHORITY**

**DEFENDANT**

***BROUGHT UNDER THE CLASS ACTIONS ACT***  
***BEFORE THE HONOURABLE MR. JUSTICE PETER BROWNE***

**AFFIDAVIT OF ROBERT W. BUCKINGHAM**

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**SUMMARY OF CURRENT DOCUMENT**

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Court File Number(s):	2012 04G 0180 CP / 2012 04G 0190 CP
Date of Filing of Document:	June 11, 2024
Name of Filing Party or Person:	Robert W. Buckingham, solicitor for the Plaintiffs
Application to which Document being filed relates:	Application for Settlement Approval
Statement of purpose in filing:	To support Application to approve the terms of settlement and in support of Bob Buckingham Law's request to be appointed as Settlement Administrator
Court Sub-File Number, if any	n/a

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I, Robert W. Buckingham, Barrister and Solicitor, make oath and give evidence as follows:

1. THAT I am a lawyer in St. John's, Newfoundland and Labrador. Along with Andrew May, of Brothers & Associates, I am class counsel for the Plaintiffs and Class Members in the within proceeding.
2. THAT I have personal knowledge of the facts affirmed to in this Affidavit except where otherwise stated to be based on information or belief.
3. THAT in this Affidavit I state the source of any information that is not based on my own personal knowledge, and my belief of the source. I do verily believe the information from each source cited to be true.
4. THAT in August 2012 I was retained by Ms. Barbara Hynes to represent her in an action related to unauthorized access to her personal healthcare information by an employee of the Defendant herein.
5. THAT on August 27, 2012, upon instruction of my client, Barbara Hynes, I filed a proposed class action being matter number 2012 04 T 0180.
6. THAT on August 24, 2012 Mr. Scott Burden, on behalf of his client, Ms. Valerie Dyke, filed a Statement of Claim alleging that the actions of Ms. Donna Colbourne, a financial clerk at the Western Regional Health Authority in Corner Brook, Newfoundland and Labrador constituted the tort of intrusion upon seclusion, for which the Defendant was vicariously liable. This matter was Court file number 2012 04 T 0190.
7. THAT two Representative Plaintiffs, Ms. Barbara Hynes and Ms. Valerie Dyke, sought certification of a proposed class proceeding. Ms. Hynes and Ms. Dyke each swore affidavits in support of certification

## PROCEDURAL HISTORY

8. THAT as stated in the Defendant's Pre-Trial Conference Brief the chronology is as follows:
  - a. A Statement of Claim in matter 2012 04G 0180 was issued on August 17th, 2012, and a Statement of Claim in matter 2012 04G 0190 was issued on August 24th, 2012;
  - b. Western Health filed its List of Documents with respect to matter 2012 04G 0180 November 29th, 2013, and with respect to 2012 04G 0190 on May 9th, 2016;
  - c. A Consolidated Amended Statement of Claim was issued on July 22nd, 2013;
  - d. A motion for Certification of the was heard on February 6th and 7th, 2014;
  - e. A Consent Order was filed on February 25th, 2016;
  - f. Western Health filed its Statement of Defence to the Consolidated Amended Statement of Claim on or about February 20th, 2017.
9. THAT Examinations for Discoveries were conducted as follows:
  - a. Ms. Sherri Tiller-Park was examined on November 7th, 2016;
  - b. Mr. Patrick Heptditch, Mr. Devon Goulding and Ms. Darlene Dicks were examined on November 8th, 2016;
  - c. Mr. Robert Kennedy was examined on November 9th, 2016;
  - d. Ms. Valerie Dyke was examined on April 14th, 2016;
  - e. Ms. Donna Colbourne was examined on April 20th, 2017;
  - f. Ms. Barbara Hynes was examined on May 30th, 2017.
10. THAT a Certification Order was issued by this Honourable Court on February 7th, 2014.
11. THAT on November 14th, 2014 it was determined by Goodridge J., as he then was, that the pleadings disclosed a cause of action and that a class of 1,043 individuals was identifiable for breach of privacy based on statutory tort established under the Privacy



Act, breach of privacy based on common law tort (“intrusion upon seclusion”), negligence, and breach of contract. Goodridge ruled that the identifiable class is those 1,043 individuals identified by the Defendant in its internal audit of its former employee Donna Colbourne. These 1,043 individuals were informed of the privacy breach by registered letter dated August 1st, 2012.

12. THAT The Plaintiffs’ List of Documents was filed on August 1st, 2017.
13. THAT Western Health filed a Supplemental List of Documents on August 7th, 2017.
14. THAT on August 6th, 2018 Goodridge J. qualified the expert proposed by the Defendant but declined to approve the expert tendered by the Plaintiffs.
15. THAT on June 25th, 2021 Browne J. qualified Mr. Rick Klumpenhauer as an expert proposed by the Plaintiffs.
16. THAT Plaintiffs’ and the Defendant’s qualified witnesses gave expert opinion on the standards that existed in Canada at the relevant time for protecting privacy of electronic medical records, and for monitoring access to electronic medical records.
17. THAT in October 12-14, 2021, the parties attended mediation in an attempt to settle the matter. Mediation was unsuccessful.
18. THAT the trial was set down to be heard on October 3rd, 2022.
19. THAT the parties reached a settlement in principle on September 30th, 2022.
20. THAT Class Counsel spoke with Ms. Dyke and Ms. Hynes, and ultimately recommended acceptance of the settlement. The Representative Plaintiffs agreed to the proposed settlement without any expressed reservation.

## THE TERMS OF THE PROPOSED SETTLEMENT

21. Pursuant to the Memorandum of Settlement executed on June 4<sup>th</sup>, 2024, the settlement proposed is as follows:
  - The Defendants shall pay to the Plaintiffs a global sum of \$962,552.40.
  - The settlement funds are comprised of:
    - A per claimant amount of \$610 in general damages
    - Pre judgment interest totaling \$111,069.14
    - Legal fees, payable to Class Counsel, in the amount of \$164,284.79, representing 25% of the global per-claimant amount inclusive of pre-judgment interest.
    - An honorarium payable to each of the two Representative Plaintiffs in the amount of \$2,500.00 each.
    - Administration fees, payable to the Claims Administrator, in the total sum of \$88,700.00 (taxes included).
    - Disbursements, payable to Class Counsel, in the amount of \$52,428.47
22. THAT initially Class counsel intended to use Trilogy Class Action Services (Trilogy) to administer the settlement. Trilogy prepared a quote to complete the task and the total cost was to be \$126,678.00 (taxes included). In an effort to increase Class Members' awards, Class Counsel advised they could administer the settlement themselves for less than \$126,678.00.
23. THAT the parties agreed that Bob Buckingham Law would administer the settlement at a reduced cost in order to provide each Class Member with a top up of \$35.00 to the general damages payment of \$610.00, plus prejudgment interest.
24. THAT as part of the settlement, the parties agreed that the Defendant would not be liable for the cost of Dr. Thomas Keenan's expert report. Dr. Keenan was retained by the Plaintiffs to provide expert evidence. However, the Court did not qualify him as an expert. The total cost of Dr. Keenan's services was \$32,770.97.
25. THAT the Plaintiffs propose that the cost of Dr. Keenan's expenses be shared equally among the Class Members. However, Class counsel shall cover a portion of Keenan's

expenses in order to round each Class Member's total payment to an even \$700.00 per Class Member.

26. THAT as a result, each Class Member shall receive:

General Damages:	\$610.00
Prejudgment Interest:	\$125.22
Less portion of expert reports:	\$ 36.95
Plus round-up from Class Counsel:	\$ 1.73
<b>TOTAL:</b>	<b>\$700.00</b>

27. THAT in the event Class Members do not accept their settlement or cannot be located, after a period of eighteen (18) months, the settlement funds will be donated to the Western Regional Hospital Foundation.

#### REGARDING CLASS COUNSEL FEES AND DISBURSEMENTS

28. THAT a review of billings in relation to work done on this file by Bob Buckingham Law indicates a minimum 530 hours of work done on this file since 2012.

29. THAT the lawyers involved included myself (437.9 hours), associate Stephen Barnes (30 hours) and then-associate Brittany Whelan (63.7 hours).

30. THAT I have been involved as the principal lawyer since the inception of the action and have been the primary responsible lawyer on this file.

31. THAT my billing hours on the file are conservative and only calculated to November 20, 2023.

32. THAT I executed a Contingency Fee Agreement with my client, Barbara Hynes. The Contingency Fee Agreement provided for compensation of 25% of the settlement funds received plus payment of disbursements.

33. THAT The Contingency Fee Agreement provided an hourly factored rate of \$500 per hour plus HST if there was a breakdown in the solicitor-client relationship.

34. THAT in light of the procedural history of this file and the amount of legal work, expense, and risk involved in advancing this claim, the legal fees set out in the terms of settlement are unexceptional. The disbursements are consistent with the conduct of a civil matter dependent for its resolution on expert opinions and reflect some travel for the purpose of conducting the various proceedings and mediation attempts in the Corner Brook area and St. John's.

#### REGARDING THE REASONABLENESS OF THE TERMS OF THE SETTLEMENT

35. THAT in this matter the parties negotiated the settlement herein on the basis of per capita damages.
36. THAT recent awards for similar class action claims for breaches by health authorities in Nova Scotia have indicated awards in the range of \$1,100 to up to \$8,000 per capita. In the decision of Hemeon and Magee v. South West Nova District Health Authority, the award was for \$1,000 per claimant. In Hemeon, the parties' respective experts each had a role in the resolution of that class proceeding. Hemeon involved facts that were very similar to this action. However, it is possible that the presence of Social Insurance Numbers in the information breached is a slightly aggravating factor in the aforementioned Nova Scotia Hemeon and Magee decision. The Defendant herein has posited that aggregate damages were not available except for nominal damages, and provided examples of data breach cases not involving personal medical information in support of its position, in which nominal damages were available in amounts between \$60 and \$250. For its part the Plaintiffs had considered uncertainty expressed in the Ontario Court of Appeal decision Hopkins v. Kay 2015 ONCA 112 in relation to the burden of proof establishing liability for the tort of intrusion upon seclusion as one of the factors encouraging settlement at a lower figure than as decided in Hemeon, supra.

Ref.: Hopkins v. Kay 2015 ONCA 112.

37. THAT discussion with other Class Counsel for similar actions indicated that other plaintiff's counsel viewed risks on liability question in this type of action to be a consideration, and our continuing legal education on this topic also indicated that many

privacy breaches were not being litigated. As such, we recommended a settlement to our representative plaintiffs lower than in Hemeon.

REGARDING THE APPOINTMENT OF BOB BUCKINGHAM LAW AS SETTLEMENT ADMINISTRATOR

38. THAT attached hereto as Exhibit "A" is a detailed Claims Administration Plan. The Plan outlines the steps Bob Buckingham Law will take to carry out its duties as Settlement Administrator. Also included is a breakdown of the cost of administering the settlement.
39. THAT our estimate of \$100 per Claimant to administer the plan brings the total cost of our settlement administration to \$88,700.00 (taxes included). I note this is significantly less than Trilogy's quote of \$126,678.00 (taxes included). Through this reduction, we will be able to provide Class Members with an additional \$35.00 each.
40. THAT our Claims Administration Plan includes providing updates to the Court and Defendant on our progress, and the release of the full \$88,700.00 will occur in stages to reflect the progress made in putting settlement funds in the hands of Class Members.
41. THAT after eighteen (18) months, if there are any funds remaining. They will be donated to the Western Hospital Foundation.
42. THAT I am confident we have sufficient personnel resources to carry out this task, which will be aided with a portal we have created to keep all information protected, confidentially organized and accessible.

**AFFIRMED AT** the City of  
St. John's, in the Province of  
Newfoundland and Labrador,  
this 11 day of June, 2024  
before me:



**LENORE CAHILL**  
A Commissioner for Oaths in and for  
the Province of Newfoundland and Labrador.  
My commission expires on December 31, 2027



Robert W. Buckingham

**LENORE CAHILL**  
A Commissioner for Oaths in and for  
the Province of Newfoundland and Labrador.  
My commission expires on December 31, 2027

This is Exhibit A of the affidavit of  
Robert Buckingham sworn before  
me this 11 day of June, 24  
L Cahill

Detailed Claims Administration Plan

EXHIBIT A

Database

1. Buckingham Law shall implement the notice provision and claims administration phases of the settlement by utilizing information from Western Regional Integrated Health Authority (hereafter "Western Health") database of claimant's contact information and forms previously submitted by claimants to Bob Buckingham Law and/or Brothers Law Office.
2. Buckingham Law will develop a portal to record all communications with class members throughout the notice provision and claim administration processes. The portal will be designed to allow Class Counsel and administrative assistant staff to record, update and monitor all contact with class members.
3. Western Regional Integrated Health Authority has now been incorporated into NL Health Services.

Website and Communications

4. Buckingham Law has a secured website that will be used to communicate information and to post relevant documents for ease of access by class members. On the firm's website there is a 'Recent News' page with a link to the "Western Health Class Action 2012". Under this link, the firm will post the following documents:
  - a. the Memorandum of Settlement;
  - b. the Settlement Approval Application and Affidavits,
  - c. Proposed Settlement Notice;
  - d. Frequently Asked Questions (F.A.Q.s) explaining the class action process and the proposed settlement,
  - e. Certification Decision;
  - f. Direct link to claim administrator's email address [claims@buckinghamlaw.ca](mailto:claims@buckinghamlaw.ca) for any settlement questions or concerns; and
  - g. Class Counsels' contact details.

5. Buckingham Law has a secure website, designated email address, designated phone line extension with answering system, and fax number which shall be maintained to the end of the claims administration period.
6. Buckingham Law has staff dedicated to sending the Notice of proposed settlement and to claim administration process, including but not limited to a part-time paralegal and two administrative assistants with decades of experience. These contact persons will be overseen by myself who will be available for consultations as the need may arise. I have been a member in good standing of the Newfoundland and Labrador since 1992.

Notice Plan – monitor undeliverable Notice by regular mail

7. Buckingham Law, as Administrator, shall prepare, maintain and update a database of Class Members to monitor who received the Notice of Proposed Settlement by regular mail and who did not, as the firm becomes aware of same from returned or undeliverable mail or through confirmation from Class Members who contact the firm.
8. Buckingham Law, as Administrator, will create, maintain and update a database to record all communication and contact with Class Members. Contact names, civic addresses, email addresses, phone numbers and notes on communications with class members will be compiled and available to counsel and the court, if requested.
9. The extra step of sending individual Notices of the Proposed Settlement to each class member by regular mail (in addition to a press release) will serve a dual purpose of firstly, reaching and notifying as many Class Members as possible; and secondly, it will proactively alert the firm to inaccurate addresses before the final closing letter and cheques are sent. If a Class Member's notice is returned undeliverable, this will allow staff to begin the process of locating the class members who have not received the Notice. Envelopes will include the firm's name and address to allow anyone who might receive the notice in error to return it to the firm. Staff will then use a variety of means to locate these Class Members including accessing forms containing contact information

that were previously submitted to both Plaintiffs' counsel, through social media platforms, follow up phone calls (if the number is available), phone numbers searches and posting notices in local newspapers and in community publications similar to as "Coffee Matters" in the west coast area.

#### Final Communications with Cheque Enclosed & Unclaimed Funds

10. Buckingham Law, as Administrator, will utilize the above methods to send, by regular mail, a closing letter with the final Order and the claimant's cheque enclosed.
11. Buckingham Law, as Administrator, will set aside advertising costs to publish a last notice for any claimants who have not received the settlement cheque to contact Buckingham Law and seek compensation. This notice will be published as a last step in attempt to locate those class members whose cheques are returned undeliverable.
12. Once the period to seek compensation expires any unclaimed funds will be deposited into a cy-pres account for later donation the Western Hospital Foundation. The Western Health Foundation has agreed to accept any unclaimed funds as a donation to its Foundation.

#### Distribution Protocol and Administration Guidelines

13. Buckingham Law will have a separate trust account set up specifically for the Claims Administration of the Western Health settlement funds. Trust cheques will accompany the final letter and Order to each claimant. The Administrator shall commence the distribution of funds after the final Court Order is issued and the funds are made available by the Defendant.
14. Class Members will have six months to deposit their cheques. If any cheques are returned to the Administrator as being undeliverable, the Administrator will make best efforts to locate those Class Members and re-send their individual payments.



### Claimants - Minors

15. Class Counsel have a plan in place for Class Members who are minors. That plan, if approved by the Court, would be for the Administrator to work with the Public Trustee to set up trusts for the minors who are entitled to settlement proceeds. The Public Trustee has confirmed that one application will be sufficient for all the minors. Western Health counsel advises there are approximately twenty (20) minors.
16. In order to facilitate this process with the Public Trustee, the Administrator will request an Order that Western Health provide the name of next-of-kin and the dates of birth for each minor claimant.
17. The Administrator will set aside funds to facilitate the trusts being set up by the Public Trustee. When settlement funds are transferred to the Public Trustee under a court order for minors, the Public Trustee applies 5% of the commission rate on the funds plus 5% of any interest/income earned by the trust held until the minor reaches age of minority. The Administrator will provide the Public Trustee with the 5% of the settlement for each of minor (5% of \$700 x 20 minors = \$35 each) upfront to administer their claims. This is to ensure that the only monies to be taken from the minor's settlement will be interest incurred at the time they reach the age of majority.

### Claimants – Deceased

18. The Administrator has a plan in place for any class members who die after the final Court Order is issued. That plan, if approved by the Court, is to make best efforts to contact the known next-of-kin of the deceased and give directions on how to proceed. The Administrator will provide a specific deadline of one year after the Order is issued for the next-of-kin to have the deceased's estate probated or administered. If the next-of-kin fails to do so in the specified time period the funds will be deposited into the cy-pres account for later donation to the Western Hospital Foundation.

### Interest on Trust Account

19. The Administrator will deposit any interest earned on the trust account into the cy-pres account when closing the bank account and reporting to the Court. Class counsel are of the view such interest will be minimal as settlement funds will be issued to class members within one month of the settlements funds being received. It is anticipated that the majority of class members will collect their funds.
20. Any undistributed funds will also be provided to the cy-pres recipient fifteen (15) months from the date of the final Court Order in this matter.

### The Estimated Cost of Administering the Settlement Funds

21. Buckingham Law, as Administrator, will incur additional expenses with respect to the management and distribution of the individual settlement payment to each Class Members.
22. Buckingham Law, as Administrator, estimates that a minimum of \$45,000.00 worth of time will be utilized by staff and lawyers at Buckingham Law in administering the settlement over fifteen (15) months. Time will be spent implementing the *Proposed Settlement Notice*, receiving communications from Class Members regarding their addresses, answering questions from Class Members, distributing the individual payments, following up with any undelivered individual payments or uncashed cheques, and reporting to the Court and Defendant, as required. This estimate is based on our review of the claims administrator's affidavit in *Hemeon* which had an estimate of \$50,000.00 for staff and lawyer time.
23. The estimated costs and expenses administering the settlement proceeds are as follows:
  - a. Website: graphically designed page with class action updates on the settlement and settlement approval process with the related documents- \$1,000.00 taxes included;
  - b. Set up Claims Administration Email: \$400.00 tax included;

- c. Online portal (professionally design, build, and pre-populate, mail notification, track settlement funds, manage all communications by Class Members- \$30,000.00 tax included;
  - d. Purchase of new cheques - \$600.00 taxes included;
  - e. Postage – \$2,000.00 tax included; and
  - f. Office Supplies, envelopes, labels, label makers, high quality bonded paper, signature stamp, etc. \$3,500 tax included.
24. The Administrator will utilize \$820.00 for the engagement of the Public Trustee, application to the court (\$120), and the cost of administration of claims of minors by the Public Trustee (\$35 dollars per minor x 20 minors = \$700.00).
25. The Administrator will utilize \$5,750.00 for advertising with VOCM and/or any local (western) community publications as a *last* resort to contacting any class members who have not cashed a settlement cheque sent to them.
25. In conclusion, Buckingham Law summarizes the estimated approximate costs and expenses associated with administering the settlement to the 887 eligible Class Members to be:

Website	\$ 1,000.00
Email Address	\$ 400.00
Online Portal	\$ 30,000.00
Cheques	\$ 600.00
Postage	\$ 2,000.00
Supplies	\$ 3,500.00
Public Trustee Application	\$ 120.00
Minors Administration Costs	\$ 700.00
Advertising reserve	\$ 5,750.00
Staff and Lawyer Fees	\$ 44,500.00
	\$ 88,700.00

HST component of the \$88,700.00 would \$11, 570.00 (approx.).

Buckingham Law states that the estimated \$100.00 per Class Member cost of administering the distribution is reasonable and fair in the circumstances.

### Structure on Administration Fee

26. Class Counsel propose the following schedule of advances to the Administrator of the Administration Fee to be:
1. That the Administration Fee of \$88,700.00 (taxes included) will be held *in Trust* by Bob Buckingham Law and advanced as follows:
    - a. First Advance of \$40,000.00 upon receipt of the funds (webpage, portal development, supplies and staff time).
  2. *Following the date on the Claimants' cheques:*
    - b. Second Advance of \$24,350.00 to be made three months after the date on the cheques and the Claims Administrator *report* to Court.
    - c. Third Advance of \$12,175.00 upon six months after the date on the cheques and the Claims Administrator *report* to Court on cheques cashed and the number of staled-dated cheques.
    - d. Final Advance, no later than fifteen (15) months after first distribution of cheques, the Claims Administrator's final cheque to the Western Health Foundation (if any) and a *final* report to Court.

### Conclusion

27. Any and all costs associated with the set up and distribution of the settlement funds in the claims administration process will be the responsibility of the court appointed Claims Administrator, Bob Buckingham Law. As Claims Administrator Buckingham Law will provide written reports to the Court at specific times of the settlement distribution and a final report no later than fifteen (15) months from the date of the Order, or as requested by this Honourable Court.

2012 04G 0180 CP  
2012 04G 0190 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
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**AFFIDAVIT OF ANDREW MAY**

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**SUMMARY OF CURRENT DOCUMENT**

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Court File Number(s):	2012 04G 0180 CP / 2012 04G 0190 CP
Date of Filing of Document:	June _____, 2024
Name of Filing Party or Person:	Andrew May, solicitor for the Plaintiffs
Application to which Document being filed relates:	Application for Settlement Approval
Statement of purpose in filing:	To support the approval of the settlement and in support Bob Buckingham Law's request to be appointed as Settlement Administrator
Court Sub-File Number, if any	n/a

---

AM

I, Andrew May, Barrister and Solicitor, make oath and give evidence as follows:

1. I am a lawyer employed by the law firm of Brothers Law Office, in Corner Brook, Newfoundland and Labrador. Along with Bob Buckingham Law Office, Brothers Law Office is Class Counsel for the Plaintiffs and Class Members in the within proceeding.
2. I have personal knowledge of the evidence sworn to in this affidavit except there otherwise stated to be based on information or belief.
3. I state, in this Affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source. I do verily believe the information from each source cited to be true.
4. I am providing this affidavit in support of the motion to approve the proposed settlement of this class proceeding, to support the appointment of Bob Buckingham Law as settlement administrator and for no other purpose.
5. On August 24th, 2012, Brothers & Burden Law Office filed a Statement of Claim alleging that the actions of Ms. Donna Colbourne, a financial clerk at the Western Regional Health Authority in Corner Brook, Newfoundland and Labrador constituted the tort of intrusion upon seclusion, for which the Defendant was vicariously liable.
6. Another Statement of Claim arising from the same privacy breach had been filed by Bob Buckingham Law Office in which Barbara Hynes was proposed as a representative Plaintiff. The actions were consolidated with a Consolidated Amended Statement of Claim filed on July 22nd, 2013.
7. The Statement of Claim further alleged negligence on the part of the Defendant, by not having in place management and operations procedures that would reasonably have prevented or detected the privacy breaches in a timely fashion.
8. The two Representative Plaintiffs, Ms. Barbara Hynes and Ms. Valerie Dyke, sought certification of a proposed class proceeding. Ms. Hynes and Ms. Dyke each swore affidavits in support of certification.

AM

## PROCEDURAL HISTORY

9. As stated in the Defendant's Pre-Trial Conference Brief the chronology is as follows:
  - a. A Statement of Claim in matter 2012 04G 0180 was issued on August 17th, 2012, and a Statement of Claim in matter 2012 04G 0190 was issued on August 24th, 2012;
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    - Pre judgment interest totaling \$111,069.14
    - Legal fees, payable to Class Counsel, in the amount of \$164,284.79, representing 25% of the global per-claimant amount inclusive of pre-judgment interest.





- An honorarium payable to each of the two Representative Plaintiffs in the amount of \$2,500.00 each.
- Administration fees, payable to the Claims administrator, in the total sum of \$88,700.00 (taxes included).
- Disbursements, payable to Class Counsel, in the amount of \$52,428.47.

23. THAT initially, Class counsel intended to use Trilogy Class Action Services (Trilogy) to administer the settlement. Trilogy prepared a quote to complete the task and the total cost was to be \$126,678.00. In an effort to increase Class Members' awards, Class Counsel advised they could administer the settlement themselves for less than \$126,678.00.
24. THAT the parties agreed that Bob Buckingham Law would administer the settlement at a reduced cost in order to provide each Class Member with a top up of \$35.00 to the general damages payment of \$610.00, plus prejudgment interest.
25. THAT as part of the settlement, the parties agreed that the Defendant would not be liable for the cost of Dr. Thomas Keenan's expert report. Dr. Keenan was retained by the Plaintiffs to provide expert evidence. However, the Court did not qualify him as an expert. The total cost of Dr. Keenan's services was \$32,770.97.
26. THAT the Plaintiffs propose that the cost of Dr. Keenan's expenses be shared equally among the Class Members. However, Class counsel shall cover a portion of Keenan's expenses in order to round each Class Member's total payment to an even \$700.00 per Class Member.
27. THAT as a result, each Class Member shall receive:

General Damages:	\$610.00
Prejudgment Interest:	\$125.22
Less portion of expert reports:	\$ 36.95
Plus round-up from Class Counsel:	\$ 1.73
<b>TOTAL:</b>	<b>\$700.00</b>

28. THAT in the event Class Members do not accept their settlement or cannot be located, after a period of fifteen (15) months, the settlement funds will be donated to the Western Regional Hospital Foundation.

#### REGARDING CLASS COUNSEL FEES AND DISBURSEMENTS

29. A review of billings in relation to work done on this file by Brothers & Associates Law Office indicates a total of 792 hours of work done on this file since 2012.
30. The lawyers involved initially included then senior counsel Scott Burden and associates Kelly Langthorne and Adam Joyce.
31. I have been involved as an associate lawyer since the inception of the action and since the departure of Scott Burden from the firm in 2013 have been the primary responsible lawyer on this file.
32. In November of 2023 I undertook a complete review of the work product and time expended to advance this proceeding and concluded that since 2012 the four lawyers involved in this proceeding at Brothers & Associates and its predecessor Brothers & Burden Law Office spent 792 hours on all aspects to this file. I feel that this estimate is conservative.

The breakdown between the lawyers is as follows:

Scott Burden – 62 hours  
Kelly Langthorne – 41 hours  
Adam Joyce – 77 hours  
Andrew May – 612 hours

33. At the time the bulk of the work was done Kelly Langthorne and Adam Joyce were junior associates with an hourly rate of between \$150 and \$200.
34. Scott Burden was a principal of the law firm and in 2013 had a \$300 ordinary billable rate.
35. My hourly rate at the onset of this proceeding was \$200 per hour. At this time as the Director of Brothers Law Office, my base rate is \$300 per hour.
36. Brothers Law Office incurred a total expense of \$28,010.49 in fees from Thomas Keenan, who ultimately was not qualified as an expert witness. At that time, we were exploring theories of liability relating to delays in installing the audit module and assessing whether

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keystrokes monitoring software was capable of being used in Meditech systems. We had been unable to secure services of Meditech Software experts at the time, despite considerable effort. Ultimately, we could not provide Keenan access to Meditech programming. As such our attempts to bring Keenan's computer language and software skills to bear was unsuccessful. I am informed and do believe that Bob Buckingham Law paid half of an invoice from Thomas Keenan in the amount of \$4,760.49. It is proposed that this disbursement of \$32,770.98 is to be carried by the Class. This will result in a per capita deduction from each class member of \$35.22.

37. In light of the procedural history of this file and the amount of legal work, expense, and risk involved in advancing this claim, the legal fees set out in the terms of settlement are unexceptional. The disbursements are consistent with the conduct of a civil matter dependent for its resolution on expert opinions and reflect some travel for the purpose of conducting the various proceedings and mediation attempts in the Corner Brook area and St. John's as the case was at during various proceedings.

#### REGARDING THE REASONABLENESS OF THE TERMS OF THE SETTLEMENT

38. In this matter the parties negotiated the settlement herein on the basis of per capita damages.
39. Recent awards for similar class action claims for breaches by health authorities in Nova Scotia have indicated awards in the range of \$1,100 to up to \$8,000 per capita. In the decision of Hemeon and Magee v. South West Nova District Health Authority, the award was for \$1,000 per claimant. In Hemeon, the parties' respective experts each had a role in the resolution of that class proceeding. Hemeon involved facts that were very similar to this action. However, it is possible that the presence of Social Insurance Numbers in the information breached is a slightly aggravating factor in the afore-mentioned Nova Scotia Hemeon and Magee decision. The Defendant herein has posited that aggregate damages were not available except for nominal damages, and provided examples of data breach cases not involving personal medical information in support of its position, in which nominal damages were available in amounts between \$60 and \$250. For its part the Plaintiffs had considered uncertainty expressed in the Ontario Court of Appeal decision Hopkins v. Kay 2015 ONCA 112 in relation to the burden of proof establishing liability for the tort of intrusion upon seclusion as one of the factors encouraging settlement at a lower figure than as stipulated in Hemeon, supra.

Ref.: Hopkins v. Kay 2015 ONCA 112.



40. Discussion with other Class Counsel for similar actions indicated that other plaintiff's counsel viewed risks on liability question in this type of action to be a consideration, and our continuing legal education on this topic also indicated that many privacy breaches were not being litigated. As such, we recommended a settlement to our representative plaintiffs lower than in Hemeon.

REGARDING THE APPOINTMENT OF BOB BUCKINGHAM LAW AS SETTLEMENT ADMINISTRATOR

41. THAT I have reviewed the affidavit evidence of Bob Buckingham and have had numerous discussions with him and members of his firm about their plan to carry out the distribution of the settlement funds.
42. THAT I am satisfied Bob Buckingham Law is capable to carry out its duties as Settlement Administrator effectively and in line with its Claims Administration Plan. I support Bob Buckingham Law's appointment as Settlement Administrator.

**AFFIRMED AT** the City of  
Corner Brook, in the Province of  
Newfoundland and Labrador,  
this 13<sup>th</sup> day of June, 2024  
before me:

Melissa Greene

Andrew May  
ANDREW MAY

MELISSA GREENE - "A Commissioner for Oaths in and for the Province of Newfoundland and Labrador. My commission expires on December 31, 2024."

2012 04G 0180 CP  
2012 04G 0190 CP  
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION

**BETWEEN:**

**BARBARA HYNES AND VALERIE DYKE                      PLAINTIFFS**

**AND:**

**WESTERN REGIONAL HEALTH AUTHORITY              DEFENDANT**

***BROUGHT UNDER THE CLASS ACTIONS ACT  
BEFORE THE HONOURABLE MR. JUSTICE PETER BROWNE***

**AFFIDAVIT OF BARBARA HYNES**

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**SUMMARY OF CURRENT DOCUMENT**

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Court File Number(s):	2012 04G 0180 CP / 2012 04G 0190 CP
Date of Filing of Document:	June ____, 2024
Name of Filing Party or Person:	Barbara Hynes
Application to which Document being filed relates:	Application for Settlement Approval
Statement of purpose in filing:	To support Bob Buckingham Law's request to be appointed as Settlement Administrator
Court Sub-File Number, if any	n/a

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I, Barbara Hynes, of the City of Corner Brook, in the Province of Newfoundland and Labrador, make oath and give evidence as follows:

1. THAT I am one of the Representative Plaintiffs in this action. As such, I have personal knowledge of the facts stated in this Affidavit, except where stated to be made on information and belief, in which case I disclose the source of my information and believe those facts to be true.

#### Background

2. THAT I reside in Corner Brook, Newfoundland and Labrador. I have long been a patient of the Defendant, the Western Regional Health Authority. At all material times to this action I was both a resident of Corner Brook and patient of the Defendant.
3. THAT in order to obtain medical care from the Defendant, I provided them with confidential, private, personal and health information. This information was in the Defendant's records respecting me. My health information records maintained by the Defendant contained private information concerning, but not limited to, my personal health, my employment, my health card number, information concerning family members, my next of kin and significant others in my life. At the time I provided this information to the Defendant, throughout the period I obtained medical services, I believed the Defendant would ensure that my personal and healthcare information would remain secure and confidential, that it will not be lost, disseminated, disclosed to unauthorized persons, nor would the Defendant allow unauthorized staff members to access my personal and healthcare information.
4. THAT on August 9, 2012 I received correspondence from the Defendant dated August 1, 2012 advising me my personal health information had been accessed without valid reason by one of the Defendant's employees. The Defendant's employee's name was not disclosed to me.
5. THAT in the August 1, 2012 letter from the Defendant I was advised a portion of my personal health information recently accessed without a valid reason by a Western Health employee may have included the following private, confidential, personal health related information: (i) demographic information including address, age and religion; (ii) the name of next of kin and emergency contact person; (iii) information about visits to Western health facilities, including the reasons for my visits; and (iv) a list of diagnostic or surgical procedures I may have undergone while a patient at Western Health.

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6. THAT I was very concerned about the actions of the Defendant's employee in accessing my personal health information without a valid reason.
7. THAT learning my personal information had been accessed by a Defendant's employee without valid reason caused me stress, concern, upset and anguish. To this date I do not know why my personal healthcare records were accessed by the Defendant's employee.

#### Retaining Counsel

8. THAT I retained Bob Buckingham Law to commence an action against the Defendant with respect to the unlawful access to my personal and health care information by the Defendant's employee. I provided instructions to Mr. Buckingham and he filed a proposed Class Action on August 17, 2012. Since that time, I have been in regular contact with Mr. Buckingham concerning this Class Action. This action has Court File Number 201204T0180.
9. THAT through Mr. Buckingham, I learned another Class Action was also filed in this matter. That was a Class Action by Ms. Valerie Dyke. The Court File number of Ms. Dyke's action is 201204T0190. I understand that Ms. Dyke was originally represented by Mr. Scott B. Burden, of Brothers and Burden, in Corner Brook.
10. THAT I am advised by Mr. Buckingham, and do verily believe, that carriage of the file representing Ms. Dyke was eventually taken over by Mr. Andrew May of the firm Brothers and Burden, now Brothers Law Office.
11. THAT after consultations with Mr. Buckingham and receiving professional legal advice from him, I instructed him to proceed with any action he considered appropriate to join or consolidate the two Class Actions in this matter, rather than have two opposing Class Actions proceed. To that end, upon my instructions, and I am advised Mr. Buckingham, and do verily believe, with the instructions of Ms. Dyke to Mr. Burden, that our respective lawyers filed a Consolidated Amended Statement of Claim with this Honourable Court on July 22, 2013. It is my understanding this essentially joined the two matters and permitted them to proceed together.
12. THAT I instructed Mr. Buckingham and his firm, associated with Brothers and Burden to pursue this proposed Class Action proceeding.

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## My work as a Representative Plaintiff

13. THAT as a Representative Plaintiff during this Class Action I performed the following work, which I felt was necessary to advance the interests of the class as a whole, (a) I became familiar with the issues to be decided by the Court; (b) I discussed and executed an agreement regarding legal fees and disbursements; (c) I prepared an Affidavit for Certification; (d) I prepared to be cross-examined on my Affidavit by the Defendant; (e) I met with Mr. Buckingham to prepare my cross-examination. (f) I was cross-examined on my affidavit; (g) I assisted in the preparation of a List of Documents and the documentary discovery phase of the lawsuit; (h) throughout the whole period of time of this Class Action I had general and strategy discussions with Mr. Buckingham; (i) I expressed my opinion to him on how the matter was proceeding throughout, especially as it encountered various delays; (j) I expressed my opinion to Class Counsel (Mr. Buckingham and Mr. May) on the proposed Settlement Agreement, which came about in September 2022; (k) I assisted in the preparation and execution of Affidavits regarding the Settlement Approval; and (l) I continue to be active in following this matter since the September 2022 proposed Settlement Agreement was reached by discussing the file with Mr. Buckingham, urging him to move it to conclusion, receiving his reporting memos and providing my opinions, suggestions and views on negotiation progress.
14. THAT as a Representative Plaintiff, my name has been noted on the Statement of Claim and Consolidated Amended Statement of Claim, and I had been associated in the public and in media as being a Representative Plaintiff.
15. THAT I have been apprised of the settlement negotiations leading to the proposed settlement with the Defendant, and the significant features of the Settlement Agreement. The Proposed Settlement Terms are essentially set out below.

## The Proposed Settlement

16. Pursuant to the Memorandum of Settlement executed on June 4<sup>th</sup>, 2024, the settlement proposed is as follows:
  - The Defendants shall pay to the Plaintiffs a global sum of \$962,552.40.
  - The settlement funds are comprised of:
    - A per claimant amount of \$610 in general damages
    - Pre judgment interest totaling \$111,069.14
    - Legal fees, payable to Class Counsel, in the amount of \$164,284.79, representing 25% of the global per-claimant amount inclusive of pre-judgment interest.

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- An honorarium payable to each of the two Representative Plaintiffs in the amount of \$2,500.00 each.
- Administration fees, payable to the Claims administrator, in the total sum of \$88,700.0
- Disbursements, payable to Class Counsel, in the amount of \$52,428.47

17. THAT initially, Class counsel intended to use Trilogy Class Action Services (Trilogy) to administer the settlement. Trilogy prepared a quote to complete the task and the total cost was to be \$126,678.00. In an effort to increase Class Members' awards, Class Counsel advised they could administer the settlement themselves for less than \$126,678.00.

18. THAT the parties agreed that Bob Buckingham Law would administer the settlement at a reduced cost in order to provide each Class Member with a top up of \$35.00 to the general damages payment of \$610.00, plus prejudgment interest.

19. THAT as part of the settlement, the parties agreed that the Defendant would not be liable for the cost of Dr. Thomas Keenan's expert report. Dr. Keenan was retained by the Plaintiffs to provide expert evidence. However, the Court did not qualify him as an expert. The total cost of Dr. Keenan's services was \$32,770.97.

20. THAT the Plaintiffs propose that the cost of Dr. Keenan's expenses be shared equally as the Class Members. However, Class counsel shall cover a portion of Keenan's expenses in order to round each Class Member's total payment to an even \$700.00 per Class Member.

21. THAT as a result, each Class Member shall receive:

General Damagés:	\$610.00
Prejudgment Interest:	\$125.22
Less portion of expert reports:	\$ 36.95
Plus round-up from Class Counsel:	\$ 1.73
<b>TOTAL:</b>	<b>\$700.00</b>

22. THAT in the event Class Members do not accept their settlement or cannot be located, after a period of fifteen (15) months, the remaining settlement funds will be donated to the Western Regional Hospital Foundation.

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23. THAT in the event Class Members do not deposit their settlement cheque or cannot be located, after a period of fifteen (15) months, the undistributed settlement funds will be donated to the Western Regional Hospital Foundation.

The Settlement is Fair and Reasonable

24. THAT I was advised by Mr. Buckingham of recent awards for similar class actions for breaches of privacy by health authorities. In particular, I was advised of the case of *Hemeon and McGee v. Southwest Nova District Health Authority* in Nova Scotia. In that case, the Plaintiffs were awarded \$1,000.00 each.
25. THAT I am aware that the settlement in this case was based on negotiations between the parties which resulted in this compromised resolution. I understand that there was no absolute certainty of success in the class action.
26. THAT I am advised by Mr. Buckingham, and do verily believe, that the Defendant has informed the Class Counsel, there are 887 members of the class.
27. THAT I am advised by Mr. Buckingham, and do verily believe, that in Class Action settlements not everyone will apply for compensation, but that they expect there will be high number of people applying for the compensation in this action. I base my opinion on there being a high number of people applying on the information provided by the lawyers, and also the fact that four hundred (400) people have registered on class counsels' databases in this matter.
28. THAT it has been some twelve and a half (12.5) years since the Defendant discovered my records, and the records of the other class members, were accessed without valid authority. To date, there has been no information, to my knowledge, that information has been used for any other unlawful purpose by the Defendant's employee who wrongfully accessed my files. I am aware from the press that the Defendant's employee faced criminal charges for unlawfully accessing my information and the information of other individuals in the class and received a criminal conviction as a result of her actions.
29. THAT I have received and reviewed the decision of Judge Kymil Howe who sentenced the Defendant's employee for her unlawful accessing patients' personal healthcare information.
30. THAT I am aware that the first expert (T. Kennan) identified by Class Counsel was not qualified as an expert by the Court. I understand that Mr. May and Mr. Buckingham had considerable difficulty in identifying an appropriate expert in this action. I am aware of

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the issues involved to retain Mr. Keenan and the work Mr. Keenan undertook to prepare his opinion including his attendance in person in court for the qualification hearing. I am satisfied that \$32,770.98 disbursement in relation to exploring this first expert's utility and capacity to provide an expert opinion should be deducted from the settlement, since they are not covered by the Defendant's contribution to costs. I understand if this disbursement is carried by the class it will reduce the amount payable to each class member by approximately \$35.22.

31. THAT I am advised by Mr. Buckingham, and do verily believe, that they retained a second expert (Mr. Klumpenhower) to provide them with an opinion on the Defendant's action in this matter, that the expert report was obtained and the report was provided to the Defendant. The second Plaintiff's expert report concluded the Defendant was negligent in failing to protect the Class members' privacy.
32. THAT I am also aware that the Defendant retained an expert in this matter. I am advised by Mr. Buckingham, and do verily believe, that the Defendant's expert provided an opinion that the actions of the Defendant were appropriate for the time and the circumstance in protecting the personal healthcare information collected by the Defendant.
33. THAT I believe the fact that there are conflicting expert reports is an important factor in this matter being settled by negotiation and agreement rather than through litigation.
34. THAT I also believe that the settlement is fair and reasonable because if the matter had not settled, the matter could possibly have continued for many years, regardless of who won at the trial level, through appeals to higher Courts.
35. THAT I believe that the legal counsel in this matter, being Mr. Buckingham and Mr. May, worked hard to address the needs on the class members by working to negotiate an agreement that allows for Class members to be compensated for the unlawful access to their files by the Defendant's employee.
36. THAT I believe that Class counsel, Mr. Buckingham and Mr. May, and the Defendant have come to a fair and reasonable resolution to the action.
37. THAT the terms of my fee agreement with Representative Counsel did account for legal fees. Furthermore, the proposed settlement, with legal fees, does not exceed the "maximum settlement amount" set by the Defendant, and the per Class Member quantum has been maximized to the extent allowed by the terms of settlement. As such, I believe legal fees are fair and appropriate.

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38. THAT I believe that the Settlement Agreement is fair and reasonable for the class, particularly given the risks and delays of continued litigation.

Concluding Remarks

39. THAT I have had the opportunity to review the Application for Settlement Agreement. I have had the Application explained to me in laypersons terms. I believe I understand the Application and the terms of the settlement.

40. THAT I make this Affidavit in support of the Settlement Agreement Application to resolve this matter.

**AFFIRMED AT** the City of  
Corner Brook, in the Province of  
Newfoundland and Labrador,  
this 13<sup>th</sup> day of June, 2024  
before me:

  
\_\_\_\_\_  
(Andrew W. May)

  
\_\_\_\_\_  
BARBARA HYNES

2012 04G 0180 CP  
2012 04G 0190 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION

**BETWEEN:**  
**BARBARA HYNES AND VALERIE DYKE** **PLAINTIFFS**

**AND:**  
**WESTERN REGIONAL HEALTH AUTHORITY** **DEFENDANT**

***BROUGHT UNDER THE CLASS ACTIONS ACT***  
***BEFORE THE HONOURABLE MR. JUSTICE PETER BROWNE***

**AFFIDAVIT OF VALERIE DYKE**

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**SUMMARY OF CURRENT DOCUMENT**

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Court File Number(s):	2012 04G 0180 CP / 2012 04G 0190 CP
Date of Filing of Document:	June ____, 2024
Name of Filing Party or Person:	Valerie Dyke, Plaintiff
Application to which Document being filed relates:	Application for Settlement Approval
Statement of purpose in filing:	To support the approval of the settlement and to support Bob Buckingham Law's request to be appointed as Settlement Administrator
Court Sub-File Number, if any	n/a

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I, Valerie Dyke, of the City of Corner Brook, in the Province of Newfoundland and Labrador, make oath and give evidence as follows:

1. THAT I am one of the Representative Plaintiffs in this action. As such, I have personal knowledge of the facts stated in this Affidavit, except where stated to be made on information and belief, in which case I disclose the source of my information and believe those facts to be true.

#### Background

2. THAT I reside in Corner Brook, Newfoundland and Labrador. I have long been a patient of the Defendant, the Western Regional Health Authority. At all material times to this action I was both a resident of Corner Brook and patient of the Defendant.
3. THAT in order to obtain medical care from the Defendant, I provided them with confidential, private, personal and health information. This information was in the Defendant's records respecting me. My health information records maintained by the Defendant contained private information concerning, but not limited to my personal health, my employment, my health card number, information concerning my family members, my next of kin and significant others in my life. At the time I provided this information to the Defendant, and throughout the period of time I obtained medical services from the Defendant, I believed the Defendant would ensure that my personal and healthcare information would remain secure and confidential, that it will not be lost, disseminated, disclosed to unauthorized persons, nor would the Defendant allow unauthorized staff members to access my personal and healthcare information.
4. THAT on August 9, 2012 I received correspondence from the Defendant, dated August 1, 2012, advising me my personal health information had been accessed without valid reason by one of the Defendant's employees. The Defendant's employee's name was not disclosed to me.
5. THAT in the August 1, 2012 letter from the Defendant I was advised a portion of my personal health information, recently accessed without a valid reason by a Western Health employee may have included the following private, confidential, personal health related information: (i) demographic information including address, age and religion; (ii) the name of next of kin and emergency contact person; (iii) information about visits to Western health facilities, including the visit the reasons for my visits; and (iv) a list of diagnostic or surgical procedures I may have undergone while a patient at Western Health.
6. THAT I was very concerned about the actions of the Defendant's employee in accessing my personal health information without a valid reason.

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7. THAT learning my personal information had been accessed by a Defendant's employee without valid reason caused me stress, concern, upset and anguish. That I was informed by an employee of the Defendant that this employee, Donna Colbourne, had accessed my personal medical information on several occasions. To this date I do not know why my personal healthcare records were shared with others by the Defendant's employee.

#### Retaining Counsel

8. THAT I retained Scott Burden of Brothers and Burden Law Office to commence an action against the Defendant with respect to the unlawful access to my personal and health care information by the Defendant's employee. I provided instructions to Mr. Burden and he filed a proposed Class Action on August 17, 2012. The Court File number of Ms. Dyke's action is 201204T0190. Since that time, I have been in regular contact initially with Mr. Burden, but primarily with Andrew May when Mr. Burden left the firm, which then became known as Brothers and Associates Law Office.
9. THAT through Mr. Burden, I learned another Class Action was also filed in this matter. That was a Class Action by Ms. Barbara Hynes. I understand Ms. Hynes was originally represented by Mr. Bob Buckingham, of Bob Buckingham Law Office, in St. John's, NL.
10. THAT after consultations with Mr. Burden and receiving professional legal advice from him, I instructed him to proceed with any action he considered appropriate to join or consolidate the two Class Actions in this matter, rather than have two opposing Class Actions proceed. To that end, upon my instructions, and I am advised Mr. Burden, and do verily believe, with the instructions of Ms. Hynes to Mr. Buckingham, that our respective lawyers filed a Consolidated Amended Statement of Claim with this Honourable Court on July 31, 2013. It is my understanding this action essentially joined the two matters and permitted them to proceed together.
11. THAT I instructed Mr. Burden and his firm, associated with Bob Buckingham Law Office, to pursue this proposed Class Action proceeding.

#### My work as a Representative Plaintiff

12. THAT as a Representative Plaintiff during this Class Action I performed the following work, which I felt was necessary to advance the interests of the class as a whole, (a) I became familiar with the issues to be decided by the Court; (b) I discussed and executed an agreement regarding legal fees and disbursements; (c) I prepared an Affidavit for Certification; (d) I prepared to be cross-examined on my Affidavit by the Defendant; (e) I met with Mr. May to prepare my cross-examination. (f) I was cross-examined on my affidavit; (g) I assisted in the preparation of a List of Documents and the documentary discovery phase of the lawsuit; (h) throughout the whole period of time of this Class Action I had general and strategy discussions primarily with Mr. May; (i) I expressed my opinion to him on how the matter was proceeding throughout, especially as it encountered various delays; (j) I expressed my opinion to Class Counsel (Mr. Buckingham and Mr. May) on the proposed Settlement Agreement, which came about in

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September 2022; (k) I assisted in the preparation and execution of Affidavits regarding the Settlement Approval; and (l) I continue to be active in following this matter through to conclusion.

13. THAT as a Representative Plaintiff, my name has been noted on the Statement of Claim and Consolidated Amended Statement of Claim, and I had been associated in the public and in media as being a Representative Plaintiff. I have had contact and communication with dozens of class members and have been able to learn about how this privacy breach at the Defendant impacted the lives and well-being of various class members.
14. THAT I have been apprised of the settlement negotiations leading to the proposed settlement with the Defendant, and the significant features of the Settlement Agreement. The Proposed Settlement Terms are essentially set out below.

#### The Proposed Settlement

15. Pursuant to the Memorandum of Settlement executed on June 4<sup>th</sup>, 2024, the settlement proposed is as follows:
  - The Defendants shall pay to the Plaintiffs a global sum of \$962,552.40.
  - The settlement funds are comprised of:
    - A per claimant amount of \$610 in general damages
    - Pre judgment interest totaling \$111,069.14
    - Legal fees, payable to Class Counsel, in the amount of \$164,284.79, representing 25% of the global per-claimant amount inclusive of pre-judgment interest.
    - An honorarium payable to each of the two Representative Plaintiffs in the amount of \$2,500.00 each.
    - Administration fees, payable to the Claims administrator, in the total sum of \$88,700.0
    - Disbursements, payable to Class Counsel, in the amount of \$52,428.47
16. THAT initially, Class counsel intended to use Trilogy Class Action Services (Trilogy) to administer the settlement. Trilogy prepared a quote to complete the task and the total cost was to be \$126,678.00. In an effort to increase Class Members' awards, Class Counsel advised they could administer the settlement themselves for less than \$126,678.00.
17. THAT the parties agreed that Bob Buckingham Law would administer the settlement at a reduced cost in order to provide each Class Member with a top up of \$35.00 to the general damages payment of \$610.00, plus prejudgment interest.

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18. THAT as part of the settlement, the parties agreed that the Defendant would not be liable for the cost of Dr. Thomas Keenan's expert report. Dr. Keenan was retained by the Plaintiffs to provide expert evidence; However, the Court did not qualify him as an expert. The total cost of Dr. Keenan's services was \$32,770.97.
19. THAT the Plaintiffs propose that the cost of Dr. Keenan's expenses be shared equally by the Class Members. However, Class counsel shall cover a portion of Keenan's expenses in order to round each Class Member's total payment to an even \$700.00 per Class Member.
20. THAT as a result, each Class Member shall receive:

General Damages:	\$610.00
Prejudgment Interest:	\$125.22
Less portion of expert reports:	\$ 36.95
Plus round-up from Class Counsel:	\$ 1.73
<b>TOTAL:</b>	<b>\$700.00</b>

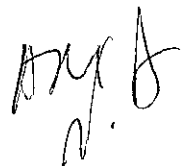
21. THAT in the event Class Members do not accept their settlement or cannot be located, after a period of fifteen (15) months, the remaining settlement funds will be donated to the Western Regional Hospital Foundation.
22. THAT in the event Class Members do not deposit their settlement cheque or cannot be located, after a period of fifteen (15) months, the undistributed settlement funds will be donated to the Western Regional Hospital Foundation.

The Settlement is Fair and Reasonable

23. THAT I was advised by Mr. May of recent awards for similar class actions for breaches of privacy by health authorities. In particular, I was advised of the case of *Hemeon and McGee v. Southwest Nova District Health Authority* in Nova Scotia. In that case, the Plaintiffs were awarded \$1,000.00 each.
24. THAT I am aware that the settlement in this case was based on negotiations between the parties which resulted in this compromised resolution. I understand that there was no absolute certainty of success in the class action.



25. THAT I am advised by Mr. May, and do verily believe, that the Defendant has informed the Class Counsel, there are 887 members of the class.
26. THAT I am advised by Mr. May, and do verily believe, that in Class Action settlements not everyone will apply for compensation, and but that they expect there will be high number of people applying for the compensation. I base my opinion on there being a high number of people applying on the information provided by the lawyers, and also the fact that four hundred (400) people have registered on class counsels' databases in this matter.
27. THAT it has been some twelve and a half (12.5) years since the Defendant discovered my records, and the records of the other class members, were accessed without valid authority. To date, there has been no information, to my knowledge, that information has been used for any other unlawful purpose by the Defendant's employee who wrongfully accessed my files. I am aware from the press that the Defendant's employee faced criminal charges for unlawfully accessing my information and the information of other individuals in the class and received a criminal conviction as a result of her actions.
28. THAT I have received and reviewed the decision of Judge Kymil Howe who sentenced the Defendant's employee for her unlawful accessing patients' personal healthcare information.
29. THAT I am aware that the first expert (T. Kennan) identified by Class Counsel was not qualified as an expert by the Court. I understand that Mr. May and Mr. Buckingham had considerable difficulty in identifying an appropriate expert in this action. I am aware of the issues involved to retain Mr. Keenan and the work Mr. Keenan undertook to prepare his opinion including his attendance in person in court for the qualification hearing. I am satisfied that \$32,770.98 disbursement in relation to exploring this first expert's utility and capacity to provide an expert opinion should be deducted from the settlement, since they are not covered by the Defendant's contribution to costs. I understand if this disbursement is carried by the class it will reduce the amount payable to each class member by approximately \$35.22.
30. THAT I am advised by Mr. Buckingham, and do verily believe, that they retained a second expert (Mr. Klumpenhower) to provide them with an opinion on the Defendant's action in this matter, that the expert report was obtained and the report was provided to the Defendant. The second Plaintiff's expert report concluded the Defendant was negligent in failing to protect the Class members' privacy.

A handwritten signature in black ink, appearing to be 'M. J. B.', located in the bottom right corner of the page.

31. THAT I am also aware that the Defendant retained an expert in this matter. I am advised by Mr. Buckingham, and do verily believe, that the Defendant's expert provided an opinion that the actions of the Defendant were appropriate for the time and the circumstance in protecting the personal healthcare information collected by the Defendant.
32. THAT I believe the fact that there are conflicting expert reports is an important factor in this matter being settled by negotiation and agreement rather than through litigation.
33. THAT I also believe that the settlement is fair and reasonable because if the matter had not settled, the matter could possibly have continued for many years, regardless of who won at the trial level, through appeals to higher Courts.
34. THAT I believe that the legal counsel in this matter, being Mr. Buckingham and Mr. May, worked hard to address the needs on the class members by working to negotiate an agreement that allows for Class members to be compensated for the unlawful access to their files by the Defendant's employee.
35. THAT I believe that Class counsel, Mr. Buckingham and Mr. May, and the Defendant have come to a fair and reasonable resolution to the action.
36. THAT the terms of my fee agreement with Representative Counsel did account for legal fees. That I initially understood the contingency fee to would be 35% and agreed to proceed on this basis. Furthermore, the proposed settlement, with legal fees does not exceed the "maximum settlement amount" set by the Defendant, and the per Class Member quantum has been maximized to the extent allowed by the terms of settlement. As such, I believe the legal fees are fair and appropriate.
37. THAT I believe that the Settlement Agreement is fair and reasonable for the class, particularly given the risks and delays of continued litigation.

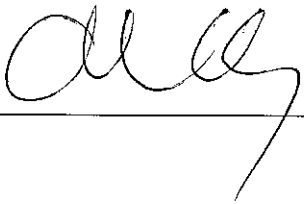
#### Concluding Remarks

38. THAT I have had the opportunity to review the Application for Settlement Agreement. I have had the Application explained to me in laypersons terms. I believe I understand the Application and the terms of the settlement.



39. THAT I make this Affidavit in support of the Settlement Agreement Application to resolve this matter.

**AFFIRMED AT** the City of  
Corner Brook, in the Province of  
Newfoundland and Labrador,  
this 13<sup>th</sup> day of June, 2024  
before me:



A handwritten signature in cursive script, appearing to be 'Dyke', written over a horizontal line.



A handwritten signature in cursive script, reading 'Valerie Dyke', written over a horizontal line.

VALERIE DYKE