litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

93 Moving to the remaining factors, although there have been no examinations for discovery, the extensive proceedings before the Krever Commission serve a similar purpose. The settlement is supported by the recommendation of experienced counsel as well as many of the intervenors. There is no suggestion of bad faith or collusion tainting the settlement. The support of the intervenors, particularly the Canadian Hemophilia Society which made submissions regarding the meetings held with class members, is indicative of communication between class counsel and the class members. Although, there were some objectors who raised concerns about the degree of communication with the Transfused Class members, these complaints were not strenuously pursued. Perhaps the most compelling evidence of the adequacy of the communications with the class members regarding the settlement is the relatively low number of objections presented to the court considering the size of the classes. Finally, counsel for all parties made submissions, which I accept, regarding the rigourous negotiations that resulted in the final settlement.

94 In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

95 The next step in the analysis is to determine whether the monies available are allocated in such a way as to provide for a fair and reasonable distribution among the class members. In my view, as the settlement agreement is presently constituted, they are not. My concern lies with the provision dealing with opt out claimants. Under the agreement, if opt out claimants are successful in individual litigation, any award such a claimant receives will be satisfied out of the settlement Fund. While this has the potential of depleting the Fund to the detriment of the class members, thus rendering the settlement uncertain, the far greater concern is the risk of inequity that this creates in the settlement distribution. The Manual for Complex Litigation states at 239 that whether "claimants who are not members of the class are treated significantly differently" than members of the class is a factor that may "be taken into account in the determination of the settlement's fairness, adequacy and reasonableness ...".

96 In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the CPA provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the CPA per se. See, for example, the reasons of Brenner J. in Sawatzky v. Societe Chirurgiale Instrumentarium Inc. *[1999] B.C.J. No. 1814* (S.C.), adopted by this court in Bisignano v. La Corporation Instrumentarium Inc. (September 1, 1999, Court File No. 22404/96, unreported.)

97 However, given that the settlement must be "fair, reasonable and in the best interests of the class", the court cannot sanction a provision which gives opt out claimants the potential for preferential treatment in respect of access to the Fund. The opt out provision as presently written has this potential effect where an opt out claimant either receives an award or settlement in excess of the benefits that he or she would have received had they not opted out and which must be satisfied out of the Fund. Alternatively, the preferential treatment could also occur where the opt out claimant receives an award similar to their entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement.

98 In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

99 The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

100 In the instant case, fairness requires a modification to the opt out claimant provision of the settlement. The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund had he or she remained in the class. This must of necessity include the time phasing factor. Such a provision ensures fairness in that there is no prospect of preferential distribution from the Fund, nor will the class suffer any detrimental effect as a result of the outcome of the individual litigation. The change also provides a complete answer to the complaint that the current opt out provision renders the settlement uncertain. Similarly, the modification renders the provision for defence costs to be paid out of the Fund unnecessary and thus it must be deleted.

101 Accordingly, the opt out provision of the settlement would not bean impediment to court approval with the modifications set out above.

102 In my view, the remainder of distribution scheme is fair and reasonable with this alteration to the opt out provision. It is beyond dispute that the compensation at any level will not be perfect, nor will it be tailored to individual cases but perfection is not the standard to be applied. The benefit levels are fair. More pointedly, fairness permeates the settlement structure in that each and every class member is provided an opportunity to make subsequent claims if his or her condition deteriorates. An added advantage is that there is a pre-determined, objective qualifying scheme so that class members will be able to readily assess their eligibility for additional benefits. Thus, while a claimant may not be perfectly compensated at any particular level, the edge to be gained by a scheme which terminates the litigation while avoiding the pitfalls of an imperfect, one-time-only lump sum settlement is compelling.

103 In any, event, the settlement structure also provides a reasonable basis for the distribution of the funds available. Class counsel described the distribution method as a "need not greed" system, where compensation is meant, within limits, to parallel the extent of the damages. There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

104 Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory, benefits assigned to claimants at different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

> At the request of the Federal government of Canada, provincial governments, and Hepatitis C claimants, i.e. individuals infected with hepatitis C virus during the period of 1986 to 1990, an impartial group, the Canadian Association for the Study of the Liver (CASL) was asked to construct a natural history model of Hepatitis C. The intent of this effort was to generate a model that would be used by all parties, as guide to disbursing funds set aside to compensate patients infected with hepatitis C virus through blood transfusion.

105 Of necessity, the settlement cannot, within each broad category, deal with individual differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

106 In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

107 I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $334,173,000. Admittedly, Eckler currently projects a deficit of $58,533,000 if the holdbacks are released.

108 However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity, including the following, which is stated in section 12.2:

> A considerable number of assumptions have been made in order to calculate the liabilities in this report. Where we have made the assumptions, we used our best efforts based on our understanding of the plan benefits; in general, where we have made simplifying assumptions or approximations, we have tried to err on the conservative side, i.e. increasing costs and liabilities. In many instances we have relied on counsel for the assumptions and understand that they, have used their best efforts in making these. Nevertheless, the medical outcomes are very unclear - e.g. the CASL report indicates very wide ranges in its confidence intervals for the various probabilities it developed. There is substantial room for variation in the results. The differences will emerge in the ensuing years as more experience is obtained on the actual cohort size and characteristics of the infected claimants. These differences and the related actuarial assumptions will be re-examined at each periodic assessment of the Fund.

109 Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. For example. the report prepared by Dr. Remis, dated July 6, 1999, states at p. 642:

> There are important limitations to the analyses presented here and, in particular, with the precision of the estimates of the number of HCV-infected recipients who are likely to qualify for benefits under the Class Action Settlement ...
>
> The proportion of transfusion recipients who will ultimately be diagnosed is particularly important in this regard and has substantial impact on the final estimate. We used an estimate of 70% as the best case estimate for this proportion based on the BC experience but the actual proportion could be substantially different from this, depending on the type, extent and success of targeted notification activities that will be undertaken, especially, in Ontario and Quebec. This could alter the ultimate number who eventually qualify for benefits by as much as 1,500 in either direction.

110 The report of the CASL study states at. 22:

> Our attempt to project the natural history of the 1986-1990 post transfusion HCV infected cohort has limitations. Perhaps foremost among these is our lack of understanding of the long-term prognosis of the disease. For periods beyond 25 years, projections remain particularly uncertain. The wide confidence intervals surrounding long-term projections highlight this uncertainty.
>
> Other key, limitations are lack of applicability of these projections to children and special groups.

111 The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on the sufficiency of the Fund.

Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

112 Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, Nantais v. Telectronics Proprietary (Canada) Ltd. *(1995), 25 O.R. (3d) 331* (Gen. Div.), leave to appeal dismissed *(1995), 129 D.L.R. (4th) 110* (Ont. Div. Ct.), to support a conclusion that the Fund is sufficient. In Nantais, all of the class members were known and accordingly received actual notice of the settlement. Seventy-two percent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

113 Although I cannot accept the Nantais experience as applicable on this particular point, the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has recognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically, revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

114 Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000.000 considered in the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus, in this respect, the settlement is reasonable.

115 I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the defendants. The Society contends that this provision simpliciter is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels per se. Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be used to augment the benefits for the class members.

116 The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

117 It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

118 The plan also provides that after the release of the holdbacks, the administrator may make an application to raise the $75,000 annual cap on income replacement if the Fund has sufficient assets to do so. It is only after these two areas of concern have been fully addressed that a surplus could be deemed to exist.

119 The clause in issue does not, according to the interpretation given to the court by class counsel, permit the withdrawal by the defendants of any actuarial surplus that may be identified in the ongoing administration of the Fund. Rather, they state that it is intended that the remainder of the Fund, if any, revert to the defendants only after the Plans have been fully administered in the year 2080.

120 Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefitting neither party during the entire 80 year term of the settlement.

121 Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

122 The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

123 This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the CPA which provides in s. 26(4) that surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members ...". On the other hand, in the proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

124 To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

125 There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

126 In ordinary circumstances, the court must either approve or reject a settlement in its entirety. As stated by Sharpe J. in Dabbs No. 1 at para. 10:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; Poulin v. Nadon, *[1950] O.R. 219* (C.A.) at 222-3.

127 These proceedings, emanating from the blood tragedy, are novel and unusually complex. The parties have adverted to this in the settlement agreement which contemplates the necessity for changes of a non-material nature in Clause 12.01:

> This Agreement will not be effective unless and until it is approved by the Court in each of the Class Actions, and if such approvals are not granted without any material differences therein, this Agreement will be thereupon terminated and none of the Parties will be liable to any other Parties hereunder. (Emphasis added.)

128 The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial. Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

129 I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.

130 The defendants have expressed their intention to be bound by the settlement if it receives court approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

131 The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by counsel for the defendants, the variation indicated is de minimis in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally de minimis. I am prepared to approve the settlement with these changes.

132 However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in Dabbs No. 1 at para. 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement ...

133 The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

133a I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to either file a written objection or appear in person at the hearings. [The Court did not number this paragraph. QL has assigned the number 133a.]

WINKLER J.

CITATION: Cygnus Electronics Corporation v. Panasonic Corporation, 2021 ONSC 2767
COURT FILE NO.: 3795/14 CP
DATE: 20210413

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Cygnus Electronics Corporation and Sean Allott, Plaintiffs

AND:

Panasonic Corporation; Panasonic Corporation of North America; Panasonic Canada Inc.; Sanyo Electric Co. Ltd.; NEC Tokin Corporation; NEC Tokin America Inc.; Kemet Corporation; Kemet Electronics Corporation; Nippon Chemi-Con Corporation; United Chemi-Con Corporation; Hitachi Chemical Co., Ltd.; Hitachi Chemical Company America, Ltd.; Hitachi Canada; Nichicon Corporation; Nichicon (America) Corporation; AVX Corporation; Rubycon Corporation; Rubycon America Inc.; Elna Co., Ltd.; Elna America Inc.; Matsuo Electric Co., Ltd.; Toshin Kogyo Co., Ltd; Samsung Electro-Mechanics; Samsung Electro-Mechanics America Inc.; Samsung Electronics Canada Inc.; Rohm Co., Ltd.; Rohm Semiconductor U.S.A., LLC.; Hitachi AIC Inc.; Hitachi Chemical Electronics Co., Ltd.; FPCap Electronics (Suzhou) Co., Ltd.; Fujitsu Ltd.; Fujitsu Canada Inc.; Holy Stone Enterprise Co., Ltd.; Vishay Polytech Co., Ltd. f/ka Holystone Polytech Co., Ltd; Milestone Global Technology, Inc. d/b/a Holystone International; and Holy Stone Holdings Co., Ltd., Defendants

BEFORE: Justice R. Raikes

COUNSEL: Jonathan Foreman, Sarah Bowden, Anne Legate-Wolfe, Counsel for the Plaintiffs
John Rook, Emrys Davis and Ian Thompson, Counsel for Panasonic and Sanyo Defendants
Eric Dufour, Pascale Cloutier and Brian Whitwham, Counsel for AVX Defendants
Kevin Wright, Todd Shikaze and Emily Snow, Counsel for the Elna DefendantsJ. Thomas Curry and Paul-Erik Veel, Counsel for the Fujistu DefendantsKatherine Kay, Eliot Kolers and Mark Walli, Counsel for the Hitachi Defendants Davit Akman, Moshe Grunfeld and Carolyn Wong, Counsel for the Kemet DefendantsAdam Goodman and Chloe Snider, Counsel for the Matsuo Defendants
Neil Campbell and William Wu, Counsel for the Nichicon DefendantsGordon Capern, Michael Fenrick and Daniel Rosenbluth, Counsel for the Nippon Chemi-Con and United Chemi-Con Defendants
Paul Martin and Vera Toppings, Counsel for the ROHM Defendants
Michael Osborne and Jessica Kuredjian, Counsel for the Rubycon Defendants
Robert Kwinter, Counsel for the Samsung Defendants
Donald Houston, Peter Leigh and Gillian Kerr, Counsel for Holystone Defendants
Kenji Kasahara, Counsel for Toshin Kogyo Defendant

HEARD: February 25, 2021

ENDORSEMENT

[1] This endorsement will deal with two motions in this matter. First, the plaintiffs move for court approval of a settlement with the Panasonic defendants pursuant to s. 29(2) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6, as am. ("*CPA*"). Second, plaintiffs' counsel seek approval of the retainer agreements with the representative plaintiffs and payment of class counsel fees and disbursements and applicable HST from the settlement proceeds.

[2] I will deal with the motions in the same order as above.

Settlement Approval Motion

[3] This is a price fixing conspiracy action commenced August 6, 2014. The plaintiffs allege that the defendants participated in an unlawful conspiracy to fix, maintain, increase or control the price and supply of aluminum and tantalum electrolytic capacitors.

[4] A capacitor is an electronic device that stores an electric charge. Electrolytic capacitors are a type of capacitor that uses an electrolyte (ionic conducting liquid) as one of its conducting plates to achieve greater capacitance. Electrolytic capacitors are used in a wide variety of devices.

[5] Parallel actions have been commenced in British Columbia and Quebec. Approval of the settlement with the Panasonic defendants is also sought in those parallel actions.

[6] The settlement agreement requires that all three courts approve the settlement for the settlement to be binding and effective. If any court declines approval, the orders made approving the settlement are rescinded and the actions proceed as if there never was any settlement.

[7] I certified this action for settlement approval purposes by order dated November 20, 2020.

[8] An earlier settlement with the NEC defendants was approved on December 6, 2018. The NEC defendants paid $2.9 million.

Class Definition

[9] The class definition is:

> All persons in Canada who purchased Electrolytic Capacitors or a product containing an Electrolytic Capacitor during the Electrolytic Class Period other than (1) all BC Settlement Class Members (2) all Quebec Settlement Class Members and (3) excluded persons.
>
> Electrolytic Capacitor means: aluminum and tantalum electrolytic capacitors; and

Electrolytic Class Period means: September 1, 1997 to December 31, 2014.

(The capitalized words in the class definition are defined terms in the settlement agreement.)

Procedural Status

[10] The certification motion was scheduled but stayed to await the outcome of an appeal to the Supreme Court of Canada on issues material to this litigation. That decision was released last year, then the pandemic intervened. The suspension of in-court hearings, and the gradual re-opening and transition to virtual hearings has taken time. Thus, the action has yet to gain needed traction.

[11] The settlement with the Panasonic defendants takes place relatively early in the procedural life of the action but, as is evident, it has taken too long to get this far. I will be communicating with counsel to fix a date for the certification motion to be heard this year, if possible.

[12] The settlement agreement reached with the Panasonic defendants resolves the claims against the Panasonic defendants in this action and a second price fixing conspiracy action dealing with film capacitors: *Allott v. AVX Corporation et al*, London Court File No. 1272/16CP. The settlement must be approved in both actions to be binding.

[13] Many of the defendants and counsel are common to both actions. For that reason, the settlement approval motions in the two actions were heard together. However, I am providing separate reasons in each action for the sake of keeping the files discrete.

[14] To that end, I will focus in this endorsement on the terms of the settlement and benefits to the class in this action since court approval requires that any settlement be fair, reasonable and in the best interests of the class defined above – the class in this action. In other words, the issue to be determined is whether the settlement reached meets the test for approval in this action without regard to the merits of the settlement in the other action involving a different class.

Settlement Agreement

[15] The settlement agreement is dated October 12, 2020. Pursuant to the settlement agreement,

1. Panasonic will pay $5.9 million inclusive of costs and prejudgment interest for the benefit of the class; and

2. Panasonic will provide cooperation as described below.

[16] The cooperation obligations include,

1. An attorney proffer;

2. Employee witness interviews;

3. Document production including deposition transcripts and productions from US litigation and US DOJ investigations;

4. Transaction data; and

5. Affidavit and testamentary evidence at trial, on certification, or on contested hearings in the action.

[17] The cooperation to be provided by the Panasonic defendants offers a window into the alleged conspiracy, how it worked, who was involved, when, and provides data that plaintiffs' counsel indicates will be particularly helpful in economic modelling to calculate damages. It adds to information obtained through cooperation provided by the NEC Tokin defendants in their settlement.

[18] All of the Panasonic information comes to the plaintiffs early in the litigation, before any examination for discovery. There are limits on the cooperation to be provided. These are spelled out in the settlement agreement and have been taken into account in my assessment of the settlement.

[19] The settlement agreement contains the usual clauses that protect the rights and interests of the non-settling defendants. The presence of such provisions ensures that the non-settling defendants will not oppose the settlement and, in fact, that is the case here. The remaining non-settling defendants take no position on the settlement approval motion, although counsel did foreshadow future issues that may arise related to some of the cooperation terms.

[20] In return for the monies paid and cooperation to be provided, the Panasonic defendants get certainty and closure. The action is dismissed as against them. They are released from any claims that could be advanced by members of the class. Plaintiffs' counsel will not pursue other litigation against them in respect of the alleged conspiracy.

The Negotiations

[21] Both sides are represented by very experienced counsel. The negotiations took place between counsel over several months. No mediator was involved. Numerous draft settlement terms were exchanged. This was not a "quick and easy" settlement. The negotiations were arm's length and adversarial.

Notice to Class and Objectors

[22] Notice was provided to class members regarding the terms of the settlement in accordance with my order dated November 20, 2020. The notice program included, *inter alia*, newspaper publication, a press release, a banner ad, notices to various organizations for whom the settlement would be relevant, and postings on social media sites dedicated to this action. Class members were advised of their right to oppose the approval of the settlement including how to do so.

[23] No objections were received in advance of the settlement approval hearing and no one attended the settlement approval hearing to voice any concern or opposition.

Legal Principles

[24] Class action settlements require court approval: *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 29.

[25] In a recent decision in another price fixing conspiracy action (*Allott v. Panasonic Corporation,* London Court File No. 1899/15CP), I summarized the principles applicable to a motion to approve a settlement in a class proceeding. Counsel in this action are substantially the same as those in that action. I will simply reiterate what I wrote in that decision.

[26] In *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, Strathy J. (as he then was) adopted the summary of principles applicable to a motion for settlement approval from the decision of the Cullity J. in *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527 at para. 7:

a) to approve a settlement, the court must find that it is fair, reasonable and in the best interests of the class;

b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

c) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval;

d) to reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

e) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give-and-take. Settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when considered in light of the risks and obligations associated with continued litigation;

f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or simply rubber stamp a proposed settlement; and

g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

[27] In assessing the reasonableness of a proposed settlement, the following factors are useful:

a) the presence of arm's length bargaining and the absence of collusion;

b) the proposed settlement terms and conditions;

c) the number of objectors and nature of objections;

d) the likelihood of recovery or likelihood of success;

e) the recommendations and *experience* of counsel;

f) the future expense and likely duration of litigation;

g) information conveying to the courts the dynamics of, and positions taken by the parties during the negotiations;

h) the recommendation of neutral parties, if any; and

i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

(See *Osmun*, at para. 32; *Nunes*, at paras. 6-7; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 45).

[28] The above factors are not to be applied in a mechanical way. It is not necessary that all factors be present in every case, nor that they be given equal weight: *Osmun*, at para. 33. These factors are a guide to aid in assessing whether the settlement is fair and reasonable and in the best interests of the class as a whole.

[29] In the absence of evidence to the contrary, the recommendation of experienced counsel should be given great weight. Counsel are well-positioned to assess the potential risks and rewards of the litigation: *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.), at para. 142.

[30] Early settlements that help both to finance and advance the prosecution of the action against non-settling defendants are productive for both class counsel and class members: *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953, at para. 33.

[31] Cooperation with the first settling defendant is particularly important and offers substantial benefit to the class: *Nutech Brands Inc. v. Air Canada*, 2009 CanLII 7095 (ON SC), at para. 37. In *Osmun*, at para. 36, Justice Strathy observed:

> [36] …In addition, securing the cooperation of Cadbury and ITWAL is an important and immeasurable non-pecuniary benefit. This would be significant in

> any case, but in a conspiracy action, where the allegation is that the defendants share a dark secret, obtaining the cooperation of two of the alleged conspirators to assist the plaintiff in pursuing the alleged co-conspirators is of inestimable value. ...

Analysis

[32] The settlement reached is the product of lengthy adversarial negotiations. There is no basis for concern regarding procedural fairness. This is no "sweetheart" deal.

[33] Plaintiffs' counsel estimates Panasonic's potential exposure in this action to be $11.83 million. That estimate is based on a number of assumptions concerning Panasonic's global sales, the amount of sales reaching Canada, the estimated overcharge, the pass-through rate, and the conversion from US dollars to Canadian. The assumptions used by counsel reflect information gleaned from counsel's investigations. I note that the estimate includes nothing for costs or pre-judgment interest.

[34] The Panasonic defendants do not agree with or accept the figures put forward by the plaintiffs. I would not expect them to do so. If the settlement is not approved and they are forced to continue to defend the action, they would not want the methodology or figures used to be thrown back at them later.

[35] The non-settling defendants likewise do not accept either the methodology used by plaintiffs' counsel or the figures provided. Again, that hardly comes as a surprise. If the settlement is approved, the non-settling defendants will not want to be bound by the plaintiffs' rough calculation of Panasonic's share of the damages if the action ultimately succeeds. Undoubtedly, there are additional reasons why they would not want to be taken to have accepted the approach used or figures provided. Nevertheless, they do not oppose the settlement approval motion because their procedural and substantive interests have been safeguarded by the provisions in the settlement agreement and draft order.

[36] I am well-aware that the numbers used by counsel are estimates. The plaintiffs do not have all the needed financial and transactional data for a comprehensive damage calculation and, depending on what, if anything, is certified, they may never have that information. This settlement is pre-certification and pre-discovery.

[37] Further, the estimated potential exposure ($11.83 million) does not take into consideration any litigation risk. The action might not be certified and, if so, each class member would be left to sue individually. Would any do so? Would such litigation be financially viable?

[38] Even if certified, the defendants including Panasonic may succeed in defending the action on its merits and/or the assumptions inherent in the estimate of the Panasonic defendants' potential exposure could prove to be significantly less. This litigation is no sure thing if such exists.

[39] There is, however, one certainty: if the settlement is not approved, the action will proceed with the Panasonic defendants as parties. It will take years to finish and the outcome is

unknown. Conspiracy actions are notoriously difficult to successfully prosecute. The defendants in this case, including the Panasonic defendants, are large, well-heeled parties with the means to make this litigation the equivalent of Napolean's march on Moscow.

[40] As indicated, counsel for the Panasonic defendants and the non-settling defendants do not accept the accuracy of or appropriateness of the plaintiffs' economic analysis. It would not likely pass muster if tendered as a damage assessment. It does, however, provide insight into plaintiffs' counsel's assessment of the risks of litigation and their perception of the range of potential recovery at this stage based on their investigations. Plaintiffs' counsel are experienced in this kind of litigation. They have approached the litigation and negotiations with diligence, and they recommend this settlement as one that is fair, reasonable and in the best interests of the class. That recommendation carries weight.

[41] I am satisfied that the economic analysis provided gives this court some basis on which to assess the fairness of the amount to be paid by the Panasonic defendants. In *Allott v. Panasonic*, plaintiff's counsel provided similar evidence as here to rationalize the fairness of the amount paid. In that decision, I wrote at para. 31:

> I cannot conclude on the evidence before me that the economic approach taken by plaintiff's counsel at this stage is flawed or deficient. It is one approach to estimating possible future recovery from these defendants. It takes into account the myriad of risks inherent in this litigation. It may not be an approach that would be used in a trial where damages are determined, but that does not mean that it fails to provide the court with some evidence on which to base its assessment of the fairness of the settlement. At a minimum, it provides insight into plaintiff's counsel's rationale for the dollar amount at which settlement was achieved.

That reasoning applies equally here.

[42] I am mindful that this settlement also provides advance information and ongoing cooperation to the plaintiffs to assist them in prosecuting this action as against the remaining non-settling defendants. While the Panasonic defendants are not the first settling defendants, the principle in *Osmun* applies; Panasonic's cooperation is "an important and immeasurable non-pecuniary benefit".

[43] The settlement provides the plaintiff class with $5.9 million plus cooperation benefits that likely will assist in pursuing the claim. I am satisfied that the settlement provides real and significant benefits to the plaintiff class. It falls within the zone of reasonable outcomes. It is fair, reasonable and in the best interests of the class. The settlement with the Panasonic defendants is approved.

Draft Order

[44] Plaintiffs' counsel provided a draft order which is satisfactory save for para 21. The following words should be removed:

> …and, subject to the approval of this Court, after the Effective Date, the Settlement Amount can be used to pay Class Counsel Disbursements incurred for the benefit of the Settlement Classes in the continued prosecution of the Ontario Electrolytic Action against the Non-Settling Defendants

[45] The same wording was present in the draft order in *Allot v. Panasonic Corporation.* I required then, as I do now, that the above be excised from the order. I adopt the rationale provided in that decision.

[46] Counsel are requested to provide me with a clean order for signature.

Counsel Fee Approval Motion

[47] Plaintiffs' counsel in this action seek an order approving their retainer agreement with the representative plaintiffs, and payment of class counsel fees of $1,487,500 plus applicable taxes and disbursements of $141,866.96 plus applicable taxes. The order is contingent on and is not effective until approval of the settlement agreement and the requested fees and disbursements by all three courts.

Retainer Agreements

[48] Mr. Foreman and his team were members of Harrison Pensa LLP when this action was commenced. The retainer agreements with Harrison Pensa LLP were approved by order dated December 10, 2018 when the NEC Tokin settlement and class counsel fees were approved.

[49] Mr. Foreman and his team left Harrison Pensa LLP in 2020. New retainer agreements were signed with the representative plaintiffs. Those agreements are identical to the approved Harrison Pensa LLP retainer agreements. As new retainer agreements, they require approval of the court.

[50] Section 32 of the *CPA* governs the minimum requirements for a retainer agreement in a class proceeding. I find that the retainer agreements with Foreman & Company in this action meet the requirements in s. 32(1) of the *CPA* in that:

a. They are in writing;

b. They state the terms under which fees and disbursements shall be paid;

c. They provide an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

d. They state the method by which payment is to be made - a lump-sum percentage subject to approval of the court.

[51] An affidavit has been filed that clarifies that 1) the time and disbursements for which payment is requested includes time and disbursements from both Harrison Pensa LLP and Foreman & Company, 2) the arrangements between Foreman & Company and Harrison

Pensa LLP are subject to a transition agreement, and 3) there is no prospect that a future claim will be advanced by Harrison Pensa LLP for any fees and disbursements pursuant to its retainer agreements.

[52] Given that the retainer agreements with Foreman & Associates mirror that which was previously approved, there is no need to undertake a fresh analysis of the new retainer agreements. They are approved.

Reasonableness of Counsel Fees Requested

[53] Plaintiffs' counsel seek approval of a payment of counsel fees from the settlement funds of $1,487,500 plus HST which is 25% of the settlement amount in the Panasonic settlement. The retainer agreement provides for a payment of up to 30% subject to court approval.

[54] In determining the reasonableness of class counsel fees, courts have traditionally considered the following factors:

a. the factual and legal complexities of the matters dealt with;

b. the risk undertaken, including the risk that the matter might not be certified;

c. the degree of responsibility assumed by class counsel;

d. the monetary value of the matters in issue;

e. the importance of the matter to the class;

f. the degree of skill and competence demonstrated by class counsel;

g. the results achieved;

h. the ability of the class to pay;

i. the expectations of the class as to the amount of fees; and

j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

(See *Osmun*, para. 23; *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 8.)

[55] As mentioned, this is not the first settlement in this action. The NEC Tokin settlement was approved on December 10, 2018. On the same date, counsel fees were approved in the amount of $725,000. That amount represented 25% of the amount of the settlement with the NEC Tokin defendants.

[56] Counsel for the plaintiffs in the three parallel actions are working together.

[57] The value of docketed time by the three firms since commencement of the action is $3,355,711. Almost $3 million of that amount represents the value of time docketed by plaintiffs' counsel in the Ontario action. The aggregate amount of time docketed must be reduced or credited by the monies previously approved and paid - $725,000. Thus, the value of docketed time net of the previous amount paid is $2,630,711. The amount for which approval is sought will put a significant dent in that amount but will not pay all time expended.

[58] I pause to note that I do not have dockets nor would I expect to have them at this stage given the ongoing litigation with the non-settling defendants. At some point, those dockets will be provided. The retainer agreement is a contingency agreement that provides for a payment of a percentage of the recovery. The value of docketed time is a relevant consideration but not the only consideration at the end of the day.

[59] This action is complex litigation. It carries significant risk for counsel. That risk includes the risk that the action will not be certified on a contested basis, will not be certified on issues related to damages, will not be successful at trial on the merits, may be subject to appeals, and may take years to reach its end. Counsel have committed to pursue this action to the bitter end. They signed onto that risk with their eyes open and they have advanced the interests of the class with diligence to this point.

[60] Counsel are experienced class action litigators. They have assumed significant responsibility. The recovery to the class through the settlement with the Panasonic defendants provides real benefit to the class. The action is important to class members. The amount requested is consistent with the retainer agreements signed. The representative plaintiffs support the motion for fee approval.

[61] Finally, plaintiffs' counsel have agreed to indemnify the representative plaintiffs against any adverse cost award. With so many defendants and counsel on the other side, that indemnity carries additional significant monetary risk.

[62] I am satisfied that the 25% requested is fair and reasonable. It is consistent with similar approvals on partial settlements in several other cases including earlier in this case.

[63] Therefore, I approve payment of counsel fees of $1,487,500 plus HST to be paid from the monies received and held in trust from the settlement with the Panasonic defendants.

[64] I observe that approval of 25% twice in this action should not be taken as a guarantee that the same percentage will be applied to future settlements. Such requests will be addressed on their merits if, and when, brought.

Disbursements

[65] Counsel seek approval for payment of disbursements of $141,866.96 and applicable taxes. The amount of applicable tax is not set out. The affidavit filed on the motion details the disbursements by category of expense. The largest amount is for expert fees of $36,096 which relates to the expert report obtained for the certification motion.

[66] The breakdown of disbursements does not differentiate between those incurred in each of the three actions. Are the disbursements listed in the affidavit incurred only in the Ontario action?

[67] I note that the approval needed for fees and disbursements is from all three courts. Thus, even if the disbursements include out-of-pocket expenses incurred in the other two actions, approval by all three courts will suffice. Counsel will not get paid twice for the same expense.

[68] The disbursements strike me as reasonable and appropriate to this litigation.

[69] Therefore, disbursements of $141,866.96 plus applicable taxes are approved to be paid from the settlement funds received and held in trust from the settlement with the Panasonic defendants.

[70] Counsel have provided a draft order for this motion which is satisfactory. I will sign it when I sign the order for approval of the settlement with the Panasonic defendants.

Justice R. Raikes

Date: April 13, 2021

CITATION: Cass v. WesternOne Inc., 2018 ONSC 4794
COURT FILE NO.: CV-16-554457CP
DATE: 20180809

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FREDERICK CASS and EDWARD ALLAN McCAFFREY, Plaintiffs

AND:

WESTERNONE INC., PETER BLAKE, CARLOS K.H. YAM, ROBERT W. KING, GEOFFREY G. SHORTEN, DOUGLAS R. SCOTT, MICHAEL L. RIDLEY, CANACCORD GENUITY CORP., NATIONAL BANK FINANCIAL INC., and RAYMOND JAMES LTD., Defendants

BEFORE: Justice Glustein

COUNSEL: *Jay Strosberg*, for the Plaintiffs

Mark A. Gelowitz and Teresa M. Tomchak, for the Defendants WesternOne Inc., Peter Blake, Carlos K.H. Yam, Robert W. King, Geoffrey G. Shorten, Douglas R. Scott and Michael L. Ridley

H. Michael Rosenberg, for the Defendants National Bank Financial Inc., Canaccord Genuity Corp., and Raymond James Ltd.

HEARD: July 27, 2018

REASONS FOR DECISION

Nature of motion and overview

[1] The plaintiffs Frederick Cass and Edward Allan McCaffrey (collectively, the "Plaintiffs") bring this motion pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (the "*CPA*") for an order to (i) on consent, certify the action against the defendants, (ii) on consent, approve the settlement of this action in accordance with the terms of the settlement agreement signed in April and May 2018 (the "Settlement Agreement"), and (iii) approve the agreements as to fees, disbursements, and taxes between the Plaintiffs and Class Counsel[1] (the "Fee Agreements") and fix those amounts.

[1] Class counsel is Strosberg Sasso Sutts LLP. I refer to the firm as "Class Counsel" in these Reasons.

[2] The Plaintiffs provided a draft approval order (the "Draft Approval Order") for the court's review which included the above relief, including setting out the fees, taxes, and disbursements sought at a total of $395,384.09, being $300,000 for fees, $39,000 for HST and $56,384.09 for disbursements including HST.[2]

[3] The Draft Approval Order also contained ancillary terms which included (a) repayment by the Plaintiffs of disbursements incurred by the Class Proceedings Fund (the "CPF") and payment of the 10% levy to the CPF (both as required under s. 10(3) of O. Reg. 771/92) and (b) payment of legal fees of Gregory Wrigglesworth ("Wrigglesworth"), counsel responsible for collecting objections and opt-outs.

[4] The substance of the Draft Approval Order was consistent with the proposed draft approval order which was incorporated into the Settlement Agreement as Schedule "B".

[5] At the hearing, I ordered that (i) the action be certified, (ii) the Settlement Agreement be approved, and (iii) the Fee Agreements be approved and fees, HST, and disbursements be fixed at the amounts sought. I approved the Draft Approval Order with minor modifications and later signed a revised approval order. I granted that relief by endorsement dated July 27, 2018 (the "Endorsement") with reasons to follow. I now set out my reasons below.

Facts

i) The parties

[6] The defendant WesternOne Inc. ("WesternOne") is a publicly-traded company that focuses on acquiring and growing businesses in the construction and infrastructure services sector. WesternOne has two principal business platforms: (i) construction heat services and aerial equipment, and (ii) modular building construction and rentals through WesternOne's subsidiary, Britco.

[7] The individual defendants Peter Blake, Carlos K.H. Yam, Robert W. King, Geoffrey G. Shorten ("Shorten"), Douglas R. Scott and Michael L. Ridley ("Ridley") (collectively, the "Individual Defendants") were officers and directors of WesternOne.

[8] The remaining defendants National Bank Financial Inc., Canaccord Genuity Corp., and Raymond James Ltd. (collectively, the "Underwriters") were underwriters in the offering of the shares qualified by WesternOne's Preliminary Short Form Prospectus dated September

[2] The amount of $56,384.09 sought for disbursements including HST relates to additional disbursements incurred by Class Counsel and does not include the disbursements set out at paragraph 3 below.

12, 2014 (the "Preliminary Prospectus") and WesternOne's Short Form Prospectus dated September 18, 2014 (the "Short Form Prospectus") (collectively, the "Prospectuses").

ii) The allegations in the amended fresh statement of claim

[9] The Plaintiffs purchased shares of WesternOne pursuant to the Prospectuses and on the secondary market during the Class Period (as defined below) and held some or all of those shares at the close of trading on the Toronto Stock Exchange on November 12, 2014.

[10] The claim arises from alleged misrepresentations in WesternOne's public documents, including management presentations, press releases, and in the Prospectuses. The alleged misrepresentations relate to Britco's involvement in the "Keeyask Project" for the development of a proposed generating station in northern Manitoba.

[11] On December 10, 2014, this action was commenced by issuance of a statement of claim. After several amendments, the claim was issued in its current form on May 14, 2015 as the Amended Fresh Statement of Claim (the "Claim").

[12] The factual allegations pleaded against the defendants are summarized below:

(i) On May 29, 2009, Manitoba Hydro and four First Nations signed a joint agreement for the Keeyask Project, a development of a proposed generating station in Northern Manitoba;

(ii) Preliminary work on access road construction and camp development began in early 2012;

(iii) On December 20, 2012, WesternOne announced that Britco had received the contract for Keeyask, to design, build and install a 2,000 room workforce accommodation complex for the construction of the generating station. The contract, worth $207 million, consisted of two phases. It was and continues to be Britco's largest project to date. Britco is a large contributor to WesternOne's earnings before interest, taxes, depreciation and amortization ("EBITDA");

(iv) Phase one of the contract provided for the design, manufacture, supply, installation and commissioning of the accommodation facility, including site preparation, infrastructure, water distribution and collection systems for the dormitories, for the initial workforce of 500 people and the design only of additional dormitories for 1,500 people;

(v) The underground civil and related works required to ready the project site for installation were outside of Britco's traditional core competencies;

(vi) The contract between Manitoba Hydro and Britco required phase one to be in working order and ready for occupancy by June 15, 2014;

(vii) Phase two of the contract provided for the manufacture, supply, installation and commissioning of an additional 1,500 dormitory rooms, with an occupancy date of April 2016;

(viii) In March 2013, Britco commenced the construction of the modular accommodation units for Keeyask;

(ix) In and around December 2013, the substantial completion date for phase one, as originally set out in the contract, was revised to July 15, 2014;

(x) On May 4, 2014, Manitoba Hydro advised Britco that it was necessary for Britco to develop and submit a recovery schedule for the construction in order to maintain the July 15, 2014 completion date;

(xi) On or about June 12, 2014, Britco notified Manitoba Hydro that it could not provide a fully operational camp by the amended contract date of July 15, 2014. WesternOne did not disclose this to investors;

(xii) As a result of Britco's inability to comply with the completion date, Manitoba Hydro incurred costs associated with the rental of a temporary camp and charged these costs to Britco;

(xiii) In a presentation prepared by WesternOne's management dated June 2014 and posted on WesternOne's website, WesternOne stated that phase one was scheduled for completion by August 2014;

(xiv) In a presentation prepared by WesternOne's management dated July 2014 and posted on WesternOne's website, WesternOne stated that phase one was scheduled for completion by August 2014;

(xv) On August 19, 2014, WesternOne issued a press release (the "August Press Release"), which it filed with SEDAR,[3] stating that phase one of Keeyask had been designed, built and installed and phase two construction would commence immediately.

The Plaintiffs allege that by issuing the August Press Release, WesternOne intended to, and did, convey to investors that phase one of Keeyask was complete;

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[3] (the System for Electronic Document Analysis and Retrieval, which is a filing system developed for the Canadian Securities Administrators)

(xvi) On September 9, 2014, WesternOne issued a news release and announced that it had entered into an agreement with a syndicate of underwriters co-led by the Underwriters under which the Underwriters agreed to purchase on a "bought-deal" basis, 4,375,000 common shares of WesternOne for sale to the public at a price of $8 per common share, representing an aggregate issue of $35 million. The aggregate issue on the offering would total $38,600,000 if the Underwriters exercised the over-allotment issue;

(xvii) On September 12, 2014, WesternOne filed the Preliminary Prospectus with the British Columbia Securities Commission ("BCSC") and SEDAR. On that date, the BCSC and the Ontario Securities Commission ("OSC") issued receipts to WesternOne for the Preliminary Prospectus;

(xviii) The Preliminary Prospectus contained the following description of Keeyask under the heading "Other Developments":

> On August 19, 2014, the Corporation announced that the Corporation's Britco division had received approval to commence the second phase of a workforce accommodations contract for Keeyask Generating Station Project following regulatory approval. The second phase of the project is comprised of the design, manufacture, delivery and installation of an additional 1,500 dorm rooms for Manitoba Hydro, with an addition to the kitchen and recreation facility for a total of 387 modular units. The total value of the second phase of the project is $100 million. Plant production is expected to be completed in Britco's Penticton facility by July 2015, and on-site construction and installation will be completed in March 2016;

(xix) On September 18, 2014, WesternOne filed the Short Form Prospectus with the BCSC and SEDAR which stated that it disclosed all material facts relating to the securities offered as required by the shares legislation of each province except Quebec;

(xx) On September 18, 2014, the BCSC and the OSC issued receipts to WesternOne for the Short Form Prospectus. A receipt for the Short Form Prospectus was deemed issued by the other reporting jurisdictions except Quebec;

(xxi) WesternOne, each of the Individual Defendants other than Shorten and Ridley, and the Underwriters, signed a certificate forming part of the Prospectuses certifying that the Prospectuses, together with the documents incorporated by reference, constituted full, true and plain disclosure of all material facts relating to the shares offered by the Prospectuses;

(xxii) On September 25, 2014, the offering closed;

(xxiii) The Underwriters exercised the over-allotment issue, and therefore the aggregate amount raised on the offering was $38,600,000. WesternOne's net proceeds from the offering were $33,512,500;

(xxiv) On November 13, 2014, before the opening of trading on the Toronto Stock Exchange, WesternOne issued a press release (the "November Press Release"), its Management's Discussion and Analysis ("MD&A"), and its Interim Condensed Consolidated Financial Statements for the period ending September 30, 2014. Each of the documents was filed with SEDAR. In the November Press Release and the MD&A, WesternOne disclosed, for the first time, that:

(a) phase one was not complete and was not scheduled to be completed until early 2015;

(b) the company had incurred increased labour and sub-contractor costs arising from delays in completing on-site civil and pre-engineered structure works for phase one of Keeyask; and

(c) Britco's adjusted EBITDA declined by 39.8 percent;

(xxv) On November 13, 2014, the price of WesternOne's common shares closed at $4.17, a decline of more than 18 percent from the closing price on November 12, 2014; and

(xxvi) On March 5, 2015, WesternOne issued a press release stating that:

(a) during the fourth quarter of 2014 it made a $7.1 million adjustment to reduce project gross profit related to the on-site construction portion of phase one of Keeyask;

(b) phase one was substantially complete as of March 5, 2015; and

(c) management's intention was to not pursue on-site general construction and infrastructure work in the future.

iii) The Class Period, Class Definition, and causes of action

[13] For the purpose of settlement, the "Class Period" is defined as the period from June 12, 2014 (when Britco notified Manitoba Hydro that it could not provide a fully operational camp by July 15, 2014) up to and including November 12, 2014 (the day prior to the November Press Release and the sharp decline in WesternOne's share price).

[14] The Plaintiffs allege that during the Class Period, the following misrepresentations were made with respect to the status of phase one of Britco's involvement in the Keeyask project:

(i) by failing to disclose that phase one could not be completed on schedule,

(ii) by stating on August 19, 2014 that phase one was installed, and

(iii) thereafter failing to disclose until November 12, 2014 that phase one was not complete.

[15] The Plaintiffs represent two subclasses of investors who allegedly suffered damages as a result of the alleged misrepresentations in the Prospectuses and in other public documents. For the purposes of settlement, the Class is defined as:

> The Prospectus Class means all persons, other than Excluded Persons,[4] who acquired Shares of WesternOne pursuant to the Prospectuses and held some or all of those Shares at the close of trading on the Toronto Stock Exchange on November 12, 2014.
>
> The Secondary Market Class means all persons, other than Excluded Persons, who acquired Shares of WesternOne during the Class Period on secondary markets, or pursuant to WesternOne's Premium Dividend and Dividend Reinvestment Plan, and held some or all of those Shares at the close of trading on the Toronto Stock Exchange on November 12, 2014.

[16] The Plaintiffs plead the following causes of action:

(i) Negligence: The Plaintiffs plead that all of the defendants breached their duties to the Prospectus Class members by failing to ensure that WesternOne provided full, true and plain disclosure of all material facts relating to the WesternOne shares that would be distributed pursuant to the Prospectuses.

The Plaintiffs plead that (a) WesternOne and the Individual Defendants were negligent since they (1) knew that the documents did not disclose a material fact or (2) "signed the certificate of the Prospectuses certifying that the Prospectuses constituted full, true and plain disclosure of all material facts relating to the WesternOne shares offered by the Prospectuses"[5] and (b) the Underwriters were negligent since "they failed to do the required due diligence which would have disclosed the matters complained of herein";

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[4] Both groups exclude persons related in any manner to WesternOne, the Underwriters, or the Individual Defendants.

[5] The defendants Shorten and Ridley did not sign the certificate so no liability in negligence is sought against them on this latter basis.

(ii) Breach of s. 130 of the *OSA*:[6] The Plaintiffs plead that WesternOne, the Individual Defendants other than Shorten and Ridley,[7] and the Underwriters breached their duties to the Prospectus Class members since "[t]he Prospectuses did not disclose that phase one was not complete" and, as such, "[t]he Prospectuses did not provide full, true and plain disclosure of all material facts relating to the WesternOne shares that were qualified and distributed pursuant to the Prospectuses";

(iii) Negligent misrepresentation: The Plaintiffs plead that WesternOne and the Individual Defendants made negligent misrepresentations relating to the status of phase one of the Keeyask project, in the August Press Release, management presentations, and the Prospectuses,[8] and, as such, breached a duty of care owed to the Secondary Market Class members; and

(iv) Subsections 138.3(1) and (4) of the *OSA*: The Plaintiffs plead that they intend to bring a motion to seek leave under s. 138.8 of the *OSA* to amend the Claim to plead the rights of action in ss. 138.3(1) and (4) of the *OSA*, *i.e.* to seek damages for the Secondary Market Class members for misrepresentations in WesternOne's documents and for failure to make timely disclosure.

iv) Steps in the litigation after the issuance of the Claim

[17] None of the defendants served a statement of defence.

[18] On April 9, 2015, the Plaintiffs received funding from the CPF.

[19] On June 11, 2015, the Plaintiffs served their motion record for certification and for leave under s. 138.8 of the *OSA* to plead the rights of action under ss. 138.3(1) and (4) of the *OSA* in relation to the alleged (i) misrepresentations in the Prospectuses and other public documents and (ii) failure to make timely disclosure.

[20] On November 13, 2015, the defendants filed responding motion material to both the certification and leave motions, which set out the following uncontested evidence:

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[6] (the *Securities* Act, R.S.O. 1990, c. S.5, as amended)

[7] (who did not sign the certificate)

[8] The Plaintiffs allege that all of the Individual Defendants are liable for "having made the misrepresentations by authorizing, permitting and/or acquiescing in the dissemination" of the Prospectuses as well as the August Press Release and the management presentations. The Plaintiffs further allege that all of the Individual Defendants who signed the certificate of full, true and plain disclosure (*i.e.* all of the Individual Defendants except Shorten and Ridley) made an additional negligent misrepresentation by the certificate.

(i) The scope of the project changed over time, was more profitable than projected and took less time than anticipated because of a very significant expansion in revenue offsetting additional costs;

(ii) There were essentially no material facts relating to the status of the project that were not disclosed;

(iii) The status of phase one of the project was not anticipated to have a significant effect on the share price so there was no obligation to disclose it; and

(iv) The decline in the share price following the alleged corrective disclosure was mainly due to non-company specific factors rather than company-specific news.

[21] The Plaintiffs considered the evidence of due diligence raised by the defendants in their responding materials. Class Counsel and the Plaintiffs then were able to evaluate the risks and had an appropriate evidentiary basis to negotiate with the defendants, to agree to the settlement and to recommend its approval to the court.

[22] In April and May, 2018, the parties signed the Settlement Agreement.

v) The Settlement Agreement

[23] Pursuant to the Settlement Agreement, the defendants will pay $1 million, all inclusive.

[24] The Settlement Agreement provides that the approval of Class Counsel's fees, disbursements, and taxes is not required as a term of the settlement:

> [T]he procedure for, and the allowance or disallowance by the Court of any requests for class counsel's fees to be paid out of the $1 million settlement amount provided for in the Approval Order are not part of the settlement provided for herein and any order or proceeding relating to class counsel's fees, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel this Settlement Agreement or affect or delay the finality of the Approval Order and the settlement of this action provided for herein.

[25] The Settlement Agreement incorporates the Draft Approval Order, which sets out that there is to be a "net settlement fund" to be determined by deducting, from the $1 million paid by the Plaintiffs, (i) Class Counsel's approved fees, disbursements and taxes, (ii) repayment by the Plaintiffs of disbursements incurred by the CPF, (iii) payment of the 10% levy to the CPF and (iv) payment of legal fees of Wrigglesworth for collecting objections and opt-outs.

[26] Consequently, the "net settlement fund" is $385,499.25, since the $1 million payment by the defendants is subject to the proposed payments:

(i)	Class counsel fees and taxes	\$339,000
(ii)	Disbursements to be reimbursed to the CPF	\$172,893.41
(iii)	Additional disbursements incurred by Class Counsel	\$56,384.09
(iv)	Legal fees paid to Wrigglesworth	\$3,390
(v)	10% levy paid to CPF	\$42,833.25[9]

[27] Consequently, approximately \$385,000 would remain for distribution to all Class members. The estimated cost of distribution of those funds to those shareholders would be \$200,000, based on other recent class action settlements. As a result, if the balance were distributed to the Class members, the approximate balance left for distribution would be \$185,000.

[28] Given the minimal projected balance left for distribution after anticipated distribution costs, the Draft Approval Order provides that the net settlement fund (approximately \$385,000) will be paid to the Access to Justice Fund administered by the Law Foundation of Ontario (the "ATJF"), targeted for the study of investor rights.

[29] In its proposal for a *cy-près* payment, the Law Foundation of Ontario set out numerous cases in which *cy-près* awards were made to the ATJF, as well as numerous examples of grants made to advance investor protection and strengthen investor rights and remedies.

[30] Notice of the proposed settlement was provided to the Class in accordance with my order dated May 30, 2018.

[31] In the notice, Class members were advised that (i) the settlement would be for \$1 million "less the lawyers' fees, \$300,000.00, plus disbursements and taxes" and (ii) the "net settlement fund" "will not be distributed to the Class because of the substantial costs of distribution" but instead "will be paid for the benefit of the class to the Law Foundation of Ontario's Access to Justice Fund for the study of investor rights".[10]

[32] As of the hearing, no Class Members objected to the settlement.

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[9] (10% of the \$428,332.50 balance remaining after the deductions at subparagraphs 26(i) to (iv))

[10] While that notice did not specifically refer to deductions for the CPF levy, repayment of disbursements paid by the CPF, or for Wrigglesworth's legal fees, I am satisfied that it was effective to advise Class members that all "disbursements" would be deducted, which in a general sense broadly includes amounts Class Counsel would have to pay out of the \$1 million, including these additional deductions. While the notice could have been clearer on the deductions, I find that it was sufficient to advise Class members of the substance of the settlement, and in particular, that after all deductions, the net settlement amount would be paid on a *cy-près* basis to the ATJF.

[33] Notice of the settlement will be given under the terms of the order I signed after the hearing, which is consistent with my May 30, 2018 order.[11]

[34] The Settlement Agreement provides for a 45 day opt-out period after the Notice of Certification and Settlement approving the settlement is last posted.

vi) Class Counsel's fees, disbursements, and taxes

[35] The retainer and fee agreements between the Plaintiffs and Class Counsel are dated January 5, 2015 and May 1, 2015 (previously defined as the "Fee Agreements"), and provide for a contingency fee of 30% of the total recovery, plus taxes and disbursements.

[36] Class Counsel requests approval of the Fee Agreements and an order that its fees be fixed at $300,000 (30% of the $1 million recovery), plus HST of $39,000, and additional disbursements of $56,384.09 (including taxes) which have been paid by Class Counsel, for a total of $395,384.09.

[37] The request for fees of $300,000 plus disbursements and taxes was contained in the notice of the proposed settlement. As of the hearing, there were no objections to this request.

[38] The Plaintiffs understand and support Class Counsel's fee request.

Analysis

[39] The issues on this motion are (i) whether the Plaintiffs have met the test under the *CPA* to have this action certified as a class proceeding, (ii) whether the court should approve the Settlement Agreement, and (iii) whether the court should approve the Fee Agreement and fix Class Counsel's fees, disbursements, and taxes at the amounts sought. I address each of these issues below.

Issue 1: Certification as a class proceeding

[40] I first consider the general principles of certification and then consider the individual requirements under s. 5 of the *CPA*.

i) General principles on certification

[11] Subject to a minor modification to make the specific deductions clearer as I discuss at footnote 10 above.

[41] The *CPA* is remedial legislation. It is to be given a generous, broad, liberal and purposive interpretation to promote the goals of class proceedings, *i.e.* judicial economy, access to justice and behaviour modification (*Hollick v. Toronto (City)*, 2001 SCC 68 ("*Hollick*"), at para. 15; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) ("*Cloud*"), at para. 37).

[42] An order certifying a class proceeding is not a determination of the merits of the proceeding (s. 5(5) of the *CPA*).

[43] The court is required to certify the action as a class proceeding where the following five-part test in s. 5(1) of the *CPA* is met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

(c) the claims of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for resolution of the common issues; and,

(e) there is a representative plaintiff who,

(i) would fairly and adequately represent the interest of the class;

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii)does not have, on the common issues for the class, an interest in conflict with the interest of other class members.

[44] Under s. 5(1)(a), the court applies the same standard of proof as on a motion to strike a cause of action. The facts as pleaded are assumed to be true and the requirement is satisfied unless it is plain and obvious that the plaintiff's claim cannot succeed (*Hollick*, at paras. 16, 25).

[45] For the remaining certification requirements, the plaintiff must establish "a minimum evidential basis for a certification order" by "show[ing] some basis in fact for each of the certification requirements" (*Hollick*, at paras. 24-25).

[46] The court must be satisfied that all of the requirements for certification are met, even when certification is sought for the purposes of settlement. However, the requirements "need not be as rigorously applied in a settlement context" (*Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (S.C.J.) ("*Osmun*"), at para. 21) given the different circumstances

associated with actions which have reached settlement (*Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.), at para. 30), and because the manageability of the proceeding is not at issue (*Speevak v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1128, at para. 14).

ii) The pleadings disclose a cause of action (s. 5(1)(a))

[47] In determining whether a pleading discloses a cause of action: (i) no evidence is admissible to assess the cause of action; (ii) all pleaded allegations of fact are accepted as proven, unless they are patently ridiculous or incapable of proof; (iii) the novelty of the cause of action will not militate against sustaining the plaintiff's claim; (iv) matters of law which are not fully settled by the jurisprudence must be permitted to proceed; and (v) the court's power to refuse to certify on this ground is exercised "only in the clearest of cases" (*Perrenoud v. eHealth Ontario*, 2012 ONSC 6704, at paras. 54-59).

[48] A court may consider documents referred to in the pleading, such as a contract, to determine if the pleading discloses a cause of action (*Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at para. 58).

[49] For the purposes of this certification motion, the Plaintiffs rely on their allegations of:

(i) negligent misrepresentation against WesternOne and the Individual Defendants (for liability to the Secondary Market Class), and

(ii) breach of s. 130 of the *OSA* by all defendants except Shorten and Ridley (for liability to the Prospectus Class), which similarly provides for liability for misrepresentation by an issuer, underwriter, director or person who signs the certificate, in a prospectus released by an issuer.[12]

[50] The negligent misrepresentation claim is set out at paragraphs 82 to 94 of the Claim, while the s. 130 claim is set out at paragraphs 60 to 64 of the Claim. The essence of the misrepresentation is that the defendants (i) failed to disclose that phase one of the Keeyask project was not complete and (ii) misled investors as to its status.

[51] The required elements to plead a negligent misrepresentation claim are set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, at para. 33:

> The required elements for a successful Hedley Byrne claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on

[12] Liability can be found under s. 130 of the *OSA* "without regard to whether the purchaser relied on the misrepresentation".

> a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. In the case at bar, the trial judge found that all elements were present and allowed the appellant's claim.

[52] In the Claim, the Plaintiffs plead the following with respect to the negligent misrepresentation claim:

(i) WesternOne and the Individual Defendants owed a duty of care to the Secondary Market Class members because “it was reasonably foreseeable that the Secondary Market Class members would rely upon the misrepresentation and would suffer damages as a result”;

(ii) WesternOne and the Individual Defendants made or authorized the dissemination of the alleged misrepresentations to the Secondary Market Class members through the management presentations, the August Press Release, and the Prospectuses.[13] The representations did not constitute full, true, and plain disclosure about phase one of the project, and were untrue, inaccurate, or misleading, since they did not disclose that phase one was not complete;

(iii) “WesternOne and the Individual Defendants made the misrepresentations negligently”, *i.e.* those defendants knew or ought to have known that the alleged representations were misleading;

(iv) The Secondary Market Class members reasonably relied on the misrepresentations; and

(v) The Secondary Market Class members suffered damages and loss as a result of relying on the misrepresentations.

[53] Consequently, I find that the Plaintiffs have pleaded the required elements of a common law negligent misrepresentation claim.

[54] The s. 130 claim is based on the same alleged misrepresentation in the Prospectuses. The Plaintiffs plead that WesternOne, the Individual Defendants other than Shorten and Ridley, and the Underwriters breached their duties to the Prospectus Class Members since “[t]he Prospectuses did not disclose that phase one was not complete” and, as such, “[t]he

[13] See footnote 8 above.

Prospectuses did not provide full, true and plain disclosure of all material facts relating to the WesternOne shares that were qualified and distributed pursuant to the Prospectuses".

[55] Consequently, I find that the Plaintiffs have pleaded the required elements of a s. 130 claim.

[56] I also note that other courts have certified similar claims of breach of s. 130 of the *OSA* for the primary market class and common law negligent misrepresentation for the secondary market class (*Simmonds v. Armtec Infrastructure Inc.*, 2014 ONSC 3587, at para. 16; *Poole v. PetroMagdalena Energy Corp.*, 2013 ONSC 4171, at para. 19).

[57] For the above reasons, I find that the Plaintiffs have pleaded the requisite elements of the causes of action of negligent misrepresentation and breach of s. 130 of the *OSA*.

iii) There is an identifiable class (s. 5(1)(b))

[58] The class definition must identify all those who may have a claim, who will be bound by the result of the litigation, and who are entitled to notice. The class must be defined by objective criteria without reference to the merits of the action. It cannot be unlimited (*Hollick*, at para. 17; *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.), at para. 10).

[59] For the purposes of certification, the Plaintiffs seek to act on behalf of the following class:

> The Prospectus Class means all persons, other than Excluded Persons, who acquired Shares of WesternOne pursuant to the Prospectuses and held some or all of those Shares at the close of trading on the Toronto Stock Exchange on November 12, 2014.
>
> The Secondary Market Class means all persons, other than Excluded Persons, who acquired Shares of WesternOne during the Class Period on secondary markets, or pursuant to WesternOne's Premium Dividend and Dividend Reinvestment Plan, and held some or all of those Shares at the close of trading on the Toronto Stock Exchange on November 12, 2014.

[60] Both groups exclude persons related in any manner to WesternOne, the Underwriters, the Individual Defendants, or any person or entity related to them.

[61] The above definition is objective and does not depend on the merits of the claim or the outcome of the litigation.

[62] There is a rational connection between the Plaintiffs' proposed class definition and the proposed common issues (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at para. 38). The proposed class is not overly broad or overly narrow (*Hollick*, at para. 21) since it is confined to those shareholders during the applicable Class Period.

[63] Accordingly, the class definition satisfies s. 5(1)(b) of the *CPA*.

iv) The claims raise common issues (s. 5(1)(c))

[64] The common issue proposed to be certified on consent is:

> Did WesternOne make a misrepresentation in the Prospectuses or at common law about the status of the Keeyask Infrastructure Project?

[65] The proposed common issue is "necessary to the resolution of each class member's claim" and a "substantial ingredient" of those claims (*Hollick*, at para. 18). Allowing the suit to proceed as a representative one will avoid duplication of fact-finding and legal analysis, meeting the "low bar" required for this aspect of s. 5 (*Cloud*, at paras. 51-52).

[66] I adopt the following submission of the Plaintiffs:[14]

> The proposed common issue is rationally connected to the claims in this action. Here, the focus is entirely on the conduct of the defendants. The determination of the common issue will establish liability for all Class members and as such, is necessary to the resolution of each claim.

v) A class proceeding is the preferable procedure (s. 5(1)(d))

[67] A class proceeding is the preferable procedure for the resolution of the common issues in an action when it is a fair, efficient and manageable method for advancing the class members' claims, and is preferable to other means of resolving the class members' claims (*Hollick*, at paras. 27-31).

[68] In considering preferability, a court "is to adopt a practical cost-benefit approach … to consider the impact of a class proceeding on class members, the defendants, and the court" (*AIC Limited v. Fischer*, 2013 SCC 69, at para. 21).

[69] Further, "where there is a cause of action, an identifiable class, common issues, and a settlement, there is a strong basis for concluding that a class proceeding is the preferable procedure because certification would serve the primary purposes of the *Class Proceedings Act, 1992*; namely, access to justice, behavioural modification, and judicial economy" (*Krajewski v. TNOW Entertainment Group, Inc.*, 2012 ONSC 3908, at para. 32).

[70] The Plaintiffs submit that a class proceeding is the preferable procedure because:[15]

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[14] (as supported by the principles set out in *Rumley v. British Columbia*, 2001 SCC 69, at paras. 27 and 34)

(i) The parties have a common interest in the determination of whether the defendants, or any of them, made the misrepresentation;

(ii) There is no other viable means of redress;

(iii) The certification of this action achieves the objectives of the *CPA* because: (a) it avoids a multiplicity of proceedings that would place a significant burden on scarce judicial resources thereby facilitating judicial economy; and (b) the majority of the individual damages claims are likely to be relatively small making the costs of pursuing individual actions prohibitive and uneconomical so it provides access to justice; and

(iv) A class proceeding for statutory and common law misrepresentation is a method of redress that would fairly, efficiently, and manageably advanced [*sic*] the Class Members' claims and is preferable to any other reasonably available means to resolve their claims.

[71] At the hearing, defendants' counsel noted that in *Musicians' Pension Fund of Canada (Trustees of) v. Kinross Gold Corp.*, 2014 ONCA 901 ("*Kinross*"), the Court of Appeal upheld the motions judge and (i) denied leave to bring an action under s. 138.8 of the *OSA* and (ii) did not certify a negligent misrepresentation claim for failing to report a write-down of goodwill.

[72] The court in *Kinross* held that certification of the negligent misrepresentation claim would not be the preferable procedure since "numerous individual trials will be required to establish reliance, causation and damages" and that "[i]f such a class action were to be certified, those trials would proceed against the backdrop of an existing judicial determination that the appellants' core claims of misrepresentation […] hold no reasonable prospect for success at trial". Consequently, the court held that "[t]o permit a class action to proceed in the circumstances of this case, in my view, would render access to justice more illusory than real and would significantly undercut the goal of judicial economy" (*Kinross*, at paras. 136-39).

[73] It would not be appropriate to undertake a "rigorous" analysis of preferability. Such an approach would require an analysis of factors which could include (i) concerns raised in *Kinross* with respect to negligent misrepresentation claims generally, or for negligent misrepresentation claims sought when leave under s. 138.8 of the *OSA* is (or could be) denied, and, on the other hand, (ii) any different factors which arise in the present case, such as the s. 130 claim which was not raised in *Kinross* and does not require reliance.

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[15] The Plaintiffs' submissions are stated *verbatim*.

[74] Neither party asked the court to embark on such a "rigorous" analysis and it would be inconsistent with settled law to do so. Consequently, I do not, by these reasons, undertake the extensive review of the preferability issue that would be required on an opposed certification motion. Both parties consented to certification for the purpose of approving the Settlement Agreement.

[75] For the above reasons, I find that there is a basis to conclude that a class action is the preferable procedure. Consequently, I find that this requirement under s. 5(1)(d) of the *CPA* has been met.

vi) There is an adequate representative plaintiff and a workable plan (s. 5(1)(e))

[76] In determining whether a representative plaintiff is appropriate, the court considers "whether there was a common interest with other class members and whether the representatives would 'vigorously prosecute' the claim" (*Campbell v. Flexwatt Corp*, 1997 CanLII 4111 (B.C.C.A.), at paras. 75-76).

[77] The proposed representative plaintiffs will fairly and adequately represent the class. Cass purchased shares pursuant to the Prospectuses. McCaffrey purchased shares pursuant to the Prospectuses and on the secondary market.

[78] Further, the affidavit evidence of the proposed representative plaintiffs demonstrates that they can and did instruct counsel, are familiar with the substance of the issues in the action, understand that they are to consider and act in the best interests of the class, and have reviewed and approved of the proposed settlement.

[79] Finally, the proposed representative plaintiffs do not have a conflict of interest with other class members on the common issues, as the settlement of the action would resolve their claims as much as it would the other class members' claims.

[80] Consequently, I find that this requirement under s. 5(1)(e) of the *CPA* has been met.

vii) Conclusion on certification issues

[81] For the above reasons, I certify the action as a class proceeding as per the Endorsement.

Issue 2: Approval of the Settlement Agreement

[82] The Settlement Agreement provides that it is binding (subject to court approval) regardless of whether the court allows Class Counsel's fees, disbursements, and taxes, such that any costs issue "shall not operate to terminate or cancel this Settlement Agreement or affect or delay the finality of the Approval Order and the settlement of this action". The Draft Approval Order provides for the court to determine whether to approve the Fee Agreements and set Class Counsel's fees, disbursements, and taxes.

[83] The approval of Class Counsel's fees, disbursements, and taxes is to be determined as a separate matter from approval of the Settlement Agreement. In other words, the Settlement Agreement can be approved without approving the fees, disbursements, and taxes sought by Class Counsel or approval of the Fee Agreements.

[84] Consequently, I separately consider the reasonableness of the Settlement Agreement, including the terms in the Draft Approval Order.

i) The applicable legal principles on approving a settlement agreement

[85] In *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) ("*Parsons 1*"), Winkler J. (as he then was) set out the applicable legal principles relevant to the court's assessment of the reasonableness of a settlement agreement (at paras. 69-80):

(i) The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, not whether the settlement meets the demands of a particular class member;

(ii) The court should not engage in a "dissection of the settlement with an eye to perfection in every aspect". The settlement need only fall "within a zone or range of reasonableness", which is an "objective standard which allows for variation depending on the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation";

(iii) In determining whether to approve a settlement, the court may take into account the following factors:[16]

(a) the likelihood of recovery or success,
(b) the proposed settlement terms and conditions,
(c) the amount and nature of discovery, evidence or investigation,
(d) the future expense and likely duration of litigation,
(e) the recommendation of neutral parties, if any,
(f) the number of objectors and nature of objections,
(g) the presence of good faith, arm's-length bargaining and the absence of collusion,
(h) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation and information conveying to the court the dynamics of, and the position taken by the parties during, their negotiation, and

[16] These factors are set out in *Parsons 1*, at para. 71 and in *Silver v. Imax Corp.*, 2016 ONSC 403 ("*Silver*"), at para. 17.

(i) the recommendation and experience of counsel;

(iv) These factors "are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process"; and

(v) Class action settlements must be "seriously scrutinized by judges".

[86] The function of the court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of improving the terms of the settlement. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement (*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (S.C.J.) ("*Dabbs*"), at para. 10).

[87] "Evidence sufficient to decide the merits of the issue is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture" (*Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 (S.C.J.), at para. 92). The parties proposing the settlement have an obligation to provide sufficient information to permit the court to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances (*Dabbs*, at para. 15).

[88] It is not necessary that examination for discovery have occurred at the time of settlement. Settlements reached at an early stage of proceedings are appropriate (*Dabbs*, at para. 24).

[89] There is a "strong initial presumption of fairness" when the settlement is negotiated at arm's length and recommended by class counsel (*Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128 ("*Serhan*"), at paras. 55-56).

[90] Similarly, Sharpe J. (as he then was) held in *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (S.C.J.), at para. 32:

> The fact that this settlement is strongly recommended by experienced class counsel is certainly a factor in its favour. The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. […]

[91] *Cy-près* settlements have been ordered by the court where (*Serhan*, at paras. 58-59):

(i) "it is not practical to distribute the benefits in any other manner";

(ii) “A direct distribution to the Settlement Class would be uneconomic considering the modest damages and the fact that there is no cost effective way of locating the Settlement Class Members, determining if they suffered damage and, if so, establishing their loss”; and

(iii) “[T]he *cy près* distribution is directly related to the issues in the lawsuit” and will “directly benefit” people in similar circumstances to the class members.

ii) Application of the law to the facts

[92] I find that the Settlement Agreement is reasonable, including the proposed *cy-près* payment.

[93] The primary factor in the present case is the risks relating to continued litigation and the likelihood of recovery or success.

[94] The uncontested evidence is that when this action was commenced, based on the information that was in the public domain, including information pursuant to several freedom of information requests to the province of Manitoba, the Plaintiffs, Class Counsel and the CPF believed that the action had significant merit.

[95] On that review of the publicly-available evidence, there was a reasonable argument that (i) the status of phase one had not properly been disclosed in the public documents; (ii) as such, liability could be imposed under s. 130 of the *OSA*, negligent misrepresentation, and negligence; and (iii) leave under s. 138.8 of the *OSA* could be granted to pursue a misrepresentation claim for the secondary market based on the WesternOne documents.

[96] However, as I set out at paragraph 20 above, the defendants delivered responding material on the certification and *OSA* leave motion. I repeat here the uncontested facts established by that evidence:

(i) The scope of the project changed over time, was more profitable than projected and took less time than anticipated because of a very significant expansion in revenue offsetting additional costs;

(ii) There were essentially no material facts relating to the status of the project that were not disclosed;

(iii) The status of phase one of the project was not anticipated to have a significant effect on the share price so there was no obligation to disclose it; and

(iv) The decline in the share price following the alleged corrective disclosure was mainly due to non-company specific factors rather than company-specific news.

[97] As a result of the defendants’ evidence, Class Counsel and the Plaintiffs recognized that there were significant, and likely insurmountable, risks that the action could not succeed.

[98] In particular, Class Counsel and the Plaintiffs reasonably concluded that the defendants would be able to establish both due diligence and minimal, or no damages. Causation would also have been a significant hurdle, as the defendants' uncontested evidence was that the decrease in share price on November 13, 2014 was not due to company-specific factors.

[99] The defendants' evidence raised significant, and likely insurmountable, risks that (i) the Plaintiffs would not obtain leave to amend the claim under s. 138.8 of the *OSA* to plead a claim for misrepresentation and lack of timely disclosure under ss. 138.3(1) and (4) of the *OSA*; (ii) the Plaintiffs would be unable to prove liability and/or obtain a meaningful assessment of damages at the trial of the common issues; and (iii) the delay and costs associated with continuing the litigation, including appeals would harm the interests of the Class members, if a settlement was not sought. I address these risks below.

[100] For a statutory claim for secondary market misrepresentation the plaintiff must first meet the threshold requirement for leave, namely, that there is a reasonable or realistic chance that the claims will succeed at the trial of the common issues.

[101] In *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, at paras. 38-39, the court (i) held that the threshold for leave "should be more than a 'speed bump'" and (ii) applied a higher threshold of requiring a plaintiff who seeks leave to lead "sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour".

[102] Based on the defendants' evidence, it was highly unlikely, and likely insurmountable, that leave would be granted on the basis of "a reasonable possibility that the action will be resolved in the claimant's favour", given the due diligence, lack of damages, and causation defences raised.

[103] With respect to the remaining claims, the defendants' evidence made it highly unlikely, and likely insurmountable, that the Plaintiffs could succeed on a misrepresentation claim or establish damages or causation at a trial of the common issues. The evidence established that (i) no material facts relating to the status of the project had not been disclosed (and the status of phase one was not material in any event); (ii) the project was more profitable than anticipated; and (iii) the decline in share price after the alleged corrective disclosure was mainly due to non-company specific factors.

[104] Consequently, Class Counsel reasonably concluded (as stated by Plaintiffs' counsel in her affidavit sworn in support of the present motion):

> It was a sobering experience to discover that the alleged facts were not supported by the evidence. We did not believe that we would be successful in obtaining leave, certification or at the trial of the common issues.

[105] Class Counsel and the Plaintiffs then had an appropriate evidentiary basis to negotiate with the defendants, to agree to the settlement, and to recommend its approval to the court. I

agree that the risks of leave not being granted or lack of success at a common issues trial were overwhelming and justified Class Counsel in trying to reach a settlement.

[106] Given the risks of the litigation arising from the uncontested due diligence evidence, a $1 million proposed settlement is well within the range of reasonableness. The settlement was reached by arm's length negotiations which proceeded over several months, with the Plaintiffs being able to obtain a $1 million settlement "which was considerably higher than the defendants' first offer".[17]

[107] The proceeds of settlement are sufficient to (i) permit Class Counsel to pay the CPF for its disbursements, (ii) permit Class Counsel to make a disbursement for the 10% levy of the CPF based on the net settlement fund and (iii) after paying legal fees and additional disbursements of Class Counsel, as well as Wrigglesworth's legal fees, still leaving over $385,000 to be distributed on a *cy-près* basis to educate future investors in order to attempt to avoid potential losses in other securities matters. Given that leave would likely not have been granted and the plaintiffs would not likely have succeeded on a common issues trial, the settlement terms are reasonable.

[108] Those terms are supported by Class Counsel who are very experienced in securities cases and in class actions generally. They have put their reputation "on the line" in supporting such a settlement as being fair, reasonable and in the best interests of the Class members. In these circumstances, the "strong initial presumption of fairness" in *Serhan*, which arises when the settlement is negotiated at arm's length and recommended by class counsel, is justified.

[109] I also find that it is appropriate to order the *cy-près* payment to the ATJF, for the purpose of the study of investor rights, as sought in the Draft Approval Order and set out in the notice to the Class members in advance of this hearing.

[110] The uncontested evidence is that of the remaining funds of approximately $385,000, an estimated $200,000 would be required to distribute the funds to all Class members, which is more than half of the remaining funds.

[111] As in *Serhan*, it is not practical to distribute the funds to every shareholder since "it would be uneconomic considering the modest damages" (which are even less than in *Serhan*), and there is "no cost effective way of locating the Settlement Class members, determining if they suffered damage and, if so, establishing their loss" (*Serhan*, at para. 58).

[112] Further, allocating the net settlement funds of over $385,000 to the ATJF for the study of investor rights is "directly related to the issues in this litigation" (*Serhan*, at para. 59), since

[17] (as stated by Plaintiffs' counsel in her affidavit sworn in support of the present motion)

future investors will benefit from education and potential legislative reform based on the work of the ATJF.

[113] Consequently, I find that the *cy-près* payment is appropriate.

[114] For the above reasons, I approve the Settlement Agreement as per the Endorsement.

Issue 3: Approval of the Fee Agreements and Class Counsel's fees, disbursements, and taxes

[115] I consider the reasonableness of the proposed fees, disbursements, and taxes separately under s. 32(2) of the *CPA*.

[116] I first consider the relevant principles on approving class counsel fees and disbursements and then apply those principles to the facts of this case.

i) The applicable legal principles on approving class counsel fees and disbursements

[117] Class counsel fees are to be approved on the basis of whether they are "fair and reasonable" in all of the circumstances (*Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.) ("*Parsons 2*"), at para. 13-14 and 56; *Lefrancois v. v. Guidant*, 2014 ONSC 1956 ("*Lefrancois*"), at para. 52).

[118] The courts in *Lefrancois* (at para. 52) and in *Silver* (at para. 41) set out the following factors which may be considered by the court when determining whether class counsel's fees are fair and reasonable:

(i) the factual and legal complexities of the matters,

(ii) the risks assumed in pursuing the litigation, including the risk that the matter might not be certified, and the risk of loss at trial,

(iii) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement,

(iv) the amount in issue,

(v) the result achieved,

(vi) the importance of the matter to the class members and to the public,

(vii) the degree of responsibility assumed and the skill and competence demonstrated by class counsel,

(viii) the ability of the class to pay, and

(ix) the expectations of the representative plaintiffs, the class and class counsel as to the basis for calculating fees and the amount of fees.

[119] An agreement to make a contingent payment, on the basis of a percentage of a settlement or recovery, is contemplated by the word "otherwise" in s. 32(1)(c) of the *CPA*, and has often been awarded (*Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Gen. Div.) at pp. 528-29; *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Gen. Div.) ("*Crown Bay*"), at 86).

[120] Contingency fee arrangements are an "important means" to provide "enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient". Similar to a multiplier, a contingency fee retainer "gives the lawyer the necessary economic incentive to take the case in the first place and to do it well" and, as such, "that opportunity must not be a false hope" (*Gagne v. Silcorp Limited* (1998), 41 O.R. (3rd) 417 (C.A.), at 422-23).

[121] The policy of the *CPA* is to provide an incentive to class counsel to pursue class actions in order to increase access to justice. Class counsel fees have been awarded and are intended to compensate law firms for the risk that they may never be paid for their time or reimbursed for their disbursements. In *Parsons 2*, Justice Winkler (as he was then) stated (at para. 56; see also para. 14):

> […] The legislature has not seen fit to limit the amount of fees awarded in a class proceeding by incorporating a restrictive provision in the *CPA*. On the contrary, the policy of the *CPA*, as stated in *Gagne*, is to provide an incentive to counsel to pursue class proceedings where absent such incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding. […]

[122] In *Crown Bay*, Winkler J. commented on the benefits of a contingency fee in class actions to encourage settlement (at 88):

> […] On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement […] Fee arrangements which reward efficiency and results should not be discouraged.

[123] Similarly, in *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, Strathy J. (as he then was) endorsed contingency fee arrangements in class actions. He held (at paras. 21 and 22):

> There is much to be said in favour of contingent fee arrangements. Litigants like them. They provide access to justice by permitting the lawyer, not the client, to finance the litigation. They encourage efficiency. They reward success. They fairly reflect the considerable risks and costs undertaken by class counsel, including the risk that they will never be paid for their work, the risk that their

> compensation may come only after years of unpaid work and expense, and the risk that they will be exposed to substantial cost awards if the action fails. Effective class actions simply would not be possible without contingent fees. Contingent fee awards serve as an incentive to counsel to take on difficult but important class action litigation.
>
> […] in my respectful view, courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple - of the mathematical calculation of hours docketed times the hourly rate.

[124] In *Abdulrahim v. Air France*, 2011 ONSC 512, Strathy J. (as he then was) approved a "one-third" contingency fee, referring to it as "standard in class action litigation". He held (at para. 13):

> A contingency fee of one-third is standard in class action litigation and has been common place in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases.

[125] In *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 ("*Cannon*"), Justice Belobaba also approved a one-third contingency fee and held that there was a presumption that such arrangements are valid and enforceable provided that they are "fully understood and accepted by the representative plaintiffs". He held (*Cannon*, at para. 8):

> What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons.

[126] In *Cannon*, Justice Belobaba provided "examples of clear cases where the presumption of validity could be rebutted" which included (*Cannon*, at para. 9):

(i) "Where there is a lack of full understanding or true acceptance on the part of the representative",

(ii) "Where the agreed-to contingency amount is excessive", and

(iii) "Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise unreasonable".

ii) Application of the law to the facts

[127] I find that there is no basis to rebut the "strong presumption of validity" of the contingency fee arrangement (*Cannon*, at para. 9).

[128] I rely on the following factors:

(i) The matter was factually and legally complex. A proper understanding of the facts concerning the status of phase one required lengthy and detailed analysis. The law relating to the various causes of action is complex, requiring counsel to consider numerous authorities, distinguish facts, and consider the applicable principles;

(ii) Consequently, Class Counsel undertook significant risk in advancing the claim;

(iii) Class Counsel demonstrated great skill and competence in the prosecution and resolution of the action under the circumstances. Class Counsel recognized that the risks of proceeding were too high and negotiated a settlement;

(iv) The agreed-to contingency amount is not excessive;

(v) The application of the contingency fee does not results in a legal fees award that is so large as to be unseemly or otherwise unreasonable;

(vi) The Plaintiffs understood and accepted the Fee Agreements. Consequently, there was an expectation of the Class as to the amount of fees that would be sought by Class Counsel;

(vii) The Plaintiffs supported approval of the Fee Agreements at this hearing; and

(viii) No Class member objected to the proposed fees of $300,000 and disbursements being deducted from the net amount of $1 million paid by the defendants, which was set out in the notice of settlement.

[129] For the above reasons, I approve the Fee Agreements and the fees, disbursements, and taxes sought by Class Counsel as per the Endorsement. I fix those amounts at a total of $395,384.09, being $300,000 for fees, $39,000 for HST and $56,384.09 for disbursements including HST.

Order and costs

[130] For the above reasons, I grant the order as per the Endorsement.

GLUSTEIN J.

Date: 20180809

COURT FILE NO.: 01-CV-217295 CP
DATE: 20050620

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
JOSEPHINE NUNES AND JORGE NUNES Plaintiffs	***J.J. Camp Q.C., Glenn Grenier*** and ***Allan Dick*** -- for the Plaintiffs
- and -	
AIR TRANSAT A.T. INC., AIRBUS S.A.S., AIRBUS OF NORTH AMERICA INC., ROLLS-ROYCE PLC AND ROLLS-ROYCE CANADA LIMITED AND AIRBUS GIE Defendants	***B. Timothy Trembley*** -- for the Defendant, Air Transat A.T. Inc. ***D. Bruce Garrow*** -- for the Defendants, Rolls -Royce PLC and Rolls -Royce Canada Limited ***John Callaghan*** -- for the Defendants, Airbus of North America Inc., and Airbus GIE
	HEARD: May 30, 2005

REASONS FOR DECISION

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

CULLITY J.

[1] The plaintiffs moved for the court’s approval of a settlement of this action pursuant to section 29 (2) of the *Class Proceedings Act 1992* S.O. 1992, c.6 ("CPA"). There was also a motion for approval of the fees and disbursements of class counsel.

[2] The proceedings involve claims against the defendants for damages suffered by passengers on Air Transat Flight 236 (" Flight 236") when, in August 2001, the aircraft, an Airbus A330, ran out of fuel, lost power in each of its engines and made an emergency landing in the Azores Islands. The defendant, Air Transat A.T. Inc., ("Air Transat") was the operator of the aircraft. Airbus S.A.S. and Airbus North America Inc., (together "Airbus") and Rolls-Royce plc and Rolls-Royce Canada Limited (together "Rolls-Royce") were sued as responsible for the manufacture of the aircraft, and that of its engines, respectively. Claims were also made on behalf of family members of the passengers.

The Settlement

[3] The proceedings were certified by order of this court on July 4, 2003. The time for opting out has expired and it has now been determined that, of the 291 passengers on board Flight 236, 115 have either opted out or entered into individual settlements with Air Transat - leaving 176 class members who would share in the benefits to be provided under the terms of the proposed settlement. These benefits can be summarised as follows:

1. A fund of $7,650,000, plus accrued interest, is to be paid to an administrator in exchange for a release of all claims of class members arising from the events of Flight 236.

2. The administrator is to invest the fund in income-earning accounts and, after payment of class counsel fees and disbursements and expenses of administration, the fund is to be distributed among class members subject to monetary limits for particular kinds of damages and, otherwise, in accordance with a claims procedure contained in the settlement agreement.

3. The monetary limits on different heads of damages claimed by any member are:

    (a) damages for non-pecuniary loss arising from post-traumatic stress disorder or similar psychological injury would not exceed $80,000 unless accompanied by evidence of other significant permanent personal injury - in which case the maximum amount of non-pecuniary damages would not exceed $100,000;

    (b) damages for past and future loss of income would not exceed $50,000;

    (c) damages for out-of-pocket expenses would not exceed $5000; and

(d) damages in respect of future-care expenses would not exceed $5000.

4. Family member claimants would be limited to their rights of recovery under the *Family Law Act* (Ontario) and the claims asserted by all such members that are derivative of the claims of a particular passenger would not exceed $5000.

[4] The settlement provides for class members to make claims, initially, to class counsel who are to provide the claimants with what counsel consider to be a fair and reasonable assessment of the value. Members then would have the option of accepting the assessment or of requesting a review by an arbitrator to be appointed by the court. In the latter event, the arbitrator would determine the value of the claim. Distributions would be made accordingly.

[5] The claims process and the powers and procedures to be followed by class counsel, the administrator, a management committee of counsel - that is to work with the administrator and to make the initial assessment of claims for loss of income - and the arbitrator are set out in some detail in the settlement agreement and in a schedule to it. Caps would be placed on the fees payable to the administrator and to members of the management committee, and on an hourly rate to be charged by the arbitrator. Class counsel would not charge fees for their services in assessing the value of claims in addition to the lump-sum amount that the court is asked to approve in connection with their services to date, and the capped amounts that may be charged by members of the management committee.

The Law

[6] The role of the court, and the standards to be applied, in determining whether a settlement should be approved has been discussed in several decisions of this court including *Dabbs v. Sun Life Assurance Co of Canada* (1998), 4 O.R. (3d) 429 (G.D.), at page 444, affirmed (1998), 41 O.R. (3d) 97 (C.A.); *Parsons v. Canadian Red Cross Society* (1999), O.J. No. 3572 (S.C.J.), at paras 77 - 80; *Fraser v. Falconbridge Ltd*, [2002] O.J. No. 2383 (S.C.J.), at paras 13 - 14; and *Vitapharm v. F. Hoffman - La Roche Ltd*, [2005] O.J. No. 1118 (S.C.J.), at paras 110 - 118.

[7] In *Vitapharm*, Cumming J. distilled the following principles from the earlier authorities:

(a) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;

(b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

(c) there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;

(d) to reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

(e) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinise the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs obligation.

(f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or, on the other hand, to simply rubber-stamp a proposal;

(g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval;

(h) in determining whether to approve a settlement, the court takes into account factors such as:

(i) the likelihood of recovery or likelihood of success;

(ii) the amount and nature of discovery, evidence or investigation;

(iii) the proposed settlement terms and conditions;

(iv) the recommendations and experience of counsel;

(v) the future expense and likely duration of litigation;

(vi) the recommendation of neutral parties, if any;

(vii) the number of objectors and nature of objections;

(viii) the presence of arm's-length bargaining and the absence of collusion;

(ix) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations; and

(x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

[8] I believe the following statements of Winkler J. in *Parsons* and in *Fraser* are particularly apposite to the settlement under consideration in this case:

> It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscience and wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. (*Parsons*, at paragraph 79)
>
> Lengthy litigation would not be in the interests of the plaintiffs with its inherent risk and delay. The court must approve or reject the settlement in its entirety. It cannot substitute or alter it.... The court does not, and cannot, seek perfection in every aspect, nor can it insist that every person be treated equally." (*Fraser,* at para 13)

[9] I note, however, that, unlike the position in the above cases, other than *Fraser*, class members who do not approve of the settlement have no right to opt out of the proceedings as the time in which this could be done has expired and, unlike what I think I was the position in *Parsons*, such a right is not conferred, or contemplated, by the settlement agreement. As notice of the terms of the settlement and of the approval hearing, and the right to object, that I considered to be reasonable and adequate was given to class members, and only two of them have informed the court that they have objections to the settlement, the potential significance of the inability to opt out at this stage might be considered to be limited to these objectors.

Discussion

[10] Subject to the specific points made by, or on behalf of, the two objectors, I am satisfied that the factors set out above militate heavily in favour of the settlement. The proceedings were contentiously adversarial from the outset and the litigation risks for the plaintiffs were significant. Article 17 of the Warsaw Convention limits the liability of Air Transat to damages for bodily injury. Class counsel conducted a meticulous investigation and review of the likely claims of class members and concluded that virtually all of them will claim to have suffered post-traumatic stress disorder or other forms of mental or emotional harm. Although I found that, for the purposes of certification, the question whether such harm is to be considered to be bodily injury should be included in the common issues to be tried, counsel's research into the interpretation of Article 17 in this jurisdiction, and internationally, convinced them that there was

a highly significant risk that the plaintiffs would not be successful on this issue at trial. After a lengthy examination of the evidence relating to the causes of the events on Flight 236, they concluded also that the case against Rolls-Royce was very weak and that Airbus had tenable defences that not only cast doubts on the prospects for establishing liability against it but made it inevitable that the litigation would be protracted and expensive. I see no reason to question the competence, diligence or judgment of class counsel on the assessment of litigation risks or, indeed, in the manner in which the proceedings were conducted and the settlement negotiated at arm's-length between the parties.

[11] When negotiating the terms of the settlement, class counsel had obtained completed questionnaires from all but a few class members to enable their claims to be reviewed with the assistance of a clinical psychologist in Vancouver and a physician in Portugal. This information, and medical reports that were provided by class members, were independently reviewed by each of the firms acting as co-counsel for the purpose of arriving at an estimate of the total value of the claims of class members. All the information was then provided to counsel for Air Transat to enable them to make their own assessment and, after the negotiations that ensued, the settlement amount of $7,650,000 was arrived at. In class counsel's submission, this amount, less counsels' fees, expenses and administration costs should be considered to be fair and reasonable - as well as substantial - compensation for the claims of class members. In their estimate - made on the basis of their assessment of the claims of class members that have already been completed - it should provide each class member with a recovery of at least 70 per cent of the amount likely to be assessed as the value of such member's claim. This is, of course, only an estimate and, to some extent, it is based on assumptions - about, for example, the amounts that will be claimed for loss of income and the number of claims that will be referred to the arbitrator - that might, or might not, turn out to be unduly optimistic.

[12] I am satisfied that the caps proposed to be placed on the recovery of particular heads of damages have been carefully considered and determined principally for the purpose of achieving fairness for the class as a whole. It appears likely that the claims for mental and emotional harm will be made by virtually all of the class members and will be far more common than claims for significant physical injuries or loss of income. The cap of $80,000 for psychological harm ($100,000 if accompanied by significant permanent other injury) was chosen after a review of recent awards in this jurisdiction and elsewhere for post-traumatic stress disorder and similar illnesses.

[13] I should note at this point that, although the terms of the proposed settlement might be construed as limiting claims for physical injuries to those that are accompanied by claims for psychological harm, I understand the intention to be that claims for physical injuries alone - if there are any - are to be compensated subject to a cap of $100,000.

[14] The most problematic of the monetary limits placed on the recovery of particular types of damages is that relating to loss of income. In conducting their preliminary assessment of the value of the claims of class members, class counsel had less information about the potential loss of income than they had relating to the other heads of damages. However, to the extent that they

were able to judge, there would be few claims for loss of income relative to those for psychological harm and only one passenger had provided documentation in support of an income loss in excess of the cap of $50,000. That member, I presume was Mr Manuel Ribeiro, one of the two members of the class who objected to the settlement. At the hearing, counsel indicated that their attention had been drawn to one other such potential claim that, on the basis of the information available to them, they considered to be of doubtful weight.

[15] Through his counsel, Mr Ribeiro successfully requested an adjournment of the original hearing date appointed for the motion for approval. At the continuation of the hearing, he was represented by Mr Brian Brock Q.C. who, while disclaiming an intention to object to the settlement agreement in principle, requested that class counsel should be required to revisit it to address a number of issues that he raised in his written and oral submissions. In general terms, these issues relate to (a) whether class counsel gave sufficient significance to the fact that neither Airbus nor Rolls-Royce could claim the protection of Article 17 of the Warsaw Convention and the possibility that, as joint tortfeasors with Air Transat, damages that could not be recovered from it might be recoverable in full from either of them under section 1 of the *Negligence Act* R.S.O. 1990, c. 1 (as amended) even if only a very small degree of relative fault was apportioned to them; (b) whether the caps placed on non-pecuniary and pecuniary damages are fair and reasonable; and (c) whether the amount of legal fees requested by class counsel, and the manner in which they would be borne by class members, are fair and reasonable.

[16] In an affidavit sworn for the purpose of the motion by Mr Joe Fiorante - a partner of one of the firms acting as class counsel - he indicated that the arguments mentioned by Mr Brock in connection with the first of the above issues had been considered by them and advanced in the negotiations for the settlement. I see no reason to reject this evidence or to conclude that the considerations to which Mr Brock referred are sufficient to remove the terms of the settlement from the "zone of reasonableness".

[17] Mr Brock's submission that the caps were unfair was made in the context of his opinion that the value of Mr Ribeiro's claims for non-pecuniary damages for post-traumatic stress disorder and loss of income will exceed the limits of $80,000 and $50,000 that would be imposed under the settlement.

[18] Class counsel's response to the submission with respect to non-pecuniary damages was that already mentioned - namely, that, from their review of damages awarded in recent cases, other than those involving sexual assaults, the $80,000 cap was at the high end of the range and, notwithstanding the evidence that, since the events of Flight 236, Mr Ribeiro has suffered, and will continue to suffer, psychological difficulties that will require psychiatric support and, probably, adjunct medication, they are not convinced that his claim would fall outside the likely range of damages. Based on their review of damages awards, I do not believe this conclusion is unreasonable although, as an experienced counsel in personal injury cases, Mr Brock's opinion that a higher award could be obtained merits respect. The fairness and reasonableness of the settlement - including the cap of $80,000 for non-pecuniary damages - must, however, be judged in relation to the class as a whole and is not to be determined in respect of the claims of each

member considered separately. The comments of Winkler J. that I have quoted from *Parsons* and *Fraser* are in point. On the basis of the record before me, I believe I am justified in deferring to the opinion of class counsel that the cap of $80,000 on non-pecuniary damages would not operate unfairly in respect of Mr Ribeiro, let alone in respect of the class as a whole.

[19] Mr Brock's criticism of the existence of the cap on the recovery for different heads of damages was not based exclusively on his opinion that his client's non-pecuniary damages would exceed $80,000. He made a similar objection with respect to the application of a $50,000 limit to Mr Ribeiro's claim for loss of income. In his submission, such a limit would operate with obvious unfairness to Mr Ribeiro in that his potential claim - calculated on the basis of a reduction in his income of $54,000 a year - would be approximately $670,000. Mr Brock informed me that his client was prepared to testify that, since Flight 236, he has lost his motivation to conduct his landscaping business of 25 years, the number of his employees and his customers has diminished and the business is now confined to grass cutting. In support of his estimate of Mr Ribeiro's loss of income, Mr Brock provided unaudited income statements of the corporation that operates the business for 1998, 2000, 2002 and 2004. These show that, between April 2001 and April 2004, the gross income of the corporation declined by approximately $48,600. During that period, operating expenses fell by approximately $49,156. Of this amount, approximately $32,000 represented a reduction in wages paid to employees. Two employees were laid off in the period after Flight 236. No personal income tax returns, or other information, were provided that would indicate the wages, or other amounts, received by Mr Ribeiro from the business in those years.

[20] The income statements hardly support Mr Brock's estimate that his client had suffered an income loss of approximately $54,000 a year and, on the basis of the limited information provided, class counsel concluded that they were unable to determine whether Mr Ribeiro's total past and future income loss would exceed $50,000. I am in no better position. At the most, I can infer that Mr Ribeiro claims to have suffered a loss of income that will exceed the cap by a significant amount. The question is whether the existence of this claim is, in itself, sufficient to justify a decision to withhold approval of the settlement. In Mr Brock's submission it is, because it illustrates not merely that the cap is too low but, as well, the unfairness of placing any caps on heads of damages. As he stated in his brief or memorandum filed in the motion:

> If an individual plaintiff's claim falls within the cap it would appear that such person would make a full recovery. Those whose claims exceed the cap would recover only a proportionate share. No explanation is provided as to why those with serious claims should have their claims compromised in this way at the expense of those whose claims are not as serious.
>
> At a minimum one would expect that the recovery for each plaintiff would be on a pro-rata basis so that the percentage of recovery or loss of recovery would be equal.

[21] Although I cannot amend the settlement, I do not think there is any doubt that I would have authority to refer this aspect of it back to the parties for their further consideration. After giving this matter careful thought, I am not disposed to do this.

[22] As I have indicated, I do not intend to find that the total amount to be paid by Air Transat is less than that which would fall within a zone, or range, of reasonableness. The question that arises is how the net amount is to be distributed among class members if it is less than the total amount of their claims. The provision of caps is one method. Each of the possibilities suggested by Mr Brock is another. In preferring the first method as being in the best interests of the class as a whole, counsel considered:

> (a) the nature of the damages likely be claimed by the great majority of class members;
>
> (b) the likely value of such claims;
>
> (c) the possibility that the existence of one, or a few, very large claims for income losses would substantially deplete the amount available for distribution to the other class members; and
>
> (d) the need to simplify the claims process to avoid delays and to reduce expenses.

[23] In my judgment each of these considerations was relevant, and properly considered by class counsel. The last of them underlines the necessity to consider the provisions of the settlement as a whole and not to place the focus on particular aspects of it in isolation. The objective of simplifying the claims process is relected in the caps placed on certain types of administrative expenses, the involvement of class counsel without further remuneration and the attempt to devise a process that members will find satisfactory without having recourse to arbitration. Each of these factors presupposes the existence of - and is designed to assist in effecting - an expeditious and economic method of allocating and distributing the net settlement funds among class members.

[24] In my judgment, I would not be justified in finding that the existence, or the amounts, of the caps is so evidently unfair and unreasonable that approval of the settlement should be withheld. Nor do I believe that anything of value is likely to be gained by referring the matter back for further consideration by the parties. I am satisfied that the questions have been carefully considered by them. The qualifications and experience of class counsel were reviewed at some length in the carriage motion early in the proceedings. Nothing has occurred since then to dilute my confidence in the competence and diligence with which they would perform their responsibilities under the CPA. Their ability to identify each of the members of the class has enabled them to conduct an unusually thorough investigation and preliminary assessment of the claims of virtually all of them. Their decision that the imposition of the caps would be in the interests of the class as a whole is one which is entitled to be given considerable weight. I do not

believe there is sufficient reason for impeding, or delaying, the implementation of the settlement by asking them to reconsider that decision.

[25] The third of Mr Brock's objections concerns the amount of the fees of class counsel and the manner in which they would be borne by class members. The appropriate amount of the fees will be considered in an endorsement that will follow the release of these reasons after Mr Brock has had an opportunity to review the time dockets of class counsel. The extent to which approval is given to the payment of class counsel's fees before the final distribution - and any consequential changes to the terms of the claims process - will also be considered in the endorsement to follow.

[26] The proposal that the fees, as then approved, should come off the top - rather than to be apportioned among class members in accordance with the value of the amounts ultimately distributed to each of them - is, I believe, appropriate in the circumstances of this case where a gross settlement amount would be paid up front by Air Transat and the further services of class counsel - other than those of the management committee - are to be provided for no further charge. Counsel have acted for the class as a whole and have negotiated a settlement on that basis. I see nothing unfair, or unreasonable, in awarding approved fees out of the settlement proceeds without regard to the proportions in which the proceeds will be shared by class members.

[27] The other objection I received was made by Mr Giancarlo Cristiano in an attachment to an email message to class counsel. In the message Mr Cristiano thanked counsel for their diligence in dealing with the file and, subject to certain questions, concerns and objections to the terms of the settlement, he expressed his pleasure that it had been reached. In the attached letter he objected that the settlement contained no finding of liability for negligence on the part of Air Transat and no award of punitive damages. He also complained of the level of fees payable to class counsel and the administrator.

[28] The first two of these objections misapprehend both the nature of the settlement as a compromise between the parties and the powers of the court. The settlement contains no admission of liability, negligence, on the part of Air Transat because it has not agreed to make any such admission. This, of course, is very common in a settlement of litigation and I have no jurisdiction to insert such a provision in the settlement. All I could do would be to refuse approval of the settlement unless it contained an admission of liability. Mr Cristiano did not ask me to do this and I would not consider such a decision to be in the best interests of class members. Similarly, and contrary to Mr Cristiano's impression, I have no power to amend the settlement so as to insert a claim for punitive damages.

[29] I will consider Mr Cristiano's objection with respect to legal fees and expenses of administration in the endorsement that is to follow.

Disposition

[30] Accordingly, pending the decision on the fees of class counsel, I will give provisional approval to the settlement as fair, reasonable and in the best interests of class members. This approval is subject to the terms of the endorsement that is to follow, any necessary adjustments to the times within which claims are to be made, any other acts to be performed and any other amendments counsel may consider to be required as a result of the delay in the release of these reasons. These changes, counsel's submissions with respect to the fees of independent counsel, a few drafting issues and the terms of any formal order can be considered following the release of the endorsement.

CULLITY J.

Released: June 20, 2005

COURT FILE NO.: 01-CV-217295 CP
DATE: 20050620

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOSEPHINE NUNES AND GEORGE NUNES

Plaintiffs

- and -

AIR TRANSAT A.T. INC., AIRBUS S.A.S., AIRBUS OF NORTH AMERICA INC., ROLLS-ROYCE PLC AND ROLLS-ROYCE CANADA LIMITED AND AIRBUS GIE

Defendants

REASONS FOR DECISION

CULLITY J.

Released: June 20, 2005

Ford et al. v. F. Hoffmann-La Roche Ltd. et al.

Ford et al. v. F. Hoffman,-La Roche Ltd. et al.

Fleming Feed Mill Ltd. et al. v. BASF Aktiengesellschaft et al.

Ford et al. v. Rhne-Poulenc S.A. et al.

Vitapharm Canada Ltd. et al. v. Degussa-Hls AG et al.

Fleming Feed Mill Ltd. et al. v. UCB S.A. et al.

Ford v. Novus International (Canada) Ltd.

[Indexed as: Ford v. F. Hoffmann-La Roche Ltd.]

74 O.R. (3d) 758
[2005] O.J. No. 1118
Court File Nos. 00-CV-202080CP, 00-CV-200045CP,
00-CV-198647CP, 00-CV-201723CP, 00-CV-200044CP
40610 and 42267CP

Ontario Superior Court of Justice,
Cumming J.
March 23, 2005

Civil procedure -- Class proceedings -- Settlement -- Plaintiffs commencing proposed class actions alleging price fixing in relation to sale of vitamins in Canada -- Plaintiffs pursuing litigation using two-stage model -- Plaintiffs first seeking aggregate damages and then developing distribution model for aggregate damages to be paid to or for benefit of direct purchasers, intermediate purchasers and consumers -- Benefits available to intermediate purchasers and consumers were to be paid cy-prs to consumer and industry organizations

-- Plaintiffs and defendants entering into settlement agreements for total of approximately $140 million, to be allocated in accordance with distribution model -- Court certifying actions as class proceedings and approving settlement agreements -- Court granting order barring any future claim for contribution or indemnity against settling defendants.

The plaintiffs commenced a number of proposed class actions alleging price fixing in relation to the sale of vitamins in Canada. They claimed that the defendants contravened s. 45(1) of Part VI of the Competition Act, R.S.C. 1985, c. C-34, giving rise to a right to damages under ss. 36(1) and 45(1); that the defendants were liable for tortious conspiracy and intentional interference with economic interests; and that the defendants were liable for punitive damages. The proposed class was comprised of direct purchasers of vitamins during the relevant period, intermediate purchasers and ultimate consumers. The plaintiffs pursued the litigation using a two-stage model. At stage one, on behalf of all purchasers of vitamins, they sought to hold the alleged conspirators accountable for the aggregate overcharge on all sales of vitamins in Canada by recovering aggregate damages. Then, at stage two, class counsel developed a distribution model for the aggregate damages to be paid to or for the benefit of di rect purchasers, intermediate purchasers and consumers. The plaintiffs and the defendants entered into settlement agreements based on a total damage assessment of approximately $140 million. Direct purchasers would receive up to 12 per cent of the value of their vitamin purchases. The benefits available to intermediate purchasers and consumers would be paid cy-prs to carefully selected and well-recognized consumer and industry organizations. Motions were brought for certification of the actions as class proceedings and approval of the settlement.

Held, the motions should be granted. [page759]

The criteria for certification were met. The class actions were the preferable procedure because they presented a fair and manageable process. For class members, there were no alternative avenues of redress apart from individual actions, which would be less practical and less efficient than a class proceeding. Class proceedings provided a fair, efficient and manageable method of determining the common issues and would advance the actions in accordance with the goals of judicial economy, access to justice and behaviour modification.

There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arms length by counsel for the class, is presented for court approval. To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes. When these class actions were commenced, this type of litigation was novel in Canada and the approach taken by class counsel was significantly different from that which had been seen in the United States Federal Court. The plaintiffs faced litigation risks. The novel nature of the actions and the theory pursued by class counsel created the risk that the actions, or some of them, would not be certified, and the risk that if certified, the court would not assess damages in the aggregate. If the defendants, or some of them, were successful in establishing any of the general defences, such as pass through, or the product-specific defences, such as no sales in Canada or no conspiracy, then the plaintiffs would not succeed, at least in the entirety, at a trial of the common issues and there would be limited recovery. While these defences were largely problematical, at the very least their number and complexity would lengthen a trial of the common issues.

Section 24 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 permits damages to be assessed in the aggregate. Section 26 permits the court to direct the distribution of settlement moneys by any means it considers appropriate whether or not such a distribution would benefit persons who are not class members or persons who otherwise might receive monetary compensation as a result of the proceeding. In order words, the Act permits cy-prs distributions of the type contemplated here.

Class counsel were seeking an order barring any future claim for contribution or indemnity against the settling defendants.

Once it became clear in the course of negotiations that some defendants would not participate in a global settlement, a bar order was critical in the negotiation of the agreements. Bar orders have their origin in the United States and are frequently used to achieve settlement in complex tort and securities litigation, including class proceedings. Ontario courts favour settlement wherever possible and have found that the underlying principles of American bar orders may be applied in Canada. The requested bar order was fair and reasonable.

The proposed settlement achieved the legislative goals of the Class Proceedings Act and afforded significant judicial efficiency and economy, while allowing access to justice through an efficient and cost-effective distribution mechanism. All of the settlement negotiations were at arms' length and were adversarial in nature. The settlements were fair and reasonable.

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A & M Sod Supply Ltd. v. Akzo Nobel Chemicals B.V., unreported, December 22, 2003, Doc. 02-CT-40300CP (Toronto); Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co., [2001] O.J. No. 6028 (S.C.J.); Alfresh Beverages Canada Corp. v. Hoechst AG, [2002] O.J. No. 79, 16 C.P.C. (5th) 301 (S.C.J.); Amoco Canada Petroleum Co. v. Propak Systems Ltd., [2001] A.J. No. 600, 200 D.L.R. (4th) 667, [2001] 6 W.W.R. 628, 2001 ABCA 110; [page760] Anderson v. Wilson (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494, 175 D.L.R. (4th) 409, 36 C.P.C. (4th) 17 (C.A.) [Leave to appeal to S.C.C. refused (2000), 258 N.R. 194n], revg in part (1998), 37 O.R. (3d) 235, [1998] O.J. No. 671, 156 D.L.R. (4th) 735, 18 C.P.C. (4th) 208 (Div. Ct.), revg in part (1997), 32 O.R. (3d) 400, [1997] O.J. No. 548 (Gen. Div.); Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3d) 734, [1993] O.J. No. 1948, 106 D.L.R. (4th) 339, 16 C.P.C. (3d) 156 (Gen. Div.); Bona Food s Ltd. v. Ajinomoto U.S.A., Inc., [2004] O.J. No. 908, 2 C.P.C. (6th) 15 (S.C.J.); Bona Foods Ltd. v. Pfizer Inc., [2002] O.J. No. 5553 (S.C.J.); California v. ARC America Corp., 109 S. Ct. 1661, 490 U.S. 93 (1989); Caputo v. Imperial Tobacco Ltd.,

[2004] O.J. No. 299, 236 D.L.R. (4th) 348, 42 B.L.R. (3d) 276, 22 C.C.L.T. (3d) 261, 44 C.P.C. (5th) 350 (S.C.J.), supp. reasons, [2005] O.J. No. 842, 250 D.L.R. (4th) 756 (S.C.J.); Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014, 196 D.L.R. (4th) 344, 1 C.P.C. (4th) 62, 11 B.L.R. (3d) 1 (C.A.) (sub nom. 3218520 Canada Inc. v. Bre-X Minerals Ltd.); Catfish Antitrust Litigation (Re), 826 F. Supp. 1019, 1993-2 Trade Cas. (CCH) P70, 395 (N.D. Miss. 1993); Chadha v. Bayer Inc. (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27, 31 B.L.R. (3d) 214, 23 C.L.R. (3d) 1, 31 C.P.C. (5th) 40 (C.A.) [Leave to appeal to S.C.C. denied, [2003] S.C.C.A. No. 106], supp. reasons (2003), 22 s 3 D.L.R. (4th) 158, [2003] O.J. No. 1162, 31 B.L.R. (3d) 214 (C.A.), affg (2001), 54 O.R. (3d) 520, [2001] O.J. No. 1844, 200 D.L.R. (4th) 309, 15 B.L.R. (3d) 177, 8 C.P.C. (5th) 138 (Div. Ct.), revg (1999) 45 O.R. (3d) 29, [1999] O.J. No. 2497 (S.C.J.); Cotton v. Hinton, 559 F.2d 1326, 15 Fair Empl. Prac. Cas. (BNA) 1342 (5th Cir. 1977); Currie v. McDonald's Restaurants of Canada Ltd., [2005] O.J. No. 506, 250 D.L.R. (4th) 224, 7 C.P.C. (6th) 60 (C.A.); Dabbs v. Sun Life Assurance Co. of Canada (1998), 41 O.R. (3d) 97, [1998] O.J. No. 3622, 165 D.L.R. (4th) 482, [1999] I.L.R. para. I-3629, 27 C.P.C. (4th) 243 (C.A.) [Leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372, 235 N.R. 390n], quashing (1998), 40 O.R. (3d) 429, [1998] O.J. No. 2811, [1998] I.L.R. para. I-3575, 22 C.P.C. (4th) 381 (Gen. Div.); Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 (Gen. Div.); Gariepy v. Shell Oil Co., unreported, April 16, 2004, Doc. 30781/99 (Toronto, Ont. S.C.J.); Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224 (1968); Hollick v. Toronto (City), [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105 (sub nom. Hunt v. T & N plc); Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 431 U.S. 720 (1977); Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481, 2001 BCSC 1060, 91 B.C.L.R. (3d) 309 (S.C.); M. (J.) v. B. (W.) (2004), 71 O.R. (3d) 171, [2004] O.J. No. 2312, 187 O.A.C. 201, 240 D.L.R. (4th) 435, 47 C.P.C. (5th) 234 (C.A.); M.C.C. v. Canada (Attorney General), [2004] O.J. No. 4924, 247 D.L.R. (4th) 667 (C.A.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No.

2474, [2001] O.T.C. 470, 8 C.P.C. (5th) 349 (S.C.J.); Millard v. North George Capital Manag ement Ltd., [2000] O.J. No. 1535, 47 C.P.C. (4th) 365 (S.C.J.); Minnema v. Archer Daniels Midland Co., unreported, February 28, 2003, Doc. G23495-99CP (Barrie, Ont. Sup. Ct.); NASDAQ Market-Makers Antitrust Litigation (Re), 169 F.R.D. 493, 1996-2 Trade Cas. (CCH) P71, 643 (S.D.N.Y. 1996); Nelson v. Bennett, 662 F. Supp. 1324 (E.D. Cal. 1987); Newly Weds Foods Co. v. Pfizer Inc., unreported, April 7, 2003, Doc. 39495 (Toronto); Nucorp Energy Securities Litigation (Re), 661 F. Supp. 1403, Fed. Sec. L. Rep. (CCH) P93, 224 (S.D. Cal. 1987); Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245, 37 C.P.C. (4th) 175 (S.C.J.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572, 40 C.P.C. (4th) 151 (S.C.J.); Price v. Panasonic Canada Inc., [2002] O.J. No. 2362, [2002] O.T.C. 426, 22 C.P.C. (5th) 382 (S.C.J.); Rumley v. British Columbia, [2001] 3 S.C.R. 184, [2001] emS.C.J. No. 39, 95 B.C.L.R. (3d) 1, 205 D.L.R. (4th) 39, 275 N.R. 342, [2001] 11 W.W.R. 207, 2001 SCC 69, 10 C.C.L.T. (3d) 1, 9 C.P.C. (5th) 1; Sawatzky v. Societe Chirurgicale Instrumentarium Inc., [1999] B.C.J. No. 1814, 37 C.P.C. (4th) 163 (S.C.); [page761] Silicone Gel Breast Implant Products Liability Litigation (Re), 1994 WL 578353 (N.D. Ala.); Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, [1988] O.J. No. 1745, 66 O.R. (2d) 225, 41 B.L.R. 22 (H.C.J.); Sugar Industry Antitrust Litigation (In Re), 73 F.R.D. 322, 22 Fed. R. Serv. 2d (Callaghan) 634 (E.D. Pa. 1976); Sutherland v. Boots Pharmaceutical PLC, [2002] O.J. No. 1361, 21 C.P.C. (5th) 196 (S.C.J.); Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2002] O.J. No. 298, 20 C.P.C. (5th) 351 (S.C.J.); Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2001] S.C.J. No. 63, 94 Alta. L.R. (2d) 1, 201 D.L.R. (4th) 385, 272 N.R. 135, [2002] 1 W.W.R. 1, 2001 SCC 46, 8 C.P.C. (5th) 1 (sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere); Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392, 49 C.P.C. (4th) 233, 24 C.P.C. (5th) 175 (S.C.J.) [Leave to appeal denied (2000), 52 O.R. (3d) 20, [2000] O.J. No. 4735 (S.C.J.), leave to appeal to S.C.C. denied, [2001] S.C.C.A. No. 88]

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 1, 5, 12, 13, 24, 26, 29, 32, 33

Clayton Act, 38 Stat. 731, 15 U.S.C. 15

Competition Act, R.S.C. 1985, c. C-34, ss. 36, 45

Interpretation Act, R.S.O. 1990, c. I.11, s. 10

Sherman Act, 26 Stat. 209, 15 U.S.C. 1

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Manual for Complex Litigation, 3rd ed. (St. Paul, MN: West Publishing, 1995)

Newberg, H.B., and A. Conte, Newberg on Class Actions, 3rd ed. (Colorado: Sheppards/McGraw-Hill, 1992)

Ontario Law Reform Commission, Report on Class Actions, vol. 1 (Toronto: Ministry of Attorney General, 1982)

MOTIONS for certification of class proceedings and for an approval of settlements.

Court File No.: 00-CV-202080CP

Harvey T. Strosberg, Q.C., C. Scott Ritchie, Q.C., J.J. Camp, Q.C., and Joe Fiorante, for plaintiffs in all actions.

Glenn M. Zakaib, for defendant Merck KgaA.

John Callaghan, for Sumitomo Chemical Co. Ltd.

William Vanveen and Franois Baril, for defendants Hoffmann-La Roche Limited, F. Hoffmann-La Roche Ltd.

Ariane Farrell, for Sumitomo Canada Ltd.

Donald Houston, for Lonza AG.

Court File No.: 00-CV-200045CP

William Vanveen and Fraois Baril, for defendants F. Hoffmann-La Roche Ltd. and Hoffmann-La Roche Limited/Limitee.

Glenn M. Zakaib, for defendant Merck KGaA.

Katherine L. Kay and Eliot N. Kolers, for defendant Eisai Co., Ltd.

Evangelia Kriaris, for Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries, Ltd.); Takeda Canada Vitamin and Food Inc. [page762]

Sandra A. Forbes, for Aventis Animal Nutrition SA, the Rhne-Poulenc defendants and Daiichi Pharmaceutical Company, Ltd.

David W. Kent, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc.

Court File No.: 00-CV-198647CP

David W. Kent, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc.

Andrew J. Roman, for Akzo Nobel N.V. and Akzo Nobel Chemicals B.V.

George D. Hunter, for DCV Inc. and Ducoa L.P.

James Doris, for Bioproducts, Inc.

Tycho Manson, for Chinook Group, Ltd.

Court File No.: 00-CV-201723CP

Sandra A. Forbes, for Aventis Animal Nutrition S.A. and the Rhne-Poulenc defendants.

F. Paul Morrison and J.P. Brown, for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls A.G.

S.A. Dawson, for Novus International, Inc.

Court File No.: 00-CV-200044CP

Donald Houston, for Lonza AG and Alusuisse-Lonza Canada Inc.

Jennifer Badley (per D. Kent) for Reilly Industries Inc. and Reilly Chemicals S.A.

F. Paul Morrison and J.P. Brown, for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls AG.

S. Vlahakis, for Nepera Inc., Roger Noack and David Purpi.

Court File No.: 40610

Donald Houston, for UCB S.A. and UCB Chemicals Corporation.

Court File No.: 42267CP

Donald Houston, for Wippon Soda Co. Ltd.

Pauline W. Wong, for defendant, Mitsui & Co., Ltd.

S.A. Dawson, for Novus International (Canada) Inc. [page763]

CUMMING J.:--

The Motions

[1] These are motions for certification, and for approval of the settlements, of a group of class actions in respect of certain defendants in the proceedings under ss. 32 and 33 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA").

[2] In 1999, multiple putative class actions were commenced in Ontario, British Columbia and Quebec alleging a complex,

global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete vitamins and with separate representative plaintiffs. Two additional, so-called "supplemental", class actions have also been initiated. Certain "Settling Defendants" have now entered into a proposed settlement with certain "Settling Plaintiffs" in these class actions in Ontario, culminating in what is called the "Amended Canadian Vitamins Class Actions National Settlement Agreement" ("Agreement") made as of November 1, 2004, and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will take place bef ore the courts in those provinces. (The status of the several class actions, upon successful motions for certification and settlement approval, is set forth in para. 106 of these Reasons.)

[3] The materials filed in support of the motion at hand are voluminous, filling three bankers' boxes. The Agreement is lengthy and complex with several schedules (see Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of the Motion Record). These materials can be found (together with additional information), online <http://www.vitaminsclassaction.com>.

[4] There are also very recent, trailing, additional, separate Settlement Agreements for three defendants (Akso Nobel Chemicals BV ("Akso"), UCB S.A. ("UCB"), and Reilly Industries Inc. ("Reilly") which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

[5] Capitalized terms used herein are as defined in the Agreement. However, the term "Class Counsel" means the law firms known as Siskinds, Cromarty, Ivey & Dowler ("Siskinds"), Sutts Strosberg ("Strosberg"), Camp Fiorante Matthews ("Camp"), Desmeules, and Allen Cooper. This definition of "Class Counsel" is different from the definition of "Class Counsel" found in the Agreement. The term "Quebec Counsel" means the two Montreal

firms, Sylvestre, Charbonneau, Fafard and Unterberg, Labelle, Lebeau. [page764]

[6] As well, "Class Counsel Fees", as this term is used herein, means the total fees payable to both Class Counsel and Quebec Counsel.

[7] The motion for certification and court approval of the proposed settlement was heard on March 8, 2005, with the motion for the approval of "Class Counsel Fees" being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of certification and the approval of the Settlement Agreement.

[8] The plaintiffs assert that:

(a) the defendants entered into conspiracies to fix prices with respect to the distribution and sale of vitamins and related products in the period January 1, 1986 to February 28, 1999; and

(b) the worldwide vitamin industry was dominated by certain groupings of the defendants who controlled a significant percentage of the world vitamin market for many of the main types of vitamins.

[9] Some of the defendants pled guilty in the United States and Canada to price-fixing charges concerning vitamins. The class actions at hand are based upon the impact of the alleged global conspiracies upon residents of Canada.

[10] Generally, vitamins are manufactured and marketed for four primary uses: animal and fish feed supplements; direct human consumption; food and beverage additive for human consumption; and cosmetics, as more fully particularized in the chart below:

Product	Uses
Biotin (Vitamin B8, Vitamin H)	Human consumption

	Animal and fish feed supplement
Bulk vitamins (Vitamin A, Vitamin B1, Vitamin B2, Vitamin B5, Vitamin B6, Vitamin B9, Vitamin B12, Vitamin C, Vitamin E, Beta Carotene, Canthaxanthin, Premix)	Human Consumption Food and Beverage additive for human consumption Cosmetics Animal and fish feed Supplement
Choline Chloride (Vitamin B4)	Food and beverage additive for human consumption Animal and fish feed supplement
Methionine	Human consumption Animal and fish feed supplement
Niacin, Niacinamide (Vitamin B3)	Human Consumption Food and beverage additive for human consumption Animal and fish feed supplement

[page765]

[11] There is a broad spectrum of plaintiffs because of the different users, namely, Direct Purchasers, Intermediate Purchasers and Consumers.

[12] The plaintiffs pursued this litigation, using a two-stage model. At stage one, on behalf of all purchasers of vitamins, the plaintiffs sought to hold the alleged conspirators accountable for the aggregate overcharge on all sales of vitamins in Canada by recovering aggregate damages. Then, at stage two, Class Counsel developed a distribution model for the aggregate damages to be paid to or for the benefit of Direct Purchasers, Intermediate Purchasers and Consumers, all of whom comprise the distribution chain.

[13] Class Counsel submits this two-stage approach is novel

in that it avoids the fragmented approach in the United States to price-fixing conspiracy claims. Under U.S. federal anti-trust laws, only direct purchasers are entitled to claim damages, notwithstanding that some of the overcharge may have been passed through the distribution chain: Sherman Act, 26 Stat. 209, 15 U.S.C. 1. Over 20 states have responded to this federal law by passing state laws that permit indirect purchasers, harmed by a conspiracy, to claim damages in state courts.

The Motions for Certification

[14] The CPA is a procedural statute. Section 5 of the CPA sets out the test for certification. The word "shall" in s. 5(1) is mandatory: the court must certify an action as a class proceeding if all of the five criteria of s. 5(1) of the CPA are met and if there is no other reason to refuse to make the order: Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3d) 734, [1993] O.J. No. 1948 (Gen. Div.), at p. 744 O.R.; Caputo v. Imperial Tobacco Ltd., [2004] O.J. No. 299, 236 D.L.R. (4th) 348 (S.C.J.), at para. 13.

[15] To certify an action as a class proceeding under s. 5, the plaintiff requires a "minimum evidentia[ry] basis for a certification order". It is necessary that the plaintiff "show some basis in fact for each of the certification requirements", other than the requirement in s. 5(1)(a). The "adequacy of the record will vary in the circumstances of each case": Hollick v. Toronto (City), [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, at para. 25.

[16] On these certification motions, there is before the court a substantial evidentiary base touching on all the requirements of s. 5(1). While the motions for certification vary in terms of the parties and vitamins involved, the motions can conveniently be discussed as a single motion.

[17] The following principles apply to the issue as to whether the pleadings disclose a cause of action under s. 5(1)

(a) of the CPA: [page766]

(a) no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;

(b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;

(c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;

(d) the novelty of the cause of action will not militate against the plaintiff;

(e) matters of law not fully settled in the jurisprudence must be permitted to proceed; and

(f) the statement of claim must be read generously to allow for inadequacies due to drafting frailties and the plaintiff'ss lack of access to key documents and discovery information: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, at pp. 990-91 S.C.R.; Anderson v. Wilson (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494 (C.A.), at p. 679 O.R.; Hollick, supra, at para. 25; M.C.C. v. Canada (Attorney General), [2004] O.J. No. 4924, 247 D.L.R. (4th) 667 (C.A.), at para. 41.

[18] The plaintiffs allege the following causes of action:

(a) the defendants contravened s. 45(1) of Part VI of the Competition Act, R.S.C. 1985, c. C-34, giving rise to a right of damages under ss. 36(1) and 45(1);

(b) the defendants are liable for tortious conspiracy and intentional interference with economic interests; and

(c) the defendants are liable for punitive damages.

[19] The plaintiffs submit that it is not "plain and obvious"

and beyond doubt that they could not succeed in the causes of action pleaded.

[20] Class definition is critical because it identifies the persons who are entitled to notice, entitled to relief, if relief is awarded, and bound by the judgment. A class definition must be "defined ... by reference to objective criteria". A class definition dependent upon a determination of an issue in the action is unacceptable because the merits are not to be decided at the certification [page767] stage: Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2001] S.C.J. No. 63, at para. 38.

[21] A class definition must bear a rational relationship to the common issues: Canadian Shopping Centres, supra, at para. 38; Hollick, supra, at para. 17; M.C.C. v. Canada, supra, at para. 45.

[22] The proposed class definition for each of the Ontario actions can be stated as follows:

> All persons in Canada who purchased the relevant Class Vitamin(s) in Canada in the relevant Purchase Period(s) except the Excluded Persons and persons who are included in the corresponding British Columbia and Quebec Actions.

[23] The proposed class definitions embody all levels of purchasers, including those who purchased vitamins in raw form and those who purchased a product of which vitamins were a component part. As the court recognized in Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 431 U.S. 720 (1977), at paras. 737-38, in the absence of a bar respecting the use of the passing-on defence, the class necessarily has to include all levels of plaintiffs, from direct purchasers to intermediate purchasers to ultimate consumers. All groups of class members must be present to ensure that the wrongdoers do not retain any of the fruits of their wrongdoing and to protect the rights of the class members to make a claim against a common fund to address their losses.

[24] The case of Hanover Shoe v. United Shoe Machinery Corp.,

392 U.S. 481, 88 S. Ct. 2224 (1968) serves as a starting point for the background of American price-fixing case law. Heard by the U.S. Supreme court in 1968, Hanover Shoe involved allegations by the plaintiffs that the defendants had monopolized the shoe machinery industry in violation of the Sherman Act, supra, resulting in an overcharge. The defendants argued that the plaintiff class had passed on some or all of the overcharge and therefore, was not entitled to recover such damages. The court rejected this defence, holding that the passing-on defence was not available to the defendants. In making its decision, the court determined that if the passing-on defence was permitted treble-damages actions would become too complicated, and the alleged co-conspirators "would retain the fruits of their illegality" because indirect purchasers, having only modest claims, would be unlikely to sue.

[25] The above decision was affirmed in 1977 in Illinois Brick, supra, another U.S. Supreme Court decision. The State of Illinois brought an action against manufacturers and distributors of concrete block in the Greater Chicago area. The state alleged that the defendants's illegal overcharges had been passed on through various levels of contractors to the plaintiff consumers, [page768] or indirect purchasers, causing them to suffer a loss. The court held that the passing-on theory must be applied uniformly for plaintiffs and defendants alike. Therefore, the plaintiffs could not use the passing-on theory offensively in light of the court'ss prior ruling that it could not be used defensively. The court further stated that only overcharged direct purchasers, and not others in the chain of manufacture or distributors, are considered parties "injured in his business or property" within the meaning of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15: Illinois Brick.

[26] The result of Illinois Brick is arguably to create a windfall for a direct purchaser that passes on an overcharge in whole or in part to an indirect purchaser. The indirect purchaser, who suffers a loss as a result of the conspiracy, would be barred from any recovery.

[27] The decision of the U.S. Supreme Court in Illinois Brick was criticized in many quarters. The reasoning of its critics

is largely contained within the dissent written by Mr. Justice Brennan, at p. 749, joined by Mr. Justice Marshall and Mr. Justice Blackmun:

> Today'ss decision flouts Congress's purpose and undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the court'ss decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers.

[28] Since the Supreme Court'ss decision in Illinois Brick, more than 20 states have enacted statutes which authorize indirect purchaser lawsuits. These statutes serve to ensure that the Illinois Brick decision does not bar state residents from potential recoveries against alleged conspirators. The United States Supreme Court has ruled that such statutes are not pre-empted by the court'ss decision in Illinois Brick. See California v. ARC America Corp., 109 S. Ct. 1661, 490 U.S. 93 (1989), at para. 1665.

[29] A national class which includes class members in all provinces and territories except Quebec (Consumers only) and British Columbia is appropriate. The subject matter of the class actions has a real and substantial connection to the Province of Ontario. As stated by this court in its decision dismissing the defendants jurisdictional challenge:

> [i]n my view, if the alleged conspiracy in each of the class actions is proven, there is a real and substantial connection with Ontario in respect of the subject matter of the actions in tort. [page769]

[30] I continued on to say:

[t]he centre of gravity for each of the class actions, initially on behalf of putative plaintiff aenational classes's, is Ontario. Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd., [2002] O.J. No. 298, 20 C.P.C. (5th) 351 (S.C.J.), at paras. 100-01.

[31] National classes have been certified by the Ontario court in many class actions: Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 (S.C.J.), at p. 228 O.R., leave to appeal denied (2000), 52 O.R. (3d) 20, [2000] O.J. No. 4735 (S.C.J.), leave to appeal to S.C.C. denied, [2001] S.C.C.A. No. 88. Recently, Sharpe J.A. said that "there are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation": Currie v. McDonald'ss Restaurants of Canada Ltd., [2005] O.J. No. 506, 7 C.P.C. (6th) 60 (C.A.), at para. 15; Alfresh Beverages Canada Corp. v. Hoechst AG, [2002] O.J. No. 79, 16 C.P.C. (5th) 301 (S.C.J.), at para. 2.

[32] The plaintiffs propose the following common issue for each of the Ontario actions:

Did the Settling Defendant(s) and its/their Affiliated Defendants(s) in the relevant Ontario Action agree to fix, raise, maintain or stabilize the prices of, or allocate markets and customers for, the relevant vitamins(s) in Canada in the relevant Purchase Period?

[33] The definition of "common issues" in s. 1 of the CPA "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high". The common issues need only to "advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of a particular legal claim ... is not required." This requirement has been described by the Court of Appeal "as a low bar". The Supreme Court of Canada has held that in framing the common issues, the guiding question should be "whether allowing the suit to proceed as a representative one would avoid duplication of fact finding or legal analysis". The common issues question should be approached purposively: Carom v. Bre-

X Minerals Ltd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.), at pp. 248-49 O.R.; M.C.C. v. Canada, supra, at para. 52; Western Canadian Shopping Centres, supra, at para. 39; Rumley v. British Columbia, [200

1] 3 S.C.R. 184, [2001] S.C.J. No. 39, at para. 29.

[34] Price-fixing conspiracy cases by their nature, deal with common legal and factual questions about the existence, scope and effect of an alleged conspiracy. Putative class members have a common interest in any proof of a concerted action, conspiracy and of agreement with the aim and result of restricting trade: [page770] In Re Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 22 Fed. R. Serv. 2d (Callaghan) 634 (E.D. Pa. 1976), at p. 335.

[35] In the United States, it is widely accepted that:

> [An] allegation of price-fixing . . . will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question.

Herbert B. Newberg & Alba Conte, Newberg on Class Actions, 3rd ed. (Colorado: Sheppards/McGraw-Hill, 1992), at pp. 18-15 to 18-21.

[36] If each class member in the subject class actions proceeded individually against the defendants, each would have to prove the existence and impact of the identical conspiracy to fix prices and allocate markets. Therefore, in each of these actions the common issue satisfies the test of advancing the proceeding and avoiding duplication of the fact-finding and legal analysis: Rumley, supra, at para. 29.

[37] "[T]he preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members." The only litigation alternatives to these class actions are a plethora of individual actions or no individual actions. These are not realistic alternatives to a class

action: M.C.C. v. Canada, supra, at para. 73.

[38] One goal of the CPA is "litigation efficiency" or "judicial economy ... to enable the court system to deal efficiently with a large number of claims [arising] from the same event". Another goal is to encourage access by victims to the court system. Thus, it is said, the CPA is "anchored in the principles of access to justice and judicial economy". The assessment of the s. 5(1)(d) requirement of the CPA "should be conducted through the lens of the three principles of advantages of class actions -- judicial economy, access to justice, and behavioural modification": Carom, supra, at pp. 238-39 O.R.; Hollick, supra, at para. 27.

[39] It is necessary "to assess the litigation as a whole" and "to adopt a practical cost-benefit approach to" the s. 5(1)(d) requirement. It is "essential to assess the importance of the common issues in relation to the claim as a whole": Hollick, supra, at para. 29; M.C.C. v. Canada, supra, at para. 76.

[40] These class actions are the preferable procedure because they present a fair and manageable process. Moreover, for class members there are no "alternative avenues of redress apart from individual actions". Further, "individual actions would be less practical and less efficient than a class proceeding". Thus, [page771] certification would increase access to justice: Hollick, supra, at para. 31; Rumley, supra, at paras. 37-38.

[41] A class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issues and because it will advance the actions in accordance with the goals of judicial economy, access to justice and behaviour modification. In the absence of these class actions, it is unlikely that the majority of claims would be advanced at all. This accords with the preferability test as enunciated by the Supreme Court of Canada in Rumley and in Hollick, namely, whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim, and whether a class proceeding is preferable, in the sense of preferable to other procedures: Rumley, supra, at

para. 35; Hollick, supra, at paras. 28-31.

[42] Any notion of judicial economy would be destroyed if each class member was required to proceed individually against the defendants and to prove the existence and impact of the identical conspiracy to fix prices: Re Catfish Antitrust Litigation, 826 F. Supp. 1019, 1993-2 Trade Cas. (CCH) P70, 395 (N.D. Miss. 1993), at p. 1034.

[43] Each of the proposed representative plaintiffs is a Direct Purchaser, Intermediate Purchaser or Consumer, and each is a class member within the proposed relevant Settlement Class definition. Each of the plaintiffs would fairly and adequately represent the interests of the Settlement Classes.

[44] The plaintiffs do not have on the common issue any interest in conflict with the interests of other class members. In conspiracy claims, every buyer and seller in the class has a common interest in proving the existence of the conspiracy and in maximizing the aggregate amount of class-wide damages: Re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 1996-2 Trade Cas. (CCH) P71, 643 (S.D.N.Y. 1996), at p. 513.

[45] The plaintiffs have produced a plan through the Agreement which sets out a workable method of resolving the litigation on behalf of the Settlement Classes and of notifying class members.

[46] The motion for certification is, of course, a necessary prerequisite to obtaining approval of the proposed settlement. The Settling Defendants will only settle if the plaintiff class members are to be bound by the settlement, subject to the right to opt out. The consent of the Settling Defendants is only for the purpose of giving effect to the settlement and is conditional upon the court'ss approval of the settlement.

[47] In my view, and I so find, the prerequisite criteria required by the CPA for certification are met. Subject to the [page772] issue of the motions for settlement approval being determined favourably, orders shall issue certifying the Ontario class actions under consideration as requested in the

motion records in respect of the Settling Defendants. (See para. 106 of these Reasons for a summary.) I turn now to a consideration of the proposed settlements.

The Proposed Settlements

[48] The proposed class action settlements at hand total, by far, the largest amount recovered in a class action relating to price-fixing in Canada. The settlements are based on a total damage assessment of about $140 million, including interest, expenses and costs and would result in an anticipated recovery of about $100 million after the deduction of Settlement Credits.

[49] Direct Purchasers will receive up to 12 per cent of the value of their vitamin purchases. The benefits available to Intermediate Purchasers and Consumers will be paid cy-prs to carefully selected and well-recognized consumer and industry organizations. Each cy-prs recipient has prepared a detailed proposal for the expenditure of its share of the settlement moneys. Each recipient will be held accountable for the moneys it receives through compliance with strict governing rules.

[50] During the settlement negotiations, Class Counsel sought damages for the class as a whole. As a result of these negotiations, the Settlement Amount reflected in the Agreement was $132,450,000 plus Pre-Deposit Interest. Since then:

(a) Akzo, a defendant in the Ontario Choline Chloride Action, has agreed to pay $250,000 to settle the claims against it (Akzo did not sell choline chloride in Canada);

(b) UCB, a defendant in the Supplemental Ontario Choline Chloride Action, has agreed to pay $250,000 to settle the claims against it (UCB did not sell choline chloride in Canada); and

(c) Reilly, a defendant in the Ontario Niacin Action, has agreed to settle the claims against it for $32,728.80, based on 16.5 per cent of its sales of $184,154.50, plus interest of $2,323.30 from March 1, 2003.

[51] In April 2002, the plaintiffs reached an agreement in principle with three of the Settling Defendants to resolve all of the actions for the amount of $144 million plus post-agreement interest, assuming that all other defendants agreed to participate. [page773]

[52] In November 2002, after the first mediation before Mr. Justice Winkler, a memorandum of understanding was signed with some of the defendants reflecting a Settlement Amount of $148,500,000, being $144,000,000 plus capitalized interest of $4,500,000.

[53] By February 2003, some of the defendants who sold methionine advised that they would not participate in the proposed settlement. Thus, an adjustment was required. After negotiations and as a result of a second mediation, the amount of $148,500,000 was reduced to $133,200,000.

[54] In the fall of 2004 and January 2005, there [were] further adjustments to the Settlement Amount to bring it to $132,450,000.

[55] The $132,450,000 includes some capitalized interest (in an amount less than $4,500,000) and is treated as damages.

[56] The proposed settlements are based on a total of $140,676,928, as of the Deposit Date, calculated as follows:

Item	Amount
Aggregate damages per Amended Settlement Agreement (Settlement Amount $132,450,000 less expenses of $10,000,000)	$122,450,000
Plus: Akzo, UCB, Reilly settlement amounts totalling	$532,728
Subtotal of aggregate damages	$122,982,728
Plus: expenses per Amended Settlement Agreement	$10,000,000

Subtotal including expenses	$132,982,728
Plus: Pre-Deposit Interest per Amended Settlement Agreement	$7,694,200
Total	$140,676,928

[57] Sales of vitamins in Canada which were subject to the alleged conspiracies totalled about $950 million. This amount includes about $43 million of methionine sales by a Settling Defendant and estimated methionine sales of about $80 million by the defendants who have not settled. Therefore, the settlements are based upon vitamins sales in Canada totalling about $870 million ($950 million minus $80 million).

[58] Dr. Thomas Ross, the plaintiffs's expert, concludes in his affidavit that the "best aepoint's estimate corresponds to overcharges on the order of 16 per cent". He also states, "absent the conspiracy, the quantity of vitamins purchased would have cost buyers only $749 million rather than $870 million, implying an aggregate damage number (overcharge) of $121 million". [page774]

[59] Dr. Ross also states:

> In summary, I suggest that a range of $103 million to $138 million provides a very good estimate of the damage arising from the price-fixing conspiracy considered in this affidavit. The "best estimate" or "point estimate" is approximately $121 million and the associated price overcharge is 16.2 per cent. This percentage price overcharge is similar to that estimated by Beyer for the United States.

[60] The settlements contemplate aggregate damages of $122,982,728, which compares favourably with Dr. Ross's "estimate of the damage arising" in the "range of $103 million to $138 million".

[61] In his affidavit on settlement approval in the U.S. direct purchaser vitamins class action, economist Dr. John

Beyer opined that the weighted average overcharge based on his regression analysis (using U.S. data) was 13.5 per cent. This estimate can be compared to Dr. Ross's regression analysis of a 16.2 per cent overcharge (using Canadian data). The settlement in the U.S. Federal Court was in the range of 18 per cent to 20 per cent of gross sales in an environment of treble damages and large jury verdicts.

Direct Purchasers

[62] The aggregate damages of $122,982,728 includes the sales to the Direct Purchasers who commenced actions or made claims against some Settling Defendants and who have settled their claims directly with them.

[63] Prior to the first mediation on October 7, 2002, and in the context of claims and/or ongoing litigation and at arm'ss length, three Settling Defendants paid, in total, $24,100,000 to settle individual claims of Direct Purchasers who had purchased a total of $200,500,000 of vitamins from them. This equates to an average overcharge of 12 per cent of sales.

[64] Each Direct Purchaser who settled with a Settling Defendant is excluded from the settlements as an "Excluded Customer" because it has already been paid and no longer has a claim. The Settling Defendants are entitled to a deduction from the aggregate damages, reflecting the payments they made to such Excluded Customers who are not class members because they no longer have a claim.

[65] Each Settling Defendant who settled with a Direct Purchaser is entitled to a Settlement Credit calculated as 12 per cent of the Purchase Price. The Settlement Credits particularized in the Agreement total $42,436,670. These Settlement Credits represent settlements made by the Settling Defendants with Direct [page775] Purchasers who purchased approximately $353,639,000 of vitamins, calculated as:

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$42,436,670
----------- x 100 per cent
12 per cent
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[66] By the time of the signing of the Agreement, the aforementioned three Settling Defendants had paid, on average, 11.5 per cent of the Purchase Price to the Direct Purchasers with whom they settled.

[67] After taking into account Settlement Credits, the Settling Defendants have agreed to pay to the Administrator approximately $98,240,258 as calculated in the following chart:

Item	Amount
Aggregate damages as per Amended Settlement Agreement	$122,450,000
Plus: Akzo Settlement Amount	250,000
Plus: UCB Settlement Amount	250,000
Plus: Reilly Settlement Amount	32,728
Subtotal of aggregate damages	122,982,728
Plus: expenses as per Amended Settlement Agreement	10 million
Subtotal of aggregate damages plus expenses	132,982,728
Plus: Pre-Deposit Interest as per Amended Settlement Agreement	7,694,200
Subtotal of aggregate damages, expenses and Pre-Deposit Interest	140,676,928
Less: Settlement Credits per the Amended Settlement Agreement	(42,436,670)
Total payable to Administrator	$98,240,258

[68] The moneys paid to the Administrator will earn interest in the Administrator'ss hands before being paid out. The additional interest to be earned will total about $2 million.

Thus, the total recovered through the settlement of the class actions is estimated to be in excess of $100 million ($98,240,258 + $2 million).

[69] Five Funds are established by s. 6.1(1) of the Agreement. The estimated amount allocated to each Fund is set forth in the following chart: [page776]

Fund	Allocation Amended Settlement Agreement	Settlement Credits	Interest % allocation	Pre-deposit Interest	Akzo, UCB and Reilly Settlements	Amount Allocated to Each Fund
Direct Purchaser	94,450,000	(42,436,670)	.578	4,447,247	250,000	56,710,577
Intermediate Purchaser	11 million	n/a	.122	938,693	141,364	12,080,057
Consumer	11 million	n/a	.122	938,693	141,364	12,080,057
Methionine	6 million	n/a	.067	515,511	n/a	6,515,511
Expense	10 million	n/a	.111	854,056	n/a	10,854,056
Total	132,450,000	(42,436,670)				

Total	7,694,200	532,728	98,240,258

[70] The recognition of Settlement Credits at 12 per cent and the entitlement of each Direct Purchaser to receive up to 12 per cent of the Purchase Price are inter-related and flow from the same relevant statistical information obtained by Class Counsel from some of the defendants during the course of settlement negotiations.

[71] As a result of the first mediation, Class Counsel agreed that it was reasonable for each Direct Purchaser to be paid up to 12 per cent of its Purchase Price.

[72] Together, the Direct Purchaser Fund and the Methionine Fund are allocated $105,662,758 with Pre-Deposit Interest (but before Settlement Credits), calculated as follows:

Item	Amount
Direct Purchaser Fund: Amended Settlement Agreement	94,450,000
Methionine Fund: Amended Settlement Agreement	6,000.000
Subtotal	100,450,000
Pre-Deposit Interest on Purchaser Fund	4,447,247
Pre-Deposit Interest on Methionine Fund	515,511
Akzo Settlement Agreement contribution to the Direct Purchaser fund	250,000
Total	105,662,758

[73] The allocation of $105,662,758 to the Direct Purchaser Fund and the Methionine Fund was made in contemplation of payments to Direct Purchasers of $104,400,000, being 12 per cent of the total vitamin sales of $870 million. Class counsel submits that this allocation to the Direct Purchaser Fund gives Direct Purchasers added assurance that they will be paid 12 per cent of the Purchase Price and will motivate them to participate in the settlements rather than opt out. [page777]

[74] Direct Purchasers must decide whether or not to participate before the precise percentage payout of the Purchase Price to each Direct Purchaser is known. It is critical to the implementation of the settlements that Direct Purchasers do not opt out of the settlements. If Direct Purchasers with sales in excess of the Opt Out Threshold opt out, then the Settling Defendants, at their option, may declare the Agreement null and void pursuant to s. 14.4 thereof.

[75] The Methionine Fund will not be distributed to Direct Purchasers of methionine at this time. It will be held pending a further order of the court.

[76] However, if the requested $18,075,000 for Administration Expenses and Class Counsel Fees were to become payable, approximately $300,000 would be paid out of the Methionine Fund towards these costs.

[77] The proposed method of payments by the Administrator is user friendly for Direct Purchasers. The Administrator will write to virtually all Direct Purchasers to advise of their right to claim and, for many, will provide the precise amount due to the Direct Purchaser based on 12 per cent of their Purchase Price as disclosed by the Settling Defendants to the Administrator.

[78] If the Direct Purchaser agrees with the amount calculated by the Administrator, the Direct Purchaser need not produce any Purchase Price information. If the Direct Purchaser disagrees with the Administrator'ss calculation or the Administrator has no Purchase Price data for a particular Direct Purchaser, then the Direct Purchaser must prove the

Purchase Price to the satisfaction of the Administrator by producing invoices or other records.

[79] There are tens of thousands of Intermediate Purchasers and millions of Consumers in the classes.

[80] There are substantial difficulties associated with the determination of the actual damage (taking into account pass through) suffered by each Intermediate Purchaser and Consumer. Moreover, the complexity and administrative costs associated with any direct distribution to each Intermediate Purchaser and Consumer would be prohibitive. Thus, the settlements contemplate cy-prs distributions to these two groups of class members.

[81] After the allocation to Direct Purchasers and to expenses, the balance of the settlement moneys is to be divided equally between the Intermediate Purchasers and Consumers so that each Fund initially would receive $11 million plus Pre-Deposit Interest. Class Counsel submit this to be reasonable given the complexities associated with a precise calculation of the damages of these class members. [page778]

Intermediate Purchasers

[82] The Intermediate Purchaser Fund will be distributed cy-prs to industry organizations for the benefit of Intermediate Purchasers.

[83] Intermediate Purchasers can generally be classified into one of three categories: agricultural producers, grocer/wholesalers and drugstores/pharmacies. The Intermediate Purchaser Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule F. It allocates 70 per cent of the fund to agricultural producers, 15 per cent to grocer/wholesalers and 15 per cent to drugstores/pharmacies.

[84] The Intermediate Purchaser Fund Distribution Protocol is intended to provide benefits to Intermediate Purchasers by funding industry organizations. Class Counsel identified potential recipient organizations by Internet research and

discussions with various industry organizations. Each potential recipient was evaluated against the following criteria:

(a) the organization'ss membership base;

(b) whether the organization was national in scope;

(c) the organization'ss ability to deliver benefits to a particular group of Intermediate Purchasers; and

(d) the organization'ss financial stability.

[85] Proposed recipients have agreed to comply with the rules governing cy-prs distributions which were developed with the assistance of the Administrator, Deloitte & Touche LLP, and are found at s. 1.3 of Schedule F. These rules seek to ensure that all recipient organizations account to the courts for the settlement funds they receive.

[86] Each proposed recipient:

(a) prepared a detailed proposal which is before the court;

(b) delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirmed it would comply with the procedures governing distribution; and

(c) has agreed to use the funds in a manner that will deliver an identifiable benefit to its respective membership.

[87] The Canadian Cervid Council was to receive 0.112 per cent of the money available to Intermediate Purchasers. However, it is now defunct. Thus, funds otherwise to have been allocated to the [page779] Canadian Cervid Counsel will be distributed to the remaining participating organizations as provided in Schedule F.

[88] The Canadian Goat Society is to receive 0.098 per cent of the Intermediate Purchaser Fund. The Canadian Goat Society seeks approval to share its portion of the settlement funds

with the Canadian Boer Goat Association, a group that also represents Canadian goat producers. This is accepted as a request. Therefore, upon court approval, each of these two organizations will receive 50 per cent of the funds earmarked for the Canadian Goat Society.

[89] Schedule F provides that two industry organizations representing grocers and grocer/wholesalers in Canada, the Federation of Independent Grocers and the Canadian Council of Grocery Distributors, are to receive 4.5 per cent and 10.5 per cent respectively of the available moneys. Combined, the membership in these two organizations accounts for virtually all grocer/wholesalers in Canada.

[90] Schedule F also provides that the Canadian Association of Chain Drugstores, an industry organization that represents the interests of over 70 per cent of all retail drugstores and pharmacies in Canada, is to receive 15 per cent of the available moneys on behalf of drugstore/pharmacies.

[91] Assuming a distribution of $11,400,000, the following chart lists the proposed cy-prs recipients on behalf of Intermediate Purchasers, the initial percentage they were to receive, their percentage taking into account the adjustment because of the demise of the Canadian Cervid Council, and the amount each is actually to receive:

Proposed Recipients	Initial %	Adjusted %	Adjusted Allocation
Agricultural Producers - 70%			
Canadian Pork Council	22.12	22.123	2,522,022
Canadian Cattlemen's Association	18.795	18.799	2,143,086
Dairy Farmers of Canada	10.927	10.934	1,246,476
Chicken Farmers of Canada	7.469	7.476	852,264

Canadian Egg Marketing Agency	3.22	3.227	367,878
Canadian Aquaculture Industry Alliance	2.884	2.891	329,574
Canadian Turkey Marketing Agency	1.463	1.47	167,580
Equine Canada	1.162	1.169	133,266
Poultry Research Council	0.784	0.791	90,174
Canadian Broiler Hatching Egg Marketing Agency	0.525	0.532	60,648
Canadian Sheep Federation	0.266	0.273	31,122
Canadian Bison Association	0.175	0.182	20,748
Canadian Cervid Council (now defunct)	0.112	0	0
Canadian Goat Society	0.098	0.056	6,384
Canadian Boer Goat Association [page780]	0	0.056	6,384
Grocer Wholesalers - 15%			
Canadian Council of Grocery Distributors	10.5	10.507	1,197,798
Canadian Federation of Independent Grocers	4.5	4.507	513,798
Drugstores/Pharmacies - 15%			
Canadian Association of Chain Drugstores	15.0	15.007	1,710,798

Total	100.0	100.0	11,400,000

Consumers

[92] The initial corpus of the Consumer Fund will be distributed to consumer organizations for activities related to vitamin products, such as food and nutritional research, education and food programs, consumer services, or consumer protection activities for the indirect benefit of consumers of all ages.

[93] The Consumer Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule G. It allocates 30 per cent of the initial moneys in the Consumer Fund to research/advocacy groups for the benefit of all consumers across Canada. The remaining 70 per cent will be divided, based on population, between Quebec (16.5 per cent) and the rest of Canada (53.5 per cent) and allocated to service delivery groups. (Quebec Counsel independently have assumed responsibility for allocating the portion of the Consumer Fund earmarked for Quebec Consumers. This distribution is set out in s. 1.2(4) of Schedule G.) (The Quebec Court is to receive full particulars of these organizations and their plans.)

[94] Proposed recipients were identified through Internet research, discussions with various consumer organizations and through consultation among Class Counsel. Additionally, Class Counsel consulted with Mr. Gordon Wolfe, a person employed in the non-profit sector with knowledge of charitable and non-profit organizations.

[95] Class Counsel recognized that selecting regional or provincial organizations would make equal treatment across Canada difficult, so they concentrated on selecting Canadian-wide organizations that had a presence in most, if not all, provinces and territories.

[96] Each potential recipient was evaluated against the following criteria:

(a) the organization'ss ability to deliver benefits in each province and territory; [page781]

(b) the organization'ss ability to reach one or more of the target age groups, being children, youth, adults or the elderly;

(c) whether the organization was non-denominational;

(d) whether the organization had a charitable or non-profit designation;

(e) the organization'ss financial stability and budget; and

(f) the organization'ss history of advocacy, service delivery, research or education relevant to vitamin products.

[97] Financial information was obtained from each potential recipient. The size of an organization'ss budget was a consideration in determining what proportion of the Consumer Fund, if any, a particular organization should receive.

[98] Each proposed recipient prepared a detailed proposal which is before the court. Each proposed recipient also delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirming that it will comply with the rules governing cy-prs distributions found at Schedule G. Class Counsel have reviewed all of the proposals and state their belief that, if the distribution is made as proposed, the funds will provide a tangible benefit to consumers.

[99] Assuming an initial distribution of $11,400,000, the following chart lists the proposed cy-prs recipients on behalf of Consumers and the amount each is to receive:

Proposed Recipients	%	Allocation
Allocation to National Organizations -- 30%		
Food Safety Network	29.0	991,800

Option Consommateurs (Canada)	29.0	991,800
Canadian Foundation for Dietetic Research	12.5	427,500
The Centre for Research in Women's Health	10.5	359,100
The Centre for Science in the Public Interest	10.5	359,100
Canadian Institute of Food and Nutrition	8.5	290,700
Allocation to all provinces and territories except Qubec -- 53.5%		
Victoria Order of Nurses	35.0	2,134,650
Canadian Association of Food Banks	25.0	1,524,750
Boys and Girls Clubs of Canada	20.0	1,219,800
Breakfast for Learning	15.0	914,850
Canadian Feed the Children	5.0	304,950

[page782]

Allocation to Qubec -- 16.5%		
Centraide pour tout le Qubec	46.0	865,260
Fonds d'aide au recours collectif	19.0	357,390
Campagne de prvention l'endettement des 40 associations de consommateurs du Qubec	10.0	188,100
Projet Petits prts (en collaboration avec la Fiducie Desjardins et la Coalition des associations des consommateurs du Qubec)	9.0	169,290
Fondation Claude Masse	8.0	150,480

Option Consommateurs	8.0	150,480
Total		$11,400,000

[100] The Agreement also provides in s. 6.2(7) that any remaining "balance in the Direct Purchaser Fund ... shall be transferred to and become part of the Consumer Fund". Based on experience and the statistics from other price-fixing class actions, class counsel are of the view that it is probable that the "take-up rate" by Direct Purchasers will be less than 100 per cent and that substantial moneys will trickle down to the Consumer Fund.

[101] Section 1.3 of the Consumer Fund Distribution Protocol creates an alternative method to distribute moneys which are subsequently allocated to the Consumer Fund as a result of trickle down from the Direct Purchaser Fund.

[102] Although within the Consumer Fund Distribution Protocol, the intent of this alternative method of distribution is to benefit both consumers and Intermediate Purchasers. This is accomplished by paying the vast majority of the trickle down moneys to universities and colleges.

[103] For example, the allocation to the Ontario Veterinary College at the University of Guelph seeks in part to benefit Intermediate Purchasers, many of whom are in the agricultural business.

[104] The following chart lists the proposed recipients of the moneys which could subsequently be allocated to the Consumer Fund and the amounts each would receive, assuming an amount of $10 million trickles down:

	%	Allocation
Northwestern Region - 30.3%		
University of British Columbia	45	1,363,500

University of Alberta	133	999,900
University of Manitoba	12	363,600
Western College of Veterinary Medicine, University of Saskatchewan	10	303,000

[page783]

Eastern Region - 7.6%		
Memorial University	50	380,000
Dalhousie University	50	380,000
Ontario -- 38.4%		
University of Toronto	25	960,000
University of Guelph	25	960,000
Ontario Veterinary College, University of Guelph	25	960,000
Ontario Agri-Food Education	25	960,000
Qubec - 23.7%		
Universit Laval	27	639,900
McGill University	26	616,200
Facult de mdecine vtrinaire, Universit of Montral	27	639,900
Option Consommateurs [to a maximum of $1 million]	20	474,000
Total	100	$10,000,000

[105] Option Consommateurs is to receive $1,142,280 of the initial Consumer cy-prs distribution and 20 per cent, to a

maximum of $1 million, of the trickle down distribution. Option Consommateurs is not only a cy-prs recipient but also a representative plaintiff in Quebec. In Quebec, Option Consommateurs has a unique status and has the capacity to sue on behalf of Consumers. As representative plaintiff, Option Consommateurs has been the recipient on behalf of Quebec Consumers of a portion of settlement funds in eight settled actions.

The Status of the Ontario Class Actions upon Settlement Approval

[106] The following chart lists the outstanding class actions in Ontario and the status of each action if the court approves the proposed settlements and they become effective.

Proceeding

Ontario Biotin Action
Glen Ford v. F. Hoffmann-La Roche Ltd.

Settling Defendants

F. Hoffmann-La Roche Ltd., Merck KGaA, Lonza AG, Sumitomo Chemical Co., Ltd., Tanabe Seiyaku Co., Ltd.

Non-Settling Defendants

None [page784]

Proceeding

Ontario Bulk Vitamins Action
Glen Ford v. F. Hoffmann-La Roche Ltd.

Settling Defendants

F. Hoffmann-La Roche Ltd., Aventis Animal Nutrition S.A., Eisai Co., Ltd., Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries, Ltd.), Merck KGaA, Daiichi Pharmaceutical Company, Ltd.

Non-Settling Defendants

none

Proceeding

Ontario Choline
Chloride Action Fleming Feed Mill Ltd. v. BASF
Atkiengesellschaft

Settling Defendants

Chinook Group Limited (incorrectly named Chinook Group, Ltd.) BASF Aktiengesellschaft Bioproducts, Incorporated (incorrectly named Bioproducts, Inc.) Akzo Nobel Chemicals BV

Non-Settling Defendants

DCV, Inc.
DuCoa, L.P.

Proceeding

Supplemental Ontario
Choline Chloride Action Fleming Feed Mill Ltd. v. UCB S.A.

Settling Defendants

UCB S.A.
UCB Chemicals Corporation
UCB, Inc.

Non-Settling Defendants

none

Proceeding

Ontario Niacin Action VitaPharm Canada Ltd. v. Degussa-Hls

AG

Settling Defendants

Degussa Canada Inc.
Lonza AG Nepera, Inc. (incorrectly named Nepera, Incorporated)
Reilly Industries Inc.

Non-Settling Defendants

None

Proceeding

Ontario Methionine Action Glen Ford v. Rhne-Poulenc S.A.

Settling Defendants

Aventis Animal Nutrition S.A.

Non-Settling Defendants

Degussa-Hls AG
Degussa Corporation
Degussa Canada Inc.
Novus International, Inc.

Proceeding

Supplemental Ontario Methionine Action
Glen Ford v. Novus International (Canada) Inc.

Settling Defendants

None

Non-Settling Defendants

Novus International (Canada) Inc.
Nippon Soda Co. Ltd.

Mitsui & Co. Ltd.

[107] If the proposed settlements are approved, Class Counsel will continue to prosecute the Ontario Methionine Action and the Supplemental Ontario Methionine Action.

[108] The only other outstanding action will be the Ontario Choline Chloride Action against DCV Inc. and DuCoa L.P. These companies represent that they are insolvent. Class Counsel will seek the court'ss direction about whether or not to continue this action against these defendants.

[109] The following chart sets out an estimate of the timeline for the implementation of the settlement if the courts in the three provinces give their approval: [page785]

Ontario approval hearing	March 8, 9, 2005
Decision -- Ontario	By March 24, 2005
British Columbia and Quebec approval hearings	April 6 and 21, 2005
Ontario judgment final	By April 24, 2005
British Columbia and Quebec judgments final	By May 6, 2005
IMPLEMENTATION OF NOTICE PROGRAM	By June 5, 2005
Opt Out period expires and claim period for Direct Purchasers begins	By August 5, 2005
Assume Opt Out Threshold is not exceeded, Administrator will report to the Courts and the Courts declare that settlements are operative and binding (s.16.1 Amended Settlement Agreement)	By September 9, 2005
Payout of Intermediate cy-prs and initial Consumer cy-prs no earlier than	September 9, 2005

Claim period expires	By November 5, 2005
Payout to Direct Purchasers no earlier than	December 1, 2005
Calculation of trickle down and payout no earlier than	January 6, 2006
Final reports to Courts no earlier than	February 1, 2006

The Law

[110] A settlement of a class proceeding is not binding unless approved by the court. To approve a settlement, the court must find that it is fair, reasonable and in the best interests of the class: CPA, s. 29(2); Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, [1998] O.J. No. 2811 (Gen. Div.), at p. 444 O.R., quashing (1998), 41 O.R. (3d) 97, [1998] O.J. No. 3622 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372.

[111] The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy. As observed in Amoco Canada Petroleum Co. v. Propak Systems Ltd., [2001] A.J. No. 600, 200 D.L.R. (4th) 667 (C.A.), at p. 677 D.L.R.:

> In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.

[112] Similar sentiments have been expressed by Cronk J.A. in M. (J.) v. B. (W.) (2004), 71 O.R. (3d) 171, [2004] O.J. No. 2312 (C.A.), at para. 65:

> Finally, there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlement of civil cases. This laudatory objective [page786] has long been recognized by Canadian courts as fundamental to

> the proper administration of civil justice . . . Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation.

[113] There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm'ss length by counsel for the class, is presented for court approval: Manual for Complex Litigation, Third 30.42 (1995). See Cotton v. Hinton, 559 F.2d 1326, 15 Fair Empl. Prac. Cas. (BNA) 1342 (5th Cir. 1977), at p. 1330; Dabbs (Gen. Div.), supra, at p. 440 O.R.

[114] To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes: Dabbs (Gen. Div.), supra, at p. 440 O.R.

[115] In general terms, a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a "zone or range of reasonableness":

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

Dabbs (Gen. Div.), supra, p. 440 O.R.; Newberg, supra, at p. 11-104.

[116] A similar standard has been applied in non-class action proceedings in Ontario. The courts recognize that settlements are by their very nature compromises, which need not, and usually do not, satisfy every single concern of every stakeholder. Acceptable settlements may fall within a broad

range of upper and lower limits:

> In cases such as this, it is not the court'ss function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court'ss function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.

Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, [1988] O.J. No. 1745 (H.C.J.), at p. 230 O.R.

[117] In determining whether to approve a settlement, a court takes into account factors such as:

(a) the likelihood of recovery or likelihood of success;

(b) the amount and nature of discovery, evidence or investigation; [page787]

(c) the proposed settlement terms and conditions;

(d) the recommendation and experience of counsel;

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

(f) the recommendation of neutral parties, if any;

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

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

(i) the information conveying to the court the dynamics of, and the positions taken by

(j) the parties during the negotiations; and

(k) the degree and nature of communications by counsel and the representative

(l) plaintiff with class members during the litigation.

Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 (Gen. Div.), at para. 13; Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572, 40 C.P.C. (4th) 151 (S.C.J.), at paras. 71-72.

[118] These factors constitute a guide in the process. It is not necessary that all factors receive the same consideration. In any particular case, certain of the listed factors will have greater significance than others, and weight should be attributed accordingly: Parsons, supra, at para. 73.

[119] When the subject class actions were commenced, this type of litigation was novel in Canada and the approach taken by Class Counsel was significantly different from that which had been seen in the United States Federal Court. Class Counsel advanced the actions on the theory that:

(1) the defendants should pay the total overcharge for vitamins sold in Canada; and

(2) the actions would be pursued in a two-phased approach: first, damages for the entire Canadian vitamins marketplace would be measured by the total overcharge for vitamins sold in Canada during the Purchase Periods; and second, an appropriate distribution protocol would be determined or negotiated. [page788]

[120] The plaintiffs faced litigation risks. The novel nature of the actions and the theory pursued by Class Counsel created the risk that the actions, or some of them, would not be certified, and the risk that if certified, the court would not assess damages in the aggregate. Quite probably, the defendants would have argued that the decision of the Ontario Court of Appeal in Chadha v. Bayer Inc. (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27 (C.A.), affg (2001), 54 O.R. (3d) 520, [2001] O.J. No. 1844 (Div. Ct.) (certification denied), revg (1999), 45 O.R. (3d) 29, [1999] O.J. No. 2497 (S.C.J.) (certification granted), leave to appeal to S.C.C. denied, [2003] S.C.C.A. No. 106, ought as precedent to preclude certification in the

actions at hand.

[121] The plaintiffs also faced risks specific to some of the defendants and actions. For example, until October 2002, there were no guilty pleas relating to Niacin. Certain bulk vitamins were not the subject of criminal convictions. Moreover, certain pleas refer to conspiracy periods which are considerably shorter than those pleaded in the actions. Therefore, Class Counsel faced the significant hurdle of having much less information to work with to prove overcharge rates for these bulk vitamins.

[122] If the defendants, or some of them, were successful in establishing any of the general defences, such as pass through, or the product specific defences, such as no sales in Canada or no conspiracy, then the plaintiffs would not succeed, at least in the entirety, at a trial of the common issues and there would be limited recovery. While these defences were arguably problematical, at the very least their number and complexity would lengthen a trial of the common issues.

[123] A court "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." The parties proposing the settlement have an obligation to provide sufficient information to permit the court to exercise its function of independent approval: Newberg, supra, at pp. 11-100 and 11-101; Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598, at para. 15.

[124] While the court requires sufficient evidence to be able to exercise an objective, impartial and independent assessment of the fairness of the settlement in all of the circumstances, it is not necessary that formal discovery have occurred at the time of settlement. It is clear that settlements reached at an early stage of proceedings are appropriate: Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at paras. 15 and 24. [page789]

[125] Class Counsel had significant information about the case and a good understanding of liability and damages issues before embarking on the negotiation process. Class Counsel'ss grasp of these issues continued to increase throughout the negotiation process as a result of, among other things:

(a) interaction with U.S. counsel who had been litigating extensively against these defendants and were able to assist in devising strategy and highlighting some of the strengths and weaknesses of the case;

(b) independent analysis of class member records including transaction data from Agro-Pacific, Statistics Canada data and industry data;

(c) affidavit evidence and cross-examinations on affidavits conducted in the context of the motions by some defendants challenging the jurisdiction of the Ontario Court;

(d) information obtained through, and as the result of, settlements with Lindel Hilling and Merck KGaA;

(e) the Agreed Statements of Fact that supported the guilty pleas; and

(f) the input from expert economists, Dr. Thomas Ross and Dr. John Beyer.

[126] There is sufficient evidence before the court to allow it to exercise an objective and independent assessment of the fairness of the proposed settlement agreements.

[127] The function of a court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the court'ss power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement: Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at para. 10; Manual

FORM 78

Statement of Affairs (Business Bankruptcy/Proposal)
(Subsection 49(2) and Paragraph 158(*d*) of the Act / Subsections 50(2) and 62(1) of the Act)

(*Title Form 1*)

□ **Original** □ **Amended**

To the bankrupt/debtor:

You are required to carefully and accurately complete this form and the applicable attachments showing the state of your affairs on the date of your bankruptcy / date of filing your proposal (*or, if applicable,* notice of intention) on the _____ day of _______________ ______. When completed, this form and the applicable attachments will constitute your Statement of Affairs and must be verified by oath or solemn declaration.

LIABILITIES
(*as stated and estimated by bankrupt/debtor*)

1. Unsecured creditors as per list "A" . . . . $________
2. Secured creditors as per list "B" . . . . . . $________
3. Preferred creditors as per list "C" . . . . . $________
4. Contingent, trust claims or other liabilities as per list "D" estimated to be reclaimable for . . . . $________

Total liabilities . . . . $_________
Surplus . . . . $_________

I, ______________________, of the _____________ of __________________________ in the Province of __________________, do swear (*or* solemnly declare) that this statement and the attached lists are, to the best of my knowledge, a full, true and complete statement of my affairs on the _____ day of ______________ ______ and fully disclose all property of every description that is in my possession or that may devolve on me in accordance with the Act.

SWORN (*or* SOLEMNLY DECLARED) before me at ____________________ (*city, town or village*), in the Province of _________________, on this _____ day of _______________ ______.

Or
SWORN (or SOLEMNLY DECLARED) remotely by ____________________ (debtor's name) stated as being located in at___________ the (*city, town, or village*), in the Province of _________before me at ________________ the (*city, town, or village*), in the Province of _____________, on this _____ day of _______________ ______in accordance with provincial Regulation on Administering Oath or Declaration Remotely.

___________________ ______________________
Commissioner of Oaths for the Province of _______________. Signature of bankrupt/debtor

ASSETS
(*as stated and estimated by bankrupt/debtor*)

1. Inventory . . . . $_________
2. Trade fixtures, etc. . . . .$_________
3. Accounts receivable and other receivables as per list "E" . . . .
   Good . . . . $_________
   Doubtful. . . . . $_________
   Bad. . . . . $_________
   Estimated to produce $_________ $_________
4. Bills of exchange, promissory note, etc. as per list "F" . . . . $__________
5. Deposits in financial institutions . . . . . $__________
6. Cash . . . . $__________
7. Livestock . . . . $__________
8. Machinery, equipment and plant . . . . . $__________
9. Real property or immovables as per list "G" . . . . $__________
10. Furniture . . . . $__________
11. RRSPs, RRIFs, life insurance, etc. . . . .$__________
12. Securities (shares, bonds, debentures, etc.) . . . .$__________
13. Interests under wills . . . . $__________
14. Vehicles . . . . $__________
15. Other property as per list "H"
    ____________ . . . . $_______
    ____________ . . . .$_______ $__________

If bankrupt/debtor is a corporation, add:
Amount of subscribed capital $________
Amount paid on capital . . . . . $________

Balance subscribed and unpaid . . . . . $__________
Estimated to produce . . . . $__________

Total assets . . . . $__________
Deficiency . . . . $__________

FORM 78 – *Continued*

List "A"

Unsecured Creditors

Names to be arranged in alphabetical order and numbered consecutively.

No.	Name of creditor	Address	Amount of claim

____
Bankrupt/Debtor

____
Date

FORM 78 – *Continued*

List "B"

Secured Creditors

No.	Name of Creditor	Address	Amount of claim	Particulars of security	When given	Estimated value of security	Estimated surplus from security	Balance of claim unsecured

Bankrupt/Debtor

Date

FORM 78 – *Continued*

List "C"

Preferred Creditors for Wages, Rent, etc.

No.	Name of creditor	Address and occupation	Nature of claim	Period during which claim accrued	Amount of claim	Amount payable in full	Difference ranking for dividend

Bankrupt/Debtor

Date

FORM 78 – *Continued*

List "D"

Contingent or Other Liabilities

Give particulars of claims not set out in lists "B" or "C."

No.	Name of creditor or claimant	Address and occupation	Amount of liability or claim	Amount expected to rank for dividend	Date when liability incurred	Nature of liability

Bankrupt/Debtor

Date

FORM 78 – *Continued*

List "E"

Debts Due to the Bankrupt/Debtor

No.	Name of debtor	Address and occupation	Nature of debt	Amount of debt (good, doubtful, bad)	Folio of ledgers or other book where particulars to be found	When contracted	Estimated to produce	Particulars of any securities held for debt

____
Bankrupt/Debtor

____
Date

FORM 78 – *Continued*

List "F"

Bills of Exchange, Promissory Notes, Lien Notes, Chattel Mortgages, etc. Available as Assets

No.	Name of all promissory, acceptors, endorsers, mortgagors and guarantors	Address	Occupation	Amount of bill or note, etc.	Date when due	Estimated to produce	Particulars of any property held as security for payment of bill or note, etc.

____
Bankrupt/Debtor

____
Date

FORM 78 – *Continued*

List "G"

Real Property or Immovables Owned by Bankrupt/Debtor

Description of property	Nature of bankrupt's/ debtor's interest	In whose name does title stand	Total value	Particulars of mortgages, hypothecs or other encumbrances (name, address, amount)	Equity or surplus

Bankrupt/Debtor

Date

FORM 78 – *Concluded*

List "H"

Property

Give full particulars of property of every description that is in the bankrupt's/debtor's possession or that may devolve on the bankrupt/debtor in accordance with the Act and that is not included in any other list.

FULL STATEMENT OF PROPERTY

Nature of property	Location	Details of property	Original cost	Estimated to produce
a) Stock-in-trade				
b) Trade fixtures, etc.				
c) Cash in financial institutions (name) (address)				
d) Cash on hand				
e) Livestock				
f) Machinery, equipment and plant				
g) Furniture				
h) Life insurance policies, RRSPs, etc.				
i) Securities				
j) Interests under wills, etc.				
k) Vehicles				
l) Taxes				
m) Other property (*state particulars*)				

____
Bankrupt/Debtor

____
Date

NOTE: If a copy of this Form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document