

**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
CANTRUST HOLDINGS INC., CANTRUST INC.,
CTI HOLDINGS (OSOYOOS) INC. AND ELMCLIFFE INVESTMENTS INC.**

Applicants

**FACTUM OF THE CCAA CANADIAN REPRESENTATIVES
(Motion for Approval of CCAA Canadian Representative Counsel's Fees)**

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TO: **The Service List**

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PART I - OVERVIEW

1. This is a motion for an order approving the fees and disbursements of CCAA Representative Counsel¹ (comprised of Henein Hutchison LLP, Strosberg Sasso Sutts LLP, and A. Dimitri Lascaris Law Professional Corporation and Kalloghlian Myers LPP) in the amount of \$12,314,628.50 (exclusive of tax) for fees and \$366,994.83 for disbursements. This request is made in accordance with the retainer agreements between CCAA Canadian Representative Counsel and the CCAA Canadian Representatives (Dharambir Singh and Patrick Hrusa).²
2. CCAA Canadian Representative Counsel have secured settlements with CannTrust Holdings Inc., its directors, officers, underwriters, insurers, and others totalling CAD\$129,542,570.00, plus the assignment of all of CannTrust's claims against its former auditor to a litigation trust (the "**Securities Claimant Trust**"). CCAA Canadian Representative Counsel will continue to pursue these claims on behalf of the Securities Claimant Trust.
3. Strictly for purposes of the allocation of fees as between CCAA Canadian Representative Counsel and counsel in the U.S. class action ("**CCAA US Representative Counsel**") 50% of the monetary value of the settlements has been notionally allocated to Canadian claimants and 50% to US claimants. The contingency fee requested by CCAA Canadian Representative Counsel represents 19.5% of the recovery notionally allocated to Canadian claimants.

¹ Capitalized terms have the definitions given to them in the Affidavit of Serge Kalloghlian affirmed December 6, 2021 ("**Kalloghlian Fee Affidavit**"), Motion Record of the CCAA Canadian Representatives (Fee Approval) ("**Fee Approval Record**"), Tab 2, p. 16.

² Representation Order paras 3 and 5, Fee Approval Record Tab 2-H, pp. 324-325.

4. The contingency fee requested by CCAA Canadian Representative Counsel is fair and reasonable and should be approved for the following reasons:

- (a) It is fully consistent with counsel's retainers with the representative plaintiffs, the terms of which the jurisprudence treats as presumptively valid and fair;
- (b) the result achieved on this settlement is excellent, considering the damages sustained by Securities Claimants, the legal and factual impediments to recovery and CannTrust's financial position;
- (c) counsel took on significant risk for claims against these Defendants because of the multiple factual and legal impediments to establishing liability and damages and, with respect to some of the Defendants, enforcing a judgment;
- (d) the requested fees are within the range of percentages that Ontario courts have approved and as noted by Justice Strathy (as he then was) in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, fees between 20% to 33% are typical in class proceedings;
- (e) counsel took on the risk of no success and minimal recovery while devoting a massive commitment of resources to the prosecution of this action. CCAA Canadian Representative Counsel has already committed millions of dollars in resources to this action, including over 2,460 lawyer hours (with a time value of over \$4.5 million) and out-of-pocket disbursements exceeding \$360,000; and
- (f) the settlement is one of the largest securities class action settlements in Canadian history.

5. The jurisprudence enforcing percentage fees, the excellent monetary result and the risks accepted by CCAA Canadian Representative Counsel support this fee request. Respectfully, it ought to be approved.

PART II - FACTS

A. Background of These Proceedings and the Allegations

6. After disclosure that CannTrust Holdings' manufacturing facilities were not compliant with applicable laws, CannTrust Holdings's share price declined and class actions were commenced in Canada and the US on behalf of shareholders seeking to recover losses arising from alleged misrepresentations.³

B. Carriage of the Class Proceeding in Canada and the US

7. Because of the multiple class proceedings commenced in Ontario, a carriage motion was necessary to determine which action should be permitted to proceed and which should be stayed. Prior to the CCAA being initiated, Justice Hainey appointed CCAA Canadian Representative Counsel to prosecute the Ontario class action and stayed the other actions.⁴

C. The CCAA Proceeding and Mediation Order

8. On March 31, 2020, CannTrust and others filed for protection from their creditors by commencing these CCAA proceedings.⁵

9. The CCAA proceedings introduced substantial complexity to the proceedings. It brought forward different stakeholders advancing different claims, cross-claims and indemnities, at a time when CannTrust's assets were rapidly depleting. The position of the Securities Claimants was fraught.

³ Kalloghlian Fee Affidavit, para. 9, Fee Approval Record, Tab 2, p. 18.

⁴ Kalloghlian Fee Affidavit, paras. 16-18, Fee Approval Record, Tab 2, p. 20.

⁵ Kalloghlian Fee Affidavit, para. 19, Fee Approval Record, Tab 2, p. 20.

10. On May 8, 2020, the Court appointed the Court-appointed mediator, the Hon. Dennis O'Connor, Q.C., to mediate a global resolution of the various securities actions, inter-related claims, cross-claims and indemnities made against CannTrust Holdings and others.⁶

D. Overview of the Negotiations and Settlements

11. CCAA Canadian Representative Counsel, CCAA US Representative Counsel, and eight other investors sought to participate in the mediation process. CCAA Canadian and US Representative Counsel elected to work together as a single negotiating unit to maximize the interests of all Securities Claimants.⁷

12. After months of complex negotiations with dozens of parties, with many sessions facilitated by the mediator, and many on a 'counsel to counsel' basis, CCAA Canadian and US Representative Counsel resolved the Securities Claims against CannTrust Holdings and related claims against nearly all co-defendants and their insurers.⁸

13. This matrix of settlements resulted from extensive and hotly-contested negotiations with counsel to more than 30 defendants and 9 insurers over 18 months. CCAA Canadian Representative Counsel participated in over 100 formal and informal mediation sessions and discussions with the mediator and other mediation participants. There is no question that the negotiations were highly adversarial and hard-fought.⁹

⁶ Kalloghlian Fee Affidavit, para. 20, Fee Approval Record, Tab 2, p. 21.

⁷ Kalloghlian Fee Affidavit, para. 58, Fee Approval Record, Tab 2, p. 31.; Affidavit of Dennis O'Connor affirmed November 29, 2021, paras 4 and 6, Fee Approval Record, Tab 3, p. 419-420.

⁸ Kalloghlian Fee Affidavit, para. 23, Fee Approval Record, Tab 2, p. 21.

⁹ Kalloghlian Fee Affidavit, para. 59, Fee Approval Record, Tab 2, p. 32.

14. In exchange for releases, upon implementation of the CCAA Plan and satisfaction of certain preconditions, CannTrust Holdings and other settling co-defendants and insurers will:

- (a) **Monetary payment:** collectively pay CAD\$129,542,570.00 into the Securities Claimant Trust;
- (b) **Assignment of claims:** assign to the Securities Claimant Trust CannTrust Holdings' direct claim against its former auditor, KPMG LLP, which will be prosecuted for the benefit of the Securities Claimants in conjunction with their claim as shareholders against the auditor.¹⁰

15. After payment to the Zola Plaintiffs under the Zola RSA (a side agreement reached with certain claimants), the monetary payment to the Securities Claimant Trust totals CAD\$126,292,570.00.¹¹ The proceeds of the settlements (after fees and expenses) will be distributed to Securities Claimants under the court-approved Allocation & Distribution Scheme.¹²

E. CCAA Canadian Representative Counsel Order

16. On January 29, 2021, this Court issued a representation order appointing:

- (a) **CCAA Canadian Representatives:** the representative plaintiffs in the Ontario class action to represent the interests of the Canadian and non-US Securities Claimants in relation to their Securities Claims; and

¹⁰ The payments comprising the cash component of the settlements is: (a) CannTrust Holdings: CAD\$50,000,000.00; (b) Eric Paul and the Paul Family Trust: CAD\$12,000,000.00; (c) Mark Ian Litwin, Fred Litwin, Stan Abramowitz, Cannamed Financial Corp., Forum Financial Corporation, Mar-Risa Holdings Inc., York Capital Funding Inc., and Sutton Management Limited: CAD\$11,000,000.00; (d) Canaccord Genuity Corp., Canaccord Genuity LLC, Citigroup Global Markets Inc., Citigroup Global Markets Canada Inc., Credit Suisse Securities (Canada) Inc., Credit Suisse Securities (USA) LLC, Jefferies Securities, Inc, Jefferies LLC, Merrill Lynch Canada Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, and RBC Dominion Securities Inc.: USD\$8,000,000.00; (e) ABC Insurers: USD\$30,000,000.00; and (f) DIC Insurers: USD\$6,900,000.00. Kalloghlian Fee Affidavit, para. 25, Fee Approval Record, Tab 2, p. 22.

¹¹ Kalloghlian Fee Affidavit, para. 27, Fee Approval Record, Tab 2, p. 22.

¹² Kalloghlian Fee Affidavit, para. 29, Fee Approval Record, Tab 2, p. 22.

- (b) **CCAA Canadian Representative Counsel:** CCAA Canadian Representative Counsel as counsel to the Canadian and non-US Securities Claimants to act on their behalf for their Securities Claims and related claims.

17. Similar orders were made for CCAA US Representative Counsel.¹³ These order parallel orders made in the Ontario and U.S. class actions.

F. The Plan Sanction Order

18. This Court issued the Plan Sanction Order on July 16, 2021 authorizing the CCAA Representatives and CCAA Canadian and US Representative Counsel to implement the settlements and Allocation Distribution Scheme in accordance and subject to their terms.¹⁴

G. Notional Allocation of the Settlement Amount for Calculation of Fees

19. The settlements provide for a total payment of CAD\$126,292,570.00 to Securities Claimants. CCAA Canadian and US Representative Counsel have agreed that the fees of Representative Counsel will be determined by notionally allocating 50% of the gross settlement to Canadian claimants and 50% to US claimants. This notional allocation is based on the relative class sizes of the Canadian and US classes.¹⁵ CCAA Canadian and US Representative Counsel's requested fees are thus each based on a recovery of CAD\$63,146,285.00 million (50% of CAD\$126,292,570.00).¹⁶ This is a common approach to counsel fee applications where there is a global resolution of actions in more than one jurisdiction.¹⁷ It is a practical approach to this issue

¹³ Kalloghlian Fee Affidavit, para. 21, Fee Approval Record, Tab 2, p. 21; Representation Order, paras. 3 and 5, Fee Approval Record, Tab 2-H, pp. 324-325.

¹⁴ Kalloghlian Fee Affidavit, para. 30, Fee Approval Record, Tab 2, p. 23.

¹⁵ This notional allocation does not affect the actual distribution of settlement proceeds to Securities Claimants. Under the proposed Claims and Distribution Protocol, the distribution of the net settlement fund is based on the claims made, the losses for those claims and the relevant risk adjustment factor for each claim. Kalloghlian Fee Affidavit, para. 44, Fee Approval Record, Tab 2, p. 26.

¹⁶ Kalloghlian Fee Affidavit, para. 43, Fee Approval Record, Tab 2, p. 26.

¹⁷ See for example *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, [2014 ONSC 62](#), para. 51, Book of Authorities of the CCAA Representatives and CCAA Canadian Representatives ("Authorities"), Tab 9; *Ironworkers*

that does not impact the interests of the Securities Claimants. This notional allocation has no bearing on the actual distribution of settlement proceeds to Securities Claimants, which will occur in accordance with the Court-approved Allocation and Distribution Scheme.¹⁸

H. The Contingency Fee Retainer Agreement Between the Plaintiffs and CCAA Canadian Representative Counsel

20. CCAA Canadian Representative Counsel have acted in these proceedings on a contingency fee basis. Their counsel fees and disbursements are governed by the retainer agreements entered into with the CCAA Canadian Representatives. The retainer agreements provide for repayment of disbursements plus taxes and a sliding scale of fees based on the amount of money recovered and the stage of the litigation:

	First \$20 million of any Recovery	Portion of the Recovery between \$20 and \$40 million	Portion of the Recovery between \$40 and \$60 million	Portion of the Recovery in excess of \$60 million
If the Recovery occurs before the Court renders a decision on a contested certification motion.	25%	20%	15%	10%
If the Recovery occurs after the Court renders a decision on a contested certification motion, but before the date that is six weeks preceding the date set for commencement of the common issues trial.	27.5%	22.5%	17.5%	12.5%
If Recovery occurs after the date that is six weeks preceding the date set for commencement of the common issues trial.	30%	25%	20%	15%

21. This fee structure provides that the larger the recovery, the less counsel will be paid as a function of the amount recovered and the complexity and duration of the proceedings. In other

Ontario Pension Fund v Manulife Financial, [2017 ONSC 2669](#), para. 23, Authorities, Tab 8. The approach was also taken in the *Gildan Activewear* and *Canadian Superior Energy* securities class actions, both of which were cross-border settlements.

¹⁸ Kalloghlian Fee Affidavit, para. 44, Fee Approval Record, Tab 2, p. 26.

words, having in mind the governing jurisprudence, counsel are paid in a manner that is tied to the degree of success achieved in the action, while ensuring that overall fees are not excessive. In addition, the fee structure provides that counsel is paid less if the action settles early in the proceeding. There are three different time periods contemplated: (a) settlement before a contested certification decision; (b) settlement after a certification decision and before the start of the common issues trial; and (c) settlement after the start of the common issues trial.

22. These different time periods are meant to reflect the resources that CCAA Canadian Representative Counsel can be expected to have expended in pursuing the claims and securing recovery. For instance, had the Defendants all settled within 30 days of the action's commencement in August 2019, counsel would have committed fewer resources to the action. In contrast, had the action proceeded to a common issues trial and success achieved only through judgment, counsel would have committed a significantly larger amount of resources to this litigation. The sliding scale is meant to reflect this increasing level of resources but uses the objective measure of stages in the proceeding (rather than the passage of time) to determine when the next level of compensation will be awarded.¹⁹

23. Notably, the staging in the retainer agreement did not contemplate these CCAA proceedings and the augmented level of resources they required. These settlements were achieved prior to a contested certification motion, and this fee request applies the pre-certification level of

¹⁹ The Settlements occurred before certification. Thus, the first row of the fee grid applies as follows:

Recovery	Contingency %	Fee
\$20,000,000.00	25%	\$5,000,000.00
\$20,000,000.00	20%	\$4,000,000.00
\$20,000,000.00	15%	\$3,000,000.00
\$3,146,285.00	10%	\$314,628.50
\$63,146,285.00	19.5%	\$12,314,628.50

the fee grid. This results in the lowest fees available to CCAA Canadian Representative Counsel. This is so notwithstanding that counsel have expended far more time and resources participating in the CCAA Proceeding than what would have been required to reach the post-certification stage of the proceedings.²⁰

24. Based on this retainer agreement, CCAA Canadian Representative Counsel are entitled to fees of at least \$12,314,628.50, equal to 19.5% of the settlement amount notionally attributable to Canadian claimants.

I. Counsel's Efforts to Advance the Action

25. CCAA Canadian Representative Counsel expended significant effort in advancing the class action and the CCAA proceedings and obtaining the settlements, including by:

- (a) conducting an extensive legal and factual investigation, including and in particular:
 - (i) reviewing CannTrust Holdings' public disclosure documents and other publicly available information on CannTrust Holdings;
 - (ii) holding discussions with a CannTrust Holdings whistleblower and obtaining relevant emails;
 - (iii) retaining and communicating with private "fact" investigators;
 - (iv) identifying and interviewing potential "fact" witnesses;
 - (v) retaining a cannabis consultant to advise counsel;
 - (vi) retaining Cyrus Khory, managing director at Froese Forensic Partners Ltd., to provide an expert opinion on applicable accounting standards;
 - (vii) retaining Professor Efrim Boritz, Ph.D., FCPA, FCA, CISA, to provide an expert opinion on applicable auditing standards;
 - (viii) retaining James Miller to provide an expert opinion on applicable underwriting standards;
 - (ix) retaining Sunita Surana, Ph.D., of Forensic Economics to provide an expert economic opinion on market efficiency, materiality and damages;
 - (x) reviewing CannTrust Holdings' responsive insurance policies and other non-public information in the mediation process;

²⁰ Kalloghlian Fee Affidavit, para 52, Motion Record, Tab 2, p. 28.

- (xi) reviewing and researching the written mediation briefs, information and documents provided, and positions taken by the parties during the mediation process;
- (xii) negotiating cooperation agreements with settling defendants to assist in continuing litigation;
- (b) preparing materials for and arguing a motion for carriage of the class action;
- (c) preparing materials for the motions for certification and leave to proceed under Part XXIII.1 of the Ontario *Securities Act*, which were not heard because of the stay initiated by the CCAA proceeding;
- (d) preparing for, arguing, and attending motions and other appearances in this CCAA proceeding;
- (e) participating in the mediation process, including attendance at dozens of formal and informal mediation sessions over a one-year period;
- (f) negotiating the RSA settlement framework which ensured claims against non-debtor defendants would be minimally affected;
- (g) negotiating the additional RSAs;
- (h) retaining and receiving advice from tax counsel on the structure of the Securities Claimant Trust;
- (i) filing a proof of claim on behalf of Securities Claimants and voted for the CCAA Plan;
- (j) preparing for, giving evidence, and making submissions in support of the representation order;
- (k) preparing for, giving evidence, and making submissions in support of the motions to sanction the CCAA Plan, to authorize the settlements and Allocation & Distribution Scheme;
- (l) preparing, with CCAA US Representative Counsel, the motions for notice approval and settlement approval in the US Court;
- (m) designing the Allocation & Distribution Scheme to distribute the settlement proceeds to Securities Claimants; and
- (n) retaining and working with the Claims Administrator on the claims filing procedure, website, and notice to Securities Claimants.²¹

²¹ Kalloghlian Fee Affidavit, para. 54, Fee Approval Record, Tab 2, pp. 29-30.

J. Counsel's time and Disbursements Incurred

26. CCAA Canadian Representative Counsel have already expended more than \$4.5 million in docketed time (without HST) and \$366,994.83 in disbursements. The disbursements comprise expert fees and investigation costs. Considering the results achieved, amount of work required, the steps taken, the division of work and responsibility between the firms, the time spent was reasonable.²²

K. The Continuing Litigation Against KPMG

27. Litigation on behalf of the Securities Claimants has been resolved with all parties except KPMG. CCAA Canadian and US Representative Counsel will continue to prosecute the class action and CannTrust Holdings' claim against KPMG.

PART III - SUBMISSIONS

28. The fees and disbursements requested track the retainer agreements with the plaintiffs. The amounts sought are fair and reasonable given the significant risks that CCAA Canadian Representative Counsel undertook in these proceedings and the very significant success achieved.

A. Counsel Fees to be Paid from Securities Claimant Trust

29. Section 4.2 of the CCAA Plan as endorsed by the Court states that CCAA Representative Counsel fees will, subject to court approval, be paid from the Securities Claimant Trust in accordance with the terms of the Trust Declaration:

²² Kalloghlian Fee Affidavit, paras. 71-72, Fee Approval Record, Tab 2, pp. 34-35.

4.2 Settlement-Related Agreements²³

The Settlement-Related Agreements will:

[...](c) provide that all fees and costs of the CCAA Representatives, CCAA Representative Counsel, the Trustees and the Securities Claimant Trust, as approved by the CCAA Court, will be paid from amounts held in the Securities Claimant Trust from time to time in accordance with the terms of the Trust Declaration and any other applicable Definitive Document.²⁴

30. The parties will execute the Trust Declaration in advance of the Plan Implementation date in a form substantially similar to that in the motion record. In respect of fees, it states:

3.4 Payment of Fees and Expenses from Securities Claimant Trust

[...] the Trustees shall make payments out of the Securities Claimant Trust Assets [...] (vii) to pay counsel fees and reimbursement of expenses to CCAA Canadian Representative Counsel and to CCAA US Representative Counsel in respect of amounts recovered for the benefit of Securities Claimants in accordance with their contingency fee retainer agreements or other agreement, in each case subject to court authorization.²⁵

B. The Test for Fee Approval

31. The test for approval of counsel fees in this context is whether they are fair and reasonable in all the circumstances.²⁶

i. The Retainer is Presumptively Valid

32. Ontario judges accept that the percentage set out in the retainer is presumptively valid and enforceable. Justice Belobaba stated that this is “the most principled approach to Class Counsel

²³ “Settlement-Related Agreements” is defined in the CCAA Plan as: the Trust Declaration, the Allocation and Distribution Scheme, the Cooperation Agreement and all other agreements, releases, consents or other documents contemplated by, or necessary or desirable to implement the transactions contemplated by, the CCAA Plan, the RSA or the RSA Supplemental Letter Agreement in relation to the settlement of or otherwise addressing the Securities Claims, the other Released Claims and the Channelled Claims, in each case in form and content satisfactory to the RSA Parties.

²⁴ CCAA Plan s. 4.2(c), Motion Record of the CCAA Representatives (Additional RSAs, Notice, Claims Administration) (“**Settlement Motion Record**”), Tab 2-C p. 123.

²⁵ Trust Declaration s 3.4, Fee Approval Record, Tab 2-K, pp. 357-358.

²⁶ *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*, [2021 ONSC 6956](#), para. 26, Authorities, Tab 16.

compensation” and “best assures the future viability of the class action as a significant vehicle for access to justice”.²⁷ In approving a one-third (33.3%) of the \$28.2 million settlement amount in a tax shelter class action (a fee award of \$9.4 million) Justice Belobaba held that:

- (a) contingency fee arrangements that are fully understood and accepted by the representative plaintiffs (such as the retainer agreement in this case) should be presumptively valid and enforceable;
- (b) the presumption of a valid contingency fee should only be rebutted as follows:
 - (i) when there is a lack of full understanding or true acceptance on the part of the representative plaintiff;
 - (ii) when the agreed-to contingency amount is excessive; and
 - (iii) when applying the presumptively valid one-third contingency fee leads to a legal fees award that is so large as to be unseemly or otherwise unreasonable.²⁸

33. Here, the requested fees are 19.5% (applying the sliding scale of percentages for this stage of the proceedings) of the settlement notionally attributable to Canadian claims. This is within (indeed, below) the range of fees that courts have routinely approved. Likewise, the plaintiffs gave evidence that they fully understood the retainers when they entered them and support the fee request now.²⁹ For these reasons, the retainer agreements are presumptively valid and enforceable and should be approved.

34. Awarding fees based on a percentage of gross recovery is more appropriate than the multiplier methodology which “has been criticized for, among other things, encouraging inefficiency and duplication and discouraging early settlement.”³⁰ In contrast, contingency fees

²⁷ *O'Brien v Bard*, [2016 ONSC 3076](#), para. 16, Authorities, Tab 14.

²⁸ *Cannon v. Funds for Canada Foundation*, [2013 ONSC 7686](#), paras. 8-10, Authorities, Tab 4.

²⁹ Affidavit of Dharambir Singh, paras 5-8, 16, Fee Approval Record, Tab 4, pp. 423, 425; Affidavit of Patrick Hrusa, paras 5-8, 16, Fee Approval Record, Tab 5, pp. 450-451, 453.

³⁰ *Mancinelli v. Royal Bank of Canada*, [2017 ONSC 2324](#), para. 52, Authorities, Tab 10.

“encourage efficiency. They reward success. They fairly reflect the considerable risks and costs undertaken by class counsel.”³¹ They also recognize that the overall risk for class counsel may be measured not in any one case but over an entire practice.³² Quoting then-Justice Strathy: “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?”³³

35. Fees in the range of 20% to 30% are “very common” in class proceedings and there have been many recent cases in which this court has approved fees that fall within that range.³⁴

<i>Baroch v. Canada Cartage</i> , 2021 ONSC 7376	30%
<i>C.S. v. Ontario</i> , 2021 ONSC 6851	27%
<i>Mancinelli v. Royal Bank of Canada</i> , 2021 ONSC 6306	21.9%
<i>Good v. Toronto Police Services Board</i> , 2020 ONSC 6332	28%
<i>Middlemiss v. Penn West Petroleum</i> , 2016 ONSC 3537	33%
<i>The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.</i> , 2018 ONSC 6447 ³⁵	22.95%

36. Finally, some courts use a multiplier as a cross-check on the percentage fee approach. In this case, the multiplier is 2.68 on CCAA Canadian Representative Counsel fees. Courts have repeatedly held that a of up to 4 times docketed time is presumptively fair. This Court recently held in a fee approval motion in *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*

³¹ *Osmun v. Cadbury Adams Canada Inc.*, [2010 ONSC 2752](#), paras. 21, Authorities, Tab 15.

³² See, e.g.: “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” per Belobaba J., *Middlemiss v. Penn West Petroleum*, [2016 ONSC 3537](#), para. 19, Authorities, Tab 13. See also: *Ramdath v George Brown College*, [2016 ONSC 3536](#), footnote 14, Authorities, Tab 17.

³³ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, [2011 ONSC 7105](#), paras. 67, Authorities, Tab 1. *Helm v. Toronto Hydro-Electric System Limited*, [2012 ONSC 2602](#), paras. 25-26, Authorities, Tab 7.

³⁴ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 63, Authorities, Tab 1.

³⁵ *Baroch v. Canada Cartage*, [2021 ONSC 7376](#), para. 1; *C.S. v. Ontario*, [2021 ONSC 6851](#), paras. 57, 71; *Mancinelli v. Royal Bank of Canada*, [2021 ONSC 6306](#), para. 21; *Good v. Toronto Police Services Board*, [2020 ONSC 6332](#), para. 40; *Middlemiss v. Penn West Petroleum*, [2016 ONSC 3537](#), para. 19; *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, [2018 ONSC 6447](#), paras. 64, 77, Authorities, Tabs 2, 3, 12, 6, 13 and 18.

(“*Pace*”) that “a multiplier of 2.5 times is well within the range accepted in the caselaw and may well be considered “low” in some circumstances.”³⁶

C. Relevant Factors in Determining CCAA Canadian Representative Counsel’s Fees

37. While the percentage fee set out in a retainer is generally considered enforceable, there are other facts that the courts historically referenced (and which various judges still note or refer to in their reasons) when determining the fees of class counsel. Those factors include:

- (a) the factual and legal complexities of the matters dealt with;
- (b) the risk undertaken;
- (c) the degree of responsibility assumed by 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 time expended by class counsel and the consequent opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

38. Which factors are the most relevant depended on the nature of the case, with the results achieved and risks undertaken usually being principally important. The factors that CCAA Representative Counsel considers to be most relevant are addressed below, with the discussion of some factors being combined to avoid unnecessary duplication of submissions.

³⁶ *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*, [2021 ONSC 6956](#), para. 28, Authorities, Tab 16. *Fantl v. Transamerica Life Canada*, [2009 CanLII 55704](#) (Ont. S.C.J.), para. 92, Authorities, Tab 5.

i. Degree of Risk in this Class Proceeding

39. CCAA Canadian Representative Counsel took on the major risk that there would be little or no recovery from the defendants with the means to satisfy a judgment, while having to commit a large amount of time, money and resources to the prosecution of Securities Claims.

40. Counsel was always confident of establishing liability against CannTrust Holdings and certain senior insiders. However, establishing liability against ‘gatekeeper’ defendants who could satisfy a large judgment and recovering from the issuer’s insurers were the greatest risk for this litigation. More particularly:

- (a) The insurers had denied coverage to CannTrust Holdings and the two senior insiders. Recovery from the insurers was thus uncertain. Because they had denied coverage against CannTrust Holdings and certain insiders, there was a major risk that they would not contribute to a judgment or resolution.³⁷
- (b) CannTrust Holdings was and remains in a precarious financial situation and any judgment would likely result in a contested judicial liquidation over CannTrust Holdings’ assets, reducing recovery for Securities Claimants.³⁸
- (c) While other defendants (such as the underwriters) had the means to satisfy a substantial judgment, recovery was still a significant challenge. To succeed against the underwriters, the plaintiffs would have to prove a breach of the due diligence standard, which the underwriters would vigorously dispute. The damages attributable to the primary market claim would be reduced further if such liability is shared with co-defendants. Further, the underwriters were expected to argue that primary market damages were far lower than the plaintiffs’ experts’ estimate, and that primary market purchasers could not establish “traceability” (i.e., they would

³⁷Kalloghlian Fee Affidavit, paras. 79 and 81, Fee Approval Record, Tab 2, pp. 36-37.

³⁸ Kalloghlian Fee Affidavit, paras. 79 and 85, Fee Approval Record, Tab 2, p. 37.

be able to prove that their shares were purchased pursuant to the offering), further reducing damages.³⁹

41. Had CCAA Canadian Representative Counsel not negotiated a favourable settlement, it would have had to prosecute an expedited but long and difficult trial involving substantial risk in terms of outcome and actual recovery. It would have had no guarantee of material success. If the claims were dismissed, CCAA Canadian Representative Counsel would have got nothing for its investment of time, professional skill and judgment.

42. Finally, like in *Pace*, because of the CCAA, this case demanded material front end loading of legal work. These costs reflect a material redirection of resources from ordinary fee-for-service files in a short amount of time and an enhanced risk on the part of the firm relative to contingent fee cases in which the work can be spread out over a longer period. CCAA Canadian Representative Counsel faced significant risks relative to the usual “time and disbursements” approach to billing.

ii. The Results Achieved are Excellent

43. For the reasons set out in CCAA Canadian Representative Counsel’s Factum for approval of the Plan, the results achieved for Securities Claimants are excellent. In particular:

- (a) the settlements resulted from hard-fought, adversarial negotiations in the context of complex, multi-party litigation grafted onto a CCAA proceeding;
- (b) transferring CannTrust’s insurance indemnification claims to a litigation trust or the benefit of Securities Claimants was a creative and novel approach that

³⁹ Kalloghlian Fee Affidavit, para. 80, Fee Approval Record, Tab 2, p. 36.

ultimately led to significant recovery from the insurers for the Securities Claimants;

- (c) transferring CannTrust's litigation claim against KPMG to a litigation trust for the benefit of Securities Claimants was a creative and novel strategy executed by CCAA Canadian Representative Counsel to maximize Securities Claimants' recovery;
- (d) the settlement is superior to the result that could be obtained through a judgment and contested liquidation of CannTrust Holdings' assets;
- (e) in liquidation proceedings, the claims would not have been resolved as quickly;
- (f) this Court determined on the Plan Sanction hearing that the Plan, including the settlements, were "fair and reasonable".⁴⁰

44. Finally, this is the sixth largest securities class action settlement in Canadian history.⁴¹

iii. The Complexity of the Proceedings

45. The complexity of the proceedings and the negotiations leading to resolution were summarized in an affidavit provided by the mediator the Hon. Dennis O'Connor, Q.C.:

- (a) the mediation process was particularly long and complex compared to other matters in which he has been involved in his career;
- (b) more than 35 Canadian and U.S. law firms participated in the mediation on behalf of over 25 separate participant groups with separate interests, many of whom played differing roles in the events leading to the insolvency;
- (c) the subject matter gave rise to complex factual and legal issues, involving an overlay of securities claims, class action procedure and insolvency;

⁴⁰ Sanction Order para. 5(d); Settlement Motion Record Tab 2-C, p. 77.

⁴¹ Kalloghlian Fee Affidavit, para. 86, Fee Approval Record, Tab 2, p. 38. ISS Research Report, Exhibit M to the Kalloghlian Fee Affidavit, Fee Approval Record, Tab 2-M, p. 410.

- (d) the cross-border nature of the claims asserted added considerable complexity;
- (e) certain defendants took the position that their ability to pay was highly constrained, which was a complicating factor; and
- (f) the mediation involved multiple layers of insurers amongst whom complex and contentious issues arose which made a resolution difficult to achieve.⁴²

46. Finally, the Hon. Dennis O'Connor, Q.C. deposed that the decision of CCAA Canadian and US Representative Counsel to work together at the outset of the mediation process made it proceed more expeditiously than it otherwise would have.⁴³

iv. The Importance of the Matter to the Securities Claimants

47. This action was of significant importance to the CCAA Canadian Representatives and the Securities Claimants for the following financial and personal reasons:

(a) **Financial Reasons:** Unlike many class proceedings where the monetary value of individual claims can be minuscule (e.g., credit card or gas bill overcharges amounting to pennies or a few dollars), the individual compensation payable under the settlement for many of the Securities Claimants will be much more significant, potentially in the hundreds of thousands of dollars for those with large holdings.

(b) **Personal Reasons:** The CCAA Canadian Representatives and other Securities Claimants place significant importance on the integrity of capital markets. Results like these settlements agreement help maintain that integrity. This will benefit the Securities Claimants beyond the compensation that they will be awarded in the claims process.⁴⁴

v. Competence of CCAA Canadian Representative Counsel

48. CCAA Canadian Representative Counsel are nationally recognized leaders in securities class proceedings, and CCAA Canadian Representative Counsel's expertise and experience were brought to bear in this novel and complex case. CCAA Canadian Representative Counsel's efforts

⁴² Affidavit of Hon. Dennis O'Connor, Q.C., para. 4, Fee Approval Record, Tab 3, p. 419.

⁴³ Affidavit of Hon. Dennis O'Connor, Q.C., para. 5, Fee Approval Record, Tab 3, p. 420.

⁴⁴ Kalloghlian Fee Affidavit, paras. 87-89, Fee Approval Record, Tab 2, p. 38.

to drive this case forward and their reputation as effective class action counsel assisted significantly in achieving this settlement.⁴⁵

vi. Expectation of the Class Regarding Fees

49. The CCAA Canadian Representatives fully expected that, if this action succeeded, CCAA Canadian Representative Counsel would be well-compensated for its work and taking on the real risks of this litigation. They are both impressed by the settlement and support the fee request.⁴⁶

vii. Opportunity Cost to Class Counsel

50. As noted above, CCAA Canadian Representative Counsel incurred more than 2,460 hours of time amounting to more than \$4.5 million in prospective fees to bring this settlement before the Court. Time and resources risked on this case represent time and resources that could not be invested in either conventional paying files or other class proceedings. That is a significant investment of time and money for any firm and a particularly significant investment for the litigation boutiques that comprise CCAA Canadian Representative Counsel.

58. In light of these considerations, CCAA Canadian Representative Counsel requests that this Honourable Court approve its contingency fee retainer agreement with the Plaintiff, its request for fees amounting to CAD\$12,314,628.50 and its disbursements and taxes as set out above.

⁴⁵ Kalloghlian Fee Affidavit, para. 90, Fee Approval Record, Tab 2, p. 38.

⁴⁶ Affidavit of Dharambir Singh sworn December 3, 2021, paras. 13, 16, Fee Approval Record, Tab 4 p. 425.; Affidavit of Patrick Hrusa sworn December 3, 2021, paras 13, 16, Fee Approval Record, Tab 5, pp. 452-453.

PART I – ORDER REQUESTED

51. CCAA Canadian Representative Counsel and insolvency counsel request that this court make an order approving their fees of \$12,314,628.50 (exclusive of tax) and disbursements of \$366,994.83.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2021.

A handwritten signature in blue ink, appearing to be 'sfc', is written above a horizontal line.

**Marie Henein / Scott Hutchison /
David Wingfield / A. Dimitri Lascaris**

SCHEDULE “A” - LIST OF AUTHORITIES

1. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, [2011 ONSC 7105](#)
2. *Baroch v. Canada Cartage*, [2021 ONSC 7376](#)
3. *C.S. v. Ontario*, [2021 ONSC 6851](#)
4. *Cannon v. Funds for Canada Foundation*, [2013 ONSC 7686](#)
5. *Fantl v. Transamerica Life Canada*, [2009 CanLII 55704](#) (Ont. S.C.J.)
6. *Good v. Toronto Police Services Board*, [2020 ONSC 6332](#)
7. *Helm v. Toronto Hydro-Electric System Limited*, [2012 ONSC 2602](#)
8. *Ironworkers Ontario Pension Fund v Manulife Financial*, [2017 ONSC 2669](#)
9. *Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, [2014 ONSC 62](#)
10. *Mancinelli v. Royal Bank of Canada*, [2017 ONSC 2324](#)
11. *Mancinelli v. Royal Bank of Canada*, [2019 ONSC 626](#)
12. *Mancinelli v. Royal Bank of Canada*, [2021 ONSC 6306](#)
13. *Middlemiss v. Penn West Petroleum*, [2016 ONSC 3537](#)
14. *O’Brien v Bard*, [2016 ONSC 3076](#)
15. *Osmun v. Cadbury Adams Canada Inc.*, [2010 ONSC 2752](#)
16. *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*, [2021 ONSC 6956](#)
17. *Ramdath v George Brown College*, [2016 ONSC 3536](#)
18. *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, [2018 ONSC 6447](#)
19. Order of Justice Kalichman dated November 12, 2019 (*Catucci v. Valeant Pharmaceuticals International Inc.*)

SCHEDULE “B” - RELEVANT STATUTES

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

Fees and disbursements

32 (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Court to approve agreements

(2) 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.

Agreements for payment only in the event of success

33 (1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

Interpretation: success in a proceeding

(2) For the purpose of subsection (1), success in a class proceeding includes,

- (a) a judgment on common issues in favour of some or all class members; and
- (b) a settlement that benefits one or more class members.

Definitions

(3) For the purposes of subsections (4) to (7),

“base fee” means the result of multiplying the total number of hours worked by an hourly rate; (“honoraires de base”)

“multiplier” means a multiple to be applied to a base fee. (“multiplicateur”)

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

- (a) given judgment on common issues in favour of some or all class members; or
- (b) approved a settlement that benefits any class member.

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

- (a) shall determine the amount of the solicitor's base fee;
- (b) 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; and
- (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee.

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto**

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(Fee Approval)**

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