recovery until after the individual issues stage, unless, of course, the case settles.

[170] Turning now to the involvement of the Class Proceedings Fund in *Brazeau* and *Reddock* and the Fonds d'aide aux actions collectives in *Gallone*, the courts were advised that they will continue to be involved. As we understand it, this involvement would be automatic with respect to the Fond but the involvement of the Class Proceedings Fund depends on it agreeing to continue to be involved for individual Class Members, which it has agreed to do in the immediate case.

[171] The Class Action Fund is always to be commended for facilitating access to justice as it appears to be doing in the immediate case, but for other cases, it should be noted that it does not automatically follow that the Fund is obliged to underwrite the individual issues phase of action.

9. Miscellaneous Matters

[172] Several miscellaneous matters about the *Draft D&I Protocol* should be noted.

[173] The *Draft D&I Protocol* adopts many provisions from the parties' draft protocols that would appear not to be controversial.

[174] While some aspects of the notice to the Class Members are addressed in the *Draft D&I Protocol,* the notice program and the claims form remain to be settled by supplementary order of the courts of Ontario and Québec.

[175] Some matters are left to be resolved outside the protocol. For example, the matter of reports from the Administrator is left, in part, to be governed by s. 24 (12)-(14) of the *Class Proceedings Act, 1992* or by order of the Superior Court of Québec pursuant to its legislation..

[176] The number of Manager/Experts remains to be determined. It may be desirable to make appointments in tranches once the take up of claims is better understood. Manager/Experts could be recruited from across Canada and there would be English-speaking, French-speaking and Aboriginal languages-speaking Manager/Experts.

[177] The *Draft D&I Protocol* specifies the remuneration to be paid to a Manager/Expert and that Canada shall pay the Manager/Experts. To be clear, for a Track 1 decision, which is just about for eligibility to a share of the Aggregate Damages Award, a Manager/Expert would be paid $1,000 for each decision. For a Track 2 matter, which is about both eligibility and also an individual issues report, the Manager/Expert would be paid $5,000 for each decision and report. For a Track 3 decision, which is again just about eligibility, a Manager/Expert would be paid $1,000 for each decision.

[178] The *Draft D&I Protocol* specifies for Track 2 claims that in addition to the an affidavit from the Class Member, he or she may annex to the Claim Form no more than two affidavits of no more than 30 pages in length, including exhibits, from a person who would be qualified to be a Manager/Expert under this Protocol. There is a similar provision for Canada to file no more than two affidavits from a deponent who would be qualified to be a Manager/Expert under the Protocol, which is to say that the deponent must be licensed or registered to practice medicine (which would include psychiatry), psychology, psychotherapy, psychiatric nursing, or psychiatric social work. The idea here is that the Manager/Expert and the deponents will have a common scientific expertise and knowledge base.

D. Conclusion

[179] In accordance with the Adjournment Endorsement, the parties shall have 30 days to show cause in writing why the *Draft D&I Protocol* should not be made final Orders for the respective courts. Those written submissions shall be simultaneous exchanged.

[180] Before releasing a final decision, the respective courts may provide further directions as to whether there should be oral submissions in addition to the written submissions. If we conclude that oral submissions are not necessary, then we shall release our final decision.

Masse, J. Perell, J.

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Released: November 25, 2020

Schedule “A”: Individual Issues Protocol for *Brazeau*

This document sets out a proposed framework for the determination of compensatory and punitive damages owing to Class Members (or "**Claimants**") in this action as a result of being placed in administrative segregation, in breach of their *Charter* rights ("**Individual Claims**") as further particularized in the decision of Justice Perell dated March 25, 2019. This plan also contemplates the 15-day temporal threshold set out by the Court of Appeal for Ontario in *CCLA v. Canada* 2019 ONCA 243.

This plan shall govern the procedure for the final resolution of the Individual Claims pursuant to s. 25 of the *Class Proceedings Act, 1992*.

All Individual Claims must be delivered within five (5) years of the commencement of the operation of this litigation plan. This deadline may be extended by further order of the Court.

I. Monetary Limits

The applicable procedure for the resolution of the Individual Issues shall be governed by the monetary amount of the Individual Claim, not including costs or prejudgment interest, based on the following two levels:

- Claims of $100,000 or less
- Claims over $100,000

Each Class Member shall make an irrevocable election to make a claim of $100,000 or less or a claim of over $100,000 in its Notice of Individual Claim (as outlined below). All Class Members who assert that any applicable limitations period was tolled by virtue of their mental illness, or for other reasons, must proceed by way of Individual Issues Trials (see Section IV below).

II. Uniform Procedures

The following procedure shall be applicable to all claims, regardless of the amount at issue. For all Individual Claims, the Individual Issues Litigation Plan provides the following uniform procedures:

(a) The Defendant shall deliver an all-inclusive offer ("**Settlement Offer**") for the Class Member's claim within 30 business days of receiving a Notice of Individual Claim.

(b) The Class Member shall have 30 days from receipt of the Settlement Offer to accept or, alternatively, make a counteroffer. The Defendant will have 15 days from receipt to accept any counteroffer. If the Class Member's claim is not settled within 65 days, or if the Class Member rejects the Settlement Offer, then the matter shall proceed to Resolution.

(c) If at any point an offer to settle is accepted, the Defendant shall provide payment of settlement funds to Koskie Minsky LLP, in trust, within 30 days. Koskie Minsky LLP shall make the settlement funds available to the claimant, less fees, disbursements and the Class Proceedings Fund levy, within 30 days of receipt of funds from Canada.

(d) As a term of settlement, the Class Member will execute a release of all claims related to administrative segregation of the Class Member by the Defendant.

All damages shall accrue prejudgment interest at the rate of 5%, calculated from March 3, 2017. Post judgment interest shall accrue at the rate of 3%, from the date of the Damages Determination or the award of damages by the Ontario Superior Court of Justice. However, the Damages Grid shall not be adjusted to reflect inflation that takes place following the approval of this Individual Issues Litigation Plan.

This Individual Issues Litigation Plan may be amended by further order of the Court on such terms as it considers just.

III Targeted Procedures

A. Claims of $100,000 Or Less

1. Such claims shall proceed on a paper record. Punitive damages shall not be available to this group. Damages for such claims shall be calculated according to the Grid, defined below and such damages shall be completely determinative of all potential heads of damages.

2. The Claimant shall serve a Notice of Individual Claim on the Defendant and a Medical Adjudicator (defined below). A Notice of Individual Claim shall consist of an affidavit of less than ten (10) pages setting out: a) diagnoses at the time of segregation; b) the length of time in segregation; c) effects of segregation; d) current condition, including any lasting effects of segregation; and e) any other relevant facts relating to the Claimant's time in segregation.

3. The Defendant shall serve the Claimant's CSC medical file and relevant segregation records on Class Counsel, the Medical Adjudicator and the Claimant, along with a Defendant's Statement of Position less than seven (7) pages long, within 60 days of receipt of the Notice of Individual Claim.

4. The Claimant shall have 15 days to make reply submissions in the form of an affidavit of less than seven (7) pages.

5. The Medical Adjudicator shall cross-reference the Claimant's and Defendant's submissions against the medical file and segregation files. The Medical Adjudicator shall determine whether the Claimant is a member of the Class. In so doing, he or she will make the following determinations:

(a) whether mental diagnoses are on file and if so, whether those diagnoses are included in the class definition;

(b) whether the claimant was suffering from symptoms that satisfy Appendix "A" in the class definition and if so, describe what symptoms and when; and,

(c) The Medical Adjudicator shall apply their findings to the Damages Grid (set out below) and shall make a Written Recommendation of 10 pages or less.

6. The Medical Adjudicator shall draft a written recommendation ("**Written Recommendation**") which shall be served on the Referee within 60 days of receiving the Class Member's submissions, the Defendant's submissions and the medical file.

7. The Referee shall make a final, binding and non-appealable determination ("**Final Determination**"), having regard to the findings of fact and law in the Reasons and the Court of Appeal for Ontario's reasons in *CCLA v. Canada*, 2019 ONCA 243. The Final Determination shall state:

(a) whether the Claimant is a Class Member;

(b) If the Claimant is a Class Member, whether damages are available to the Claimant under the Damages Grids;

(c) If the Claimant was placed in segregation for less than 15 days, whether the facts surrounding the placement justify an award of *Charter* damages;

(d) whether the Claimant's entitlement to damages should be adjusted from the recommendation of the Medical Adjudicator, considering (a), (b) and (c).

8. The Referee shall deliver a final determination of damages ("**Damages Determination**") in reasons of five (5) pages or less to the Claimant, Class Counsel and the Defendant. The Damages Determination shall attach the Medical Adjudicator's Written Recommendation. In a circumstance where the Referee does not follow the recommendation of the Medical Adjudicator, the Referee shall explain his or her reasoning in the Damages Determination.

9. The Defendant shall make payments ("**Damages Payment**") to Koskie Minsky, LLP in trust, within 30 days of delivery of the Damages Determination.

10. If the Damages Determination is higher than the Settlement Offer, the Claimant shall receive $2,000 in costs, in addition to the Damages Payment. If the Damages Determination is lower than the Settlement Offer, the Defendant shall receive $2,000 in costs, reduced from the damages Payment. If the Damages Determination is less than $2,000 the Claimant shall not be required to pay costs to the Defendant.

B. Damages Grids

The Medical Adjudicator shall make a determination of the Claimant's General Assessment of Functioning ("**GAF**") score during their time in administrative segregation based on the Claimant's and Defendant's sworn affidavits and their review of the medical and segregation file.

Damages shall begin to accrue after fifteen (15) continuous days in segregation. For those who spent less than fifteen (15) continuous days in segregation, the Referee may have regard to the Claimant's individual circumstances and commence the quantification of damages before fifteen (15) days have elapsed.

There shall be no difference in the quantification of damages for "voluntary" or "involuntary" segregation.

The following per diem damages analysis shall apply:

- GAF score 40-50 - $100 per day (up to 30 days) $200 per day (30-60 days) $300 per day (60-90 days) $400 (90-120 days) $500 per day (over 120 days)
- GAF Score 30-40 - $200 per day (up to 30 days), $300 per day (30-60 days), $400 (60-90 days), $500 per day (over 90 days)
- GAF Score 20-30 - $300 per day (up to 30 days), $400 per day (30-60 days), $500 per day (over 60 days)
- GAF Score 10-20 $400 per day (up to 30 days), $500 per day (over 30 days).
- GAF Score 0-10 - $500 per day.

In addition to the per diem award set out above, the Medical Adjudicator and/or Referee may award damages for additional injury resulting from segregation. The following Damages Grid may be used to assist in determining Claimant's damages for Psychiatric Harm, in claims for under $100,000, but should not be understood to be an exhaustive list of possible injuries:[61]

Injury	**Low Range**	**Max/Cap**
Post-traumatic stress disorder	$25,000	$100,00
Depression	$20,000	$100,00
Non-suicidal self-injurious behavior	$25,000	$100,00
Suicidal ideation	$20,000	$100,00
Suicide Attempt	$55,000	$100,00

C. Roster of Independent Medical Adjudicators and Referee

Class Counsel and the Defendant shall agree on a roster of five independent medical adjudicators and one Referee. Each independent Medical Adjudicator shall be a psychiatrist or psychologist in good standing with their respective colleges or professional associations. In the event the parties cannot agree on the roster of medical adjudicators and Referee, the parties shall attend before Justice Perell for a case management conference to determine the issue.

The Cost of the claims process for claims of $100,000 or less shall be borne by the Defendant.

IV. Claims Over $100,000 or more – Individual Issues Trials

1. If the Class Member elects to make a claim valued at over $100,000, they shall proceed by way of "Individual Issues Motion". The Class Member shall serve the Defendant with a Notice of Claim, setting out the material facts relied on and the quantum of damages sought.

2. The Class Member shall receive production of all relevant documentation, including their medical records and segregation records from the Defendant, within 60 days of service of their Affidavit in Support of Claim.

3. The Claimant may challenge the sufficiency of the Defendant's productions by filing a motion with the Court

[61] The Damages Grid is based on an assessment of the case law and the previous amounts awarded therein, as well as an assumed cap of $100,000.

(“**Production Motion**”) within 15 days of receiving the productions.

4. If the Claimant wishes to make a claim for continuing psychological or physical damage or pecuniary loss, they must undertake to produce all relevant medical records and other evidence from after their release from administrative segregation (including post-release from custody). This documentation shall be included in the Claim Record.

5. The Class Member shall serve and file a claim record ("**Claim Record**") within 90 days of receipt of records from the Defendant, and the Claim Record will include any evidence in support of their Individual Issues Motion.

6. The Defendant shall serve and file a responding claim record ("**Responding Claim Record**") within 90 days of the receipt of the Claim Record. The Responding Claim Record shall contain all responding evidence.

7. Any Reply Claim Record shall be filed within 30 days of receipt of the Responding Claim Record. The Reply Claim Record shall contain reply evidence.

8. The Claimant shall make written submissions of 30 pages or less within 30 days of service of the Responding Claim Record or Reply Claim Record (if served). The Defendant shall make responding written submissions of 30 pages or less within 30 days of service of the Claimant's written submissions. The Claimant may make reply submissions of 10 pages or less within 10 days of service of the responding submissions.

9. The Individual Issues Trial shall be heard as a half-day motion before a judge of the Ontario Superior Court of Justice. The Court shall make an award of damages, if the Class Member is successful.

10. Class Counsel shall retain carriage of the Individual Issues Trials. Class Counsel may prosecute the Individual Issues Trials in a consortium with another law firm or firms. Class Counsel shall determine what counsel or firms are suitable to prosecute the Individual Issues Trials.

11. All Individual Issues Trials shall proceed on a paper evidentiary record pursuant to the *Rules of Civil Procedure* as a motion under *Rule* 20. All evidence, including expert evidence (if applicable), shall be tendered in affidavit form and cross-examinations shall take place out of Court.

12. In determining damages, the Court will have regard to, but is not bound by, the Damages Grid, and the Court may award punitive damages.

13. The Claimants will continue to receive funding from the Class Proceedings Fund ("**CPF**") for the Individual Trials Phase. Disbursements and indemnities for individual issues shall be provided by the CPF. Costs of the Individual Issues Trials shall operate in the ordinary course according to the *Rules of Civil Procedure*.

14. All Class Members who assert that any applicable limitations period was tolled by virtue of their mental illness, or for other reasons, must proceed by way of Individual Issues Trials.

V. Counsel Fees

1. Class Counsel shall retain carriage of the determination of all Individual Claims. Class Counsel may prosecute the Individual Claims in a consortium with another law firm or firms. Class Counsel shall determine what counsel or firms are suitable to prosecute the Individual Claims.

2. The contingency fee set out in the retainer agreements between the representative plaintiffs and Class Counsel shall apply to all damages payable under this Individual Issues Litigation Plan. More specifically, a 33.3% counsel fee shall apply against all Damages Payments. Class Counsel shall receive its fee out of each Damages Payment. After the counsel fee, disbursements for the litigation of the individual claim shall be reimbursed and the 10% levy shall be paid to the CPF. The remainder of the Damages Payment shall be payable to the Claimant.

3. Class Counsel, acting on the instructions of a particular Class Member, may transfer carriage of their Individual Issues Motion to another law firm. Class Counsel shall retain an entitlement to 10% of the Damages Payment of such Class Members in the event a damages award becomes available.

4. Class Counsel may cease to act for a particular Class Member if Class Counsel determines that the Class Member is providing instructions that are not in their own best interest. In such circumstances, Class Counsel shall advise the Class Member in writing and will advise the Class Member to retain other counsel (but shall not be required to assist in the retention of new counsel). Class Counsel shall retain an entitlement to 10% of the Damages Payment of such Class Members in the event a damages award becomes available.

Schedule "B": Canada's Individual Issues Protocol

This document (**"Protocol"**) sets out Canada's proposed framework for the determination of individual claims including damages claims above and beyond the compensation already awarded through the aggregate damages awards in *Brazeau, Reddock,* and *Gallone*.

This Protocol shall govern the procedure for the final resolution of the Individual Claims pursuant to s. 25 of the *Class Proceedings Act, 1992*. It covers individual claims for compensation for harms suffered by Class Members (or **"Claimants"**) as a result of being placed in administrative segregation, contrary to their *Charter* rights ("**Claims**"). The procedure is further particularized in the Reasons for Decision of Justice Perell in *Brazeau* dated March 25, 2019 and May 28, 2020, and in *Reddock* dated August 29, 2019.

Where this Protocol specifies procedural rules under the Ontario *Rules of Civil Procedure*, comparable rules under the *Civil Code of Québec* will be applied in the *Gallone* proceeding (as required) at a later time.

I. Supervising Judge

1. For the purpose of this Protocol, the Supervising Judge is the judge who decided the respective Class Action (*Brazeau*, *Reddock*, *Gallone*) ("**Supervising Judge**").The Supervising Judge retains jurisdiction to resolve any dispute arising under this Individual Issues Protocol.

II. Claims Deadline

2. Claimants wishing to file a Claim must do so within one year of the final resolution of the Claimant's entitlement to their distribution of the aggregate award in either *Reddock*, *Brazeau,* or *Gallone*. ("**Claims Deadline**").

3. Any Claim received after the Claims Deadline will not be accepted except with leave of the Supervising Judge.

III. Small Claims and Simplified Tracks

4. There will be two separate tracks for all Claims under this Protocol: a Small Claims Track and a Simplified Track.

Small Claims Track

5. The following Claims must proceed in the Small Claims Track:

(a) Claims up to (and including) $35,000; and

(b) where the only issue is quantum of damages above and beyond the aggregate damages already awarded.

6. Claims in the Small Claims Track must be limited to the quantum of damages for harm suffered and any consequential loss of opportunity suffered as a result of being placed into administrative segregation and cannot include any additional grounds of liability or tolling of limitation periods.

7. Claims under the Small Claims Track shall be adjudicated by a Referee chosen from a list of Referees agreed to by the parties. The Supervising Judge, with input from the parties, will predetermine a standard remuneration fees for Referees in the Small Claims Track. Canada agrees to pay for the remuneration fees of the Referees.

8. Referees will be responsible for determining:

(a) Whether a Claim falls within the scope of the Referee's authority under paragraphs 5 and 6 above;

(b) Whether, and to what extent, the Claimant suffered additional harm beyond the base level of harm that justified the aggregate damages award;

(c) If so, whether the additional harm was caused by the Claimant's placement in administrative segregation;

(d) Whether, and to what extent, the Claimant suffered any consequential loss of opportunity as a result of their placement;

(e) Considering any relevant mitigating or aggravating factors and considering the amount of aggregate damages already received, whether the claimant is entitled to compensation above and beyond the aggregate damages already awarded;

(f) If so, the quantum of such compensation; and

(g) Whether the Claimant or Defendant is entitled to legal costs (limited to a maximum of 15% of the amount of the damages assessment) and reasonable disbursements.

9. Claims in the Small Claims Track shall be determined in writing based on the written record before the Referee.

10. Except with leave of the Supervising Judge, all Claims in the Small Claims Track shall proceed on a paper evidentiary record pursuant to the Ontario *Rules of Civil Procedure* as a motion under Rules 20 and 55.01. All evidence, including any expert evidence, shall be filed in affidavit form and cross-examinations (if any) shall take place out of court.

11. Referees shall assess monetary compensation for losses in relation to the Claim that it considers just, based on the principles of compensation for *Charter* damages applied by the courts.

12. Referees are required to give brief written reasons for their decisions and those reasons shall be deemed to be a report for the purpose of Rule 54 of the *Rules of Civil Procedure*.

13. Unless the Supervising Judge orders otherwise, Claimants who fail to submit a Summary Judgment Motion within two years of filing a Claim are deemed to be dismissed for delay.

14. Awards in the Small Claims Track cannot exceed $35,000 plus legal costs (limited to a maximum of 15% of the amount of the damages assessment) and reasonable disbursements.

15. Any disagreement over a decision of a Referee is to be addressed by way of a confirmation motion before the Supervising Judge in accordance with Rule 54 of the *Rules of Civil Procedure*.

b. Simplified Track

16. Subject to paragraph 17, Claims for an amount over $35,000, or where there are issues beyond the quantum of damages above and beyond the aggregate damages already awarded, must proceed in the Simplified Track.

17. Claims above $35,000 up to (and including) $100,000 will proceed by way of motion for Summary Judgment (Rule 20 of the *Rules of Civil Procedure*).

18. Claims above $100,000 will proceed as an action in accordance with the *Rules of Civil Procedure*.

19. Class Counsel and Counsel for the Defendant may agree on the following for use in any Simplified Track Claim:

- a common list of documents;
- common affidavit(s) for CSC background information.
- a common roster of agreed upon experts;
- a common list of authorities,

20. For greater certainty, any Claims:

- seeking to establish *Charter* violations beyond those found in a Claimant's class Order for Judgment (*Brazeau* - March 25, 2019 or *Reddock* – August 29, 2019, *Gallone* – September 10, 2020);
- for punitive damages; or
- seeking to rebut the limitations period (*Reddock* and *Brazeau*),

must proceed in the Simplified Track.

IV. Settlement of Claim

21. Any claim may be identified by the parties for settlement.

22. Offers to settle are to be made in writing.

23. Rule 49 of the *Rules of Civil Procedure* shall apply to offers to settle, but legal costs associated with a settled claim in the Small Claims Track cannot exceed 15% of the award.

V. Legal Principles

24. All Claims are limited to claims for monetary compensation for harm, opportunity loss, and punitive damages resulting from placement in administrative segregation. Claimants may also challenge limitations periods. No other

forms of relief are available under the Protocol.

25. For all Claims, Claimants bear the burden of proof.

26. The standard of proof in all Claims is the civil standard of a balance of probabilities.

27. Unless a Claim is resolved by way of settlement, in order to be eligible for compensation, Claimants must prove that their placement into administrative segregation caused the alleged harms that are above and beyond the base level of harm established in the common issues phase of their class action.

28. All damages shall accrue pre-judgment interest at the rate of 1.285% calculated from the first relevant period in administrative segregation or from the date the Claimant's class claim was issued, whichever is later.

29. Under both the Small Claims and Simplified tracks, the parties retain the right to cross-examine affiants adverse in interest, including medical experts and reserve the right to have Claimants attend an independent medical examination.

VI. Document Production

30. Within 90 days of receipt of a Claim Form under the Small Claims or Simplified track for compensation under this Protocol, the Defendant must produce the following documents:

(a) Claimant's case management records showing the number of placements in segregation, the institution(s) where the inmate was located and the total number of days spent in segregation;

(b) Documents relating to the incidents or events that lead to the segregation placement;

(c) Documents relating to admission, segregation review and discharge from segregation;

(d) Relevant psychological and medical records.

31. In the Simplified Track, any issue relating to document production shall be resolved in the normal way under the *Rules of Civil Procedure*. In the Small Claims Track, any issue relating to documents productions shall be resolved by the Referee by way of motion in writing.

VII. Decisions and Payments

32. If settlement between the parties is reached, the Defendant shall pay the Claimant within 60 days of reaching an agreement.

33. Upon receipt of a final decision, the Defendant shall make the Damages Payment within 60 days of receipt of the decision. No post-judgment interest is payable.

VIII. Referees

34. A roster of Referees shall be developed with agreement of the parties, pursuant to Rule 54 of the *Rules of Civil Procedure*.

Schedule "C": Class Counsels' Distribution and Individual Issues Protocol

PART I - GENERAL PRINCIPLES

1. The procedures set forth herein shall govern the distribution of the aggregate damages awarded to the Classes in these class proceedings as well as the claims process for individual issues claims.

2. The Administrator shall:

(a) implement and conform to orders of the Courts and this Protocol; and

(b) employ secure, paperless, web-based systems with electronic registration and record-keeping where possible.

PART II - DEFINITIONS

3. For the purpose of this Protocol, the following definitions apply:

(a) Administrator means Epiq, or such other administrator as the Courts may appoint from time to time on a motion by Class Counsel.

(b) Canada means the Defendant, the Attorney General of Canada.

(c) Claims Form means the electronic or paper claims form that a Class Member in either matter must complete and submit before the Claims Filing Deadline in order to be considered for benefits under this Distribution Protocol.

(d) Claims Filing Deadline means the date by which Claims (and any required supporting documentation) must be electronically submitted, sent via mail, or received in person at one of the Administrator's office in order for Class Members to be considered for damages under this Distribution Protocol, which date shall be nine (9) months after the first publication of Notice in accordance with section 5(d), below.

(e) Class Counsel means McCarthy Tétrault LLP and Koskie Minsky LLP in *Reddock v. Canada*, Koskie Minsky LLP in *Brazeau v. Canada* and Trudel Johnston & Lespérance in *Gallone v. Canada*.

(f) Class Members and Classes are defined in the Reddock and Brazeau Certification Orders, there having been no valid opt-outs, and the Gallone Authorization Judgement.

(g) Courts means the Ontario Superior Court of Justice and the Québec Superior Court of Justice.

(h) Collective Damages Award means the award of aggregate damages, costs, and interest in favour of the Class, together with any applicable interest in favour of the Class, less:

(i) Class Counsel's fees and disbursements as approved by the Courts;

(ii) The Class Proceedings Fund's levy, only applicable to the Reddock and Brazeau actions; and

(iii) any other deductions approved by the Courts.

(i) Gallone Action means the class proceeding styled Gallone c. Procureur général du Canada before the Superior Court of Québec, File No. 500-06-000781-167.

(j) Incarcerated Class means all inmates who were detained in administrative segregation for more than 15 days from March 3, 2011 to present and remain incarcerated or otherwise in the custody of the Correctional Service of Canada.

(k) Individual Damages Award means the award of aggregate damages, costs, and interest in favour of the Class, together with any applicable interest in favour of the Class, less:

(i) Class Counsel's fees and disbursements as approved by the Courts;

(ii) The Class Proceedings Fund's levy, only applicable to the Reddock and Brazeau actions; and

(iii) Any other deductions approved by the Courts.

(l) Notice means the Notice of Judgment.

(m) Prolonged Segregation Class means all members of the Reddock Class and the Gallone Non-SMI subgroup.

(n) Roster means the of group of Medical Referees and/or Claims Referees selected by agreement among the parties, or failing that, at the direction of the Courts. The Medical Referees will have appropriate medical training, experience or knowledge and will be responsible for determining whether Claimants are SMI Class or Prolonged Segregation Class members. The Claims Adjudicators will be responsible for assessing the per diem entitlements of Claimants under the Simplified Track.

(o) SMI Class means all members of the *Brazeau* Class and the *Gallone* SMI subgroup.

PART III - DISTRIBUTION OF NOTICE

4. Once nominated, the Administrator will set up a campaign to publicize and disseminate the Notice.

5. The Notice and Claims Form will be in a form to be approved by the Court on submission of Class Counsel no later than ten (10) days after the date of this Order,

6. The Notice can be adapted as necessary to the method of communication and target audience, with the consent of Class Counsel For example, if some advertising campaign platforms require a shorter notice, the Administrator may adapt the content of the Notice to Class Members to better reach Class Members.

7. The advertising campaign will run in three phases: one at the start of the Claims Period, the second around the middle of the claims period, and the third approximately two months before the end of the claims period.

8. The advertising campaign shall include the following measures:

(a) Canada shall provide the Notice, together with a postage paid return envelope, to every person who is incarcerated in a federal correctional institution, and Canada shall make available reasonable facilities for Class members to complete the Claims Form;

(b) Class Counsel shall post the Notice, together with the French language translations of these documents, on Class Counsel and the Administrator's respective websites;

(c) The Administrator shall purchase 10 million impressions, targeted across Canada over a two-month period following the date of this Order, of digital banner advertisements linking to the Notice on websites such as Facebook, Google, YouTube, and the like.

(d) Within thirty (30) days of the Court approval of the Notice and Claims form, the Administrator shall place the Notice of Judgement in the national edition of the Globe and Mail, in ¼ of a page size, in the weekend edition, if possible;

(e) Within thirty (30) days of the Court approval of the Notice and Claims form, the Administrator shall place the French version of the Notice in La Presse, in ¼ of a page size, in the weekend edition, if possible;

(f) Within thirty (30) days of the Court approval of the Notice and Claims form, the Administrator shall place the Notice in the Journal de Montréal and Journal de Québec, in ¼ of a page size, in the weekend edition, if possible;

(g) Within thirty (30) days of the Court approval of the Notice and Claims form, the Administrator shall distribute the Notice to all offices of the organizations listed in Appendix A;

(h) Within thirty (30) days of the Court approval of the Notice and Claims form, he Defendant shall post the Notice and a reasonable quantity of copies of the Claims Form in a conspicuous place within the common area of each federal correctional institution, visible to Class Members, and provide reasonable facilities to complete the Claims Form;

(i) The Defendant shall provide a reasonable quantity of copies to every Federal Parole Office in Canada. Each parolee who attends in person at such offices shall be provided with a copy of the Notice. In addition, a copy of the Notice shall be posted in a conspicuous place within a visible area of the

Parole office, and the parole office shall provide reasonable facilities to complete the Claims Form.

9. Furthermore, to ensure extensive dissemination of the Notice, the Administrator shall:

(a) Provide the Notice to any Class member who requests it, together with a postage paid return envelope;

(b) Provide bilingual services and ensure that the Notice is available in both English and French;

(c) Establish a toll-free support line to provide assistance to class members, family, guardians or agency staff, or other persons who make inquiries on their own behalf or on behalf of Class Members; and

(d) Allow Class Members to attend at its offices in order to obtain, complete, or submit the Claims Form and receive any payment they are due, public health guidelines permitting.

PART IV - THE CLAIMS PROCESS

10. Class members shall have the opportunity to either claim compensation only from the Collective Damages Award or claim compensation from the Collective Damages Award and make a claim for an additional, Individual Damages Award.

11. The applicable procedure for the resolution of the Individual Damages Awards shall be governed by the monetary amount of the Individual Claim, not including costs and pre judgment interest, based on the following two levels:

(a) Simplified Track: Claims of $100,000 or less

(b) Motion Track: Claims for more than $100,000

12. All damages shall accrue pre-judgment interest at the rate of 5%, calculated from March 3, 2017. Post judgment interest shall accrue at the rate of 3%, from the date of the Damages Determination or the award of damages by the Ontario Superior Court of Justice or Québec Superior Court of Justice. However, the Damages Grid shall not be adjusted to reflect inflation that takes place following the approval of this Individual Issues Protocol.

13. This Protocol may be amended by further order of the Court on such terms as it considers just.

The Claim

14. Class Members may file Claims Forms until the Claims Filing Deadline. After the Claims Filing Deadline, Class Members may only file Claims Forms with leave of the Courts, which shall retain jurisdiction to allow late claims on such terms as are just.

15. Class Members who wish to be part of the Claims Process shall complete the Claims Form and return it to the Administrator. The Claims Form will ask:

(a) Whether the claimant meets the conditions of membership in the Prolonged Segregation Class or the SMI class, and whether the claimant satisfied these conditions only in Québec and only after February 24, 2013;

(b) Whether the Administrator is authorized to contact the claimant to obtain further information;

(c) The claimant's contact details;

(d) The claimant's desired means of payment, and;

(e) A declaration that the information submitted in the Claims Form is true and correct.

16. The Administrator shall create an Online Claims Portal that Class Members can access in order to file a Claims Form and shall provide the necessary administrative support to enable Class Members to do so.

17. Class Members shall be encouraged to complete and submit a Claims Form electronically using the online claims portal. If the Class member does not have internet access or is otherwise unable to submit a Claims Form using the online claims portal, the Class Member may register over the telephone with the Administrator and the Administrator shall send the Class Member a hard copy Claims Form by mail.

18. Public health guidelines permitting, the Administrator will allow Class Members to submit Claims Forms in person at their offices.

Extension of the Claims Filing Deadline

19. Class Counsel may move before the Courts to extend the Claims Filing Deadline if, in their opinion, doing so will further the fair and efficient administration of the Collective or Individual Damages Award and promote the best interests of the Class Members.

PART V - DETERMINATION OF CLASS MEMBERSHIP

20. No later than 60 days after this adoption of this Protocol, Canada will provide Class Counsel, the Administrator and the Roster with the following information for all Class members::

(a) The name of the inmate;

(b) The inmate's Prison number;

(c) The inmate's classification;

(d) The admission date and release date of each placement in segregation;

(e) The number of days spent in segregation per placement;

(f) The name of the establishment where each placement in segregation occurred.

21. The information set out above will be provided in Microsoft Excel format or the like.

22. All information received from the Defendant, Class Counsel, or Class Members that is retained by the Administrator for the purposes of administering this Protocol, is protected under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000 c. 5.

23. A Roster of Medical Referees and/or Claims Referees will be selected by agreement among the parties, or failing that, at the direction of the Courts to be determined no later than ninety (90) days from the date of this Order. The Medical Referees will have appropriate medical training/experience and will be responsible for assessing whether Claimants are SMI Class or Prolonged Segregation Class members. The Claims Referees will be responsible for assessing the *per diem* entitlements of Claimants under the Simplified Track.

24. Upon receipt of completed Claims Forms, the Administrator will deliver those claims to Canada and Class Counsel on a rolling basis and no more than five (5) days from their receipt.

25. Within thirty (30) days of its receipt of the Claims Form or upon the appointment of the Roster, whichever is later, Canada will send a copy of the inmate's CSC file to the offices of the Roster.

26. Where the claimant has elected to proceed by way of the Simplified Track, Canada shall also provide the following information about the Class member to the Roster within thirty (30) days of its receipt of the Claims Form:

(a) The admission date and release date of each of their placements in segregation;

(b) The number of days spent in segregation per placement;

(c) The name of the establishment where each placement in segregation occurred.

27. For each Claims Form claiming SMI damages, the question of the Claimant's membership in the SMI Class will be referred to a Medical Referee from the Roster.

28. The Medical Referee will review the Claimant's CSC file and Claims Form and apply the Class definitions to determine whether the Claimant is a SMI Class or Prolonged Segregation Class member This determination will be completed within ninety (90) days of their receipt of the CSC file, and will be made with reasons no longer than five (5) pages in length.

29. With approval of the Courts, the Medical Adjudicators may adopt objective criteria to identify claimants who meet the Class definitions in order to streamline the classification process.

30. Class Counsel or Canada may appeal to the Courts from the decision of the Medical Adjudicator, but the standard of review will be palpable and overriding error and the Courts will target the disposition of the appeal in writing within sixty (60) days of receiving notice. There will be no further appeal.

DETERMINATION OF INDIVIDUAL DAMAGES AWARD

Simplified track: claims of $100,000 or less

31. Such claims shall proceed on a paper record with data provided by Canada.

32. Such claims will be limited to general damages. By electing to pursue their claims in the Simplified Track, Claimants will be agreeing to release all other claims arising from their Administrative Segregation placements and will only pursue a claim of less than $100,000 for pain and suffering directly attributable to the time spent in solitary confinement. For clarity, other heads of damages, including inter alia specific psychological injuries and lost income, as well as punitive damages will not be available in the Simplified Track.

33. Members of the Prolonged Segregation Class will receive compensation for stays that have lasted longer than 15 days. Unless the Court orders otherwise, these Claimants shall have their per diem damages calculated from the 16th day on.

34. Members of the SMI class shall receive compensation for stays of any duration during the class periods. Unless the Court orders otherwise, these Claimants shall have their *per diem* damages calculated from the 1st day on.

35. Any award of damages pursuant to the Simplified Track shall be capped at $100,000 no matter the duration of the Claimant's stay or stays in Administrative Segregation.

> (a) Claimants who elect to proceed by way of the Simplified Track will have their Claims for Individual Damage Awards assessed thirty (30) days of receipt of the Claims Form or the final determination of their SMI Class membership, as may be, whichever is later (the "Simplified Damages Determination") by a Roster Claims Adjudicator within applying the following principles: Damages for such claims shall be calculated on a per diem basis. The per diem quantum's will be as follows:
>
> > (i) $300/day for the Brazeau class and SMI members of the Gallone class (SMI class); and
> >
> > (ii) $200/day for the Reddock class and non-SMI members of the Gallone class (Prolonged segregation class);
>
> (b) Damages for such claim will be reduced by the sum of any awards made to them as part of the distribution of any Collective Damages Award; and
>
> (c) Administrative Segregation placements will be considered one Continuous Placement in Administrative Segregation if:
>
> > (i) the placements are separated by 24 hours or less, or;
> >
> > (ii) the placements are interrupted by a transfer to another institution and continued after the transfer.

Motion Track - Claims Over $100,000 or more

36. If the Claimant elects to make a claim for more than $100,000, the claim shall proceed by way of "Individual Issues Motion". The Claimant shall serve the Defendant with a Notice of Claim, setting out the material facts relied on and the quantum of damages sought.

37. Class members have the right to terminate their solicitor-client relationship with Class Counsel if they wish to pursue an individual claim on the Motion Track against Class Counsel's recommendation.

38. If the Defendant have the instructions required for a settlement of a claim under the Motion Track, the following procedure shall be applicable to the Motion Track:

> (a) the Defendant shall deliver an all-inclusive offer ("Settlement Offer") for the Claimant's claim within 30 business days of receiving a Notice of Individual Claim;
>
> (b) The Claimant shall have 30 days from receipt of the Settlement Offer to accept or, alternatively, make a counter-offer. The Defendant will have 15 days from receipt to accept any counter-offer. If the Claimant's claim is not settled within 65 days, or if the Claimant rejects the Settlement Offer, then the matter shall proceed to Resolution by way of the Motion Track.

(c) As a term of settlement, the Claimant will execute a release of all claims related to Administrative Segregation of that Claimant by the Defendant.

39. Within 60 days of service of the Claimant's Affidavit in Support of the Claim, the Defendant shall produce to the Claimant all relevant documentation, including the Claimant's complete CSC medical file and segregation records.

40. The Claimant may challenge the sufficiency of the Defendant's productions by filing a motion with the Court ("Production Motion") within 15 days of receiving the productions.

41. At any point during this procedure, the Ontario Superior Court of Justice or the Québec Superior Court, as the case may be, shall retain the explicit ability to refer claims to a Referee with medical training pursuant to s. 25(1)(b) of the *Class Proceedings Act, 1992* and 158 of the Québec *Code of Civil Procedure* and article 600 of the Québec *Code of Civil Procedure* once the Court has set clear guidelines in its initial decisions.

42. The Claimant shall serve and file a claim record ("Claim Record") within 90 days of receipt of the productions from the Defendant, as set out above, or the dismissal of a Production Motion, and the Claim Record will include any evidence in support of their Individual Issues Motion.

43. If the Claimant wishes to make a claim for losses that continued after the conclusion of the sentence in which he or she was last detained in prolonged Administrative Segregation (the "Segregation Sentence"), the Claimant shall produce all relevant medical records and any other evidence from after their release from Administrative Segregation, including post-release from custody, on which they intend to rely. This documentation shall be included in the Claim Record.

44. The Defendant shall serve and file a responding claim record ("Responding Claim Record") within 90 days of service of the Claim Record. The Responding Claim Record shall contain all responding evidence. The Reply Claim Record shall only contain reply evidence.

45. Within 30 days of the expiry of the time to serve a Reply Claim Record, the Claimant shall serve and file written submissions of 30 pages or less. Within 30 days of the service of the Claimant's written submissions, the Defendant shall serve and file written submissions of 30 pages or less. Within 15 days of the service of the Defendant's written submissions, the Claimant may serve and file reply submissions of 10 pages or less within 10 days of service of the reply submissions.

46. If the Claimant is a member of the Reddock or Brazeau Classes and a member of the *Gallone* Class, the Individual Issues Motion shall be heard as a half-day summary determination before a judge of the Ontario Superior Court of Justice or the Québec Court of Justice, depending on the Claimant's residence. The Court shall determine the Claimant's entitlement to damages, if the Claimant is successful. Otherwise the Ontario Superior Court of Justice will hear the Individual Issues Motions in Reddock and Brazeau, and the Québec Superior Court of Justice will hear the Individual Issues Motions in *Gallone*.

47. All Individual Issues Motions shall proceed on a paper evidentiary record pursuant to the Rules of Civil Procedure as a motion under Rule 20 for Reddock and Brazeau and as directed by the Québec Superior Court under article 158 of the Québec Code of Civil Procedure for members of the *Gallone* class. All evidence, including expert evidence (if applicable), shall be tendered in affidavit form and cross-examinations shall take place out of Court.

48. The Defendant shall deduct from any award in favour of the Claimant any amount that the Claimant received as Collective Damages Award, provided however, that said deduction shall not exceed the amount of the Damages Payment.

49. Successful Claimants will be entitled to seek their costs, pursuant to the rules applicable to the court where the Motion is filed.

50. During the individual issues claims process, Claimants and Class Counsel will continue to receive funding from the Class Proceedings Fund ("CPF") and the Fonds d'aide aux actions collectives, subject to its approbation. Disbursements and indemnities for individual issues shall be provided by the CPF to members of the Reddock and Brazeau classes proceeding before the Ontario Superior Court.

51. Canada will pay any Individual Damages Award ordered by the Court to Koskie Minsky LLP, McCarthy Tetrault LLP or Trudel Johnston & Lespérance in trust, within 30 days of the final disposition of the Motion Track claim. Amounts owing to the Class Proceedings Fund or the Fonds d'aide aux actions collectives, amounts owing for disbursement reimbursement or amounts owing for counsel fees shall be paid out by counsel out of the Individual

Damages Awards.

52. The remainder of any amounts paid in respect of Individual Claims will be paid to the Claimant within 30 days of the receipt of funds by Class Counsel and the exhaustion of the Defendant's rights of appeal.

PART VI - PAYMENT OF CLAIMS

53. The Administrator will pay the Collective Damages Awards to all Claimants on a date no later than ninety (90) days after the close of the Claims Filing Deadline, or the final determination of any Claimants' SMI Class membership, whichever is later.

54. The Collective Damages Award will be calculated on a pro-rata basis for the Prolonged Segregation Class and the SMI class, respectively.

55. The Administrator will also pay the Individual Damages Awards for those who elect to proceed by way of the Simplified Track on that same date and as part of the same payment as the Collective Damages Awards. The quantum of these Individual Damages Award payments will be the quantum of the Simplified Damages Determination, less the levy and disbursements due to the Class Proceedings Fund or the Fonds d'aide aux actions collectives, and any counsel fees due to Koskie Minsky, LLP, McCarthy Tétrault LLP, or Trudel Johnston Lesperance. . Canada will be responsible for ensuring the Administrator has the funds required to make such payments possible.

56. Unless members of the Incarcerated Class direct otherwise, and so long as they remain incarcerated at a Federal Institution, the Administrator will pay any damages set out above directly to their prisoner account. Otherwise, claimants will be paid by their chosen means of payment, as specified in their Claims Form or indicated to the Administrator, whichever is most recent.

57. On the same date as the Collective Damages Awards and Individual Awards from the Simplified Track are paid to claimants, the Administrator will pay to the Class Proceedings Fund and the Fonds d'aide aux actions collectives dues as well as fees to Koskie Minsky, LLP, McCarthy Tétrault LLP, or Trudel Johnston as per the respective fees agreements.

PART VII - COUNSEL REPRESENTATION

58. By default, Class Counsel shall retain carriage of the determination of all Individual Claims. However, class members who ask for Individual Damages Award will have the right to terminate their solicitor-client relationship with Class Counsel if they wish to pursue their individual claims under the Motion Track against Class Counsel's recommendation.

PART VIII - THE SUPERVISORY POWERS OF THE COURTS

59. The Administrator shall administer this Protocol under the ongoing authority and supervision of the Courts and the Courts shall have jurisdiction to amend this Protocol as required in the interests of justice on a motion by Class Counsel or by Canada, or on either of the Courts' own motion.

PART IX - INVESTMENT OF AGGREGATE AWARDS

60. The Administrator shall hold the Collective Damages Awards in a guaranteed investment vehicle, liquid money market account or equivalent security with a rating equivalent to or better than that of a Canadian Schedule I bank (a bank listed in Schedule I of the *Bank Act*, S.C. 1991, c. 46), held at a Canadian financial institution.

61. The Administrator will account to the Courts at the conclusion of the distribution of the Collective and Individual Damages Awards, with copy to Class Counsel and Canada.

PART X - COMMUNICATION, LANGUAGES AND TRANSLATION

62. The Administrator shall establish a toll-free number for calls from Canada, with French and English options available.

63. The Administrator shall dedicate sufficient personnel to respond to Class Members' inquiries in English or French, as the Class Member elects.

64. All written communications from the Administrator to a Class Member shall be transmitted via email, if an email is provided, unless the Class Member indicates a preference to receive communications by regular mail.

PART XI - UNDELIVERABLE MAIL

65. Except as provided above in "Part III – Distribution of Notice:, the Administrator shall have no responsibility for locating Class Members for any mailing returned to the Administrator as undeliverable, unless the Class Member has provided an alternative form of communication, in which case the Administrator will attempt the alternative form of communication once and thereafter shall have no responsibility for locating Class Members.

66. The Administrator shall have the discretion, but is not required, to reissue payments to a Class Member that were returned as undeliverable, as the Administrator deems appropriate.

PART XII - REPORTING

67. The Administrator shall provide regular reports to Class Counsel regarding the administration of this Protocol.

68. The Administrator shall provide any reports requested by the Courts.

PART XIII - PRESERVATION AND DISPOSITION OF CLAIM SUBMISSIONS

69. The Administrator shall preserve, in hard copy or electronic form, as the Administrator deems appropriate, all documents relating to a Claim, until two years after all funds have been paid as set out above, and at such time the Administrator shall destroy the documents by shredding, deleting, or such other means as will render the materials permanently illegible.

PART XIV - ASSISTANCE TO THE ADMINISTRATOR

70. The Administrator shall have the discretion to enter into such contracts and obtain financial, accounting, and other expert assistance as are reasonably necessary in the implementation of this Distribution Protocol.

PART XV - CONFIDENTIALITY

71. All information received from the Defendant or Class Members, used and retained by the Administrator for the purposes of administering the Distribution Protocol, is protected under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000 c. 5. The information provided by Class Members is strictly private and confidential and will not be disclosed, except to Class Counsel, or with the express written consent of the relevant Class Member, or as required by law. Prior to implementing the Distribution Protocol, the Administrator shall execute an undertaking that confirms its commitment to abide by the obligations set out in this paragraph.

FUNDING

72. Canada shall be solely responsible for paying the cost of this Protocol, including the cost of Notice, distribution, the Referees and the Administrator.

APPENDIX A

• Elizabeth Fry Society

• John Howard Society

• Aboriginal Legal Services

• West Coast Prison Justice Society Prisoners' Legal Services

• Association des services de réhabilitation sociale du Québec, and all Member Organisations

• All Halfway Houses across Canada

Schedule "D": *Draft Distribution and Individual Issues Protocol*

1. – General

1.1 Pursuant to the *Class Proceedings Act, 1992*, and the Québec *Code of Civil Procedure*, this Protocol governs:

(a) the distribution of the Aggregate Damages Award in:

i. *Brazeau v. Canada (Attorney General)* ("*Brazeau*");

ii. *Reddock v. Canada (Attorney General)* ("*Reddock*"); and

iii. *Gallone c. Canada (Attorney General)* ("*Gallone*"); and,

(b) the procedures for the determination of the individual issues in *Brazeau, Reddock,* and *Gallone*.

1.3. This Protocol may be amended by further order of the Court.

1.4 In this Protocol:

"Canada" means the Defendant, the Attorney General of Canada.

"Class Counsel" means (a) Koskie Minsky LLP in *Brazeau*; (b) McCarthy Tétrault LLP and Koskie Minsky LLP in *Reddock*; and (c) Trudel Johnston & Lespérance in *Gallone.*

"Court" means the Ontario Superior Court of Justice or the Superior Court of Québec.

1.5 For this Protocol, "Class Member" and "Class" are defined by the *Reddock* and *Brazeau* Certification Orders and by the *Gallone* Authorization Judgment.

1.6 For this Protocol, "Incarcerated Class Member" means a Class Member during the period from March 3, 2011 to present and who remains incarcerated or otherwise in the custody of the Correctional Service of Canada.

1.7 Nothing in this Protocol precludes the parties from settling a claim proceeding on Tracks 2 or 3 of the Protocol.

2. Retainer of Class Counsel

2.1 Unless the Class Member in his or her Claim Form provides the name and contact information for the lawyer retained to act for the Class Member, Class Counsel shall continue to have a solicitor and client relationship with the Class Member.

2.2 If a Class Members selects Track 1, then Class Counsel or the lawyer retained to act for the Class Member cannot charge for his or services for the Class Member with respect to the Track 1 claim.

2.3 If a Class Member selects Track 2, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member with respect to the Track 2 claim, such fee not to exceed 15% of the damages awarded plus reasonable disbursements.

2.4 If the Class Member selects Track 3, the Class Counsel or the lawyer retained to act for the Class Member may charge a fee for his or her services for the Class Member as may be approved by the court.

3. Class Proceedings Fund and the Fonds d'aide aux actions collectives

3.1 Where the Class Member selects Tracks 2 or 3, Class Counsel may continue to receive funding from the Class Proceedings Fund ("CPF") or the Fonds d'aide aux actions collectives, subject to its approval.

3.2 Where the Class Member selects Tracks 2 or 3, disbursements and indemnities may be provided by the CPF to Class Members of *Reddock* and *Brazeau* classes proceeding before the Ontario Superior Court subject to its approval.

4. Administrator

4.1 "Administrator" means Epiq, or such other administrator as the courts may appoint from time to time on a motion by Class Counsel.

4.2 The Administrator shall invest the Aggregate Damages Award at a Bank listed in Schedule I of the *Bank Act*, S.C. 1991, c. 46.

4.3 The Administrator shall distribute the Notice and the Claims Form in accordance with a notice and distribution plan approved by the court.

4.4 Where mail to a Class Member is returned to the Administrator as undeliverable, the Administrator shall have no responsibility for locating the Class Member.

4.5. The Administrator shall provide a bilingual (English and French) toll-free support line to assist Class Members, family, guardians or agency staff, or other persons who make inquiries on behalf of Class Members.

4.6 No later than sixty (60) days after the approval of this Protocol, Canada shall provide the Administrator and Class Counsel with the following information in an electronic spreadsheet format (Microsoft Excel or the like) for each inmate incarcerated in a correctional institution during the Class Periods of *Brazeau, Reddock*, and *Gallone*:

(a) his or her name;

(b) his or her Prison Number;

(c) his or her inmate classification;

(d) the correctional institutions in which he or she was incarcerated;

(e) the admission date and or transfer date to each of the correctional institutions in which he or she was incarcerated;

(f) the date of placement and the release date for each placement in administrative segregation.

4.7 Upon receipt of a Claims Form, the Administrator shall examine the form to determine if it is complete, and if it is not complete, the Administrator shall complete the form, if possible, with the database of information provided by Canada and/or may contact the Class Member to obtain further information to complete the Form, if possible to do so.

4.8 Within twenty days of receipt of a Claims Form, the Administrator shall provide a copy of the Claims Form and any associated documents to:

(a) a Manager/Expert from the Roster;

(b) Class Counsel or the lawyer retained to act for the Class Member; and

(c) Canada.

4.9 For Track 1 Claims, the Administrator shall pay the Class Member's share of the Aggregate Damages award within sixty days after the Roster of Manager/Experts has determined all timely submitted Claims Forms.

4.10 For Track 2 and Track 3 Claims, the Administrator shall hold the Class Member's share of the Aggregate Damages Award in trust pending the completion of the Class Member's Track 2 or Track 3 Claim, after which the Administrator shall pay the Class Member his or her share.

4.11 For Track 2 and Track 3 Claims, the Administrator shall pay:

(a) any amounts owing to the Class Proceedings Fund or the Fonds d'aide aux actions collectives including reimbursement for disbursements;

(b) Class Counsel's or the lawyer retained by the Class Member's fee; and

(c) the balance of the damages award, along with the Class Member's share of the Aggregate Damages Award, to the Class Member.

4.12 Where there are unclaimed funds from the distribution of the Aggregate Damages Award, the Administrator shall make a *cy-près* payment as the court may direct.

4.13 The Administrator shall pay any monies owing to a Class Member of the Incarcerated Class to his or her prisoner account, unless the Class Member directs otherwise.

4.14 The Administrator may but is not required, to reissue payments to a Class Member that were returned as undeliverable.

4.15 The Administrator shall comply with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000 c. 5.

4.16 After the distribution of:

(a) the Aggregate Damages Assessment;

(b) any awards for Track 2 or 3 Class Member Claimants; and

(c) any *cy-prés* payments, the Administrator shall apply to be discharged and shall file with the court a report containing their best information respecting the following:

1. The total number of Class Members Claimants.

2. The number of Class Members who received notice associated with the distribution, and a description of how notice was given.

3. The number of Class Members who made a claim pursuant to Track 1, 2, or 3 respectively.

4. The amounts distributed to Class Members and others and a description of how the awards were distributed.

5. The administrative costs associated with the distribution of the award.

4.17 Upon being discharged as Administrator, the Administrator shall retain in hard copy or electronic form, all documents relating to a Claim for two years after which the Administrator shall destroy the documents.

4.18 The fees and expenses of the Administrator under this Protocol shall be paid by Canada as approved by the court.

5. Notice

5.1. In this Protocol, "Notice" means the Notice of Judgment in *Brazeau*, *Reddock*, and *Gallone* in English and in French that has been approved by the court.

5.2 The cost of the Notice and the Notice Program shall be paid by Canada.

5.3 Class Counsel shall post the Notice and the Claims Form on its website.

5.4 The Administrator shall post the Notice and the Claims Form on its website.

5.5 The Administrator shall provide the Notice and the Claims Form to any Class Member who requests it, together with a postage paid return envelope.

5.6 Within thirty (30) days of the court approval of the Notice and Claims Form, the Administrator shall distribute the Notice and the Claims Form to all offices of:

(a) Elizabeth Fry Society;

(b) John Howard Society; Aboriginal Legal Services;

(c) West Coast Prison Justice Society Prisoners' Legal Services;

(d) Association des services de réhabilitation sociale du Québec; and

(e) Halfway Houses across Canada.

5.7 Canada shall provide the Notice, together with a postage paid return envelope, to every Incarcerated Class Member, and Canada shall make available reasonable facilities for Class Members to complete the Claims Form.

5.8 Within thirty (30) days of the Court approval of the Notice and Claims Form, Canada shall post the Notice and a reasonable quantity of the Claims Form in a conspicuous place within the common area of each federal correctional institution and provide facilities to complete the Claims Form.

5.9 Canada shall provide a reasonable quantity Claims Forms to every Federal Parole Office in Canada, and each parolee who attends at such offices shall be provided with a copy of the Notice. In addition, a copy of the Notice and the Claims Form shall be posted in a conspicuous place within a visible area of the Parole Office, and the Canada shall provide facilities at the Parole Office for parolees to complete the Claims Form.

6. Manager/Experts

6.1 In this Protocol, "Roster" means the of group of Manager/Experts appointed by the parties or by the court:

(a) to determine eligibility for a share of the distribution of the Aggregate Damages Award; and.

(b) to inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the Damages Award for Class Members who elect to make a Track 2 claim.

6.2 No later than ninety (90) days from the of the court approval of the Notice and Claims Form, Class Counsel and Canada shall constitute the Roster of Manager/Experts failing which the courts shall appoint the Manager/Experts to constitute the Roster from a list of candidates submitted by Class Counsel and or Canada.

6.3 A Manager/Expert shall be:

(a) a person licensed to practice medicine in any Canadian jurisdiction;

(b) a person licensed to practice psychology in any Canadian jurisdiction;

(c) a person registered as a psychotherapist in any Canadian jurisdiction;

(d) a person registered as a psychiatric nurse in any Canadian jurisdiction; or

(e) a person licensed as a psychiatric social worker in any Canadian Jurisdiction.

6.4 After a Manager/Expert's decision is released, Canada shall pay that Referee:

(a) $1,000 for a Track 1 or Track 3 decision; and

(b) $5,000 for a Track 2 decision and report.

7. Distribution and Individual Issues Protocols

7.1. Aggregate Damages Award means the gross award of aggregate damages, costs, and interest made in *Brazeau, Reddock,* and *Gallone*, less:

(a) Class Counsel's fees and disbursements as approved by the Courts;

(b) the Class Proceedings Fund's levy, applicable to the *Reddock* and *Brazeau* actions;

(c) the allocation to the Fond d'aide aux actions collective; and

(d) any other deductions approved by the Courts

(for a net aggregate damages award of approximately $28.0 million).

7.2 A share in Aggregate Damages Award is equal to the Aggregate Damages Award divided by the number of Class Members eligible to receive a share as determined by the Roster of Manager/Experts.

7.3. Claims Form" means the electronic or paper claims form in English or in French that a Class Member must complete and submit before the Claims Filing Deadline to participate in the distribution of the aggregate damages and to have his or her individual issues determined in *Brazeau, Reddock* and *Gallone*.

7.4. Claims Filing Deadline means the date by which the Claims Form (and the required supporting documentation) must be electronically submitted, sent via mail, or received in person by the Administrator, which date shall be one year after the first publication of Notice.

7.5 Before the Claims Filing Deadline, a Class Member may submit a Claims Form (and the required supporting documentation) to the Administrator.

7.6 After the Claims Filing Deadline, with leave of the court, Class Members may file Claims Forms for Tracks 2 or 3, and leave shall be granted only if the Class Member establishes that the failure to file a timely Claims Form was due to circumstances beyond his or her control or that provide a reasonable explanation for the delay.

7.7 In the Claims Form, a Class Member shall elect to proceed on one of the following tracks:

(a) Track 1 (*Distribution and Release of Claim Track*).

(b) Track 2 (*Distribution and Under-$50,000 Track*).

(c) Track 3 (*Distribution and Over-$50,000 Track.*).

7.8 A Class Member whose claim is presumptively barred by a limitation period shall elect to proceed by Track 3.

7.9. In the Claims Form, a Class Members shall provide the following information:

(a) his or her name;

(b) his or her date of birth;

(c) his or her Social Insurance Number;

(d) his or her Prison Number;

(e) his or her inmate classification;

(f) the correctional institutions in which he or she was incarcerated;

(g) the admission date and or transfer date to each of the correctional institutions in which he or she was incarcerated;

(h) the date of placement and the release date for each placement in administrative segregation

(i) his or her mailing address, email address, and phone numbers, if any;

(j) for other than Incarcerated Class Members a direction as to how the Class Members should be paid his or her share of the distribution and his or her individual issues award

(k) an acknowledgement that the Administrator is authorized to contact the Class Member to obtain further information;

(l) if other than Class Counsel, the name and contact information for the lawyer retained to act for the Class Member;

(m) a declaration that the information submitted in the Claims Form is true and correct.

7.10 Where the Class Member selects Track 2, he or she may annex to his or her or her Claims Form:

(a) an affidavit from the Class Member of no more than 30 pages in length, including exhibits, in support of the Track 2 Claim;

(b) no more than two affidavits of no more than 30 pages in length, including exhibits, from a person who would be qualified to be a Manager/Expert under this Protocol;

(c) the transcript of any cross-examinations; and,

(d) a factum of no more than 30 pages.

7.11 Where the Class Member selects Track 3, he or she shall annex to his or her Claims Form a Statement of Claim.

7.12 Within thirty (30) days of its receipt of a copy of the Claims Form, Canada shall send a copy of the Class Member's CSC file to the Manager/Expert assigned the claim.

7.13 Where the Class Member selects Track 2, Canada may also deliver to the Manager/Expert and to the Class Member:

(a) an affidavit from a representative of the Canada Correctional Service of no more than 30 pages in length, including exhibits, in opposition to the Track 2 Claim;

(b) no more than two affidavits of no more than 30 pages in length, including exhibits, from a person who would be qualified to be a Manager/Expert under this Protocol;

(c) the transcript of any cross-examinations; and

(d) a factum of no more than 30 pages..

Track 1 Claims

7.14 A Class Members who selects Track 1 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

7.15 Where a Class Member elects to proceed on Track I, he or she shall be deemed to have released Canada from all other claims arising from his or her placement(s) in administrative segregation.

7.16 Where a Class Member selects Track 1, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the parties and the Administrator.

7.17 There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

Track 2 Claims

7.18 A Class Members who selects Track 2 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

7.19 Where a Class Member elects to proceed on Track 2, he or she shall be deemed to have released Canada from all claims arising from his or her placement(s) in administrative segregation save for the claims as set out in the damages grid set out below:

Criteria for Award	**Award**
15-60 days in administrative segregation	Up to $10,000
More than 60 days in administrative segregation	Up to $20,000
SMI Eligible	Up to $10,000
Any one or more of: Post-traumatic stress disorder, Severe Clinical Depression, Self-injurious behavior, substantial degradation in Axis I Disorder (excluding substance use disorders), or substantial degradation of Borderline Personality Disorder ("BPD")	Up to $20,000

7.20 Where a Class Member selects Track 2, after the parties have delivered their affidavits, a deponent may be summonsed for an out of court cross-examination by the opposing party, with the duration of the cross-examination not to exceed 60 minutes.

7.20 Where a Class Member selects Track 2, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the Administrator and the parties.

7.21 There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

7.22 Where a Class Member selects Track 2, the the parties are bound by the findings of fact made in the *Brazeau*, *Reddock*, and *Gallone* actions including causation of harm and the Manager/Expert shall inquire into and report to the Ontario Superior Court of Justice or to the Superior Court of Québec his or her findings and conclusions as to the quantum of the individual issues award by reviewing the Claims Form, the Class Member's CSC file, and the affidavits and factums filed by the Class Member and Canada.

7.23 The Manager/Expert shall report his or her decision as to eligibility to the Administrator and the parties and the Manager/Expert's report to the court shall be no more than ten pages in length.

7.24 Where a Class Member selects Track 2, after the Manager/Expert delivers his or her report to the court, either party may move for an Order confirming the Report of the Manager/Expert.

7.25 Where a Class Member selects Track 2, the court may award costs not to exceed $6,000.

7.26 Damages awarded under Track 2 shall accrue pre-judgment interest at the rate of 5%, calculated from March 3, 2017. Post-judgment interest shall accrue at the rate of 3%, from the date of the Damages award

7.27 The Class Member's share of the gross aggregate damages award is a credit to the payment of the damages awarded under Tracks 2.

7.28 Where the Class Member makes a successful claim under Track 2, Canada shall pay any award to the Administrator within 30 days after the final disposition of the claim.

Track 3 Claims

7.29 A Class Members who selects Track 3 is entitled to a share in the distribution of aggregate damages if he or she was placed in administrative segregation for more than 15 consecutive days.

7.30 Where a Class Member elects to proceed on Track 3, his or her individual issues claim shall be determined in accordance with the Track 3 summary judgment procedure described in this Protocol.

7.31 Where a Class Member selects Track 3, the Manager/Expert shall determine the Class Member's eligibility to receive a share of the distribution of the Aggregate Damages Award by reviewing the Claims Form and the Class Member's CSC file and the Manager/Expert shall report his or her decision to the Administrator and the parties.

7.32 There is no appeal of the Manager/Expert's decision with respect to a Class Member's eligibility to receive a share of the Aggregate Damages Award.

7.33 For Class Members who select Track 3, the Manager/Expert shall determine only the Class Member's eligibility to receive a share of the distribution of aggregate damages and the balance of the claim shall be determined in accordance with the procedures for Track 3.

7.34 Damages awarded under Track 3 shall accrue pre-judgment interest at the rate of 5%, calculated from March 3, 2017. Post-judgment interest shall accrue at the rate of 3%, from the date of the Damages award

7.35 The Class Member's share of the gross aggregate damages award is a credit to the payment of the damages awarded under Tracks 3.

7.36 Where the Class Member selects Track 3, the claim shall proceed by an individual issues summary judgment motion in accordance with the Ontario *Rules of Practice* before a judge of the Ontario Superior Court of Justice save and except for Class Members of *Gallone*, whose summary judgment motion shall proceed before a judge of the Superior Court of Québec in accordance with s. 600 of the Québec *Code of Civil Procedure* as follows:

(a) Within twenty days after the receipt of the Claim Form and the Statement of Claim from the Administrator, Canada shall deliver its Statement of Defence;

(b) Within twenty days after receipt of the Statement of Defence, the Class Member shall deliver:

(i) his or her Reply,

(ii) a Notice of Motion for Summary Judgment, and

(iii) his or her supporting affidavit(s) for the motion.

(c) Within ninety days after receipt of the Class Member's Notice of Motion for Summary Judgment, Canada shall deliver:

(i) an Affidavit of Documents including the Class Member's CSC medical file and CSC inmate file;

(ii) its affidavits to respond to the summary judgment motion.

(d) Within thirty days after receipt of Canada's responding materials, the Class Member may deliver his or her reply affidavits, if any.

(e) After thirty days from the receipt of Canada's responding materials, the Class Member shall bring a motion to fix a timetable for the balance of the summary judgment motion.

7.37 Where a Class Member selects Track 3, the parties are bound by the findings of fact made in the *Brazeau*, *Reddock*, and *Gallone* actions.

Schedule "E": Ontario Statutory Provisions

Class Proceedings Act 1992, S.O. 1992, c. 6

Court may determine conduct of proceeding

12. The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[…]

Aggregate assessment of monetary relief

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

> (a) the use of standardized proof of claim forms;
>
> (b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis.

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were given.

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

Individual issues

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner.

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

Idem

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

Extension of time

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).

Determination under cl. (1) (c) deemed court order

(7) A determination under clause (1) (c) is deemed to be an order of the court.

Judgment distribution

26. (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.

Idem

(2) In giving directions under subsection (1), the court may order that,

> (a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;
>
> (b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and
>
> (c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

(4)-(6) Repealed: 2020, c. 11, Sched. 4, s. 23 (1).

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

Payment of awards

(8) The court may order that an award made under section 24 or 25 be paid,

> (a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate.

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

Duty of person, entity administering distribution

(11) A person or entity administering the distribution of an award under section 24 or 25 shall do so in a competent and diligent manner.

Report

(12) No later than 60 days after the date on which an award made under section 24 is fully distributed, including any distribution under subsection (10) or section 27.2, the person or entity who administered the distribution shall file with the court a report containing their best information respecting the following:

1. The amount of the award.

2. The total number of class members.

3. Information respecting the number of class members identified in each affidavit filed under subsection 5 (3) in the motion for certification.

4. The number of class members who received notice associated with the distribution, and a description of how notice was given.

5. The number of class members who made a claim for monetary relief and, of them, the numbers of class members who did and who did not receive the relief.

6. The amount of the award distributed to class members and a description of how the award was distributed.

7. The amount and recipients of any distribution under subsection (10) or section 27.2.

8. The number of class members who opted out of the class proceeding.

9. The smallest and largest amounts distributed to class members, the average and the median of the amounts distributed to class members, and any other aggregate data respecting the distribution that the person or entity who administered the distribution considers to be relevant.

10. The administrative costs associated with the distribution of the award.

11. The solicitor fees and disbursements.

12. Any amount paid to the Class Proceedings Fund established under the Law Society Act or to a funder under a third-party funding agreement approved under section 33.1.

13. Any other information the court requires to be included in the report.

Same

(13) Once the court is satisfied that the requirements of subsection (12) have been met with respect to a filed report, the court shall make an order approving the report and append the report to the order.

Same

(14) If the regulations so provide, the person or entity who administered the distribution, or such other person or entity as may be prescribed, shall provide, in accordance with the regulations, a copy of the approved report to the person or entity specified by the regulations

Judgment on common issues

27. (1) A judgment on common issues of a class or subclass shall,

(a) set out the common issues;

(b) name or describe the class or subclass members;

(c) state the nature of the claims or defences asserted on behalf of the class or subclass; and

(d) specify the relief granted.

Effect of judgment on common issues

(2) A judgment on common issues of a class or subclass does not bind,

(a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

Idem

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

(a) are set out in the certification order;

(b) relate to claims or defences described in the certification order; and

(c) relate to relief sought by or from the class or subclass as stated in the certification order.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.**

INTERPRETATION

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Matters Not Provided For

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

[…]

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

[…]

DISPOSITION OF MOTION

General

[…]

20.04 (2) The court shall grant summary judgment if,

> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

Only Genuine Issue Is Question Of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

[…]

WHERE TRIAL IS NECESSARY

Powers of Court

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

Directions and Terms

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

> (a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;
>
> (b) that any motions be brought within a specified time;
>
> (c) that a statement setting out what material facts are not in dispute be filed within a specified time;
>
> (d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;
>
> (e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;
>
> (f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;
>
> (g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;
>
> (h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;
>
> (i) that any oral examination of a witness at trial be subject to a time limit;
>
> (j) that the evidence of a witness be given in whole or in part by affidavit;
>
> (k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

[…]

[…]

COURT APPOINTED EXPERTS

Appointment by Judge

52.03 (1) On motion by a party or on his or her own initiative, a judge may, at any time, appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the action.

(2) The expert shall be named by the judge and, where possible, shall be an expert agreed on by the parties.

Contents of Order Appointing Expert

(3) The order shall contain the instructions to be given to the expert and the judge may make such further orders as he or she considers necessary to enable the expert to carry out the instructions, including, on motion by a party, an order for,

(a) inspection of property under Rule 32; or

(b) the physical or mental examination of a party under section 105 of the Courts of Justice Act.

Remuneration of Expert

(4) The remuneration of an expert shall be fixed by the judge who appoints the expert, and shall include a fee for the expert's report and an appropriate sum for each day that attendance at the trial is required.

(5) The responsibility of the parties for payment of the remuneration of an expert shall be determined in the first instance by the judge.

[…]

Report

(7) The expert shall prepare a report and send it to the registrar and the registrar shall send a copy of the report to every party.

(8) The report shall be filed as evidence at the trial of the action unless the trial judge orders otherwise.

[…]

Liability of Parties for Remuneration of Expert

(11) The liability of the parties for payment of the remuneration of the expert shall be determined by the trial judge at the end of the trial, and a party who has paid the expert in accordance with a determination under subrule (5), if not the party determined to be liable for payment under this subrule, shall be indemnified by the party determined to be liable.

APPLICATION OF RULES 54 AND 55

54.01 Rules 54 and 55 apply to references directed,

> […]
>
> (b) under a statute, subject to the provisions of the statute.

WHERE REFERENCE MAY BE DIRECTED

Reference of Whole Proceeding or Issue

54.02 (1) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference of the whole proceeding or a reference to determine an issue where,

> (a) all affected parties consent;
>
> (b) a prolonged examination of documents or an investigation is required that, in the opinion of the judge, cannot conveniently be made at trial; or
>
> (c) a substantial issue in dispute requires the taking of accounts.

[…]

TO WHOM REFERENCE MAY BE DIRECTED

Judge or Officer

54.03 (1) A reference may be directed to the referring judge, to another judge with that judge's consent, to a registrar or other officer of the court or to a person agreed on by the parties.

Person Agreed on by Parties

(2) Where a reference is directed to a person agreed on by the parties, the person is, for the purposes of the reference, an officer of the court directing the reference.

(3) The judge directing a reference to a person agreed on by the parties may,

> (a) determine his or her remuneration and the liability of the parties for its payment;
>
> (b) refer that issue to the person to whom the reference is directed; or
>
> (c) reserve that issue until the report on the reference is confirmed.

ORDER DIRECTING A REFERENCE

54.04 (1) An order directing a reference shall specify the nature and subject matter of the reference and who is to conduct it and may,

> (a) direct in general terms that all necessary inquiries be made, accounts taken and costs assessed;

(b) contain directions for the conduct of the reference; and

(c) designate which party is to have carriage of the reference.

[…]

(3) A referee has, subject to the order directing the reference, all the powers these rules give to a referee.

[…]

REPORT ON REFERENCE

54.06 A referee shall make a report that contains his or her findings and conclusions.

REPORT MUST BE CONFIRMED

54.07 (1) A report has no effect until it has been confirmed.

[…]

CONFIRMATION ON MOTION WHERE REPORT BACK REQUIRED

54.08 (1) Where the order directing a reference requires the referee to report back, the report or an interim report on the reference may be confirmed only on a motion to the judge who directed the reference on notice to every party who appeared on the reference, and the judge may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just.

(2) Where the judge who directed the reference is unable for any reason to hear a motion for confirmation, the motion may be made to another judge.

CONFIRMATION BY PASSAGE OF TIME WHERE REPORT BACK NOT REQUIRED

Fifteen-Day Period to Oppose Confirmation

54.09 (1) Where the order directing a reference does not require the referee to report back, the report or an interim report on the reference is confirmed,

(a) immediately on the filing of the consent of every party who appeared on the reference; or

(b) on the expiration of fifteen days after a copy, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced, unless a notice of motion to oppose confirmation of a report is served within that time.

To Whom Motion to Oppose Confirmation Made

(2) A motion to oppose confirmation of a report shall be made to a judge other than the one who conducted the reference.

Notice of Motion to Oppose Confirmation

(3) A notice of motion to oppose confirmation of a report shall,

(a) set out the grounds for opposing confirmation;

(b) be served within fifteen days after a copy of the report, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced; and

(c) name the first available hearing date that is at least three days after service of the notice of motion.

Motion for Immediate Confirmation

(4) A party who seeks confirmation before the expiration of the fifteen-day period prescribed in subrule (1) may make a motion to a judge for confirmation.

Disposition of Motion

(5) A judge hearing a motion under subrule (2) or (4) may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just.

[…]

GENERAL PROVISIONS FOR CONDUCT OF REFERENCE

Simple Procedure to be Adopted

55.01 (1) A referee shall, subject to any directions contained in the order directing the reference, devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may,

(a) give such directions as are necessary; and

(b) dispense with any procedure ordinarily taken that the referee considers to be unnecessary or adopt a procedure different from that ordinarily taken.

[…]

(3) At the hearing for directions, the referee shall give such directions for the conduct of the reference as are just, including,

(a) the time and place at which the reference is to proceed;

(b) any special directions concerning the parties who are to attend; and

(c) any special directions concerning what evidence is to be received and how documents are to be proved.

(4) The directions may be varied or supplemented during the course of the reference.

[…]

Schedule "F: Québec Statutory Provisions

Québec *Code of Civil Procedure*, CQLR, c. C-25.01

17. The court cannot rule on an application, or take a measure on its own initiative, which affects the rights of a party unless the party has been heard or duly called.

In any contentious matter, the court, even on its own initiative, must uphold the adversarial principle and see that it is adhered to until the judgment and during execution of the judgment. It cannot base its decision on grounds the parties have not had the opportunity to debate.

18. The parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application.

Judges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice

19. Subject to the duty of the courts to ensure proper case management and the orderly conduct of proceedings, the parties control the course of their case insofar as they comply with the principles, objectives and rules of procedure and the prescribed time limits.

They must be careful to confine the case to what is necessary to resolve the dispute, and must refrain from acting with the intent to cause prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.

They may, at any stage of the proceeding, without necessarily stopping its progress, agree to settle their dispute through a private dispute prevention and resolution process or judicial conciliation; they may also otherwise terminate the proceeding at any time.

[…]

157. In order to ensure the orderly progress of a proceeding, the chief justice or chief judge may, on their own initiative, given the nature, character or complexity of the case, order that it be examined and, if warranted, case-managed as soon as the application is instituted and even before the case protocol is filed.

The chief justice or chief judge may also, for the same reasons, on their own initiative or on request, order special case management at any time and assign a judge as special case management judge. The special case management judge is responsible for deciding all incidental applications, convening a case management conference and a pre-trial conference if warranted, and issuing such orders as are appropriate, unless another judge is temporarily assigned because the special case management judge is unable to act. The special case management judge may also be assigned to preside over the trial and render judgment on the merits of the principal application.

158. For case management purposes, at any stage of a proceeding, the court may decide, on its own initiative or on request, to

(1) take measures to simplify or expedite the proceeding and shorten the trial by ruling, among other things, on the advisability of ordering the consolidation or separation of proceedings or the splitting of the proceeding, of better defining the issues in dispute, of amending the pleadings, of limiting the length of the trial, of admitting facts or documents, of authorizing affidavits in lieu of testimony or of determining the procedure and time limit for the disclosure of exhibits and other evidence between the parties, or by convening the parties to a case management conference or a settlement conference, or encouraging them to use mediation;

(2) assess the purpose and usefulness of seeking expert opinion, whether joint or not, determine the mechanics of that process as well as the anticipated costs, and set a time limit for submission of the expert report; if the parties failed to agree on joint expert evidence, assess the merits of their reasons and impose joint expert evidence if it is necessary to do so to uphold the principle of proportionality and if, in light of the steps already taken, doing so is conducive to the efficient resolution of the dispute without, however, jeopardizing the parties' right to assert their contentions;

(3) determine terms for the conduct of pre-trial examinations, if such examinations are required, including their number and their length when it appears necessary to exceed the time prescribed by this Code;

(4) order notification of the application to persons whose rights or interests may be affected by the judgment, or invite the parties to bring a third person in as an intervenor or to implead a third person if the court considers that that person's participation is necessary in order to resolve the dispute and, in family or personal status or capacity matters, order the production of additional evidence;

(5) rule on any special requests made by the parties, modify the case protocol or authorize or order provisional measures or safeguard measures as it considers appropriate;

(6) determine whether the defence is to be oral or written;

(7) extend the time limit for trial readiness; or

(8) issue a safeguard order, effective for not more than six months.

[…]

234. At any stage of a proceeding, if it considers that expert evidence is necessary in order to decide the dispute, the court, even on its own initiative, may appoint one or more qualified experts to provide such evidence. The court's decision defines the expert's mission, gives the necessary instructions as to how it is to be carried out, sets the time limit within which the expert must submit a report and rules on the expert fee and its payment. The decision is notified to the expert without delay.

[…]

236. Court-appointed experts act under the court's authority to gather the evidence required to carry out their mission. They may examine any document or thing, visit any premises and, with the authorization of the court, take testimony under oath. They must preserve such testimony and certify its origin and integrity.

Experts are required to give the parties at least five days' notice of when and where their operations are to begin.

[…]

238. An expert report must be brief but provide sufficient details to enable the court to make its own assessment of the facts set out in the report and of the reasoning that led to the conclusions drawn by the expert. It must mention the analytical methodology used.

Any testimony taken by the expert is attached to the report and forms part of the evidence.

The expert's conclusions are not binding on the court or on the parties, unless the parties declare that they accept them.

[…]

572. As soon as an application for authorization to institute a class action is filed, the chief justice, unless the chief justice decides otherwise, assigns a judge as special case management judge to manage the proceeding and hear all procedural matters relating to the class action. The chief justice may assign a judge despite there being grounds for the judge's recusation, provided the chief justice considers the situation, in the context of the case, does not undermine the impartiality of the judiciary.

After considering the interests of the parties and of the class members, the chief justice may determine the district in which the application for authorization is to be heard or the class action instituted.

[…]

590. A transaction, acceptance of a tender, or an acquiescence is valid only if approved by the court. Such approval cannot be given unless notice has been given to the class members.

In the case of a transaction, the notice must state that the transaction will be submitted to the court for approval on the date and at the place indicated. It must specify the nature of the transaction, the method of execution chosen and the procedure to be followed by class members to prove their claim. The notice must also inform class members that they may assert their contentions before the court regarding the proposed transaction and the distribution of any remaining balance. The judgment approving the transaction determines, if necessary, the mechanics of its execution.

[…]

592. If the judgment awards damages or a monetary reimbursement, it specifies whether members' claims are to be recovered collectively or individually.

593. The court may award the representative plaintiff an indemnity for disbursements and an amount to cover legal costs and the lawyer's professional fee. Both are payable out of the amount recovered collectively or before payment of individual claims.

In the interests of the class members, the court assesses whether the fee charged by the representative plaintiff's lawyer is reasonable; if the fee is not reasonable, the court may determine it.

Regardless of whether the Class Action Assistance Fund provided assistance to the representative plaintiff, the court hears the Fund before ruling on the legal costs and the fee. The court considers whether or not the Fund guaranteed payment of all or any portion of the legal costs or the fee.

[…]

595. The court orders collective recovery of the class members' claims if the evidence allows a sufficiently precise determination of the total claim amount. The total claim amount is determined without regard to the identity of individual class members or the exact amount of their respective claims.

After determining the total claim amount, the court may order that it be deposited in its entirety, or according to the terms it specifies, with a financial institution carrying on business in Québec; the interest on the amount deposited accrues to the class members. The court may reduce the total claim amount if it orders an additional form of reparation, or may order reparation appropriate to the circumstances instead of a monetary award.

If execution measures prove necessary, instructions are given to the bailiff by the representative plaintiff.

596. A judgment that orders collective recovery makes provision for individual liquidation of the class members' claims or for distribution of an amount to each class member.

The court designates a person to carry out the operation, gives them the necessary instructions, including instructions as to proof and procedure, and determines their remuneration.

The court disposes of any remaining balance in the same manner as when remitting an amount to a third person, having regard, among other things, to the members' interests. If the judgment is against the State, the remaining balance is paid into the Access to Justice Fund.

597. If the individual liquidation of the class members' claims or the distribution of an amount to each class member is impracticable, inappropriate or too costly, the court determines the balance remaining after the collocation of the costs, fee and disbursements and orders that the amount be remitted to a third person it designates.

However, before remitting the amount to a third person, the court hears the representations of the parties, the Class Action Assistance Fund and any other person whose opinion the court considers useful.

[…]

599. A judgment ordering individual recovery specifies what issues remain to be decided in order to determine individual claims. It sets out the content of the judgment notice to class members, which must include explanations as to those issues and as to the information and documents to be provided in support of an individual claim and any other information determined by the court.

Within one year after the publication of the notice, class members must file their claim with the office of the court in the district where the class action was heard or in any other district the court specifies.

600. The court determines the claim of each class member or orders the special clerk to determine it according to the procedure it establishes. The court may determine special methods of proof and procedure for such purpose.

601. At the trial of an individual claim, the defendant may urge against a claimant a preliminary exception that this Title did not earlier permit against the representative plaintiff.

CITATION: Brazeau v. Canada (Attorney General), 2020 ONSC 7229
COURT FILE NO.: CV-15-53262500-CP
Reddock v. Canada (Attorney General), 2020 ONSC 7232
COURT FILE NO.: CV-17-570771-00CP
DATE: 2020/11/25

ONTARIO
SUPERIOR COURT OF JUSTICE

Between:

CHRISTOPHER BRAZEAU and DAVID KIFT
Plaintiffs
- and -

ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under the *Class Proceedings Act, 1992*
And Between:

JULLIAN JORDEA REDDOCK

Plaintiff
- and -

ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under the *Class Proceeding Act, 1992*

SUPERIOR COURT (Class Action Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-06-000781-167

Between:

ARLENE GALLONE

Plaintiff

c.

PROCUREUR GÉNÉRAL DU CANADA

Defendant

Released: November 25, 2020

FILE NO.: 49348 CP
DATE: 20070323

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Tim Gould and Archie Leach	***Charles M. Wright, A. Dimitri Lascaris*** and ***H. Juroviesky***- - for the plaintiffs
Plaintiffs	***Ronald G. Slaght Q.C.*** and ***Jordan Goldblatt*** -- for BMO Nesbitt Burns Inc., Thomas Little and Atul Shah
- and -	
BMO Nesbitt Burns Inc.; Blackmont Capital Inc.; Canaccord Capital Corporation; National Bank Financial Inc.; Sprott Securities Inc.; TD Securities Inc.; BDO Seidman, LLP; FMF Capital Group Ltd.; FMF Capital LLC; FMF Holdings, LLC; Michigan Fidelity Acceptance Corporation; PKF, LLC; Thomas Little; Atul Shah; Michael Hoffman; Edan King; Howard Morof; Robert Pilcowitz; Eric Slavens; and Lorie Weisberg	***Margaret Waddell*** -- for FMF Capital Group Ltd., FMF Capital LLC, FMF Holdings, LLC, Michigan Fidelity Acceptance Corporation, PKF, LLC, Michael Hoffman, Eric Slavens, Lorie Weisberg, Edan King, Howard Morof, and Robert Pilcowitz
	F. McLaughlin and ***Jeffrey Feiner*** -- for TD Securities Inc.
Defendants	***Reena Goyal*** -- for National Bank Financial Inc.
	Gavin Smyth -- for Sprott Securities Inc.
	Timothy Banks -- for BDO Seidman
	David Mitchell -- for Canaccord Capital Corporation and Blackmont Capital Inc., for the
	HEARD: March 14, 2007

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

CULLITY J.

[1] The plaintiffs' motions to approve the settlement of this class proceeding, and the fees of class counsel, were initially set down to be heard on January 25, 2007. On that date, after hearing the submissions of counsel, and of one of the putative class members who addressed the question of class counsel's fees, the hearing was adjourned to permit another member – Mr Richard Byers - who had provided a written objection to the settlement to expand on his concerns. After further communications were received from him, the hearing resumed on February 23, 2007 and class counsel responded to his objections. In an endorsement released on March 7, 2007, I declined to approve the settlement but provided counsel with an opportunity to file material, and make further submissions, on what I considered to be inadequacies in the record.

[2] Additional affidavit material was then filed and addressed by counsel on March 14, 2007. At the conclusion of the hearing I indicated that I was satisfied that, in principle, the settlement should be approved. Subject to the comments I will make on particular provisions of the settlement agreement, there will be an order to this effect and an order certifying the proceeding for the purpose of implementing the settlement.

Background

[3] The litigation concerns losses made by purchasers of income-participating securities ("Securities") issued by FMF Capital Group Ltd ("FMF Group"). FMF Group was incorporated under the *Ontario Business Corporations Act,* R.S.O. 1990, c. B.16 on October 20, 2004 for the purpose of an initial public offering ("IPO") of the Securities. Each of the Securities has two components: a common share, or equity component; and a subordinated note, or debt component. The prospectus stated that monthly distributions of dividends or interest were intended to be made. The value of the Securities, and the ability to declare dividends, and pay interest, on them was derived from subprime mortgage loans made by FMF Capital LLC ("FMF Capital") in the United States residential real estate market. As such loans are made to borrowers with a low credit rating, and may be made with relatively low margins, they are accompanied with a degree of risk that would not normally attach to residential mortgages. These risks were disclosed in the prospectus.

[4] FMF Group has a 60 per cent indirect interest in FMF Capital. The remaining 40 per cent indirect interest is owned by Michigan Fidelity Acceptance Corporation (" MFAC") and PKF, LLC ("PKF"). PKF is allegedly controlled by the defendants, Edan King and Robert Pilcowitz, and 90 per cent of the equity of MFAC is owned by trusts for their families. Each of the above corporations - other than FMF Group - is incorporated in the United States.

[5] The IPO of the Securities was made in Canada pursuant to a prospectus dated March 16, 2005. It closed on March 24, 2005 and the Securities were then listed, and traded, on the Toronto Stock Exchange ("TSX"). Dividends were declared, and interest paid, monthly, through October,

2005. On November 14, 2005, FMF Group announced that the declaration of dividends was suspended, and payments of interest deferred. The following day the listed price of the Securities on the TSX fell by 76.7 per cent. The price has continued to fall. At the close of trading on January 9, 2007, the Securities were trading at $ 0.17 compared with the offering price under the IPO of $10.00.

[6] Since the initial hearing of these motions, the TSX has suspended trading of the Securities, and has informed FMF Group that that they will be delisted on April 5, 2007. On March 9, 2007, FMF Group announced its decision to wind up the business and operations of FMF Capital as a result of the "continuing rapid and severe deterioration of the US nonprime mortgage industry and other factors affecting its overall nonprime mortgage business".

The litigation

[7] The statement of claim in this action was issued in London, Ontario on January 25, 2006. A similar class proceeding (the "Michigan action") had been commenced in Michigan State Court on December 5, 2005. On March 21, 2006, a class proceeding was commenced in Quebec on behalf of residents of the Province who purchased Securities either in the IPO or, subsequently, over the TSX. Since that time the plaintiffs and their counsel in the three actions have attempted to co-ordinate their resources and efforts in the litigation, and the proposed settlement is intended to resolve and dispose of the issues in each of the proceedings.

[8] Following amendments to the complaint filed in Michigan, the defendants in that action now include each of the defendants to this proceeding. In addition, the family trusts that own 90 per cent of MFAC are named as defendants in the Michigan proceedings. Subject to the general exclusion of residents of Quebec from the class in this proceeding, and their inclusion in the class in the Quebec action, the proposed class is defined in substantially the same manner in each of the three actions.

[9] Although, strictly, I am concerned only with whether the action in Ontario should be certified, and the settlement of it approved, it was necessary to consider whether a proposed dismissal of the Michigan action would be in the interests of the putative class in this proceeding.

The parties

[10] The plaintiffs purchased Securities under the IPO and, also, subsequently over the TSX before November 16, 2005. They seek to represent purchasers who would not be included in the class for which certification is sought in Quebec and who fall within each of the two categories ("Class I" and "Class II"). Of the 20 defendants, eleven consist of the corporations I have mentioned, a related holding company and certain directors and senior officers of them. These have been referred to by counsel as the "FMF Defendants". The remaining defendants consist of six underwriters, and an accounting firm, who were involved in the IPO, and a director and analyst of the lead underwriter, BMO Nesbitt Burns Inc.

The claims

[11] The plaintiffs claim compensatory damages for negligence, negligent misrepresentation and breaches of sections 36 and 52 of the *Competition Act*. Punitive damages are also claimed. Expert evidence filed on behalf of the plaintiffs estimates the maximum aggregate, compensatory damages at approximately $135 million.

[12] The misrepresentations consist of allegedly untrue statements in the prospectus for the IPO and, in particular, the omission of facts required to prevent other statements in the prospectus from being misleading. In addition to the prospectus misrepresentations, it is pleaded that certain of the defendants negligently made statements to, or withheld information from, the public that should be considered material to their decisions as prospective investors in the Securities. These allegations are particularised in the pleading.

[13] Underlying the claims with respect to material misrepresentations and non-disclosure is the general allegation that an extraordinary growth in FMF Capital's loan volume in the period preceding the IPO was accompanied by a degradation of its underwriting standards that led to repurchase demands by institutional purchases of the loans for which the corporation's loan loss reserves were, to the knowledge of defendants, inadequate.

The course of the proceedings

[14] From the outset, the defendants indicated their intention to deny liability and to contest the claims made against them if the actions proceeded to trial. Motions to dismiss the proceedings in Michigan and to limit rights of discovery and the examination of witnesses there have been made. Apart from a successful motion by the defendants to change the venue of this action from London to Toronto, there have been no orders on motions in this proceeding to date. There is, however, a pending motion by the plaintiffs to stay this action until certification is denied, or the issues have been determined, in Michigan. The defendants have indicated their intention to oppose that motion on the ground that Ontario is the more convenient forum - the mirror image of part of their motion in the Michigan court to dismiss the action there.

[15] Although Mr Byers has characterised the motions in Michigan, and the pending motion here, as "legal manoeuvring", I am satisfied that they were much more than preliminary skirmishes. They highlight the existence of jurisdictional, procedural, practical and substantive legal issues that could impact significantly on the outcome of the litigation. Even if the likelihood of appeals from whatever disposition of the pending motions is made could be disregarded, I do not think there is any doubt that, if the litigation is to continue to a final judicial resolution, its complexity is such that it will very likely be protracted over a period of several years. It will be inordinately expensive to the parties and in terms of judicial resources. Moreover, at this stage – for the reasons I will give - there can be no guarantee of any satisfactory recovery for the members of the class. In short, this is pre-eminently a case in which the parties should be encouraged to reach a settlement that falls within a zone of reasonableness. The question is whether the proposed settlement is such.

The settlement

[16] The settlement agreement was made between the plaintiffs and the defendants in each of the three actions with the exception of certain defendants in the Michigan proceedings. The latter are the spouses of Edan King and Robert Pilcowitz and the trustees of the trusts that own MFAC. The trusts are alleged to have received the greater part of the proceeds of the IPO and claims against them in respect of fraudulent conveyances and unjust enrichment are made in the Michigan proceedings. Although not parties to the settlement agreement, they are intended to be "third party beneficiaries" of it and to be entitled to all the rights it purports to confer on them - including releases of all claims that the class may have against them.

[17] The agreement provides for a settlement fund consisting of (a) (US) $21 million to be provided by insurers of certain of the FMF Defendants; (b) (Can) $3,750,000 to be provided by the underwriters; and (c) (Can) $800,000 to be provided by the accounting firm involved in the IPO. The fund is to be distributed among the class in accordance with a Distribution Protocol after payment of class counsel's fees and certain expenses, including the expenses of giving notice to, and locating, class members, assisting them to make claims, and administering and distributing the balance of the fund to them. The fund ($28,625,504) has been deposited with class counsel and is earning interest of approximately $100,000 a month.

[18] In consideration of those payments, all claims against the defendants – including the trusts – in the three actions are to be released without an admission of liability.

[19] The Distribution Protocol is intended to permit the net settlement fund to be divided among the class members in a manner proportionate to the loss suffered by each of them with a discount factor applied to the amounts otherwise distributable to Class II members to reflect increased certification and substantive litigation risks affecting their claims.

[20] Expert evidence was filed that estimated the loss per Security suffered by Class I members as falling within a range of 77¢ to $7.74, and by Class II members from 46¢ to $4.60. The mid-point within each range has been accepted for the purposes of the protocol.

[21] Independent counsel were retained to negotiate the appropriate discount factor on behalf of the members of each of the classes. Their joint recommendation of a discount of 26 per cent is reflected in the protocol.

[22] As well as the above considerations, which will require an individual determination in respect of each claimant, further adjustments are proposed to deal with a number of variables that will include: (a) whether members sold Securities prior to November 15, 2005; (b) whether they continued to own securities after that time; (c) whether they acquired Securities over the TSX as well as under the IPO; and (d) the total number of Securities purchased by class members whose valid claims are filed in a timely manner.

[23] In view of the above, the Distribution Protocol is necessarily elaborate and complex and this created difficulties in summarising its contents and effect in the notices of the settlement approval hearing that were provided to purchasers of the Securities. The notices informed them of their ability to obtain further information from class counsel, or from counsel's website which contained the settlement documents including the protocol.

Analysis

[24] The requirement that settlements of class proceedings must be approved by the court was enacted to ensure that the interests of the class members who will be bound by the settlement would be protected. In a case like this, where certification has not preceded the motion for settlement approval, the concern is lessened by the right to opt out that will be provided to members who do not agree with the settlement after it has been approved. The concern, however, continues to exist because the right to opt out provides less than perfect protection for the interests of persons who are not before the court. The necessity for court approval is particularly important in cases where the factual and legal issues are complex and the task of assessing the litigation risks is difficult.

1. The governing principles

[25] The principles that the court applies when considering approval of the settlement have been stated and discussed in numerous cases, including *Dabbs v. Sun Life Assurance Co of Canada* (1998), 40 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; *Ford v. F. Hoffmann-La Roche Ltd*, [2005] O.J. No. 1118 (S.C. J.), at paras 110 - 118; and *Nunes v. Air Transat A.T. Inc*., [2005] O.J. No. 2527 (S.C.J.)

[26] As a settlement is necessarily a compromise of the competing rights asserted on behalf of the parties, it is necessary to consider the likelihood that the plaintiffs would be successful if the litigation continued and the future expense and likely duration of the proceeding, and to weigh these factors against the benefits that the settlement would provide. In deciding whether to grant, or withhold, approval, the court must consider whether the settlement is fair, reasonable and in the best interests of the class. It does not hold the parties to a standard of perfection. It is sufficient if the terms and effect of the settlement on the interests of the class fall within a zone of reasonableness.

[27] Although the requirement of court approval is not a formality, and an exercise of judgment is required, the court will rarely, if ever, be in a position to weigh the benefits of the settlement against the litigation risks and likely outcome of the proceeding with the thoroughness and acuteness of experienced class counsel involved in the litigation. For that reason, a degree of deference is given to counsel's recommendation of the settlement if the court is satisfied that it was the result of arm's-length negotiations without collusion.

2. *Conflicts of interest*

[28] As the Ontario Law Reform Commission recognised in chapter 20 of its *Report on Class Actions* (Ministry of the Attorney-General, 1982), an important threshold aspect of the court's consideration must be the adequacy of representation provided by the plaintiffs and their counsel and the potential conflicts between their respective interests and those of other class members. I have no concerns of this kind here. The proposed representative plaintiffs are by no means unsophisticated investors. Each of them purchased securities under the IPO and also on the

secondary market and there is nothing in the record to suggest that they have interests that conflict with those of other putative class members under the settlement agreement, or otherwise.

[29] Where, as here, counsel will also be seeking approval of an agreement for a contingency fee expressed in terms of a percentage of the gross recovery in the action, there will be a concern to see that counsel have not succumbed to a temptation to prefer their own interests by recommending a speedy settlement that would provide them with rewards disproportionate to the work they have performed and the benefits for the class. At the same time, it must be noted that an early settlement of the proceedings can be very much in the interests of the class members.

[30] The motion to approve the settlement in this case is not conditioned on the court's approval of the fee counsel are requesting. Although the time records they have filed indicate that the possibility of settlement was considered, and discussed, from virtually the inception of the proceedings, I do not find this to be in any way unusual, or inconsistent with an exercise of professional judgment in the light of the respective interests of the parties faced with potentially protracted litigation of this nature.

[31] Having considered the settlement at some length, I see no basis for any concern that in recommending the settlement to their clients, counsel were acting inconsistently with their professional obligations to the representative plaintiffs and the class, or that they were improperly influenced by the existence of the contingency fee agreement. They are experienced in class proceedings and, from my examination of the material filed and having heard the submissions of class counsel, I am satisfied that the settlement was arrived at in arm's-length negotiations with the numerous defendants and their similarly experienced counsel. In these circumstances, I am satisfied that I should give considerable weight to their professional judgment when assessing the litigation risks and the other factors that have a significant bearing on the merits of the settlement.

3. Litigation risks

[32] Although the decline in the value of the Securities was dramatic - even spectacular - and the claims asserted on behalf of the plaintiffs were by no means frivolous, I am, as I have indicated, satisfied that the proceedings would have been protracted and, from the viewpoint of the plaintiffs and the class, that the litigation risks were considerable. Apart from the issues affecting the appropriate forum, and differences between the substantive laws of Ontario and Michigan, there are also questions relating to the enforcement of foreign judgments and the prospects of recovery against certain defendants. Although important, and to varying degrees, difficult, these issues were, in counsel's judgment, increasingly overshadowed by fundamental factual considerations of causation underlined by a general and continuing decline in the subprime mortgage market in the United States - a matter that would bear on both the defences of the defendants on the facts, and the extent of damages if liability was ultimately established.

4. The settlement fund

[33] In the retainer agreements executed by the plaintiffs in December, 2005, they acknowledged that counsel had advised that the amount of a reasonable settlement could be in a

range of $10,000,000 to $50,000,000. By the time notice of the settlement approval has been given and class members' individual claims have been received and processed, it is estimated that the gross settlement fund will amount to more than $29 million. When the benefits of having this amount - less fees, disbursements and expenses - available within a relatively short period are weighed against the litigation risks, I am not prepared to find that it, and the other provisions of the settlement agreement, fall outside the required zone of reasonableness. This includes the provisions of the Distribution Protocol which are based, in part, on the report of a qualified firm of consultants in economic damage quantification for complex litigation, on the recomendations of experienced counsel with respect to the Class II discount and, otherwise, on assumptions that I consider to be reasonable.

[34] To the limited extent that guidance can be obtained from analyses of amounts recovered in securities cases in the United States, the settlement amount is not out of line.

5. Objections

[35] Mr Byers was the only prospective class member to file, or voice, objections to the settlement. He criticised it as a settlement of convenience that does not properly or fairly represent the best interests of the class members. I have referred above to his description of the motions in Michigan and the pending motions in Ontario as mere legal manoeuvring, and not meaningful progressive steps to advance the claims against the defendants. I am satisfied that this criticism reflects a misapprehension of the importance of those motions if, as he evidently wishes, the litigation were to continue. Among other things, success for the defendants would have created obstacles for any attempt to follow the proceeds of the IPO into the trusts that are defendants in the Michigan action. On this issue - and generally - I differ from Mr Byers in my assessment of the benefits that are likely to be achieved for the class if the proceedings are to continue. I am satisfied that he has not appreciated fully the risks involved in prosecuting these proceedings to an eventual trial, or the length of time that would inevitably elapse - and the expense that would be incurred - before their final resolution.

[36] Mr Byers stated that he finds it incomprehensible that litigation of this magnitude could be settled so quickly. To the extent that this is intended to imply that plaintiff's counsel had not expended the time and effort required to investigate and assess the relative strengths and weaknesses of their case, I am satisfied from my review of the record - including the time sheets they provided - that the suggestion is unwarranted. This is not intended as a criticism of Mr Byers' comments. His objections were helpful in focusing attention on a number of issues as well as the extent to which information about the settlement had been communicated to class members and the adequacy of the notice of the settlement approval hearing. As a consequence, further material was filed, further submissions were made by counsel, and the adjournment of the hearing provided members with a further opportunity to have access to materials filed on the motion. Any of the class members who share Mr Byers' conviction that a claim could be advanced successfully against the underwriters, or other defendants, will have an opportunity to opt out of the proceedings and to pursue their separate claims in court, or otherwise. To that extent, they should not be prejudiced by this court's approval of the settlement.

[37] The matters on which I considered the original material filed to be inadequate included the proposed dismissal of the Michigan action and the question whether this would be in the interests of the class in this proceeding. One of the concerns raised by Mr Byers - and on which further material was filed and submissions made on March 14, 2007 - related to the effect of the dismissal of the Michigan action on the ability of class members to have recourse against the family trusts that are alleged to have received the greater part of the proceeds of the IPO. There was evidence, which I see no reason to reject, that a judgment of this court against the trusts might not be recognised and enforced in Michigan. While I was not entirely persuaded by the other evidence, or by counsel's submissions, on the substantive law of that jurisdiction that supposedly might withhold a restitutionary remedy against the trustees in the Michigan action, I am satisfied that any such remedy would necessarily be predicated on findings of liability there against the defendants to this proceeding. On that basis, and although the litigation risks in the Michigan action were not identical to those of this proceeding, I am satisfied that no material distinction should be drawn between the two actions for the purpose of this motion.

6. Appeals from decisions of the Claims Administrator

[38] My only remaining concern about the proposed settlement is the absence of any provision for arbitration, in the event that claims are denied in full, or in part, by the Claims Administrator. This requires attention. The settlement is otherwise approved.

Certification

[39] There will also be an order certifying the proceeding for the purposes of implementing the settlement. The requirements for certification in section 5 (1) of the CPA are, in my judgment, satisfied. Causes of action for negligent misrepresentation and negligence have been pleaded against the defendants: section 5 (1) (a); there are two classes, or subclasses, of purchasers of the Securities: section 5 (1) (b); subject to my comments below, the claims of the members of the classes raise common issues: section 5 (1) (c); a class proceeding is the preferable procedure for disposing of the claims: section 5 (1) (d); and the representative plaintiffs will fairly and adequately represent the interests of the class and, for the purposes of certification, the settlement agreement may be considered to contain an acceptable litigation plan: section 5 (1) (e).

[40] The sole common issue proposed by class counsel was as follows:

> What claims to the Class 1 Members and the Class II members have against the Defendants arising from the Defendants' alleged acts, omissions, disclosures or non-disclosures relating either to the IPO, or subsequent alleged acts, omissions, disclosures or non-disclosures relating to the [Securities].

[41] Given the purpose for which certification was requested, it is unnecessary to consider the extent to which the common issue would otherwise advance the proceeding but, in my judgment, it is too broadly stated. Insofar as it is to be understood as referring to valid claims, it would include issues that could only be decided individually. Although, but for the settlement, it might

be necessary to define the issues more elaborately, and to separate those arising from the claims of the two classes, or subclasses, I believe the following would be satisfactory for the present purposes:

> Did the Defendants, or any of them, breach duties of care owed to the Class 1 Members, or the Class II Members, by reason of the alleged acts, omissions, disclosures or non-disclosures relating to the IPO, or subsequent alleged acts, omissions, disclosures or non-disclosures relating to the Securities.

[42] In the notice of settlement approval and certification, the opting out deadline referred to in the settlement agreement is to be extended from 30 days to 60 days after the short form approval notice is published. Any other matters concerning the terms and dissemination of notice can be discussed at a case conference.

Fees of class counsel

[43] The representative plaintiffs moved for the court's approval of class counsel's fees in the amount of $6,000,000, plus disbursements in the amount of $289,416.49 and GST in the amount of $123,900.38 for a total of $6,413,316.87. These amounts would be payable out of the gross settlement fund in respect of the past, and future, professional services and disbursements of the six law firms retained on behalf of the plaintiffs in the proceedings in Ontario and Michigan. The firms were Siskinds LLP ("Siskinds") counsel for the plaintiffs in this action; Bernstein, Litowitz, Berger and Grossman, New York counsel retained to assist Siskinds in its initial investigation and analysis of the relevant law and facts; Juroviesky Ricci LLP, counsel for the plaintiffs in the Michigan action; Frank, Haron, Weiner and Navarro, Michigan counsel retained for the purpose of the Michigan action; and Strosberg Sutts LLP and Rochon Genova LLP, counsel retained by Siskinds for the purpose of the Class II discount.

[44] The fee represents 24.66 per cent of the amount of the settlement fund notionally allocated to the Ontario action after 15 per cent of the fund has been attributed to the proposed settlement of the proceedings in Quebec. It is in line with the Siskinds retainer agreements with the representative plaintiffs that provided for a contingency fee of 25 per cent of any recovery by way of settlement, or judgment, in the action. Although the plaintiffs in the Michigan action had agreed to a fee of 33 per cent of the total value of the settlement, their counsel – the Juroviesky firm – have supported the motion for a global fee of $6,000,000. The fee is intended to cover the work performed in respect of the settlement motion and any further services that may be required in connection with the administration of the settlement by the Claims Administrator. I see no reason why the latter should be substantial or be permitted to have any significant impact on the size of the contingent fee.

[45] Putting on one side for the moment the reasonableness of the amounts, I have no problem with the request to approve fees and disbursements in respect of the Michigan, as well as the Ontario, action. The settlement and the settlement fund are applicable to each of the actions and, although strictly, I may have jurisdiction under the CPA to deal only with the fees attributable to

this proceeding, I see no reason why I cannot, with the consent, and at the request, of the parties, deal with all the fees and disbursements in accordance with the practice and principles applied in this court.

[46] Although there were separate proceedings in Ontario and Michigan, there was, in reality, one piece of litigation conducted on two fronts. In the circumstances, I am not prepared to find that this was unreasonable. Neither of the proceedings was frivolous and the advantages of one over the other would not have been apparent at the outset. Practical, as well as different legal, advantages and disadvantages for the parties attached to each and, as I have indicated earlier in these reasons, the pending motion to stay the proceedings here until the termination of the Michigan action might well have had an important, although at this stage necessarily unpredictable, bearing on the outcome of the litigation – if it had continued.

[47] The representative plaintiffs filed substantially identical affidavits in which they referred to the fee provisions in the retainer agreements and expressed their support for applications to the court consistent with their terms. The affidavits were prepared by their counsel and there is no evidence that they obtained independent legal advice. They did not expressly state their belief that the fees requested by counsel are fair and reasonable from the viewpoint of the class but I am satisfied that this is to be inferred and that they were aware that, without court approval, the fee agreements would be unenforceable.

[48] Section 32 (2) of the CPA requires that fee agreements with representative plaintiffs are not enforceable without the consent of the court. The court must still be satisfied that their effect will not be unduly and unfairly detrimental to the interests of the class. Despite the agreement of the plaintiffs, the complexity of the issues involved in the litigation, and the quality of the services performed, I have had serious concerns about the size of the fee requested given, in particular, the relatively short period between the commencement of the proceedings and the negotiation of the settlement. Similar concerns were addressed at the initial hearing by one of the investors, Mr David McDonald.

[49] My concerns were enhanced when counsel attempted to persuade me that the fee of $6 million would represent a multiplier of less than three times the value of the time that will have been expended by the conclusion of the matter. As of January 17, 2007, the time sheets and dockets provided on behalf of the six law firms recorded time of more than 50 lawyers, paralegals and students for a total value of $1,776,430.20. As I have earlier indicated, the Michigan action was commenced on December 5, 2005 and this action on January 25, 2006. While I do not question that the docket entries record time actually spent, they fall far short of satisfying me that it was productive time, or time that might otherwise properly be charged to a client, or allowed for the purpose of determining a base fee pursuant to section 33 of the CPA. Many of the entries are repetitive, and inscrutably uninformative, and suggest, rather than exclude, the possibility of an amount of duplication and unnecessary work. The time sheets of the Juroviesky firm, in particular, are replete with general references to research and analysis, and time spent reviewing materials and memoranda prepared by, or emails received from, other lawyers. Almost $40,000 of time is, for example, attributed to “Research & analysis re: FMF share price decline, service of process”. Counsel’s reliance on the docketed time appears