Court File No.: CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.

BOOK OF AUTHORITIES OF THE CCAA REPRESENTATIVES AND CCAA CANADIAN REPRESENTATIVES

HENEIN HUTCHISON LLP
235 King Street East, First Floor
Toronto, ON M5A 1J9

Marie Henein (LSO #33289T)
mhenein@hhllp.ca

Scott Hutchison (LSO #29912J)
shutchison@hhllp.ca

Tel: (416) 368-5000
Fax: (416) 368-6640

KALLOGHLIAN MYERS LLP
Suite 2201, 250 Yonge St.
Toronto, ON M5B 2L7

A Dimitri Lascaris (LSO #50074A)
dimitri@kalloghlianmyers.com
Tel: (514) 941-5991

Serge Kalloghlian (LSO #55557F)
serge@kalloghlianmyers.com
Tel: (647) 812-5615

STROSBERG SASSO SUTTS LLP
Lawyers
1561 Ouellette Avenue
Windsor, ON N8X 1K5

David R. Wingfield (LSO #28710D)
dwingfield@strosbergco.com

Tel: (519) 561-6285
Fax: (866) 316-5308

WEISZ FELL KOUR LLP
5600-100 King St W,
Toronto, ON, M5X1C9

Steven Weisz (LSO #32102C)
sweisz@wfklaw.ca

Tel: (416) 613-8281
Fax: (416) 613-8290

To: **The Service List**

TABLE OF CONTENTS

Tab 1

CITATION: *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105
COURT FILE NO.: CV-080036065100 CP
DATE: 20111130

SUPERIOR COURT OF JUSTICE – ONTARIO

2011 ONSC 7105 (CanLII)

RE: **The Estate of Chesney Henry "Chet" Baker et al**., Plaintiffs/Moving Parties

AND:

Sony BMG Music (Canada) Inc. et al., Defendants/Respondents

BEFORE: G.R. Strathy J.

COUNSEL: *Paul Bates and Jonathan Foreman*, for the Plaintiffs/Moving Parties

Danielle Royal for the Defendant/Respondent Universal Music Canada Inc.

Timothy Pinos and Casey M. Chisick, for the Defendants/Respondents CMRRA and SODRAC

HEARD: November 22, 2011

ENDORSEMENT (CLASS COUNSEL FEE APPROVAL)

I get along without you very well,
of course I do.
Except when soft rains fall
and drip from leaves, that I recall
the thrill of being sheltered in your arms.
Of course I do,
but I get along without you very well.

Chet Baker, *I Get Along Without You Very Well (Except Sometimes)*

[1] Chet Baker was an American trumpeter and jazz singer. He was born in 1929 and died in Amsterdam in 1988 in tragic circumstances, after a troubled and turbulent life. He left behind an impressive, if occasionally melancholic, legacy of music.

[2] Unfortunately, Mr. Baker and his heirs, like many musicians and their families, did not receive full compensation for the use of his works by others. This was the result of a royalty and licensing system in Canada that permitted third parties, such as the defendants, Sony BMG Music (Canada) Inc. ("Sony"), EMI Music Canada Inc. ("EMI"), Universal Music Canada Inc. ("Universal") and Warner Music Canada Co. ("Warner") (collectively, the "Record Labels"), to reproduce and distribute copyrighted musical works owned or controlled by musicians or their rights holders, without having a licence to do so or without paying the royalties due to the rights holders.

[3] The issue was well known by the defendants Canadian Musical Reproduction Rights Agency Ltd. ("CMRRA") and Society for Reproduction Rights of Authors, Composers and Publisher (SODRAC) Inc. ("SODRAC"), (referred to as the "Collectives"). They had been aware of the problem for years and had apparently been unwilling or unable to resolve it. CMRRA represents the reproduction rights of the vast majority of music publishers whose repertoires are in use in Canada. SODRAC is a copyright collective that administers the reproduction rights in musical works and collects royalties on behalf of its clients. Due to a combination of factors, including the Collectives' lack of resources and the absence of motivation on the part of the Record Labels, nothing significant was done. The problem simply festered and grew worse – until this proceeding was commenced.

2011 ONSC 7105 (CanLII)

[4] This class action was brought in 2008 on behalf of artists and rights holders who had not received full compensation for the use of their works. It was initially commenced by Mr. Baker's widow, Carol Baker. Mrs. Baker saw it through almost to completion before she was required to withdraw as a result of a dispute concerning the administration of her husband's estate. Craig Northey, a Canadian singer/songwriter, agreed to step into the role of representative plaintiff to complete the work commenced by Mrs. Baker, ultimately finalizing a settlement with the defendants and establishing a structure not only to resolve past injustices, but to establish a mechanism to ensure that they did not recur.

[5] On May 30, 2011, I approved the settlement of this class proceeding. It will result in the payment of $46,688,805.91 into a settlement trust for the benefit of the class. In addition, the Record Labels will pay $600,000.00 as a contribution to the costs incurred by the Class.

[6] Class Counsel subsequently moved for approval of a request for payment of fees, taxes and disbursements in the amount of $7,647,583.85. The fee portion is $6,950,000.00, taxes are $610,805.19 and disbursements are $86,778.66. After the deduction of the $600,000.00 paid by the Record Labels, the sum of $7,047,583.85 would be paid out of the settlement fund. The fee portion of the account of Class Counsel represents a payment of approximately 15% of the settlement fund.

[7] On October 27, 2011, when this motion came on for hearing, some of the objecting parties requested an adjournment to consider the filing of additional material. As a condition of the adjournment, I approved an interim payment of $2,200,000.00 plus taxes and disbursements. All objectors acknowledged that Class Counsel was entitled to a fee of at least that amount.

[8] Class Counsel also ask for permission to pay an honorarium of $3,000, to each of Mr. Northey and Mrs. Baker.

Background

[9] This action was brought under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*C.P.A.*") on behalf of owners of copyright in certain musical works in relation to a systemic practice by the Record Labels whereby musical works were exploited without securing the necessary licences and/or without payment of the applicable mechanical royalties. The representative plaintiffs alleged that these parties were liable for infringing copyright in musical works, by reproducing those works in sound recordings released or distributed in physical

formats in Canada without securing licences from the owners of the copyright to reproduce those works and/or by failing to pay the required royalties. The claim made further allegations against the Collectives in their capacity as intermediaries between copyright owners and the Record Labels.

[10] A brief description of the problem will be sufficient for the purposes of this motion.

[11] Prior to 1988, the *Copyright Act*, R.S.C. 1985, c. C-42 contained a compulsory statutory licence for mechanical reproduction of musical works, which set royalties at two cents per playing surface. Because the licence was mandatory, and the royalty was fixed, the practice developed that record companies would release new records without applying for a licence in advance. This was an efficient method of operation, but it meant that the owner of the copyright in the work had to be located and paid. That was often a problem. The Record Labels began to develop what was referred to as the "Pending Lists", to record their use of musical works for which the owners of the copyright had not been paid.

[12] The statutory licence was repealed in 1988. This meant that it was now necessary to negotiate a licence in the case of each musical work. It fell to CMRRA to negotiate the terms of the licences. Unfortunately, in practice, there were serious problems, largely administrative.

[13] The practice of the record companies of "breach copyright now, pay later" continued under the new copyright regime, except that in some cases the "pay later" was not happening. Due to ongoing difficulties in identifying owners of copyright, and other administrative problems, the size and value of the items on the Pending Lists continued to grow. By the time this action was commenced, the list contained more than 250,000 items, with an estimated value in excess of $50,000,000.

[14] CMRRA had attempted, over the years, to address the issue of the Pending Lists. Although some progress was made from time to time, it is my impression that both CMRRA and the Record Labels had more pressing current issues to deal with and there were neither the resources, nor the will, to treat the Pending Lists as a priority.

<u>This Action</u>

[15] This action was commenced on the instructions of Carol Baker in the name of the Estate of Chesney Henry "Chet" Baker Junior and Chet Baker Enterprises LLC, by Statement of Claim issued on August 14, 2008. It was brought against the Record Labels and the Collectives.

[16] On September 3, 2008, a Fresh as Amended Statement of Claim was issued and on October 6, 2008, an Amended Fresh as Amended Statement of Claim was filed. Class Counsel filed a Certification Motion Record on January 26, 2009.

[17] The action was, in a sense, welcomed by the Collectives because it got the urgent attention of the Record Labels and it provided a potential framework for the resolution of the Pending Lists problem. On October 2, 2008, Class Counsel concluded a cooperation and settlement agreement with the Collectives. On March 31, 2009, Class Counsel moved for approval of the settlement agreement with the Collectives.

2011 ONSC 7105 (CanLII)

[18] The decision by Class Counsel to sue the Collectives and to negotiate a settlement agreement with them provided to be a shrewd tactical move. It isolated the Record Labels and it took advantage of the expertise and resources of the Collectives in prosecuting the action against the Record Labels. There is no question that the assistance of the Collectives, and their Lawyers, has contributed to the successful resolution of this matter and the establishment of a workable system going forward.

[19] The plaintiffs served a motion record for certification in January, 2009.

[20] I was appointed to case manage this proceeding in the fall of 2009. I have presided over about ten in-person case conferences and an equal number of teleconferences with counsel. There have also been several court appearances. I will describe my observations concerning these attendances, and of the dynamics of the litigation, in due course.

[21] Settlement discussions between the parties began in earnest in March of 2010. The parties attended before Justice Colin L. Campbell, acting as a mediator, over several dates. These discussions continued on a vigorous and adversarial basis until settlement agreements were reached with each of the Record Labels.

[22] Settlement terms were reached first with Sony, followed by Warner and then EMI in close succession in June 2010. Settlement documentation was executed with those labels throughout July and August of 2010. Minor amendments were made to the Sony settlement agreement and a final version was signed in December of 2010.

[23] Negotiations with Universal did not initially bear fruit. A revised schedule for the certification motion against Universal was established through a series of case management conferences. Class Counsel, the Collectives, and Universal conducted cross-examinations of all witnesses who had sworn affidavits in connection with the certification motion, including Mrs. Baker, who was examined in the U.K. This examination involved no small expense and confirms my impression that Universal was prepared to take a serious run at contesting certification.

[24] Settlement discussions continued with Universal concurrently with the certification schedule. Further mediation sessions were held with Justice Campbell. In or about December, 2010, settlement terms were finally reached with Universal and settlement documentation was executed shortly thereafter.

[25] In January of 2011, the Collectives advised that they had identified certain “held royalties” which had been paid to the Collectives by the Record Labels but could not be distributed. They stated that they wished to contribute these to the settlement fund. A second amended settlement agreement was therefore executed with the Collectives on January 31, 2011.

[26] On or about February 9, 2011, EMI advised that it would be submitting video royalty amounts into the settlement fund as contemplated by its settlement agreement. As a result, the parties agreed to a revised class definition reflecting EMI’s participation in the video aspect of the settlement.

2011 ONSC 7105 (CanLII)

[27] In February of 2011, the Record Labels advised Class Counsel and the Collectives of their position that a portion of the "held royalties" which had been paid to the Collectives by the Record Labels, and were proposed to be paid into the settlement trust, should be credited to the payments to be made by the Record Labels into the settlement trust. This reflects the ongoing adversarial nature of the proceedings.

[28] All parties engaged in negotiations aimed at ascertaining the nature and veracity of the Record Labels' claims to a credit in respect of those held royalties. Those negotiations culminated in an agreement whereby the Record Labels have been provided with a credit of $1.25 million against payments to be made by them into the settlement trust.

[29] Prior to the execution of the agreement to provide a credit to the Record Labels in respect of "held royalties", correspondence was sent to the Court from Paul Baker, Chet Baker's son, challenging the authority of Carol Baker to act on behalf of the estate of Chet Baker in commencing this action and in pursuing the settlement.

[30] Carol Baker and Class Counsel disagreed with the objections made by Paul Baker. Notwithstanding that view, the Record Labels continued to have concerns about the ability of Carol Baker and Chet Baker Enterprises LLC to act as Representative Plaintiffs. It was ultimately agreed by all parties, and approved by me, that it would be most expeditious, efficient and desirable for Mrs. Baker and Chet Baker Enterprises LLC to withdraw as the proposed representative plaintiffs in favour of an appropriate substitute.

[31] Class Counsel were then retained by Craig Northey, an accomplished Canadian songwriter and musician, who has a claim for unpaid mechanical royalties on one of Record Label's pending lists. Mr. Northey was prepared to step into the role of representative plaintiff and to prosecute the action to a conclusion.

[32] The settlement agreements reached between Carol Baker and the defendants were terminated and Mr. Northey executed new settlement agreements with each of the defendants on substantially the same terms as the agreements signed by Mrs. Baker. In addition, Mr. Northey executed a copy of the agreement providing the Record Labels with a credit with respect to the "held royalties".

[33] As a result of the time and effort required to address the issue of the substitution of a new class representative, the Record Labels demanded a reduction to the costs payments provided for in each Label's settlement agreement in the aggregate amount of $150,000, to be divided as agreed amongst the Record Labels as a condition of entering into the new agreements with Mr. Northey. Once again, the Record Labels pressed for every concession they could get. The plaintiff agreed to this demand, recognizing, among other things, the desirability of concluding the settlement in a timely way.

[34] It is likely that additional work will be required of Class Counsel in the administration of the settlement. Class Counsel request compensation for such work on an hourly rate basis out of the settlement fund.

2011 ONSC 7105 (CanLII)

The Settlement

[35] Under the terms of the settlement, as ultimately implemented, a total of $46,688,805.91 is to be paid into a settlement trust for the benefit of Class members. After payment of Class Counsel's fees and other expenses, these funds will be administered and distributed by an entity ("CSI") jointly created by the Collectives. The Record Labels will contribute a total of $42,761,023.94 of this amount and CMRRA and SODRAC will pay $3,927,781.97 in "held royalties". The objective of the settlement administration will be to identify, and pay, the accrued royalties to as many rights holders as possible. It will be necessary to prioritize the efforts of the administration in both temporal and financial terms. Priority will be given to high value amounts (items on the Pending Lists with a value of $2,500 or more) and medium value amounts ($1,000-$2,500) which will be identified on a claims website which can be accessed by potential class members. Efforts will be made to locate rights holders in respect of low value items (less than $1,000).

[36] As well, as part of the settlement, a system of licensing and royalty administration has been established, on a going-forward basis, to ensure that the problem does not recur. This is a very important feature of the settlement and a significant accomplishment.

[37] After the administration period has been completed with respect to high value and medium value amounts, any residue will be distributed *cy-pres* to the universe of rights holders with market share in Canada, according to analysis that will be carried out by CSI. A similar distribution will be made with respect to the low value items.

[38] It is the stated goal of Class Counsel, and CSI to compensate rights holders to the greatest extent possible. As noted, Class counsel propose to remain involved, on a fee-for-service basis, in the administration of the settlement, as required.

Settlement Approval

[39] On May 30, 2011, I approved the settlement, finding that it was fair, reasonable and in the best interests of the class. My reasons indicated that I was satisfied that this action meets the requirements of section 5 of the *C.P.A*,: there is an identifiable class, represented by a suitable and qualified plaintiff, with tenable causes of action under the *Copyright Act* and for unjust enrichment, which give rise to issues that can be resolved on a common basis. I found that certification, and the settlement it implements, would achieve the goals of the *C.P.A.* by giving access to justice to many individuals with relatively modest claims that could not, as a practical matter, have been economically pursued on an individual basis. I found that the action and the settlement achieved judicial economy by consolidating the claims of several thousand class members into one proceeding and achieved behaviour modification by resolving a long-standing problem in the music industry and by putting a process in place to address the problem going forward.

The Position of Class Counsel

[40] As stated above, Class Counsel seeks approval of a fee of $6,950,000 plus taxes and disbursements.

2011 ONSC 7105 (CanLII)

[41] Both representative plaintiffs executed contingent fee agreements that stipulated a maximum counsel fee of 30% of the amount recovered. The fee request made by Class Counsel is approximately 15% of the gross settlement value and therefore represents a significant discount of the fee to which Class Counsel is contractually entitled. The fee request is supported by both Mrs. Baker and Mr. Northey.

2011 ONSC 7105 (CanLII)

[42] In summary, the submissions of Class Counsel are as follows:

(a) this was complex intellectual property litigation, involving multiple defendants and a seemingly intractable problem that has finally been resolved in a way that not only provides direct benefits to the Class, but also addresses the issue on an ongoing basis;

(b) the settlement was an extremely good one, resulting in a high rate of recovery of the unpaid amounts;

(c) Class Counsel carried all the disbursements in the litigation and agreed to indemnify the representative plaintiff against an adverse costs award – this avoided the need to seek assistance from the Class Proceedings Fund, which would have charged a 10% levy on any settlement or recovery;

(d) it has taken over four years to bring this matter to completion, during which time Class Counsel received no fees; and

(e) Class Counsel were at risk for a variety of reasons, including the risk that the action would not be certified or, if certified, would not ultimately be successful.

[43] I will address other points made by Class Counsel in the course of my reasons.

Objections

[44] There were no substantive objections to the settlement itself and there have been only two opt-outs. The fee request is opposed by the Collectives, by Universal and by Warner/Chappell Music Canada Ltd. ("WCMC"). I will review their objections.

<u>The Objection of WCMC</u>

[45] WCMC takes the position that the fee is excessive in light of the services rendered by Class Counsel, when balanced against the complexity of the matter, the importance of the matter to the Class, the expectations of the Class and the effect that the fee will have on the recovery achieved by the Class. That being said, WCMC acknowledges the contribution made by Class Counsel to the successful resolution of this matter and asks that a fair fee be awarded, having regard to the time and expenses invested by Class Counsel. It submits that the fee should be based on the time actually spent and the hourly rates of Class Counsel.

[46] WCMC submits that the litigation was not complex, liability was not seriously disputed and the action was settled at a relatively early stage. It says that Class members should be entitled to receive the royalties that are due to them, and should not be required to accept a

discount in order to allow Class Counsel to benefit from a fee that far exceeds the time spent on the matter.

[47] WCMC makes the point that songwriters rely on royalties to earn their livelihood and that without songwriters and their songs, the world would be decidedly bleak. Its letter of objection points out:

> Songwriters rely on royalties as their means of making a living. Take away a songwriter's income and a songwriter will be forced to pursue a different livelihood. The result will be detrimental to us all. Songs are used in television, movies, commercials and for personal enjoyment. Songs are used to tell stories, to create moods, to quiet the mind, generate enthusiasm, to energize the body, to uplift spirits. Music is used to celebrate and to mourn. Music can be educational and can be therapeutic. The world benefits from the fruits of the songwriter's labor.

[48] This is a fair point, elegantly made. No sensible person would suggest, however, that a songwriter should be compensated based on the time spent writing the song, which is the way in which WCMC submits Class Counsel should be compensated, in spite of the terms on which they took on the brief.

[49] WCMC's letter continues:

> The songwriters and publishers were punished by the failure of the record Companies to pay royalties in the first instance. They are being punished a second time by being made to accept less than the full royalties they are entitled; and, will be punished a third time if Class Counsel is awarded the contingent fee requested, which will further reduce the royalties payable to the Class Members.

[50] WCMC concludes by asking that the Court fix Class Counsel's fee in an amount that corresponds with the time actually spent, so that the royalties payable to class members will more closely correspond to the amounts actually owing to them.

The Objection of Universal

[51] Universal is both a defendant and, through its publishing arm, is a member of the Class. It acknowledges that Class Counsel are entitled to fair compensation, but it says that the fee requested is excessive having regard to the nature of the dispute, the settlement and the expectations of the class. It also says that there was unnecessary duplication of work and over-lawyering by Class Counsel.

[52] Universal's position is similar to the position of WCMC. It says that the issues in the action were straightforward, the problem was notorious and long-standing and the matter settled prior to certification and before significant time was expended in preparation for discovery and trial.

2011 ONSC 7105 (CanLII)

[53] Universal also notes that the net amount that class members will receive will already be diluted by the 10% commission that will be paid to CSI for the administration of the settlement.

[54] Finally, Universal says that a review of Class Counsel's docket summary suggests that the involvement of three counsel firms in the action resulted in duplication of effort and "over-lawyering." It refers to *Andersen v. St Jude Medical Inc.*, [2004] O.J. No. 3102 (S.C.J.) at para. 11, in which Cullity J. expressed concern about the risk of duplication of work and overhead when there are multiple counsel involved in the brief. As has been noted by Universal, that was a contested costs award and not a fee request. That distinction reflects the philosophy of costs awards that what may be reasonable billing as between a lawyer and his or her own client may not be within the reasonable expectations of the opposing party when it comes to a costs award. Universal submits, however, that the same principles should apply to shield class members from being required to pay excessive fee requests by Class Counsel.

2011 ONSC 7105 (CanLII)

The Objection of the Collectives

[55] The Collectives say that the fees claimed are not fair and reasonable. They say that a "multiplier" approach should be used, using a multiplier of 1.3, resulting in a Class Counsel fee of around $2,725,000.

[56] The objections of the Collectives are, essentially, that this was relatively risk-free litigation that was handed to Class Counsel on a platter, that liability was not seriously in issue, that most of the heavy lifting was done by the Collectives and that the resulting settlement, while decent, was not exceptional. They make the following submissions, in summary:

(a) after being named as defendants in this action, the Collectives and their lawyers made significant efforts to resolve the issues, thereby taking a considerable burden off the shoulders of Class Counsel – their lawyers spent a total of 2,200 billable hours on the matter, reflecting the time and effort involved;

(b) the Collectives, and their lawyers, have been significantly involved in moving the action forward, in fact, at times they were pressing Class Counsel to move the matter forward;

(c) the future licensing proposal was developed by the Collectives, which have also helped to develop the proposal and documentation for the resolution of the litigation;

(d) the Collectives were actively involved in pushing for settlement, participating in the mediation, negotiating with the Record Labels and developing the settlement documentation and protocols;

(e) the Collectives identified the existence of the held royalties, which were added to the settlement trust and this recovery was not the result of the efforts of Class Counsel;

(f) there was time and money wasted due to the issues surrounding the authority of Carol Baker to represent the Baker estate, ultimately resulting in a reduction of $150,000 of the amount paid by the Record Labels by way of costs – this issue could have been foreseen and avoided;

(g) the net benefit of the settlement is approximately $38.5 million, after deduction of the 10% commission that will be payable to the Collectives for the administration of the settlement and

(h) the held royalties were not contributed to the settlement by the Collectives as a result of any efforts made by Class Counsel and they should be excluded from the settlement fund for the purposes of calculating the fee.

2011 ONSC 7105 (CanLII)

Discussion

Approval of Class Counsel's Retainer

[57] The first issue is the consideration of the agreement made between Class Counsel and the representative plaintiffs with respect to fees and disbursements.

[58] Section 33 of the *C.P.A.* recognizes that Class Counsel may enter into a contingent fee arrangement with the representative plaintiff. Section 32(2) provides that an agreement respecting fees and disbursements between Counsel and the Class representative is not enforceable unless approved by the Court. The agreement must be in writing, must state the terms under which the fees and disbursements are to be paid and must give an estimated fee. It must also state the method by which payment is to be made, whether by lump sum, salary or otherwise. Where the Court does not approve the agreement, it may nevertheless determine the amount of fees and disbursements owing to counsel.

[59] As I have noted, the fee agreement between Class Counsel and the representative plaintiffs called for a contingent fee of 30%. Class Counsel voluntarily agreed to reduce their fee to approximately 15%.

[60] I find that the fee agreements meet the requirements of the *C.P.A.* I turn now to the question of whether Class Counsel's fee request should be approved.

Fee Approval

[61] My responsibility in this motion is to determine a fee that is "fair and reasonable" in all of the circumstances: *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.) at paras. 13 and 56.

[62] The factors to be considered in the application of this test are well-known and I will turn to them in a moment. I will begin with a few preliminary textual comments.

[63] First, a contingent fee retainer in the range of 20% to 30% is very common in class proceedings, as it has been in other kinds of litigation in this province for some years. As Class

Counsel has pointed out, there have been a number of instances in recent years in which this Court has approved fees that fall within that range. These include:

• *Abdulrahim v. Air France*, [2011] O.J. No. 326:	30%
• *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302:	19.4%
• *Robertson v. ProQuest LLC*, [2011] O.J. No. 2013	24%
• *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093:	25%
• *Pichette v. Toronto Hydro*, [2010] O.J. No. 3185:	28.5%
• *Robertson v. Thompson Canada Ltd.*, [2009] O.J. No. 2650:	36%
• *Cassano v. Toronto- Dominion Bank* (2009), 98 O.R. (3d) 542:	20%
• *Martin v. Barrett*, [2009] O.J. No. 2015:	29%

[64] There should be nothing shocking about a fee in this range. Personal injury litigation has been conducted in this province for years based on counsel receiving a contingent fee as high as 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the "no cure, no pay" principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings. The contingent fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well paid for a good result.

[65] My second observation reflects the reality of class action litigation. Defendants tend to be well-resourced and represented by larger law firms. This is a case in point. There were four defendants. EMI and Universal were represented by national and international law firms, each with over 500 lawyers. Sony and Warner were represented by a smaller litigation firm (about 50 lawyers) which focuses exclusively on complex litigation. The Collectives were represented by a 200 lawyer firm. These were some of the best law firms in the country, charging substantial hourly rates, with virtually unlimited resources and no incentive to roll over and play dead.

[66] Due to the nature of the work, Class Counsel are frequently associated with smaller firms and are invariably engaged on a contingent basis. Without wanting to paint all with the same brush, defendants frequently employ a strategy of wearing down the opposition by motioning everything, appealing everything and settling nothing. If class proceedings are to realize the goal of access to justice, Class Counsel must be liberally compensated to ensure that they take on challenging but difficult briefs such as this one.

[67] There must be an economic incentive to encourage lawyers to take on litigation of this kind and this is a factor to be considered in assessing the reasonableness of a fee: *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49

2011 ONSC 7105 (CanLII)

O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at paras. 59-61. If first-class lawyers cannot be assured that the Courts will support their reasonable fee requests, how can the Courts and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution?

[68] My third comment, which is not original, is that this is one area where the Court should free itself from the chains of the hourly rate. The result achieved for the class should generally be the most important test of the value of counsel's services.

[69] Finally, flowing from this, it seems to me that one should consider the proposed fee from the perspective of the class member, both prospectively and retrospectively. Had it been possible for Class Counsel and the class members to discuss the issue from the outset, would the class have considered the fee arrangement reasonable? If so, in light of the ultimate resolution, does the fee remain reasonable? In the context of this case, if Class Counsel had proposed a fee of 15 cents per dollar of gross recovery, would that have appeared fair and reasonable at the outset? With the benefit of hindsight, does it appear fair and reasonable?

[70] I now turn to the factors that have traditionally been considered in determining the fees of Class Counsel. In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Sup. Ct.) at para. 67, Cumming J. summarized those factors:

(a) the factual and legal complexities of the matters dealt with;

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

(c) the degree of responsibility assumed by Class Counsel;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the class;

(f) the degree of skill and competence demonstrated by Class Counsel;

(g) the results achieved;

(h) the ability of the class to pay;

(i) the expectations of the class as to the amount of fees; and

(j) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation and settlement.

See also: *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Wamboldt v. Northstar Aerospace (Canada)* [2009] O.J. No. 2583 (S.C.J.) at para. 33; *Smith Estate v. National Money Mart Co.*, [2011] O.J. No. 1321, 2011 ONCA 233 (C.A.).

2011 ONSC 7105 (CanLII)

[71] The weight to be given to a particular factor will vary from case to case. In *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302, 2010 ONSC 4294, I observed that one of the most important factors on a fee approval motion must be the result achieved in relation to the amount at issue and the complexity of the case. Some assessment must be made of what the plaintiff was able to obtain, in relation to what the case was really "worth". Other important facts are the time spent and the risks incurred by the lawyers, the agreement between Class Counsel and the representative plaintiff and the level of fees awarded in other proceedings of a similar nature. I stated, at para. 44:

> After examining all these factors, it is important to ask whether the work of Class Counsel has fulfilled the goals of the *C.P.A.* by giving access to justice to claimants who might not otherwise obtain it and by promoting behaviour modification of wrongdoers. It is also important to recognize that the achievement of these goals demands that there is an available pool of experienced and skilled lawyers of high repute, who are prepared to take on the onerous and risky responsibility of Class Counsel. Where counsel achieve successful results, they render a service not just to the class but to the legal system itself, by providing access to justice and by achieving judicial economy. Their fees should not be assessed simply on the basis of *quantum meruit* - they should be enhanced in appropriate cases to recognize and reward successful performance and to serve as an incentive to counsel to take on class action litigation

[72] The *results achieved* in this case were, in my view, excellent. The Collectives and Universal agree that the result was a good one, although they point out that there has been no recovery of interest or statutory damages.

[73] The gross recovery under the settlement is almost the full amount owing to class members. The net recovery, after the deduction of fees, will be in the range of 80% to 85% of the amount owing. It is true that substantial statutory damages were potentially recoverable under the *Copyright Act*, but the availability of such damages is not absolute and the entitlement to such damages was speculative in the circumstances. It is also true that the settlement does not include recovery of interest over the long period that payment was withheld, but a party will frequently agree to forebear a claim for interest in return for a settlement. The results achieved must also be considered in the context that there were serious defences available to the defendants, including, in particular, limitations defences.

[74] While the defendants say that the percentage fee should not be applied to the commission of some $4 million payable to CSI for the administration of the settlement, that money is necessarily spent in order to put the settlement into the hands of the class in an equitable and expedited manner. It was obtained through the efforts of counsel. While the "held royalties" are somewhat in the nature of a windfall, we should not lose track of the fact that Class Counsel have actually agreed to reduce their fee to a percentage that is half as much as the amount to which they were entitled under their retainer agreements.

2011 ONSC 7105 (CanLII)

[75] The matter was *important to the class.* As the submission of WCMC points out, intellectual property rights and the entitlement to royalties for their use are vitally important to songwriters and musicians. The breach of those rights was real and long-standing. The recovery of wrongfully withheld past royalties, and the creation of a structure to ensure that the problem will not recur, must be regarded as an extremely important achievement for the benefit of the Class.

[76] The *monetary value of the matter* was significant, some $50 million. This will be real cash in the hands of the Class – not coupons, discounts or forgiveness of debt having only notional value.

[77] The *degree of responsibility assumed by counsel* was also significant, in light of the size of the Class and the amount at issue. It is fair to note that Class Counsel was assisted by the Collectives, but Class Counsel was ultimately responsible for, and accountable for, the prosecution of the litigation.

[78] The *factual and legal complexities* of the matter were not at the highest end of the scale, but they were significant. The issues in the action were essentially unique and unprecedented and required thorough investigation. There were multiple parties. The settlement itself was extremely complicated, involved multiple parties and multiple documents and a complex structure for resolution.

[79] In my view, the *skill and competence demonstrated by Class Counsel* was exceptional. They developed and executed an aggressive strategy designed to bring this action forward for certification and their determination to do so, and their credibility as counsel, brought the defendants, one by one, to the bargaining table and ultimately to settlement. The objectors do not take issue with the skill and competence of Counsel, other than to point out that the difficulties that arose with respect to Mrs. Baker resulted in increased costs and delayed the resolution. In my view, the unfortunate and possibly unmeritorious concerns raised by Paul Baker, at the eleventh hour, cannot be laid at the doorstep of Class Counsel. It was one of those things that can go wrong in litigation. Class Counsel responded to the challenge in a timely and practical manner.

[80] The *risk undertaken by Class Counsel*, and the *opportunity cost* was sizeable. The action took four years to bring to conclusion. In comparison to some substantial class actions, this is commendable expedition. At the same time, during those years Class Counsel received not a penny for their efforts. They incurred and paid disbursements on behalf of the class. They spent some 6,000 hours on the file without compensation. Their docketed time has a face value of about $2.2 million. They bore the risk of an adverse costs award if the action was not successful. They, not the Class, were at risk.

[81] The *expectation of the class as to the amount of the fee* and *the ability of the class to pay* would not detract from the fee proposed by Class Counsel. There has been minimal opposition to the fee request in spite of quite extensive notice of this hearing. The class members are clearly able to pay the fee and it will not significantly dilute their recovery.

2011 ONSC 7105 (CanLII)

[82] Turning to the dynamics of the litigation, having case managed this action for over two years, and having conducted a number of case conferences as this proceeding worked its way to resolution, it is my view that this was a difficult, hard-fought piece of litigation in which the outcome was by no means assured. While the plaintiffs were successful in securing the early cooperation of the Collectives, this itself was no small accomplishment. Nor were the initial settlements with Sony, Warner and EMI. Universal remained a tenacious hold-out and there were very serious questions as to whether a resolution would be achieved.

[83] From my observations, the positions taken by Universal from time to time were highly adversarial and its position was aggressively and effectively advanced. I reject any suggestion that the settlement was a cake walk for Class Counsel. It was hard work and the risk of failure of the resolution strategy was always present. So was the risk that the action would not be certified for any one of the reasons advanced by Universal.

[84] Class Counsel were insistent that if the matter was not resolved, they would proceed to a certification hearing and counsel for Universal was equally insistent that certification would be vigorously opposed and that there were flaws in the plaintiff's case that made it unsuitable for certification. This was not posturing. The very satisfactory result in the proceeding was due to the preparedness of Class Counsel to go to the wall if a satisfactory settlement could not be achieved. I am convinced that this resolve was demonstrated to the defendants throughout and it resulted in a better and more effective settlement for the class.

[85] Having supervised the proceeding and having reviewed counsel's time records, it is my view that the assertion that this case was over-lawyered is unfair and erroneous. Class Counsel were a consortium consisting of Bates Barristers, Harrison Pensa and the Canadian Internet Policy and Public Interest Clinic, a legal clinic representing consumers and public interests in intellectual property and other matters. Most of the work was done by Mr. Bates, the more senior of the lawyers (1983 call), and by Mr. Foreman (2002 call). Mr. Foreman spent at least 1,670 hours on the file. Mr. Bates spent about 800 hours. The total time spent on the matter, by all personnel in the Class Counsel consortium, was around 6,000 hours, having a face value of $2.2 million. Although there were various juniors, paralegals and others involved in the file, I have no sense at all that this is a case in which everyone from the most senior partner to the most junior clerk was thrown at the file in order to pump up the fee. Nor do I have the sense, at all, that any of the lawyers involved was engaging in unnecessary or redundant work. On the contrary, my observation is that Class Counsel conducted themselves efficiently throughout.

[86] I think one should resist the temptation to engage in armchair quarterbacking when assessing the value of Class Counsel's time. The objecting defendants and WCMC make the argument that this was an easy piece of litigation. I disagree. The problem festered for many years before Class Counsel got involved. None of the defendants was able to resolve it. It took over four years to resolve once this action was commenced. Even after it had been resolved with some of the defendants, there were constant frictions and new problems cropped up, such as the "held royalties" and the substitution of a new class representative.

[87] WCMC suggests that Class members are being "punished" by having to pay over a percentage of the royalties to which they are entitled in order to pay the lawyers. This submission overlooks the fact that Class members would likely still be waiting for their royalties had Class

2011 ONSC 7105 (CanLII)

Counsel not agreed to invest their own blood, sweat and tears in the issue and to take on the Record Labels in what has proven to be an arduous battle.

[88] In this case, the proposed fee is about 15% of the net settlement. Had Class Counsel proposed a fee of this size to the Class, as a condition of taking on a battle that had sat unresolved for years, there is no question in my mind that the vote would have been overwhelmingly positive. Looking back on the time and effort displayed by Class Counsel and considering the result and the other factors I have referred to, it seems to me that it was a fair bargain and the result is, in general, fair.

[89] I would say that the "held royalties" do not stand on quite the same footing and there should be a modest reflection of the fee to reflect this. In all the circumstances, a fee of $6,250,000 would be fair and reasonable, plus taxes. In addition, Class Counsel shall be entitled to render invoices to CSI on an hourly rate basis, for any services rendered in the implementation of the settlement. All such invoices shall be approved by me or by the judge case-managing this proceeding in the future.

Compensation for Representative Plaintiffs

[90] Class Counsel have requested payment of an "honorarium" of $3,000 to each of Mrs. Baker and Mr. Northey, out of the fees received by Class Counsel.

[91] The retainer agreements signed by Mrs. Baker and Mr. Northey allowed for the possibility of a *quantum meruit* compensation of the class representative, if approved by the Court:

> If the action is successful, the consortium shall make a request to the Court for an award of compensation for the plaintiff on a *quantum meruit* basis for the time spent acting as a representative for the class. It is acknowledged that such compensation is entirely within the discretion of the court.

[92] Mrs. Baker and Mr. Northey have sworn affidavits stating that, while they have no expectation of receiving such compensation or honorarium, they would be grateful for any payment the Court may see fit to make. Their affidavits indicate that they were extensively involved in settlement discussions, correspondence, telephone conversations and meetings, and review of settlement documentation. Mrs. Baker, who lives in England, was required to travel from her home in Cornwall to London for cross-examination on her affidavits.

[93] The payment of compensation to a representative plaintiff is exceptional and rarely done: *McCarthy v. Canadian Red Cross Society* [2007] O.J. No. 2314 (S.C.J.) at para. 20; *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.); *Bellaire v. Daya* [2007] O.J. No. 4819 (S.C.J.) at para. 71. It should not be done as a matter of course. Any proposed payment should be closely examined because it will result in the representative plaintiff receiving an amount that is in excess of what will be received by any other member of the class he or she has been appointed to represent: *McCutcheon v. Cash Store Inc.*[2008] O.J. No. 5241 (S.C.J.) at para. 12. That said,

2011 ONSC 7105 (CanLII)

where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, it may be appropriate to award some compensation: *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.) at para. 28.

[94] The Court of Appeal has recently indicated in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37 at paras. 134-135 that any compensation paid to the representative plaintiff should normally be paid out of the settlement fund and not out of Class Counsel's fee, to avoid concerns with respect to fee-splitting.

[95] It is interesting to note that on certification motions, the Court is often concerned to ensure that the representative plaintiff is truly engaged in the litigation and is not a mere "bench-warmer" or a "straw man" recruited by Class Counsel. Courts have frequently commented on the need to have an active and involved plaintiff who will be familiar with the proceedings, instruct counsel, monitor settlement discussions and generally act as any private client would in supervising his or her own litigation. A private client will normally receive indirect compensation for such efforts out of the proceeds of settlement or judgment. A representative plaintiff normally will not. That being said, these are contributions the Court expects a representative plaintiff to make and I respectfully agree with the observation of Hoy J. in *Bellaire v. Daya*, above, at para. 71 that compensation should not be awarded simply because the representative plaintiff has done what is expected of him or her. It should be reserved for cases, like *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.) where the contribution of the representative plaintiff has gone well above and beyond the call of duty.

[96] I have decided that this is not one of those rare and exceptional cases that calls for payment of compensation to the class representative. I do not wish to minimize, in any way, the efforts of Mrs. Baker and Mr. Northey. They have acted as exemplary representatives. They can be proud of their contributions to the prosecution and resolution of this matter and they have earned the gratitude of the Class. The Court could ask no more of them. I hope they will appreciate that my decision not to award compensation is no reflection on their most commendable efforts on behalf of the Class.

Summary and Order

[97] An order will therefore issue:

(a) approving the retainer agreements entered into between the representative plaintiffs and Class Counsel;

(b) approving the fees of Class Counsel in the amount of $6,250,000 plus taxes and directing that such amount be paid out of the Settlement Trust; and

2011 ONSC 7105 (CanLII)

(c) providing that future services rendered by Class Counsel shall be invoiced on a time and hourly rate basis, subject to Court approval.

G.R. Strathy J.

Date: November 30, 2011

2011 ONSC 7105 (CanLII)

Tab 2

CITATION: Baroch v. Canada Cartage, 2021 ONSC 7376
COURT FILE NO.: CV-13-492525-CP
DATE: 20211110

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARC-OLIVER BAROCH
Plaintiff

and

CANADA CARTAGE DIVERSIFIED GP INC., DIRECT GENERAL PARTNER CORPORATION and CANADA CARTAGE SYSTEM, LIMITED
Defendants

Proceedings under the *Class Proceedings Act 1992*, S.O. 1992, c. 6

BEFORE: Justice Edward Belobaba

COUNSEL: *Rahool P. Agarwal and Michael A. Currie* for the Plaintiff
Linda Plumpton and Sarah Whitmore for the Defendants

HEARD: November 1, 2021 via Zoom video

Class Action Settlement and Legal Fees Approval

[1] After eight years of litigation, this class action alleging unpaid overtime by the defendant trucking company has settled for $22.25 million. Class counsel ask that the Court approve the settlement, the payment of a $10,000 honorarium to the representative plaintiff and the requested legal fees based on the 30 per cent contingency agreement.

[2] At the conclusion of the hearing on November 1, 2021, I advised counsel that each of these items would be approved and I signed the draft Orders. I further advised counsel that my written reasons would follow shortly.

[3] These are the reasons.

2021 ONSC 7376 (CanLII)

2021 ONSC 7376 (CanLII)

Background

[4] The background facts are set out in the certification decision[1] and can be summarized as follows.

[5] The plaintiff, Marc-Oliver Baroch, worked as a shunter[2] with the defendant Canada Cartage from March 2006 to June 2013. Canada Cartage is a national provider of trucking, warehousing, distribution, and logistics services with about 3000 employees.[3] It is a federally-regulated employer that is subject to the *Canada Labour Code*[4] and its regulations, including the *Motor Vehicle Operators Hours of Work Regulations* ("the federal legislation").[5]

[6] The federal legislation provides three overtime eligibility thresholds that may apply on the facts herein: 8 hours a day or 40 hours a week for non-driver employees, 9 hours a day or 45 hours a week for city drivers and 60 hours a week for highway drivers.

[7] The plaintiff alleged that Canada Cartage, as a matter of policy or practice, only paid overtime if the 60-hour threshold was exceeded; that it had no written overtime policy, no directives for its human resources staff and no centralized record-keeping system; that overtime eligibility determinations were made on a case-by-case basis in disregard of applicable law; and that when Canada Cartage was directed by federal labour authorities to comply with the prescribed overtime thresholds, it unilaterally reduced the hourly wage in the affected areas so it would appear that the required overtime was being paid when it was not.

[8] The defendant joined issue on each of these points and was confidently proceeding to the scheduled summary judgment motions when the action was settled.

[9] In a detailed submission that candidly examined the strengths and weaknesses of its case, class counsel persuaded me of the following. The class faced serious challenges with respect to the core allegation of systemic liability. To succeed, it had to prove that Canada Cartage had a company-wide policy or practice of failing to pay overtime as required by law. As it turned out, the defendant did not have a company-wide policy governing overtime. This left the class having

---

[1] *Baroch v. Canada Cartage*, 2015 ONSC 40.

[2] Mr. Baroch drove a shunt truck, a type of semi-tractor that moved and positioned semi-trailers within the confines of a customer's yard.

[3] The three named defendants are part of the Canada Cartage group of companies. For the purposes of this litigation and in particular this motion, nothing turns on any corporate distinctions.

[4] R.S.C. 1985, c. L-2.

[5] C.R.C., c. 990.

to show that the defendant had a company-wide *practice* giving rise to unpaid overtime. Given that the defendant is a national business with separate divisions, multiple departments, and thousands of employees, proving a corporate-level practice would have been difficult. Moreover, the plaintiff's fact evidence largely focused on the eastern division.

[10] The defendant trucking company, however, operated as two separate businesses, east and west — with different payroll records and practices, dozens of different job positions with different responsibilities, multiple terminals, divisions within terminals, and job groups within divisions, each with different managers and different practices with respect to overtime. I therefore agree with class counsel that proving systemic liability across the entire business, most notably with respect to the western division, would have been difficult at best.

[11] Further, there was no evidence of time worked but not paid, that is, "off the clock" overtime. The plaintiff's case was mainly limited to class members who were paid using the wrong overtime threshold because they were treated as highway drivers instead of city drivers (60/week versus 9/45) or city drivers instead of non-drivers (9/45 versus 8/40). This created a significant risk: if the defendant was successful in persuading the court that the plaintiff's case turned on a "misclassification" of employees, the court could well conclude that the case was not suitable for class-wide determination and should be decertified.

[12] The plaintiff also faced numerous obstacles regarding the scope and content of the damages claim and disputed interpretations of the *Canada Labour Code* and the *MVOHOW Regulations*. There were genuine disputes about the interpretation about the federal legislation particularly relating to the meaning and application of "prevailing industry practice" in the definition of a "city motor vehicle operator"; whether a shunter's applicable overtime threshold is 9/45 or 8/40; and the proper approach to overtime for salaried employees who are scheduled for a regular work week above the standard hours of 40 hours.

[13] The plaintiff also had to overcome numerous limitation hurdles. Indeed, the imposition of a two-year limitation period (which was certainly plausible) could have reduced the class-wide damages to $16 million.

[14] I commended class counsel on their candid and detailed assessment of the risks of further litigation and their understandable support for the proposed settlement.

Approval of the settlement agreement

[15] For the two main reasons that follow, I accept class counsel's overall submission that the non-reversionary $22.25 million settlement is fair and reasonable and very much in the best interests of the 7400 class members covered by the class period.

[16] First, class counsel were as informed as they could be about all aspects of their case when the matter was settled. This was a late-stage settlement, achieved only weeks before the scheduled summary judgment motions. The volume of available information (about risks and rewards) was detailed and extensive. Over the course of the eight years of litigation, the defendants had produced 95,000 documents; there were multiple contested motions; multiple

2021 ONSC 7376 (CanLII)

discoveries and cross-examinations; two appeals; two mediations; and the preparation and filing of lengthy (and expensive) expert reports dealing with the nuances of the trucking industry, complex data analysis, statistical sampling and overall damage calculations. The settlement amount was based on hard evidence (trip data and payroll records) collected by the parties and used by their experts to calculate class members' aggregate damages.

[17] The factual foundation for settlement was as complete as reasonably possible.

[18] Next, the experts' suggested range of damages. The expert reports presented damage calculations that ranged from a low of $3 million to a high of $45 million. The $22.25 million settlement falls in the middle of this range and is over $7 million more than the highest amount presented by the experts for the defendant. This alone is worthy of note.

[19] I also note two additional features that favour judicial approval: (i) the claims process is remarkably straight-forward — no class member will be required to do anything to prove their entitlement to a payment from the settlement proceeds; and (ii) the distribution of the proceeds will be speedy — class members will start receiving payments in early 2022.

[20] Based on the risk assessments as set out above and the range of damages as identified by the parties' experts, I am satisfied that the settlement amount is fair and reasonable, falls well within the required zone of reasonableness, and is in the best interests of the class. I note that the representative plaintiff strongly supports the settlement and that there were no objectors.

[21] The settlement is approved.

Approval of the honorarium

[22] As a general rule, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. It is only where they can demonstrate a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary, or where there is evidence that they were financially harmed because of their role as class representative that a significant honorarium will be justified.[6]

[23] Here, I am persuaded on the evidence that a performance honorarium at a level of $10,000 is justified for Mr. Baroch in part because of his level of dedication and commitment over a long and difficult 8-year litigation and, in particular, because he unselfishly put aside his individual pursuit of a single unpaid overtime claim in favour of a much riskier class-wide claim. I also accept the evidence that without Mr. Baroch's determined participation, this class action would never have materialized

[6] *Aps v. Flight Centre Travel Group*, 2020 ONSC 6779, at para. 43; *Casseres v. Takeda Pharmaceutical Company*, 2021 ONSC 2846, at para. 10.

2021 ONSC 7376 (CanLII)

[24] The payment of the requested $10,000 honorarium is approved.

Approval of the legal fees

[25] Based on the retainer agreement, which was pre-approved in an earlier Order, class counsel ask to be paid 30 per cent of the $22.25 million settlement as the agreed-to legal fees, plus disbursements and taxes. As discussed in *Cannon*,[7] and as further refined in *Brown*,[8] this contingency fee amount is presumptively valid and reasonable on the evidence herein and is approved.

[26] This brings me to this last comment.

Third-party funding and legal fees

[27] Class action litigation funding is becoming increasingly common. In a growing number of cases, class counsel sensibly secure third-party funding (whether from the Class Proceedings Fund or a private sector provider) to minimize their financial exposure, particularly with regard to disbursements and adverse cost awards.

[28] Here, class counsel entered into an agreement with a private-sector litigation funder, Augusta Pool 1 Canada Limited. The latter agreed to cover a certain level of disbursements and adverse cost awards in return for a funder's fee, the repayment of the disbursements amount and 10 per cent of the overall recovery.

[29] Class counsel ask that the court approve a payment of $3,945,000 to Augusta to reimburse it for $1,500,000 for disbursements incurred, $2,250,000 representing 10% of the settlement, plus an additional $195,000 as a funder's fee. The $3.945 million will be paid not by class counsel out of their fees but out of the settlement.

[30] I do not question the value of, or need for, litigation funding agreements or LFAs, particularly in the context of class action litigation. However, I note that many if not all class action judges (myself included) have generally ignored the impact of third-party funding in their assessment of class counsel's legal fees and "risks incurred".

[31] It was only a year or so ago that I began to discuss LFAs and their relevance in the determination of reasonable legal fees. As I said in *Macdonald v. BMO Trust*[9] it should be "self-

[7] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[8] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429.

[9] *Macdonald et al v. BMO Trust Company et al*, 2021 ONSC 3726

2021 ONSC 7376 (CanLII)

evident … that third-party funding should be a relevant factor in the 'risks incurred' analysis".[10] I added, however, that "it may be unfair to impose this new risk metric retroactively on a class action that was undoubtedly commenced under a very different expectation".[11]

[32] The same can be said here. As I advised class counsel at the hearing, their legal fees in this case were not in jeopardy and would not be adjusted because of the LFA. However, I add this commentary to draw attention to the new approach that is now mandated by the amended CPA.

[33] The amended CPA, which applies to actions commenced on or after October 1, 2020, makes clear in s. 32 (2.2) that "in considering the degree of risk assumed by the solicitor, the court shall consider":

> (c) the existence of … any … funding arrangement that affected the degree of risk assumed by the solicitor in providing representation.

[34] Judges will soon be required to consider third-party funding arrangements — whether public or private sector LFAs — in their assessment of "risks incurred" and their determination of reasonable legal fees. I have no doubt that the implications of this particular amendment are already well-understood by all class counsel.

Disposition

[35] The settlement agreement, the requested honorarium and class counsel's legal fees are approved.

[36] Orders to go as per the draft Orders signed at the conclusion of the hearing on November 1, 2021.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

[10] *Ibid* at para. 43. Also see Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (2018) at 165: "There is no legitimate reason why class action lawyers should be compensated as generously when the risks of litigation are borne by others. Costs of justice matter, and to this end, the presence of third-party funding is a relevant factor in the access to justice analysis."

[11] *Macdonald, supra,* note 9, at para. 44.

2021 ONSC 7376 (CanLII)

Date: November 10, 2021

2021 ONSC 7376 (CanLII)

Tab 3

2021 ONSC 6851 (CanLII)

CITATION: C.S. v. Ontario, 2021 ONSC 6851
COURT FILE NO.: CV-16-00543895-00CP
DATE: 20211014

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
C.S. Plaintiff	)	*James Sayce, Jay Strosberg, Jamie Shilton,* and *Scott Robinson,* for the Plaintiff
– and –	)	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO Defendant	)	*Christopher A. Wayland* and *Jonathan Sydor* for the Defendant
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: October 14, 2021

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*,[1] this action, which was commenced in 2015, was certified as a class action in 2018. In 2021, the parties have now agreed to settle subject to court approval. The Plaintiff, C.S., moves for approval of a $15.0 million settlement and Class Counsel moves for approval of its fee.

[2] Class Counsel seeks approval from the Court for fees in the amount of $4.05 million plus HST, which equates to a contingency fee percentage of 27% and a multiplier of approximately 2.3 on the sum of Class Counsel's billed time and anticipated time in the implementation of this settlement. Class Counsel seeks approval of an honorarium for C.S. of $15,000. In addition, Class Counsel seeks approval of the statutory levy for the Class Proceedings Fund and reimbursement of disbursements paid by the Fund.

[3] The action concerns the practice of “Youth Segregation” as implemented by the defendant provincial government of Ontario at its youth penal institutions. In the certification Order, Youth Segregation is defined as "the segregation at a Youth Justice Facility of a person under the age of eighteen alone in a designated room or area for more than six consecutive hours without any meaningful human contact."

[4] At the heart of the litigation is the question whether Youth Segregation is another

[1] S.O. 1992, c. 6.

Orwellian euphemism for torturous solitary confinement and a violation of the *Canadian Charter of Rights and Freedoms*.[2]

[5] In the last decade, the matter of whether the use of solitary confinement in federal and provincial adult and youth penal institutions is contrary to the *Charter* has been much litigated across the country.[3] The case at bar was litigated in the judicial light and fresh air of the contemporary jurisprudence that has provided declaratory and compensatory relief to the inmates who suffered from solitary confinement.

[6] However, without resolving the issue of whether Youth Segregation is the equivalent to the unconstitutional and unconscionable use of solitary confinement but having prompted review and some modifications in Ontario's practice, the case at bar has now settled in the atmosphere of the contemporary jurisprudence.

[7] For the reasons that follow, I approve the settlement, the honorarium, and Class Counsel's fee request and the ancillary relief.

B. <u>Procedural History</u>

[8] It is an understatement to say that this action was hard-fought.

[9] The Class Members in this action are persons who were detained in penal institutions under the *Youth Criminal Justice Act*.[4] The names of the Representative Plaintiffs and Class Members in this action have been reduced to initials.

[10] In the fall of 2015, P.M. (who was later replaced by C.S. as Representative Plaintiff) retained Class Counsel to commence an action against Ontario in respect of Youth Segregation in Youth Justice Facilities, the penal institutions for juveniles. These detention centres are operated by Ontario or Ontario supervises their operation by non-governmental organizations (NGOs) under contract with the province.

[11] Class Counsel is a consortium of Koskie Minsky LLP and Strosberg Sasso Sutts LLP.

[12] On November 3, 2015, the Statement of Claim was issued. The action against Ontario concerned the practice of Youth Segregation as implemented by Ontario at its youth penal institutions some of which are operated by the province and some of which were operated by NGOs under contract with the province.

[13] In December 2015, J.K. was added as a plaintiff and the Statement of Claim was amended.

[14] In May 2016, Ontario delivered its Statement of Defence, and it served a Third Party Claim on the NGOs that were operating youth justice facilities. Ontario sought contribution and indemnity from the NGOs.

---

[2] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.
[3] *Francis v. Ontario,* 2020 ONSC 1644, aff'd 2021 ONCA 197; *Reddock v. Canada (Attorney General),* 2019 ONSC 5053, aff'd 2020 ONCA 184; *Brazeau v. Attorney General (Canada),* 2019 ONSC 1888, aff'd 2020 ONCA 184; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen,* 2017 ONSC 7491, aff'd 2019 ONCA 243; *British Columbia Civil Liberties Association v. Canada (Attorney General),* 2018 BCSC 62, aff'd 2019 BCCA 228.
[4] S.C. 2002, c.1.

2021 ONSC 6851 (CanLII)

2021 ONSC 6851 (CanLII)

[15] Ontario vigorously defended the action and vigorously resisted certification. It denied any breach of the *Charter* or negligence or breach of fiduciary duty. Ontario pleaded that its decisions, actions, and omissions challenged by the Plaintiff constituted "policy decisions" for which it would not be liable in negligence. It relied on the coming into force of the *Crown Liability and Proceedings Act, 2019*[5] in the summer of 2019 which statutorily defined policy activity in respect of which Ontario could not be sued in negligence. It relied on limitation period defences under the *Limitations Act, 2002*.[6]

[16] In May 2016, P.M. experienced a mental health episode, and P.M. was no longer capable of representing the Class Members. Class Counsel received instructions from J.K. to request leave to file an amended pleading removing P.M. as a plaintiff. Ontario consented to the motion, and the Court granted leave. J.K. carried on as the lone putative Representative Plaintiff.

[17] In October 2016, J.K. and the NGOs brought motions to strike Ontario's Third Party Claim and Ontario brought a motion to require the Plaintiff to bring a Youth Court application for access to the institutional records that Ontario claimed were necessary for its response to the Plaintiff's motion for certification. I heard these motions together. I granted the motion to strike the Third Party Claim,[7] and I granted Ontario’s motion with respect to the youth records.[8]

[18] There were appeals from both orders to the Ontario Court of Appeal. The appeal with respect to the youth records was quashed as being within the jurisdiction of the Divisional Court,[9] and the Divisional Court dismissed the motion for leave to appeal.[10]

[19] With respect to the third party claims, the Court of Appeal held that J.K could limit his claim for damages from Ontario in respect of the NGO-operated facilities to the amount corresponding with Ontario's relative degree of fault.[11] However, the Court held that J.K.’s Fresh as Amended Statement of Claim was not sufficiently clear as to achieve this result. The Court allowed the appeal and provided language for an amended Statement of Claim. J.K amended the Statement of Claim in accordance with the Court of Appeal's guidance.

[20] The action moved towards a hearing of the certification motion. The Plaintiff served a motion record, two supplementary records, and a reply record, totaling over one thousand pages of materials. Ontario's voluminous responding record comprised four volumes. Extensive cross-examinations took place in July and August 2018. The cross-examination of Dr. Stuart Grassian, the Plaintiff's main expert, took a full day, with the transcript running in excess of three hundred pages. Ontario's examinations of the Plaintiff and of the class member affiants were also lengthy, with several transcripts running over one hundred pages.

[21] In the run-up to the certification motion, discussions between the parties about Ontario's position on the certification motion raised the prospect of narrowing the claim to exclude the NGO-operated Youth Justice Facilities. J.K. agreed to seek the Court's approval to narrow his claim to only the Ontario-operated facilities and Ontario agreed not to oppose the certification

[5] S.O. 2019, c. 7, Sched. 17.
[6] S.O. 2002, c. 24, Sch. B.
[7] *J.K. v Ontario*, 2016 ONSC 8047.
[8] *J.K. v Ontario*, 2016 ONSC 8040.
[9] *J.K. v. Ontario*, 2017 ONCA 332.
[10] *J.K. v. Ontario*, +.
[11] *J.K. v. Ontario*, +.

motion.

[22] The rationale for J.K. excluding the NGO-operated facilities included the following considerations: (a) the challenge of proving vicarious liability; (b) the challenge of proving Ontario negligent in its role in overseeing the NGO-operated facilities; (c) the likelihood that Ontario would have rights of production and discovery against NGOs with the prospect of delays and complications in this action; and (d) the fact that a substantial majority of Youth Segregation placements, up to 90% in some years, took place in Youth Justice Facilities directly operated by Ontario.

[23] Following a hearing on December 17, 2018, without opposition, I certified the action as a class proceeding excluding NGO-operated Youth Justice Facilities.[12] In addition, I substituted C.S. for J.K. as the Representative Plaintiff.

[24] The case at bar now concerns Youth Segregation placements at the following nine Youth Justice Facilities, all of which are or were directly operated by Ontario: Bluewater Youth Centre; Brookside Youth Centre; Cecil Facer Youth Centre; Donald Doucet Youth Centre; Invictus Youth Centre; Justice Ronald Lester Youth Centre; Roy McMurtry Youth Centre; Sprucedale Youth Centre; and Toronto Youth Assessment Centre.

[25] The court-supervised notice program was carried out between January 9, 2019 and July 1, 2019. Pursuant to the certification order, Class Members wishing to opt out of the proceeding were required to submit an opt-out form by April 9, 2019. No opt-out forms were received.

[26] In July 2020, the Plaintiff wrote to Ontario to make a discovery request, following which the parties engaged in informal settlement discussions. The parties then engaged Linda Rothstein, a partner with Paliare Roland Rosenberg Rothstein LLP to seek her assistance in mediating a resolution to the action.

[27] On December 21, 2020, Class Counsel wrote to this Court to advise that the parties had agreed to mediation. I was advised that for the mediation to be fruitful, better class size data was necessary. Class Counsel proposed that the Court issue a direction with respect to an application for access to youth records so that Ontario could prepare an accurate class size estimate for the purposes of the mediation.

[28] After I issued the requested direction, the parties attended before Justice Campbell of the Ontario Court of Justice in January 2021 to obtain access to relevant youth records. Ontario then prepared class size data, which it provided to Class Counsel. Ontario estimated that there are approximately 3,126 eligible individuals who meet the class definition. Those individuals were placed in secure isolation/secure de-escalation for at least six hours between April 1, 2004 and December 17, 2018, one or more times.

[29] The mediation was conducted by Ms. Rothstein over three days on March 25-26 and May 5, 2021. Continuous discussions between the parties took place in the interim.

[30] Following more negotiations, the parties concluded the terms of the Settlement Agreement on August 18, 2021.

[12] *J.K. v. Ontario*, 2018 ONSC 7545.

2021 ONSC 6851 (CanLII)

2021 ONSC 6851 (CanLII)

C. Settlement Agreement

[31] The major terms of the settlement agreement are as follows:

a. Ontario pays $15 million for a settlement fund.

b. The Class Members may make claims for one or more placements in Youth Segregation. The compensation ranges from $1,000 to $40,000 per placement.

c. There is a nine-month time period to submit claims.

d. The claims process is paper-based, confidential, and non-adversarial in the sense that there are no in court proceedings. Claimants are not required to testify or appear in person. Claims are adjudicated on the basis of institutional records, unless the records are missing or substantially incomplete or unreliable in which case the adjudication is made on the basis of the claim form. Claimants will be required to complete claim forms setting out information about their identities and their experiences in Youth Segregation.

e. Cost of notice to the class and administration of the claims process are paid from the settlement fund.

f. Claimants will be required to sign consents authorizing the disclosure of relevant youth records for the purposes of the determination of their claims.

g. The lowest value Category 1 claims will be determined by the Claims Administrator.

h. Category 2-4 claims for higher levels of compensation will be adjudicated by the Honourable S. Casey Hill, retired judge of the Superior Court of Justice.

i. Class Members will receive compensation ranging from $1,000 - $35,000 for each approved claim, and each Class Member may make multiple claims in respect of multiple placements.

j. Each claimant with a Category 4 claim may receive a top-up to their compensation, in an amount of up to $5000, on a *pro rata* basis, if there are remaining funds in the settlement fund after all claims are processed.

k. If there are insufficient funds to pay all approved claims in full, the amounts payable will be adjusted downward on a *pro rata* basis.

[32] In the 2015 publication, *It's a Matter of Time*, about the use of segregation in Youth Justice Facilities in Ontario, the Provincial Advocate for Children and Youth reported that in none of the years 2009, 2013, or 2014 did any of the Youth Justice Facilities operated by Ontario report that average secure isolation/secure de-escalation placements were more than 72 hours – the threshold for a Category 2 or $5000 claim.

[33] The Advocate reported that among a subset of Ontario-operated Youth Justice Facilities, 86/834 placements in 2009 lasted more than 72 hours, with 41/460 and 38/436 placements exceeding that threshold in 2013 and 2014, respectively. In simpler terms, the percentage of placements which might exceed the 72-hour threshold to make a Category 2 claim or higher ranged from 8.7% to 10.3% over those three years.

[34] While the Advocate's data does not break down the remaining 89.7% to 91.3% in a form that would permit Class Counsel to estimate the proportion of eligible Category 1 placements (6-72 hours), the data with respect to average placement durations indicate that placements in the Category 1 range are typical experiences of secure isolation in the Ontario-operated Youth Justice Facilities.

[35] Within the same subset of Youth Justice Facilities, placements lasting 5-9 days ranged from 2.4% to 2.8% of all placements over the three reporting years, placements lasting 10-14 days ranged from 0.5% to 1.1% of all placements, and placements lasting for fifteen or more days ranged from 0% to 0.4% of all placements.

[36] Based on this data, Class Counsel concluded that the vast majority of eligible claims under the Settlement will be under Category 1 (placements of 6-72 hours), while a substantial proportion of the remainder will be under Category 2 (placements of 72 hours – 5 days).

[37] Class Counsel also reviewed the total number of placements in Ontario-operated Youth Justice Facilities as reported by the Advocate in 2009, made reasonable adjustments to allow for comparability, and multiplied this adjusted total by $1000, representing the Category 1 compensation level that will be applicable for the vast majority of claims. The result is approximately $687,600 per year, or, across a 14.5-year class period, just less than $10 million.

[38] Considering the relatively small numbers of higher value claims that are expected, and accounting for counsel fees, the Class Proceedings Fund's levy, and notice and administration costs, Class Counsel is confident that the settlement fund will be sufficient to pay all claims approved by the Claims Administrator and Claims Adjudicator.

[39] C.S. and Class Counsel recommend the settlement for approval.

D. <u>Is Youth Segregation Unconstitutional Solitary Confinement?</u>

[40] When this action commenced, Koskie Minsky LLP, a partner in the consortium of Class Counsel in the immediate case, was engaged in class actions against the federal government and the provincial government of Ontario about the use of solitary confinement in adult penal institutions.

[41] As ultimately confirmed by the courts in *British Columbia Civil Liberties Association v. Canada (Attorney General),*[13] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen,*[14] *Brazeau v. Attorney General (Canada),*[15] *Reddock v. Canada (Attorney General),*[16] and *Francis v. Ontario,*[17] solitary confinement was determined to be "the confinement of prisoners for 22 hours or more a day without meaningful human contact". This is the definition prescribed by what is known as the *Mandela Rules* promulgated by the United Nations.

[42] In *Brazeau*, *Reddock*, and *Francis*, it was eventually determined – at summary judgment hearings – that administrative segregation in adult federal prisons and Ontario's adult provincial

---

[13] 2018 BCSC 62, aff'd 2019 BCCA 228.
[14] 2017 ONSC 7491, aff'd 2019 ONCA 243.
[15] 2019 ONSC 1888, aff'd 2020 ONCA 184.
[16] 2019 ONSC 5053, aff'd 2020 ONCA 184.
[17] 2020 ONSC 1644, aff'd 2021 ONCA 197.

2021 ONSC 6851 (CanLII)

jails met the definition of solitary confinement. It was determined that the conditions of solitary confinement in adult prisons and penitentiaries across the country amounted to breaches of *Charter* and common law duties in respect of inmates with serious mental health issues as well as other inmates placed into prolonged solitary confinement of more than 15 days.

[43] At the commencement of this action, Class Counsel believed or suspected but actually did not know that young offenders were also being subjected to solitary confinement in the young offenders facilities operated by Ontario and by NGOs in Ontario.

[44] The legislative basis for Youth Segregation is found in the *Child, Youth and Family Services Act, 2017* and its predecessor legislation.[18] The legislation authorizes the use of "secure de-escalation", called "secure isolation" under the predecessor legislation, a practice involving the placement of a youth inmate of a Youth Justice Facility alone in a locked room. Under s. 174(3) of the Act, secure de-escalation is authorized only where staff are of the opinion that the youth is likely to cause serious property damage or serious bodily harm to another person and no less restrictive method of restraining the youth is practicable.

[45] It was Ontario's strongly held position throughout this class action up to the present that secure isolation is not solitary confinement as defined under the *Mandela Rules* in the caselaw, in the academic literature or as defined by the most motivated anti-solitary confinement activists.

[46] At the outset of the immediate action, Class Counsel did not know whether Ontario's Youth Justice Facilities actually practised "solitary confinement" as defined in the relevant international legal instruments. The applicable legislation and regulations contained safeguards that were designed to protect young people from conditions amounting to solitary confinement. There were some indications, but nothing conclusive, that Ontario was not following its own policies, and that youth were regularly being placed into conditions of solitary confinement as a result of Ontario's conduct.

[47] As the case progressed, the differences between "Youth Segregation" and "solitary confinement" became more and more apparent. This created the procedural risk that C.S. would be unable to establish a common issue and the liability risk of proving class-wide constitutional breaches, breaches of fiduciary duty, negligence, or damages.

[48] The evidence with respect to whether these limits and rules were being complied with was mixed. On the one hand, the plaintiffs and Class Members who swore affidavits in support of the motion for certification painted a disturbing picture of the day-to-day practices of Youth Segregation. For his part, C.S. deposed in his certification affidavit that C.S. had also been placed in Youth Segregation on numerous occasions, sometimes for long periods of time. On the other hand, reported data on the use of Youth Segregation suggested that average placements were below or near the limits established by the legislation.[19]

---

[18] *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sch. 1, ss. 173-175. The *Child, Youth and Family Services Act, 2017* replaced the *Child and Family Services Act*, R.S.O. 1990, c. C.11, which authorized the use of "secure isolation" at ss. 126-128.

[19] In the 2015 publication on the use of segregation in Youth Justice Facilities in Ontario, the Provincial Advocate for Children and Youth reported that the system-wide average duration of secure isolation ranged from approximately 7 hours to approximately 9.5 hours between 2009 and 2014. The Advocate also reported that the average length of time of placements at many Youth Justice Facilities hovered at around one hour over that same period. Given that the Advocate's statistics included inmates aged 18 and older who were serving youth sentences in

2021 ONSC 6851 (CanLII)

[49] As this case progressed, it became apparent that it could be challenging for the Plaintiff to demonstrate that, at a systemic level, the durations of Youth Segregation placements came close to the durations of prolonged placements in adult solitary confinement at issue in *Brazeau*, *Reddock*, and *Francis*. Additionally, Youth Justice Facilities' statutorily mandated practice of observing youth inmates, whether on a continuous basis or every 15 minutes, may have made it challenging for the Plaintiff to show that the Class Members were being denied meaningful human contact.

[50] It turns out that Youth Segregation in Ontario is not as easily definable as solitary confinement as is the corresponding practice in adult facilities. Having litigated the other solitary confinement matters, Class Counsel is of the strong view that the risk of proceeding to a judgment and losing greatly outweighs the benefits available under the Settlement Agreement.

E. <u>Retainer and Counsel Fee</u>

[51] Pursuant to s. 32 of the *Class Proceedings Act*, *1992*, the Plaintiffs in this action signed a contingency fee retainer agreement with Class Counsel. The relevant portions of the Retainer Agreement executed between C.S. and Class Counsel provide, among other things, the following:

> Except for any Costs paid to Class Counsel as provided in paragraph 10 above, Class Counsel shall be paid its fees upon achieving Success in the Action, whether by obtaining judgment on any of the Common Issues in favour of some or all Class members or by obtaining a settlement that benefits one or more of the Class members. The fees shall be paid by a lump sum payment to the extent possible, or (if a lump sum payment is not possible) by periodic payments, out of the proceeds of any judgment, order or settlement awarding or providing monetary relief, damages, interest or costs to the Class or any Class Member.
>
> In the event of Success, Class Counsel shall be paid an amount equal to
>
>> (a) any disbursements not already paid to Class Counsel by the Defendants as costs, plus applicable taxes and plus interest thereon in accordance with s. 33(7)(c) of the *Act*, plus
>>
>> (b) an amount equal to 33% of the Recovery plus HST.

[52] Class Counsel expended 2,623.2 hours to prosecuting this case up to early October 2021, with a value of $1,262,720.50, excluding HST.

[53] Class Counsel incurred $139,129.27 in disbursements (including taxes) in prosecuting this action of which they were reimbursed $117,229.27 from the Class Proceedings Fund leaving $21,900 unreimbursed.

[54] In total, Ontario has paid $15,000 in costs to the Plaintiff throughout the course of this action.

[55] Class Counsel expects to incur at least another $500,000 in fees between now and the end of the settlement implementation and administration phase.

[56] Should the Settlement be approved, the work left to be done to ensure the Settlement is

---

Youth Justice Facilities, but who are not included in the class definition for this action, it is likely that even these modest numbers overstated the durations of Youth Segregation at issue in this action.

2021 ONSC 6851 (CanLII)

implemented and administered includes: (a) monitoring the implementation of the notice plan to ensure it has been disseminated in accordance with the approved notice plan; (b) communicating with Class Members; (c) assisting Class Members with the completion of Claim Forms, their Consents for production of relevant youth records, and their Identity Documents; (d) communicating with third parties such as caregivers, family members, and others who contact Class Counsel about the Settlement and claims process; (e) monitoring the claims process and the claims deadline; (f) communicating with and resolving any issues with the Claims Administrator regarding the disposition of submitted claims; and (g) reporting to the Court and parties regarding the disposition of the Settlement fund. Class Counsel estimates that it will devote time with a value of approximately $500,000 to complete the Settlement phase of this class proceeding.

[57] Class Counsel requests a Counsel Fee at 27%, *i.e.*, the fee request is $4.05 million plus HST. This fee represents a multiplier of approximately 2.3 on the sum of Class Counsel's billed time and anticipated time in the implementation of this settlement.

[58] The litigation was supported by the Class Proceedings Fund of the Law Foundation of Ontario. The Fund is to be paid its 10% levy on the compensation payable to the Class Members pursuant to O. Reg. 771/92 in addition to reimbursement of disbursement expenses.

F. <u>Settlement Approval</u>

[59] Section 29(2) of the *Class Proceedings Act*, *1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[20]

[60] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[21]

[61] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[22] An objective

---

[20] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

[21] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).

[22] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

2021 ONSC 6851 (CanLII)

and rational assessment of the pros and cons of the settlement is required.[23]

[62] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[24] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[25]

[63] Having read the motion materials and considered both parties' factums, I am satisfied that the settlements in the immediate case should be approved along with the ancillary relief.

[64] I obviously cannot determine on a settlement motion, the merits of C.S.'s action and its likelihood of success, but I agree with Class Counsel's assessment that in the immediate case, the risk of proceeding to a judgment and losing greatly outweighs the benefits available under the Settlement Agreement. I conclude that the settlement is reasonable and in the best interests of the class.

[65] The ancillary relief should also be approved.

G. Fee Approval

[66] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.[26] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[27]

[67] These risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding.[28]

[68] Fair and reasonable compensation must be sufficient to provide a real economic incentive

[23] *Al-Harazi v. Quizno's Canada Restaurant Corp*. (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).
[24] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).
[25] *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd*., [2002] O.J. No. 2383 at para. 13 (S.C.J.).
[26] *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).
[27] *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).
[28] *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35; *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 t para. 17 (C.A.).

2021 ONSC 6851 (CanLII)

to lawyers to take on a class proceeding and to do it well.[29]

[69] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved.[30] Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee.[31] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[32]

[70] In the immediate case, in my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request should be approved. Class Counsel brought a high-risk action to an outcome that provides meaningful benefits to the Class Members in a settlement that is reasonable and in the best interests of the Class Members.

[71] Class Counsel earned their fee in this hard-fought litigation, and the fee should be and is approved.

H. <u>Honorarium</u>

[72] Turning to the matter of the honorarium. Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by an honorarium.[33] However, the court should only rarely approve this award of compensation to the representative plaintiff.[34] Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.[35]

[73] Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. In determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant

---

[29] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61(S.C.J.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.).
[30] *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.
[31] *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at para. 92.
[32] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (C.A.).
[33] *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090; *Brazeau v. Attorney General (Canada)* 2019 ONSC 4721; *Houle v. St. Jude Medical Inc.*, 2019 ONSC 4560; *Dolmage v. HMQ*, 2013 ONSC 6686; *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528 at para. 43; *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26–43; *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at paras. 133–136; *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *Windisman v. Toronto College Park Ltd*., [1996] O.J. No. 2897 at para. 28 (Gen. Div.).
[34] *Sutherland v. Boots Pharmaceutical plc*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).
[35] *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.

2021 ONSC 6851 (CanLII)

personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.[36]

[74] In the immediate case, C.S. should be awarded an honorarium. C.S. made an extraordinary contribution and should be heralded for the bravery of his leadership and his pursuit for access to justice. C.S. made an extraordinary contribution that was instrumental to the fair and reasonable outcome of the class action.

I. <u>Conclusion</u>

[75] Orders accordingly. I have signed the Orders.

Perell, J.

Released: October 14, 2021

[36] *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

2021 ONSC 6851 (CanLII)

CITATION: C.S. v. Ontario, 2021 ONSC 6851
COURT FILE NO.: CV-16-00543895-00CP
DATE: 20211014

2021 ONSC 6851 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

C.S.

Plaintiff

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

REASONS FOR DECISION

PERELL J.

Released: October 14, 2021

Tab 4

CITATION: Cannon v. Funds for Canada Foundation, 2013 ONSC 7686
COURT FILE NO.: CV-08-362807-CP
DATE: 20131219

2013 ONSC 7686 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: MICHAEL CANNON / Plaintiff / Moving Party

AND

FUNDS FOR CANADA FOUNDATION, MATT GLEESON AND SARAH STANBRIDGE as trustees for the DONATIONS CANADA FINANCIAL TRUST, PARKLANE FINANCIAL GROUP LIMITED, TRAFALGAR ASSOCIATES LIMITED, TRAFALGAR TRADING LIMITED, APPLEBY SERVICES (BERMUDA) LTD. as trustee for the BERMUDA LONGTAIL TRUST, EDWIN C. HARRIS Q.C., PATTERSON PALMER also known as PATTERSON PALMER LAW, PATTERSON KITZ (Halifax), PATTERSON KITZ (Truro), MCINNES COOPER, SAM ALBANESE, KEN FORD, RIYAD MOHAMMED, DAVID RABY, GREG WADE, GLEESON MANAGEMENT ASSOCIATES INC., MARY-LOU GLEESON, MATT GLEESON and MARTIN P. GLEESON / Defendants / Responding Parties

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *Margaret Waddell, Samuel Marr and Andrew Lewis* for the Plaintiff

HEARD: October 18, 2013

APPROVAL OF LEGAL FEES

[1] In a short endorsement dated October 18, 2013 I approved the class action settlements with the FFCF-Gleeson Defendants and the Lawyer Defendants. I was satisfied that these settlement agreements were in the best interests of the class members. The class members will receive about $28.2 million. The class action will continue against the non-settling defendants.

[2] I also considered class counsel's motion for the approval of their legal fees on the settlements achieved. Based on the contingency fee retainer agreement, class counsel was asking for one-third of the settlement amount – about $9.4 million. Contingency fee awards of 25 per cent (sometimes 30 per cent) have been approved by Ontario courts. But, I was not aware of any decision that had approved a full one-third. I therefore advised class counsel I was prepared to approve legal fees in the amount of 25 per cent (because my sense of the case law was that the accepted range was 20 to 25 per cent), but that I needed further written submissions to persuade me that the approval of the full one-third was indeed fair and reasonable.

[3] I have now been provided with these supplementary submissions and I am persuaded that my Order of October 18, 2013 approving the 25 per cent amount should be varied to allow the full one-third. I have also been persuaded that a one-third contingency fee agreement, if fully understood and accepted, should be accorded presumptive validity.

Analysis

[4] I initially approved class counsel's legal fees at the 25 per cent level (rather than the full one-third that had been agreed to in the retainer agreement) because, frankly, that's what other judges were doing. I reviewed several of the decisions, expecting to find persuasive reasons for capping the legal fees at say, 20 to 25 per cent and not allowing the 30 per cent or one-third that had been agreed to in the retainer agreement. What I found, instead, were well-intentioned judicial efforts to rationalize legal fee approvals by discussing arguably irrelevant or immeasurable metrics such as docketed time (irrelevant) or risks incurred (immeasurable.) By using these metrics, judges felt comfortable building up a reasonable legal fees award that was capped at the 20 to 25 per cent level, sometimes 30 per cent but rarely, if ever, approved at the one-third level.

[5] I couldn't understand this reasoning. Why should it matter how much actual time was spent by class counsel? What if the settlement was achieved as a result of "one imaginative, brilliant hour" rather than "one thousand plodding hours"?[1] If the settlement is in the best interests of the class and the retainer agreement provided for, say, a one-third contingency fee, and was fully understood and agreed to by the representative plaintiff, why should the court be concerned about the time that was actually docketed?

---

[1] To borrow the language of Cumming J. in *Vitapharm Canada Ltd. v. Hoffman LaRoche Ltd.*, 12 C.P.C. (6th) 226, [2005] O.J. No.1117 (S.C.J.) at para. 107 (QL).

2013 ONSC 7686 (CanLII)

This only encourages docket-padding and over-lawyering, both of which are already pervasive problems in class action litigation.

[6] If "risks incurred" was something judges could really measure on the material provided, then this metric might make sense. Everyone understands that class counsel accept and carry enormous risks when they undertake a class action. But I don't understand how a judge, post-hoc and in hindsight, confronted with untested, self-serving assertions about the many risks incurred, can measure or assess those risks in any meaningful fashion and then purport to use this assessment as a principled measure in approving class counsel's legal fees. And why are we approaching legal fees approval as a building blocks exercise to begin with, working from the bottom up rather than from the top down? Why not start at the top with the retainer agreement that was agreed to by the clients and their solicitor when the class action began?

[7] In my view, it would make more sense to identify a percentage-based legal fee that would be judicially accepted as presumptively valid. This would provide a much-needed measure of predictability in the approval of class counsel's legal fees and would avoid all of the mind-numbing bluster about the time-value of work done or the risks incurred.

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

[9] Examples of clear cases where the presumption of validity could be rebutted include the following:

(i) *Where there is a lack of full understanding or true acceptance on the part of the representative plaintiff*. Did the representative plaintiff truly understand that one-third of the recovery would be claimed by class counsel as legal fees? Class counsel would be wise to set out the consequences of their contingency fee arrangement in some detail in the retainer agreement: e.g. "if we recover $30 million for the class, we will be entitled to legal fees of $10 million." Settlement agreement notices should bold-face or highlight the legal fees portion in order to focus class members' attention on the amount being requested. Affidavits from the representative plaintiffs or class members supporting the legal fees request would certainly be relevant.

(ii) *Where the agreed-to contingency amount is excessive*. I, for one, am prepared to accept that a one-third contingency is presumptively reasonable and acceptable in the class actions area because that amount that has been

2013 ONSC 7686 (CanLII)

found to be reasonable and acceptable (and successful) in the personal injury area.[2] If class counsel seek higher amounts, say 40 or 50 per cent, they should be prepared to provide a detailed justification because these higher amounts fall outside the penumbra of what, in my view, is currently acceptable.

(iii) *Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise unreasonable*. I know that I would be quite comfortable approving legal fees of $10 or even $15 million based on overall cash recoveries of $30 or $45 million. But I frankly don't know what I would or should do as a class actions judge when the recovery is, say, $150 million and class counsel are asking for $50 million. Although the $50 million legal fees award would be enormous, to say the least, I really can't think of a principled reason for not approving these larger amounts. Fortunately, I don't have to decide this today.

[10] In my view, the judicial acceptance of the contingency fee agreement as presumptively valid would further the development of the class action in at least three ways:

- Class counsel's legal fees would be more easily understood, more principled and more "reasonable" than under the "multiplier" approach.[3]

- The contingency fee approach would inject a much-needed measure of predictability into class counsel's compensation calculus, which in turn would encourage greater use of the class action vehicle, enhancing access to justice.

---

[2] As Strathy J. noted in *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105, 98 C.P.R. (4th) 244, at para. 64: "Personal injury litigation has been conducted in this province for years based on counsel receiving a contingent fee as high as 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the "no cure, no pay" principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings. The contingent fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well paid for a good result."

[3] The "multiplier" approach requires the court to accept as fair and reasonable monopoly-based hourly rates that are everything but fair and reasonable; and, it asks the court to divine a "multiplier" reflecting the risks incurred which, as already noted, is an almost impossible task on the material that is typically provided, and almost always results in a parody of the judicial process. Fortunately, most class counsel appear to be choosing contingency fees over multipliers in their retainer agreements. In a few years, the latter may (happily) become extinct.

2013 ONSC 7686 (CanLII)

- According presumptive validity to a one-third contingency fee, and thus making class counsel's compensation more certain would take the pressure off certification-motion costs awards as a method for forward-financing the class action lawsuit.[4]

[11] The approach that I have discussed works best when you have, as we do here, an all-cash settlement. An across the board one-third recovery will likely not be available when the settlement is in-kind, or involves vouchers or coupons, or where class counsel compensation is best determined by considering the take-up rate. But to the extent that the retainer agreement provides for a percentage-based fee approach rather than the multiplier approach, I will be one judge that will accept a fully understood one-third contingency fee agreement as presumptively valid.

[12] Returning, then, to the motion before me. I am satisfied that the one-third contingency fee should be approved. The contingency fee retainer agreement was fully understood and agreed to by Michael Cannon, the representative plaintiff. Indeed, Mr. Cannon filed an affidavit strongly supporting the one-third legal fee and no class members have voiced any objections. The one-third contingency is not excessive because it is in line with the percentages that are charged in the personal injury area. And there is no suggestion that the $9.4 million amount that class counsel will receive is unseemly or inherently unreasonable. In short, no reasons have been advanced to rebut the presumption of validity.

Disposition

[13] Class counsel's request for the full one-third contingency fee is granted. My Order of October 18, 2013 shall be amended to reflect this variation.

Belobaba J.

[4] See the discussion in the opening pages of my costs awards in *Dugal v. Manulife Financial*, 2013 ONSC 6354 or *Rosen v. BMO Nesbitt Burns Inc*., 2013 ONSC 6356. I tried to inject a measure of certainty and predictability into the calculation of legal costs for certification motions, just as I am doing here with respect to class counsel's legal fees. In my view, predictability is a good thing in the continuing evolution of the class action. Who knows, maybe in a decade or two, with a class actions bar that has a more confident understanding of the certification proceeding (it was always intended to provide a very low procedural hurdle and was never intended to generate the frenzied over-litigation that currently exists) and with a more competitive legal services market-place, class counsel may be willing to undertake class proceedings on the basis of a 20 per cent or even 10 per cent contingency. (One can hope.)

2013 ONSC 7686 (CanLII)

Date: December 19, 2013

2013 ONSC 7686 (CanLII)

Tab 5

COURT FILE NO.: 06-CV-306061- CP
DATE: October 15, 2009

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH FANTL

Plaintiff

- and -

TRANSAMERICA LIFE CANADA

Defendant

Proceedings under the *Class Proceedings Act, 1992*

COUNSEL:

C. Scott Ritchie QC for the Plaintiff
William G. Horton for the Defendant

HEARING DATE: October 7, 2009

REASONS FOR DECISION

PERELL, J.

<u>*Introduction*</u>

[1] In this action under the *Class Proceedings Act, 1992*, S.O. 1992, c.6, the parties reached a partial settlement. On August 10, 2009, I certified the action as a class proceeding for settlement purposes, and I approved the settlement. The motion for approval of the fee of Class Counsel was adjourned, and it is that motion and a motion by the Defendant for standing on the fee approval motion that are now before the court.

[2] As is typical, the Representative Plaintiff, Mr. Fantl, supports the motion, but the motion is strenuously opposed by the Defendant, Transamerica Life Canada, which is not typical.

[3] Also not typical are that: (a) there is a preliminary issue about the standing of the defendant to participate in the motion for fee approval; (b) assuming that Transamerica has standing, there is a contested issue about the extent to which Transamerica can raise objections to the amount of the fee and the significance, if any, of the retainer agreements signed by Mr. Fantl; (c) there is a contested issue about the monetary value of the

2009 CanLII 55704 (ON SC)

settlement and whether it is a “defendant-driven settlement”; (d) there is a contested issue about the extent to which Class Counsel can take credit for the monetary value of the settlement; (e) there is a contested issue about the extent to which Class Counsel can take credit for modifying the behaviour of Transamerica; (f) there is a contested issue about the risks assumed by Class Counsel and about when risk should be measured; (g) there is a contested issue about what the parties agreed when Transamerica agreed to pay the counsel fee, including a serious contest about the interpretation of the Settlement Agreement; and (h) there are numerous contested issues, some typical but some untypical, about what are the relevant facts for the court to consider in approving the fee and the weight to be given to various disputed facts.

[4] A lot of money rides on these motions because Class Counsel, Roy Elliott O’Connor LLP (“REO”), asks the Court to approve its retainer agreement with Mr. Fantl and to fix REO’s fees in the amount equal to 30% of the value of the settlement, which is estimated to be in excess of $40.5 million plus disbursements of approximately $200,000. Thus, the amount of the counsel fee claimed is between $12 to $13.5 million.

[5] The counsel fee being sought substantially exceeds the value of the time expended by REO, and it insists that its counsel fee should be calculated by reference to the contingency fee agreement and <u>not</u> by reference to its dockets.

[6] As will be explained further below, in the Fall of 2005, Mr. Fantl hired a law firm known as REKO, but there was a change of lawyers to REO in January 2008. Between initial retainer and September 18, 2009, REKO expended 998.77 hours with respect to the matters being settled and 5,667.89 hours were expended by REO. The total is 6,666.66 hours. The value of the time to August 5, 2009 is $3,116,697.65 of which $340,202.90 is attributable to REKO and $2,776,494.75 to REO. The additional value for recent work to September 18, 2009 is $60,590.50, and thus, based on hours worked and hourly rates, the total fees for REKO and REO is $3,177, 288.15.

[7] Transamerica submits that the claim for a fee of $12 to $13.5 million is excessive, aberrant, a premium that is disproportionate to the risk assumed and success achieved and beyond what Transamerica reasonably contemplated paying when it agreed to pay Class Counsel Fees. Transamerica states that it neither agreed nor contemplated that it would be called on to pay a 30% contingency fee. Transamerica also challenges the reasonableness of the hours of work expended and the recovery of certain disbursements, including the cost of REO’s hiring counsel when an issue arose about the carriage of the class proceeding.

[8] Transamerica submits that a fair and reasonable fee reflecting the time reasonably docketed and a premium commensurate with the risk assumed by Class Counsel and the contribution made by Class Council to the success achieved for the Class should be in the range of $3 million, plus disbursements of $54,405.40 and applicable GST.

[9] Both parties take positions at the extremes reasonably available to them. There is no hint of compromise. In monetary terms, the difference between the parties is approximately $10 million.

2009 CanLII 55704 (ON SC)

[10] For the reasons that follow, I approve a counsel fee of $7.0 million, all inclusive of counsel fee, disbursements, and GST.

Factual Background

[11] Some of the factual background is described in my Reasons for Decision for the certification motion; see *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.), and some of the events are described in earlier Reasons for Decision for a motion, mentioned below; see *Fantl v. Transamerica Life Canada*, [2008] O.J. No. 1536 (S.C.J.). I shall repeat some of that description below, but I shall also add to it and from time to time, I will pause to make some observations and to draw some conclusions.

[12] Mr. Michael A. Millman, a chartered accountant in Vancouver, British Columbia, was the owner of an insurance policy from what is now Transamerica. The policy contained an investment option known as the Can-Am Fund.

[13] In February 2002, Mr. Millman complained to Transamerica that: (1) he had been overcharged a management expense ("the management expense claim"); and (2) that the Can-Am Fund had not tracked the results of the S&P 500 total return index as had been represented to him ("the tracking claim"). For both claims, Mr. Millman claimed a loss of between $3,200 to $5,600.

[14] When Mr. Millman was not satisfied by Transamerica's response, he retained Mr. J.J. Camp to sue Transamerica. Mr. Camp, in turn, referred the matter to Mr. Harvey Strosberg, Q.C. of Sutts, Strosberg LLP to commence a class action in Ontario. On December 29, 2003, the action began. The statement of claim was framed in breach of contract. The action did not progress, and in the spring of 2005, Mr. David Jones of Mr. Camp's law firm inquired whether REKO would be prepared to assume carriage of the action. Until it disbanded, REKO was a law firm comprised of Peter Roy, R. Douglas Elliott, Won J. Kim, and David F. O'Connor. They were prepared to take on the matter.

[15] In September 2005, Sutts, Strosberg LLP forwarded its file material to REKO. Mr. Kim became the supervising partner with the most involvement in the file.

[16] For their involvement in the proceedings, Sutts Strosberg and Camp Fiorante have claims for fees of $27,822.25 and $35,032.71, respectively for a total of $ 62,854.96.

[17] After the arrival of the file material, in the autumn of 2005, one of the matters that had to be addressed was that Mr. Millman was no longer prepared to be representative plaintiff. But, as it happened, around this time, Mr. Fantl was seeking legal advice from REKO about an unrelated matter, and it was coincidentally discovered that he was an investor in the Can-Am Fund. Mr. Fantl accepted the invitation to be representative plaintiff.

[18] On May 16, 2006, Mr. Fantl signed a retainer agreement with REKO. The agreement described the scope of the retainer to be in respect of: “claims arising out of the Defendant’s negligent misrepresentations and contractual breaches pertaining to class members’ investment in the Can-Am Fund and/or other related events.” Pursuant to

2009 CanLII 55704 (ON SC)

clause 9 of this agreement, in the event of success, REKO was entitled to be paid 30% of any amounts recovered by the Class. There is no mention in the agreement of a “multiplier” or “lodestar” method of calculating fees. Clause 34 of the retainer provided that in the event that REKO dissolved, the agreement would apply to a successor law firm.

2009 CanLII 55704 (ON SC)

[19] Between the autumn of 2005 and the end of March 2006, Mr. Kim decided to amend the statement of claim to add negligent misrepresentation claims to the claims sounding in contract. A Fresh as Amended Statement of Claim, which also introduces Mr. Fantl as the proposed representative plaintiff, was issued on April 5, 2006.

[20] With a new pleading and a new plaintiff, the action began to make some progress. Cross-examinations on the certification materials were conducted on April 9, 10, and 26, 2007. The certification motion was scheduled for May 2007, but did not proceed. Instead, Mr. Kim and Ms. Mary Jane Stitt, counsel for Transamerica, began discussions about the possibility of a consent certification.

[21] Around this time, Mr. Kim indicated to Ms. Stitt orally and in writing, by letter dated June 1, 2007, that Mr. Fantl had plans to expand the scope of the proposed class action beyond the Can-Am Fund to include other funds where it would be alleged that expenses should not have been charged.

[22] Based on this disclosure of Mr. Fantl’s plans, REO submits that Class Counsel was the impetus for Transamerica eventually agreeing to pay over $100 million in respect of management fee overcharges with at least $40.5 million attributable to Class Members.

[23] On August 8, 2007, Transamerica informed its federal and provincial insurance regulators that it had identified an issue related to possible excess management fees that may have been charged to segregated funds and that it had commenced a review to determine how much was involved and which policyholders were affected. The review included but extended beyond the segregated funds and insurance policies that eventually were included in the settlement of the class proceedings.

[24] On August 22, 2007, Mr. Kim and Ms. Stitt had a dinner meeting. At this meeting, Ms. Stitt advised Mr. Kim that Transamerica intended to settle the portion of the claim dealing with the management fee overcharge. Mr. Kim was advised that Transamerica was considering reimbursing and compensating all of the similarly-situated policyholders - not just the Can-Am Fund policyholders. Any settlement would leave unresolved Mr. Fantl’s claim about whether the Can-Am fund tracked stock market performance.

[25] The Transamerica action, which was already large in terms of class size and amount claimed ($200 million) had the potential to become much-much larger.

[26] Shortly after the dinner meeting between Mr. Kim and Ms. Stitt, Transamerica sent a letter on August 29, 2007 to policyholders. The letter states: "We want to assure you that, if our review finds that excess management fees were charged to you,

Transamerica Life Canada will fully repay excess fees charged to you and to all impacted policyholders and compensate you for related lost fund earnings."

[27] On September 12, 2007, there was a case conference before Justice Hoy, and she was advised that there was a prospect of settlement but the scope of the class proceeding was expanding beyond the Can-Am Fund claims. During the autumn of 2007, the funds implicated by a management expense claim grew to 26 funds. Justice Hoy was also advised that Transamerica was instituting a voluntary restitution program in respect of a group of funds that were outside of any class action settlement but that would involve the same restitution methodology. Justice Hoy was told that Transamerica proposed to pay Class Counsel's fees and the reasonable costs of an expert retained by Class Counsel to advise about the fairness of the settlement.

[28] It appears that in the Fall of 2007, the thinking of the executives at Transamerica was that if Transamerica had overcharged expenses, it should stop the practice and also put its policyholders in the financial position that they would have been, had the overcharges not been made. This approach meant establishing: (1) a reset date from which to go forward and only make appropriate expense charges; (2) a restitution methodology, which would have to be negotiated with Class Counsel; and (3) paying the legal expenses incurred by Class Members. The payment of legal costs was necessary because it would not be fair to class members if their restitution was net of legal fees while similarly-situated policyholders outside of the class proceedings would be restored without incurring any legal expense.

[29] The settlement negotiations were to move forward based on the discussions in the Fall of 2007.

[30] Pausing here in the history, it is useful to describe the situation from the perspective of REKO. At this juncture, it would have been rash and premature to declare victory in the litigation, but they had good reason to be optimistic of success. Transamerica had not only made public commitments to its policyholders, but it was taking steps to fulfill its pledges. While its position in the litigation was and remains not to admit liability, Transamerica's conduct was placing it in a position where it would have difficulty resisting certification and perhaps, even a summary judgment. In any event, it would have been irresponsible for REKO to put up resistance to what appeared to be a capitulation by Transamerica.

[31] Further, the class proceedings had reached a turning point, and as experienced Class Counsel, REKO would know that Class Counsel sometimes wears the gown of a barrister to argue in court and sometimes it wears the suit of a solicitor to negotiate a contract. REKO did the responsible thing, it stopped litigating and started negotiating to finalize and implement a settlement that was in the best interest of the class. Transamerica apparently had the same goal, and I find its pitch that the outcome was a "defendant-driven settlement" and that it was the chief architect not very helpful in determining what is a fair and reasonable fee for Class Counsel, who sensibly allowed Transamerica to clean up its own mess.

2009 CanLII 55704 (ON SC)

[32] Returning to the history, in early November 2007, the REKO partnership began to come apart, and the partners decided to end the firm after December 31, 2007. On December 31, 2007, REKO dissolved.

[33] On January 1, 2008, Mr. Kim established Kim Barristers, P.C., which in February 2008 became Kim, Orr Barristers P.C. ("KO") when Mr. James C. Orr joined the firm.

[34] On January 4, 2008, Mr. Fantl received a letter from Mr. Roy advising that REKO had dissolved. On January 5, 2008, Mr. Fantl wrote REO advising it that he had chosen it as his solicitors for the class action.

[35] KO, Mr. Kim's new law firm, challenged Mr. Fantl's status as proposed representative plaintiff. By motion, Mr. Kim sought to set aside the notice of change of solicitors served by Mr. Fantl. REO retained Ms. Bonnie Tough of Tough, Podrebarac LLP to respond to the KO's motion. Although both KO and REO would deny it, the motion had the appearance of being a fight for ownership of a file that was likely to be very remunerative. I have reviewed the material filed for this motion, and it is clear that REO internally regarded the matter as a carriage dispute.

[36] On April 23, 2008, I released my Reasons for Decision dismissing KO's motion. Leave to appeal was granted, [2008] O.J. No. 2593 (S.C.J.). The Divisional Court, [2008] O.J. No. 4928 (Div. Ct.), and the Court of Appeal, [2009] O.J. No. 1826 (C.A.), ultimately upheld my decision, the Court of Appeal ruling in early May 2009.

[37] After an initial hesitation, REO, and most particularly, Transamerica did not let the KO motion and the series of appeals stop them from working towards implementing a settlement. The settlement negotiations and the plans to develop a restitution methodology continued based on the approach envisioned in the Fall of 2008. The burden of developing the methodology was on Transamerica, which, of course, had the information and the technology that would have to be employed to create a restitution methodology.

[38] My Reasons for Decision mentioned and set out various terms of Mr. Fantl's retainer agreement, and in the light of that disclosure, on May 13, 2008, Ms. Stitt wrote a letter to REO that addressed the matter of the fee to be paid to Class Counsel and she indicated in her letter that "the offer regarding the payment of legal fees referable to the management fee claim was intended to supersede any contingency arrangements." She also wrote about the effect of the addition of funds to the class proceeding, and her letter stated: "The fees payable to class counsel would not be increased exponentially simply because 25 other funds were being rolled into the settlement with Transamerica's concurrence (Justice Hoy made this rather pointed observation to Mr. Kim when we appeared before her in September 2007). …"

[39] Ms. Stitt's letter also stated:

> My client has offered to resolve the excess management fee aspect of this litigation on a basis which is responsible, eminently fair to the class and which respects the interests of class counsel. It will not, however, embark

2009 CanLII 55704 (ON SC)

> upon this process if class counsel intends to seek to enforce the contingency agreement and receive as a first charge on the settlement funds 30% of the total compensation amount. The vigour with which Mr. Kim has fought to secure carriage of this litigation suggests that he believes that there is a massive “pay day” at the end of the road equal to 30% of the settlement value of this action, which is not the case. Transamerica Life Canada would never have agreed to fold in the other funds to make them subject to a 30% contingency agreement when such an agreement would operate so obviously to the prejudice of its policyholders. Transamerica remains committed to completing this restitution process and to acting in a reasonable manner. We hope that we can complete this process working in conjunction with your firm to achieve an outcome that can be a credit to our class proceedings regime.

2009 CanLII 55704 (ON SC)

[40] On July 16, 2008, Mr. Fantl's claim was further amended to include the additional funds. (See Second Fresh as Amended Statement of Claim.) Transamerica did not consent, but it did not oppose the amendments.

[41] While the various KO appeals were still pending, on September 2, 2008, REO and Transamerica issued a joint press release, which was also posted on their respective websites, announcing that the parties had reached an agreement in principle to settle the management expense claim and announcing the anticipated next steps, including the reset of the management fees around November 14, 2008 to contractually permitted amounts.

[42] On October 28, 2008, REO and counsel for Transamerica executed a "Memorandum of Understanding Concerning Proposed Settlement," confirming the parties' agreement in principle regarding the broad outlines of the proposed settlement. Clause 8 of that Memorandum addressed Class Counsel fees; it stated:

> 8. The legal fees and disbursements of Class Counsel, which Class Counsel would otherwise be entitled to seek and recover from the class members, shall be paid directly by Transamerica in such amounts to be agreed upon by the parties and Class Counsel and then approved by the Court or, failing such agreement, in an amount to be determined by the Court. The Court will approve or determine the overall fees and disbursements of Class Counsel as aforesaid at a motion for that purpose to be heard following the settlement approval hearing. For clarity, if the proposed settlement is approved, Class Counsel shall not seek to enforce any contingency fee arrangements previously agreed upon with the representative plaintiff as against the recovery by individual class members, and the amounts paid in restitution to each class member by Transamerica shall not be diminished or attached by any claim for legal fees and disbursements of Class Counsel or their experts and consultants.

[43] During the Fall of 2008 and into 2009, REO continued negotiations toward a formal agreement, and it made a deliberate decision not to negotiate the counsel fee until the settlement agreement was finalized.

[44] By order dated February 27, 2009, Deloitte & Touche LLP were appointed as Monitor/Administrator for the proposed settlement.

[45] The parties attended at a case conference on March 5, 2009 where, on the plaintiff's motion and with Transamerica's consent, a notice program was approved, including the text of notices that stated that the parties had agreed to a restitution methodology. A pre-approval case conference was scheduled for April 23, 2009.

[46] On April 23, 2009, there was a case management conference, and I was advised that the parties had reached an impasse in finalizing the settlement, but they were optimistic that with mediation, the gap could be bridged. They asked the court to arrange a mediation session, and I asked Justice Colin Campbell to help the parties.

[47] I was somewhat surprised by the news that there were unresolved points that required mediation, but I did not appreciate until the settlement approval motion and the fee approval motion how serious were the points and how the settlement was allegedly imperiled. Unfortunately, Transamerica accuses REO of acting irresponsibly and in its own selfish interests. I, however, see this submission as without merit. I can understand Transamerica's frustration, but I can also understand REO's indignation to Transamerica's submission. For my part, I see both parties just attempting to negotiate a fair outcome for the Class.

[48] On May 7, 2009, the Court of Appeal released its decision, and the Court upheld my decision that KO could not challenge Mr. Fantl's selection of REO as his lawyers for the class proceeding. Legal fees and disbursements totaling $144,750.01 (reduced to reflect costs awards totaling $30,000) were paid to Ms. Tough's firm. Transamerica has calculated that about $850,000 in docketed time is referable to the KO motion and the subsequent appeals,

[49] The parties met with Justice Campbell on May 26 and 27, 2009 to mediate their dispute. The result of the mediation was to improve the benefits to Class Members. Class Counsel submits that their efforts added about $7.5 million to the overall compensation package. Transamerica says this is an overstatement, because it negotiated a $2.1 to $2.7 million reduction to the expense claim calculation.

[50] In any event, the mediation was successful in leading to an overall settlement, and once the paper work was done on July 10, 2008, a Settlement Agreement was concluded and signed by the parties.

[51] On July 15, 2009, Mr. Fantl confirmed by letter agreement that he had retained REO in accordance with the terms of the original retainer agreement with REKO. The letter, which notably comes at a point, where Mr. Fantl knew that he would not be paying any counsel fee himself stated:

> I am writing to confirm our mutual understanding and agreement that your retainer of REO was intended to be, and is, on the same terms and conditions as set out in the retainer agreement you entered into with REKO on May 16, 2006 and that those terms and conditions apply to the expanded

2009 CanLII 55704 (ON SC)

> claim reflected in the amended Statement of Claim. I am also writing to confirm that the reference to recovery by the “Client” in paragraph 17 of the retainer agreement is meant to refer to the total amount recovered by the members of the Class.

2009 CanLII 55704 (ON SC)

[52] Transamerica estimates that the number of policyholders who fall within the proposed class is at least 307,446 persons. It is estimated that approximately 200,000 persons will have entitlements under the settlement.

[53] For the present purposes of a motion to approval the fee of Class Counsel, it is only necessary to sketch out the nature of the settlement agreement without going into the details, more of which may be found in my Reasons for Decision for approving the settlement. The major elements are as follows:

- The settlement is without prejudice to Mr. Fantl's right to continue the action in respect of the tracking claim.

- The settlement relates to 28 segregated funds originally offered by NN Life and its predecessors under the specified individual variable insurance contracts and universal life insurance contracts.

- Transamerica pays, without admission of liability, compensation to any policyholders who purchased the insurance products if they were charged management fees, investment advice fees and/or operating expenses in excess of the amounts permitted in the applicable insurance contracts or represented in related summary information folders.

- The objective of the restitution calculation is to put each policyholder in the position he or she would have enjoyed under the insurance contract had the overcharges not occurred, subject to certain assumptions, adjustments and compromises.

- Compensation will be paid to Class Members without regard to any potential limitation periods.

- If a policyholder died during the period for which the policy could otherwise have remained in force, Transamerica will apply the compensation owing towards past premiums and will honour a claim by policy beneficiaries for the applicable death benefit payable in accordance with the terms of the policy.

- Class members will not be required to pay class counsel’s legal fees and disbursements. These will be paid directly by Transamerica.

[54] The ultimate amount of restitution to be paid will depend on transactions which occurred between June 19, 2009 and the restitution calculation date, changes in market conditions, and fluctuations in interest rates. Transamerica provisionally estimates (as of July 23, 2009) that the value of the overall restitution, including interest, involving

transactions up to June 19, 2009 is $40,546,911. The restitution referable to the Can-Am Fund is estimated to be approximately $9 million as of July 23, 2009.

[55] The Settlement Agreement entered into between the parties defines "Class Counsel Fees" in Article 1(o) as follows:

> "the fees, disbursements, GST and other applicable taxes of Class Counsel and the Plaintiff's previous legal counsel, REKO, including the reasonable fees and disbursements of the Plaintiff's accounting and actuarial consultants, Pricewaterhouse Coopers LLP ("PwC"), as may be agreed upon by the Parties and/or fixed or approved by the Court".

[56] Paragraphs 32-36 provide the details of the parties' agreement with respect to the payment of Class Counsel Fee. These paragraphs state:

> 32. Class Counsel Fees and expenditures shall be paid by the Defendant pursuant to the terms and conditions specified below. The Class Counsel Fees which Class Counsel would otherwise be entitled to seek and recover from the Class Members under its retainer agreement with the Plaintiff or otherwise, shall be paid directly by the Defendant.
>
> 33. For clarity, if this proposed Settlement is approved, Class Counsel shall not seek to enforce any contingency fee arrangements previously agreed upon with the Plaintiff as against the recovery by individual Class Members, and the amounts paid in Restitution to each Class Member by the Defendant shall not be diminished or attached by any claim for Class Counsel Fees.
>
> 34. The amount of Class Counsel Fees shall either be agreed upon by the Parties prior to the Approval Hearing and approved by the Court, or shall otherwise be fixed by the Court, at a hearing immediately following the Approval Hearing.
>
> 35. Class Counsel shall provide the Defendant and Defence Counsel by no later than July 24, 2009 with full particulars of the fees and disbursements being claimed in connection with this settlement, including copies of all docket entries and supporting invoices in respect of disbursements and with the same detailed information from PwC in respect of their fees and disbursements. All such docket entries may be redacted for privileged information, particularly given the outstanding Tracking Claim. Any docket entries, invoices or information disclosed in connection with the Tracking Claim shall not, however, constitute or be argued by the Defendant to amount to a waiver of privilege over those entries, invoices or information. Any dispute regarding the sufficiency of the dockets or propriety of redactions may be addressed by the Court prior to or at the Approval Hearing, and Class Counsel shall provide, if necessary, unredacted docket entries to the Court for that purpose. Class Counsel shall also provide the Defendant and Defence Counsel with its reasonable estimate of

2009 CanLII 55704 (ON SC)

> the fees and disbursements to be incurred up to and including the conclusion of the Approval Hearing to allow the Parties to reasonably and effectively attempt to agree on Class Counsel Fees. Class Counsel will also make its best efforts to provide docket entries and supporting invoices for the balance of the period up to the Approval Hearing as they become available. All such docket entries and estimates, and all copies thereof, shall be returned to Class Counsel if the Settlement is not approved, and the Defendant agrees that the privilege over such dockets or estimates shall not be waived or affected in such circumstances.
>
> 36. In the event that this Settlement Agreement is approved, the Parties shall agree upon the amount of any further Class Counsel Fees and disbursements, including the reasonable fees and disbursements of PwC, to be paid by the Defendant in connection with the implementation of this Settlement Agreement and Class Counsel shall provide the Defendant and Defence Counsel full particulars of such fees and disbursements, including copies of docket entries and supporting invoices. In the event of disagreement concerning same, the Court shall form time to time, upon motion by the Plaintiff or Class Counsel on notice to the Defendant, fix the amount of such fees and disbursements.

[57] At paragraph 46, the Settlement Agreement contains an entire agreement clause that provides that any prior or contemporaneous agreement is merged and integrated into the Settlement Agreement.

[58] On July 24, 2009, further to the requirements of Article 35 of the Settlement Agreement, REO delivered a Brief of Costs and Disbursements.

[59] As already mentioned above, Transamerica denies that counsel fee should be calculated based on a contingency fee. It submits that a multiplier of 2.5 for the pre-settlement services and a multiplier of 1.5 for the settlement negotiation services, excluding any services with respect to the carriage dispute, would yield the appropriate fee of $3,023,465, exclusive of GST.

[60] This description of the factual background may conclude with two observations, the first of which I will return to below.

[61] The first observation is that typically a contingency fee involves a sharing of the client’s recovery between lawyer and client. The client gives up a percentage of his or her recovery. A contingency fee reduces the client’s recovery by a percentage of the recovery. Atypically, in the case at bar, the so-called contingency fee would have no effect at all on the client’s recovery. In the case at bar, the client does not share his or her recovery with the lawyer.

[62] The second observation, made by Mr. Ritchie during argument, is that it is sad that this dispute over fees has led both sides to denigrate the value of the contribution made by the other to achieving what was a good result for class members.

2009 CanLII 55704 (ON SC)

The Preliminary Issue of Transamerica's Standing

[63] REO is the moving party for the motion to approve its counsel fee. It has standing on the motion: *Parsons v. Canadian Red Cross Society*, [2001] O.J. No. 214 (C.A.).

[64] Before this fee motion was argued, Mr. Fantl took the position that Transamerica did not have standing on the motion by REO for approval of Class Counsel fee. Transamerica responded with a motion for an order under s. 12 of the *Class Proceedings Act, 1992* directing that it had full party status on the motion.

[65] In taking the position that Transamerica did not have standing, Mr. Fantl relied on *Parsons v. Canadian Red Cross Society*, *supra*. In that case, the federal government was a defendant in a class action that had settled. The settlement fixed the amount of the government's contribution, and thus it had no direct interest as to how much of the settlement funds should be allocated for the Class Counsel fee. Nevertheless, it applied to be a party on the fee approval motion, and the Court of Appeal upheld the decision of Justice Winkler that the government had no standing on the motion.

[66] As I read the *Parsons* decision, it goes no further then saying that a defendant who is not "affected" by the fee approval motion has no standing on the motion. The Court of Appeal left open the possibility that a defendant who is affected by the motion may be a proper party on the motion. This possibility is made clear by Justice Morden at para. 19 of the judgment, where he states:

> Nothing we have said, of course, is intended to reflect a view on whether or not defendants in some class proceedings should have the right to participate as parties with rights of appeal in fee-fixing motions or applications. Much will depend on the facts of the particular case. We have merely held that, on the facts of this case, we do not think that the appellants' rights were affected by the judgment of Winkler J. and that, accordingly, there is no basis for appeal from his judgment.

[67] In the immediate case, under the Settlement Agreement, Transamerica is responsible to pay Class Counsel fees. The amount of those fees will be determined by this motion. Whether Transamerica pays $3 million or $13.5 million is obviously a matter that affects it. As a matter of rudimentary fairness, it has and it should have full party standing to argue this motion, and I so order.

Discussion and Analysis

[68] Under 32(2) of the *Class Proceedings Act, 1992*, "An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor."

[69] REO moves for an approval of Mr. Fantl's contingency fee agreement (with REKO and then REO) that provides for a contingency fee of 30% of the value of the settlement plus disbursements.

2009 CanLII 55704 (ON SC)

[70] On a motion under s. 32 (2), the court must eventually assess the reasonableness and fairness of the amount claimed by Class Counsel.

[71] In *Lawrence et al. v. Atlas Cold Storage et al*. (February 12, 2009), Toronto 04-CV-263289CP (S.C.J.), Justice Lax approved a fee retainer agreement because it complied with the formalities of a contingency fee agreement and then she determined whether it was fair and reasonable. Her judgment was affirmed by the Ontario Court of Appeal, 2009 ONCA 690, and Justice MacFarland stated at paragraph 36:

> [R]egardless of the interpretation of ss. 32 and 33, at some point the motion judge was obliged to assess the reasonableness and fairness of the amount claimed by Class Counsel. Counsel further acknowledged that whether it was under s. 32 or s. 33, the motion judge had to determine whether the fee amount produced by the terms of the fee agreement was within the range of what was reasonable and fair. In my view, it follows that if the judge decided it was not fair and reasonable, she had authority under either s. 32 or s. 33 to determine what a reasonable amount was. Regardless of what interpretation may be placed on ss. 32 and 33, the reasonableness and fairness of the fees must be addressed.

[72] I am relieved of the burden of resolving several of the contentious factual and interpretative issues in this case by the imperative of s. 32 of the *Act* that ultimately, I must determine whether the fee claimed by REO is within the range of what is reasonable and fair. For instance, Mr. Fantl argues that under the Settlement Agreement, Transamerica has agreed to pay the amount that the Class Members would otherwise pay to Class Counsel under its Retainer Agreement. However, because Class Counsel has applied under s. 32, what class members would otherwise pay must past the test of what is fair and reasonable. Likewise, Transamerica's arguments that it never agreed to pay a 30% contingency fee on the value of the settlement need not be determined because Transamerica did bind itself to pay what the court determines to be fair and reasonable. For similar reasons, it is not necessary to decide whether the settlement was a "defendant-driven settlement" or the extent to which Class Counsel can take credit for modifying the behaviour of Transamerica.

[73] In its factum. REO repeatedly makes a submission to the effect that since Mr. Fantl has agreed both in his retainer agreements and also by his approval to REO's motion to a 30% percentage contingency fee and since Transamerica has agreed to pay Mr. Fantl's legal fees, that is the end of the discussion, and the court must approve the 30% contingency fee. Once again, that submission is overcome by the court's obligation under s. 32 to determine what is a fair and reasonable counsel fee.

[74] REO's submission, however, is helpful because it identifies what is analytically troublesome about the motion for fee approval. The troublesome feature is that every counsel fee (and indeed no counsel fee at all) would be fair and reasonable to Mr. Fantl and the members of the class because it is now a matter to which they are indifferent (apart from wishing REKO and REO well).

2009 CanLII 55704 (ON SC)

[75] As I observed above, Mr. Fantl and the class are not being asked to share their recovery. They have no skin in the game, and in these circumstances it is nonsensical to talk about them being indemnified for their legal expenses, because they, in truth, are not incurring any. Typically, if the court is asked whether a contingency fee is fair, the issue the court would address is whether it would be fair and reasonable for the class to give up some percentage of their recovery, but that is not happening. The analytical problem is how to measure fairness and reasonableness in these circumstances.

[76] Fortunately, identifying the analytical problem, also suggests a means to solve it. The solution is to measure fairness and reasonableness from more perspectives. What the case at bar requires is to measure fairness and reasonableness of the counsel fee against what is fair and reasonable to all of the class, Class Counsel, the defendant, and the public interest.

[77] I include the public interest because what incurred in this case was a good thing and not to be discouraged. The defendant, Transamerica, agreed to be responsible for paying for the Class Member's access to justice. It is in the public interest and a good thing to encourage defendants to pay the fair and reasonable legal costs of the persons that they are alleged to have injured, and in the context of class proceedings, paying fair and reasonable legal costs includes paying a premium for the risk that Class Counsel accepted in bringing the matter forward and for assisting and not obstructing the fair resolution of the litigation. Transamerica acknowledged in its factum that Class Counsel should receive a premium for its services.

[78] I also include the public interest because it is in the public's interest to encourage the economic use of not just judicial resources (which is a well known policy factor of the *Class Proceedings Act, 1992)* but to encourage the economic use of legal resources. Too much litigation already is a battle over legal fees, and in the case at bar, it would have been a waste of resources to obstruct a resolution of the Class Member's claims because Class Counsel would wish to push the matter to trial in order to obtain their share of the prize based on a contingency fee.

[79] Therefore, my approach in determining what is the fair and reasonable counsel fee in the case at bar, is to examine the factors identified in the case law as relevant to assessing the reasonableness of fees and the reasonableness of contingency fees against the measure of what would be fair and reasonable in the circumstances of this case to all affected parties. To borrow from Ms. Stitt's letter, I propose to complete this process to achieve an outcome that can be a credit to the class proceedings' regime.

[80] The first step in the process is to identify the factors relevant to determining the fairness and reasonableness of Class Counsel fees. The second step is to apply the relevant factors using several approaches to determining what would be fair to the class, to Class Counsel, to the defendant, and to the public interest.

[81] Factors relevant in assessing the reasonableness of the fees of any Class Counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of

2009 CanLII 55704 (ON SC)

responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.); *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.) at para. 8; *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.); *Gariepy v. Shell Oil Co.*, [2003] O.J. No. 2490 (S.C.J.) at para. 13; *Bilodeau v. Maple Leaf Foods Inc.*, [2009] O.J. No. 1006 (S.C.J.) at para. 71; *Cohen v. Kealey & Blaney*, [1985] O.J. No. 160 (C.A.)

[82] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, *supra* at paras. 59-61.

[83] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304 (Gen. Div.); *Windisman v. Toronto College Park Ltd.* [1996] O.J. No. 2897 (Gen. Div.); *Serwaczek v. Medical Engineering Corp. supra*; *Parsons v. Canadian Red Cross Society*, *supra*; 799376 *Ontario Inc. (c.o.b. Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group Inc.*, [2008] O.J. No. 5280 (S.C.J.).

[84] What is agreed between the representative plaintiff and Class Counsel is just one factor in fixing and approving Class Counsel's fee: *Gagné v. Silcorp* (1998), 41 O.R. (3d) 417 (C.A) at para. 25-27; *Martin v. Barren*, [2008] O.J. 2105 (S.CJ.) at para. 43.

[85] In identifying factors, I think it is also helpful to consider the law about contingency fees generally. In Ontario, the leading case is *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.), which accepted that the common law had developed to accept contingency fees because of their value in facilitating access to justice. The Court concluded that contingency fees were not necessary to be regarded as prohibited by the *Champerty Act*. In this case, Associate Chief Justice O'Connor stated at paras.

> [75] To be clear, I am not suggesting that contingency fee agreements can never be champertous. Rather, I conclude only that contingency fee agreements should no longer be considered *per se* champertous. The issue of whether a particular agreement is champertous will depend on the application of the common law elements of champerty to the circumstances of each case. A court confronted with an issue of champerty must look at the conduct of the parties involved, together with the propriety of the motive of an alleged champertor in order to determine if the requirements for champerty are present.

2009 CanLII 55704 (ON SC)

> [76] When considering the propriety of the motive of a lawyer who enters into a contingency fee agreement, a court will be concerned with the nature and the amount of the fees to be paid to the lawyer in the event of success. One of the originating policies in forming the common law of champerty was the protection of vulnerable litigants. A fee agreement that so over-compensates a lawyer such that it is unreasonable or unfair to the client is an agreement with an improper purpose -- i.e., taking advantage of the client. See *Thai Trading, supra*, at pp. 788, 790 Q.B. The applications judge in this case dealt with this concern as follows, at p. 157 O.R.:
>
>> The suggested compensation may or may not be fair and reasonable, depending upon the outcome of the litigation in light of the difficulty of the case, as well as the time and expenses incurred. Counsel should be well rewarded if the litigation is successful, for assuming the risk and costs of the litigation. The compensation however should not be a windfall resembling a lottery win.

2009 CanLII 55704 (ON SC)

[86] All of the above factors are engaged in the case at bar, and a determination of what is a fair and reasonable fee may begin by considering REKO's and REO actual hours of work on the Fantl retainer, which are said to be worth $3,177,288.15. To that sum, I add the Sutts Strosberg and Camp Fiorante's claims for fees of $62,854.96. From this total sum, I deduct the work associated with the carriage dispute between REO and KO, which means that the so-called base fee is approximately $2.4 million.

[87] I agree with Transamerica's submission that REO's counsel fee should not include charges for fees associated with its carriage fight with KO. It seems to me that this expenditure of effort, which did little to advance the litigation for the Representative Plaintiff or the Class is part of the risk assumed by Class Council when it takes the retainer. This expenditure is part of what may justify the contingency fee or the multiplier of a base fee, but it is not reasonable to charge a client for what it costs the lawyer to safeguard a retainer from a competitor. These costs are a risk that the lawyer assumes when he or she takes on the retainer. Viewed in the context of the public's interest, it strikes me as a bad idea to encourage and intensify carriage fights by the prospect that the winner will not only get the file but be paid something by his or her client for getting the file.

[88] In *Bilodeau v. Maple Leaf Foods Inc.*, [2009] O.J. No. 1006 (S.C.J.) for similar reasons, I did not allow a disbursement for the legal fees incurred by two members of a consortium of Class Counsel to be recovered as a part of the approved Class Counsel fee. I, therefore, disallow the Tough, Podrebarac LLP disbursement. The remaining disbursements are unobjectionable.

[89] I turn now to determining a fair and reasonable fee by using the base fee and a multiplier. Here, I appreciate that Class Counsel's retainer agreements did not envision a multiplier being applied to their base fee, but in the circumstances of this case, where the evils of a multiplier approach are missing (visualize, a multiplier approach encourages

inefficiency and padded dockets), it makes sense to me to use a multiplier approach, at least, for the information it may provide as to what is a fair and reasonable counsel fee.

[90] In this regard, having regard to the risks undertaken, the role played by Class Counsel both before and after the proceedings moved from contested litigation to a settlement track, the considerable success achieved, and other cases about multipliers. I believe an appropriate multiplier would be around 2.75. This multiplier reflects the risks undertaken and the excellent result achieved. If this multiplier is appropriate, then Class Counsel's fee would be $6.6 million plus disbursements and GST. If a multiplier of 2.5 was employed - which is a multiplier suggested by Transamerica - the Class Counsel fee would be $6.0 million plus disbursements and GST.

[91] I disagree with Transamerica's submission that the range of the multiplier should be 1.5 for the settlement services and 2.5 for the services before a settlement seemed in the offering. Transamerica justified the differential multipliers by submitting that the multiplier should reflect the greater risk assumed by Class Counsel when everything is being challenged and the lesser risk when a settlement seems quite likely, which was the situation in the case at bar.

[92] However, as I pointed out during argument, it is arguable that despite any lower risk, the settlement work was the more valuable contribution to all concerned, including the public interest and Transamerica itself. Moreover, as Justice Winkler noted in *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.), the settlement path has its own set of risks, and indeed settlement negotiations may be a guise for a war of attrition that depletes the resources of Class Counsel. I am not suggesting that these circumstances existed in the case at bar, but I see no justification for applying differential multipliers, and although it think it low, a 2.5 multiplier applied to the adjusted base fee is within range of producing a fair and reasonable counsel fee.

[93] In *Gagne v. Silcorp* (1998), 41 O.R. (3d) 417 (C.A.), Justice Goudge discussed the process of determining the appropriate multiplier and stated at p. 425:

> I recognize that the selection of the precise multiplier is an art, not a science. All the relevant factors must be weighed. .... In the end, three considerations must yield a multiplier that, in the words of s. 33(7)(b), results in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well.

2009 CanLII 55704 (ON SC)

[94] I will test the multiplier of 2.75 in the manner suggested by Justice Goudge but, in my opinion, a fee of around $6.6 million plus disbursements and GST does not constitute an excessive proportion of the total recovery especially given that the counsel fee will not diminish the recovery. Further, in my opinion, a risk factor of 2.75 has regard to the result achieved and to the risks accepted by Class Counsel when it initially took on the case.

[95] Another possible approach to determining what is a fair and reasonable fee is to ask what benefit Transamerica obtained from the services of Class Counsel. The answer to this question is that Transamerica's promise to its policyholders to honour their policies was validated or authenticated by Class Counsel as being in the best interests of the policyholders. This validation came from a participant charged with protecting the interests of the class members and having a fiduciary duty to do so. In other words, Transamerica had advised its policyholders that it was going to make them whole, if it turned out that there were improper expense charges. Transamerica benefited from having its delivery on this undertaking scrutinized and validated by REO's participation and endorsement.

[96] While a contingency fee approach based on a percentage of the value of the settlement does not work in the circumstances of this case because there is no sharing of recovery between Class Counsel and class members, it is useful to reflect on what would be a fair fee for REO to charge for its role in validating and authenticating the fairness of the settlement. It seems to me that REO could fairly charge $6.6 million, which as it turns out is around 16% of the value of the settlement.

[97] Interestingly, a 16% percent recovery for Class Counsel is supported by an analysis of what Ontario courts typically award as a reasonable and fair fee in class proceedings. In "Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions," (2007), *The Canadian Class Action Review* 15, Professor Benjamin Alarie analyzed a sample of 27 reported Ontario class action decisions. His study revealed that the average multiplier was 2.48 with a median of 2.74 and that as a percentage of the value of the settlement, Class Counsel fees averaged 14.85 percent with a median of 14.73 percent. Professor Alarie's study revealed that approved Class Counsel fees increase with the value of the settlement but not proportionately to the increase in the settlement amount.

[98] The above considerations test the range of counsel fees as a multiple of a base fee, as against the retainer agreement, as against a percentage of recovery, as against the approved fees in a sample of reported Ontario cases, and as an incentive for Class Counsel to take on difficult cases in the future. See *v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.) at para. 63 and Justice Goudge's comments above.

[99] I conclude from the above analysis that a counsel fee of $7.0 million, which would be all inclusive of fee, disbursements, and GST, would be a fair and reasonable counsel fee.

2009 CanLII 55704 (ON SC)

Conclusion

[100] Accordingly, I grant REO's application and I approve a counsel fee of $7.0 million, all inclusive.

[101] If the parties cannot agree about the costs of this motion for approval, they may make written submissions beginning with REO within 20 days of the release of these Reasons for Decision, to be followed by Transamerica within a further 20 days.

Perell, J.

Released: October 15, 2009

2009 CanLII 55704 (ON SC)

COURT FILE NO.: 06-CV-306061- CP
DATE: October 15, 2009

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH FANTL

Plaintiff

- and -

TRANSAMERICA LIFE CANADA

Defendant

REASONS FOR DECISION

Perell, J.

Released: October 15, 2009

2009 CanLII 55704 (ON SC)

Tab 6

CITATION: Good v. Toronto Police Services Board, 2020 ONSC 6332
COURT FILES NO.: CV-10-408131CP
CV-15-524523CP
DATE: 20201022

2020 ONSC 6332 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN:

SHERRY GOOD

Plaintiff

and

TORONTO POLICE SERVICES BOARD

Defendant

AND BETWEEN:

THOMAS HOWARD TAYLOR

Plaintiff

and

TORONTO POLICE SERVICES BOARD

Defendant

Proceedings under the *Class Proceedings Act, 1992*

2020 ONSC 6332 (CanLII)

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Eric K. Gillespie Murray Klippenstein and Kathleen Coulter* for the Moving Parties / Plaintiffs

Kevin McGivney, Glenn Zakaib and Jonathan Thoburn for the Responding Party / Defendant

HEARD: October 19, 2020

SETTLEMENT AND LEGAL FEES APPROVAL

[1] After almost a decade in litigation, these two high-profile class actions against the Toronto Police for wrongful arrest and detention have settled.

[2] The Good and Taylor class actions were brought on behalf of the hundreds of protestors and members of the public who were arrested and detained by Toronto Police during the G20 Summit that was held in Toronto in June 2010.

[3] As part of the settlement, Toronto Police have acknowledged that "many hundreds of members of the public were detained or arrested when they should not have been and were held in detention in conditions that were unacceptable" and that they "regret that mistakes were made."

[4] The proposed settlement with the defendant Toronto Police Services Board, the body with jurisdiction over the city's police force, has four components:

- Financial compensation to all class members (up to a maximum total of $16.5 million); every class member will receive between $5000 and $24,700 depending on the level of harm experienced (minus agreed-to deductions for the Class Proceedings Fund and class counsel legal fees);
- Police acknowledgement of wrong-doing;
- Police commitment to reforms in the policing of future public demonstrations; and
- Police commitment to expunge the arrest records of class members.

2020 ONSC 6332 (CanLII)

[5] The representative plaintiffs, Sherry Good and Thomas Taylor, ask this court to approve both the proposed class action settlement and class counsels' legal fees.

[6] At the approval hearing on October 19, 2020, I advised counsel that I had reviewed the affidavit and other written material filed in support of the approval motion. I then invited and heard their additional oral submissions. Having reviewed the five written objections that were in the filed material, I also invited two of the objectors who were present in court to explain the basis for their objections – and they did so.

[7] At the conclusion of the hearing, I was satisfied that the proposed settlement was fair and reasonable and in the best interests of the class. I was also satisfied that class counsels' legal fees were reasonable. I told counsel that both the proposed settlement and the legal fees were approved and I signed the requisite order. I advised everyone that I would release a written decision shortly, setting out my reasons in more detail.

[8] These are the reasons for my decision.

Background

[9] With class counsels' permission, I track the background narrative as described in their factum.

(1) The events of June 26 and 27, 2010

[10] On December 7, 2009, the Government of Canada announced that it would host a summit of the leaders of the Group of Twenty countries (the "G20") in Toronto. The Summit was held seven months later over the weekend of June 26 and 27, 2010.

[11] Given the experience at previous G20 and other summits, it was widely expected that political demonstrations would occur both before and during the Summit. As part of its planning process, Toronto Police set up a temporary Detention Centre for potential G20-related arrests on Eastern Avenue.

[12] As expected, thousands of people peacefully participated in public demonstrations. However, there were also instances of vandalism and property damage.

[13] The police made many arrests. In five specific areas of the city, they conducted "mass arrests" by surrounding and containing large numbers of demonstrators and other individuals who just happened to be at that particular location. In the end, more than 1,000 people were arrested and/or detained by Toronto Police.

(2) The class actions

[14] Ms. Sherry Good, who was detained in the mass arrest at the corner of Queen St. West and Spadina Ave. in downtown Toronto, commenced a class action (the "Good Action") in August 2010.

[15] The proposed class action included all individuals "in the City of Toronto who were arrested and/or subjected to mass detention by police, on June 26 and 27, 2010, and were: i) released without charge; or ii) imprisoned in the Eastern Avenue Detention Centre".

[16] The motion for certification was heard over the course of seven days in December of 2012 and January of 2013. In May 2013, the motions judge issued reasons dismissing the certification motion.[1] Ms. Good appealed the denial of certification to the Divisional Court. The Divisional Court allowed the appeal and granted certification but ordered that the class proceeding be divided into two actions.[2]

[17] As a result of this court order, Mr. Thomas Taylor issued a statement of claim on in March 2015 on behalf of the Detention Centre class. And Ms. Good amended the pleadings in her action, limiting her claim to the five mass-arrest locations (and not including the Detention Centre subclass, now the subject of the Taylor action).

[18] The defendant's appeal to Court of Appeal was dismissed[3] as was its attempt to seek leave to appeal to the Supreme Court of Canada. Six years into the litigation, the certification of the two class actions was now beyond dispute. The next step was the trial.

(3) Mediation

[19] In June 2017, soon after I assumed case management responsibilities, I suggested that mediation with the assistance of a judge acting as mediator may be beneficial. The

---

[1] *Good v. Toronto Police Services Board*, 2013 ONSC 5826.

[2] *Sherry Good v. Toronto Police Services Board*, 2014 ONSC 4583.

[3] *Good v. Toronto (Police Services Board)*, 2016 ONCA 250.

2020 ONSC 6332 (CanLII)

parties were open to this suggestion and Justice Morgan agreed to mediate the matter. The mediation was conducted in June 2018.

[20] By the end of the second day of the mediation, the parties had agreed on the monetary component as described above. The non-monetary component required a further mediation which was held in January 2019. Again, with the assistance of Justice Morgan, the parties were able to agree on the specific language describing the non-monetary aspects of the settlement agreement.

2020 ONSC 6332 (CanLII)

(4) Settlement

[21] The class consists of some 1000 individuals who were wrongfully arrested and detained in five different locations in downtown Toronto. There are six subclasses: the five initial arrest locations (the U of T Gymnasium, Queen and Spadina, the Esplanade, Eastern Avenue and Parkdale) and the so-called Detention Centre, which held the class members who were transported to the detention site from the five mass-arrest locations.

[22] As already noted, the settlement agreement consists of both a monetary and a non-monetary component.

Monetary component

[23] The settlement includes a commitment by the defendant to pay individual class members on a per-claim basis in specified amounts, up to an aggregate maximum of $16.5 million, as compensation for breaches of their rights and for individual harms sustained.

[24] The parties have agreed upon specific amounts of compensation payable to individuals based on their subclass. The actual amount payable to class members in each subclass varies and is based on the differing circumstances and experiences at each of the six locations. The longer the detention and the harsher the conditions of confinement (no toilet, no water, the severity of police conduct) the larger the compensation amount.

[25] These individual payments vary from $5000 to a high of $24,700:

- $5,000 for class members arrested in the Eastern Avenue and Parkdale subclasses;
- $11,000 for class members arrested in the Esplanade subclass;
- $12,000 for class members arrested in the Queen and Spadina subclass;
- $16,000 for class members arrested in the U of T Gymnasium subclass;

- Plus - an additional $8,700 for any class member who was transferred to and held at the Detention Centre.

[26] For example, a member of the Gymnasium subclass who was transferred to the Detention Centre after arrest will receive $16,000 plus $8,700 for a total of $24,700. A member of the Esplanade subclass who was transferred to the Detention Centre after arrest will receive $11,000 plus $8,700 for a total of $19,700.

[27] These compensation amounts are subject to a 10 per cent deduction for the Class Proceedings Fund and a 12.5 per cent deduction as a contribution towards class counsel legal fees.

Non-monetary component

[28] The non-monetary acknowledgements and commitments by the defendant police board were as important to the class as the monetary compensation amounts, even more so.

[29] A key provision is the defendant's acknowledgement of wrong-doing. As already noted, the Toronto Police Services Board has agreed that "many hundreds of members of the public were detained or arrested when they should not have been and were held in detention in conditions that were unacceptable" and that the police "regret that mistakes were made."

[30] Equally important to the class members was the commitment by the defendant to implement reforms in the policing of future public protests and to ensure that class members' arrest records would be expunged. The defendant agreed to issue a press release describing the non-monetary aspects of the settlement as soon as the overall settlement was judicially approved. This public statement by the police has now been made.

Settlement approval

[31] The applicable law on the approval of class action settlements is well established. The court must be satisfied that the proposed settlement is fair, reasonable and in the best

2020 ONSC 6332 (CanLII)

interests of the class. The settlement need not be perfect or ideal. The settlement will be approved if it falls within a zone of reasonableness.[4]

[32] As I noted in court during the approval hearing, the monetary and non-monetary features of this settlement were fair and reasonable and very much in the best interests of the class. My exact words were that "this is not just a good settlement; it is a very good settlement."

[33] I said this for the following reasons.

- The settlement is the result of a successful mediation and is recommended not only by experienced class counsel and dedicated representative plaintiffs but also by the class members, several of whom filed personal affidavits in support. Only five written objections were received (two of the objectors also attended in court). The objections - about the compensation amounts and the allocation system –were genuine and heartfelt but they cannot undermine what is a very good settlement for the vast majority of the class.

- Class counsel reviewed comparable mass-arrest settlements in the U.S. and correctly concluded that the compensation herein was more favorable than in the American cases and, in any event, within the zone of reasonableness.

- The option of proceeding to trial was considered but sensibly rejected. A trial would mean several more years of litigation, including appeals. The outcome of a trial was unpredictable and the risks of losing at trial were real given the legal defences available to the defendant. According to class counsel, the defendant would almost certainly argue two "themes": first, that there was a great deal of deliberate and violent vandalism during the Summit weekend, which (the defendant would argue) justifiably led to the measures taken by police; and second, that there was such a wide variation amongst the experiences (and conduct) of the class members that the case should not have been certified as a class action – and should now be decertified.

---

[4] *Dabbs v. Sun Life Assurance,* (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.).

2020 ONSC 6332 (CanLII)

- There was also no reason to believe that the compensation amounts that would be awarded at trial if the class prevailed would be more generous than those set out in the settlement agreement.

- Finally, even if the class were to prevail at trial, the court would not be able to impose the non-monetary components that were just as important, if not more important, to the class than monetary compensation. Indeed, as the representative plaintiffs and several class members confirmed, this class action was about "more than money."

[34] For all of these reasons, this is a very good resolution of the two class actions. The settlement is fair and reasonable and in the best interests of the class.

Legal fees approval

[35] Class counsels' request for legal fees is also fair and reasonable.

[36] The original retainers agreed to by the class representatives contemplated a "base fee plus multiplier" approach to class counsels' legal fees. However, class counsel decided to seek an approval of legal fees in an amount that they say is less than what would have resulted from the application of the multiplier principle.

[37] In particular, class counsel are seeking court approval for legal fees that amount to about 28 per cent of the $16.5 million compensation amount recovered for class members. However, the actual impact on class members will only be about 12.5 per cent because the defendant has agreed to contribute just under $3 million for the payment of the legal fees - over and above the $16.5 million for class member compensation. This means that the balance to be paid by class members is about 12.5 per cent. This amount will be deducted from the class member's individual compensation cheque.

[38] I note that over the course of the decade-long litigation, class counsel docketed more than 8000 hours in lawyer and law student time - about $3 million in legal fees. The disbursements amount is a relatively modest $23,373.

[39] I also note that both Ms. Good and Mr. Taylor support the requested legal fees and find them to be fair and reasonable and that no class member has suggested otherwise.

2020 ONSC 6332 (CanLII)

[40] In sum, I have no difficulty approving the requested legal fees and disbursements. If the retainer agreements had originally provided for a 28 per cent contingent recovery for legal fees, I would have approved this amount. As discussed in *Cannon*,[5] and as further refined in *Brown*,[6] this contingency fee amount is presumptively valid on the facts herein and should be approved.

Disposition

[41] Both the proposed settlement and the requested legal fees and disbursements are approved as fair and reasonable.

[42] Order to go as per the draft order that I signed at the conclusion of the hearing on October 19, 2020.

[43] My compliments again to counsel on both sides for achieving such a fair and reasonable resolution of the two class actions.

Signed: *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective from the date it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Judgment [Order] need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment [Order] may nonetheless submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: October 22, 2020

---

[5] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[6] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429.

2020 ONSC 6332 (CanLII)

2020 ONSC 6332 (CanLII)

Tab 7

CITATION: *Helm v. Toronto Hydro-Electric System Limited*, 2012 ONSC 2602
COURT FILE NO.: CV-10-415780
DATE: 20120508

2012 ONSC 2602 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Christian Helm,** Plaintiff/Moving Party

Toronto Hydro-Electric System Limited, Defendant/Respondent

BEFORE: G.R. Strathy J.

COUNSEL: *Charles Wright & Daniel Bach*, for the Plaintiff/Moving Party

Kelly Friedman, for the Defendant/Respondent

DATE HEARD: April 30, 2012

ENDORSEMENT

(Settlement Approval and Fee Approval)

[1] This is a motion for: (a) approval of a settlement reached by the parties; (b) approval of the fees of Class Counsel; and (c) approval of an "honorarium" of $2,500.00 to the representative plaintiff.

[2] The plaintiff in this proposed class action alleges that Toronto Hydro-Electric System Limited ("Toronto Hydro") breached s. 4 of the *Interest Act*, R.S.C. 1985, c. I-15, by failing to inform its customers of the effective annual rate of interest it charged on overdue accounts.

[3] Section 4 of the *Interest Act* states that where a written or printed contract provides for interest to be paid at a rate or percentage for any period less than a year, and does not express the equivalent annual rate, the collection of interest is limited to 5% per year. The rate actually charged by Toronto Hydro was 19.56% per annum. This rate was set out in its tariff, which had been approved by the Ontario Energy Board ("OEB"). However, Toronto Hydro's invoices to its customers referred only to a 1.5% monthly late payment interest charge and made no reference to the effective annual rate of interest.

[4] The plaintiff claims, among other things, that Toronto Hydro's invoice did not comply with the *Interest Act*. He alleges that he and other Class Members have been charged more than the limit permitted by law and that Toronto Hydro has thereby been unjustly enriched.

[5] On June 16, 2011, I heard a summary judgment motion brought by Toronto Hydro and a cross motion for judgment brought by the plaintiff. While my decision was under reserve, I was advised that counsel were pursuing settlement discussions. I agreed that my decision would not be released if the parties were able to reach a settlement. Settlement discussions continued, with counsel keeping the court advised of their progress, in the hope of reaching a settlement that would form a proper framework for the resolution of the litigation.

2012 ONSC 2602 (CanLII)

(a) Settlement Approval

[6] The parties have executed a Settlement Agreement that, subject to the approval of the court, resolves the claims of the Class Members for the total sum of CAD$5,835,882.00.

[7] On February 8, 2012, there was a preliminary motion to certify this action as a class proceeding for the purposes of settlement and to establish a procedure for the dissemination of a notice of this settlement hearing and an opt-out form. The opt-out period expired on April 16, 2012 and there have been no opt outs. Nor have there been any objections to the proposed settlement.

[8] The basic terms of the settlement are as follows:

> (a) The Defendant will consent to certification of a class proceeding for the purposes of settlement. The Class will consist of:
>
> > All persons that were customers (retail, commercial or otherwise) of the Defendant, who were billed at some time within the period from July 1, 2000 through to and including December 8, 2010, and who paid interest on an unpaid account billed during that period.
>
> (b) The Common Issue will be:
>
> > Did the Defendant breach the *Interest Act* by charging interest on unpaid customer accounts at a monthly rate which equated to more than 5% per annum without disclosing the equivalent annual rate on its bills dated between July 1, 2000 and December 8, 2010, inclusive?
>
> (c) The Defendant will provide CAD$5,835,882.00 in compensation to the Class, to be distributed as follows:
>
> > (i) The Defendant will make repayment, less applicable court-approved Class Counsel Fees, by mailed cheque or account credit, of interest paid in excess of 5% per annum (“Excess Interest”) to Class Members who, between December 7, 2008 and June 29, 2011, paid an amount equal to or greater than $30.00 in Excess Interest in respect of a bill issued on or before December 8, 2010 (“Refund Eligible Class Members”).

(ii) The Defendant will pay any residual funds, less Class Counsel Fees, to *cy près* recipient charities in proportions to be approved by the court.

(d) The Defendant will take all reasonable steps, including instructing third party collection agencies, within sixty (60) business days of the Approval Order to cancel all Excess Interest currently owed by Class Members that was assessed prior to December 9, 2010. The amount of accounts receivable to be cancelled and the benefit to the class in this regard is approximately $184,224.00. To the extent that any currently owed Excess Interest is collected before the *cy près* payment is made, and to the extent that such funds can reasonably be identified as Excess Interest, they will be paid to the *cy près* recipient charities in the same manner as the residual funds addressed above.

(e) The Defendant will achieve a final resolution of this matter and will not be required to admit liability for the allegations advanced in the Plaintiff's Claim. The action will be settled and dismissed on the merits with prejudice and without costs.

[9] The Refund-Eligible group is limited to Class Members who, between December 7, 2008 and June 29, 2011, paid an amount equal to or greater than $30.00 in Excess Interest. This was done for two primary reasons.

[10] First, Customer data for the portion of the Class Period prior to December 7, 2008 and after April 30, 2002, is stored on a different database than the one currently used by Toronto Hydro. It would have been disproportionately expensive and time-consuming to access this data. As well, Customer data for the beginning of the Class Period until April 30, 2002 is archived. Creating a structure to access this data and to convert it to manageable form would have been expensive and time-consuming. Moreover, logistical difficulties would have been created due to difficulties in locating former Customers of the defendant who are no longer Customers.

[11] Second, the estimated cost of distributing the Settlement Amount to Refund-Eligible Class Members is approximately $4.00 per Class Member. Nearly 60% of the Class Members paid less than $5.00 in Excess Interest. It would have been manifestly uneconomical to spend $4.00 to put $5.00 in the hands of a Class Member. By restricting refund entitlements to Class Members who paid at least $30.00 in Excess Interest, chronic late payers are compensated. Such chronic late payers have suffered the most from the alleged wrongdoing. It would further allow these individuals to benefit without compromising the parties' ability to achieve a meaningful settlement due to costs concerns.

[12] The *Cy Près* recipients are listed below, and were selected for the following reasons:

(a) United Way Centraide Canada, was selected because of its dedication to community-building and poverty-relief initiatives, as well as its ability to distribute *cy près* funds to numerous meritorious projects;

2012 ONSC 2602 (CanLII)

(b) Second Harvest, was selected because of its work toward supplying fresh, nutritious food to low income communities in the Toronto region; and

(c) Red Door Family Shelter, was selected because of its efforts in assisting Toronto families in crisis by providing them with transitional housing facilities.

2012 ONSC 2602 (CanLII)

[13] The plaintiff proposes, and I agree, that the *cy près* distribution ought to be split among the three recipients equally.

[14] In order to approve a settlement, the court must be satisfied that it is fair, reasonable and in the best interests of the class. The leading authority is *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.), which identifies the following factors that a court should take into account in approving a settlement;

> (a) its likelihood of success;
> (b) the amount and nature of discovery, evidence or investigation required to prosecute the action;
> (c) its terms and conditions;
> (d) the recommendation and experience of counsel;
> (e) the future expense, and likely duration of litigation and risk;
> (f) the recommendation of neutral parties, if any;
> (g) the number of objectors and nature of objections;
> (h) the presence of good faith, arms-length bargaining and the absence of collusion;
> (i) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation; and
> (j) the degree and nature of communications by counsel and the representative plaintiff with Class Members during the litigation.

[15] It is well understood, however, that these factors are only guides and that their relative importance will vary from case to case. In any particular case, some factors will have greater significance than others and weight should be attributed accordingly: *Parsons v. Canadian Red Cross Society*, 40 C.P.C. (4^{th}) 151 (S.C.J.).

[16] As a result of having heard the summary judgment motion on the merits, I am in a rather unique position. A judge on a settlement approval motion rarely has the benefit of such an intensive, merits-based analysis on agreed facts. Having had this benefit, I am able to form my own independent view of whether the settlement is fair, reasonable and in the best interests of the class.

[17] In this case, having had that perspective, I am satisfied that significant compromise was warranted, on both sides, and that the resulting settlement is well within the zone of reasonable outcomes. I am also satisfied, from my own observations, that the settlement was the result of good faith, arm’s length negotiations in which the parties were attempting to reach a resolution that was fair to Class Members, workable and reasonable. The settlement comes with the

recommendation of experienced and highly reputable counsel, on both sides and I am fully satisfied that they have fulfilled their duties to their clients and to the court in the negotiation of the settlement and resolution of this litigation. It is of significance, as well, that there have been no objections to the settlement.

[18] Every settlement involves compromise. This settlement is no exception. Some compromises had to be made as a practical matter to ensure that the costs of administration of the settlement did not become disproportionate to the amount actually paid to Class Members. I am satisfied, however, that the settlement, which includes not only direct payments to the Refund-Eligible Class Members, but also the forgiveness of arrears and the *cy près* distribution, is fair and reasonable.

[19] For these reasons, the settlement is approved.

(b) Class Counsel Fee Approval

[20] Class Counsel also move for an order: (a) approving the retainer agreement entered into with Christian Helm; and (b) approving Siskinds LLP's legal fees ("Class Counsel Fees") in the amount of $1,458,970.50, plus applicable taxes.

[21] Class Counsel seeks a fee of 25% of the recovery, namely $1,458,970.50 plus HST in the amount of $189,666.16. Under the terms of the settlement, the defendant is responsible for paying the first $10,000.00 in "reasonable" disbursements. The parties have agreed to a payment of $7,678.29 (inclusive of taxes, as applicable). Class Counsel is writing off the balance of the disbursements as well as all disbursements incurred after April 19, 2012. I should also note that under the terms of the settlement, the defendant agreed to pay the costs of giving notice of the settlement approval motion.

[22] Mr. Helm entered into a retainer agreement that provided that Class Counsel's compensation should be 25% of the recovery obtained in the action, plus disbursements and taxes. This is a reasonably standard fee agreement in class proceedings litigation. Mr. Helm supports Class Counsel's legal fee request. The fee agreement complies with the requirements of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*C.P.A.*) and it is approved.

[23] Since the commencement of the action, Class Counsel have financed disbursements totalling $10,741.37 (including taxes as applicable and as of April 19, 2012). In addition, as of April 19, 2012, Class Counsel had docketed time of $203,669.50.

[24] There are some particular aspects of this case that should be taken into account in assessing whether the fee is fair and reasonable:

- the amount of the settlement is substantial, particularly having regard to the legal difficulties associated with recovery of the claim;

2012 ONSC 2602 (CanLII)

- leaving aside the monetary benefit to Refund Eligible Class Members, there are direct benefits to all Class Members through the cancellation of Excess Interest charges, there is a substantial *cy près* payment and actual behaviour modification has been achieved;

- the proceeding was funded entirely by Class Counsel and no application to the Class Proceedings Fund was required;

- there was significant risk to Class Counsel in taking on this case, in which liability was hotly contested and the outcome difficult to predict; and

- the proceeding was conducted in an efficient, imaginative and cost-effective manner.

[25] The proposed fee represents a significant premium over what the fee would be based on time multiplied by standard hourly rates. Is that a reason to disallow it? If the settlement had only been achieved four years later, on the eve of trial, when over a million dollars in time had been expended, would the fee be any more or less appropriate? Should counsel not be rewarded for bringing this litigation to a timely and meritorious conclusion? Should counsel not be commended for taking an aggressive and innovative approach to summary judgment, ultimately causing the plaintiff to enter into serious and ultimately productive settlement discussions?

[26] Plaintiff's counsel are serious, responsible, committed and effective class action counsel. They are entrepreneurial. They will likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here.

[27] For those reasons, I approve the counsel fee.

(c) <u>Honorarium for Representative Plaintiff</u>

[28] Counsel requests an honorarium of $2,500.00 for Mr. Helm, to be paid out of the settlement fund. They note that Mr. Helm carried out his responsibilities in a diligent and proper manner, providing assistance in the litigation leading to the settlement. They say that were it not for Mr. Helm's willingness to represent the class despite his small personal stake in the action, there would have been no settlement. Mr. Helm's efforts resulted in nearly immediate behaviour modification: the defendant brought its invoices into compliance with law shortly after the filing of the claim. Counsel says that Mr. Helm's accomplishments in this action far exceed his individual interest, which is only about $70.00, and that some modest payment is in order to recognize his accomplishment and to provide some indemnity for the time and effort he has put into the case.

2012 ONSC 2602 (CanLII)

[29] I accept that I have jurisdiction to award an honorarium: *Wilson v. Servier Canada Inc*, 2005 CarswellOnt 1020 at para 95 (S.C.J.)*; Pysznyj v. Orsu Metals Corp,* [2010] O.J. No 1994 at para 31 (S.C.J.); *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, 2009 CarswellOnt 4962 at paras 69-70 (S.C.J.); *Smith Estate v. National Money Mart Co,* 2011 ONCA 233 at paras 133-136.

[30] I discussed the issue of compensation or honoraria for representative plaintiffs at some length in my settlement approval decision in *Robinson v. Rochester Financial Ltd.*, [2012] O.J. No. 534; 2012 ONSC 911. I noted in that case, at para. 43, that "compensation should be reserved to those cases, where, considering all the circumstances, the contribution of the plaintiff has been exceptional". In my view, this is not an exceptional case.

[31] My decision not to award an honorarium should not be perceived by Mr. Helm as a lack of appreciation for what he has accomplished in commencing this action and in bringing it to a successful conclusion. Mr. Helm can take some satisfaction from the fact that this case, his case, *Helm v. Toronto Hydro-Electric System Limited*, has accomplished the goals of the *Class Proceedings Act, 1992* – it has brought access to justice to thousands of Toronto Hydro customers; it has actually achieved behaviour modification by causing Toronto Hydro to change its invoices; and it has resulted in judicial economy. The settlement puts real money into the hands of many Toronto Hydro customers and the *cy près* award will bring assistance to others in need. Mr. Helm can be justly proud of these accomplishments and he should be commended for them.

[32] In closing, I express the court's appreciation to counsel on both sides for the efficient manner in which this action has proceeded and has been brought to a satisfactory conclusion.

G.R. Strathy J.

DATE: May 8, 2012

2012 ONSC 2602 (CanLII)

Tab 8

CITATION: Ironworkers Ontario Pension Fund v. Manulife Financial 2017 ONSC 2669
COURT FILE NO.: CV-09-383998-CP
DATE: 20170508

2017 ONSC 2669 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IRONWORKERS ONTARIO PENSION FUND and LEONARD SCHWARTZ, Plaintiffs

AND:

MANULIFE FINANCIAL CORPORATION, DOMINIC D'ALESSANDRO and PETER RUBENOVITCH, Defendants

Proceeding under the *Class Proceedings Act*, *1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Daniel Bach, Michael Wright* and *Alex Dimson* for the Plaintiffs

Patricia D. S. Jackson for Manulife Financial Corporation

HEARD: April 28, 2017

CLASS ACTION SETTLEMENT AND RELATED APPROVALS

[1] After almost eight years of litigation, this securities class action against the country's largest life insurance company has settled for $69 million.

[2] The plaintiffs bring three motions seeking judicial approval of (i) the settlement, the plan of allocation and the payment of honoraria to the representative plaintiffs; (ii) the payment of class counsel contingency-based legal fees; and (iii) the payment of a preliminary commission to a third-party litigation funder.

[3] This is a settlement of the Ontario Action commenced in 2009, with leave and certification granted in 2013,[1] and the Quebec Action also commenced in 2009, with authorization to proceed granted in 2011.[2] These are parallel class proceedings that have been brought on behalf of current and former shareholders of Manulife Financial Corporation ("MFC") in Ontario and Quebec and have been prosecuted in tandem.

[4] The actions were settled in December, 2016 after several mediations just as a summary judgment motion was being scheduled in the Ontario Action and a few months before the trial was to start in the Quebec Action. This was a "late stage" settlement. In a late stage settlement, the supervising class action judge will be justified in assuming that class counsel had a complete or almost complete understanding of the risks and rewards of further litigation and will be more comfortable relying on class counsel's recommendation that the settlement is indeed fair and reasonable and in the best interests of the class.

[5] For the reasons set out below, the $69 million settlement is approved, as is the plan of allocation, the payment of honoraria to the representative plaintiffs, the payment of class counsel contingency-based legal fees, and the payment of a preliminary commission to a third-party litigation funder.

Background

[6] The background facts were set out in my leave and certification decision[3] and can be briefly summarized as follows. Manulife Financial Corporation ("MFC") is the largest life insurance company in Canada. In early 2004, MFC added several new guaranteed investment products ("the Guaranteed Products") to its segregated funds line-up. Unlike with the older variable annuity products, MFC decided that the new products would not be hedged or reinsured. The risk of fluctuations in the equity market and in generating the money needed to provide the promised return on the Guaranteed Products would be fully borne by MFC itself.

[7] The new Guaranteed Products line was a success. MFC proceeded to grow the business from about $71 billion in early 2004 to about $165 billion by year-end 2008. But all or almost all of it was unhedged and uninsured. When the full force of the global

---

[1] *Dugal v. Manulife Financial*, 2013 ONSC 4083.

[2] *Lamoureux v Société Financière Manuvie*, (Case no. 200-06-000117-096, July 8, 2011).

[3] *Dugal, supra,* note, 1 at paras. 6 -14.

2017 ONSC 2669 (CanLII)

financial crisis hit in the fall of 2008 and the Canadian and American equity markets fell by more than 35%, MFC found itself badly overexposed.

[8] On February 12, 2009 MFC released its annual financial statements for year-end 2008. The financial statements noted that over the year, corporate profits had fallen by almost $3.8 billion (almost $2 billion of this was attributed to the Guaranteed Products line) and earnings per share had dropped from $2.78 just one year earlier to 32 cents. The financial statements also made clear that the company had to increase its reserves by more than ten times, from $526 million at year-end 2007 to $5.783 billion at year-end 2008, because of its unhedged exposure to the equity market. Noting these losses and the fact that "unlike most of the other large writers of variable annuities and segregated funds in North America, [MFC] has not implemented a comprehensive equity hedging program," Moody's placed MFC's ratings on review for a possible downgrade.

[9] The market reacted immediately. The MFC share price dropped 6% on February 12 on heavy trading volume. Over the next ten days the share price dropped another 37%. By the end of the first quarter of 2009, the shares were trading at $8.92, down from $38.28 just six months earlier—a drop of almost 77%.

[10] The Ontario and Quebec Actions followed soon thereafter. A class action was also commenced by MFC shareholders in the U.S.[4]

(1) Settlement and plan of allocation approval

[11] Section 29(2) of the *Class Proceedings Act*[5] requires the court to approve the class action settlement before it can take effect. The judge must be satisfied that the proposed settlement is fair and reasonable and in the best interests of the class.[6]

[12] The vast majority of class action settlements materialize just before or just after certification. In most of the cases, documents have not been exchanged, discoveries have not taken place and class counsel's knowledge level about the risks and rewards of further litigation is, to say the least, at a minimum. In such early stage settlements, most

[4] *In Re Manulife Financial Corporation Securities Litigation*, 09 Civ. 6185 (JFK) (S.D.N.Y., May 23, 2011).)

[5] *Class Proceedings Act, 1992,* S.O. 1992, c. 6.

[6] *Dobbs v. Sun Life Assurance,* (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998.

2017 ONSC 2669 (CanLII)

judges, myself included, need to be satisfied that the settlement falls within "a zone of reasonableness."[7]

[13] As already noted, this was not an early stage settlement. Quite the contrary. Statements of defence were filed; there was extensive production and review of more than 300,000 documents; discoveries of numerous witnesses were conducted over some ten days; the key issues were analyzed in more than a dozen expert reports; the litigation progressed through several court decisions both here and in Quebec, and there were a number of confidential mediation sessions.

[14] In a late-stage settlement such as the one here, I am prepared to accept that class counsel was well informed about the risks and rewards of further litigation when the settlement was reached and that the settlement was indeed in the best interests of the class.

[15] The various litigation risks and legal impediments that could have resulted in the action being dismissed were legitimately identified by class counsel as follows:

- *No misrepresentations*. There was compelling evidence that MFC's lack of hedging was fully understood by market analysts. In various conference calls, MFC disclosed that the company had no hedging program and retained most of the risk associated with the variable annuity products. Moody's wrote that MFC "foregoes a hedging program on the view that value-added from hedging in the long-term does not justify the costs," and Standard and Poor's explained that one of MFC's weaknesses was that the company's "[v]ariable annuities book since 2004 remains largely unhedged."

- *Reasonable investigation defence*. There was compelling evidence that MFC's risk management practices had been reviewed by Deloitte, Oliver Wyman, Moody's, Standard & Poor's, Towers Perrin Tillinghast, and PricewaterhouseCoopers, all of whom determined that the risk management practices were broadly consistent with industry practice.

- *No correction*. The defendants deny that a corrective disclosure occurred on February 12, 2009. The information released on this date, they say, was incremental to the information provided in a previous disclosure in December, 2008, when MFC revealed information about the company's expected loss for

[7] Discussed more fully in *Clegg v. HMQ Ontario*, 2016 ONSC 2662, at paras. 26-36.

2017 ONSC 2669 (CanLII)

fiscal 2008 and disclosed that they would increase their Guaranteed Products related reserves to approximately $5 billion by year-end (the actual amount of the increase disclosed on February 12 was $5.783 billion). The defendants say that the information released on February 12, 2009 was "stale" and irrelevant in an efficient market and was certainly no "correction."

- *Economic crisis*. The pleaded correction occurred in the midst of an economic crisis. The defendants' event study arguably shows that after controlling for market and industry-wide factors, MFC's "excess return" (the portion of the stock's return that can be attributed to MFC-specific information) on the date of the alleged correction was statistically insignificant. The defendants take the position that it was this once-in-a-lifetime collapse of the global financial system and not any company-specific issue that caused MFC's losses.

- T*he failed U.S. action*. The U.S. class action, based on substantially the same allegations as those made herein, was dismissed. The American judge found that the misrepresentations alleged by the plaintiffs amounted to "fraud-by-hindsight,"[8] that MFC did not attempt to conceal their exposure to market changes,[9] and that "[MFC] clearly disclosed the risks of an equity market downturn to its investors."[10] The American judge also found that the so-called correction on February 12, 2009 simply "confirmed many of the negative forecasts [MFC] made in early December 2008."[11]

- *Challenges in the Quebec Action*. The action in Quebec was met with similar judicial skepticism. The Quebec judge indicated that it was unlikely MFC breached its disclosure obligations and that the alleged misrepresentations or omissions "depend… on conclusions drawn *a posteriori*, obviously resulting from the stock market crash that began in 2008."[12] The fact that the Quebec judge's remarks echoed what was said by the American judge was obviously a source of concern for class counsel.

---

[8] *Ibid*., at 30.

[9] *Ibid*., at 32.

[10] *Ibid*., at 35.

[11] *Ibid*., at 20.

[12] *Supra*, note 2, at para. 81.

2017 ONSC 2669 (CanLII)

- *OSC investigation*. As was the fact that after issuing an enforcement notice, the Ontario Securities Commission decided not to pursue the matter further and declined to seek any order.

[16] In sum, class counsel was well informed about the risks and rewards of further litigation. I can comfortably accept class counsel's assessment of these risks and their recommendation that the $69 million settlement be approved.

[17] I find the settlement to be fair and reasonable and in the best interests of the class. The settlement is approved.

[18] The proposed Plan of Allocation, designed to provide a fair, streamlined and efficient claims and compensation process, is also approved.

(2) Honoraria to representative plaintiffs

[19] Class counsel requests that a $10,000 honorarium be paid to each of the two representative plaintiffs. I am satisfied that such a payment should be made.

[20] Both Ironworkers and Mr. Schwartz and have devoted more than seven years to this litigation and played a key role throughout the prosecution of the Ontario Action. They provided affidavits and were cross-examined and they participated in the approval of the litigation funding agreement, the execution of the tolling agreement, the several mediations and the final settlement negotiations – instructing counsel throughout. In short, they represented the interests of the class members with impressive dedication and diligence.

[21] Class counsel suggests that the $20,000 honoraria be paid out of its fees. The better practice, in my view, is for honoraria be paid out of the settlement amount. As the Court of Appeal noted in *Smith Estate v. National Money Mart*[13]:

> As a general matter the representative plaintiff's fee should be paid out of the settlement fund and not out of class counsel fees. Class counsel fees are predicated on the work that class counsel have done for the class.

[13] *Smith Estate v. National Money Mart Company*, 2011 ONCA 233.

2017 ONSC 2669 (CanLII)

> Allocating a part of that fee to a layperson, especially a representative plaintiff, raises the spectre of fee splitting …[14]

[22] The payment of a $10,000 honorarium to each of the two representative plaintiffs is approved – such payment to be drawn from the settlement fund.

(3) Legal fees approval

[23] As set out in the retainer agreements with the representative plaintiffs, class counsel seeks a 22.5 per cent contingency fee plus disbursements and taxes. For the purposes of the fee approval motion, which applies to the counsel fees payable in the Ontario Action, class counsel in the two actions have notionally allocated 92% of the settlement amount (which now includes some $91,495.90 in interest) to the Ontario class members and 8 per cent to the Quebec class members. This allocation will only be used to provide an amount against which the fee requests may be calculated. The notional allocation will not affect the distribution of the settlement among class members which will be determined by the Plan of Allocation.

[24] As I explained in *Cannon*[15] and again in *Middlemiss v. Penn West Petroleum*,[16] I am prepared to accord presumptive validity to a properly executed contingency fee arrangement such as the one that is before me. It is only through a robust contingency compensation system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice.[17]

[25] The representative plaintiffs support class counsel's fee request and no class members have filed objections. Class counsel in the Ontario Action is entitled to receive

---

[63] *Ibid.*, at para. 135. The same point (that honoraria should be paid out of the settlement fund and not out of class counsel's fees) is also made in Morabito, "Additional Compensation to Representative Plaintiffs in Ontario: Conceptual, Empirical and Comparative Perspectives," (2014) Queen's L.J. 341.

[15] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[16] *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537.

[17] *Ibid.*, at para. 19. Also see *Ramdath v. George Brown College of Applied Arts and Technology*, 2016 ONSC 3536, at note 14: "Over a period of years, plaintiff-side class action firms will win cases and lose cases. The "risk" that contingency lawyers face cannot be assessed case-by-case or one-off, but must be measured across a great many files. A "large" contingency recovery in one case will offset the loss or losses in other cases. That is why the "multiplier" approach that purports to assess risk by considering only the case that is currently before the court is fundamentally flawed, indeed unprincipled."

2017 ONSC 2669 (CanLII)

22.5 percent of 92 per cent of the $69 million recovery (plus $91,496 in interest) which amounts to just over $14.3 million in fees. Class counsel is also entitled to disbursements[18] and taxes. The legal fees request is approved.

(4) Preliminary commission to CFI

[26] The plaintiffs entered into a funding agreement with litigation funder CFI whereby CFI would pay any adverse cost award in return for a commission of 7% of any settlement or judgment, subject to a cap of $5 million. CFI secured its costs exposure by depositing letters of credit with the accountant of this court.

[27] The plaintiffs ask that the letters of credit be released and a preliminary commission of $1,711,540.09 be paid to CFI in accordance with the terms of the funding agreement, which was previously approved by this court and which requires payment "as soon as practicable" and "in any event prior to the distribution of funds to class members."

[28] I have no difficulty approving these requests.

Disposition

[29] Orders to go approving the $69 million settlement, the proposed Plan of Allocation, the payment of a $10,000 honorarium to each of the two representative plaintiffs, the payment of class counsel legal fees based on the 22.5 per cent contingency agreement, plus disbursements and taxes, and the payment of a preliminary commission to CFI.

[30] My congratulations to counsel on both sides in achieving what in my view is a fair and reasonable resolution.

Justice Edward P. Belobaba

[18] The disbursements were just over $2.3 million largely because of the more than $1.9 million that was paid for the preparation of numerous expert reports.

2017 ONSC 2669 (CanLII)

Date: May 8, 2017

2017 ONSC 2669 (CanLII)

Tab 9

CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2014 ONSC 62

COURT FILE NO.: CV-12-9667-00CL
CV-11-431153-00CP

DATE: 20140203

2014 ONSC 62 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF** the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF a plan of compromise or arrangement of SINO-FOREST CORPORATION, Applicant

AND RE: **THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG**

Plaintiffs

\- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PŐYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA) INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LUNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to BANC OF AMERICA SECURITIES LLC)

Defendants

BEFORE: **MORAWETZ R.S.J.**

COUNSEL: **Kirk M. Baert**, **Kenneth Rosenberg, and A. Dimitri Lascaris**, for the Canadian Class Action Plaintiffs and CCAA Representative Counsel

John Fabello and Rebecca Wise for the Underwriters and initial Purchasers

James Doris, for the U.S. Class Action Plaintiffs

Jennifer A. Whincup, for Kai Kip Poon

Caroline Descours, for the Ad Hoc Committee of Noteholders

Kenneth Dekker, for BDO Limited

Jonathan G. Bell, for Sino-Forest Corporation

David Sterns, for the Objector, Robert Wong

Yonatan Rozenszajn, for Invesco Canada Limited, Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.

Peter Osborne, and Shara Roy, for Ernst & Young LLP

HEARD: **DECEMBER 13, 2013**
RELEASED: **DECEMBER 27, 2013**
REASONS: **FEBRUARY 3, 2014**

ENDORSEMENT

[1] On December 13, 2013, I heard three motions. On December 27, 2013, the motion records were endorsed as follows:

(a) Motion Record of the Plaintiffs

(Claims and Distribution Protocol)

The motion is granted. The Claims and Distribution Protocol is approved. Reasons will follow.

(b) Motion Record of the Plaintiffs

(Motion for Fee Approval)

2014 ONSC 62 (CanLII)

> The fees and disbursements of Koskie Minsky LLP, Siskinds LLP and Paliare Roland Rosenberg Rothstein LLP are approved in the requested amounts. Reasons will follow.

(c) Motion Record of the Plaintiffs in the U.S. Class Action

> The motion is granted. The fees and disbursements of Cohen Milstein Sellers and Toll PLLC are approved in the requested amount. Reasons will follow.

[2] These are the reasons in respect of all three motions.

Background

[3] The facts have been extensively reviewed in previous endorsements.

[4] On March 30, 2012, Sino-Forest Corporation ("SFC"), SFC applied for and was granted protection from its creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA").

[5] The CCAA proceedings were commenced following the publication of allegations on June 2, 2011 that SFC was a massive "Ponzi" scheme and that its public disclosures contained misrepresentations regarding its business and affairs.

[6] This action was commenced under the *Class Proceedings Act*, *1992*, S.O. 1992, c. 6 (the "CPA"). Class proceedings were also commenced in the province of Quebec and New York State.

[7] In November 2012, a settlement, conditional on court approval, was reached with Ernst & Young LLP ("E&Y") which provides for payment of $117 million in full settlement of all claims that relate to SFC as against E&Y, Ernst & Young Global Limited, and their affiliates.

[8] On December 10, 2012, I granted an order (the "Sanction Order") sanctioning the Plan of Compromise and Reorganization, dated December 3, 2012, of SFC (the "Plan"), pursuant to s. 6 of the CCAA. The reasons are reported at *Sino-Forest Corporation (Re)*, 2012 ONSC 7050.

[9] On March 20, 2013, I granted an order approving the settlement with E&Y (the "Settlement Approval Order"). The reasons are reported at *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078. The Settlement Approval Order provides that the net settlement proceeds (net of class counsel fees and other expenses) are to be distributed among Securities Claimants (excluding the defendants and their affiliates).

[10] Both the Sanction Order and the Settlement Approval Order were the subject of a leave application to the Court of Appeal for Ontario. The motions for leave to appeal were

2014 ONSC 62 (CanLII)

dismissed, with reasons reported at *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONCA 456.

(a) Claims and Distribution Protocol

[11] The plaintiffs bring this motion for an order approving the proposed Claims and Distribution Protocol (the "Protocol"). The Protocol sets out the process for the allocation and distribution of the net proceeds of the settlement with E&Y.

[12] The E&Y settlement resulted in the establishment of a settlement trust for the settlement proceeds. Paragraph 4 of the Settlement Approval Order appointed the plaintiffs as representatives of persons who purchased Sino-Forest securities ("Securities Claimants") for the purposes of the settlement. Paragraph 5 appointed Koskie Minsky LLP and Siskinds LLP (together "Canadian Class Counsel"), along with Paliare Roland Rosenberg Rothstein LLP ("Insolvency Counsel"), as counsel for the Securities Claimants. Paragraph 17 of the Settlement Approval Order provided that Canadian Class Counsel and Insolvency Counsel were to establish a process for the allocation and distribution of the net settlement proceeds among the Securities Claimants and that such process was to be approved by the court. The Protocol is now before the court for approval.

<u>The Protocol</u>

[13] The Protocol provides that Securities Claimants (subject to certain exceptions) are to participate in a claims process to receive compensation from the settlement. Compensation is to be based on:

(a) the losses suffered by each Securities Claimant attributable to the alleged misrepresentation; and

(b) the strength of different types of claims that each Securities Claimant advances against E&Y.

[14] As counsel to the plaintiffs submits, this means that persons with stronger claims would receive more on a per dollar of loss basis than persons with weaker claims. Specifically, a claim for purchases with fewer litigation challenges would receive more on a per dollar of loss basis than a claim for purchases with greater litigation challenges. Counsel submits that this approach reflects the risks of different claims and that to differentiate on this basis is reasonable and appropriate.

[15] Counsel to the plaintiffs submit that the purchases are divided into three date ranges to reflect the varying risks faced for claims arising from purchases made within these different time periods:

(a) March 18, 2008 to August 11, 2008;

(b) August 12, 2008 to June 2, 2011; and

(c) June 3, 2011 to August 25, 2011.

2014 ONSC 62 (CanLII)

These purchases were respectively assigned risk adjustment factors of 0.30, 0.45 and 0.15 (increased to 0.25 if the claimant had filed a CCAA claim) to account for the strength of the different types of claims.

[16] The exceptions to the claims process are for:

(a) note holders whose interests are represented by counsel to the Initial Consenting Note Holders[1] and who will receive a fixed payment of $5 Million in aggregate;

(b) persons excluded from compensation by paragraph 18 of the Settlement Approval Order; and

(c) persons with no claim against E&Y.

[17] Counsel to the plaintiffs submits that the Protocol should be approved as it provides a fair and reasonable process for the allocation and distribution of the net settlement proceeds.

[18] The Protocol has wide support.

<u>The Objections</u>

[19] Canadian Class Counsel received 14 objections to the Protocol. Counsel submits that four of the objections provided no reason and that three of the objections did not provide relevant criticism, focusing on irrelevant matters, such as that the other defendants have not agreed to settle, that the Ontario Securities Commission is ineffective or, that the Settlement Approval Order ought not to have been made. Counsel advises that the remaining seven objections related to the Protocol. One objection stated all settlement proceeds should go to the note holders before any equity claimant is paid. One objection stated the opposite, that note holders should not be entitled to any compensation because they already received Newco shares. This same objection also stated that post-June 2, 2011 purchasers who filed a CCAA proof of claim should not receive greater compensation than those who did not file a proof of claim and generally was critical of the May 14, 2012 claims procedure order. Three objections stated that post-June 2, 2011 purchasers should not receive less than pre-June 2, 2011 purchasers or the discount should not be as great and that damages should be calculated differently where shares were held after August 25, 2011. Two objections incorrectly asserted that claims for purchases before 2012 are not entitled to compensation.

[20] Canadian Class Counsel submits that the concerns raised in these objections were considered in designing the Protocol and that Canadian Class Counsel endeavoured to balance the competing interests of the Securities Claimants.

[21] At the hearing, only one party, Mr. Wong, raised objections of a substantive nature.

---

[1] As defined in the Plan, Plaintiffs' Motion Record, Tab 10, Schedule A.

2014 ONSC 62 (CanLII)

[22] Mr. Wong's objection is limited. It concerns the compensation to be received by claimants depending on when they made their purchases.

[23] The difference in the positions taken by the plaintiffs and Mr. Wong centres around purchases occurring from June 3, 2011 to August 25, 2011.

[24] Mr. Wong proposes that a fairer and more reasonable allocation for this time period is to assign such purchasers a risk adjustment factor of 0.01 (or 0.05 for purchasers who filed a CCAA claim) and to apply the differential to the risk adjustment for purchasers of SFC shares from August 12, 2008 to June 2, 2011 such that the risk adjustment for those purchasers would change from 0.45 to 0.59.

[25] Mr. Wong submits that the reason for his requested adjustment is that there can be no doubt that purchasers of SFC shares after June 2, 2011 knew of the nature and scope of the alleged fraud in SFC when they bought their shares and that they willingly and knowingly assumed the risk that the allegations were correct. Accordingly, Mr. Wong submits the purchasers should have little to no expectation of benefitting from the settlement and should receive only nominal consideration in exchange for the release of their claims. He further submits that purchasers who bought shares in SFC after the release of the report willingly assumed the risk that their shares would be worthless and that these purchasers should be given nominal consideration to reflect the fact that they willingly bought shares of a company they knew or ought to have known was potentially fraudulent.

[26] Counsel to Mr. Wong submitted that the considerations set out in *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490, 44 C.P.C. (7th) 178, ("*Zungui*"), should not be applied. In *Zungui*, class counsel argued that no compensation should be paid to parties who purchased shares on August 22, 2011, the date that E&Y announced it had suspended its audit for the corporation for 2011. Further, if any consideration was to be given to these purchasers, counsel proposed that it be discounted by 98.5%. Perell J. disagreed and amended the plan of allocation so that these purchasers could participate, albeit at an 80% discount.

[27] Counsel to Mr. Wong submits that this case differs from *Zungui* in many important respects:

(a) *Zungui* did not involve any allegations of fraud on August 22, 2011 and the critical event was the announcement by E&Y that it had suspended its audit of the corporation for 2011. Counsel submitted that unlike this case, there was no analysis report laying bare the nature and scope of the alleged fraud. Specifically, the report on SFC foreshadowed precisely what followed such that purchasers knew or ought to have known what they were risking.

(b) Shares in *Zungui* traded for mere hours after the announcement on August 22 and by contrast, shares in SFC traded for more than two months after the release and were widely reported on.

2014 ONSC 62 (CanLII)

[28] Canadian Class Counsel did acknowledge that establishing a rate of discount is difficult and that three different time periods were established to reflect the varying risks for claims arising from purchases in the different time periods. Counsel emphasized that claims from June 3, 2011 to August 25, 2011 had already been assigned a risk adjustment factor to reflect the position put forth by Mr. Wong. However, counsel emphasized that a steep discount did not necessarily mean that there was no claim and that reasonable compensation should still be paid to such claimants as it could not be said with certainty that these purchasers were aware of the fraud.

[29] Further, counsel also submitted that four of the five representative plaintiffs were in agreement with the Protocol.

[30] Canadian Class Counsel also emphasized that they had been involved throughout the process and, while no plan was perfect, this Protocol, having been heavily negotiated, should be approved as being fair and reasonable.

[31] I have not been persuaded by the submissions put forth by counsel to Mr. Wong. While there is no doubt that after the report was released, on June 2, 2011, there was increased skepticism with respect to the operations of SFC, in my view it cannot be said that the purchasers were aware that the activities were fraudulent. Rather, I accept the position that any purchase was risky, but this increased risk has been addressed through the discount factor. In arriving at my conclusion, I have also taken into account that four of the five representative plaintiffs are in agreement with the Protocol. In my view, this is a significant factor.

[32] In the result, the Protocol is approved. In my view, it provides a fair and reasonable process for the allocation and distribution of the settlement proceeds.

(b) Fee Approval – Canadian Class Counsel and Insolvency Counsel

[33] I now turn to the motion for approval of the fees and disbursements of Canadian Class Counsel and Insolvency Counsel in the amount of $17,846,250.00 (exclusive of tax) for fees and $1,737,650.84 for disbursements.

[34] The fees and disbursements request is made in accordance with the executed Retainer Agreements between Canadian Class Counsel and the plaintiffs.

[35] Counsel submits that the Retainer Agreement is the starting point for the approval of counsel fees in class proceedings and that the first step is for the court to determine whether the fees and disbursements as provided for in the Retainer Agreement are fair and reasonable, failing which the Court has the discretion to determine the amount owing to Class Counsel for fees and disbursements.

[36] There are two main factors in these determinations:

(a) the risks that class counsel assume; and

(b) the success achieved.

2014 ONSC 62 (CanLII)

[37] Counsel submits that the requested fees and disbursements are consistent with the retainer agreement entered into with the plaintiffs and are fair and reasonable. Counsel submits that the requested fees are within the range of percentages that Ontario courts have approved in the past. As noted by Strathy J., (as he then was), in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, 98 C.P.R. (4th) 244, at para. 63, fees in the range of 20% to 30% are very common in class proceedings and there have been a number of instances in recent years in which this Court has approved fees that fall within that range.

[38] Counsel points out that in this case, the requested fees are 16.9% of the settlement that is notionally attributable to Canadian claims.

[39] Counsel also submits that they took on a significant risk for claims against E&Y because of the multiple legal impediments to establishing liability and recovering damages against an auditor under Canadian and U.S. law - even if there was wrongdoing.

[40] In addition, counsel points out that they took the risk of no success and minimal recovery, while at the same time having to devote a massive amount of time, money and other resources to the prosecution of this action. Counsel submits that they committed millions of dollars in resources to this action, including 23,000 lawyer hours (with a time value of $8.6 million) and out-of-pocket disbursements exceeding $1.7 million.

[41] Finally, the settlement obtained - $117 million - is the largest auditors' settlement in Canadian history, which leads to a conclusion that counsel successfully achieved a very good settlement.

[42] In their factum, counsel set out, in detail, the approach to fee approval in class proceedings. Reference was made to the CPA and to the following cases: *Baker (Estate)*, *supra*; *Cassano v. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543 (S.C.J.) at paras. 59 and 63; *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); and *Sayers v. Shaw Cable Systems Ltd.*, 2011 ONSC 962, 16 C.P.C. (7th) 367.

[43] By way of comparison, Strathy J. in *Baker (Estate)*, *supra*, at para. 63, stated that fees in the range of 20% to 30% are "very common" in class proceedings. In *Hislop v. Canada (Attorney General)* (2004), 3 C.P.C. (6th) 42 (S.C.J.) the percentage was 18%. In *Wilson v. Servier Canada Inc.* (2005), 252 D.L.R. (4th) 742 (S.C.J.), the recovery was 20% and in *Cassano*, *supra*, the Court approved fees of 20%. In *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, Belobaba J. approved fees of 33% based on the retainer agreement. He also stated at para. 8 that "contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved."

[44] In this case, as noted above, the requested fees are 16.9% of the settlement that is notionally attributable to Canadian claims.

[45] I have also taken into account that there was a certain recovery risk from the outset of the litigation and that there was a risk of prosecuting a difficult and expensive case. These issues were also referenced in my endorsement approving the E&Y settlement.

2014 ONSC 62 (CanLII)

[46] Finally, a settlement of $117 million constitutes a significant success in this proceeding.

[47] Having considered the written submissions and having heard oral submissions, and in the absence of any substantive criticism of the requested fees, I am satisfied that the requested fees and disbursements are consistent with the Retainer Agreement entered into with the plaintiffs and are fair and reasonable.

[48] Apart from the fee request, counsel request an honorarium payment of $15,000 to Mr. Wong in recognition of his assistance prosecuting this action. This request was not opposed and, in my view, is reasonable in the circumstances.

[49] In the result, an order shall issue approving the fees of Canadian Class Counsel in the amounts requested and also approving the honorarium payment of $15,000 to Mr. Wong.

(c) Fee Approval – U.S. Class Counsel

[50] There was also a motion for approval of the fees and disbursements to Cohen Milstein Sellers & Toll PLLC ("U.S. Class Counsel") in the amount of Cdn $2,340,000 for fees and US $151,611.15 for disbursements. The fees and disbursements request was made in accordance with the Retainer Agreements between U.S. Class Counsel and the lead plaintiffs in the U.S. class action and, as counsel submits, is consistent with counsel fees approved in other class actions by Canadian and U.S. courts.

[51] The plaintiffs and class counsel in the Ontario, Quebec and New York class actions agreed to a "notional" allocation of the settlement amount between the Canadian and U.S. claims for the purposes of determining class counsel fees. They agreed that the fees of Canadian Class Counsel will be determined on the basis that 90% of the gross settlement is allocated to the Canadian claims and 10% of the gross settlement is allocated to the U.S. claims.

[52] Based on this notional allocation, 10% of the E&Y settlement is $11,700,000 and U.S. Class Counsel request attorney fees of 20% of that amount or Cdn $2,340,000. U.S. Class Counsel submits that the fees and disbursements requested are consistent with Canadian and U.S. law, and are otherwise fair and reasonable having regard to the litigation and recovery risks undertaken and the success achieved.

[53] As set out in the factum, there were no challenges to the fees requested by U.S. Class Counsel.

2014 ONSC 62 (CanLII)

[54] Consistent with my reasons with respect to the fee requests of Canadian Class Counsel, I am satisfied that the amount requested by U.S. Class Counsel is fair and reasonable and is also approved.

MORAWETZ R.S.J.

DATE: February 3, 2014

2014 ONSC 62 (CanLII)

2014 ONSC 62 (CanLII)

Tab 10

CITATION: Mancinelli v. Royal Bank of Canada, 2017 ONSC 2324
COURT FILE NO.: CV-15-536174
DATE: 20170420

ONTARIO
SUPERIOR COURT OF JUSTICE

2017 ONSC 2324 (CanLII)

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK

Kirk Baert, *Louis Sokolov* and *Ronald Podolny* for the Plaintiffs

Andrea Laing and *Robert Kwinter* for the Defendants the Goldman Sachs Group, Inc., Goldman, Sachs & Co., and Goldman Sachs Canada Inc.

Michael Eizenga for the Defendants JPMorgan Chase & Co., J.P.Morgan Bank Canada, J.P.Morgan Canada and JPMorgan Chase Bank National Association

D. Michael Brown for the Defendants Citigroup, Inc., Citibank, N.A., Citibank Canada, and Citigroup Global Markets Canada Inc.

Allan Coleman for the Defendants, Royal Bank of Canada and RBC Capital Markets LLC

Jessica Kimmel for the Defendants, The Bank of Tokyo Mitsubishi UFJ Ltd., and Bank of Tokyo-Mitsubishi UFJ (Canada)

Donald B. Houston for the Defendants Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG, and Credit Suisse Securities (Canada), Inc.

Caitlin Sainsbury for the Defendant Deutsche Bank AG

Matthew Milne-Smith for the Defendants Morgan Stanley Canada Limited and Morgan Stanley

Neil Campbell and *Samantha Gordon* for the

USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS SECURITIES LLC and UBS BANK (CANADA)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

Defendants Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., and Royal Bank of Scotland PLC

Chris Hunter for the Defendants Société Générale S.A., Société Générale (Canada), and Société Générale

Ian C. Matthews for the Defendant Standard Chartered PLC

HEARD: April 13, 2017

<u>PERELL, J.</u>

REASONS FOR DECISION

1. Introduction

[1] This is an action under the *Class Proceedings Act*, *1992*, S.O. 1992, c. 6. There are two motions before the court. In the first motion, the Plaintiffs seek approval of three settlements with a combined value of $39.2 million. In the second motion, Class Counsel seek approval of fees and disbursements in the amount of approximately $10 million ($9,812,500) in fees and approximately $0.2 million in disbursements. Class Counsel also request an order that expert fees may be paid from the settlement funds on a monthly basis up to an aggregate amount of $0.5 million without further court order and that they may pay U.S. Consulting Counsel $0.25 million, plus applicable taxes, from the fees awarded to them.

[2] I approve the three settlements, grant Class Counsel's disbursements requests and approve an additional counsel fee of $2 million, without prejudice to a renewed motion for a counsel fee approval at the earlier of: (a) another round of settlements; (b) a motion to distribute settlement proceeds to Class Members; or (c) the contested certification motion.

2. Factual Background

[3] I shall describe the factual background below, but the general background facts are also set out in my Reasons for Decision reported as: *Staines v. Royal Bank of Canada*, 2016 ONSC 5270 (Consent Certification No. 1), *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953 (Settlement Approval No. 1), and *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 7857

2017 ONSC 2324 (CanLII)

(Consent Certification No. 2).

[4] The Plaintiffs, Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos, and Jack Oliveira, in their capacity as The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, and Christopher Staines, sue 16 groups of financial institutions; namely: Royal Bank of Canada, RBC Capital Markets LLC, Bank of America Corporation, Bank of America, N.A., Bank of America Canada, Bank of America National Association, The Bank of Tokyo Mitsubishi UFJ Ltd., Bank of Tokyo-Mitsubishi UFJ (Canada), Barclays Bank PLC, Barclays Capital Inc., Barclays Capital Canada Inc., BNP Paribas, BNP Paribas (Canada), BNP Paribas Group, BNP Paribas North America Inc., Citibank, N.A., Citibank Canada, Citigroup Global Markets Canada Inc., Citigroup, Inc., Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG, Credit Suisse Securities (Canada), Inc., Deutsche Bank AG, The Goldman Sachs Group, Inc., Goldman, Sachs & Co., Goldman Sachs Canada Inc., HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., HSBC Bank Canada, J.P.Morgan Canada, JPMorgan Chase Bank National Association, JPMorgan Chase & Co., J.P.Morgan Bank Canada, Morgan Stanley, Morgan Stanley Canada Limited, Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., Royal Bank of Scotland PLC, Société Générale S.A., Société Générale (Canada), Société Générale, Standard Chartered PLC, UBS AG, UBS Securities LLC and UBS Bank (Canada).

[5] In their class action under the *Class Proceedings Act*, *1992*, S.O. 1992, c. 6, the Plaintiffs allege that the Defendants conspired with each other to fix prices in the futures exchange market (the "FX Market"). It is alleged that through the use of multiple chat rooms with names such as "The Cartel," "The Bandits' Club," and "The Mafia," the Defendants communicated directly with each other to coordinate their: (a) fixing of spot prices; (b) control and manipulation of FX benchmark rates; and (c) exchange of key confidential customer information to trigger client stop loss orders and limit orders. The Plaintiffs allege that the Defendants' conspiracy impacted all manner of FX instruments, including those trading both over-the-counter and on exchanges.

[6] The Plaintiffs, through Mr. Staines, commenced an action by way of Statement of Claim, which was issued on September 11, 2015. The Statement of Claim pleads several causes of action against the Defendants including a statutory right of action for contraventions of Part VI of the *Competition Act*, R.S.C. 1985, c. C-34; namely: civil conspiracy, and unjust enrichment. The Plaintiffs claim damages of $1 billion plus punitive damages.

[7] The Class Counsel team is made up of lawyers from Sotos LLP, Siskinds LLP, Koskie Minsky LLP, and Camp Fiorante Matthews Mogerman.

[8] Class Counsel agreed to pursue the action on a contingency fee basis. The Retainer Agreements provide for a sliding scale of counsel fees depending on the stage of the litigation. If recovery in the action occurs at an early phase of the litigation, Class Counsel fees would be based on a lower percentage. On the other hand, if recovery occurs later, Class Counsel fees would be based on a higher percentage.

[9] There is no third-party funding, and Class Counsel did not apply to the Class Proceedings Fund, which would have claimed 10% of any recovery for the Class. Class Counsel are financing disbursements and have provided indemnities for costs consequences to the Plaintiffs.

[10] Similar litigation has been commenced in Québec. Class Counsel in the Ontario action is

2017 ONSC 2324 (CanLII)

working cooperatively with the law firm of Siskinds Desmeules s.e.n.c.r.l ("Siskinds Québec"), counsel to the plaintiff in the Québec action (Court File No. 200-06-000189-152), to prosecute the Québec action.

[11] There is litigation in the United States dealing with similar misconduct as alleged in this action. In the American litigation, settlements were reached in respect of nine groups of defendants, including the defendants involved in the first and second round of settlements in the immediate action. In the U.S. settlements, in addition to compensating class members who transacted directly with a defendant (the "Direct Class"), the settlements included a component to compensate class members who traded in exchange-traded instruments (the "Exchange-Only Class") for which there is no equivalent in the case at bar. The particulars of the U.S. settlements, including the global market share of the settling parties and quantum of settlement per market share point, as calculated by U.S. counsel, are as follows:

Bank	**U.S. Settlement (USD) (Direct Class)**	**U.S. Settlement (USD) (Exchange-Only Class)**	**U.S. Settlement (USD) (Total – Including Notice and Administration)**	**Global Market Share (2003-2013)**	**U.S. Settlement / Market Share Pt. (USD)**
UBS	$135,000,000	$6,075,000	$141,075,000	11.96%	$11,795,569
BNP Paribas	$110,000,000	$5,000,000	$115,000,000	2.26%	$50,884,956
Bank of America	$180,000,000	$7,500,000	$187,500,000	3.90%	$48,076,923
Goldman Sachs	$129,500,000	$5,000,000	$135,000,000	3.88%	$34,793,814
JPMorgan	$99,000,000	$5,000,000	$104,500,000	5.60%	$18,660,714
Citibank	$394,000,000	$8,000,000	$402,000,000	9.97%	$40,320,963
RBS	$247,000,000	$8,000,000	$255,000,000	6.09%	$41,871,921
Barclays	$375,000,000	$9,000,000	$384,000,000	9.25%	$41,513,516
HSBC	$279,000,000	$6,000,000	$285,000,000	5.26%	$54,182,510

[12] Returning to this class action, in the first round of settlements, the court approved settlements with three groups of Defendants: (1) UBS AG, UBS Securities LLC and UBS Bank (Canada) ("UBS"); (2) BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas (Canada), and BNP Paribas ("BNP"); and (3) Bank of America Corporation, Bank of America, N.A., Bank of America Canada and Bank of America National Association ("Bank of America"), (collectively, "the Previous Settling Defendants").

[13] With respect to the impugned transactions, the market share of the first round of settling Defendants, UBS, BNP, and the Bank of America, was around 15%.

[14] In the first round of settlements, the Plaintiffs recovered $15.95 million for the Class Members. UBS paid $4.95 million. BNP paid $4.5 million. Bank of America paid $6.5 million. The Settling Defendants of the first round also agreed to co-operate with the Plaintiffs in the

2017 ONSC 2324 (CanLII)

prosecution of the action against the non-Settling Defendants.

[15] In the first round of settlements, Class Counsel recovered fees of approximately $4 million and disbursements of $156,103.41. Class Counsel's fee was based on a contingency fee agreement and a 25% contingency fee. At the time of the fee approval, Class Counsel had dedicated over 2,896 lawyer hours with a time value of $1.5 million and had incurred disbursements exceeding $156,000.

[16] At the present time; *i.e.*, at the time of the second round of settlements, the total hours since the commencement of the action are 4,750 lawyer hours with a time value of $2.7 million, plus applicable taxes, and the total disbursements are approximately $0.4 million.

[17] In a second round of settlements, the Plaintiffs reached settlements with three more groups of Defendants: (1) The Goldman Sachs Group, Inc., Goldman, Sachs & Co., and Goldman Sachs Canada Inc. ("Goldman Sachs"); (2) JPMorgan Chase & Co., J.P.Morgan Bank Canada, J.P.Morgan Canada, and JPMorgan Chase Bank National Association ("JPMorgan"); and (3) Citigroup, Inc., Citibank, N.A., Citibank Canada, and Citigroup Global Markets Canada Inc. ("Citibank").

[18] The Defendants of the second round of settlements collectively constitute approximately 17% of the Canadian FX market.

[19] Of the Settling Defendants, there have been criminal and regulatory proceedings against JPMorgan and Citibank in the United States and in the United Kingdom. Goldman Sachs has not been the subject of any criminal or regulatory proceedings.

[20] In the criminal and regulatory proceedings:

a. In the United States, the Commodity Futures Trading Commission imposed a fine on JPMorgan of USD$310 million (in respect of conduct between 2010 and 2012) and imposed a fine on Citibank of USD$310 million (in respect of conduct between 2009 and 2012).

b. In the United Kingdom, on November 12, 2014, the Financial Conduct Authority imposed a financial penalty of £222 million on JPMorgan and £225.6 million on Citibank.

c. In the United States, on November 12, 2014, the United States Office of the Comptroller of the Currency assessed fines of USD$350 million against each of JPMorgan and Citibank and issued cease and desist orders requiring them to correct deficiencies and enhance oversight of their FX trading activity.

d. In the United States, on May 20, 2015, following an investigation by the United States Department of Justice, JPMorgan and Citibank agreed to plead guilty to conspiring to manipulate the price of the U.S. dollar and euro currency pair exchanged in the FX spot market. JPMorgan agreed to pay a fine of USD$550 million in respect of conduct that occurred between July 2010 and January 2013. Citibank agreed to pay a fine of USD$925 million in respect of conduct that occurred between December 2007 and January 2013.

e. In the United States, on May 20, 2015, the Federal Reserve fined each of JPMorgan and Citibank USD$342 million and issued cease and desist orders

2017 ONSC 2324 (CanLII)

> requiring them to improve their policies and procedures for oversight and controls over activities in the wholesale FX and similar types of markets.

[21] Under the Settlement Agreement, Goldman Sachs has agreed to pay $6.75 million and to provide cooperation in the prosecution of the case against the remaining Defendants.

[22] Under the Settlement Agreement, JPMorgan has agreed to pay $11.5 million and to provide cooperation in the prosecution of the case against the remaining Defendants.

[23] Under the Settlement Agreement, Citibank has agreed to pay $21 million and to provide cooperation in the prosecution of the case against the remaining Defendants.

[24] Thus, the recovery from the second round of settlements is $39.25 million for an aggregate recovery to date of $55.2 million.

[25] For the second round of settlements, the Plaintiffs brought a motion for an order certifying the action for settlement purposes, approving notices of certification and of the settlement approval hearing, and for related relief. I granted the consent certification for settlement purposes; see *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 7857 (Consent Certification No. 2).

[26] The Plaintiffs now move for approval of the second round of settlements.

[27] In my Reasons for Decision for the settlement approval for the first round of settlements, I noted that for future settlement approval motions, the Court would require additional information on the Plaintiffs' calculation of damages. In my Reasons for Decision, I stated at paras. 34 and 35:

> 34. Like the objector, I was concerned that at this early juncture of this class proceeding, there was insufficient information about the amount of the settlements being reasonable having regard to the actual damages allegedly suffered by the Class Members, which has not yet been quantified.
>
> 35. Nevertheless, having regard to the information that was available from the proceedings in the United States and having regard to the Defendants' minority share of the Canadian market and keeping in mind the very significant litigation risks and also the value to be attributed to the Settling Defendants' co-operation in prosecuting the claims against the non-Settling Defendants who command 85% of the marketplace, I am satisfied that the amount of these early settlements is fair and reasonable. I will, however, expect more information about the methodology of the Plaintiffs' calculation of damages if there are more settlements.

[28] For this second round of settlement approvals, the Plaintiffs retained Professor Ilias Tsiakas, Professor of Finance at the University of Guelph and an expert in foreign exchange markets, to provide an estimate on the range of potential damages suffered by members of the putative class.

[29] Professor Tsiakas has estimated a range of total damages between $155 million and $619.9 million betweem 2008 and 2013 (*i.e.*, the period that was the subject of regulatory findings) and between $270 million and $1,080 million (approximately $1 billion) for the entire class period.

[30] The parties to the settlement seek an order barring any claim for contribution or indemnity against the Settling Defendants. The proposed bar orders provide that if the court ultimately determines that a right of contribution and indemnity exists between co-conspirators, the Plaintiffs and settlement classes shall restrict their joint and several claims against the non-

2017 ONSC 2324 (CanLII)

Settling Defendants. Should the court determine that no such right exists, the settlement Class Members will be entitled to advance the entirety of their claims subject only to a reduction for the value of the settlement payments received.

[31] Class Counsel recommend the settlement as fair, reasonable, and in the best interests of the class.

[32] The Representative Plaintiffs recommend the settlement and support Class Counsel's fee request.

[33] Notice of the proposed settlement was given in accordance with the order of this court.

[34] There are no objectors to the settlement or to Class Counsel's fee request.

[35] A settlement approval motion for the second round of settlements will be heard in the Québec Proceeding on May 2, 2017. The settlements are conditional on approval by both the Ontario and Québec courts.

3. Settlement Approval

[36] Section 29(2) of the *Class Proceedings Act*, *1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[37] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra*, at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

[38] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[39] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows

2017 ONSC 2324 (CanLII)

for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.). A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.) at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

2017 ONSC 2324 (CanLII)

[40] Class Counsel submits that the second round of settlements constitute a very good result. As I shall explain below, I cannot say whether it is a very good result, but I regard the settlements as fair, reasonable, and in the best interests of the Class Members based on the information available at this juncture of the proceedings. The settlements are a respectable outcome, but they cannot yet be characterized as a very good result for the Class.

[41] Having reviewed the motion record and having regard to the various factors used to determine whether to approve a settlement, I am satisfied that the three additional settlements should be approved.

4. Class Counsel Fee

(a) General Principles

[42] Section 33 of the *Class Proceedings Act, 1992*, permits contingency fee agreements in class proceedings, but pursuant to s. 32 of the *Act*, contingency fee agreements are not enforceable until approved by the court. In class proceedings, the court must also approve the quantum of class counsel's fee.

[43] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of: (1) the degree of success or result achieved; and (2) the risk undertaken by class counsel in conducting the litigation: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.)at para. 13; *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.)at para. 25.

[44] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith v. National Money Mart*, *supra*; *Fischer v. I.G. Investment Management Ltd.*, *supra*, at para. 28.

[45] These risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding: *Gagne v. Silcorp Ltd*, [1998] O.J. No. 4182 (C.A.)at para. 17; *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35.

[46] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at paras. 59-61; *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37.

(b) Class Counsel's Submissions

[47] In the case at bar, Class Counsel submits that the fee request is fair and reasonable given the success achieved and the risks assumed and is below the range of fee percentages that Ontario courts have repeatedly endorsed as being fair and reasonable, where fees up to 30% are very common in class proceedings and are usually approved as fair and reasonable.

[48] Class Counsel submits that the settlement represents "a very good recovery for Class Members in an extremely complex case against some of the world's leading financial institutions" and that "the requested fees are reasonable given the significant risk Class Counsel took in this case, including the risk of no success and minimal recovery in this action, while at the same time having to devote a significant commitment of time, money, and other resources; *i.e.*, 4,750 lawyer hours with a time value of over $2.7 million and out-of-pocket disbursements exceeding $410,000."

[49] Somewhat repetitively, Class Counsel describe the significant risk they took on in this case at paras. 18, 30, and 56 of their factum as follows:

> 18. The prosecution of the Proceedings has involved significant risk. In commencing and continuing the prosecution of the Proceedings, Class Counsel were cognizant of the following specific litigation risks:
>
> > (a) The risk that the case would not be certified or would be certified based on a narrower class. Despite favourable case law, and Class Counsel's belief that this case meets all of the certification criteria, Class Counsel expect that the certification motion will be vigorously contested by well-resourced Defendants who have retained experienced competition and class action defence counsel.
> >
> > (b) The risk that the court would find that:
> >
> > > (i) there was no unlawful conspiracy or that the unlawful conspiracy was only operative for part of the class period or would have affected some, but not all, FX Instruments;
> > >
> > > (ii) there was no impact on the prices of FX Instruments that were transacted in by the class members;
> > >
> > > (iii) the effects of any unlawful manipulation were not passed-through to class members who did not transact directly with a Defendant; or
> > >
> > > (iv) the U.S. Release covers most of the claims for damages of the direct purchaser class members in Canada.
> >
> > (c) Procedural risks associated with multi-party litigation.
> >
> > (d) The risk that the litigation will be delayed by appeals in respect of multiple issues.

2017 ONSC 2324 (CanLII)

(e) The risk that the court would not award the punitive, aggravated and exemplary damages sought.

(f) The length of time likely to pass before reaching trial and the risk that key witnesses would become unavailable and/or their recollection of events would diminish with time.

(g) The issue of whether rights of contribution and indemnity exist as between the Defendants and whether the Plaintiffs and settlement class members will be limited in their ability to recover full damages less only the value of any settlement payments received.

….

30. ... there are unique risks arising from the class proceedings procedure, including:

a. the risk that the action will not be certified as a class proceeding;

b. the risk that a large number of class members will opt out;

c. the risk that a defendant successfully moves to decertify a class proceeding;

d. the risk that an award of aggregate damages on a class-wide basis is denied and individual issues trials are ordered;

e. the risk that individual issues trials are ordered but are not economically feasible;

f. the risk that the court does not approve a settlement agreement after lengthy, time-consuming and expensive negotiations; and

g. the risk that the court does not approve class counsel fees, or approves them at a reduced rate.

….

56. By any measure, this is an extremely complex case, both in terms of the subject matter and the number of parties. Success against the Settling Defendants was not assured nor, even with cooperation, is it assured against the remaining Defendants. Those risks include:

(a) The risk that the case would not be certified or would be certified based on a narrower class. Despite favourable case law, and Class Counsel's belief that this case meets all of the certification criteria, Class Counsel expect that the certification motion will be vigorously contested by well-resourced Defendants who have retained experienced competition and class action defence counsel.

(b) The risk that the court would find that:

(i) there was no unlawful conspiracy or that the unlawful conspiracy was only operative for part of the class period or would have affected some, but not all, FX Instruments;

(ii) there was no impact on the prices of FX instruments that were transacted in by the class members;

(iii) the effects of any unlawful manipulation were not passed-through to class members who did not transact directly with a Defendant; or

2017 ONSC 2324 (CanLII)

(iv) the U.S. Release covers most of the claims for damages of the direct purchaser class members in Canada.

(c) Procedural risks associated with multi-party litigation.

(d) The risk that the litigation will be delayed by appeals in respect of multiple issues.

(e) The risk that the Court would not award the punitive, aggravated and exemplary damages sought.

(f) The length of time likely to pass before reaching trial and the risk that key witnesses would become unavailable and/or their recollection of events would diminish with time.

(g) The issue of whether rights of contribution and indemnity exist as between the Defendants and whether the Plaintiffs and settlement class members will be limited in their ability to recover full damages less only the value of any settlement payments received.

2017 ONSC 2324 (CanLII)

(c) Discussion and Analysis

[50] At the outset of the discussion, I note that at this juncture of the proceeding, and where funding has not been obtained from the Class Proceedings Fund and where the results so far achieved for the Class are below $60 million, I have no concerns about a 25% contingency fee for Class Counsel. In *Baker (Estate) v. Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at para. 63, Justice Strathy, as he then was, stated that fees in the range of up to 30% are very common in class proceedings.

[51] In recent years, there have been several cases in which the court has approved fees that fall within that range; visualize: *Abdulrahim v. Air France*, 2011 ONSC 512 (30%, for an award of $20.7 million); *Robertson v. ProQuest LLC*, 2011 ONSC 2629 (24% for an award $7.9 million); *Osmun v. Cadbury Adams Canada Inc*., 2010 ONSC 2752 (25% for an award $5.8 million; *Pichette v. Toronto Hydro*, 2010 ONSC 4060 (28.5% for an award $17 million); *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (S.C.J.) (36% for an award $11 million); *Martin v. Barrett*, [2008] O.J. No. 2105 (S.C.J.) (29% for an award $14 million).

[52] I also agree with the sentiment in the case law that contingency fees are an appropriate way to remunerate class counsel for taking on the risk of class proceedings and preferable to the lodestar or multiplier approach, which reward counsel based on a multiplier of their base fee. The multiplier approach has been criticized for, among other things, encouraging inefficiency and duplication and discouraging early settlement: *Cassano v. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543 (S.C.J.) at paras. 55, 60, 63.

[53] This said, a problem with contingency fee agreements is that they have a tendency to incentivize too early settlements that may be very provident for class counsel having regard to class counsel's investment in the litigation and having regard to minimizing class counsel's exposure to risk, but the contingency fees may lead to an early settlement that is not very provident to the class members whose loss is a sunk and fixed loss.

[54] Contingency fees work best for rewarding the outcome of a trial judgment. It is difficult for the court to determine the justness of a settlement and difficult to determine whether class counsel have earned their contingency fee or whether the defendants are just paying a licence fee

for wrongdoing, while class counsel has profitably bailed out and avoided both the risk of prosecuting the class action and also the opportunity of achieving meaningful access to justice for the class and behaviour modification of the defendant.

[55] I hasten to add that I am not suggesting that any improvident settlements have occurred in the immediate case. Rather, I am saying that the court must be diligent and recognize that with the advantages of contingency fees there are also problems when contingency fees are a measure of what counsel should be paid for settling and not litigating a case.

[56] At the outset of the discussion, I also note that relying on *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, *supra*, at para. 71, Class Counsel submits that class action risks cannot be assessed with the benefit of hindsight and that the risks involved in pursuing class action litigation must be assessed as they existed when the litigation commenced and as the litigation continued. I agree with this sentiment, particularly the notion that the risk can be assessed as the litigation continues.

[57] Turning then to the circumstances of the immediate case, as noted above, the predominant factors in determining the fairness and reasonableness of Class Counsel's fee are: (1) the degree of success or result achieved; and (2) the risk undertaken by Class Counsel in conducting the litigation.

[58] I begin with the degree of success. In the immediate case, Class Counsel submits that the second round of settlements constitute "a very good result" for the Class Members. That is a debatable proposition.

[59] Based on Professor Tsiakas's opinion, Class Members lost between $270 million and $1 billion. After two rounds of settlements, Class Members have recovered $55.2 million gross of their losses. Deducting a contingency fee of 25% ($13.8 million), disbursements of approximately $1 million, and applicable taxes on the fees (approximately $1.8 million), the net recovery for Class Members is approximately $38.6 million against a pleaded loss (and one now supported by an expert opinion) that ranges from $270 million to $1 billion.

[60] Thus, to date, against a billion-dollar loss, the gross recovery of Class Members is 5 cents on the dollar and their net recovery is 4 cents on the dollar. Based on market share, the Settling Defendants from the two rounds of settlements are responsible for $341.9 million of the Class Members' losses. Thus, the Class Members' gross recovery against the loss caused by the Settling Defendants is a recovery of 16 cents on the dollar and their net recovery is 11 cents on the dollar. These results are within the range of what is fair, reasonable and in the best interests of the Class Members, but it is debatable that these results are a very good result for the Class Members. Moreover, it is debatable whether the results so far have achieved significant access to justice or behaviour modification of the Settling Defendants who it seems are retaining 84 cents on the dollar of their allegedly ill-gotten gains.

[61] As for Class Counsel, they have invested $2.7 million in time and are claiming a contingency fee of $13.8 million, which is a return of $5.1 dollars on the invested dollar.

[62] I turn then to the risk factor, given that the outcome so far is respectable but debatably not a very good result. Here, as noted above, Class Counsel submits that the risk they assumed in taking on this class action justifies awarding them their 25% contingency fee at this juncture before the final outcome is known.

2017 ONSC 2324 (CanLII)

[63] I disagree. Without prejudice to Class Counsel claiming their full contingency fee subsequently, in my opinion, the appropriate award at this juncture is to award the disbursements and an additional counsel fee of $2 million, bringing the total counsel fee to date to approximately $6 million.

[64] Speaking generally, what class counsel say about risk is self-serving and especially so because it is well known that class counsel carefully screen their cases and typically require some substantial indicia that the defendants are culpable or highly likely to settle. In general, the bravery of Class Counsel and their assumption of risk is somewhat exaggerated, and in the immediate case, it is likely that their courageousness is much exaggerated.

[65] In the case at bar, before the class action was commenced, there were regulatory investigations by: the U.S. Commodity Futures Trading Commission; the U.S. Office of the Comptroller of Currency; the U.S Department of Justice; the U.S Federal Reserve; Britain's Financial Conduct Authority; and the Swiss Financial Market Supervisory Authority. In the case at bar, before the first round of settlements, UBS and Bank of America collectively paid more than USD$1.8 billion in fines to regulatory authorities and UBS, BNP and Bank of America collectively agreed to pay USD$444 million to settle the U.S. litigation. In the case at bar, before the second round of settlements, JPMorgan, and Citi paid more than USD$3.6 million and £448 million in fines to regulatory authorities and Goldman Sachs, JPMorgan, and Citi paid $639.5 million to settle the U.S. litigation. These regulatory investigations and settlements ought to have given Class Counsel some comfort and some spine about the litigation risk they were voluntarily assuming.

[66] Speaking generally - and I emphasize that I am not speaking specifically about the case at bar - the unique risks of class actions described by Class Counsel in para. 30 of their factum have, over time, been much attenuated as class action practice and jurisprudence has matured. Further, once again, the risks associated with class action procedure are reduced by the known fact that class counsel carefully screen their cases.

[67] Over the years, the risk that a carefully selected action will not be certified has diminished and the risk that a large number of class members will opt out has never materialized. The risk that a court would not approve a settlement agreement after lengthy, time-consuming and expensive negotiations is remote to the extreme.

[68] The risk that the court does not approve class counsel fees or approves them at a reduced rate is a not a risk but a responsibility that Class Counsel must assume as part of their professional responsibilities to Class Members and as officers of the court.

[69] I obviously cannot and do not speak about the procedural risks and the litigation risks of the action that is continuing against the non-Settling Defendants, but I am not considering a fee request for a contested certification motion; rather, I am determining the appropriate fees for a second consent certification motion (for which there can be no opt-outs), and the fee for a partial settlement.

[70] Put shortly, in my opinion, having regard to the results achieved and the risks assumed, and with the real work left to be done, and with the Class Members having received nothing to date, Class Counsel have not yet earned a fee of $13.8 million.

[71] In my opinion, the appropriate award is an additional $2 million in fees plus the payment

2017 ONSC 2324 (CanLII)

of disbursements. This award is without prejudice to a renewed motion for fee approval at the earlier of: (a) another round of settlements; (b) a motion to distribute settlement proceeds to Class Members; or (c) the contested certification motion.

5. Conclusion

[72] For the above reasons, I approve the three settlements, grant Class Counsel disbursements, and dismiss the motion for fee approval without prejudice to a renewed motion for fee approval at the earlier of: (a) another round of settlements; (b) a motion to distribute settlement proceeds to Class Members; or (c) the contested certification motion.

Perell, J.

Released: April 20, 2017

2017 ONSC 2324 (CanLII)

CITATION: Mancinelli v. Royal Bank of Canada, 2017 ONSC 2324
COURT FILE NO.: CV-15-536174
DATE: 20170420

2017 ONSC 2324 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS SECURITIES LLC and UBS BANK (CANADA)

Defendants

REASONS FOR DECISION

PERELL J.

Released: April 20, 2017

Tab 11

CITATION: Mancinelli v. Royal Bank of Canada, 2019 ONSC 626
COURT FILE NO.: CV-15-536174
DATE: 2019/01/24

2019 ONSC 626 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

Louis Sokolov for the Plaintiffs

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK

Matthew Milne-Smith for the Defendants Morgan Stanley Canada Limited and Morgan Stanley Canada Limited

Robert Carson for the Royal Bank of Canada and RBC Capital Markets LLC

Caroline Humphrey for the Defendants Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG and Credit Suisse Securities (Canada) Inc.

Samantha Gordon for the Defendants Royal Bank of Scotland Group PLC, RBS Securities Inc., Royal Bank of Scotland N.V. and Royal Bank of Scotland PLC

Pierre N. Gemson for the Defendant Deutsche Bank AG

Ben Kates for the Defendants Toronto Dominion Bank, TD Bank, N.A., TD Group Holdings, LLC, TD Bank USA, N.A. and TD Securities Limited

USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS SECURITIES LLC and UBS BANK (CANADA)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

HEARD: January 24, 2019

PERELL, J.

REASONS FOR DECISION

[1] The Plaintiffs, Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos and Jack Oliveira, in their capacity as The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, and Christopher Staines, sue 18 groups of financial institutions.

[2] Pursuant to the *Class Proceedings Act, 1992*,[1] the Plaintiffs bring a motion for an order approving a settlement reached with the Defendants Morgan Stanley Canada Limited and Morgan Stanley Canada Limited ("Morgan Stanley").

[3] The Plaintiffs sue: (1) Royal Bank of Canada, RBC Capital Markets LLC; (2) Bank of America Corporation, Bank of America, N.A., Bank of America Canada, Bank of America National Association; (3) The Bank of Tokyo Mitsubishi UFJ Ltd., Bank of Tokyo-Mitsubishi UFJ (Canada); (4) Barclays Bank PLC, Barclays Capital Inc., Barclays Capital Canada Inc.; (5) BNP Paribas, BNP Paribas (Canada), BNP Paribas Group, BNP Paribas North America Inc.; (6) Citibank, N.A., Citibank Canada, Citigroup Global Markets Canada Inc., Citigroup, Inc.; (7) Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG, Credit Suisse Securities (Canada), Inc.; (8) Deutsche Bank AG; (9) The Goldman Sachs Group, Inc., Goldman, Sachs & Co., Goldman Sachs Canada Inc.; (10) HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., HSBC Bank Canada; (11) J.P. Morgan Canada, JPMorgan Chase Bank National Association, JPMorgan Chase & Co., J.P. Morgan

[1] S.O. 1992, c. 6.

2019 ONSC 626 (CanLII)

Bank Canada; (12) Morgan Stanley, Morgan Stanley Canada Limited; (13) Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., Royal Bank of Scotland PLC; (14) Société Générale S.A., Société Générale (Canada), Société Générale; (15) Standard Chartered PLC; (16) UBS AG, UBS Securities LLC and UBS Bank (Canada); (17) Bank of Montreal, BMO Financial Corp., BMO Harris Bank N.A., BMO Capital Markets Limited; and (18) Toronto Dominion Bank, TD Bank, N.A., TD Group Holdings, LLC, TD Bank USA, N.A. and TD Securities Limited.

[4] In their proposed class action under the *Class Proceedings Act*, *1992*, S.O. 1992, c. 6, the Plaintiffs allege that the Defendants conspired with each other to fix prices in the futures exchange market ("FX Market"). It is alleged that through the use of multiple chat rooms with names such as "The Cartel," "The Bandits' Club," and "The Mafia," the Defendants communicated directly with each other to coordinate their: (i) fixing of spot prices; (ii) control and manipulation of FX benchmark rates; and (iii) exchange of key confidential customer information to trigger client stop loss orders and limit orders.

[5] The Plaintiffs allege that the Defendants' conspiracy impacted all manners of FX instruments, including those trading both over-the-counter and on exchanges.

[6] The Plaintiffs, through Mr. Staines, commenced an action by way of Statement of Claim, which was issued on September 11, 2015. The Statement of Claim pleads several causes of action against the Defendants, including a statutory right of action for contraventions of Part VI of the *Competition Act*[2]; namely civil conspiracy, and unjust enrichment.

[7] The Class Counsel team is made up of lawyers from Sotos LLP, Siskinds LLP, Koskie Minsky LLP and Camp Fiorante Matthews Mogerman LLP.

[8] Similar litigation has been commenced in Québec. Class Counsel in the Ontario action is working cooperatively with the law firm of Siskinds Desmeules s.e.n.c.r.l ("Siskinds Québec"), counsel to the plaintiff in the Québec action (Court File No. 200-06-000189-152), to prosecute the Québec action.

[9] Class Counsel and Siskinds Québec are working together and have agreed to pursue the litigation on a national basis with carriage in Ontario.

[10] The hearing of the motion for certification is scheduled for June 10-15, 2019.

[11] The Plaintiffs have reached court approved settlements with twelve groups of Defendants: (1) UBS AG, UBS Securities LLC and UBS Bank (Canada); (2) BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas (Canada), and BNP Paribas; (3) Bank of America Corporation, Bank of America, N.A., Bank of America Canada and Bank of America National Association; (4) The Goldman Sachs Group, Inc., Goldman, Sachs & Co., and Goldman Sachs Canada Inc.; (5) JPMorgan Chase & Co., J.P. Morgan Bank Canada, J.P. Morgan Canada, and JPMorgan Chase Bank National Association; (6) Citigroup, Inc., Citibank, N.A., Citibank Canada, and Citigroup Global Markets Canada Inc; (7) Barclays Bank PLC, Barclays Capital Inc., and Barclays Capital Canada Inc. ("Barclays"); (8) HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., and HSBC Bank Canada ("HSBC"); (9) Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of

[2] R.S.C. 1985, c. C-34.

2019 ONSC 626 (CanLII)

Scotland N.V., and Royal Bank of Scotland PLC ("RBS"); (10) Standard Chartered PLC; (11) The Bank of Tokyo Mitsubishi UFJ Ltd. and Bank of Tokyo-Mitsubishi UFJ (Canada) ("Bank of Tokyo"); and (12) Société Générale S.A., Société Générale (Canada) and Société Générale (Société Générale).[3]

[12] The chart below describes the settlements:

Defendants	Settlement Amount	Settlement Agreement Date	Settlement Approval Date
UBS AG, UBS Securities LLC and UBS Bank (Canada)	$4,950,000	May 20, 2016	November 9, 2016
BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas (Canada), and BNP Paribas	$4,500,000	July 27, 2016	November 9, 2016
Bank of America Corporation, Bank of America, N.A., Bank of America Canada, and Bank of America National Association	$6,500,000	July 29, 2016	November 9, 2016
The Goldman Sachs Group, Inc., Goldman, Sachs & Co., and Goldman Sachs Canada Inc.	$6,750,000	October 14, 2016	April 13, 2017
JPMorgan Chase & Co., J.P. Morgan Bank Canada, J.P. Morgan Canada, and JPMorgan Chase Bank National Association	$11,500,000	November 28, 2016	April 13, 2017
Citigroup Inc., Citibank, N.A., Citibank Canada, and Citigroup Global Markets Canada Inc.	$21,000,000	November 29, 2016	April 13, 2017
Barclays Bank PLC, Barclays Capital Inc., Barclays Capital Canada Inc.	$19,677,205.88	April 13, 2017	September 18, 2017
HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., HSBC Bank Canada	$15,500,000	May 24, 2017	September 18, 2017
Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., Royal Bank of Scotland PLC	$13,220,000	May 29, 2017	September 18, 2017
Standard Chartered PLC	$900,000	May 29, 2017	September 18, 2017
The Bank of Tokyo Mitsubishi UFJ Ltd., Bank of Tokyo-Mitsubishi UFJ (Canada)	$450,000	June 30, 2017	September 18, 2017
Société Générale S.A., Société Générale (Canada), Société Générale	$1,800,000	July 4, 2017	September 18, 2017

[3] See: *Staines v. Royal Bank of Canada*, 2016 ONSC 5270; *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953; *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 7857; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 3910; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 4219; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 5503.

2019 ONSC 626 (CanLII)

[13] The Plaintiffs have now reached a settlement with Morgan Stanley. The action against Morgan Stanley has been certified as a class action for settlement purposes.[4]

[14] The Settlement Agreement is conditional upon approval of the Ontario and Québec courts. A motion for settlement approval in the Québec Proceeding is scheduled for February 8, 2019.

[15] The settlement requires Morgan Stanley to pay USD$2.3 million for the benefit of the settlement class and to provide cooperation in the prosecution of the case against the remaining Defendants. The settlement also provides for a dismissal of the action against Morgan Stanley Canada Limited.

[16] In order to assist the court in assessing the Plaintiffs' calculation of damages, the Plaintiffs retained Professor Ilias Tsiakas, Finance Professor at the University of Guelph and an expert in foreign exchange markets, to provide an estimate on the range of potential damages suffered by members of the putative class.

[17] Professor Tsiakas has estimated a range of total damages between $155 million to $619.9 million during 2008 and 2013 (*i.e.*, the period that was the subject of regulatory findings) and between $270 million to $1,080 million for the entire class period. Morgan Stanley holds 0.51% of the Canadian FX market (liability range between $1.4 million to $5.5 million) and 2.88% of the global FX market.

[18] The parties to the settlement seek an order barring any claim for contribution or indemnity against Morgan Stanley. The proposed bar order provides that if the Court ultimately determines that a right of contribution and indemnity exists between co-conspirators, the Plaintiffs and settlement classes shall restrict their joint and several claims against the non-Settling Defendant. Should the Court determine that no such right exists, the settlement Class Members will be entitled to advance the entirety of their claims subject only to a reduction for the value of the settlement payments received.

[19] The Morgan Stanley settlement is in line with the previously approved settlements in this class proceeding.

[20] Class Counsel recommend the settlements as fair, reasonable, and in the best interests of the class.

[21] The Representative Plaintiffs recommend the settlements.

[22] Notice of the proposed settlement was given in accordance with the order of this Court. There are no objectors to the settlement.

[23] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[5]

---

[4] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 6129.
[5] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

2019 ONSC 626 (CanLII)

[24] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[6]

[25] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[7] An objective and rational assessment of the pros and cons of the settlement is required.[8]

[26] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[9] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[10]

[27] I regard the settlement as fair, reasonable, and in the best interests of the Class Members based on the information available at this juncture of the proceedings. Having reviewed the motion record and having regard to the various factors used to determine whether to approve a settlement, I am satisfied that the settlement should be approved.

[28] Class Counsel proposes that the settlement funds (less a 10% holdback which is to be maintained in trust by Class Counsel for future fees and disbursements and to fund the ongoing litigation, including any adverse costs awards made in this case) be subject to the same Distribution Protocol that has been previously approved by this Court. I have already determined that the Protocol was fair, reasonable and in the best interests of the class.[11] The previously approved Distribution Protocol shall apply to this settlement.

[29] Order accordingly.

Perell, J.

Released: January 24, 2019

[6] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).
[7] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).
[8] *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).
[9] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).
[10] *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.).
[11] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192, para. 52, Plaintiffs' Book of Authorities, Tab 5.

2019 ONSC 626 (CanLII)

CITATION: Mancinelli v. Royal Bank of Canada, 2019 ONSC 626
COURT FILE NO.: CV-15-536174
DATE: 2019/01/24

ONTARIO
SUPERIOR COURT OF JUSTICE

2019 ONSC 626 (CanLII)

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS SECURITIES LLC and UBS BANK (CANADA)

Defendants

REASONS FOR DECISION

PERELL J.

Released: January 24, 2019

Tab 12

CITATION: Mancinelli v. Royal Bank of Canada, 2021 ONSC 6306
COURT FILE NO.: CV-15-536174-00CP
DATE: 20210923

2021 ONSC 6306 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

Louis Sokolov, Daniel Bach, and *Nathalie Gondek* for the Plaintiffs.

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA, CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, BANK OF MONTREAL, BMO FINANCIAL CORP., BMO HARRIS BANK N.A., BMO CAPITAL MARKETS LIMITED, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA, INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS, (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES, (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN

Stephen Aylward for the Defendants, Toronto Dominion Bank, TD Securities, TD Bank USA, N.A. and TD Bank, N.A.

Allan D. Coleman and *Robert Carson* for the Royal Bank of Canada and RBC Capital Markets LLC.

Don Houston and *Akiva Stern* for the Defendants, Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG and Credit Suisse Securities (Canada), Inc.

Subrata Bhattacharjee, Caitlin R. Sainsbury and *Pierre N. Gemson* for the Defendant, Deutsche Bank AG.

SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P. MORGAN BANK CANADA, J.P. MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND, GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL, BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE, (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, TORONTO DOMINION BANK, TD BANK, N.A., TD GROUP HOLDINGS, LLC, TD BANK USA, N.A., TD SECURITIES LIMITED, UBS AG, UBS SECURITIES LLC, and UBS BANK (CANADA)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

HEARD: September 23, 2021

2021 ONSC 6306 (CanLII)

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In this certified action under the *Class Proceedings Act*, *1992*, the Plaintiffs and Class Counsel bring motions for the approval of four settlements and for approval of Class Counsel's fee.

[2] There is a motion for court approval of proposed settlements with: (a) Toronto Dominion Bank, TD Bank, N.A., TD Group Holdings, LLC, TD Bank USA, N.A., and TD Securities Limited (collectively, "TD"); (b) Royal Bank of Canada and RBC Capital Markets LLC (collectively, "RBC"); (c) Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG, and Credit Suisse Securities (Canada), Inc. (collectively, "Credit Suisse"); and (d) Deutsche Bank AG ("Deutsche Bank").

[3] The settlements total more than $25 million dollars. The settlements are conditional upon approval of the Ontario and Québec courts. If approved, these settlements will resolve this action

which began in 2015 in its entirety. With the previous settlements, the settlements in this class action against some of the world's largest banks total $135 million.

B. Facts

[4] In this action under the *Class Proceedings Act, 1992*,[1] the Plaintiffs, Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos, and Jack Oliveira, in their capacity as The Trustees of the Labourers' Pension Fund of Central and Eastern Canada ("Labourers"), and Christopher Staines, sued eighteen groups of bank financial institutions.

[5] The Plaintiffs, through Mr. Staines, commenced this action by way of Statement of Claim, which was issued on September 11, 2015. The Plaintiffs allege that the Defendants conspired with each other to fix prices in the futures exchange market ("FX Market"). The Statement of Claim pleads several causes of action including a statutory right of action for contraventions of Part VI of the *Competition Act*;[2] namely: civil conspiracy, and unjust enrichment. It is alleged that through the use of multiple chat rooms with names such as "The Cartel," "The Bandits' Club," and "The Mafia," the Defendants communicated directly with each other to coordinate their: (i) fixing of spot prices; (ii) control and manipulation of FX benchmark rates; and (iii) exchange of key confidential customer information to trigger client stop loss orders and limit orders. The Plaintiffs allege that the Defendants' conspiracy impacted all manner of FX instruments, including those trading both over the counter and on exchanges.

[6] The Class Counsel team is made up of lawyers from Sotos LLP, Siskinds LLP, Koskie Minsky LLP and Camp Fiorante Matthews Mogerman LLP. There was no third-party funding.

[7] Similar litigation has been commenced in Québec. Class Counsel in the Ontario action is working cooperatively with the law firm of Siskinds Desmeules s.e.n.c.r.l ("Siskinds Québec"), counsel in the Québec action (Court File No. 200-06-000189-152), to prosecute the Québec action. Class Counsel and Siskinds Québec are working together and have agreed to pursue the litigation on a national basis with carriage in Ontario.

[8] Related litigation is ongoing in the United States. In that litigation, settlements have been reached with fifteen defendant groups. The U.S. litigation is continuing against the Credit Suisse Defendants.

[9] The litigation in Canada was complex with high litigation risks associated with certification, proof of liability, the calculation of damages, and about the effect of releases given in the U.S. proceedings. The litigation was vigorously defended by well-resourced and well-represented defendants.

[10] The Plaintiffs reached court approved settlements with fourteen groups of Defendants; namely: (1) UBS AG, UBS Securities LLC and UBS Bank (Canada); (2) BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas (Canada), and BNP Paribas; (3) Bank of America Corporation, Bank of America, N.A., Bank of America Canada and Bank of America National Association; (4) The Goldman Sachs Group, Inc., Goldman, Sachs & Co., and Goldman Sachs Canada Inc.; (5) JPMorgan Chase & Co., J.P. Morgan Bank Canada, J.P. Morgan Canada, and

[1] S.O. 1992, c. 6.
[2] R.S.C. 1985, c. C-34.

2021 ONSC 6306 (CanLII)

JPMorgan Chase Bank National Association; (6) Citigroup, Inc., Citibank, N.A., Citibank Canada, and Citigroup Global Markets Canada Inc; (7) Barclays Bank PLC, Barclays Capital Inc., and Barclays Capital Canada Inc. ("Barclays"); (8) HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., and HSBC Bank Canada ("HSBC"); (9) Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., and Royal Bank of Scotland PLC ("RBS"); (10) Standard Chartered PLC; (11) The Bank of Tokyo Mitsubishi UFJ Ltd. and Bank of Tokyo-Mitsubishi UFJ (Canada) ("Bank of Tokyo"); (12) Société Générale S.A., Société Générale (Canada) and Société Générale (Société Générale); (13) Morgan Stanley; and (14) Bank of Montreal, BMO Financial Corp., BMO Harris Bank N.A. and BMO Capital Markets Limited ("BMO").[3]

[11] The Chart below sets out the settlements.

Settled Defendants	Amount
UBS AG, UBS Securities LLC and UBS Bank (Canada)	$4,950,000
BNP Paribas Group, BNP Paribas North America, Inc., BNP Paribas (Canada), and BNP Paribas	$4,500,000
Bank of America Corporation, Bank of America, N.A., Bank of America Canada, and Bank of America National Association	$6,500,000
The Goldman Sachs Group, Inc., Goldman, Sachs & Co., and Goldman Sachs Canada Inc.	$6,750,000
JPMorgan Chase & Co., J.P. Morgan Bank Canada, J.P. Morgan Canada, and JPMorgan Chase Bank National Association	$11,500,000
Citigroup Inc., Citibank, N.A., Citibank Canada, and Citigroup Global Markets Canada Inc.	$21,000,000
Barclays Bank PLC, Barclays Capital Inc., and Barclays Capital Canada Inc.	$19,677,205.88
HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., and HSBC Bank Canada	$15,500,000
Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., and Royal Bank of Scotland PLC	$13,220,000
Standard Chartered PLC	$900,000
The Bank of Tokyo Mitsubishi UFJ, Ltd., and Bank of Tokyo-Mitsubishi UFJ (Canada)	$450,000
Société Générale S.A., Société Générale (Canada) and Société Générale	$1,800,000
Morgan Stanley	$2,300,000 US
Bank of Montreal, BMO Financial Corp., BMO Harris Bank N.A. and BMO Capital Markets Limited	$250,000

[12] The distribution of the previous settlement funds is currently in administration. The

[3] See: *Staines v. Royal Bank of Canada*, 2016 ONSC 5270; *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953; *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 7857; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 3910; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 4219; *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 5503; *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 6129; *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 4328.

2021 ONSC 6306 (CanLII)

deadline to file a claim was January 15, 2020. The Claims Administrator is currently processing claims. It is expected that claims will be paid out in mid-2022.

[13] The Plaintiffs have now reached a settlement with the final four groups: (a) Toronto Dominion Bank, TD Securities Limited, TD Group Holdings, LLC, TD Bank USA, N.A. and TD Bank, N.A; (b) the Royal Bank of Canada and RBC Capital Markets LLC; (c) Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG and Credit Suisse Securities (Canada), Inc.; and (d) Deutsche Bank AG.

[14] As a result of investigations in Canada and the U.S. the settling defendants have been subject to findings and fines as follows:

TD	Ontario Securities Commission	$9.3 million + $800,000 (costs)
RBC	Ontario Securities Commission	$13.6 million + $800,000 (costs)
Credit Suisse	New York State Department of Financial Services	$135 million (USD)
Deutsche Bank	Federal Reserve	$136.9 million (USD)
	New York State Department of Financial Services	$205 million (USD)
	Korean Fair Trade Commission	212 million (Won)
	Brazil Council for Economic Defence	R$183.5 million (jointly with others)

[15] Pursuant to their settlement agreements: (a) TD agrees to pay CAD $4.5 million less $175,000 previously paid towards the costs of the contested certification motion; (b) RBC agrees to pay CAD $6,556,000 less $175,000 previously paid towards the costs of the contested certification motion; (c) Credit Suisse agrees to pay CAD $5,560,000; and (d) Deutsche Bank agrees to pay USD $7,220,000 less the $175,000 converted to USD $144,000 previously contributed to the costs of the contested certification motion.

[16] Each settlement was negotiated separately, at arm’s length, by counsel for the plaintiffs and each of the defendants. The Plaintiffs bring motions for the following relief:

- An Order approving the settlement agreement entered into with Toronto Dominion Bank, TD Bank, N.A., TD Group Holdings, LLC, TD Bank USA, N.A., and TD Securities Limited (collectively, “TD”), dated May 7, 2021 as fair, reasonable and in the best interests of the settlement classes.

- An Order approving the settlement agreement entered into with Royal Bank of Canada and RBC Capital Markets LLC (collectively, “RBC”), dated May 7, 2021 as fair, reasonable and in the best interests of the settlement classes.

- An Order approving the settlement agreement entered into with Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG, and Credit Suisse Securities (Canada), Inc. (collectively, “Credit Suisse”), dated May 7, 2021 as fair, reasonable and

2021 ONSC 6306 (CanLII)

in the best interests of the settlement classes.

- An Order approving the settlement agreement entered into with Deutsche Bank AG ("Deutsche Bank"), dated July 2, 2021 as fair, reasonable and in the best interests of the settlement classes.
- An Order that the Amended Distribution Protocol applies to all Court-approved settlements in this action.
- An order approving the fees and disbursements of Sotos LLP, Siskinds LLP, Koskie Minsky LLP and Camp Fiorante Matthews Mogerman LLP (collectively "Class Counsel").
- An order that the approved Class Counsel fees and approved reimbursement for disbursements shall be paid out of: (a) the settlement funds established pursuant to the settlement agreements between the parties (the "Settlement Agreements"); and (b) the costs awards paid by the Defendants.

[17] Class Counsel recommends approval of the settlements to the court. In their motion materials Class Counsel sets out a detailed explanation of the rationale for the settlement funds for each defendant. It is Class Counsel's opinion that the settlements represent a favourable result for the class and is a fair and reasonable compromise of the litigation against these defendants, especially in light of the litigation risks.

[18] The representative plaintiffs have instructed Class Counsel to seek approval of the settlements. Notice of the settlement was disseminated to Class Members, and Class Counsel have not received any objections to the proposed settlements.

[19] The retainer agreement between the Representative Plaintiffs and Class Counsel provide for recovery of 25% of settlements achieved before certification and 30% of settlements achieved after certification and before trial. In earlier fee approval motions, the retainer agreements have been approved by the court.

[20] The Court has previously made seven interim orders concerning the payment of fees and/or disbursements. The previous awards total $19,375,000 pursuant to the following orders: (a) $3,987,500 plus applicable taxes on November 9, 2016; (b) $2,000,000 plus applicable taxes on April 20, 2017; (c) $7,000,000 plus applicable taxes on July 5, 2018; (d) $62,500 plus applicable taxes on July 16, 2020; and (e) $6,325,000 plus applicable taxes on November 26, 2020.

[21] Class Counsel requests approval of a final instalment of fees and disbursements of $10,244,525.20 plus tax and disbursements. If approved, Class Counsel will receive a total contingency fee of 20% in respect of the settlements achieved before certification and 30% in respect of the settlements achieved after certification. This award would amount to 21.9% of the overall settlement fund. If approved the award is comparable to awards in similar scale class actions.[4]

[4] See: *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC Lavalin Group Inc*, 2018 ONSC 6447 ($25.5 million fee; 22.95% contingency); *Eidoo v. Infineon Technologies AG*, 2013 ONSC 853, 2014 ONSC 6082 and 2016 ONSC 3628 ($24.0 million; 30.2% contingency).

2021 ONSC 6306 (CanLII)

[22] Since the outset of the action, until August 31, 2021, Class Counsel has incurred $8,323,058.25 in docketed time, as summarized in the table below.

	Docketed Hours	**Billable Total Time Value**
Sotos LLP	4,556.1	$2,736,465.00
Koskie Minsky LLP	4,128.0	$2,662,876.50
Siskinds LLP	4,407.1	$2,120,208.50
Camp, Fiorante, Matthews Mogerman, LLP	921.25	$501,542.25
Siskinds Desmeules	930.38	$301,966.00
TOTAL	14,942.83	$8,323,058.25

[23] Class Counsel anticipate that $250,000 in additional time will be required to complete the administration of the settlement. If approved, the requested fee would result in a multiplier of 3.45%.

[24] Class Counsel request payment of disbursements in the amount of $40,630.41 (plus taxes of $5,032.35). This is in addition to the disbursements that have been authorized and paid pursuant to this Court's previous orders.

C. <u>Settlement Approval</u>

[25] Section 29(2) of the *Class Proceedings Act*, *1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[5]

[26] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the

[5] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

2021 ONSC 6306 (CanLII)

negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[6]

[27] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[7] An objective and rational assessment of the pros and cons of the settlement is required.[8]

[28] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[9] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[10]

[29] Having read the motion materials and considered Class Counsel's factums, I am satisfied that the settlements in the immediate case should be approved along with the ancillary relief.

D. <u>Fee Approval</u>

[30] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.[11] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[12]

[31] These risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding.[13]

---

[6] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).
[7] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).
[8] *Al-Harazi v. Quizno's Canada Restaurant Corp*. (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).
[9] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).
[10] *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd*., [2002] O.J. No. 2383 at para. 13 (S.C.J.).
[11] *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).
[12] *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).
[13] *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35; *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 t para. 17 (C.A.).

2021 ONSC 6306 (CanLII)

[32] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well.[14]

[33] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved.[15] Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee.[16] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[17]

[34] In the immediate case, in my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request should be approved. Class Counsel brought a high-risk action to a substantial and significant outcome. Class Counsel earned their fee, and the fee should be and is approved.

E. <u>Conclusion</u>

[35] Orders accordingly. I have signed the Orders.

Perell, J.

Released: September 23, 2021

2021 ONSC 6306 (CanLII)

[14] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61(S.C.J.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.).
[15] *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.
[16] *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at para. 92.
[17] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (C.A.).

CITATION: Mancinelli v. Royal Bank of Canada, 2021 ONSC 6306
COURT FILE NO.: CV-15-536174-00CP
DATE: 20210923

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA, CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, BANK OF MONTREAL, BMO FINANCIAL CORP., BMO HARRIS BANK N.A., BMO CAPITAL MARKETS LIMITED, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA, INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS, (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT, SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES, (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P. MORGAN BANK CANADA, J.P. MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND, GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL, BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE, (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, TORONTO DOMINION BANK, TD BANK, N.A., TD GROUP HOLDINGS, LLC, TD BANK USA, N.A., TD SECURITIES LIMITED, UBS AG, UBS SECURITIES LLC, and UBS BANK (CANADA)

Defendants

REASONS FOR DECISION

PERELL J.

Released: September 23, 2021

2021 ONSC 6306 (CanLII)

Tab 13

CITATION: Middlemiss v. Penn West Petroleum, 2016 ONSC 3537
COURT FILE NO.: CV-15-525189-CP
DATE: 20160606

2016 ONSC 3537 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: James Middlemiss, Plaintiff

AND:

Penn West Petroleum Ltd., David E. Roberts, Murray R. Nunns, Todd H. Takeyasu, Frank Potter, James C. Smith, William E. Andrew and Jeffrey Curran, Defendants

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Jay Strosberg and Kirk Baert* for the Plaintiff

Scott Kugler for Defendants Penn West Petroleum, David E. Roberts and James C. Smith

Lawrence Ritchie for Defendant Murray R. Nunns and for the remaining individual defendants as agent for counsel

HEARD: May 31, 2016

Proceeding under the *Class Proceedings Act, 1992*

SETTLEMENT AND LEGAL FEES APPROVAL

[1] The approval of this proposed securities class action settlement turns on whether the settlement amount falls within a range or zone of reasonableness.[1] The other factors that are repeated in the case law[2] – such as the risks of continued litigation and the

---

[1] *Dabbs v. Sun Life Assurance,* [1998] O.J. No. 1598 (Gen. Div.) at para. 12; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572, at para. 70 (S.C.J.). Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada* (2014) at 305.

[2] *Dabbs*, at para. 13; *Parsons* at para. 71-72.

experience of class counsel – more often than not amount to self-serving "boiler plate" that doesn't really help the judge decide if the proposed settlement is truly in the best interests of the class (and not just in the best interests of class counsel.)[3] It is the "zone of reasonableness" analysis that, in my view, is not only the most helpful but is usually determinative.

[2] Here, as in too often the case, class counsel spent far too much time on the so-called "boiler plate" submissions and not enough time addressing and explaining the zone of reasonableness point.[4] Fortunately, class counsel agreed to file a supplementary affidavit providing more evidence about the latter and as a result, I was satisfied that the settlement was indeed within a zone of reasonableness and should be approved.[5]

Brief background

[3] The defendant Penn West Petroleum was one of Canada's largest oil and gas companies. Its shares trade on the Toronto and New York Stock Exchanges. The individual defendants are current or former officers or directors.

[4] The factual narrative in this proposed securities class action follows a well-charted course. Penn West disclosed a need to restate earlier financials. The share price dropped. Class actions materialized within days in both the U.S. and Canada alleging misrepresentation and claiming substantial damages on behalf of aggrieved shareholders. Four class actions were commenced in Canada: two in Ontario that effectively merged into one; and one in each of Quebec and Alberta.

---

[3] See the discussion in *Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co.,* 2016 ONSC 729, at para. 12; *Leslie v. Agnico-Eagle Mines,* 2016 ONSC 532, at paras. 3-12; and *O'Brien v. Bard,* 2016 ONSC 3076, at paras.11-14.

[4] As I noted in *O'Brien v Bard,* at para. 13: "It is simply not enough for class counsel (whose interests are not aligned with those of the class) to file a factum that in essence says nothing more than '*We know what we're doing … trust us*.' It is my hope that in approving class action settlements in the future, judges will urge class counsel to skip the wind-up (i.e. all the non-specific "boiler-plate") and just throw the pitch (and explain why the settlement amount is within a zone of reasonableness.)"

[5] In every one of my most recent settlement approval motions, class counsel had to file supplementary evidence about the "zone of reasonableness" before the settlement was approved: see *Sheridan Chevrolet* at paras. 13-15; *Leslie* at paras. 13-16 and *Bard* at paras. 11-14.

2016 ONSC 3537 (CanLII)

[5] This familiar litigation narrative was complicated in this case by the fact that during the same time period, world oil prices were falling dramatically[6] and the defendant oil and gas producer soon found itself in a precarious financial position facing a real risk of insolvency.

[6] It was in this context that class counsel persuaded all parties, including those involved in the parallel U.S. action, to sit down with a mediator. The mediation proved to be successful and shortly thereafter the American and Canadian class actions against Penn West were settled for $53 million Canadian. Given that an almost equal amount of shares were purchased on the TSX and the NYSE, it was agreed that the settlement amount would be divided equally and the Canadian class actions would receive $26.5 million.

[7] Class counsel now moves for settlement approval. More specifically, class counsel asks that leave be granted under s. 138.8 of the *Securities Act*,[7] the action be certified for settlement purposes under s. 5(1) of the *Class Proceedings Act,*[8] and the $26.5 million settlement and class counsel's legal fees be formally approved by the court.

[8] Similar approval hearings have been scheduled in Quebec and Alberta.

The motions for leave and certification

[9] As I advised counsel at the hearing, I have no difficulty granting leave under the *Securities Act* and certifying the action for settlement purposes under the *Class Proceedings Act.* I am satisfied on the evidence before me that the action is being brought in good faith and there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. As I noted in *Rahimi*,[9] it is hard to imagine a scenario where a

[6] On July 29, 2014, the date of the company's first disclosure about the need for a restatement, the price of West Texas Intermediate crude oil was US$104.91 a barrel. By the summer and fall of 2015, the oil price had fallen to about US$30 a barrel. The impact on the defendant company's share prices was devastating: shares tumbled from a high of around $10.00 in July, 2014 to less than dollar ($0.82) in May, 2016.

[7] *Securities Act*, R.S.O. 1990, c. S.5, as am.

[8] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[9] *Rahimi v. South Gobi Resources*, 2015 ONSC 5948.

2016 ONSC 3537 (CanLII)

publicly-traded company restates its financials and in doing so allegedly causes shareholder loss and leave under s. 138.8 is not granted.[10]

[10] I also find that the requirements of s. 5(1) of the CPA have been satisfied. The pleadings disclose a cause of action (namely, statutory misrepresentation); there is an identifiable class (all persons, other than residents of Quebec and Alberta, who purchased Penn West shares on the TSX during the class period); the claim raises a common issue (did any of the Penn West financials contain a misrepresentation?); there some evidence that a class action would be the preferable procedure; and there is a suitable representative plaintiff with no conflicts of interest.

[11] Leave and certification are thus granted for settlement purposes.

Settlement approval

[12] This was an early stage settlement. The proposed class action was settled within months of the action being filed and before any motions for leave or certification were brought. Early stage settlements understandably attract more judicial scrutiny than, say, settlements achieved on the eve of the common issues trial.[11]

[13] My concern here was as follows. The plaintiff used for $500 million in damages and the plaintiff's expert concluded that the actual monetary loss sustained by the Canadian class members was in the range of $186.5 million. Why did class counsel agree to settle for $26.5 million?

[14] Class counsel tried to answer this question in very broad terms: in their view, the settlement amount was fair and reasonable because the defendant's financial state was precarious and there was a real risk of insolvency; and the company's available insurance coverage was being eroded by legal defence costs. Class counsel decided that while there was still a significant amount of coverage remaining under the insurance policies, it was better to settle rather than wait until judgment or a later settlement when the insurance policies would likely be depleted.

[15] But this still did not explain why the $26.5 million settlement amount was within a range or zone of reasonableness. In other words, why $26.5 million and not, say, $126 million? I needed more information, in particular about the available insurance coverage

[10] *Ibid.*, at para. 25.

[11] See the discussion in *Clegg v. HMQ Ontario*, 2016 ONSC 2662, at paras. 26-36.

2016 ONSC 3537 (CanLII)

– the applicable policy limits and how quickly these limits were being eroded by defence costs. Fortunately, class counsel agreed to provide additional information by way of a supplementary affidavit.

[16] Having reviewed this additional information, I can now set out the reasons why the settlement amount is fair and reasonable and in the best interests of the class. At the time of the mediation and shortly thereafter when the settlement was concluded, class counsel had the following information:

(i) Even if oil prices were starting to slowly recover, the defendant's share price was not following suit. In other words, the market was no longer confident about the defendant's future as an ongoing concern. The defendant was off-side its financial covenants and there was a real risk of insolvency.

(ii) The defendant would not be able to contribute financially to any class action settlement or judgment. Penn West had less than $2 million in cash on hand and was in no position to draw down on any existing credit facilities. The only realistic source of funding for class member claims was from the company's insurance coverage.

(iii) The available insurance coverage, after the payment of actual and anticipated legal defence costs in the U.S. and Canada, was in the range of C$55 million.

[17] The overall settlement amount of $53 million was therefore not only a reasonable portion of the available insurance monies but virtually the entire available amount. That is, the $53 million settlement, or $26.5 million for the Canadian class members, was not only within a zone of reasonableness, it was demonstrably at the high end of ultimate recoverability.

[18] This additional information about the insurance limits explains why class counsel decided that $26.5 million was fair and reasonable and allows me to conclude without hesitation that the settlement as it pertains to the Ontario class members is very much in the best interests of the class and should be approved. This is an excellent outcome.

Legal fees approval

2016 ONSC 3537 (CanLII)

[19] The retainer agreement provides for the recovery of a 33 per cent contingency fee plus disbursements and taxes. Following the reasoning in *Cannon*[12] I have no difficulty according presumptive validity to this contingency fee arrangement. As I have noted many times, it is only through a robust contingency fee system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice.

[20] Class counsel is entitled to receive one-third of the $26.5 million recovery plus disbursements and taxes. The legal fees request is approved.

[21] I am also pleased to formally approve the Fee and Retainer Agreement, the Consortium and Carriage Agreement and the Carriage and Co-operation Agreement - the latter two agreements were authorized by the Fee and Retainer Agreement.

[22] My congratulations again to counsel on both sides for resolving this matter in such an impressive fashion.

[23] Order to go as per the draft Order that I signed at the conclusion of the hearing.

Belobaba J.

Date: June 6, 2016

[12] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

2016 ONSC 3537 (CanLII)

Tab 14

CITATION: O'Brien v. Bard, 2016 ONSC 3076
COURT FILE NO.: CV-15-523068-CP
DATE: 20160511

2016 ONSC 3076 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Donna O'Brien, Adam Pierce, Elizabeth Burden and Bruce Burden, Plaintiffs

AND:

Bard Canada Inc., C.R. Bard Inc., and Bard Medical Division, Defendants

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Michael Peerless and Matthew Baer* for the Plaintiffs

Michael Eizenga and Ashley Paterson for the Defendants

HEARD: May 2, 2016

Proceeding under the Class Proceedings Act, 1992

APPROVAL OF SETTLEMENT AND LEGAL FEES

[1] The plaintiffs ask that the court certify the proposed class action for settlement purposes and then approve the settlement and the legal fees.

[2] Unlike the plaintiffs' initial and much larger class action which was not certified because it involved some 19 different categories of pelvic mesh products,[1] the class action herein is limited to just two categories: the defendant's Avaulta product that is used to treat pelvic organ prolapse ("POP") and the defendant's Align or Ajust product used to treat stress urinary incontinence ("SUI").

---

[1] *O'Brien v. Bard Canada Inc.*, 2015 ONSC 2470.

[3] The settlement provides $400,000 for the benefit of the Avaulta Class, $1,550,000 for the benefit of the Align and Ajust Class, $300,000 in a "special circumstances fund" for the benefit of both classes, and $225,000 for notice and claims administration - for a non-reversionary total of $2,475,000.

[4] Class counsel advises that there are currently 22 potential claimants.

[5] Every class member's claim will be awarded points by class counsel (because they have the best understanding of each claim) based on the severity of the harm or injury sustained. The claims administrator will use the points to determine the appropriate compensation payment. Appeals from the decision of the administrator were initially to come to this court.

[6] At the hearing on May 2, 2016 I voiced two concerns about the settlement as proposed: first, that any appeals from the decision of the administrator not involve the court; and second, that class counsel should provide more information as to why the $2.475 million settlement amount falls within a zone of reasonableness.

[7] Both concerns were promptly addressed. Within days, class counsel advised that the parties had amended the settlement agreement to provide that a "special appeals master" (an experienced class action lawyer) would review and decide any claims appeals. Class counsel also provided a supplementary affidavit with the additional information that I required.

Certification for settlement purposes

[8] The first order to business is to certify the proposed class action for settlement purposes. I have no difficulty doing so. Each of the five requirements set out in s. 5(1) of the *Class Proceedings Act*[2] is satisfied. The pleadings disclose a cause of action in negligence. There is an identifiable class defined, in essence, as all persons resident in Canada (excluding Quebec) who were implanted with an Avaulta, Align and/or Ajust product, and includes family law claims and the subrogated claims of the provincial health insurers.

[9] There is some basis in fact for the existence and commonality of the proposed common issue – whether the defendants breached a duty of care owed to the classes by marketing and distributing the above-noted products in Canada. The certification of this

[2] *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("CPA").

2016 ONSC 3076 (CanLII)

common issue will avoid duplication in fact-finding and legal analysis and will definitely advance the litigation. A class action will be a fair, efficient and manageable method of advancing the claim and the named plaintiffs have a workable litigation plan in place and together will fairly and adequately represent the interests of the class.

[10] The proposed class action, limited to the Avaulta, Align and Ajust products, is certified for settlement purposes.

2016 ONSC 3076 (CanLII)

Settlement approval

[11] As already noted, I was not persuaded by the material that was initially filed by class counsel. The affidavit and factum, although in many respects routine, was little more than non-specific "boiler-plate."[3] The primary concern of a class action judge in approving a settlement is to be satisfied that the settlement amount falls within a range or zone of reasonableness.[4] I frankly needed more information on this important point.

[12] In a supplementary affidavit filed just a few days after the hearing, class counsel addressed my concern and explained why $2.475 million is within a zone of reasonableness. What follows is my summary of the additional evidence:

- Class counsels' knowledge level about the risks (and rewards) of further litigation in this case is relatively high given that they have just fought and lost a larger certification motion with the same basic liability and damages issues. In other words, this is not an "early stage" settlement and class counsel's assessment should be taken more seriously;

- About 328 Avaulta models and 4,059 Align/Ajust models were sold in Canada, although some may not be implanted and may still be in inventory. The risk of serious side effects for the SUI products is between 1 and 2% and for the POP products between 2.5 and 10%. Applying the higher percentage in each case results in about 33 POP claimants and 81 SUI claimants, with an overall total of 114 potential claimants.

- Class counsel, however, is currently aware of only 22 claimants and notes that the number of claims actually made typically ends up being two to three times the number of known cases at the time of resolution. Here this means, at most, 66 claimants.

- Had the matter gone to trial, the recovery would have been in the range of $50,000 to $150,000 per claimant. Discounting this by 50 per cent to reflect the risks of litigation,

---

[3] See my comments in *Leslie v. Agnico-Eagle Mines*, 2016 ONSC 532.

[4] *Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co.*, 2016 ONSC 729, at para. 12.

> the compensation payment is therefore in the range of $25,000 to $75,000 per claimant. Given that 22 to 66 claims are expected, and given the settlement amount, the average recovery will exceed $30,000 and individual claims will range from a few thousand to around $100,000.[5]

[13] This is exactly the kind of information that a court requires. It is simply not enough for class counsel (whose interests are not aligned with those of the class) to file a factum that says nothing more than "We know what we're doing … trust us." It is my hope that in approving class action settlements in the future, judges will urge class counsel to skip the wind-up (i.e. all the non-specific "boiler-plate") and just throw the pitch (and explain why the settlement amount is within a zone of reasonableness.)

[14] In this case, with the additional information provided by class counsel as summarized above, I am satisfied that the $2.475 million settlement amount is indeed within a zone of reasonableness. I am satisfied that the agreement is fair and reasonable and in the best interests of the class. The settlement is approved.

Legal fees approval

[15] Under the retainer agreements entered into with the four representative plaintiffs, class counsel is entitled to a 30 per cent contingency plus disbursements and taxes. This is exactly what class counsel is requesting: legal fees of $742,500 plus disbursements and taxes.

[16] As I noted in *Cannon*,[6] contingency fee arrangements of up to one-third recovery that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable. In my view, this is the most principled approach to class counsel compensation and one that best assures the future viability of the class action as a significant vehicle for access to justice. Class counsels' legal fees are therefore approved as requested.

[17] Orders to go as per the draft Orders signed by me today.

---

[5] I would add this calculation: assume an average compensation payment of $50,000 (the mid-point between $25,000 and $75,000) and assume 44 claimants (the mid-point between 22 and 66) the settlement should be around $2.2 million. Therefore, the actual settlement of $2.475 million falls easily within a zone of reasonableness.

[6] *Cannon v. Funds for Canada Foundation*, (2013) ONSC 7686.

2016 ONSC 3076 (CanLII)

Belobaba J.

Date: May 11, 2016

2016 ONSC 3076 (CanLII)

Tab 15

CITATION: Osmun v. Cadbury Adams Canada Inc., 2010 ONSC 2752
COURT FILE NO.: 08-CV-347263PD2
DATE: 20100513

2010 ONSC 2752 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DAVID OSMUN and METRO (WINDSOR) ENTERPRISES INC.	)	*Harvey T. Strosberg Q.C.* and *Charles M. Wright*, for the plaintiff
Plaintiffs	)	
– and –	)	
CADBURY ADAMS CANADA INC., THE HERSHEY COMPANY, HERSHEY CANADA INC., NESTLÉ CANADA, INC., MARS, INCORPORATED, MARS CANADA INC. and ITWAL LIMITED	)	
Defendants		
	)	**HEARD:** April 21, 2010 and by written submissions

Proceedings under the *Class Proceedings Act, 1992*

REASONS FOR DECISION – FEE APPROVAL

2010 ONSC 2752 (CanLII)

G.R. STRATHY J.

[1] This is a motion for approval of fees and disbursements of class counsel with respect to partial settlements reached in this action. The settlements are conditional upon approval of the courts in each of Ontario, British Columbia and Québec. In reasons released on May 5, 2010, I approved the settlements. A motion for settlement approval will be heard by the Supreme Court of British Columbia on May 25, 2010 and by the Québec Superior Court on June 8, 2010.

[2] The details of these proceedings, and of the settlements, are set out in my reasons on the settlement approval: *Osmun v. Cadbury Adams Canada Inc*, 2010 ONSC 2643. The key terms for present purposes are:

> (a) Cadbury has paid $5,795,695.60 inclusive of pre-deposit interest for the benefit of settlement class members. Cadbury is also obligated to pay the costs of notice that exceed $250,000;
>
> (b) Cadbury has agreed to cooperate with the plaintiffs in pursuing their claims against the non-settling defendants;
>
> (c) ITWAL is required to assign to the settlement class its claims against the non-settling defendants and to pay the costs of notice up to $25,000; and
>
> (d) ITWAL has agreed to cooperate with the plaintiffs in pursuing their claims against the non-settling defendants.

[3] I have found that the settlement is fair and reasonable and in the best interests of the class. It is the product of cooperation between class counsel in Ontario, B.C. and Québec. Approval of a combined counsel fee, to be shared with B.C. class counsel, is being sought in this action and in the B.C. action, based upon the share of the settlement amount notionally allocated to these two proceedings. A separate counsel fee will be sought in the Québec action based upon the share of the settlement amount notionally allocated to that proceeding. Class counsel in Ontario and B.C. are seeking a combined fee award because they have pursued the proceedings on a national basis outside Québec, with the litigation being focused in Ontario. B.C. class counsel has assisted in the prosecution of the Ontario action.

2010 ONSC 2752 (CanLII)

[4] By agreement amongst class counsel in Ontario, Québec and B.C., 7.2% ($414,383.31) of the settlement amount has been notionally allocated as the recovery of the Québec settlement class for the purpose of their fee request. The remaining 92.8% of the settlement amount, ($5,340,940.48), has been notionally allocated to the recovery of the Ontario and B.C. settlement classes for the purpose of this fees request. Class counsel in the three provinces have agreed to collectively request court approval of legal fees in a total amount equal to 25% of the Cadbury settlement amount (including accrued interest), plus disbursements and applicable taxes.

[5] Class counsel also commenced actions in Alberta, Manitoba, Saskatchewan, Newfoundland, Nova Scotia, and New Brunswick, working with local counsel in each province. Other lawyers have also commenced actions in some of these provinces as well as in other provinces. Class counsel have worked cooperatively with the lawyers in those actions and it has been agreed that the plaintiffs is those actions will resolve their claims as part of the settlement agreements made in this action and the B.C. action.

[6] From the outset, Ontario class counsel agreed to pursue this action on a contingent fee basis, accepting responsibility for all costs and seeking court approval for a fee if successful.

[7] The retainer agreement entered into with the plaintiffs in this action as of December 1, 2007, provides that in the event of success in the action, Ontario class counsel will be paid any disbursements (not already recovered from the defendants as costs), plus applicable taxes and interest in accordance with s. 33(7)(c) of the *Class Proceedings Act*, *1992*, S.O. 1992, c. 6 (“*C.P.A.*”), plus the greater of:

> (a) the base fee increased by a multiplier of 4, less any fees already recovered as costs, plus applicable taxes; or
>
> (b) if a settlement is reached before examinations for discovery, 30% of the settlement, less any fees already paid, plus applicable taxes.

[8] “Success” is defined in the retainer agreement to include “a settlement that benefits some or all of the Class members.” Under the heading “Interim Distributions,” the agreement provides that “The Court may authorize payments to the Solicitor and/or to the Class from time to time.”

[9] The retainer agreement entered between the plaintiff in the B.C. action and B.C. class counsel also provides for payment on a contingency basis. It provides that class counsel will be paid a fee calculated as 30% of the value of any settlement including any partial settlement and will be payable on all amounts, including prejudgment interest and post judgment interest.

2010 ONSC 2752 (CanLII)

[10] The fee agreement in this case complies with the requirements of s. 32(1) of the *C.P.A.*

[11] Class counsel in Ontario and B.C. request fees of $1,335,235.12 with respect to the settlement, plus disbursements of $81,231.04 and G.S.T. in the amount of $70,729.60, for a total of $1,487,195.76. The fee represents 25% of the portion of the settlement amount allocated to the Ontario and B.C. settlement classes ($5,340,940.48) and is less than the 30% permitted by the retainer agreements entered into with the plaintiffs in this action and the B.C. action.

Analysis

[12] The court has inherent jurisdiction to supervise the conduct of lawyers, including the jurisdiction to supervise the fees they charge to clients: *Glanc v. O'Donaghue,* 2008 ONCA 395, 90 O.R. (3d) 309. In class proceedings, the court exercises that supervisory jurisdiction over the fees charged by class counsel. Subsection 32(2) of the *C.P.A.* states that an agreement respecting fees and disbursements between a solicitor and representative party is not enforceable unless approved by the court. Subsection 32(1) sets out the terms that must be included in such an agreement.

<u>Interim Fee Awards</u>

[13] I am satisfied that there is jurisdiction to make an interim fee award and that it is appropriate to do so in this case. It is permitted by the retainer agreement. Since the settlement class is defined to include all persons in Canada who purchased chocolate products during the settlement period, regardless of whether they purchased from Cadbury or a non-settling defendant, there is no concern that the interim fee award will be an excessive or unfair burden on some members of the class. This is similar to the form of settlement in *Catalyst Paper Corp. v. Atofina Chemicals Inc.,* 2009 BCSC 1659, [2009] B.C.J. No. 2409, in which an interim fee was approved on a partial settlement. The court noted, at paras. 59-60:

> All plaintiffs share in the success that has been achieved to date. Similarly, all plaintiffs share an interest in ensuring that the litigation continues to conclusion as against the non-settling defendants.
>
> As a result of this structure, no group of plaintiffs can say that legal fees fall disproportionately upon those whose claims have been settled early or those whose claims have not yet been settled.

[14] I accept the submission of class counsel that the payment of an interim fee award is a salutary measure that will help to promote early settlement. Similar observations were made in *Catalyst Paper Corp. v. Atofina Chemicals Inc.*, at para. 63:

> In my view, the court should seek to establish a regime that is conducive to settlements generally. Permitting the payment of counsel fees on interim settlements is an important element of such a regime.

[15] The payment of interim fees is in keeping with sound business practice. Most paying clients (and undoubtedly most defendants in class actions) expect to be billed and to pay on an ongoing basis.

[16] There is precedent in this jurisdiction for the award of interim fees on partial settlement: *Nutech Brands Inc. et al* v. *Air Canada et al*, above, (19 February 2009), London, 50389CP (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117, [2005] O.T.C. 208 (S.C.J.).

<u>Contingent Fee Arrangements</u>

[17] The *C.P.A.* expressly permits contingent fee arrangements – fees payable only in the event of success: s. 33(1). It is a common practice, indeed an almost invariable practice, for class counsel to enter into an agreement for a contingent fee based on a percentage of the recovery.

[18] A number of cases have recognized that such arrangements reward results achieved rather than time spent: *Cogan (Re)* (2007), 88 O.R. (3d) 38, [2007] O.J. No. 4539 (S.C.J.) at paras. 37 and 50; *Crown Bay Hotel Ltd. Partnership* v. *Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 at 88, [1998] O.J. No. 1891 (Gen. Div.) at para. 11.

2010 ONSC 2752 (CanLII)

[19] In the context of class proceedings, a contingent fee agreement focuses on the benefit achieved by the class: *Vitapharm Canada Ltd.* v. *F. Hoffmann-La Roche Ltd.*, above, at para. 107; *Endean* v. *Canadian Red Cross Society*, 2000 BCSC 971, [2000] B.C.J. No. 1254 (S.C.) at para. 74.

[20] Section 33(4) of the *C.P.A.* provides that a contingent fee arrangement may include a provision that permits the lawyer to move to the court to have his or her fees increased by a multiplier. On such motion, the court is to determine a "base fee" (i.e., time multiplied by an hourly rate) and may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success. This "multiplier" approach has been regarded by some as encouraging inefficiency and discouraging early settlement: *Martin* v. *Barrett*, [2008] O.J. No. 2105, 55 C.P.C. (6th) 377 (S.C.J.) at para. 38-39; *Cassano* v. *The Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543, 2009 CarswellOnt 4052 (S.C.J.) at paras. 55, 60, 63.

[21] There is much to be said in favour of contingent fee arrangements. Litigants like them. They provide access to justice by permitting the lawyer, not the client, to finance the litigation. They encourage efficiency. They reward success. They fairly reflect the considerable risks and costs undertaken by class counsel, including the risk that they will never be paid for their work, the risk that their compensation may come only after years of unpaid work and expense, and the risk that they will be exposed to substantial cost awards if the action fails. Effective class actions simply would not be possible without contingent fees. Contingent fee awards serve as an incentive to counsel to take on difficult but important class action litigation.

[22] It is appropriate to use other methods of measurement, such as time multiplied by hourly rate, or a multiplier, or the result, as a check against the reasonableness of the fees claimed; but, in my respectful view, courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple - of the mathematical calculation of hours docketed times the hourly rate.

Factors to be considered

2010 ONSC 2752 (CanLII)

[23] Some of the factors to be considered by the court in the determination of class counsel's fee include:

(a) the time expended by the solicitor;
(b) the legal complexity of the matters to be dealt with;
(c) the degree of responsibility assumed by the solicitor;
(d) the monetary value of the matters in issue;
(e) the importance of the matter to the client;
(f) the degree of skill and competence demonstrated by the solicitor;
(g) the results achieved;
(h) the ability of the client to pay;
(i) the client's expectations as to the amount of the fee;
(j) the risks undertaken by counsel in taking on the case, including the risk that the action may not be certified; and
(k) the position taken by any objectors.

[24] In this case, the following factors are particularly important.

Time expended

[25] Significant time and money have been expended by class counsel in pursuing this litigation. As of March 22, 2010, Class Counsel had docketed time worth $632,743.75 and incurred disbursements of $81,231.04 plus applicable taxes. A good deal of additional time has been docketed in preparation for the settlement and fee approval hearings.

[26] Class counsel has funded all of the disbursements associated with the Ontario and B.C. actions. The plaintiffs in this action have not applied to the Class Proceedings Fund for assistance. If the class had received disbursements funding from the Fund, it would now be obligated to repay any financial support provided by the Fund and pay an additional 10% of the settlement funds.

Result achieved

[27] I have concluded that the partial settlement is an excellent result for the class, with major financial and non-financial benefits. The result achieved is an important consideration in determining the reasonableness of the fee: *Parsons* v. *Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (S.C.J.), at paras. 15-17.

2010 ONSC 2752 (CanLII)

Complexity, importance and value of the litigation

[28] This is legally and factually complex litigation. The issues are of significant private importance to the class, but they also raise concerns of public importance. The amounts at issue are in the many millions of dollars. Counsel should be well compensated for bringing this stage of the litigation to a conclusion.

Skill and diligence

[29] The settlement is the product of many months of negotiation. It is complex and it has been carefully crafted. It required negotiation with the settling defendants but it also required negotiation and discussion with numerous counsel across the country. Bringing all these lawyers, and their clients, on side was no small task. The settlement has been achieved relatively early in the litigation and it seems probable that it will substantially improve the plaintiffs' prospects in the litigation.

Reasonableness of contingent fee

[30] The contingent fee permitted by the retainer agreements is 30%. Class counsel seeks a fee of 25%. I accept the submission of Mr. Wright that this is consistent with the terms of retainer agreements and fees awarded by the courts in other price-fixing conspiracy cases: *Nutech Brands Inc. et al* v. *Air Canada et al*, above, (25% plus disbursements) at paras. 7-8; *Bona Foods Ltd. et al.* v. *Ajinomoto U.S.A., Inc et al.*, [2004] O.J. No. 908, 2 C.P.C. (6^{th}) 15 (S.C.J.) (25% plus disbursements) at paras. 40-42; *Minnema et al.* v. *Archer Daniels Midland Company et al.*, (28 February 2003), Barrie Court File No. G23495-99CP (S.C.J.) (25% plus disbursements) at pp. 4-5.

[31] As I have noted, on a straight "time and hourly rate" basis, class counsel's charges would be $632,743.75, excluding disbursements. The effective multiplier being requested, therefore, is about two, which is not out of the reasonable range. That range has been expressed as being from slightly greater than one (at the low end) to four or higher in the most deserving cases: *Gagné* v. *Silcorp Ltd*. (1998), 41 O.R. (3d) 417 at p. 425, [1998] O.J. No. 4182 (C.A.) at paras. 16-27.

2010 ONSC 2752 (CanLII)

Absence of objection from class members

[32] The notice to class members identified the fee being sought by class counsel. There has been no opposition from the class. Both representative plaintiffs support the proposed fee.

Conclusion

[33] The amount claimed is in line with the fee agreement and, in fact, it is somewhat less. The partial settlement can be regarded as a successful piece of work by class counsel. It is a success in its own right and it may well pave the way for further settlements. If not, it provides the settlement class with both a reasonable recovery and a strategic advantage. In the result, class counsel's fee in the amount of $1,487,195.76 is approved.

[34] In the event of future fee approval motions, the time spent by counsel to date will effectively be cleared off the ledger as covered by this award. This will not preclude class counsel from referring to that time as a factor to be considered in the context of the overall fees claimed in the future.

G.R. Strathy J.

Released: May 13, 2010

2010 ONSC 2752 (CanLII)

2010 ONSC 2752 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID OSMUN and
METRO (WINDSOR) ENTERPRISES INC.

Plaintiffs

– and –

CADBURY ADAMS CANADA INC.,
THE HERSHEY COMPANY, HERSHEY CANADA INC.,
NESTLÉ CANADA, INC., MARS, INCORPORATED,
MARS CANADA INC. and ITWAL LIMITED

Defendants

REASONS FOR DECISION – FEE APPROVAL

G.R. Strathy J.

Released: May 13, 2010

Tab 16

CITATION: PACE SECURITIES CORP. et al v. FIRST HAMILTON HOLDINGS INC. et al., 2021 ONSC 6956

COURT FILE NO.: CV-20-00641059-00CL and CV-20-00641372-00CL

DATE: 2021-10-19

2021 ONSC 6956 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, R.S.O. 1990, C. B.16, AS AMENDED

AND:

IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C., 1985, C. C-44, AS AMENDED

AND:

IN THE MATTER OF A WINDING UP OF PACE SECURITIES CORP., PACE FINANCIAL LIMITED, PACE INSURANCE BROKERS LIMITED AND PACE GENERAL PARTNER LIMITED

BEFORE: Penny J.

COUNSEL: Massimo Starnino and Jesse Wright for Representative Counsel for the Investor Claimants

Wayne Gould on his own behalf

David Miller on his own behalf

Barry Papazian for Mr. Ariel Simms (PSC investment advisor)

HEARD: October 18, 2021

ENDORSEMENT

[1] Representative Counsel was appointed to represent certain investors in preference shares of the respondents by the August 6, 2020 order of The Honourable Justice Hainey. The shares turned out to be worthless. Representative Counsel was able to negotiate a settlement with potential defendants in what otherwise would have been an investor-based claim for losses arising out of the failed investment. The settlement, of some $40 million, was approved by the March 2, 2021 order of Justice Koehnen. Representative Counsel now seeks payment of its professional costs and approval of its proposed scheme of distribution to the investors.

[2] Specifically, this motion is for an order approving Representative Counsel's Third Report, approving payment of Representative Counsel's professional costs out of the settlement fund, directing the transfer of the balance of the settlement fund to Industrial Alliance, Insurance and Financial Services Inc. as distribution agent, to be distributed in accordance with the requested pro rata scheme of distribution and discharging and releasing Representative Counsel from its appointment.

2021 ONSC 6956 (CanLII)

[3] Notices of objection to the professional costs and proposed scheme of distribution were filed by two investors: Mr. Miller and Mr. Gould.

[4] There are only two points of contention.

[5] First, both objectors oppose the proposed manner of allocating the professional costs among the 610 investors. Representative Counsel proposes that the professional costs be paid off the top, followed by the pro rata distribution of the remaining settlement fund. Both objectors argue for some form of flat fee allocation of professional costs to avoid, or reduce, what they alleged would be "cross-subsidization" of the smaller investors by the larger investors under Representative Counsel's proposal.

[6] Second, Mr. Gould opposes the proposed fee of $6 million requested by Representative Counsel. He maintains the fee should be capped at $5 million.

[7] For the reasons that follow, Representative Counsel's motion is granted in full. The requested order shall issue.

<u>The Allocation of Professional Costs</u>

[8] Mr. Miller argues that each and every claimant "household" (of which he says there are 503) contributed to incurring the professional costs in equal portions. There was and is no difference among claimant households in this regard. Each claimant household contributed equally to incurring the cost, thus it is reasonable that each claimant household should pay an equal share of the costs. Thus, Mr. Miller argues for a flat or equal fee allocation of professional costs based on a mathematical formula in which the total amount permitted for professional costs is divided by total number of investor households.

[9] From this perspective, the deduction of professional costs "off the top" and pro rata distribution thereafter results in an alleged "cross-subsidization" of small investors by large investors, which, he says, is "unfair". The result is illustrated, at least directionally, in Figure 4 to Mr. Miller's submission. Under proportional allocation, a $5,000 investor household pays $640 toward the professional costs (for a net recovery of $3,628); a $750,000 investor household pays $96,038 (for a net recovery of $544,213). Under Mr. Miller's flat fee allocation approach, each investor household pays $11,928 (for a net recovery of $0 for the $5,000 investor household and $$628,323 for the $750,000 investor household). A by-product of this approach is that investor households of $15,000 or less would get nothing, or next to nothing, from the settlement fund.

[10] Mr Gould proposes a hybrid approach, in which 70% of the professional costs are allocated pro rata and 30% are allocated on a flat fee basis. Mr. Gould's flat fee allocation is by individual investor, however, not by household. Under his proposal, a $5,000 investor would pay a combined proportional/flat fee allocation of $2,834 (for a recovery of $1,431), and a $750,000 investor would pay $58,709 (for a recovery of $581,041). Although there is some dispute about this, Mr. Gould maintains that under his "hybrid" approach, every investor gets at least some recovery.

[11] Neither Mr. Miller nor Mr. Gould were able to offer any precedent for either of these approaches.

[12] Settled authority establishes that when allocating a limited fund, courts will apply the approach which is the most just, convenient and equitable in the circumstances: *Nortel Networks Corp., Re,* 2015 ONSC 2987 (Commercial List), leave to appeal denied 2016 ONCA 332. Similarly, in the class actions context, courts will approve a plan to allocate funds where it falls within a zone of reasonableness and is fair and in the best interests of the class: *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192 (Sup. Ct.) at para. 496.

[13] In the absence of a reliable juridical basis to differentiate between claimants, the jurisprudence calls for a ratable distribution of the fund. For example, in the *Nortel* proceedings, where Newbould J. was required to determine the basis for allocating $7.3 billion among the various Nortel debtor estates, having found that the Nortel group had not contractually stipulated a method to allocate the funds, the court defaulted to a pro rata allocation, having regard to the "fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors shall receive equal treatment.

[14] In this case, there is a limited fund, the claimants seeking payment from that fund cannot be made whole, there is no agreement, and there is no ready and/or reliable way to differentiate between investor claimants' entitlement to the settlement fund. These considerations strongly support a pro rata allocation of the settlement fund on the basis of what each claimant invested. In addition, a pro rata allocation is consistent with the two principles underpinning Representative Counsel's approach to advocating for the investors, that:

(1) each investor has a valid claim because the preference shares were not an appropriate investment for any investor and, accordingly, any proposal to segregate or "bucket" the investors should be rejected; and

(2) timeliness is of critical importance to the investor claimants and that efficient and expedited procedures were required to achieve a timely resolution of outstanding issues.

[15] A pro rata allocation of professional costs accords with these principles by ensuring that each claim results in a common, proportionate recovery and by avoiding any delays and additional costs that would arise if an attempt were made to more critically examine and differentiate the claims of each investor.

2021 ONSC 6956 (CanLII)

[16] A pro rata allocation also falls within a zone of reasonableness. The proposed allocation of the settlement fund will result in each investor receiving in excess of 70 cents on the dollar based on their original investment. Even if one were to make the inquiries necessary to distinguish or "bucket" investors into different groups, the quantification of the premium or discount to be applied to particular cohorts of investors would necessarily be arbitrary.

[17] Where professionals such as lawyers or accountants have contributed to the creation of a fund, the associated professional costs typically constitute a charge against the fund and are paid "off the top" prior to any distribution of net proceeds. Where costs are paid in priority this way, the effect is that the cost burden is borne by each claimant rateably with their entitlement to the fund. This approach to professional fee payment has been adopted in dozens of group investor claims.

[18] The mandate of Representative Counsel was to represent all investors with claims. Representative Council sought recovery for the benefit of all investors. Small investors' claims formed a material part of the demand that was advanced in these proceedings. Indeed, "smaller" investors made up the bulk of the investors advancing claims. It is highly doubtful that the settlement would have been achieved without them, or if a settlement was possible, that it would have been anywhere near as beneficial to the investors as a whole.

[19] I agree with Representative Counsel that in order to depart from the pro rata allocation approach to professional costs, the objectors must identify a persuasive juridical basis to distinguish between different investor claims. The distinction that the objectors offer is the amount invested. They distinguish between larger investors (who they suggest saved for years and invested their retirement savings) and smaller investors (who they suggest can afford their losses and fall back on other investments).

[20] I cannot accept that the size of an investment is juridically relevant to the manner in which professional costs should be allocated between members of the investor as a group. Larger investors have more to lose, and therefore more to gain by incurring the cost of pursuing their claims. The so-called "reliance" factor between large and small investors is entirely speculative, being unproved, and would require enquiries into the investing circumstances of each claimant, an enquiry that the settlement was, in part, designed to avoid and which would be costly and time-consuming.

[21] I find the objectors' proposed use of flat fee allocations of the professional cost of achieving the settlement, in any form, to be arbitrary and unfair.

[22] I therefore approve the approach to the treatment of professional costs advanced by Representative Counsel, as being not only in keeping with well-established precedent, but as being fair and reasonable in the circumstances.

Representative Counsel's Fees

[23] The August 6, 2020 order of Hainey J. provided for the payment of professional costs in para. 9:

2021 ONSC 6956 (CanLII)

THIS COURT ORDERS that the fees and expenses of Representative Counsel shall be paid out of the funds recovered for the Investor Claimants (if any) pursuant to or by virtue of this appointment, in accordance with terms to be agreed with the members of the Representative Committee and approved by this Court in the ordinary course, or, in the absence of an agreement, as directed by further order of this Court, having regard to the resources invested, risk assumed and results achieved by Representative Counsel, together with such other considerations as this Court determines to be relevant.

[24] Representative Counsel asks for a fee of $6 million.

[25] Mr. Gould submits that Representative Counsel's fees and expenses, including HST, be limited to a maximum of $5,000,000. According to Mr. Gould, during the mediation process, the Representative Committee (of which he was a member) was provided with a dollar value from Representative Counsel of the amount of fees/expenses/HST to be included in the settlement calculations for negotiation purposes. That number, he says, was $5 million. From his perspective, this figure "served as the key component of the mediation position that determined the settlement expectations for investor claimants".

[26] The test for approval of professional fees in similar contexts is whether they are fair and reasonable in all the circumstances.

[27] In the class action context, the court may consider a number of factors when determining whether counsel's fees are fair and reasonable, including:

(a) the factual and legal complexities of the matters;

(b) the risks assumed in pursuing the litigation, including the risk of nonpayment and the risk of loss at trial;

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

(d) the amount in issue;

(e) the result achieved;

(f) the importance of the matter to the class members and to the public;

(g) the degree of responsibility assumed and the skill and competence demonstrated by class counsel;

(h) the ability of the class to pay;

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

(j) whether the fee maintains the integrity of the profession.

2021 ONSC 6956 (CanLII)

[28] In some Ontario class proceedings, judges have gone so far as to apply a presumption that the percentage contingency fee (up to one third) provided in class counsel's retainer agreement with the representative plaintiff will be approved. There is no agreement on a percentage fee in this case, although the evidence is that when Representative Counsel was first approached to take on this case, a 30% contingency fee was the initial basis upon which it was to be compensated. Our courts have also applied a multiplier approach to test the reasonableness of a proposed fee: a multiplier of 2.5 times docketed time is well within the range accepted in the case law and may well be considered "low" in some circumstances. A multiplier of up to 4 times docketed time was recently described as "presumptively fair" and courts have accepted multipliers in excess of 7 times docketed time. Regardless of whether a fee is calculated as a percentage of recovery or as a multiplier of a base fee, the premium must result in fair and reasonable compensation.

[29] Here, the "premium" requested by Representative Counsel represents a 1.62 multiplier over docketed time at its regular hourly rates.

Resources Invested

[30] Due to the breadth of the case and the need to move it forward quickly, a significant team of professionals was required to work on the matter over the course of Representative Counsel's engagement. In order to achieve a resolution of the investor claims in a very short time frame, the file demanded serious front-end loading of legal work and became very time and resource intensive.

[31] In total, as of October 4, 2021, Representative Counsel's billing professionals had spent approximately 5,240 hours in respect of the Representative Counsel engagement. This time has a total value, at Representative Counsel's usual hourly rates, of approximately $2.95 million.

[32] Awarding professional costs of $6 million (inclusive of disbursements and taxes) gives rise to a multiple of approximately 1.6 times the standard Paliare Roland hourly rates. Expressed as a percentage of total recovery, the proposed professional costs, inclusive of disbursements and taxes, represent only 15% of the settlement fund.

[33] Whether calculated as a percentage or by using a multiplier, the professional costs requested are well within the range accepted in the case law and are fair and reasonable having regard to the risks assumed and the results achieved by Representative Counsel.

Risks Assumed

[34] The risks of an action are to be assessed at the time the action was commenced and are not to be discounted merely because the parties chose to proceed down the path of a negotiated settlement. This was a legally and factually complex case in which Representative Counsel took on significant risk. The case involved claims grounded in negligence, group enterprise liability and oppression—heads of liability that, as applied to investor loss cases, are factually driven and which often present difficult issues of proof. This case also raised

2021 ONSC 6956 (CanLII)

significant procedural challenges because, while the investors had a number of common issues, they also had very different circumstances that would present difficulties at trial.

[35] Had representative Counsel not negotiated a favourable settlement, it would have been required to prosecute an expedited but long and difficult trial. It would have had no guarantee of material success. If the claims were dismissed, Representative Counsel would have got nothing for its investment of time, professional skill and judgment.

[36] In addition to the risk associated with proving the investors' claims, Representative Counsel also took on the risk of being unable to enforce any judgment awarded. There was limited insurance available to pay the investors' claims and the Credit Union itself was subject to regulatory proceedings of uncertain duration and outcome.

[37] Finally, this case demanded material front end loading of legal work. The fact that these costs had to be incurred over the period of less than a year reflects a material redirection of resources from ordinary fee-for-service files and an enhanced risk on the part of the firm relative to contingent fee cases where the work can be spread out over a longer period of time. Representative Counsel proceeded along a dual path – litigation and negotiation. This was a necessary and reasonable approach, given that the willingness of a defendant to settle very much depends on a credible litigation threat.

[38] Representative Counsel faced, in short, very serious risks relative the usual "time and disbursements" approach to billing.

Results Achieved

[39] The results achieved by Representative Counsel for the investors can only be described as excellent. The settlement was achieved within approximately one year of Representative Counsel being contacted and less than one year after its appointment. Further, before costs, the settlement amount is in excess of 80% of the principal amount invested in the preference shares by the investors. If the amount and allocation of professional costs proposed by Representative Counsel are approved, the investors will still recover more than 70% of the amount invested by them in respect of their preference shares. I tend to agree that, in liquidation proceedings, it is somewhat rare for investor claims to be resolved so quickly and for investors to achieve a 70% net recovery.

Communications with the Representative Committee

[40] I have reviewed Mr. Gould's allegations regarding the estimation of costs during the lead up to the mediation. I have also reviewed Mr. Rosenberg's response to these allegations. Without getting into the details of the Representative Committee's expectations (of which there is no evidence but Mr. Gould's own), I am satisfied that the estimates Mr. Gould relies on, taken in proper context, are not reasonably capable of supporting a promise that Representative Counsel's fees would, in no circumstances, exceed $5 million.

[41] For all these reasons, I approve Representative Counsel's requested professional fee of $6 million as fair and reasonable in all the circumstances.

2021 ONSC 6956 (CanLII)

The Terms of the Order Sought

[39] I am satisfied that the other terms of the order sought on this motion are appropriate and warranted. That order shall issue.

Scheduling

[42] At the end of the hearing, I confirmed an appointment for counsel involved in an issue relating to the form of the release for settling defendants, if they need it, for 30 minutes on October 25, 2021 at 9:30. Counsel shall arrange the Zoom co-ordinates for this attendance and, in co-ordination with the Commercial List office, send the necessary invitation to the presiding judge.

2021 ONSC 6956 (CanLII)

Penny J.

Penny J.

Date: October 19, 2021

Tab 17

CITATION: Ramdath v. George Brown College, 2016 ONSC 3536
COURT FILE NO.: CV-O8-363847-CP
DATE: 20160531

2016 ONSC 3536 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
KATRINA RAMDATH, ZSOLT KOVESSY and ASHISH SINGH	)	*Won J. Kim, Aris Gyamfi and Glenn Brandys* for the Plaintiffs
Plaintiffs	)	
- and -	)	
THE GEORGE BROWN COLLEGE OF APPLIED ARTS AND TECHNOLOGY	)	*Robert Bell and Jonathan Chen* for the Defendant
Defendant	)	
	)	**HEARD:** May 30, 2016

Proceeding under the Class Proceedings Act, 1992

2016 ONSC 3536 (CanLII)

SETTLEMENT AND LEGAL FEES APPROVAL

Justice Belobaba:

[1] After eight years of precedent-setting trials and hard-fought appeals, this class action has settled. The class members will be fairly, indeed generously, compensated. I am satisfied that the proposed settlement is fair and reasonable and very much in the best interests of the class. The settlement amount, the requested honoraria for the three representative plaintiffs and class counsel's legal fees are all approved.

[2] This is that rare class action that actually went to trial and in doing so generated new law in consumer protection and aggregate damages. The class counsel team worked tirelessly and deserve special commendation for their legal acumen, their unrelenting commitment to the best interests of the class members and for the superior results that were achieved.

Brief background

[3] The class action stems from misrepresentations made by George Brown College ("GBC") in the 2007-08 and 2008-09 course calendars about the benefits of the International Business Management Program. GBC falsely stated that by completing the eight-month Program, students would obtain three industry designations[1] in addition to the GBC graduate certificate. The Program attracted students from around the world. The students soon discovered that GBC had no agreements in place with any of the industry associations and no such additional designations would be awarded.

[4] Three of the students commenced an action in 2008. The action was certified as a class proceeding in 2010.[2] The class was defined to include the 119 students (two-thirds of whom were foreign students) that had enrolled in the three affected "cohorts" - the first cohort (September, 2007 to April, 2008), the second cohort

---

[1] Specifically, a CITP (Certified International Trade Professional); a CCS (Certified Customs Specialist); and a CIFF (Certified International Freight Forwarder).

[2] *Ramdath v. George Brown College of Applied Arts and Technology*, 2010 ONSC 2019.

(January, 2008 to August, 2008), and the third cohort (September, 2008 to April, 2009). Eleven students have opted out of the action, leaving 108 class members.

[5] I conducted the common issues trial in 2012. At the conclusion of the common issues trial, I found that GBC had engaged in an unfair practice under the *Consumer Protection Act*[3] and that the students had prevailed on the negligent misrepresentation claim.[4] These findings were upheld on appeal.[5] When the matter returned before me for the damages trial, class counsel advised they would be proceeding solely on the basis of the consumer protection claim. I conducted the damages trial in early 2014 and concluded that damages could be assessed in the aggregate for two of the four categories – “direct expenses” and “residual value” – but not for “foregone income” or “delayed entry” and only for the first two cohorts, but not the third.[6] In a follow-up decision I concluded that the residual value of the GBC diploma standing alone was about 15 per cent.[7] On appeal, the Court of Appeal affirmed the aggregate damages and residual value analysis but reversed my exclusion of the third cohort. The Court referred the assessment of damages relating to the third cohort back to me.[8]

[6] The defendant’s insurer meanwhile decided to seek leave to appeal from the Supreme Court of Canada. It was at that point that the parties settled.

Settlement approval

[7] The defendant (through its insurer) has agreed to pay $2.725 million to the 108 class members in the three affected cohorts. The claims process is designed to be fast and easy. Simply by submitting a one-page claim form, with no need for

[3] *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Schedule A.

[4] *Ramdath v. George Brown College of Applied Arts and Technology*, 2012 ONSC 6173.

[5] *Ramdath v. George Brown College of Applied Arts and Technology*, 2013 ONCA 468.

[6] *Ramdath v. George Brown College of Applied Arts and Technology,* 2014 ONSC 3066.

[7] *Ramdath v. George Brown College of Applied Arts and Technology*, 2014 ONSC 4215.

[8] *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921.

2016 ONSC 3536 (CanLII)

supporting documentation, the class members will be reimbursed for all of the direct costs of entering into the Program[9], and up to 40 per cent of the income that they lost taking the Program. The domestic students who graduated from the Program will be entitled to a maximum of $16,427 and the international students a maximum of $22,484.

[8] The overall settlement falls within a zone of reasonable because:

(i) At the time of settlement, class counsel's knowledge base about the ongoing risks and rewards was at its highest possible point. In other words, this was not an early stage settlement where the court is understandably "suspicious."[10] Here the settlement was negotiated and achieved after the completion of discovery, two trials and numerous appeals. Class counsel's recommendations were thus less likely to be tainted with self-interest and more likely to be in the best interests of the class.

(ii) The amount that is allocated for "direct costs" includes three categories of expenses that were not awarded by the court in the aggregate damages decision, namely public transportation costs, increased living expenses, and visa/immigration fees.[11] That is, the direct costs component in the settlement is much higher than in the amount decided by this court.

(iii) The provision allowing claimants to recover up to 40 per cent in the "foregone income" category is very generous given that less than 10 per cent of the class was able to produce any documentation on this point. And now they will be receiving reimbursement of up to 40 per cent of "foregone income" on their word alone.

(iv) The fact that no monies are being allocated under the third category, "delayed entry into the workforce," is really of no consequence. In the damages decision, I effectively foreclosed this additional source of compensation because I was not persuaded on the evidence before me that

---

[9] Less the 15% residual value of the college diploma as determined at the damages trial, *supra*, note 7.

[10] See the discussion in *Clegg v. HMQ Ontario*, 2016 ONSC 2662, at paras. 26-31.

[11] *Supra*, note 6.

2016 ONSC 3536 (CanLII)

> a "delayed entry" of eight months at age 25 "cannot be mitigated over a lifetime in the workforce".[12] Pursing this claim in a further individual damages trial would be expensive and challenging, to say the least.

[9] In sum, I agree with class counsel that when one considers the increased value of the "direct costs" component and the risk that class members may not able to prove any of their indirect damages at individual damage assessments, the settlement herein is very much in the class members' best interest.

2016 ONSC 3536 (CanLII)

Approval of honoria

[10] Class counsel is requesting a $10,000 honorarium for each of the three representative plaintiffs, to be paid out of the settlement fund.[13] I have no difficulty with this request. The record shows that Katrina Ramdath, Zsolt Kovessy and Ashish Singh went far beyond what is normally required of a representative plaintiff in advancing a class action. In addition to their usual duties as representative plaintiffs they endured three extensive examinations when most representative plaintiffs are only subjected to one (i.e. cross-examination on their affidavit in support of certification); they remained in contact with class members, via email, telephone and in-person meetings throughout the litigation to provide updates and answer questions; they assisted class counsel in publicizing the notice of the settlement approval hearing and locating class members whose contact information was out of date so that they could receive notice of the proposed settlement and have an opportunity to participate; and they have handled a large number of media inquiries.

[11] I also note that Mr. Singh attended the settlement approval hearing, expressed his gratitude to class counsel and spoke eloquently about his experience in this litigation and the reasonableness of the overall settlement.

---

[12] *Supra*, note 6, at para. 66.

[13] When honoraria are paid to representative plaintiffs, they should be paid out of the settlement fund and not out of class counsel's legal fees award: see generally Morabito, "Additional Compensation to Representative Plaintiffs in Ontario: Conceptual, Empirical and Comparative Perspectives," (2014) Queen's L.J. 341.

[12] The requested payment of a $10,000 honorarium to each of the three class representatives is approved.

Approval of class counsel's legal fees

[13] Class counsel asks for the payment of legal fees on the basis of the 30 per cent contingency that is set out in the retainer agreement. The amount being sought, $773,412 plus disbursements and taxes, is a small portion of the actual time that was docketed by class counsel over the eight years of protracted litigation.[14]

[14] The legal fees request is more than reasonable and easily approved.

Disposition

[15] The settlement, the payment of honoraria to the three class representatives and the payment of class counsel's legal fees are all approved.

[16] Order to go as per the draft Order that I signed at the conclusion of the hearing.

[17] I thank counsel on both sides again for their assistance and for the quality of their written and oral advocacy during the motions and trials in a matter that I was pleased to hear and even more pleased to see concluded.

---

[14] That is why I concluded in *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 that contingency fee agreements of up to one-third should generally be accorded presumptive validity and enforced by the court. Over a period of years, plaintiff-side class action firms will win cases and lose cases. Or, like here, they will win the case but end up taking a large loss on the legal fees award. The "risk" that contingency lawyers face cannot be assessed case-by-case or one-off, but must be measured across a great many files. A "large" contingency recovery in one case will offset the loss or losses in other cases. That is why the "multiplier" approach that purports to assess risk by considering only the case that is currently before the court is fundamentally flawed, indeed unprincipled.

2016 ONSC 3536 (CanLII)

Belobaba J.

Released: May 31, 2016

2016 ONSC 3536 (CanLII)

CITATION: Ramdath v. George Brown College, 2016 ONSC 3536
COURT FILE NO.: CV-O8-363847-CP
DATE: 20160531

2016 ONSC 3536 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KATRINA RAMDATH, ZSOLT KOVESSY and ASHISH SINGH

Plaintiffs

- and -

THE GEORGE BROWN COLLEGE OF APPLIED ARTS AND TECHNOLOGY

Defendant

REASONS FOR JUDGMENT

Justice Edward P. Belobaba

Released: May 31, 2016

Tab 18

CITATION: The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc., 2018 ONSC 6447
COURT FILE NO.: 12-CV-453236CP
DATE: 2018/10/31

2018 ONSC 6447 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE TRUSTEES OF THE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675 PENSION FUND and 0793094 B.C. LTD.

Plaintiffs

Michael Robb, Joel Rochon, Douglas M. Worndl, *Ronald Podolny*, and *Peter R. Jervis* for the Plaintiffs

– and –

SNC-LAVALIN GROUP INC., IAN A. BOURNE, DAVID GOLDMAN, PATRICIA A. HAMMICK, PIERRE H. LESSARD, EDYTHE A. MARCOUX, LORNA R. MARSDEN, CLAUDE MONGEAU, GWYN MORGAN, MICHAEL D. PARKER, HUGH D. SEGAL, LAWRENCE N. STEVENSON, GILLES LARAMÉE, MICHAEL NOVAK, PIERRE DUHAIME, RIADH BEN AÏSSA and STÉPHANE ROY

Defendants

Linda Fuerst, Daniel Urquhart for the Defendants, SNC-Lavalin Group Inc., Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal and Lawrence N. Stevenson

Paul D. Guy for the Defendant, Riadh Ben Aïssa

Steven I. Sofer and *Scott Kugler* for the Defendant, Pierre Duhaime

Patricia D.S. Jackson for the Defendant Michael Novak

Laura C. Young for the Defendant, Stéphane Roy

Paul Fruitman for the Defendant Gilles Laramée

Proceeding under the *Class Proceedings Act, 1992*

HEARD: October 31, 2018

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Pursuant to the *Class Proceedings Act*, *1992*,[1] in 2012, the Plaintiffs, 0793094 B.C. Ltd. and The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund commenced proposed class actions. They advanced common law misrepresentation claims and also statutory causes of action under Part XXIII.1 of the Ontario *Securities Act*,[2] for misrepresentations in the secondary market.

[2] After numerous interlocutory motions, an appeal of an interlocutory order, voluminous documentary discovery, nearly 40 days of examinations for discovery, preparation for trial, and two rounds of mediation, the Plaintiffs and Class Counsel now bring motions for: (a) approval of a settlement of the action; (b) approval of the distribution plan; (b) payment of an honorarium to the Representative Plaintiffs; (d) approval of its Class Counsel's counsel fee including disbursements.

[3] For the reasons that follow, the motions are granted.

B. FACTS

1. The Progress of the Class Action

[4] The Plaintiffs in the Action are 0793094 B.C. Ltd. (the family holding company of Brent Gray of British Columbia), and the Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (a multi-employer pension plan).

[5] The Defendant, SNC-Lavalin Group Inc. ("SNC"), is a Montreal-based engineering, construction and infrastructure company with global operations. SNC is a reporting issuer within the meaning of Canadian securities legislation. Its shares trade on the TSX and on alternative trading platforms in Canada.

[6] The other Defendants are current or former officers and directors; namely Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal, Lawrence N. Stevenson, Riadh Ben Aïssa, Pierre Duhaime, Michael Novak, and Stéphane Roy.

[7] The Plaintiffs purchased the shares of SNC during the period from November 6, 2009 to February 27, 2012. On November 6, 2009, the market capitalization of SNC was approximately $6.68 billion.

[8] On February 28, 2012, SNC issued a press release in which it announced the following:

> SNC-Lavalin Group Inc. (TSX: SNC) announced today that its 2011 net income is expected to be approximately 18% (or approximately $80 million) below its previously announced 2011 outlook. Of this amount, the following items are expected to be recorded in the fourth quarter of 2011:
>
> A loss of approximately $23 million from a revised position of the Company's net

[1] S.O. 1992, c. 6.
[2] R.S.O. 1990, c. S.5.

2018 ONSC 6447 (CanLII)

> financial exposure on its Libyan projects;
>
> Unfavourable cost reforecasts on certain projects in its Infrastructure and Environment and Chemicals and Petroleum segments; and
>
> Period expenses of approximately $35 million relating to certain payments made in the fourth quarter of 2011 that were documented to construction projects to which they did not relate and, consequently, had to be recorded as expenses in the quarter.

> The Company's Board of Directors initiated an independent investigation, led by its Audit Committee, of the facts and circumstances surrounding the $35 million of payments referred to above and certain other contracts. Independent legal counsel were retained in this connection. The investigation's current findings support the Company's accounting treatment of these payments. The Board of Directors is taking steps to implement changes and further appropriate actions arising from the investigation.
>
> The Company is working with its external auditors and legal advisors to resolve all issues relating to the investigation to permit the auditors to deliver their audit report on a timely basis. The Company is working towards announcing and filing its 2011 fourth quarter and year-end financial results as soon as reasonably possible and in any event prior to March 30, 2012.

[9] Following the press release, the price of SNC's shares declined from $48.37 on February 27, 2012, to $38.43 on February 28, 2012 and $37.40 on February 29, 2012, causing a drop in its market capitalization of hundreds of millions of dollars.

[10] On March 1, 2012, a proposed class action for secondary market misrepresentation was commenced in Québec styled *Winder v. SNC-Lavalin Group Inc., et al*. The Québec action was subsequently re-styled as *Delaire v. SNC-Lavalin*.

[11] On March 26, 2012, SNC released its MD&A for financial year ended December 31, 2011, which disclosed the results of the internal investigation announced in the press release. There was disclosure of a $56 million payment made under three agency agreements.

[12] On April 13, 2012, it was disclosed that the RCMP had conducted a search of SNC's headquarters in Montreal. Several criminal proceedings were to follow.

[13] On May 9, 2012, an action styled *Gray v SNC-Lavalin Group Inc.,* was commenced in Toronto with Rochon Genova LLP as counsel, and an action styled *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc.,* was commenced in Brampton with Siskinds LLP was counsel to the Plaintiffs. Both actions were proposed class actions for secondary market misrepresentations.

[14] Rochon Genova LLP and Siskinds LLP decided to form a consortium to prosecute their actions together.

[15] On June 25, 2012, it was disclosed that two former employees of SNC had been charged under the *Corruption of Foreign Public Officials Act* relating to SNC's attempt to secure a contract for the construction of the Padma Bridge project in Bangladesh.

[16] On June 29, 2012, the two Ontario actions were consolidated, and the action was discontinued against certain defendants. The same day, the Plaintiffs served their motion record for certification under the *Class Proceedings Act, 1992* and for leave to bring a statutory action under the Ontario *Securities Act.*

[17] On July 6, 2012, the Plaintiffs served a supplementary motion record.

2018 ONSC 6447 (CanLII)

[18] On August 3, 2012, SNC and the outside director Defendants served a responding motion record.

[19] Negotiations to resolve the certification and leave motion followed, and the parties agreed to an unopposed certification and leave Order except with respect to Mr. Ben Aïssa and Mr. Roy, who had not filed a notice of intent to defend and who did not appear on the motions having been served.

[20] Thus, on September 19, 2012, the Defendants did not oppose leave being granted for the Plaintiffs to commence statutory causes of action under Part XXIII.1 of the Ontario *Securities Act*, and the analogous provisions of the securities legislation of the other Canadian provinces and territories.

[21] The Defendants also consented to the certification of a class action under the *Class Proceedings Act*, *1992.* The Plaintiffs then discontinued their common law negligence and oppression claims.[3]

[22] The class action was now solely an action under the securities legislation. As a factual matter, the litigation was very complex. As a legal matter, the litigation was very complex, and its complexities were augmented by the circumstance that Part XXIII.1 of the Ontario *Securities Act* is uncharted deep sea legal waters.

[23] On November 26, 2012, it was disclosed that Swiss authorities were investigating possible illegal or improper payments by SNC in the approximate amount of $139 million, in addition to the $56 million that had been disclosed on February 28, 2012 and March 26, 2012.

[24] On November 28, 2012, it was disclosed that SNC's former Chief Executive Officer, Pierre Duhaime, had been arrested and charged with fraud and other criminal offences related to the contract awarded to SNC with respect to the construction and operation of the McGill University Health Centre hospital project in Montreal ("MUHC Project").

[25] On January 24, 2013, the Québec Superior Court authorized the Québec action as a class proceeding. The Court appointed Jean-Paul Delaire as representative plaintiff and granted leave to the plaintiff to commence an action under the secondary market liability provisions of the Québec *Securities Act*. Following the granting of authorization by the Québec Court, the Québec action was not actively pursued separately from the action in Ontario. It was agreed by the parties that documentary and oral discovery conducted in the Ontario action would also be used in the Québec action. The Québec Court was provided with updates on the progress of the action from time to time.

[26] After the certification of the Ontario action, class Members were given an opportunity to opt-out of the action. The deadline to opt-out passed on May 8, 2013. There were 153 opt-outs

[27] On July 3, 2013, it was disclosed that SNC had paid a secret $13.5 million commission linked to a froth treatment plant in Alberta, the construction of which had been awarded to SNC in 2011 ("CNRL Project").

[28] During 2013 through 2015, a number of motions were argued regarding documentary production, the Plaintiffs' pleadings and the proposed discovery plan. One of the pleadings

---

[3] T*he Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288.

2018 ONSC 6447 (CanLII)

motions resulted in a motion for leave to appeal, another pleadings motion in an appeal to the Court of Appeal. There was considerable motion activity with respect to the production of documents and obtaining documentary disclosure from the related criminal proceedings.

[29] Subsequently, in January 2016, SNC and the outside director Defendants delivered a motion for summary judgment that sought the dismissal of the action. The motion focused on the question of whether a "public correction" is a necessary element of the right of action under Part XXIII.1, and whether the Plaintiffs could satisfy that requirement. The matter of whether or not and when if more than once there was a corrective disclosure was a fundamentally important issue in the immediate case, because under the Ontario *Securities Act*, it was a constituent element for liability and also for the calculation of damages. The Defendants proposed summary judgment motion was an attempt to dispose of the Plaintiffs' claims in their entirety, failing which they had other substantive defences and defences to reduce their exposure to liability.

[30] On June 30, 2016, the Plaintiffs delivered a responding motion record to the Defendants' summary judgment motion, and the Plaintiffs brought a cross-motion for summary judgment on several of the certified common issues.

[31] In August of 2016, I heard a motion for directions to determine whether either or both of the motions for summary judgment should be heard and determined. I decided that both summary judgment motions should be stayed and ordered that the action proceed to examinations for discovery and trial.

[32] In December 2016, there was a two-day mediation session before The Honourable Warren Winkler. The mediation was unsuccessful.

[33] In January of 2017, Mr. Ben Aïssa, who had previously been noted in default, delivered a Statement of Defence and had his noting in default set aside. Mr. Ben Aïssa return to the civil field of battle stirred up a hornet's nest of interlocutory motion issues that raised difficult matters of substantive law.

[34] The Plaintiffs delivered amended Replies. SNC and certain of the other Defendants moved to strike out portions of Mr. Ben Aïssa's Statement of Defence and the Plaintiffs' Replies. The Defendants were largely successful in striking the pleadings they sought to have struck, and the action rolled along.

[35] Between April and September of 2017, the parties conducted nearly 40 days of examinations for discovery in Toronto and Montreal.

[36] In April of 2018, the Plaintiffs delivered their trial record.

2. The Proposed Settlement

[37] In May 2018, there was another two-day mediation with the Honourable Mr. Winkler again as the mediator. This mediation session was successful, and the parties reached a settlement agreement in principle.

[38] The key terms of the Settlement Agreement are as follows:

a. the Settlement is conditional on the approval of the Courts in Ontario and Québec;

b. the Settlement does not constitute an admission of liability by the Defendants;

2018 ONSC 6447 (CanLII)

c. SNC will pay $88 million and shall cause the Defendants' insurers to pay $22 million for a total of $110 million;

d. the amount of $1.5 million shall be paid, within thirty days of execution of the Settlement Agreement, to Siskinds LLP to be deposited into an interest-bearing trust account from which funds shall be paid toward Administration Expenses incurred prior to the issuance of the Approval Orders. This payment was received by Siskinds LLP on September 11, 2018;

e. the amount of $108 million shall be paid, within ten days of the issuance of the last Approval Order, to the Administrator to be held in an escrow account for the benefit of the Class Members and disbursed in accordance with the Settlement Agreement and the Approval Orders;

f. on the Effective Date, all Defendants will receive a full and final release from all Class Members of all claims made against them in the actions;

g. there is no provision for any reversion of the Settlement Amount to the Defendants or their insurers, unless the Settlement is not approved;

h. if any remainder exists after the Net Settlement Amount is distributed *pro rata* in accordance with the Settlement Agreement and the Distribution Protocol, it will be distributed *cy-près* to one or more recipients to be approved by the Court.

i. the Net Settlement Amount will be distributed to Class Members who file claims in accordance with the Distribution Protocol; and

j. the approval of the Distribution Protocol and the request for Class Counsel Fees are not conditions of the approval of the Settlement itself.

[39] Notice of the settlement approval was disseminated. No objections have been received.

[40] The Plaintiffs and Class Counsel recommend the settlement as a substantial achievement and in the best interest of the Class.

3. <u>The Risk and Damages Assessment and the Settlement Proceeds</u>

[41] The Defendants had several substantive defences to liability which had the defences proven successful would have meant there was no damages recovery.

[42] The substantive defences raised complex evidentiary issues and complex matters of statutory interpretation and application of the Ontario *Securities Act*. The case specific risks, along with conventional risks associated with proving complex class actions, included:

a. the risk that the Court would find that there had been no misrepresentation made by the Defendants either because the alleged misstatements were not untrue or because they were not material;

b. the risk that the Court would find that no public correction of the alleged misrepresentations had occurred, and relatedly that no damages flowed from the misrepresentations, which arguments were the basis for the Defendants' summary judgment motion that was stayed without consideration of the merits;

c. the risk that the Defendants would establish a "reasonable investigation" or due

2018 ONSC 6447 (CanLII)

diligence defence pursuant to s.138.4(6) and (7) of the Ontario *Securities Act*;

[43] The assessment of damages also raised very complex legal and factual issues with considerable risk for both parties. The Plaintiffs pled that the alleged misrepresentations were publicly corrected in the news release issued by SNC on February 28, 2012 and through a number of subsequent corrective disclosures that did not emanate from SNC. The Defendants' position was that none of the Plaintiffs' pleaded corrective disclosures constituted public corrections of the pleaded misrepresentations as contemplated for damages under the Ontario *Securities Act*. If the Defendants were successful in arguing that the Plaintiffs' alleged corrective disclosures did not constitute public corrections of the misrepresentations, the Defendants would have argued that damages should be assessed at zero under the legislative scheme.

[44] Further, the Defendants contended that Part XXIII.1 of the Ontario *Securities Act* does not provide for multiple corrective disclosures. If the Defendants had been successful in arguing that it is not possible to assert multiple corrective disclosures, the Plaintiffs would have been confined to arguing that the sole public correction was the SNC disclosure released on February 28, 2012 and the Defendants would have argued that the February 28, 2012 disclosure was not a valid corrective disclosure.

[45] Further, s. 138.5(3) of the Ontario *Securities Act* provided the Defendants with a mechanism to argue for a reduction in the amount of damages by establishing that news unrelated to the correction of the alleged misrepresentations negatively influenced share prices. In particular, it was anticipated that the Defendants would argue that the decline in the price of SNC shares in the period immediately after the February 28, 2012 disclosure was wholly or partly attributable to information that was unrelated to the alleged misrepresentations.

[46] The quantum of damages would also have been impacted by the determination of when the first misrepresentation was made. If the Court determined that a misrepresentation was not made in the disclosure document issued on the first day of the Class Period, but rather in a later document, that would contract the Class Period and reduce the quantum of damages.

[47] For the purposes of mediation, the Plaintiffs obtained a preliminary estimate of potential class-wide damages from Professor Joseph Weber from the MIT Sloan School of Management. Professor Weber assumed 100% participation by Class Members and based on certain other assumptions, he calculated damages under s. 138.5(3) of the Ontario *Securities Act* to be approximately $439.9 million using a single-trader proportional trading model and approximately $294.4 million using a multi-trader trading model.

[48] The Plaintiffs estimated that SNC's liability limit under Part XXIII.1 was as low as $334 million and as high as $424 million, depending on the point in time during the Class Period used for the purposes of calculating SNC's market capitalization, upon which SNC's liability limit is calculated.

[49] If Professor Weber's s. 138.5(3) damages approach was accepted, his higher estimate of damaged shares was accurate, all Class Members participated, and SNC's proportionate liability was assessed at 100% (all of which was subject to doubt and risk), the Plaintiffs would not have been in a position to recover the full amount of the class-wide damages from SNC because of the capitalization limits on damages provided by Ontario *Securities Act* s. 138.7.

[50] A critical issue in the case was whether SNC could successfully rely on the proportionate liability provision in s. 138.6(1) of the Ontario *Securities Act* such that, if there was any liability

2018 ONSC 6447 (CanLII)

on the part of SNC, it would be proportionately small relative to the greater liability of the senior executive management defendants. SNC argued that this statutory provision enabled it to lay most of any civil liability at the feet of these defendants who might not, on their own, have the financial means (nor available insurance) to satisfy a substantial damages award.

2018 ONSC 6447 (CanLII)

4. **Honoraria**

[51] Honoraria of $10,000 per plaintiff are requested for each of the Plaintiffs in recognition of the commitment, time and energy they gave in advancing this matter on behalf of the Class.

[52] The Representative Plaintiffs subjected their particular circumstances and business practices to significant scrutiny by way of documentary production and discovery. They were involved through pleadings, certification, examinations for discovery, preparation for trial and mediation. They were active participants throughout the litigation.

5. **Distribution Protocol**

[53] The Distribution Protocol creates a claims process for Class Members to seek compensation that employs a damage calculation formula analogous to the formulae set out in s.138.5(1) of the Ontario *Securities Act*. The Distribution Protocol incorporates expert evidence that became available during the course of the action.

[54] The approach taken in the Distribution Protocol mirrors the Plaintiffs' damages theory that the value of SNC common shares was artificially inflated during the Class Period and that the artificial inflation was removed, to a significant degree, in the ten trading days after the February 28, 2012 corrective disclosure.

[55] The Distribution Protocol also seeks to reflect anticipated arguments that might have been made by the Defendants under s. 138.5(3) of the Ontario *Securities Act*. It was anticipated that the Defendants would argue that any drop in the share price prior to the first alleged corrective disclosure on February 28, 2012 was unrelated to the alleged corrective disclosure. As such, the Distribution Protocol uses a maximum purchase price of $48.37. That maximum purchase price is reflected in the definition of "Acquisition Expense" in the Distribution Protocol; and it was anticipated that the Defendants would argue that the alleged corrective disclosure on February 28, 2012 included negative information unrelated to the alleged misrepresentations and, therefore, some of the decline in the price of SNC shares on February 28, 2012 and February 29, 2012 was attributable to news unrelated to the pleaded misrepresentations. The Distribution Protocol utilizes a post-correction floor price of $41.69.

[56] The key elements of the Distribution Protocol are as follows are:

a. the objective of the Distribution Protocol is to equitably distribute the Net Settlement Amount among Authorized Claimants having regard to the issues in the Action;

b. the Administrator will administer all claims pursuant to the terms of the Distribution Protocol;

c. the Administrator, in the absence of reasonable grounds to the contrary, will assume Claimants to be acting honestly and in good faith;

d. Claimants will have 120 days from the date of the publication of notice of approval of the Settlement within which to submit a claim to the Administrator;

e. the Administrator will have discretion to correct minor omissions or errors in a Claim Form;

f. in the event of a denial of a claim by the Administrator, there is a process whereby a Claimant can request that there be a reconsideration of the claim. Any decision of the Administrator after a reconsideration of the claim is final and binding and not subject to further review or appeal;

g. this is a non-reversionary settlement and, as such, the Net Settlement Amount will be distributed to Authorized Claimants on *pro rata* basis pursuant to the terms of the Distribution Protocol; and,

h. if any remainder exists after the Net Settlement Amount is distributed *pro rata* in accordance with the Settlement Agreement and the Distribution Protocol, it will be distributed *cy-près* to one or more recipients to be approved by the Court.

2018 ONSC 6447 (CanLII)

[57] Class Counsel believes that the Distribution Protocol will achieve its stated objective of equitably distributing the Net Settlement Amount among Authorized Claimants.

6. Fee Request

[58] At the outset of the litigation, the Plaintiffs entered into Retainer Agreements with Class Counsel which provided, among other things, as follows:

a. Class Counsel would undertake the litigation on a contingent fee basis, and would be paid only in the event of success as defined in the retainer agreements;

b. Class Counsel would fund the disbursements incurred in advancing litigation, which would be recovered in the event of success from a settlement or judgment; and,

c. Class Counsel would indemnify the Plaintiffs against any award of adverse costs made against them at any stage of the Action.

[59] The retainer agreements provided that Class Counsel would be paid on a percentage basis from any settlement or judgment obtained on behalf of the Class, with the applicable percentages varying depending on the circumstances when the case is resolved. The circumstances relevant to determining the percentages applicable under the retainer agreements are as follows:

a. The action continued on a contested basis for nearly six years after the Court granted leave and certification of the action. Accordingly, pursuant to section 7 of the Retainer Agreements, the operative base percentage is 27.5%;

b. Pursuant to paragraph 11 of the Retainer Agreement, Class Counsel agreed to indemnify the Plaintiffs against any award of adverse costs made against them. Paragraph 12 specifies that in exchange for providing such indemnity, the Plaintiffs agree that the base percentage in the Retainer Agreements shall be increased by 5.0%, to 32.5%;

c. Pursuant to paragraph 8 of the Retainer Agreements, the base percentage of

32.5% is applied to the first $20 million recovered; the applicable percentage is reduced by 5% to 27.5% for amounts between $20 million and $40 million; the applicable percentage is reduced by an additional 5% to 22.5% for amounts between $40 and $60 million; and the applicable percentage for amounts above $60 million is 17.5%.

d. Accordingly, the Retainer Agreements provide for a fee calculated as follows: 32.5% on first $20 million = $6.5 million; 27.5% on next $20 million = 5.5 million; 22.5% on next $20 million = $4.5 million; 17.5% on amount above $60 million = $8.75 million. Total requested fees $25.25 million

[60] Siskinds LLP and Rochon Genova LLP have collectively docketed time which, applying standard hourly rates, equates to work in process of $9,114,909.50, exclusive of HST. They have financed disbursements of $2,393,423.69 and HST on those disbursements of C$256,006.24.

[61] Up to and including October 1, 2018, Siskinds LLP has docketed 15,655 hours equating to fees of $6,099,030.50 at standard hourly rates. HST on those fees would amount to $792,873.97. Up to and including September 19, 2018, Siskinds LLP has financed disbursements of C$1,752,641.58 and HST on those disbursements of $213,883.57.

[62] Since the commencement of the action up to September 24, 2018, Rochon Genova LLP has docketed fees of $3,015,879.00 and HST on those fees of C$392,064.27, and Rochon Genova LLP has financed disbursements of $640,782.11 and HST on those disbursements of $42,122.67.

[63] Class Counsel estimates that it will accrue approximately $150,000 in additional time before the work on this matter is completed.

[64] The global fee requested, including the fee to be sought in the Québec Action, is $25.25 million, which equates to 22.95% of the settlement. The fee in this action is $23.25 million plus disbursements and applicable taxes. This reflects a multiplier of approximately 2.54 on the time spent by Class Counsel. The fee requested in the Québec action, which was largely deferred in favour of the Ontario action, will be $2 million plus disbursements and applicable taxes.

[65] The Representative Plaintiffs support Class Counsel's fee request.

C. ANALYSIS

1. Settlement Approval

[66] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

> *Discontinuance, abandonment and settlement*
>
> 29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> *Settlement without court approval not binding*
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.

2018 ONSC 6447 (CanLII)

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

[67] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[4]

[68] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation.[5]

[69] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[6] An objective and rational assessment of the pros and cons of the settlement is required.[7]

[70] In mandating that settlements are subject to court approval, the class action statutes place an onerous responsibility to ensure that the class members interests are not being sacrificed to the interests of Class Counsel who have typically taken on an enormous risk and who have a great deal to gain not only in removing that risk but in recovering an enormous reward from their contingency fee. The incentives and the interests of class counsel may not align with the best interests of the class members, and, thus, it falls on the court to seriously scrutinize the proposed

[4] *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.); *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.
[5] *Fakhri v. Alfalfa's Canada, Inc*., 2005 BCSC 1123; *Jeffery v. Nortel Networks Corp*., 2007 BCSC 69; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.
[6] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).
[7] *Al-Harazi v. Quizno's Canada Restaurant Corp*. (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

2018 ONSC 6447 (CanLII)

settlement both in its making and in its substance.[8]

[71] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[9] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[10]

[72] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.[11]

[73] In the case at bar, a case with which I am very familiar, I have no doubt that the settlement is a good settlement, and I approve it. The settlement is well within the zone of reasonableness. In all the circumstances, the settlement and the distribution plan is fair, reasonable, and in the best interests of the class. The Representative Plaintiffs deserve their honorarium and it too is approved.

2. Fee Approval

[74] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.[12]

[75] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of

[8] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at para. 30 (Gen. Div.); *L. (T.) v. Alberta (Director of Child Welfare)*, 2015 ABQB 815 at para. 11; *AFA Livforsakringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532 at paras. 3-17; *Sheridan Chevrolet Ltd. v Furukawa Electric Co*., 2016 ONSC 729; *McIntyre v. Ontario* 2016 ONSC 2662 at para. 26; *Welsh v. Ontario*, 2018 ONSC 3217; *Perdikaris v. Purdue Pharma*, 2018 SKQB 86.

[9] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.); *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).

[10] *Fraser v. Falconbridge Ltd*., [2002] O.J. No. 2383 at para. 13 (S.C.J.); *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.).

[11] *Welsh v. Ontario*, 2018 ONSC 3217.

[12] *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.); *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.).

2018 ONSC 6447 (CanLII)

the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[13]

[76] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[14]

[77] In my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, Class Counsel's fee request in the immediate case should be approved. Quite simply, they earned their fee.

D. CONCLUSION

[78] For the above reasons, the motions are granted.

Perell, J.

Released: October 31, 2018

2018 ONSC 6447 (CanLII)

[13] *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).
[14] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (B.C.C.A.).

CITATION: The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc., 2018 ONSC 6447
COURT FILE NO.: 12-CV-453236CP
DATE: 2018/10/31

2018 ONSC 6447 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE TRUSTEES OF THE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675 PENSION FUND and 0793094 B.C. LTD.

Plaintiffs

- and -

SNC-LAVALIN GROUP INC., IAN A. BOURNE, DAVID GOLDMAN, PATRICIA A. HAMMICK, PIERRE H. LESSARD, EDYTHE A. MARCOUX, LORNA R. MARSDEN, CLAUDE MONGEAU, GWYN MORGAN, MICHAEL D. PARKER, HUGH D. SEGAL, LAWRENCE N. STEVENSON, GILLES LARAMÉE, MICHAEL NOVAK, PIERRE DUHAIME, RIADH BEN AÏSSA and STÉPHANE ROY

Defendants

REASONS FOR DECISION

Perell, J.

Released: October 31, 2018.

Tab 19

A

SUPERIOR COURT
(Class action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-000783-163

DATE: November 12, 2019

PRESIDING : THE HONOURABLE PETER KALICHMAN, S.C.J.

CELSO CATUCCI
and
NICOLE AUBIN, *ES QUALITÉ* TRUSTEE OF THE AUBIN FAMILY TRUST

Plaintiffs

vs.

VALEANT PHARMACEUTICALS INTERNATIONAL INC.
-and-
J. MICHAEL PEARSON, HOWARD B. SCHILLER, ROBERT L. ROSIELLO, ROBERT A. INGRAM, RONALD H. FARMER, THEO MELAS-KYRIAZI, G. MASON MORFIT, DR. LAURENCE PAUL, ROBERT N. POWER, NORMA A. PROVENCIO, LLOYD M. SEGAL, KATHARINE B. STEVENSON, FRED HASSAN, COLLEEN GOGGINS, ANDERS O. LONNER, JEFFREY W. UBBEN
-and-
PRICEWATERHOUSECOOPERS LLP
-and-
GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., DEUTSCHE BANK SECURITIES INC., BARCLAYS CAPITAL INC., HSBC SECURITIES (USA) INC., MITSUBISHI UFJ SECURITIES (USA) INC., DNB MARKETS INC., RBC CAPITAL MARKETS LLC, MORGAN STANLEY & CO. LLC, SUNTRUST ROBINSON HUMPHREY INC., CITIGROUP GLOBAL MARKETS INC., CIBC WORLD MARKETS CORP., SMBC NIKKO SECURITIES AMERICA INC., TD SECURITIES (USA) LLC, J.P. MORGAN SECURITIES LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BMO CAPITAL MARKETS CORP., AIG INSURANCE COMPANY OF CANADA; ALLIANZ GLOBAL RISKS US INSURANCE COMPANY; EVEREST INSURANCE COMPANY OF CANADA; ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA; TEMPLE INSURANCE COMPANY;

XL INSURANCE COMPANYSE; CHUBB INSURANCE COMPANY OF CANADA; IRONSHORE CANADA LTD AND IRONSHORE LTD; LIBERTY MUTUAL INSURANCE COMPANY; LLOYD'S UNDERWRITERS SYNDICATE NUMBERS: AWH 2232, QBE 1886, CONSORTIUM 9885, AML 1200, MIT 3210, SJC 2003, ANV 1861, NAV 1221, AMA 1200, HCC 4141, AWH 2232, BARBICAN PROFESSIONAL AND FINANCIAL LINES CONSORTIUM 9562, STARR FINANCIAL LINES CONSORTIUM 9885 AND ASP 4711;

Defendants

v.

CLASS ACTION ASSISTANCE FUND

Mise en cause

JUDGMENT APPROVING CLASS COUNSEL FEES

---

[1] **CONSIDERING** that this Court approved the settlement agreement in the present proceeding reached with PricewaterhouseCoopers LLP ("**PwC**" or the "**Settling Defendant**") dated May 28, 2019 (the "**Settlement Agreement**").

[2] **CONSIDERING** that the appropriate notices were published in French and in English, in compliance with Article 590 CCP and as ordered by the Court on September 5, 2019, and that no opposition was filed in due time;

[3] **CONSIDERING** that no objection to Class Counsel fees or ancillary matters was received by Siskinds LLP by the deadline of November 5, 2019 set out in the Order of this Court dated September 5, 2019 (the "**September 2019 Order**"), and therefore no affidavit was filed in the Court record to that effect;

[4] **CONSIDERING** the materials filed in the Court record, including the affidavits from Plaintiffs and Class Counsel, with the attached Exhibits, confirming compliance with paragraph 16 of the September 2019 Order;

[5] **CONSIDERING** the submissions of counsel for the Plaintiffs;

[6] **CONSIDERING** that this Court is of the opinion that Class Counsel fees, disbursements and a holdback to fund future disbursements are fair, reasonable and in the best interests of Settlement Class Members and complies with Article 593 CCP;

[7] **CONSIDERING** that the parties either consent to or do not oppose this Judgment;

[8] **CONSIDERING** that Class Counsel are required to collect and remit applicable taxes on fees and certain disbursements.

FOR THESE REASONS, THE COURT:

[9] **ORDERS** that, except as otherwise specified in or modified by this Judgment, capitalized terms used herein shall have the meaning ascribed in the Settlement Agreement.

[10] **ORDERS** that the amount payable to Class Counsel out of the Settlement Amount is hereby set at $9,000,000.00 in respect of legal fees, $1,347,750.00 for tax on fees, $2,049,832.89 for disbursements and $239,606.40 for tax on disbursements.

[11] **ORDERS** that $2,000,000.00 in the Settlement Amount shall be held back from the Plan of Allocation and maintained in trust by Class Counsel for future disbursements.

[12] **ORDERS** that the levy payable to the Ontario Class Proceedings Fund pursuant to section 10(3) of Regulation 771/92 of the *Law Society Act* (the "**Levy**") shall be set at: (a) $43,000; plus (b) 3.875% of the Settlement Amount less the amounts set out in paragraphs 9 and 10, notice costs, administration expenses, and taxes. No amounts shall be distributed to any class member until the Ontario Class Proceedings Committee has had an opportunity to review and confirm the calculation of the Levy. Where there is any dispute as to the calculation of the levy, the parties shall appear before this Court to determine that dispute, and pending that appearance, no amounts shall be distributed to any class member.

THE WHOLE, without legal costs.

THE HONOURABLE JUSTICE PETER KALICHMAN, S.C.J.

For Plaintiffs and the Settlement Class:
Shawn Faguy
Faguy & Co., Barristers & Solicitors Inc.
329, de la Commune West, Suite 200
Montréal, Québec, H2Y 2E1
Email: sfaguy@faguyco.com

For PwC:
Laura F. Cooper, Sarah J. Armstrong and Noah Boudreau
Fasken LLP
800 Rue du Square-Victoria, Bureau 3700
Montréal, QC H4Z 1E9

Email: lcooper@fasken.com, sarmstrong@fasken.com; nboudreau@fasken.com

Hearing Date: November 11, 2019

B

SUPERIOR COURT
(Class action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-000783-163

DATE: November 12, 2019

PRESIDING : THE HONOURABLE PETER KALICHMAN, S.C.J.

CELSO CATUCCI
and
NICOLE AUBIN, *ES QUALITÉ* TRUSTEE OF THE AUBIN FAMILY TRUST

Plaintiffs

vs.

VALEANT PHARMACEUTICALS INTERNATIONAL INC.
-and-
J. MICHAEL PEARSON, HOWARD B. SCHILLER, ROBERT L. ROSIELLO, ROBERT A. INGRAM, RONALD H. FARMER, THEO MELAS-KYRIAZI, G. MASON MORFIT, DR. LAURENCE PAUL, ROBERT N. POWER, NORMA A. PROVENCIO, LLOYD M. SEGAL, KATHARINE B. STEVENSON, FRED HASSAN, COLLEEN GOGGINS, ANDERS O. LONNER, JEFFREY W. UBBEN
-and-
PRICEWATERHOUSECOOPERS LLP
-and-
GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., DEUTSCHE BANK SECURITIES INC., BARCLAYS CAPITAL INC., HSBC SECURITIES (USA) INC., MITSUBISHI UFJ SECURITIES (USA) INC., DNB MARKETS INC., RBC CAPITAL MARKETS LLC, MORGAN STANLEY & CO. LLC, SUNTRUST ROBINSON HUMPHREY INC., CITIGROUP GLOBAL MARKETS INC., CIBC WORLD MARKETS CORP., SMBC NIKKO SECURITIES AMERICA INC., TD SECURITIES (USA) LLC, J.P. MORGAN SECURITIES LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BMO CAPITAL MARKETS CORP., AIG INSURANCE COMPANY OF CANADA; ALLIANZ GLOBAL RISKS US INSURANCE COMPANY; EVEREST INSURANCE COMPANY OF CANADA; ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA; TEMPLE INSURANCE COMPANY;

XL INSURANCE COMPANYSE; CHUBB INSURANCE COMPANY OF CANADA; IRONSHORE CANADA LTD AND IRONSHORE LTD; LIBERTY MUTUAL INSURANCE COMPANY; LLOYD'S UNDERWRITERS SYNDICATE NUMBERS: AWH 2232, QBE 1886, CONSORTIUM 9885, AML 1200, MIT 3210, SJC 2003, ANV 1861, NAV 1221, AMA 1200, HCC 4141, AWH 2232, BARBICAN PROFESSIONAL AND FINANCIAL LINES CONSORTIUM 9562, STARR FINANCIAL LINES CONSORTIUM 9885 AND ASP 4711;

Defendants

-and-

CLASS ACTION ASSISTANCE FUND

Mise en cause

JUDGMENT APPROVING SETTLEMENT AGREEMENT WITH PRICEWATERHOUSECOOPERS LLP

---

[1] **CONSIDERING** that the Petitioners request that the Court approve the settlement agreement in the present proceeding reached with PricewaterhouseCoopers LLP ("**PwC**" or the "**Settling Defendant**") dated May 28, 2019 (the "**Settlement Agreement**"), as appears from the attached **Schedule "A"**;

[2] **CONSIDERING** that the appropriate notices were published in French and in English, in compliance with Article 590 CCP and as ordered by the Court on September 5, 2019;

[3] **CONSIDERING** that no objection to the Settlement Agreement was received by Siskinds LLP by the deadline of November 5, 2019 set out in the Order of this Court dated September 5, 2019 (the "**September 2019 Order**"), and therefore no sworn statement was filed in the Court record to that effect;

[4] **CONSIDERING** the materials filed in the Court record, including the sworn statement from Class Counsel confirming compliance with paragraph 16 of the September 2019 Order;

[5] **CONSIDERING** that RicePoint Administration Inc. was appointed to receive any opt-out forms from the Supplementary Class by November 14, 2019, and will report by sworn statement to the Court in this regard by November 21, 2019, pursuant to the September 2019 Order;

[6] **CONSIDERING** the submissions of counsel for the Plaintiffs and counsel for the Settling Defendant as well as the negotiations between them which were extensive, conducted in good faith and at arm's length;

[7] **CONSIDERING** that this Court is of the opinion that the Settlement Agreement is fair, reasonable and in the best interests of Settlement Class Members and complies with Article 590 CCP;

[8] **CONSIDERING** that the parties either consent to or do not oppose this Judgment;

FOR THESE REASONS, THE COURT:

[9] **ORDERS** that, except as otherwise specified in or modified by this Judgment, capitalized terms used herein shall have the meaning ascribed in the Settlement Agreement.

[10] **ORDERS** that, in the event of a conflict between this Judgment and the Settlement Agreement, this Judgment shall prevail;

[11] **ORDERS AND DECLARES** that the Settlement Agreement:

(a) is fair, reasonable and in the best interests of the Settlement Class Members;

(b) is hereby approved pursuant to Article 590 CCP; and

(c) shall be implemented in accordance with all of its terms;

[12] **ORDERS** that the Settlement Amount is in full satisfaction of the Released Claims against the Releasees, and is all-inclusive of, without limitation, interests, costs, Class Counsel Fees and Administration Expenses;

[13] **ORDERS** that Siskinds LLP and the Claims Administrator shall manage the Escrow Account as provided for in the Settlement Agreement. While in control of the Escrow Account, Siskinds LLP and the Claims Administrator shall not pay out all or part of the monies in the Escrow Account, except in accordance with the Settlement Agreement, or in accordance with an order of this Court obtained after notice to the Parties;

[14] **ORDERS** that the Settling Defendant shall have no responsibility for and no liability whatsoever related to:

(a) the administration of the Settlement Agreement;

(b) the Escrow Account (other than as expressly set out in the Settlement Agreement); or

(c) the Plan of Allocation;

[15] **DECLARES** that the Settlement Agreement constitutes a transaction in accordance with Articles 2631 and following of the CCQ.

[16] **DECLARES** that all provisions of the Settlement Agreement (including Recitals and Definitions) are binding upon, and enure to the benefit of, the Plaintiffs, the Settlement Class Members, the Settling Defendant, Plaintiffs' counsel, the Releasees and the Releasors or any of them, and all of their respective heirs, executors, predecessors, successors and assigns. Without limiting the generality of the foregoing, each and every covenant and agreement made in the Settlement Agreement by the Plaintiffs shall be binding upon all Releasors and each and every covenant and agreement made in the Settlement Agreement by the Settling Defendant shall be binding upon all of the Releasees;

[17] **DECLARES** that all Settlement Class Members shall be bound by the Settlement Agreement and this Judgment;

[18] **ORDERS AND DECLARES** that:

(a) as of the Effective Date, the Releasors forever and absolutely release, relinquish and discharge the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have or hereafter can, shall or may have;

(b) upon the Effective Date, for any Settlement Class Members resident in any province or territory where the release of one tortfeasor is a release of all other tortfeasors, the Releasors do not release the Releasees, but instead covenant and undertake not to make any claim in any way or to threaten, commence, participate in or continue any proceeding in any jurisdiction against the Releasees in respect of or in relation to the Released Claims;

(c) upon the Effective Date, the Action shall be declared settled out of Court, and without costs, as against the Settling Defendant; and

(d) upon the Effective Date, each Settlement Class Member shall be deemed to irrevocably consent to the dismissal, without costs, with prejudice and without reservation, of his, her or its Proceedings against the Releasees;

[19] **DECLARES** that:

(a) the Settlement Class Members expressly waive and renounce the benefit of solidarity against the Non-Settling Defendants with respect to the facts and deeds of the Releasees, and the Non-Settling Defendants are thereby released with respect to the proportionate liability of the Releasees determined at trial or otherwise, if any;

(b) this Court shall have full authority to determine the proportionate liability of the Releasees at the trial or other disposition of the Action, whether or not the Releasees appear at the trial or other disposition and the proportionate liability of the Releasees shall be determined as if the Releasees are parties to the Action;

(c) the Plaintiffs and the Settlement Class Members shall henceforth only be able to claim and recover damages, including punitive damages, attributable to the conduct of the Non-Settling Defendants;

(d) in this Action, any action in warranty or other joinder of parties to obtain any contribution or indemnity from the Releasees or relating to the Released Claims shall be inadmissible and void;

(e) in accordance with and subject to the Settlement Agreement, the Settling Defendant will have one representative attend for examination for discovery by the Plaintiffs in accordance with the schedule pursuant to the case protocol in the Action, and the Non-Settling Defendants who are defendants in the Action will have the same right to examine that representative in accordance with, and in the manner and to the extent permitted by, the CCP and the CCQ, and this sub-paragraph shall not limit the rights of the Non-Settling Defendants;

(f) in accordance with and subject to the Settlement Agreement, the Plaintiffs may issue a subpoena requiring one representative of the Settling Defendant, who is a partner of the Settling Defendant at the time of the application, to attend to give evidence at a trial of the Action in Québec, and the Non-Settling Defendants who are defendants in the Action will have the same right to cross-examine that representative in accordance with, and in the manner and to the extent permitted by, the CCP, and this sub-paragraph shall not limit the rights of the Non-Settling Defendants;

(g) any future right the Non-Settling Defendants may have to request the production of any records from the Settling Defendant as part of any right to ask questions of the Settling Defendant in accordance with subsection [19](e) hereof will be determined on at least thirty (30) days' notice to the Settling Defendant and otherwise according to the provisions of the CCP, and the Settling Defendant will have the right to oppose such a request;

[20] **DECLARES** that, as set out in the Settlement Agreement, Other Actions (each, an Other Action) means:

(a) *Joyce Kowalyshyn, Robert Morton, SEB Investment Management AB, and SEB Asset Management S.A. v. Valeant Pharmaceuticals International, Inc. et al.* (Court File No. CV-15-541082-00CP), commenced in the Ontario Superior Court of Justice on November 23, 2015 by way of Notice of Action, with Statement of Claim filed on December 17, 2015;

(b) *Lorraine O'Brien v. Valeant Pharmaceuticals International Inc. et al.* (Court File No. CV-15-543678-00CP), commenced in the Ontario Superior Court of Justice on December 30, 2015;

(c) *Joyce Kowalyshyn, Robert Morton, SEB Investment Management AB, and SEB Asset Management S.A. and Lorraine O'Brien v. Valeant Pharmaceuticals International, Inc. et al.*, which consolidated actions (a) and (b) above by Fresh As Amended Statement of Claim dated September 15, 2016 pursuant to the Order of Justice Paul Perell dated September 15, 2016;

(d) *Misuzu Sukenaga v. Valeant Pharmaceuticals International, Inc. et al* (Court File No. CV-15-540567-00CP), commenced in the Ontario Superior Court of Justice on October 27, 2015;

(e) *Randy Okeley v. Valeant Pharmaceuticals International, Inc. et al* (Court File No. S-159991), commenced before the British Columbia Supreme Court on December 2, 2015;

(f) *Mirza Alladina v Valeant Pharmaceuticals International, Inc. et al* (Court File No. S-159486), commenced before the British Columbia Supreme Court on November 15, 2015; and

[21] **ORDERS AND DECLARES** that nothing in the Settlement Agreement shall require, or be construed to require, the Settling Defendant, or any of its present, former or future officers, partners, principals, directors or employees, to perform any act, including the transmittal or disclosure of any information, which would violate the law of this or any other jurisdiction, or any court order (including the U.S. Confidentiality Order);

[22] **ORDERS AND DECLARES** that nothing in the Settlement Agreement shall require, or shall be construed to require, the Settling Defendant or any representative or employee of the Settling Defendant to disclose or produce any documents or information prepared by or for counsel for the Settling Defendant, or that is not within the possession, custody or control of the Settling Defendant, or to disclose or produce any documents or information in breach of any order, regulatory directive, rule or law of this or any jurisdiction, or subject to solicitor-client privilege, litigation privilege, or any other privilege, or to disclose or

produce any information or documents they obtained on a privileged or co-operative basis from any party to any action or proceeding who is not a Releasee;

[23] **ORDERS AND DECLARES** that the scope of the Settling Defendant's obligations relating to the provision of any evidence pursuant to the Settlement Agreement shall be limited to the allegations asserted in the Action as presently filed;

[24] **ORDERS** that the Plaintiffs, Class Counsel and the Non-Settling Defendants who are defendants in the Action shall continue to abide by the confidentiality agreement entered into by the parties to the Action dated July 5, 2019, and that the Confidentiality Agreement shall also apply to any documents provided by the Settling Defendant pursuant to the Settlement Agreement;

[25] **ORDERS AND DECLARES** that this Court shall retain continuing jurisdiction to interpret and enforce the terms, conditions and obligations under the Settlement Agreement and this Judgment;

[26] **ORDERS** that this Judgment shall be declared null and void and of no force and effect, *nunc pro tunc*, on subsequent application made on notice in the event that the Settlement Agreement is terminated in accordance with its terms.

THE WHOLE, without legal costs.

THE HONOURABLE JUSTICE PETER KALICHMAN, S.C.J.

For Plaintiffs and the Settlement Class:
Shawn Faguy
Faguy & Co., Barristers & Solicitors Inc.
329, de la Commune West, Suite 200
Montréal, Québec, H2Y 2E1
Email: sfaguy@faguyco.com

For PwC:
Laura F. Cooper, Sarah J. Armstrong and Noah Boudreau
Fasken LLP
800 Rue du Square-Victoria, Bureau 3700
Montréal, QC H4Z 1E9

Email: lcooper@fasken.com, sarmstrong@fasken.com; nboudreau@fasken.com
Hearing Date: November 11, 2019

VALEANT CLASS ACTION SETTLEMENT AGREEMENT

Made as of the 28th day of May, 2019

Between

Celso Catucci and Nicole Aubin
Representative plaintiffs in Québec Superior Court Action No.: 500-06-000783-163
In their personal and representative capacities

- and -

PricewaterhouseCoopers LLP

Table of Contents

RECITALS

A. **WHEREAS** the Action was commenced by the Plaintiffs on behalf of putative class members for, *inter alia,* damages for misrepresentation under Title VIII, Chapter II, Divisions I and II of the QSA and, if necessary, the concordant provisions of the other Securities Legislation, and for civil fault pursuant to article 1457 of the CCQ;

B. **AND WHEREAS** the Other Actions, which were commenced in Ontario and British Columbia, arise out of the same circumstances as the Action, and counsel for the Plaintiffs in the Action and each of the Other Actions have agreed to work co-operatively to pursue the settlement of Settlement Class Members' claims in Québec and will be seeking dismissals of the Other Actions (except the Alladina Action) as against PwC, and discontinuances without costs as against the Non-Settling Defendants who are defendants in the relevant Other Actions;

C. **AND WHEREAS** the Non-Settling Defendants who are defendants in the Action remain named defendants in the Action;

D. **AND WHEREAS** PwC denies any alleged misrepresentation, fault and resulting damages;

E. **AND WHEREAS** in the Action, the Québec Court authorized the bringing of a class action under articles 574 to 577 of the CCQ and the bringing of an action pursuant to section 225.4 of the QSA in the Authorization Decision;

F. **AND WHEREAS** the Court of Appeal of Québec dismissed the defendants' respective applications for leave to appeal from the Authorization Decision in judgments dated November 30, 2017;

G. **AND WHEREAS** the opt-out period in the Action in respect of the class authorized in the Authorization Decision concluded on June 19, 2018;

H. **AND WHEREAS** counsel for the Parties have engaged in arm's length settlement discussions and negotiations over several years, including mediations before Ronald Slaght, Q.C. on April 11, 2017 and before Joel Wiesenfeld on May 28, 2019, the latter of which resulted in the Settlement;

I. **AND WHEREAS** documentary discovery has occurred in the Action, and examinations of the defendants are scheduled to take place in the fall of 2019;

J. **AND WHEREAS** the Action continues as against the Non-Settling Defendants who are defendants in the Action, and the Plaintiffs, on behalf of the authorized class in the Action, reserve all rights against the Non-Settling Defendants who are defendants in the Action, other than as may be provided for in Section 11;

NOW THEREFORE, in consideration of the covenants, agreements and releases set forth in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed by the Parties that the Action be declared settled out of Court without costs as with PwC only, and the Other Actions (except the Alladina Action), be dismissed on their merits with prejudice as against PwC and without costs, subject to the approval of the Québec Court, on the following terms and conditions.

SECTION 1 - DEFINITIONS

1.1 For the purposes of this Agreement, including the Recitals:

(a) **Action** means *Catucci and Aubin v. Valeant International Pharmaceuticals Inc. et al.*, brought in the Québec Superior Court of Justice, Court File No. No.: 500-06-000783-163.

(b) **Administration Expenses** means all fees, disbursements, expenses, costs, tax and any other amounts incurred or payable by the Plaintiffs, Class Counsel, the Administrator or otherwise for the approval, implementation and operation of this Agreement, including the costs of notices and claims administration but not Class Counsel Fees.

(c) **Agreement** means this settlement agreement, including the recitals.

(d) **Alladina Action** means *Mirza Alladina v Valeant Pharmaceuticals International, Inc. et al* (Court File No. S-159486), commenced before the British Columbia Supreme Court on November 15, 2015, in which PwC is not a named defendant.

(e) **Authorization Decision** means the Judgement of the Honourable Justice Chantal Chatelain of the Québec Court in the Action dated August 29, 2017.

(f) **B.C. Court** means the Supreme Court of British Columbia.

(g) **CCP** means the *Code of Civil Procedure* CQRL, c. 25.01.

(h) **CCQ** means the *Civil Code of Québec*.

(i) **Class Counsel** means Siskinds LLP, Koskie Minsky LLP, Faguy & Co., Strosberg Sasso Sutts LLP, Rochon Genova LLP, Morganti Legal P.C., Siskinds Desmeules s.e.n.c.r.l. and Investigation Counsel P.C.

(j) **Claims Administrator** means a third-party professional firm appointed by the Québec Court to administer this Agreement and the Plan of Allocation and any employees of such firm.

(k) **Class Counsel Fees** means the fees and accrued interest thereon, disbursements, costs, holdbacks, GST/PST/HST and other applicable taxes or charges of Class Counsel.

(l) **Common Issue** means: Is PwC liable to the Settlement Class Members for damages for misrepresentation under Title VIII, Chapter II, Divisions I or II of the QSA, the concordant provisions of the other Securities Legislation, or for civil fault pursuant to article 1457 of the CCQ? If so, in what amount?

(m) **Effective Date** means the date when both of the following have occurred: (i) the Final Order has been issued by the Québec Court approving the Agreement; and (ii) each of the Other Actions (except the Alladina Action) has been dismissed with prejudice as against PwC and discontinuances as against the Non-Settling Defendants who are defendants in the relevant Other Action, by the Ontario Court or the B.C. Court, as applicable, have been sought.

(n) **Escrow Account** means an interest-bearing Escrow Account at a Canadian Schedule I bank under the control of Class Counsel for the benefit of Settlement Class Members.

(o) **Excluded Persons** means PwC and the Non-Settling Defendants, members of the immediate families of the Individual Defendants, and the directors, officers, subsidiaries and affiliates of Valeant and its subsidiaries.

(p) **Execution Date** means the date on the execution pages as of which the Parties have fully executed this Agreement.

(q) **Final Order** means the later of a final judgment entered by the Québec Court approving this Agreement, the time to appeal such judgment having expired without any appeal being taken, if an appeal lies, and the approval of this Agreement upon a final disposition of all appeals.

(r) **Individual Defendants** means J. Michael Pearson, Howard B. Schiller, Robert L. Rosiello, Robert A. Ingram, Ronald H. Farmer, Laizer D. Kornwasser, Theo Melas-Kyriazi. G. Mason Morfit, Dr. Laurence Paul, Robert N. Power, Norma A. Provencio, Lloyd M. Segal, Katherine B. Stevenson, Fred Hassan, Colleen Goggins, Anders O. Lonner and Jeffrey W. Ubben.

(s) **Non-Refundable Expenses** means certain Administration Expenses stipulated in section 2.8 of the Agreement to be paid from the Settlement Amount.

(t) **Non-Settling Defendants** means Valeant, the Individual Defendants and the Underwriter Defendants.

(u) **Notes** means Valeant's: (i) 6.75% senior notes due 2018; (ii) 7.50% senior notes due 2021; (iii) 5.625% senior notes due 2021; (iv) 5.50% senior unsecured notes due 2023; (v) 5.375% senior unsecured notes due 2020; (vi) 5.875% senior unsecured notes due 2023; (vii) 4.50% senior unsecured notes due 2023; and (viii) 6.125% senior unsecured notes due 2025.

(v) **Notice of Hearing** means the form or forms of notice, as agreed to by the Plaintiffs and PwC, or such other form or forms of notice as agreed to by the Plaintiffs and PwC and approved by the Québec Court, which inform(s) the Settlement Class Members of: (i) the authorization of the Action as a class proceeding for settlement purposes for the Supplementary Québec Class Members; (ii) the date and location of the Settlement Approval Hearing (iii) the principal elements of the Agreement; (iv) the process by which Settlement Class Members may object to the Settlement; (v) the process by which the Supplementary Québec Class Members may opt out; and (vi) Class Counsel Fees requested by Class Counsel.

(w) **Offering Memoranda** (each, "**Memorandum**" or "**Circular**") means Valeant's: (i) Offering Circular dated June 27, 2013; (ii) Offering Circular dated November 15, 2013; (iii) Offering Memorandum dated January 15, 2015; and, (iv) Offering Memorandum dated March 13, 2015.

(x) **Offerings** (each, an "**Offering**") means the offerings of Valeant's Securities during the period February 28, 2013 to October 26, 2015 by way of the Offering Memoranda and the Prospectuses.

(y) **Ontario Court** means the Ontario Superior Court of Justice.

(z) **Other Actions** (each, an **Other Action**) means:

(i) *Joyce Kowalyshyn, Robert Morton, SEB Investment Management AB, and SEB Asset Management S.A. v. Valeant Pharmaceuticals International, Inc. et al.* (Court File No. CV-15-541082-00CP), commenced in the Ontario Superior Court of Justice on November 23, 2015 by way of Notice of Action, with Statement of Claim filed on December 17, 2015;

(ii) *Lorraine O'Brien v. Valeant Pharmaceuticals International Inc. et al.* (Court File No. CV-15-543678-00CP), commenced in the Ontario Superior Court of Justice on December 30, 2015;

(iii) *Joyce Kowalyshyn, Robert Morton, SEB Investment Management AB, and SEB Asset Management S.A. and Lorraine O'Brien v. Valeant Pharmaceuticals International, Inc. et al.*, which consolidated actions (i) and (ii) above by Fresh As Amended Statement of Claim dated September 15, 2016 pursuant to the Order of Justice Paul Perell dated September 15, 2016;

(iv) *Misuzu Sukenaga v. Valeant Pharmaceuticals International, Inc. et al* (Court File No. CV-15-540567-00CP), commenced in the Ontario Superior Court of Justice on October 27, 2015;

(v) *Randy Okeley v. Valeant Pharmaceuticals International, Inc. et al* (Court File No. S-159991), commenced before the British Columbia Supreme Court on December 2, 2015; and

(vi) the Alladina Action.

(aa) **Parties** means PwC and the Plaintiffs and, where necessary, the Québec Class Members.

(bb) **Plaintiffs** means Celso Catucci and Nicole Aubin.

(cc) **Plan of Allocation** means the plan for allocating and distributing the Settlement Amount and accrued interest, net of court-approved deductions, in whole or in part, as established by Class Counsel and approved by the Québec Court.

(dd) **Proceedings** means actions or proceedings, other than the Action or the Other Actions, solely advancing Released Claims commenced by a Settlement Class Member either before or after the Effective Date.

(ee) **Prospectuses** means Valeant's: (i) Short Form Base Shelf Prospectus dated and filed on SEDAR on June 14, 2013; (ii) Prospectus Supplement dated and filed on SEDAR on June 18, 2013; (iii) Prospectus dated June 10, 2013, filed on EDGAR on June 19, 2013; (iv) Prospectus Supplement dated June 18, 2013, filed on EDGAR on June 19, 2013; (v) Prospectus dated June 10, 2013, filed on EDGAR on March 18, 2015; and, (vi) Prospectus Supplement dated March 17, 2015, filed on EDGAR on March 18, 2015.

(ff) **PwC** means PricewaterhouseCoopers LLP, the U.S. member firm in the PwC network of firms.

(gg) **Québec Class or Québec Class Members** means, other than Excluded Persons and any person who validly opted out of the Action before the opt-out period concluded on June 19, 2018:

(i) **Primary Market Sub-Class:** All persons and entities, wherever they made reside or be domiciled, who, during the period February 28, 2013 to October 26, 2015, acquired Valeant's Securities in an Offering, and held some or all of such Securities at any point in time between October 19, 2015 and October 26, 2015, excluding any claims in respect of Valeant's' Securities acquired in the United States (but not excluding any claims in respect of Valeant's 4.5% Senior Notes due 2023 offered in March 2015); and,

(ii) **Secondary Market Sub-Class:** All persons and entities, wherever they may reside or may be domiciled who, during the period February 28, 2013 to October 26, 2015, acquired Valeant's Securities in the secondary market and held some or all such Securities at any point in time between October 19, 2015 and October 26, 2015, excluding any claims in respect of Valeant's Securities acquired in the United States.

(hh) **Québec Court** means Québec Superior Court of Justice.

(ii) **QSA** means Québec *Securities Act*, CQLR c. V-1.1, as amended.

(jj) **Released Claims** mean any and all manner of claims, demands, actions, suits, causes of action, whether class, individual, representative or otherwise in nature, whether personal or subrogated, damages whenever incurred, damages of any kind including compensatory, punitive or other damages, liabilities of any nature whatsoever, including interest, costs, expenses, class administration expenses, penalties, and lawyers' fees (including Class Counsel Fees), known or unknown, suspected or unsuspected, foreseen or unforeseen, actual or contingent, and liquidated or unliquidated, in law, under statute or in equity that Releasors, or any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have, relating in any way to any conduct occurring anywhere, from the beginning of time to the date hereof relating to any conduct alleged (or which could have been alleged) in the Action or Other Actions including, without limitation, any such claims which have been asserted, would have been asserted, or could have been asserted, directly or indirectly, whether in Canada or elsewhere, as a result of or in connection with alleged misrepresentations or performance of professional services regarding Valeant in respect thereof. For greater certainty, "costs" above includes all outstanding costs awards payable by PwC to the Plaintiffs with the share of any such costs awards allocable to PwC to be determined by the Québec Court.

(kk) **Releasees** means, jointly and severally, individually and collectively, PwC and each of the other firms in the PricewaterhouseCoopers network of firms, and all of their respective present and former, direct and indirect, parents, subsidiaries, divisions, affiliates, partners, principals, insurers, and all other persons, partnerships or corporations with whom any of the former have been, or are now, affiliated, and all of their respective past, present and future officers, directors, employees, agents, shareholders, attorneys, trustees, servants and representatives; and the predecessors, successors, purchasers, heirs, executors, administrators and assigns of each of the foregoing, excluding always the Non-Settling Defendants.

(ll) **Releasors** mean, jointly and severally, individually and collectively, the Plaintiffs and the Settlement Class and Settlement Class Members on behalf of themselves and any person claiming by or through them as a parent, subsidiary, affiliate, predecessor, successor, shareholder, partner, director, owner of any kind, agent, employee, contractor, attorney, heir, executor, administrator, insurer, devisee, assignee or representative of any kind.

(mm) **Securities** means Valeant's common shares and Notes.

(nn) **Securities Legislation** means, collectively, the QSA; the Securities Act, RSO 1990, c S.5, as amended; the Securities Act, RSA 2000, c S-4, as amended; the Securities Act, RSBC 1996, c 418, as amended; the Securities Act, CCSM c S50, as amended; the Securities Act, SNB 2004, c S-5.5, as amended; the Securities Act, RSNL 1990, c S-13, as amended; the Securities Act, SNWT 2008, c 10, as amended; the Securities Act, RSNS 1989, c 418, as amended; the Securities Act, S Nu 2008, c 12, as amended; the Securities Act, RSPEI 1988, c S-3.1, as amended; the Securities Act, 1988, SS 1988-89, c S-42.2, as amended; and the Securities Act, SY 2007, c 16, as amended.

(oo) **Settlement** means the settlement provided for in this Agreement.

(pp) **Settlement Amount** means the all-inclusive sum of thirty million dollars (CAD $30,000,000.00) to be paid in full and final settlement of the claims against PwC, inclusive of class counsel fees, notice and administration costs, fees, costs, expenses related to the litigation or the settlement, and all outstanding costs awards with the share of any such costs awards allocable to PwC to be determined by the Québec Court.

(qq) **Settlement Approval Hearing** means the hearing for the Québec Court's approval of the Settlement.

(rr) **Settlement Approval Order** means the order of the Québec Court to be requested by the Plaintiffs, with the consent of PwC, approving the Agreement.

(ss) **Settlement Class or Settlement Class Members** means, other than Excluded Persons and any person who validly opted out of the Action or who is deemed to have opted out of the Action pursuant to article 580 of the CCP before the opt-out period concluded on June 19, 2018, or who validly opts out pursuant to the process set out in Section 7:

(i) **<u>Primary Market Sub-Class:</u>** All persons and entities, wherever they made reside or be domiciled, who, during the period February 28, 2013 to November 12, 2015, acquired Valeant's Securities in an Offering, and held some or all of such Securities at any point in time between October 19, 2015 and November 12, 2015, excluding any claims in respect of Valeant's Securities acquired in the United States (but not excluding any claims in respect of Valeant's 4.5% Senior Notes due 2023 offered in March 2015); and,

(ii) **<u>Secondary Market Sub-Class:</u>** All persons and entities, wherever they may reside or may be domiciled who, during the period February 27, 2012 to November 12, 2015, acquired Valeant's Securities in the secondary market and held some or all such Securities at any point in time between October 19, 2015 and November 12, 2015, excluding any claims in respect of Valeant's Securities acquired in the United States.

(tt) **Settling Defendant** means PwC.

(uu) **Supplementary Québec Class or Supplementary Québec Class Members** means all persons and entities, wherever they may reside or may be domiciled who, during the periods of February 27, 2012 to February 27, 2013 and October

27, 2015 to November 12, 2015, acquired Valeant's Securities in the secondary market, excluding (a) any claims in respect of Valeant's Securities acquired in the United States; and (b) Excluded Persons.

(vv) **Underwriter Defendants** means Goldman Sachs & Co., Goldman Sachs Canada Inc., Deutsche Bank Securities Inc., Barclays Capital Inc., HSBC Securities (USA) Inc., Mitsubishi UFJ Securities (USA) Inc., DNB Markets Inc., RBC Capital Markets LLC, Morgan Stanley & Co. LLC, Suntrust Robinson Humphrey Inc., Citigroup Global Markets Inc., CIBC World Markets Corp., SMBC Nikko Securities America Inc., TD Securities (USA) LLC, J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated and BMO Capital Markets Corp.

(ww) **U.S. Confidentiality Order** means the Stipulation and Confidentiality Order dated July 18, 2017 in the U.S. proceeding in *In re Valeant Pharmaceuticals International, Inc. Securities Litigation* Master No. 3:15-cv-07658-MAS-LHG.

(xx) **Valeant** means the corporation formerly known as Valeant Pharmaceuticals International Inc. which, as of July 13, 2018, changed its name to Bausch Health Companies Inc.

SECTION 2 - SETTLEMENT BENEFITS

Payment of Settlement Amount

2.1 Subject to Section 13, within thirty (30) days of the Execution Date, PwC shall pay the Settlement Amount to Siskinds LLP for deposit into the Escrow Account.

2.2 PwC shall deposit the Settlement Amount into the Escrow Account by wire transfer. Siskinds LLP shall provide the necessary wire transfer information to counsel for PwC on or before the Execution Date so that PwC has a reasonable period of time to comply with section 2.1.

2.3 The Settlement Amount shall be provided in full satisfaction of the Released Claims against the Releasees.

2.4 The Settlement Amount shall be all-inclusive of all amounts, including without limitation, interest, costs, Class Counsel Fees and Administration Expenses. PwC shall take no position on the Plaintiffs' motion for approval of Class Counsel Fees.

2.5 The Releasees shall have no obligation to pay any amount in addition to the Settlement Amount, for any reason, pursuant to or in furtherance of this Agreement or the Action or any Other Actions.

2.6 Once a Claims Administrator has been appointed, Siskinds LLP shall transfer control of the Escrow Account, net of Class Counsel Fees and Non-Refundable Expenses, as approved by the Québec Court, to the Claims Administrator.

2.7 Siskinds LLP and the Claims Administrator shall maintain the Escrow Account as provided for in this Agreement. While in control of the Escrow Account, Siskinds LLP and the Claims Administrator shall not pay out all or part of the monies in the Escrow Account, except in accordance with this Agreement, or in accordance with an order of the Québec Court obtained after notice to the Parties.

Non-Refundable Expenses

2.8 The following Administration Expenses, reasonably incurred, and as approved by the Québec Court, shall be the Non-Refundable Expenses, and shall be payable from the Settlement Amount in the Escrow Account (the "**Escrow Settlement Amount**"), when incurred:

(a) the costs incurred in connection with establishing and operating the Escrow Account;

(b) all costs incurred in publishing and distributing the Notice of Hearing, or other steps taken in respect of administration of this Agreement, up to the date of the termination of the Agreement;

(c) if necessary, the costs incurred by the Administrator in publishing notice to the Settlement Class that the Agreement has been terminated.

2.9 In no event shall Non-Refundable Expenses totaling more than CAD $200,000 be incurred or paid prior to the Effective Date.

2.10 Class Counsel shall account to the Québec Court and to the Parties for all payments it makes from the Escrow Account. In the event that the Agreement is terminated, this account shall be delivered no later than ten (10) days after such termination.

2.11 Any disputes concerning the Non-Refundable Expenses shall be dealt with by a motion to the Québec Court on notice to the Parties.

SECTION 3 - CLASS COUNSEL FEES

Class Counsel Fees Approval

3.1 At the Approval Hearing, Class Counsel shall seek the approval of Class Counsel Fees to be paid as a first charge on the Settlement Amount. Unless this Agreement is terminated pursuant to Section 13, all amounts awarded on account of Class Counsel Fees shall be paid from the Settlement Amount.

3.2 PwC acknowledges that it is not a party to the motion concerning the approval of Class Counsel Fees, it will have no involvement in the approval process to determine the amount of Class Counsel Fees and it will not make any submissions to the Québec Court concerning Class Counsel Fees.

3.3 Any order in respect of Class Counsel Fees, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel the Agreement or affect or delay the Settlement of the Action as provided herein.

3.4 Forthwith after the Settlement becomes final, Class Counsel Fees approved by the Court shall be paid to Class Counsel from the Escrow Account.

Taxes and Interest

3.5 Except as expressly provided herein, all interest earned on the Settlement Amount shall accrue to the benefit of the Settlement Class and shall become and remain part of the Escrow Settlement Amount.

3.6 Subject to Section 3.7, all taxes payable on any interest which accrues on or otherwise in relation to the Escrow Settlement Amount shall be the responsibility of the Plaintiffs and the Settlement Class. Class Counsel or a Claims Administrator, as may later be appropriate, shall be solely responsible to fulfil all tax reporting and payment requirements arising from the Escrow Settlement Amount, including any obligation to report taxable income and make tax payments. All taxes (including interest and penalties) due with respect to the income earned by the Settlement Amount shall be paid from the Escrow Account.

3.7 PwC shall have no responsibility in any way related to the Escrow Account other than as expressly set out herein, including but not limited to, making any filings relating to the Escrow Account, paying tax on any income earned by the Settlement Amount, or paying any taxes on the monies in the Escrow Account, unless this Agreement is terminated, in which case any interest earned on the Settlement Amount shall be paid to PwC who, in such case, shall be responsible for the payment of any taxes on such interest not previously paid by Class Counsel or a Claims Administrator.

No Reversion

3.8 Unless this Agreement is terminated as provided herein, PwC shall not be entitled to the repayment of any portion of the Settlement Amount and then only to the extent of and in accordance with the terms provided herein.

SECTION 4 - DISTRIBUTION OF SETTLEMENT AMOUNT

Distribution of the Net Settlement Amount

4.1 The formula for distribution of the Settlement Amount shall be contained in the Plan of Allocation.

4.2 In conjunction with the Plaintiffs' motion to the Québec Court for approval of this Settlement, on notice to PwC, Class Counsel will make an application seeking an order from the Québec Court approving the Plan of Allocation.

4.3 PwC shall not have any responsibility, financial obligations or liability whatsoever with respect to the Plan of Allocation, or the investment, distribution or administration of monies in the Escrow Account, including, but not limited to, Administration Expenses and Class Counsel Fees.

SECTION 5 - EFFECT OF SETTLEMENT

No Admissions or Concessions

5.1 This Agreement, whether or not it is terminated, anything contained in it, any and all negotiations, discussions, and communications associated with this Agreement, and any action taken to implement this Agreement, shall not be deemed, construed or interpreted to be:

(a) an admission or concession by PwC of any fact, fault, omission, wrongdoing or liability, or of the truth of any of the claims or allegations made or which could have been made against it in the Action or the Other Actions, or the application of the law of Québec to any of the claims made in the Action; or

(b) an admission or concession by the Plaintiffs, Class Counsel or the Settlement Class of any weakness in the claims of the Plaintiffs and the Settlement Class, including those against the Non-Settling Defendants, or that the consideration to be given hereunder represents the amount that could or would have been recovered from PwC after trial of the Action.

Agreement Not Evidence Nor Presumption

5.2 This Agreement, whether or not it is terminated, anything contained in it, any and all negotiations, documents, discussions and proceedings associated with this Agreement (including, but not limited to, the Plan of Allocation), and any action taken to implement this Agreement, shall not be offered or received in the continuing Action, the Other Actions, any pending or future civil, criminal, quasi-criminal, administrative action or disciplinary investigation or proceeding in any jurisdiction:

(a) against PwC, as evidence, or a presumption, of a concession or admission of any fact, fault, omission, wrongdoing or liability, or of the truth of any of the claims or allegations made against it in the Action or the Other Actions; or

(b) against the Plaintiffs, Class Counsel or the Settlement Class, as evidence, or a presumption, of a concession or admission:

(i) of any weakness in the claims of the Plaintiffs and the Settlement Class, including those against the Non-Settling Defendants; or

(ii) that the consideration to be given hereunder represents the amount that could or would have been recovered from PwC after trial of the Action.

5.3 Notwithstanding Section 5.2, this Agreement may be referred to or offered as evidence in order to obtain the orders or directions from the Québec Court contemplated by this Agreement, in a proceeding to approve or enforce this Agreement, to defend against the assertion of Released Claims, or as otherwise required by law.

SECTION 6 - STEPS TO EFFECTUATE AGREEMENT

Reasonable Efforts

6.1 The Parties shall take all reasonable steps to effectuate the Agreement and to secure its approval and have the Action declared settled out of Court, and to secure the prompt, complete and final dismissal with prejudice of the Other Actions (except the Alladina Action) on a without costs basis as against PwC, including cooperating in the Plaintiffs' efforts to obtain the approval and orders required from the Québec Court and, as necessary, the Ontario Court and the B.C. Court, regarding the dismissals with prejudice as against PwC and the discontinuances without costs as against the Non-Settling Defendants who are defendants in the relevant Other Actions, and the implementation of this Agreement. This Agreement shall only become final on the Effective Date.

6.2 With the exception of the materials contemplated in Section 3 regarding Class Counsel Fees, the Plaintiffs will provide all materials to be filed with or provided to the Québec Court, the Ontario Court or the B.C. Court in connection with this Agreement to PwC in advance for review and comment.

6.3 The Parties agree that, if necessary to give effect to this Agreement in provinces outside of Québec, they will co-operate in entering into such further documentation and agreements using language as required to effect the agreed-upon results, and applying to the Ontario Court and/or the B.C. Court for directions.

Action in Abeyance

6.4 Other than in accordance with section 11.1(e), until the Parties have obtained the Final Order or this Agreement is terminated in accordance with its terms, whichever occurs first, Class Counsel agree to hold in abeyance all other steps in the Action and the Other Actions as they relate to PwC, other than the settlement approval motion and dismissal, amendment and discontinuance motions contemplated by this Agreement and such other matters required to implement the terms of this Agreement, unless otherwise agreed in writing by the Parties.

Pleading Amendment

6.5 On or as soon as practicable after the Québec Court's approval of this Agreement, Class Counsel shall seek: (i) the approval of the Québec Court to amend the Judicial Application Originating Class Proceeding in the Action and, (ii) the approval of the Ontario Court and the B.C. Court, as necessary, to cause to be amended the claims in the Other Actions, as the case may be, to:

(a) remove PwC as a party to the Action and each of the Other Actions (except the Alladina Action); and

(b) limit the scope of the Plaintiffs' claims in the Action and the claims of the plaintiffs in each of the Other Actions against the Non-Settling Defendants who are defendants in each of those actions to their proportionate liability.

SECTION 7 - AUTHORIZATION FOR SETTLEMENT APPROVAL ONLY

Authorization for Settlement Approval on behalf of Supplementary Québec Class and Common Issue

7.1 The Action shall be authorized as a class proceeding on behalf of the Supplementary Québec Class as against PwC solely for purposes of settlement of the Action and the approval of this Agreement by the Québec Court.

7.2 In the Plaintiffs' motion for authorization of the Action as a class proceeding on behalf of the Supplementary Québec Class for settlement purposes and for the approval of this

Agreement, the only common issue that they will seek to define is the Common Issue and the only class they will assert is the Supplementary Québec Class.

7.3 Authorization of the Action as against PwC for the purpose of implementing the Agreement on behalf of the Supplementary Québec Class shall not derogate in any way from the rights of the Plaintiffs as against the Non-Settling Defendants who are defendants in the Action except as expressly set out in this Agreement.

7.4 Following authorization of the Action as against PwC for the purpose of implementing the Agreement on behalf of the Supplementary Québec Class, notice of authorization shall be disseminated as follows:

(a) by Class Counsel posting the notice on their websites and by delivering a copy of the notice of authorization electronically to all individuals and entities who have contacted Class Counsel about this action and all individuals and entities who request it;

(b) by Class Counsel placing the notice online in abbreviated form with a URL leading to more information on a number of websites for a period of 60 days;

(c) disseminated once through Canada NewsWire in English and French;

(d) by publishing the notice once in French in a weekday tablet (online) edition of La Presse+;

(e) by publishing the notice on the Québec Class Action Registry; and

(f) by publishing the notice once in English in the national print edition of The Globe and Mail, Report on Business section and in English in the national print edition of the National Post, Financial Post section.

7.5 The Parties shall, acting reasonably, agree on the form and content of an opt-out form for the Supplementary Québec Class.

7.6 The opt-out period for the Supplementary Québec Class shall begin on the date of the order approving authorization of the Action as against PwC for the purpose of implementing the Agreement on behalf of the Supplementary Québec Class and conclude sixty (60) days thereafter.

SECTION 8 - NOTICE TO SETTLEMENT CLASS

8.1 The proposed Settlement Class shall be given the following notices: (i) the Notice of Hearing; (ii) notice of the proposed dismissals, amendments and discontinuances in Ontario and British Columbia; (iii) notice if this Agreement is approved; (iv) notice if this Agreement is not approved, is terminated, or otherwise fails to take effect; and (v) such further notice as may be directed by the Québec Court.

8.2 The form of notices referred to in Section 8.1 and the manner and extent of publication and distribution shall be in the manner set out in Section 7, or in such form or manner as approved by the Québec Court.

SECTION 9 - SETTLEMENT APPROVAL

Motions for Approval and Dismissals/Discontinuances

9.1 As soon as practicable after this Agreement is executed, the Plaintiffs shall bring motions before the Québec Court for orders authorizing the Action as a class proceeding (for settlement purposes) on behalf of the Supplementary Québec Class as against PwC, and then approving the Agreement.

9.2 The form of orders referred to in Section 9.1, and any notices attached thereto, shall be as agreed to by the Plaintiffs and PwC or in such form or manner as agreed to by the Plaintiffs and PwC and approved by the Québec Court.

9.3 As soon as practicable after the Settlement Approval Order is obtained, the plaintiffs in the Other Actions shall also bring motions before the Ontario Court and the B.C. Court, respectively, for orders dismissing each of the Other Actions (except the Alladina Action) as against PwC with prejudice and without costs, amending the claims in the Other Actions as set out in Section 6.5, and seeking leave to discontinue without costs as against the Non-Settling Defendants who are named as defendants in the Other Actions.

9.4 The Approval Order shall also contain a term providing that no action may be taken against PwC, Class Counsel or the Administrator without leave of the Québec Court with respect to any issues arising from the Settlement.

Pre-Motion Confidentiality

9.5 Until the first of the motions required by Section 9.1 is brought, the Parties shall keep all of the terms of the Agreement confidential and shall not disclose them without the prior consent of counsel for PwC or Class Counsel, as the case may be, except as required for the purposes of financial reporting, communications with insurers, or the preparation of financial records (including tax returns and financial statements), as otherwise required by law, or as otherwise required to give effect to the terms of this Agreement.

No Press Release

9.6 The Parties agree that, other than in connection with any court-approved notice arising from this Agreement, they will not issue any press release, whether joint or individual, concerning this Agreement or anything related thereto. The Parties further agree that they will not seek to obtain media coverage in relation to the Agreement, with the exception that Class Counsel will post this Agreement on their websites and on the Registry of Class Actions.

9.7 The Parties specifically agree that the Parties will not make any public statements, comment or any communication of any kind about any negotiations or information exchanged as part of the settlement process. The Parties' obligations under this subsection shall not prevent them, or any of them, from reporting to their clients, or from complying with any order of the Québec Court, or from making any disclosure or comment otherwise required by the Agreement, or from making any necessary disclosure or comment for the purposes of any applicable legislation or professional obligation.

9.8 If comment is solicited by the press, Class Counsel and the Plaintiffs agree and undertake to describe the Settlement and the terms of this Agreement only as fair, reasonable and in the best interests of the Settlement Class.

SECTION 10 - RELEASES

10.1 As of the Effective Date, and in consideration of payment of the Settlement Amount, and for other valuable consideration set forth in the Agreement, the Releasors forever and absolutely release, relinquish and discharge the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have or hereafter can, shall or may have.

10.2 The Plaintiffs and Settlement Class Members acknowledge that they may hereafter discover facts in addition to, or different from, those facts which they know or believe to be true regarding the subject matter of the Agreement, and it is their intention to release fully, finally and forever all Released Claims and, in furtherance of such intention, this release shall be and remain in effect notwithstanding the discovery or existence of different facts.

10.3 Notwithstanding section 10.1, upon the Effective Date, for any Settlement Class Members resident in any province or territory where the release of one tortfeasor is a release of all other tortfeasors, the Releasors do not release the Releasees, but instead covenant and undertake not to make any claim in any way or to threaten, commence, participate in or continue any proceeding in any jurisdiction against the Releasees in respect of or in relation to the Released Claims.

10.4 As of the Effective Date, the Releasors and Class Counsel shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any other person, any action, suit cause of action, claim or demand against any Releasee in respect of any Released Claims or any matter related thereto.

10.5 As of the date of this Agreement, Class Counsel do not and will not represent plaintiffs in any other proceeding related to any matter raised or which could have been raised in the Action or the Other Actions as against PwC.

10.6 Upon the Effective Date, the Action shall be declared settled out of Court, and without costs, as against PwC.

10.7 Upon the Effective Date, each Settlement Class Member shall be deemed to irrevocably consent to the dismissal, without costs, with prejudice and without reservation, of his, her or its Proceedings against the Releasees.

10.8 Except as provided herein, this Agreement does not settle, compromise, release or limit in any way whatsoever any claim by Settlement Class Members against any Person other than the Releasees.

10.9 For the avoidance of doubt and without in any way limiting the ability of the Parties to assert that other terms in this Agreement are material terms (subject to Subsections 13.2 and 13.3), the releases and reservation of rights contemplated in this Section 10 shall be considered a material term of the Agreement and the failure of the Québec Court to approve the releases and/or reservation of rights contemplated herein shall give rise to a right of termination pursuant to section 13.1 of the Agreement.

SECTION 11 - RENUNCIATION OF SOLIDARITY AND WAIVER ORDER (QUÉBEC) / BAR ORDER

Renunciation of Solidarity and Waiver (Québec)

11.1 The Parties agree that the Settlement Approval Order shall include a renunciation of solidarity and waiver order ("**Renunciation of Solidarity and Waiver Order**") providing for the following:

(a) the Settlement Class Members expressly waive and renounce the benefit of solidarity against the Non-Settling Defendants with respect to the facts and deeds of the Releasees, and the Non-Settling Defendants are thereby released with respect to the proportionate liability of the Releasees proven at trial or otherwise, if any;

(b) the Québec Court shall have full authority to determine the proportionate liability of the Releasees at the trial or other disposition of the Action, whether or not the Releasees appear at the trial or other disposition and the proportionate liability of the Releasees shall be determined as if the Releasees are parties to the Action;

(c) the Plaintiffs and the Settlement Class Members shall henceforth only be able to claim and recover damages, including punitive damages, attributable to the conduct of the Non-Settling Defendants;

(d) any action in warranty or other joinder of parties to obtain any contribution or indemnity from the Releasees or relating to the Released Claims shall be inadmissible and void;

(e) in accordance with and subject to Section 12, the Settling Defendant will have one representative attend for examination for discovery by the Plaintiffs in accordance with the schedule pursuant to the case protocol in the Action, and the Non-Settling Defendants who are defendants in the Action will have the same right to examine that representative in accordance with, and in the manner and to the extent permitted by, the CCP and the CCQ.

(f) in accordance with and subject to Section 12, the Plaintiffs may issue a subpoena requiring one representative of the Settling Defendant, who is a partner of the Settling Defendant at the time of the application, to attend to give evidence at a trial of the Action in Québec, and the Non-Settling Defendants who are defendants in the Action will have the same right to cross-examine that representative in accordance with, and in the manner and to the extent permitted by, the CCP and the CCQ.

11.2 For the avoidance of doubt and without in any way limiting the ability of the Parties to assert that other terms in this Agreement are material terms (subject to Subsections 13.2 and 13.3), the Renunciation of Solidarity and Waiver Order contemplated in this Section 11 shall be considered a material term of the Agreement and the failure of the Québec Court to approve the Renunciation of Solidarity and Waiver Order contemplated herein shall give rise to a right of termination pursuant to section 13.1 of the Agreement.

Bar Order

11.3 The Parties agree that the Settlement Approval Order shall contain a bar order, which will be operative only in the event that the Other Actions are not amended as contemplated in Section 6.5 above and discontinued as against the Non-Settling Defendants (the "**Bar Order**").

11.4 The Bar Order shall be in a form agreed to by the Parties and shall provide the following with respect to each of the Other Actions:

(a) all claims for contribution, indemnity or other claims over, whether asserted, un-asserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims, which were or could have been brought in the Action or the Other Action, or otherwise, by any Non-Settling Defendant or any other person or party against a Releasee or by a Releasee against any Non-Settling Defendant, are barred, prohibited and enjoined in accordance with the terms of this section;

(b) the plaintiffs in the Other Action and the Settlement Class Members shall not be entitled to claim or recover from the Non-Settling Defendants and/or any other Person or party that is not a Releasee that portion of any damages (including punitive damages, if any), restitutionary award, disgorgement of profits, interest and costs that corresponds to the proportionate liability of the Releasees proven at trial or otherwise;

(c) the plaintiffs in the Other Action and the Settlement Class Members shall limit their claims against the Non-Settling Defendants and/or any other person or party that is not a Releasee to include only, and shall only seek to recover from the Non-Settling Defendants and/or any other Person or party that is not a Releasee, those claims for damages (including punitive damages, if any), restitutionary award, disgorgement of profits, interest, and costs attributable to the aggregate of the several liability of the Non-Settling Defendants and/or any other person or party that is not a Releasee to the plaintiffs in the Other Action and the Settlement Class Members, if any, and, for greater certainty, the Settlement Class Members shall be entitled to claim and seek to recover on a joint and several basis as between the Non-Settling Defendants and/or any other person or party that is not a Releasee, if permitted by law;

(d) the Ontario Court or the B.C. Court, as applicable, shall have full authority to determine the Proportionate Liability of the Releasees at the trial or other disposition of the Other Action, whether or not the Releasees remain in the Other Action or appear at the trial or other disposition, and the proportionate liability of the Releasees shall be determined as if the Releasees are parties to the Other Action and any determination by the Ontario Court or the B.C. Court, as applicable, in respect of the proportionate liability of the Releasees shall only apply in the Other Action and shall not be binding on the Releasees in any other proceeding;

(e) if, in the absence of (a) hereof, the Non-Settling Defendants who are defendants in the Other Action would not have the right to make claims for contribution and indemnity or other claims, whether in equity or in law, by statute or otherwise, from or against the Settling Defendant, then nothing in the order is intended to or shall limit, restrict or affect any arguments which those Non-Settling Defendants may make regarding the reduction of any judgment against them in the Other Action;

(f) a Non-Settling Defendant may, on application to the Ontario Court or the B.C. Court, as applicable, in an Other Action in which the Non-Settling Defendant is a party, and on at least thirty (30) days' notice to counsel for the Settling Defendant, and not to be brought until after all appeals or times to appeal certification have been exhausted, seek orders for the following:

  (i) the right to use the documents produced by the Settling Defendant in the Action for purposes of the Other Action;

  (ii) the right to use the oral discovery evidence of the Settling Defendant in the Action for purposes of the Other Action, the transcript of which may be read in at a trial of the Other Action;

  (iii) leave to serve a request to admit on the Settling Defendant in respect of factual matters; and/or

  (iv) the production of a representative of the Settling Defendant to testify at trial, with such witness to be subject to examination by counsel for the Non-Settling Defendants in the Other Action.

(g) the Settling Defendant retains all rights to oppose any application brought pursuant to subsection (f), including any such application brought at trial seeking an order requiring the Settling Defendant to produce a representative to testify at trial. Moreover, nothing herein restricts the Settling Defendant from seeking a protective order to maintain confidentiality and protection of proprietary information in respect of any documents ordered to be produced and/or for information obtained from discovery in accordance with section (f);

(h) on any application brought pursuant to subsection (f), the Ontario Court or the B.C. Court, as applicable, may make such orders as to costs and other terms as it considers appropriate;

(i) to the extent that such an order is granted and discovery is provided to a Non-Settling Defendant, a copy of all discovery provided, whether oral or documentary in nature, shall be provided by the Settling Defendant to Class Counsel within ten (10) days of such discovery being provided to a Non-Settling Defendant;

(j) the Québec Court will have an ongoing supervisory role over the discovery process in the Action and the Settling Defendant will attorn to the jurisdiction of that court only for this purpose; and

(k) a Non-Settling Defendant may effect service of the application(s) referred to in subsection (f) on a Settling Defendant by service on counsel for the Settling Defendant.

11.5 For the avoidance of doubt and without in any way limiting the ability of the Parties to assert that other terms in this Agreement are material terms (subject to Subsections 13.2 and 13.3), the Bar Order contemplated in Sections 11.3 to 11.4 shall be considered a material term of the Agreement and the failure of the Québec Court to approve the Bar Order contemplated herein shall give rise to a right of termination pursuant to section 13.1 of the Agreement.

SECTION 12 - LIMITATIONS ON EVIDENCE

12.1 Nothing in this Agreement shall require, or be construed to require, the Settling Defendant, or any of its present, former or future officers, partners, principals, directors or employees, to provide any further answers to the documentary requests made by the

Plaintiffs in the Action, nor to provide answers to any additional documentary requests that may be made in the future, either in writing or on examination for discovery.

12.2 Any future right the Non-Settling Defendants may have to request the production of any records from the Settling Defendant as part of any right to ask questions of the Settling Defendant in accordance with subsection 11.1(e) will be determined on at least thirty (30) days' notice to the Settling Defendant and otherwise according to the provisions of the CCP, and the Settling Defendant will have the right to oppose such a request under the CCP.

12.3 The Plaintiffs confirm and agree that they accept the documents already produced in the Action by the Settling Defendant as the full and complete documentary production by the Settling Defendant, and that they accept and will not challenge or dispute the objections made in the Action by the Settling Defendant to the Plaintiffs' documentary requests.

12.4 Nothing in this Agreement shall require, or be construed to require, the Settling Defendant, or any of its present, former or future officers, partners, principals, directors or employees, to perform any act, including the transmittal or disclosure of any information, which would violate the law of this or any other jurisdiction, or any court order (including the U.S. Confidentiality Order).

12.5 Nothing in this Agreement shall require, or shall be construed to require, the Settling Defendant or any representative or employee of the Settling Defendant to disclose or produce any documents or information prepared by or for counsel for the Settling Defendant, or that is not within the possession, custody or control of the Settling Defendant, or to disclose or produce any documents or information in breach of any order, regulatory directive, rule or law of this or any jurisdiction, or subject to solicitor-client privilege, litigation privilege, or any other privilege, or to disclose or produce any information or documents they obtained on a privileged or co-operative basis from any party to any action or proceeding who is not a Releasee.

12.6 The Settling Defendant shall not seek to quash a subpoena issued by the Plaintiffs in accordance with section 11.1(f), unless the subpoena is not legally valid or is broader than permitted by that section.

12.7 The Settling Defendant's obligations under this section shall not be affected by the release provisions in Section 10 of this Agreement. Unless this Agreement is not approved, is terminated or otherwise fails to take effect for any reason, the Settling Defendant's obligations under this section and subsections 11.1(e) and 11.1(f) shall cease at the date of the Plaintiffs' settlement with all Non-Settling Defendants who are defendants in the Action, or final judgment in the Action against all Non-Settling Defendants who are defendants in the Action.

12.8 The provisions set forth in this section are the exclusive means by which the Plaintiffs, the Settlement Class Members and Class Counsel may obtain discovery, information, or documents from the Releasees or their current or former officers, directors or employees. The Plaintiffs, the Settlement Class Members and Class Counsel agree that they shall not pursue any other means of discovery against, or seek to compel the evidence of, the Releasees or their current or former officers, directors, employees, agents, or counsel, whether in Canada or elsewhere and whether under the rules or laws of this or any other Canadian or foreign jurisdiction.

12.9 The scope of the Settling Defendant's obligations under this section shall be limited to the allegations asserted in the Action as presently filed.

SECTION 13 - TERMINATION

Right of Termination

13.1 In the event that:

(a) the Québec Court declines to grant authorization on behalf of the Supplementary Québec Class for settlement purposes as contemplated by Section 7;

(b) the Québec Court declines to approve this Agreement or any material part hereof;

(c) the Québec Court approves this Agreement in a materially modified form;

(d) the Québec Court issues a Settlement Approval Order that is materially inconsistent with the terms of the Agreement;

(e) the Settlement Approval Order does not become a Final Order;

(f) the Settlement Approval Order is reversed on appeal and the reversal becomes a Final Order;

(g) the Québec Court declines to declare the Action settled out of court against PwC;

(h) the Ontario Court and/or the B.C. Court, as applicable, decline to dismiss the Other Actions (except the Alladina Action) with prejudice and without costs against PwC;

(i) Class Counsel fail to seek or the Québec Court, the Ontario Court and/or the B.C. Court, as applicable, fail to approve the amendments to the pleadings in the Action or the Other Actions which are contemplated by Section 6.5;

(j) discontinuances without costs as against the Non-Settling Defendants who are defendants in the relevant Other Actions, have not been sought from the Ontario Court or the B.C. Court, as applicable;

(k) the Québec Court declines to approve the releases, covenants (including the covenant not to sue), dismissals, granting of consent, and reservations of rights contemplated in Section 10, or approves them in a materially modified form; or

(l) the Québec Court declines to approve the Renunciation of Solidarity and Waiver Order and Bar Order clauses contemplated in Section 11, or approves them in a materially modified form;

the Plaintiffs and PwC shall have the right to terminate this Agreement (except that only PwC shall have the right to terminate this Agreement under subsection (g) through (l) above) by delivering a written notice in accordance with subsection 15.17 of same within thirty (30) days following an event described above.

13.2 For greater certainty, if the Ontario Court or the B.C. Court does not grant the motions for discontinuance of the Other Actions without costs as against the Non-Settling Defendants, this Settlement remains effective.

13.3 Any order, ruling or determination made (or rejected) by the Québec Court with respect to Class Counsel Fees or Class Counsel Disbursements shall not be deemed to be a material modification of all, or a part, of this Agreement and shall not provide any basis for the termination of this Agreement.

13.4 Except as provided for in section 13.9, if the Plaintiffs or PwC exercise their right to terminate, the Settling Agreement shall be null and void and have no further force or effect, shall not be binding on the Parties, and shall not be used as evidence or otherwise in any litigation or in any other way for any reason.

Steps Required on Termination

13.5 If this Agreement is terminated, either PwC or the Plaintiffs shall, within thirty (30) days after termination, apply to the Québec Court, on notice to the Plaintiffs (or PwC, as the case may be) and the Non-Settling Defendants who are defendants in the Action, for an order:

(a) declaring this Agreement null and void and of no force or effect except for the provisions of those sections listed in Section 13.9;

(b) setting aside and declaring null and void and of no force or effect, *nunc pro tunc*, all prior orders or judgments entered by a court in accordance with the terms of this Agreement; and

(c) authorizing the payment of the Escrow Settlement Amount, plus all accrued interest thereon, less taxes paid on interest, and less the Non-Refundable Expenses, to PwC.

13.6 Subject to Section 13.9, the Plaintiffs shall consent to the orders sought in any motion made by PwC under Section 13.5.

Notice of Termination

13.7 If this Agreement is terminated, a notice of the termination will be given to the Settlement Class. Plaintiffs' counsel will cause the notice of termination, in a form approved by the Québec Court, to be published and disseminated as the Québec Court directs.

Effect of Termination

13.8 In the event this Agreement is not approved, is terminated in accordance with its terms or otherwise fails to take effect for any reason:

(a) the Parties will be restored to their respective positions prior to the execution of this Agreement, except as expressly provided for herein;

(b) no motion for authorization for settlement purposes or motion to approve this Agreement which has not been decided shall proceed;

(c) the Parties will cooperate in seeking to have all prior orders or judgments entered by a court in accordance with the terms of this Agreement set aside and declared null and void and of no force or effect, and any Party shall be estopped from asserting otherwise;

(d) Class Counsel shall, within thirty (30) business days of the issuance of the order contemplated by 13.5(b), return to PwC the Settlement Amount, plus all accrued interest thereon, less taxes paid on interest, and less the Non-Refundable Expenses;

(e) this Agreement will have no further force or effect and no effect on the rights of the Parties except as specifically provided for herein;

(f) all statutes of limitation applicable to the claims asserted in the Action shall be deemed to have been tolled during the period beginning with the execution of this Agreement and ending with the day on which the orders contemplated by Section 13.5 are entered;

(g) all Administration Expenses are non-recoverable from the Plaintiffs, the Settlement Class Members and Class Counsel; and

(h) this Agreement will not be introduced into evidence or otherwise referred to in any litigation against PwC.

13.9 Notwithstanding the provisions of Section 13.5, if this Agreement is terminated, the provisions of Sections 2.8, 2.9, 2.10, 2.11, 3.6, 3.7, 4.3, 5.1, 5.2, 5.3, 6.2, 8.1 (iv) and (v), 9.6, 9.7, 12.4, 13.4, 13.5, 13.6, 13.7, 13.8, 13.10, 14.1, 14.4, 15.3, 15.4, 15.5, 15.6, 15.7, 15.8, 15.12, 15.13, 15.15, 15.16, and 15.17, and the definitions applicable thereto (but only for the limited purpose of the interpretation of those sections), shall survive termination and shall continue in full force and effect. All other provisions of this Agreement and all other obligations pursuant to this Agreement shall cease immediately.

Disputes Relating to Termination

13.10 If there is a dispute about the termination of this Agreement, the Parties agree that the Québec Court shall determine the dispute on a motion made by a Party on notice to the other Party.

SECTION 14 - LIMITS ON USE OF DOCUMENTS

14.1 The confidentiality agreement entered into by the parties to the Action dated July 5, 2019 (the "**Confidentiality Agreement**"), provides that its terms shall survive, *inter alia*, any settlement of the Action. The Plaintiffs, Class Counsel and the Non-Settling Defendants who are defendants in the Action shall continue to abide by the Confidentiality Agreement. For the avoidance of doubt, the Confidentiality Agreement shall also apply to any documents provided by PwC pursuant to this Agreement.

14.2 Class Counsel shall provide notice forthwith to PwC of any intention to renegotiate the Confidentiality Agreement.

14.3 Class Counsel shall provide at least thirty (30) days' notice to PwC of any future application to the court by any party to the Action to seek any sealing or confidentiality or other order pursuant to the terms of the Confidentiality Agreement or that would in any way affect the Confidentiality Agreement. The Plaintiffs and the Settlement Class will support any request by PwC to intervene to make submissions before the court on any such application and the Plaintiffs will not oppose PwC's standing to bring an application for a sealing or confidentiality order in the Action.

14.4 It is understood and agreed that all documents and information made available or provided by PwC to the Plaintiffs and Class Counsel, whether previously in the Action or pursuant to this Agreement, shall be used only in connection with the prosecution of the claims in the Action, and shall not be used directly or indirectly for any other purpose, except to the extent that the documents or information are or become publicly available. The Plaintiffs and Class Counsel agree they will not disclose the documents and information provided by PwC beyond what is reasonably necessary for the prosecution of the Action or as otherwise required by law, except to the extent that the documents or information were, are or become publicly available. Subject to the foregoing, Class Counsel shall take reasonable precautions to ensure and maintain the confidentiality of such documents and information, and of any work product of Class Counsel that discloses such documents and information.

SECTION 15 - MISCELLANEOUS

Motions for Directions

15.1 Any of the Parties may apply to the Québec Court for directions in respect of any matter in relation to this Agreement.

15.2 All motions contemplated by this Agreement shall be on notice to the Parties.

Headings, etc.

15.3 In this Agreement:

(a) the division into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation;

(b) the terms "the Agreement", "this Agreement", "herein", "hereto" and similar expressions refer to this Agreement and not to any particular section or other portion of the Agreement; and

(c) "person" means any legal entity including, but not limited to, individuals, corporations, sole proprietorships, general or limited partnerships, limited liability partnerships or limited liability companies.

Computation of Time

15.4 In the computation of time in this Agreement, except where a contrary intention appears:

(a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, including all calendar days; and

(b) only in the case where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday.

Governing Law

15.5 The Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Québec, without prejudice to PwC's position as to the law applicable to the issues in the Action and the Other Actions.

15.6 The Parties agree that the Québec Court shall retain continuing jurisdiction to interpret and enforce the terms, conditions and obligations under this Agreement and the Settlement Approval Order.

Severability

15.7 Any provision hereof that is held to be inoperative, unenforceable or invalid in any jurisdiction shall be severable from the remaining provisions which shall continue to be valid and enforceable to the fullest extent permitted by law.

Entire Agreement

15.8 This Agreement constitutes the entire agreement among the Parties and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements, agreements in principle and memoranda of understanding in connection herewith. None of the Parties will be bound by any prior obligations, conditions or representations with respect to the subject matter of this Agreement, unless expressly incorporated herein.

Amendments

15.9 This Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment after settlement approval must be approved by the Québec Court.

Binding Effect

15.10 If the settlement is approved by the Québec Court and becomes final, this Agreement shall be binding upon, and enure to the benefit of, the Plaintiffs, the Settlement Class Members, PwC, Plaintiffs' counsel, the Releasees and the Releasors or any of them, and all of their respective heirs, executors, predecessors, successors and assigns. Without limiting the generality of the foregoing, each and every covenant and agreement made herein by the Plaintiffs shall be binding upon all Releasors and each and every covenant and agreement made herein by PwC shall be binding upon all of the Releasees.

Survival

15.11 The representations and warranties contained in this Agreement shall survive its execution and implementation.

Negotiated Agreement

15.12 This Agreement and the underlying Settlement have been the subject of arm's-length negotiations and discussions among the undersigned and counsel. Each of the Parties has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafters of this Agreement shall have no force and effect. The Parties further agree that the language contained in or not contained in previous drafts of the Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of this Agreement.

Transaction

15.13 This Agreement constitutes a transaction in accordance with articles 2631 and following of the CCQ, and the Parties are hereby renouncing any errors of fact, of law and/or of calculation.

Recitals

15.14 The recitals to this Agreement are true, constitute material and integral parts hereof and are fully incorporated into, and form part of, this Agreement.

Acknowledgements

15.15 Each Party hereby affirms and acknowledges that:

(a) her, his or its signatory has the authority to bind the Party for which it is signing with respect to the matters set forth herein and has reviewed this Agreement;

(b) the terms of this Agreement and the effects thereof have been fully explained to her, him or it by her, his or its counsel; and

(c) her, his or its representative fully understands each term of this Agreement and its effect.

Counterparts

15.16 This Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and an emailed pdf. signature shall be deemed an original signature for purposes of executing this Agreement.

Notice

15.17 Any notice, instruction, motion for court approval or motion for directions or court orders sought in connection with this Agreement or any other report or document to be given by any Party to any other Party shall be in writing and delivered by email to:

For Plaintiffs and the Settlement Class:

Michael G. Robb
Siskinds LLP
680 Waterloo Street
London, ON N6A 3V8

Email: michael.robb@siskinds.com

For PwC:

Laura F. Cooper and Sarah J. Armstrong
Fasken
333 Bay Street, Suite 2400
Toronto, ON M5H 2T6

Email: lcooper@fasken.com; sarmstrong@fasken.com

This Agreement is effective as of May 28, 2019.

Date: July 25/2019 ______________________ Per
Siskinds LLP as counsel for the Plaintiffs and the Settlement Class and on behalf of the plaintiffs in the Other Actions

Date: July 25, 2019 ______________________ Per
Fasken LLP as counsel for PwC

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC. ET AL.

Court File No. CV-20-00638930-0CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

BOOK OF AUTHORITIES
OF THE CCAA REPRESENTATIVES AND THE
CANADIAN CCAA REPRESENTATIVES

STROSBERG SASSO SUTTS LLP
1561 Ouellette Avenue
Windsor, ON N8X 1K5
David R. Wingfield (LSO #28710D)
dwingfield@strosbergco.com
Tel: (416) 432-1443
Fax: (866) 316-5308

HENEIN HUTCHISON LLP
235 King Street East, First Floor
Toronto, ON M5A 1J9
Marie Henein (LSO #33289T)
mhenein@hhllp.ca
Scott Hutchison (LSO #29912J)
shutchison@hhllp.ca
Tel: (416) 368-5000
Fax: (416) 368-6640

KALLOGHLIAN MYERS LLP
Suite 200, 150 King St. W
Toronto, ON M5H 1J9
A. Dimitri Lascaris (LSO#50074A)
alexander.lascaris@gmail.com
Tel: (514) 941-5991
Serge Kalloghlian (LSO# 55557F)
serge@kalloghlianmyers.com
Tel: (647) 812-5615

WEISZ FELL KOUR LLP
5600-100 King St W,
Toronto, ON M5X 1C9
Steven Weisz (LSO #32102C)
sweisz@wfklaw.ca
Tel: 416.613.8281

CCAA Representative Counsel