Court File No.: CV-12-9667-00CL

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 COMPRISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No. CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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, PÖYRY (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 LYNCH 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

Proceeding under the *Class Proceedings Act, 1992*

SUPPLEMENTAL BOOK OF AUTHORITIES OF THE PLAINTIFFS
(Motion for Fee Approval, returnable December 13, 2013)

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Lawyers for the Plaintiffs and CCAA Representative Counsel

TO : THE ATTACHED SERVICE LIST

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Gagne v. Silcorp Ltd.

Proceeding under the Class Proceedings Act, 1992
Between
Sherrie B. Gagne, (plaintiff), and
Silcorp Limited, (defendant)

[1998] O.J. No. 4182

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Docket No. C28348

Ontario Court of Appeal
Toronto, Ontario

Charron, Rosenberg and Goudge JJ.A.

Heard: May 27, 1998.
Judgment: October 21, 1998.

(14 pp.)

Barrister and solicitor -- Compensation -- Agreements, contingent fees -- Review and approval -- Multiplier -- Calculation of -- Accounts -- Hourly rates -- Measure of compensation -- Relevant considerations -- Reasonable charges, reasonably performed -- Respecting successful services -- Class services.

Appeal by solicitors for the plaintiff in a class action, Gagne, from the dismissal of their motion for court approval to increase their base fee by a multiple of three. Gagne brought a class action for wrongful dismissal against the defendant, Silcorp. Pursuant to a written agreement, the lawyers took her class action on a contingency basis as permitted by the Class Proceedings Act. They agreed that the base fee would be the product of the hours worked by the lawyers and their usual hourly rates. Negotiations resulted in a fairly quick settlement. Mini hearings were held to resolve individual claims. The final total gross recovery was $1,945,723. The lawyers motion for court approval to increase their base fee by a multiple of three was denied, and they were allowed only their base fee. The motions judge found that there was no material risk in accepting the retainer and that the base fee was fair compensation for the lawyers' services in obtaining the degree of success they had. They appealed to the Ontario Court of Appeal.

HELD: Appeal allowed. A multiplier of two was to be applied to the base fee. This was fair and reasonable compensation as contemplated by the retainer, and it represented a multiplied fee that was much less than ten per cent of gross recovery. It provided a sufficient real incentive for solicitors in future similar cases. The motions judge erred by failing to give due weight to relevant risk and success considerations. Both the degree of risk assumed by the lawyers and the degree of success they achieved were relevant considerations. Here, while the risk of an adverse finding on liability was minimal, there was a material risk of non-certification. As well, there were significant elements of success in the way the solicitors conducted the proceedings. Weighed against these success factors was the fact that individual class members incurred further legal fees to finally realize on their claims after the settlement. Class members' views about whether the base fee should be increased were not to be considered.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 33, 33(2), 33(7)(b).
Employment Standards Act, R.S.O. 1990, c. E-14.

Counsel:

Paul S.A. Lamek, Q.C., for the appellant solicitors.
McGowan & Associates and Jeff Burtt, advocate.

The judgment of the Court was delivered by

1 **GOUDGE J.A.**:-- The Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "Act") permits a solicitor to take a class action on a contingency basis. If the action is successful the Act permits the solicitor to seek the court's approval to increase his or her base fee by applying a multiple to that fee. This appeal concerns the appropriate considerations that should inform the court's decision on such a motion.

2 The appellants are solicitors who acted on behalf of the plaintiff Sherrie Gagne in a class action against the defendant Silcorp Limited. The action was concluded successfully and the appellants, having taken the case on a contingency basis, moved to increase their base fee by a multiple of three. Southey J. denied this request, allowing the solicitors only their base fee, namely the prod-

uct of their usual hourly rates and their hours worked on the matter. This is an appeal from that disposition.

THE FACTUAL BACKGROUND

3 Beginning in late 1996, the defendant Silcorp proceeded to merge the operations of the Becker's and Mac's convenience store chains which it owned. As a consequence of the merger, a number of its employees were no longer needed and were dismissed. Initially Silcorp offered those terminated only an amount that was less than the minimum termination and severance pay to which they were entitled under the Employment Standards Act, R.S.O. 1990, c. E.14.

4 On March 24, 1997 the appellant solicitors commenced a class action for wrongful dismissal on behalf of those former employees who had been terminated. Sherrie Gagne was the representative plaintiff.

5 Immediately after commencing the action, the appellants brought a motion before Southey J. seeking an injunction to compel Silcorp to comply with the Employment Standards Act. This motion was adjourned from April 3, 1997 to April 17, 1997 on the undertaking of Silcorp to immediately comply with the requirements of that Act.

6 The parties then engaged in intensive negotiations which culminated in minutes of settlement dated April 14, 1997. On April 17, 1997, that settlement was approved by Southey J. as required by s. 29 of the Act. The settlement order was very complex but its essential elements were the following:

* The action was certified as a class proceeding for the purposes of the Act.
* Sherrie Gagne was appointed the representative plaintiff on behalf of the class of former employees who had been terminated by the defendant Silcorp.
* The appellant solicitors were appointed as counsel for the class.
* The defendant was adjudged liable for compensatory damages and Employment Standards Act entitlements.
* The claims for punitive and exemplary damages were dismissed.
* Pursuant to s. 25 of the Act, a reference was directed to determine the quantum of damages for each class member.
* The terms of the reference created a mini-hearing process with a mediation stage and an arbitration stage.
* The class members were each permitted to be represented in the mini-hearing process by a personal lawyer rather than the appellant solicitors.

7 Between the date of the settlement and August 26, 1997, when the appellant solicitors prepared the material seeking to triple their base fee, thirty-five individual claims were finally resolved through the mini-hearing process. This court was further advised that by the time of this appeal, all sixty-five class members had resolved their individual claims for a total gross recovery of $1,945,723.

8 As required by the Act, the appellant solicitors executed a written agreement with the representative plaintiff respecting their fees and disbursements. It provided that the payment of any legal fees was contingent on the class action being concluded successfully as defined by the Act. It also

provided that the base fee would be the product of the hours worked by the solicitors and their usual hourly rates. In addition, it set out that the solicitors could seek court approval for a multiplier to be applied to that base fee. Finally, the agreement described two examples of how this might work:

> 7. The Consortium and the Client acknowledge it is difficult to estimate what the expected fee will be. However, the following are estimates:
>
> (a) If the class action results in a quick settlement for the class, within 3 months after the date of this retainer, and at that time the Base Fee is $50,000 and if the court sets the Multiplier at 3.0, then the fee will be $50,000 x 3.0 = $150,000.
> (b) If the trial of the common issues occurs within 2 or 3 years and is decided in favour of the class and no appeals are taken, and at the time the Base Fee is $250,000 and if the court sets the Multiplier at 2.0, then the fee will be $250,000 x 2.0 = $500,000.
>
> These estimates do not include work for any mini-hearings or other proceedings which may be necessary to deal with individual damage claims.

9 The motion brought by the appellants sought a multiplier of 3. In denying this request Southey J. considered two factors, namely the degree of risk in accepting the retainer and the degree of success achieved by the solicitors. He set out his analysis of each of these factors clearly and concisely as follows:

> As to the first of the above elements, I am unable to see any reason why the employees who were dismissed would not be entitled to their "entitlements" under the Employment Standards Act and to compensatory damages, if any. It appears to me that there was no serious issue as to liability in this case. In these circumstances, I cannot find that there was any material risk in accepting the retainer.
>
> When I asked counsel for the Consortium to explain the risk, his reply was that the difficulty arose out of procedural complexity. In my judgment, that is not the sort of risk that should influence the multiplier. That sort of risk is adequately covered by an award of a Base Fee in the full amount of the usual charges made by the legal professionals, as I have approved in this case ...
>
> As to the second element, what has been achieved? Former employees now have available to them a procedure for the prompt determination of their claims. For Achieving that result, the solicitors, in my opinion, are fairly compensated for their services to August 8 last by the Base Fee of $109,411.28, including GST. Any premium based on a high degree of success must depend on the recovery in each case, which was not the subject of evidence before me.

10 The appellants argue that Southey J. erred in his consideration of both the risk factors and the success factors and, further, that he failed to give weight to the views of the class members who,

it is argued, appear content with a significant multiplier. No one appeared in opposition to the appellants.

ANALYSIS

11 Central to a consideration of these arguments is s. 33 of the Act. It reads as follows:

> 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 purposes 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; "multiplier" means a multiple to be applied to a base fee.
>
> 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.
>
> 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 (7)(b), the court may consider the manner in which the solicitor conducted the proceeding.

12 This section makes clear that the motion seeking to apply a multiplier to the base fee can be brought only after the class proceeding has been concluded successfully as defined in s. 33(2). Section 33(7)(b) gives the judge a discretion in determining whether to apply a multiplier or not. Hence, on appeal, while this court is not free to simply substitute its own exercise of discretion for that exercised at first instance, reversal of the order appealed from may be justified if the motions judge gave no weight or insufficient weight to considerations relevant to his decision. See Friends of the Old Man River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3 at 76-77.

13 In applying this standard of review to the decision appealed from, it is appropriate to begin with a consideration of the genesis of the Class Proceedings Act, 1992. It was enacted following much legislative study and in the wake of a detailed report of the Ontario Law Reform Commission laying out the broad rationale for such legislation. One of the objects which the Act seeks to achieve is the efficient handling of potentially complex cases of mass wrongs. See Dabbs v. Sun Life Assurance Company of Canada, a judgment of the Ontario Court of Appeal, released September 14, 1998 at p. 3.

14 Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.

15 With that background, I turn to the judgment appealed from. As I have said, Southey J. addressed two criteria in concluding that he would not apply a multiple to the base fee: the degree of risk assumed by the solicitors and the degree of success they achieve. In my view, he was correct in focusing on these two considerations. Section 33(7)(b) makes clear the relevance of "the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success". Section 33(9) invites a consideration of the manner in which the solicitor con-

ducted the proceedings. However, for the reasons that follow I have concluded that he erred in giving no weight to considerations relevant to each of the risk and success criteria.

Risk Factors

16 The multiplier is in part a reward to the solicitor for bearing the risks of acting in the litigation. The court must determine whether these risks were sufficient that together with the other relevant considerations a multiplier is warranted. While this determination is made after the class proceeding has concluded successfully, it is the risks when the litigation commenced and as it continued that must be assessed.

17 The only risk factor considered by Southey J. was whether the defendant might ultimately escape liability. Because there was no real doubt about that liability, he determined that there was no material risk in accepting the retainer.

18 Since this class proceeding was concluded quickly, the risk assessment was properly focussed on the risks incurred at the outset in undertaking the proceeding and did not have to extend to the risks, if any, in continuing it. Nonetheless, in my view there was from the beginning a second material risk that was a relevant consideration, namely the risk that comes with this action being brought as a class proceeding, particularly the risk of non-certification. The certification step in a class action is a significant one, often requiring extensive preparation by counsel. If certification is denied, a solicitor who has agreed to a fee contingent on success recovers nothing. Moreover, when this action was commenced, certification could not be predicted with certainty. A debate was quite possible about whether the common issues requirement would be met or whether a class proceeding was the preferable procedure given the enforcement mechanisms provided by the Employment Standards Act. This risk factor was material and ought to have been given weight.

19 It is true that this risk factor will be present in most class proceedings. This factor should be recognized so that solicitors faced with a class proceeding retainer will have the necessary economic incentive to take on the matter. They will know that if, in prosecuting the action, they can meet the success criterion there will be a real opportunity to have some multiple attached to the base fee. To accord due weight to this consideration is to serve the legislative objective of enhanced access to justice.

Success Factors

20 Section 33(9) invites the court, in determining whether a multiplier is appropriate, to consider the manner in which the solicitor conducted the proceeding. Just as the real opportunity to receive an enhanced reward for incurring the risks of the litigation serves as an incentive for the solicitor to take on the retainer, that opportunity is also designed to serve as an incentive for the solicitor to achieve the best possible results for the class, expeditiously and efficiently.

21 The only success factor considered by Southey J. was that a procedure had been provided to former employees for the prompt determination of their claims. This was insufficient, in his view, to warrant the application of any multiple to the base fee.

22 In my view, this fails to recognize that the solicitors achieved immediate, partial success in extracting a commitment from the defendant to comply forthwith with the Employment Standards Act. Second, the ultimate settlement of the common issues was achieved quickly. Third, the settlement provided for a creative and effective mini-hearing process that resulted in the complete resolution of all individual claims within little more than a year. These factors are all relevant to the de-

gree of success with which the solicitors conducted the proceedings and all deserved to be considered in determining whether a multiplier was appropriate.

Views of Class Members

23 In reaching his decision Southey J. did not consider the views of class members about whether a multiplier should properly be applied to the base fee. In my view, he was correct in doing so. The Act does not appear to invite such a consideration. Moreover, in this case those views, which are said to constitute acceptance or even approval of a multiplier, can be gleaned only by a very tenuous process of inference. One simply cannot say with any certainty that the views of class members on this issue are as they are argued to be.

24 In summary, therefore, I have concluded that Southey J. erred in the exercise of his discretion in failing to give due weight to relevant risk and success considerations. If appropriate weight is accorded them, I think the conclusion must be that this is an appropriate case to apply a multiplier to the base fee.

25 I recognize that the selection of the precise multiplier is an art, not a science. All the relevant factors must be weighed. Here, while the risk of an adverse finding on liability was minimal, there was a material risk of non-certification. As well, as I have outlined, there were significant elements of success in the manner in which the solicitors conducted the proceedings. Weighed against these success factors is the fact that following the April 17, 1997 settlement, individual class members had to incur further legal fees to finally realize on their claims.

26 In the end, these considerations must yield a multiplier that, in the words of section 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.

27 In this case, then, taking into account all the relevant considerations I have recited, in my view the appropriate multiplier is two. This reflects the risk and success factors at play. It represents a multiplied fee that is significantly less than ten per cent of gross recovery. It reflects the fact that this case does not exemplify the greatest risk or the greatest success. It is within the range contemplated by the retainer agreement. And finally, the resulting compensation should provide a sufficient real incentive for solicitors in future similar cases.

DISPOSITION

28 I would therefore allow the appeal and provide for a multiplier of two to be applied to the base fee up to April 17, 1997, the date of the settlement order. I would vary the order below accordingly. The appellants do not seek costs of the appeal and I would order none.

GOUDGE J.A.
CHARRON J.A. -- I agree.
ROSENBERG J.A. -- I agree.

cp/d/ln/aaa/DRS

Case Name:

Mondor v. Fisherman; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman

PROCEEDING UNDER The Class Proceedings Act, 1992
Between
Roger Mondor and Amit M. Karia, plaintiffs, and
Igor Fisherman, Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, James J. Held, Guy R. Scala, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Inc., formerly known as First Marathon Securities Limited, Griffiths McBurney & Partners, Cassels, Brock & Blackwell and Lawrence Wilder, defendants, and
Fogler, Rubinoff LLP, YBM Magnex International, Inc. through its independent Litigation Supervisor, Paul Farrar, YBM Magnex International, Inc. by its Receiver and Manager Ernst & Young YBM Inc., Decision Strategies LLC, Pepper Hamilton LLP, Connor Clark & Lunn Investment Management Ltd., third parties,
And between
Royal Trust Corporation of Canada, in its capacity as Trustee of the CC&L Dedicated Enterprise Fund, Royal Trust Corporation of Canada, in its capacity as Trustee of the CC&L Balanced Canadian Equity Fund, Connor Clark & Lunn Investment Management Ltd. and The British Columbia Investment Management Corporation, plaintiffs, and
Igor Fisherman, Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Inc., Griffiths McBurney & Partners, Scotia Capital Inc., Canaccord Capital Corporation, HSBC Securities (Canada) Inc., Cassels Brock & Blackwell and Lawrence Wilder, defendants, and
Fogler, Rubinoff LLP, YBM Magnex International, Inc. through its Independent Litigation Supervisor, Paul Farrar, Decision Strategies LLC and Pepper Hamilton LLP, third parties
And between
YBM Magnex International, Inc. through its independent Litigation Supervisor, Paul Farrar, plaintiff, and

Jacob Bogatin, Igor Fisherman, Harry Antes, Kenneth Davies, Frank Greenwald, R. Owen Mitchell, David Peterson, Michael Schmidt, Cassels, Brock & Blackwell, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Corp., formerly First Marathon Securities Limited, Griffiths McBurney & Partners, Scotia-McLeod Inc., Canaccord Capital Corporation and HSBC James Capel Inc., formerly Gordon Capital Corporation, defendants, and
Connor Clark & Lunn Investment Management Ltd., third party
And between
YBM Magnex International, Inc. by its Receiver and Manager Ernst & Young YBM Inc., plaintiff, and
Jacob Bogatin, Igor Fisherman, Michael Schmidt, Kenneth Davies, Frank Greenwald, Guy Scala, Daniel Gatti, James Held, Robert Ventresca and Harry Antes, defendants
And between
Deloitte & Touche LLP, plaintiff, and
YBM Magnex International, Inc., Jacob G. Bogatin, Daniel E. Gatti, R. Owen Mitchell, Cassels Brock & Blackwell, First Marathon Securities Ltd., defendants

[2002] O.J. No. 1855

[2002] O.T.C. 317

26 B.L.R. (3d) 281

22 C.P.C. (5th) 346

114 A.C.W.S. (3d) 16

Court File Nos. 00-CV-193345CP, 00-CV-186800CP, 01-CV-209418,

99-CL-3424, 00-CV-202036-CM

Ontario Superior Court of Justice

Cumming J.

Heard: May 2, 2002.
Judgment: May 10, 2002.

(56 paras.)

Practice -- Persons who can sue or be sued -- Individuals and corporations, status or standing -- Class actions, certification, evidence and proof.

Motion by the proposed representative plaintiffs for certification of two class proceedings and to approve a settlement made pursuant to the terms of a settlement agreement. The plaintiffs alleged that there was a massive conspiracy and fraud perpetrated upon the investors in YBM Magnex International by organized crime. In particular, the plaintiffs in the prospectus class action claimed that members of Russian organized crime caused YBM to enter into a series of contracts and transactions that were simply a mechanism to siphon cash out of YBM including the proceeds of a 1997 prospectus. It was alleged that there were misrepresentations through statements set out in the 1997 Prospectus and that Prospectus Class Members suffered losses arising out of their purchase or acquisition of shares pursuant to the 1997 Prospectus. There were also allegations of negligent misrepresentations against other defendants who were involved in the public offering of shares by YBM. With respect to the general class action, there were allegations that YBM was a fraud and was used as a vehicle for money laundering and other criminal activities. The general class action was brought on behalf of a class of persons who dealt in shares of YBM on the secondary market between July 1, 1994 and May 14, 1998 and suffered a loss as a result thereof. Both class actions were commenced in late 1998 and early 1999 and settled in February 2002.

HELD: Application allowed. The criteria set out in section 5 of the Class Proceedings Act as mandatory prerequisites to certification were met. Further, the proposed settlement was fair, reasonable and in the best interests of all class members. There was significant risk and cost to the plaintiffs and the defendants in proceeding to trial. No objections to the settlement were raised. There was effective communication with class members through publication and mailings of the notice of the settlement approval hearing. The net amount available for distribution to class members was approximately $110 million. It was in the best interests of the class members to gain the recovery available through court approval of the proposed settlement. Further, the legal fees and disbursements in this matter were reasonable, taking into account the complexity of the proceedings, the risks involved, the success achieved and the degree of skill and competence demonstrated by class counsel. The total fees amounted to about five per cent of the amount available to the claimants as a result of the settlement.

Statutes, Regulations and Rules Cited:

Alberta Securities Act, S.A. 1981, c. S.6.1, s. 168.

British Columbia Securities Act, S.A. 1981, c. S.6.1, s. 131.

Class Proceedings Act, 1992, S.O. 1992, c.6, ss. 5, 17(6), 29(2), 32, 33.

Competition Act, R.S.C. 1985, c. C.34.

Ontario Rules of Civil Procedure, Rule 7.08(4).

Ontario Securities Act, R.S.O. 1990, c.S.5, ss. 128, 130.

Quebec Securities Act, R.S.Q. c. V.1.1, Regulation 29, ss. 218, 219, 230.

Counsel:

Harvey T. Strosberg, Q.C., for the plaintiffs.

Michael Statham, for Jacob G. Bogatin.
Kelly Charlebois, for Kenneth Davies.
Randy Bennett, for Deloitte & Touche LLP.
David F. Bell, for Parente, Randolph, Orlando, Carey & Associates.
Karen Mitchell, for Daniel E. Gatti, James Held and Guy R. Scala.
Jessica Kimmel, for Griffiths McBurney & Partners.
Bonnie A. Tough, for National Bank Financial Inc.
Linda L. Fuerst, for Cassels Brock & Blackwell and Lawrence Wilder.
Alan Mersky and Jeremy Devereux, for Scotia Capital Inc.
W.A. Kelly, Q.C., for Fogler Rubinoff LLP.
Peter F.C. Howard, for YBM Magnex International Inc. through its Independent Litigation Supervisor, Paul Farrar and by its Receiver and Manager Ernst & Young YBM Inc. and for Pepper Hamilton.
Laura F. Cooper, for Decision Strategies LLC.
Earl A. Cherniak, Q.C., Lisa Munro, and Melanie Schweizer, for Connor Clark & Lunn Investment Management Ltd. (00-CV-193345CP).
Earl A. Cherniak, Q.C., Lisa C. Munro and Melanie D. Schweizer, for the plaintiffs (00-CV-186800CP).
David Whitten, for Canaccord Capital Corporation.

CUMMING J.:--

The Motions

1 The motions to be dealt with arise in respect of two class proceedings under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"), being:

(1) Royal Trust Corporation of Canada in its capacity as Trustee of the CC&L Dedicated Enterprise Fund et al. v. Igor Fisherman, Jacob G. Bogatin et al. (Court File No. 00-CV-186800) (the "prospectus class action"). This is a class action under the CPA on behalf of all persons in Canada who purchased or acquired common shares in YBM Magnex International Inc. ("YBM") distributed by a prospectus dated November 17, 1997 (the "1997 Prospectus") and suffered a loss as a result thereof; and

(2) Roger Mondor and Amit M. Karia v. Jacob Bogatin et al. (Court File No. 00-CV-193345 (the "general class action"). This is a class action under the CPA brought on behalf of the class of persons in Canada who dealt in shares of YBM in the secondary market between July 1, 1994 and May 14, 1998 and suffered a loss as a result thereof.

2 YBM is an Alberta corporation, with its head office in Newtown, Pennsylvania.

3 There have been extensive proceedings to date in this court in respect of the two class actions and other related actions involving YBM. See CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman [2001] O.J. No. 598; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman [2001]

O.J. No. 637; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman [2001] O.J. No. 4621; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman [2001] O.J. No. 4622; and Mondor v. Fisherman [2001] O.J. No. 4620. The many allegations and extensive background relating to the class actions at hand are dealt with at length in my Reasons for Decisions in these earlier proceedings.

4 A class action was also commenced by shareholders in the United States District Court for the Eastern District of Pennsylvania, John Paraschos et al. v. YBM Magnex International (5 December 2000) (E.D.Penn.) which has now been stayed upon motion by the defendants in that action on the basis of the principle of comity. A motion for reconsideration was denied (8 February 2001) (E.D.Penn.), appeal pending (the "Paraschos" class action).

5 The total approximate loss to all persons who dealt in YBM shares is in excess of $360 million. The estimated loss to purchasers under the public offering pursuant to the 1997 Prospectus is more than $100 million. The estimated loss to persons who purchased shares in the secondary market is in excess of $250 million.

6 The plaintiffs in the prospectus class action assert, inter alia, a statutory claim for damages as against all defendants pursuant to s. 130 of the Ontario Securities Act, R.S.O. 1990, c. S.5, s. 168 of the Alberta Securities Act, S.A. 1981, c. S.6.1, s. 131 of the British Columbia Securities Act, S.A. 1981, c. S.6.1 and Regulation 29 and ss. 218, 219 and 230 of the Quebec Securities Act, R.S.Q. c. V.1.1. The plaintiffs assert that there were misrepresentations through statements set out in the 1997 Prospectus and documents incorporated by reference therein.

7 In brief, the plaintiffs in the prospectus class action claim that members of Russian organized crime caused YBM to enter into a series of contracts and transactions which were simply a mechanism to siphon cash out of YBM, including the proceeds of the 1997 Prospectus. They allege that, "YBM was a money laundering operation and the sales, revenues and profits were fictitious". (para. 3 of Amended Fresh as Amended Statement of Claim) The plaintiffs allege negligent misrepresentations and negligence against the defendant auditors, underwriters, lawyers, directors and officers who were involved in the public offering of shares by YBM.

8 In brief, the plaintiffs in the general class action assert that the insiders, auditors, lead financial advisors and lawyers for YBM caused the public to believe that YBM was a legitimate business with income only from legitimate business activities. They say that, in reality, YBM was a fraud and was used as a vehicle for money laundering and other criminal activities. They say that one purpose of the fraud was to promote the sale of shares of YBM in the public market through the Alberta and Toronto stock exchanges during the period July 1, 1994 to May 14, 1998.

9 The general class action plaintiffs do not allege that the defendants, apart from Igor Fisherman and Jacob C. Bogatin as alleged insiders, were intentionally dishonest. Rather, the general class action plaintiffs allege negligent and reckless misrepresentation against the remaining defendants. In particular, the general class action plaintiffs allege that the conduct of the defendants, when coupled with their immediate pecuniary interests, was such as to constitute knowledge in law or be considered reckless or wilfully blind. The plaintiffs further allege that this thereby makes the defendants parties to the conspiracy and liable in damages for the conspiracy and misrepresentation.

10 On June 7, 1999 YBM pleaded guilty to a charge of conspiracy to commit fraud in the United States.

11 The proposed representative plaintiffs in the two Canadian class actions bring a motion (1) to certify these two class proceedings and (2) to approve the settlement thereof, pursuant to the terms of an agreement to settle these class actions. The agreement to settle includes a disposition of other YBM-related litigation in Ontario and the United States. Orders were made March 13 and 18, 2002 which resulted in a widely-published notice to the current and former shareholders of YBM of this certification and settlement approval hearing.

12 This is the first case in Canada where there is a proposed settlement of a class action relating to trading in the secondary market. These class actions are also unique for Canada in including class members who are located throughout the world. The jurisdiction of this court is not contested. Indeed, Judge Clarence C. Newcomer in Parachos, supra, held that because Canada has a greater interest than the United States in the subject matter, the American action should be dismissed, "in deference to Canadian law and the Canadian courts on the basis of international comity". (at 13)

13 These actions have not proceeded through to a trial. There are no findings of liability. The plaintiffs' pleadings allege that there was a very sophisticated, multi-layered conspiracy and massive fraud perpetrated upon the public through the utilization of YBM by organized crime. Indeed, the level of complexity and fraud of the alleged overall scheme seems unparalleled in Canadian experience and may well rival any such scheme seen on the international scene. See the several Reasons for Decision, supra.

14 The class actions were commenced in late 1998 and early 1999. All defendants have filed defences except Igor Fisherman, who has been noted in default. Some defendants have issued third party claims, crossclaims and counterclaims. Several amendments have been made to the pleadings. By Order dated October 1, 2001 the certification motions were to be heard during the weeks of February 18 and 25, 2002. However, by Order dated November 19, 2001 counsel for all parties in the two class actions were also directed to appear before Mr. Justice Winkler of this court for a settlement conference to consider the possibility of resolving some or all of the several issues. The settlement conferences commenced January 16, 2002 and were concluded successfully February 7, 2002.

The Proposed Certification

15 Section 5 of the CPA sets forth the five criteria to be met as mandatory prerequisites to certification. The defendants conditionally consent to certification, dependent upon approval of the proposed settlement. In my view, and I so find, the criteria of s. 5 are met and certification is appropriate. I turn to the question of approval of the proposed settlement.

The Proposed Settlement

16 The defendants, notwithstanding their consent to the proposed settlement, have denied and continue to deny any wrongdoing or liability.

17 A settlement of a class action is not binding unless approved by the court: C.P.A., s. 29(2). The resolution of complex litigation through the compromise of claims is favoured as a matter of public policy. Ontario New Home Warranty Program et al. v. Chevron Chemical Company et al. (1999), 46 O.R. (3d) 130 at 147 (S.C.J.)

18 A court in exercising an objective and independent assessment must find that the settlement is fair, reasonable, and in the best interests of the class. Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429 at 444 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to

S.C.C. dismissed October 22, 1998, [1998] S.C.C.A. No. 372; Directright Cartage Ltd. v. London Life Insurance Co. [2001] O.J. No. 4073.

19 There is a prima facie presumption of fairness when a proposed settlement is negotiated at arms-length. Manual for Complex Litigation, 3rd ed. (Federal Judicial Centre: West Publishing, 1995) at 30.42. This is particularly so when the settlement negotiations have taken place through the auspices of the court.

20 There are significant uncertainties of law and fact in the litigation at hand with corresponding risks and costs necessarily inherent in pursuing the litigation to trial. I refer briefly to some of these risks.

21 There are particular problems inherent to any action in Canada based upon alleged misrepresentations relating to the purchase of shares in the secondary market. The law is fundamentally different in the United States. See Mondor v. Fisherman [2001] O.J. No. 4620 at paras. 57 to 71.

22 There is a risk to class members in the general class action because of the necessity in Canada of proving individual, actual reliance upon the alleged misrepresentation. There is uncertainty whether reliance could be established by the simple act of purchase of the shares or whether each shareholder would have to establish individually that he or she relied upon a misrepresentation that YBM was a legitimate business.

23 The issue of negligence in respect of certain defendants, in particular, securities counsel and the auditors, may be problematical under the test set forth in Hercules Management Ltd. v. Ernst & Young (1997), 146 D.L.R. (4th) 577 (S.C.C.) at 586; Mondor v. Fisherman [2001] O.J. No. 4620 at paras. 32 to 71.

24 The claim advanced in the general class action under the misleading advertising provisions of the Competition Act, R.S.C. 1985, c. C.34 is novel and seems problematic and tenuous. See Mondor v. Fisherman [2001] O.J. No. 4620 at paras. 72 to 85.

25 There is also a risk that a portion of the statutory claim brought by the representative plaintiffs in the prospectus class action might not succeed on the basis that their purchase of YBM shares was not made pursuant to the 1997 Prospectus or in reliance upon the Prospectus, as required under the securities legislation. A limitation of actions defence, while doubtful, is raised with respect to all the prospectus claimants.

26 There is a risk that the plaintiffs would not be able to establish liability for negligence on the part of some or all of the defendants. The defendants assert that YBM was such a sophisticated fraud that they could not, through their own reasonable due diligence, have discovered the fraud.

27 Those insurance policies ascertained by the plaintiffs' counsel to be in place for some defendants provide that legal costs paid reduce the amounts of coverage otherwise available to meet claims. The estimate is that a trial of the common issues could well last at least a year with much of the insurance monies otherwise available being consumed in legal costs. It could quite possibly take three or four years for a determination of all the issues before there could be any final judgment. Plaintiffs' counsel state that the defendants with the deepest pockets' have the strongest defences.

28 There are also claims for indemnity brought by defendants against the Receiver for YBM, a third party in each of the class actions. Some defendants assert that there are contractual obligations on the part of YBM to provide indemnity.

29 The Receiver is a party to the settlement. The Receiver and the Independent Litigation Supervisor for YBM recommended the proposed settlement and the Receiver's involvement in the administration of the Plan to the court in Alberta where the bankruptcy proceedings in respect of YBM are taking place. By Order dated March 14, 2002 Mr. Justice Sulatycky of the Court of Queen's Bench of Alberta approved the recommendation of the Independent Litigation Supervisor to implement the proposed settlement.

30 In summary, there is a significant risk and cost to the plaintiffs (as there is to the defendants) in proceeding to trial. This is well-recognized by all the parties.

31 Mr. William Dermody, a lawyer, was appointed as a friend of the court to receive any objections to the settlement and was named for this purpose in the published notice in respect of this settlement approval hearing. Mr. Dermody advises that no objections have been received.

32 There has been effective communication with class members through publication and mailings of the notice of this settlement approval hearing. Class counsel have communicated with the class members by the operation of a website containing all pleadings, records (including the materials in the motions for approval of the settlement through this hearing) and decisions (www.ybmclassaction.com) and a toll-free telephone number with a recorded message. Class counsel have met with some twenty institutional investors who are class members and who expressly support the settlement. The representative plaintiffs, including those in the Paraschos action, have all provided affidavits supporting the settlement.

33 The settlement achieved in respect of these class actions is quite remarkable, given all the circumstances. There has been necessarily a very large number of parties, with very disparate interests and issues, involved in the settlement negotiations. An earlier mediation effort toward settlement by a very skilled and well-respected mediator was not successful.

34 The significant details of the proposed settlement are seen in the Judgment attached to these Reasons for Decision and the agreed-to "Plan" for the administration of the settlement, being Schedule "2" to the Judgment. Ernst & Young YBM Inc., the current Receiver of YBM, is to be appointed as Administrator of the settlement. The court will supervise the administration and operation of the Plan.

35 A person will only be eligible to participate in the distribution if that person suffered a net loss trading in shares of YBM and did not contribute to the wrongdoing involving YBM that gave rise to the class actions.

36 Class members may opt out of the settlement. There is a so-called blow-up' clause whereby if a certain number of class members opt out then a condition subsequent may be operative such that the settlement is rendered null and void.

37 The total settlement through contributions by some of the defendants and third parties is $85 million. (The identity of particular defendants and third parties contributing, and the respective amounts to be contributed, are not disclosed.) Against this amount is debited approximately $8,500,000 for legal fees and administration costs, as discussed below. However, to the net amount of $76,500,000 available for distribution to the class members must also be added the estimated net amount of $33,500,000. This is available from the YBM estate in bankruptcy and is freed up for the benefit of members of the classes by virtue of the resolution of all litigation. Thus, the estimated net total for distribution to class claimants is approximately $110 million.

38 The purchasers through the 1997 Prospectus will collectively receive a premium of $7.5 million from the settlement funds to reflect their relatively stronger chance of success if the litigation had proceeded. This is based upon the statutory regime in securities legislation applicable to misrepresentations in a prospectus. It is estimated that this will result in a pro rata priority payment of $0.07 for each $1.00 of net loss.

39 The balance remaining of an estimated $102.5 million will be shared on a pro rata basis amongst all class members. It is estimated that this general distribution should result in a recovery of about $0.20 per $1.00 of loss.

40 Thus, it is estimated that prospectus class member claimants will recover about $0.27 and general class action members will receive about $0.20 for each $1.00 of net loss.

41 In my view, and I so find, the proposed settlement is fair, reasonable and in the best interests of class members. I turn now to the question of legal fees, disbursements and costs.

Legal fees and disbursements, costs of the notice program and administration and distribution costs

42 Sections 32 and 33 of the CPA set forth the regime for the approval of legal fees and disbursements. The underlying central criterion is that of reasonableness in the context of all the relevant circumstances.

43 Legal fees and disbursements sought, together with the costs of the notice program and the projected costs of administration in implementing the Plan, are estimated at about $8,500,000. Counsel for the general class action had a retainer agreement which provided for fees on the basis that payment was contingent upon success. Counsel for the prospectus class action was retained on the basis that fees would be paid by the representative plaintiffs in all events.

44 Fees of $3,000,000 are requested by counsel for the general class action; fees of $1,500,000 are requested by the counsel for the prospectus class action; and fees of U.S. $1,000,000 (approximately Cdn. $1,600,000) are requested by counsel in the United States action. Thus, total legal fees are sought of about Cdn. $6,100,000. In addition, applicable G.S.T. and disbursements are requested.

45 There is also the amount of $44,446.58 plus G.S.T. of $2,927.81 paid by two of the representative plaintiffs in respect of legal fees to counsel who preceded the present class counsel in the prospectus class action. I allow reimbursement for this amount. The role of two executives of these representative plaintiffs was instrumental in work done in the conduct of the case. They were actively involved in achieving a satisfactory settlement to the class actions for the benefit of all class members. This exceptional role was attested to by class counsel in both class actions and by counsel for the Receiver. Accordingly, I allow compensation to these two representative plaintiffs of $20,930.00 on a quantum meruit basis and $18,366.94 plus G.S.T. in the amount of $557.24 for related travelling expenses.

46 These two representative plaintiffs in the prospectus class action also seek $59,369.76 for the interest value on those legal fees paid to their counsel, calculated at a 10% rate from the date of payment to February 7, 2002, the date the proposed settlement was announced. They argue that there is an interest value, or opportunity cost, to these paid legal fees. I do not accept this claim for reimbursement from the common fund available to all class members. In my view, it is reasonable that any claimed opportunity cost relating to legal fees be borne by the representative plaintiffs. Their claims constitute a very significant percentage of the claims of the prospectus class claimants.

It is noted that the prospectus class has gained a particular benefit through the negotiated premium in the settlement payable to the members of that class alone. The normative approach for a successful litigant who is being indemnified for legal fees is for that litigant to bear any arguable opportunity cost relating to a retainer paid to its own counsel.

47 A condition to the settlement being finalized is that the pending appeal by the plaintiffs in Paraschos be dismissed. Counsel in the Canadian class actions advise that there has been a cooperative approach by all class counsel and that the assistance of American counsel for the plaintiffs in Paraschos has been integral to achieving the overall settlement.

48 No class member has objected to the requested fees. Notice of the requested fees was set out in the notice to class members of this settlement approval hearing. All representative plaintiffs have expressly agreed to the requested fees.

49 Dockets have been filed by counsel in the two Canadian class actions. The multiplier sought in respect of the general class action amounts to less than three times the base fee and for the prospectus class action amounts to less than 1.5 times the base fee. The premium for counsel in the prospectus class action is based simply upon the success achieved. Payment of this premium to counsel in the prospectus class action is supported by counsel for the plaintiffs in the general class action. The premium is modest, reflecting the fact that there was an agreement by the representative plaintiffs to pay counsel fees in all events.

50 The total fees amount to about 8% of the gross total of $85 million received directly through the settlement, and about 5% of the total $118.5 million available ($85,000,000 plus an estimated $33,500,000 freed up from the YBM estate in bankruptcy) to claimants as a result of the settlement.

51 Given the amounts claimed and recovered, the complexity of the proceedings, the responsibility assumed by counsel, the risks involved, the success achieved, the importance of the issues and the degree of skill and competence demonstrated by class counsel, in my view, and I so find, the requested fees are reasonable and are approved.

Conclusion and Overall Disposition

52 The plaintiffs allege that there was a massive conspiracy and fraud perpetrated upon the investors in YBM by organized crime. There are two defendants (Messrs. Fisherman and Bogatin) who are alleged to have been intentional insider participants in this scheme by organized crime. The remaining defendants are directors and officers, legal advisors, auditors and underwriters. The essence of the allegations against this group of defendants is that they were negligent and made negligent misrepresentations. That is, the plaintiffs allege that the directors and officers, underwriters, auditors and legal advisors knew (or were wilfully blind), or should through reasonable due diligence have known, of the intended unlawful conduct by the intentional wrongdoers such that the fraud could have been prevented.

53 The plaintiffs allege that about November, 1995 articles began appearing in newspapers in Russia and Britain that linked leaders of Russian organized crime to YBM and/or its subsidiaries. The plaintiffs allege that there were indications to the directors of YBM as early as August, 1996 of a significant risk that YBM was being used for unlawful purposes and that it was known then that there was an ongoing criminal investigation of YBM by the United States' Department of Justice. The plaintiffs allege that an investigation on behalf of the board of directors of YBM disclosed in January, 1997 that there was credible information that members of Russian organized crime were

involved in YBM. See Reasons for Decisions in the earlier proceedings, in particular, CC&L Enterprise Fund (Trustee of) v. Fisherman [2001] O.J. No. 4622 at paras. 22 to 27.

54 The plaintiffs in the class actions allege that the defendant directors, officers, legal advisors, auditors and underwriters each had duties and obligations relating to protecting YBM and its investors. Each of these defendants says that there was no negligence on his or its part. Some also defend on the basis that they were relying upon the due diligence of others, including the Ontario Securities Commission ("OSC"). Indeed, a special audit by the defendant, Deloitte & Touche LLP, initiated at the request of the OSC, did not manage to uncover the fiction created by the wrongdoers behind YBM. However, it is also to be noted that the pleadings in related proceedings brought by some defendants against the OSC for indemnity - in the event those defendants might be found liable to the plaintiffs in the class actions - allege that there was some evidence before the OSC, prior to the OSC authorizing the 1997 Prospectus, that suggested a risk of fraud.

55 There are many significant questions that remain unresolved because of the settlement of this litigation, including whether some defendants or the OSC did not take reasonable care in all the circumstances such that innocent persons were put at risk in investing in YBM. Such unresolved questions are a necessary consequence of any agreed-to settlement. In some situations, the fact that there are unresolved questions might be a reason for not approving a proposed settlement. That is not the case in the situation at hand. In my view, it is in the best interests of the class members in the three class actions to gain the recovery available through court approval of the proposed settlement.

56 For the reasons given, I find that the proposed settlement is fair, reasonable and in the best interests of all class members. Accordingly, the certification of the two class proceedings is granted and the settlement is approved. It is to be implemented and given force by the terms of the Judgment attached hereto signed today. The "Notice" attached thereto as Schedule 1 shall be published forthwith as required.

CUMMING J.

* * * * *

APPENDICES

Court file No. 00-CV-193345CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR. JUSTICE PETER A. CUMMING	)))	THURSDAY, THE 2ND DAY OF MAY, 2002

BETWEEN

ROGER MONDOR and AMIT M. KARIA

Plaintiffs

- and -

IGOR FISHERMAN, JACOB G. BOGATIN, KENNETH DAVIES, MICHAEL SCHMIDT, HARRY W. ANTES, FRANK GREENWALD, R. OWEN MITCHELL, DAVID R. PETERSON, DANIEL E. GATTI, JAMES J. HELD, GUY R. SCALA, PARENTE, RANDOLPH, ORLANDO, CAREY & ASSOCIATES, DELOITTE & TOUCHE LLP, NATIONAL BANK FINANCIAL INC., formerly known as FIRST MARATHON SECURITIES LIMITED, GRIFFITHS McBURNEY & PARTNERS, CASSELS, BROCK & BLACKWELL and LAWRENCE WILDER

Defendants

- and

FOGLER, RUBINOFF LLP, YBM MAGNEX INTERNATIONAL, INC. through its independent Litigation Supervisor, Paul Farrar, YBM MAGNEX INTERNATIONAL, INC. by its Receiver and Manager ERNST & YOUNG YBM INC., DECISION STRATEGIES LLC, PEPPER HAMILTON LLP, CONNOR CLARK & LUNN INVESTMENT MANAGEMENT LTD.

Third Parties

Proceeding under the Class Proceedings Act, 1992

Court file No. 00-CV-186800CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

ROYAL TRUST CORPORATION OF CANADA, in its capacity as Trustee of the CC&L Dedicated Enterprise Fund, ROYAL TRUST CORPORATION OF CANADA, in its capacity as Trustee of the CC&L Balanced Canadian Equity Fund, CONNOR CLARK & LUNN INVESTMENT MANAGEMENT LTD. and THE BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

Plaintiffs

- and -

IGOR FISHERMAN, JACOB G. BOGATIN, KENNETH DAVIES, MICHAEL SCHMIDT, HARRY W. ANTES, FRANK GREENWALD, R. OWEN MITCHELL, DAVID R. PETERSON, DANIEL E. GATTI, PARENTE, RANDOLPH, ORLANDO, CAREY & ASSOCIATES, DELOITTE & TOUCHE LLP, NATIONAL BANK FINANCIAL INC., GRIFFITHS MCBURNEY & PARTNERS, SCOTIA CAPITAL INC., CANACCORD CAPITAL CORPORATION, HSBC SECURITIES (CANADA) INC., CASSELS BROCK & BLACKWELL and LAWRENCE WILDER

Defendants

- and

FOGLER, RUBINOFF LLP, YBM MAGNEX INTERNATIONAL, INC. through its independent Litigation Supervisor, Paul Farrar, DECISION STRATEGIES LLC and PEPPER HAMILTON LLP

Third Parties

Proceeding under the Class Proceedings Act, 1992

Court file No. 01-CV-209418

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

YBM MAGNEX INTERNATIONAL, INC.
THROUGH ITS INDEPENDENT LITIGATION SUPERVISOR,
PAUL FARRAR

Plaintiff

- and -

JACOB BOGATIN, IGOR FISHERMAN, HARRY ANTES, KENNETH DAVIES, FRANK GREENWALD, R. OWEN MITCHELL, DAVID PETERSON, MICHAEL SCHMIDT, CASSELS, BROCK & BLACKWELL, PARENTE, RANDOLPH, ORLANDO, CAREY & ASSOCIATES, DELOITTE & TOUCHE LLP, NATIONAL BANK FINANCIAL CORP., FORMERLY FIRST MARATHON SECURITIES LIMITED, GRIFFITHS MCBURNEY & PARTNERS,

SCOTIA-MCLEOD INC., CANACCORD CAPITAL CORPORATION and HSBC JAMES CAPEL INC., FORMERLY GORDON CAPITAL CORPORATION

Defendants

- and

CONNOR CLARK & LUNN INVESTMENT MANAGEMENT LTD. FOGLER RUBINOFF LLP, DECISION STRATEGIES LLC and PEPPER HAMILTON LLP

Third Parties

Court file No. 99-CL-3424

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN

YBM MAGNEX INTERNATIONAL, INC.
by its Receiver and Manager ERNST & YOUNG YBM INC.

Plaintiff

- and -

JACOB BOGATIN, IGOR FISHERMAN, MICHAEL SCHMIDT, KENNETH DAVIES, FRANK GREENWALD, GUY SCALA, DANIEL GATTI, JAMES HELD, ROBERT VENTRESCA and HARRY ANTES

Defendants

Court file No. 00-CV-202036-CM

ONTARIO
SUPERIOR COURT OF JUSTICE

DELOITTE & TOUCHE LLP

Plaintiff

and

YBM MAGNEX INTERNATIONAL, INC., JACOB G. BOGATIN, DANIEL E. GATTI, R. OWEN MITCHELL, CASSELS BROCK & BLACKWELL, FIRST MARATHON SECURITIES LTD., and LAWRENCE WILDER

Defendants

JUDGMENT

THIS MOTION, made by the Plaintiffs for certification of the General Class Action and the Prospectus Class Action and for judgment pursuant to subsection 29(2) of the Act approving the settlement of the Class Actions, and dismissing the General Class Action, the Prospectus Class Action, the YBM Action, the YBM Insider Trading Action and the Deloitte Action, all in accordance with the terms of this judgment, was heard on May 2, 2002 at Toronto, Ontario.

ON READING the following:

(a) the notice of motion and record returnable May 2, 2002;
(b) the Consent and Agreement, filed,
(c) the order of the Alberta Court, dated March 14, 2002, issued in the Alberta Action, authorizing the Receiver and Independent Litigation Supervisor to consent to this Judgment,
(d) the letter from the General Counsel to the Public Guardian and Trustee, dated May 1, 2002;
(e) the letter from Counsel to the Children's Lawyer, dated April 30, 2002; and
(f) the affidavits of:

(i) Leslie Swartman, sworn the 3rd day of April, 2002;
(ii) Franca Mazzulla, sworn the 10th day of April, 2002;
(iii) Teri Prince, sworn the 3rd day of April, 2002;
(iv) Brian Denega, sworn the 12th day of March, 2002;
(v) Paul Farrar, sworn the 12th day of March, 2002;
(vi) Paul Farrar, sworn the 11th day of April, 2002;
(vii) Roger Mondor, sworn the 5th day of April, 2002;
(viii) Amit M. Karia, sworn the 2nd day of April, 2002;
(ix) Patricia A. Speight, sworn the 6th day of April, 2002;
(x) John Paraschos, sworn the 2nd day of April, 2002;
(xi) Sheldon Kapustin, sworn the 3rd day of April, 2002;
(xii) Ralph A. Sutton, sworn the 3rd day of April, 2002;
(xiii) Stephen K. Leff, sworn the 5th day of April, 2002:
(xiv) Claude Bergeron, a representative of Caisse de Depot et Placement du Quebec sworn the 5th day of April, 2002:
(xv) Brian J. Wallace, Q.C., sworn the 10th day of April, 2002;
(xvi) Douglas G. Pearce, a representative of The British Columbia Investment Management Corporation, sworn the 11th day of April, 2002;

(xvii) Gordon H. MacDougall, a representative of Connor Clark & Lunn Investment Management Ltd. sworn the 10th day of April, 2002:
(xviii) Fidel Hinds, a representative of Royal Trust Corporation of Canada, sworn the 12th day of April, 2002;
(xix) Robert V. Moses, sworn the 12th day of April, 2002:
(xx) Patricia A. Speight, sworn the 24th day of April, 2002;
(xxi) Amit Karia, sworn the 2nd day of April, 2002;
(xxii) Roger Mondor, sworn the 2nd day of April, 2002;
(xxiii) Russel Beatie, sworn the 16th day of April, 2002;
(xxiv) Sandra Szabo, sworn the 23rd day of April, 2002;
(xxv) Sandra Szabo, sworn the 1st day of May, 2002; and
(xxvi) Brian J. Wallace, sworn the 22nd day of April, 2002,

AND ON HEARING the submissions of counsel for the Plaintiffs, Defendants, except Igor Fisherman, Third Parties, and William Dermody, the friend of the court

AND ON BEING ADVISED THAT:

(a) all parties, except Igor Fisherman, to the Actions submit to the jurisdiction of the Ontario Court;
(b) the Plaintiffs in each of the Actions consent to this Judgment;
(c) the Defendants (except Igor Fisherman), Third Parties, Receiver and the Independent Litigation Supervisor consent to this Judgment;
(d) the Receiver consents to being appointed Administrator;
(e) Reva Devins consents to being appointed Referee;
(f) the U.S. Plaintiffs' Executive Committee and the U.S. Plaintiffs, in accordance with the Consent and Agreement and the Stipulation of Dismissal signed by counsel for all parties to the Paraschos Action, except Igor Fisherman, undertake and agree to take the necessary steps to dismiss, with prejudice, the appeal in Paraschos, et al. v. YBM Magnex et al. No. 01-1390, No. 01-1621 and No. 01-1634 now pending in the United States Court of Appeals for the Third Circuit forthwith if this Judgment remains in full force and effect and is not rendered null and void pursuant to paragraph 36 of the Judgment;
(g) counsel for the U.S. Plaintiffs, Prospectus Class Counsel and General Class Counsel have undertaken not to act for, or render any assistance to, any person who opts out of the Class Actions in any action relating, directly or indirectly, to YBM;
(h) the Independent Litigation Supervisor's Counsel has undertaken and agrees not to act for any person who opts out of the Class Actions in any actions relating, directly or indirectly, to YBM and not to voluntarily render assistance to any such person and only to render assistance if so ordered by the Alberta Court by order made on notice to the Defendants and Third Parties;
(i) OSC Staff has undertaken that upon this Judgment issuing and not being rendered null and void pursuant to paragraphs 32 and 36 or pursuant to paragraph 51, the OSC Staff will not seek authorization from the OSC to

pursue any order under section 128 of the Securities Act that would require any further monetary contribution to be made by any party to the Actions, including any orders for payment of damages, disgorgement, restitution or repayment of monies, but excluding any order as to costs; and

(j) Connor Clark, Decision Strategies LLC and Pepper Hamilton LLP have not contributed to the Settlement Monies,

And without any admission of liability on the part of any of the Defendants and Third Parties, all Defendants and Third Parties having denied liability.

1. THIS COURT ORDERS AND DECLARES that for the purposes of this Judgment, the following definitions apply:

(a) "Act" means the Class Proceedings Act, S.O. 1992, c. 6;

(b) "Actions" means collectively the General Class Action, the Prospectus Class Action, the YBM Action, the YBM Insider Trading Action, the Deloitte Action, the Paraschos Action, the third party claims, crossclaims and counterclaims, if any, in each of these actions;

(c) "Administrator" means Ernst & Young YBM Inc. or its successor as appointed by this court;

(d) "Alberta Action" means action No. 9801-16691 in the Alberta Court;

(e) "Alberta Court" means the Court of Queen's Bench of Alberta, Judicial District of Calgary;

(f) "Class Actions" means collectively the General Class Action and the Prospectus Class Action;

(g) "Class Counsel" means Sutts, Strosberg LLP and Lerner & Associates LLP;

(h) "Connor Clark" means Connor Clark & Lunn Investment Management Ltd.;

(i) "Defendants" means Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, James J. Held, Guy R. Scala, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Inc., formerly known as First Marathon Securities Limited, Griffiths McBurney & Partners, Cassels, Brock & Blackwell, now known as Cassels, Brock & Blackwell LLP, Lawrence Wilder, HSBC Securities (Canada) Inc., Scotia Capital Inc., previously known as ScotiaMcLeod Inc., Canaccord Capital Corporation and HSBC James Capel Inc., formerly Gordon Capital Corporation;

(j) "Deloitte Action" means action No. 00-CV-202036-CM in the Ontario Court;

(k) "Excluded Persons" means the Defendants, the Third Parties (except Connor Clark, Pepper Hamilton LLP and Decision Strategies LLC) and any person claiming, directly or indirectly, on behalf of any Excluded Person, any entity in which any Excluded Person has a controlling interest and the legal representatives, heirs, predecessors, successors and assigns of any Excluded Person, but shall not include any person, not otherwise named in

this definition, for whose benefit a person named in this definition is holding Shares;

(l) "General Class Action" means action No. 00-CV-193345CP in the Ontario Court;

(m) "General Class Counsel" means Sutts, Strosberg LLP;

(n) "General Class Members" means each and every person, wherever resident, except Excluded Persons, who, during the period July 1, 1994 to May 14, 1998, Traded in Shares but not including Shares purchased or acquired pursuant to the YBM prospectus dated November 17, 1997;

(o) "Hodgson Tough" means Hodgson Tough Shields DesBrisay O'Donnell LLP;

(p) "Independent Litigation Supervisor" means Paul Farrar appointed as Independent Litigation Supervisor by order of the Alberta Court dated October 11, 2000;

(q) "Independent Litigation Supervisor's Counsel" means Stikeman, Elliott;

(r) "Mr. Justice Cumming" means the Honourable Mr. Justice Peter A. Cumming of the Ontario Court or such other justice of the Ontario Court as may be designated by the Chief Justice of the Ontario Court to act in his stead in this matter;

(s) "Mr. Justice Winkler" means the Honourable Mr. Justice Warren K. Winkler of the Ontario Court or such other justice of the Ontario Court as may be designated by the Chief Justice of the Ontario Court to act in his stead in this matter;

(t) "Notice" means notice of the Judgment generally in accordance with the form attached as Schedule 1 to this Judgment;

(u) "Net Losses" for the purposes of paragraphs 32 and 36 of this Judgment means the greater of: (i) the aggregate of the losses of each person who opts out of the Class Actions, pursuant to the terms of this Judgment, calculating each person's net loss in accordance with the following formula: cost of all Shares purchased or acquired (including brokerage fees) minus proceeds of the sale or disposition of all Shares (including brokerage fees); or (ii) such Trading losses as Mr. Justice Cumming recognizes or accepts for purposes of the motion contemplated by paragraph 36 of this Judgment which will be brought on notice to all of the parties to the Actions (except Igor Fisherman) and to any person who has opted out of the Class Actions whose rights may be affected on that motion;

(v) "Net Settlement Monies" means the Settlement Monies plus interest resulting from the investments directed by paragraph 25 of this Judgment minus the payments authorized by paragraph 27 of this Judgment and paragraph 8 of the Order;

(w) "Ontario Court" means the Ontario Superior Court of Justice;

(x) "Order" means the order of the Honourable Mr. Justice Cumming dated March 13, 2002;

(y) "OSC" means the Ontario Securities Commission;

(z) "OSC Staff" means staff of the OSC;

(aa) "Paraschos Action" means Paraschos et al. v. YBM Magnex, et al, U.S.D.C., E.D., Pa. consolidated action No. 98-CV-6444 and all actions related thereto;
(bb) "Plan" means the plan which is annexed as Schedule 2 to this Judgment;
(cc) "Prospectus" means the prospectus of YBM dated November 17, 1997;
(dd) "Prospectus Class Action" means action No. 00-CV-186800CP in the Ontario Court;
(ee) "Prospectus Class Counsel" means Lerner & Associates LLP;
(ff) "Prospectus Class Members" means each and every person, wherever resident, except Excluded Persons, who purchased or acquired Shares pursuant to the Prospectus dated November 17, 1997;
(gg) "Receiver" means Ernst & Young YBM Inc.;
(hh) "Referee" means the person or persons appointed by the court to determine disputes with respect to the calculations of net loss and entitlement to participate in the Plan;
(ii) "Securities Act" means Securities Act, R.S.O. 1990, c. S-5, as amended;
(jj) "Settlement Monies" means CDN $75,000,000 plus U.S. $6,205,000;
(kk) "Shares" includes all securities of YBM or its predecessor Pratecs Technologies, Inc.;
(ll) "Third Parties" means Fogler Rubinoff now known as Fogler, Rubinoff LLP, YBM, Decision Strategies LLC, Pepper Hamilton LLP and Connor Clark;
(mm) "Trade," "Traded" and "Trading" include the acquisition, the purchase, the disposition or the sale of Shares;
(nn) "U.S. Plaintiffs" means Caisse de Depot et placement du Quebec, John Paraschos, Sheldon Kapustin, Ralph A. Sutton, and Stephen K. Leff;
(oo) "U.S. Plaintiffs' Executive Committee" means the law firms designated as the Executive Committee of Plaintiffs' Counsel by order of the United States District Court for the Eastern District of Pennsylvania dated March 30, 1999 and entered on April 1, 1999 in the Paraschos Action;
(pp) "YBM" means YBM Magnex International, Inc., through and including its Receiver and Manager, Ernst & Young YBM Inc., and its Independent Litigation Supervisor, Paul Farrar, and its subsidiaries and affiliates;
(qq) "YBM Action" means action No. 01-CV-209418 in the Ontario Court; and
(rr) "YBM Insider Trading Action" means action No. 99-CL-3424 in the Ontario Court.

2. THIS COURT ORDERS that the General Class Action be and is hereby certified as a class proceeding.

3. THIS COURT ORDERS that the class in the General Class Action is defined as:

> Each and every person, wherever resident, except Excluded Persons, who, during the period July 1, 1994 to May 14, 1998, Traded in Shares but not including Shares purchased or acquired pursuant to the YBM prospectus dated November 17, 1997.

4. THIS COURT DECLARES that Roger Mondor and Amit Karia are representative parties of the class and APPOINTS them as the representative plaintiffs in the General Class Action.

5. THIS COURT DECLARES that the common issue in the General Class Action is:

> What claims, if any, do the General Class Members have against the Defendants, or any of them, arising out of Trading in Shares?

6. THIS COURT ORDERS that the Prospectus Class Action be and is hereby certified as a class proceeding.

7. THIS COURT ORDERS that the class in the Prospectus Class Action is defined as:

> Each and every person, wherever resident, except Excluded Persons, who purchased or acquired Shares pursuant to the Prospectus dated November 17, 1997.

8. THIS COURT DECLARES that Royal Trust Corporation of Canada, in its capacity as Trustee of the CC&L Dedicated Enterprise Fund, Royal Trust Corporation of Canada, in its capacity as Trustee of the CC&L Balanced Canadian Equity Fund, Connor Clark and the British Columbia Investment Management Corporation are representative parties of the class and APPOINTS them as the representative plaintiffs in the Prospectus Class Action.

9. THIS COURT DECLARES that the common issue in the Prospectus Class Action is:

> What claims, if any, do the Prospectus Class Members have against the Defendants, or any of them, arising out of their purchase or acquisition of Shares pursuant to the Prospectus dated November 17, 1997?

10. THIS COURT DECLARES, for greater certainty, that a person may be both a General Class Member and a Prospectus Class Member.

11. THIS COURT ORDERS AND ADJUDGES that the proposed settlement of the Class Actions as particularized in this Judgment and the Plan, which is annexed as Schedule 2, is fair, reasonable, adequate, and in the best interests of the General Class Members and the Prospectus Class Members.

12. THIS COURT ORDERS that the Plan, which is incorporated by reference into this Judgment, is hereby approved and shall be implemented.

13. THIS COURT DECLARES that, pursuant to the Act and the Plan, Mr. Justice Winkler shall supervise the implementation of the Plan, the execution of this Judgment, and the administration, operation of, and the distribution pursuant to the Plan. Without limiting the generality of the foregoing, Mr. Justice Winkler may issue orders, in such form as are necessary, to implement and enforce the provisions of the Plan and this Judgment.

14. THIS COURT ORDERS that Ernst & Young YBM Inc. be and is hereby appointed as the Administrator of the Plan, until further order of Mr. Justice Winkler, on the terms and conditions and with the powers, rights, duties and responsibilities set out in the Plan.

15. THIS COURT ORDERS that each General Class Member and each Prospectus Class Member who does not opt out in accordance with the provisions of paragraphs 30 and 31 of this

Judgment and who is eligible pursuant to the provisions of the Plan shall be paid in accordance with the Plan.

16. THIS COURT DECLARES that each General Class Member and each Prospectus Class Member who does not opt out in accordance with the terms of this Judgment, and his or her heirs, legal representatives and assigns or its past and present parents, subsidiaries and related or affiliated entities, employees, agents, officers, directors, shareholders, partners, attorneys, insurers, representatives, executors, administrators, predecessors, successors, transferees and assigns have released and shall be conclusively deemed to have fully, finally and forever released the Receiver, the Independent Litigation Supervisor, the Defendants and the Third Parties (except YBM Magnex International, Inc.), and each of their respective past and present parents, subsidiaries and related or affiliated entities, and their respective employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns from any and all actions, causes of action, common law and statutory liabilities, contracts, claims and demands of every nature or kind, available, asserted, or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, expenses and interest, which they ever had, now have or may hereafter have, directly or indirectly, or in any way relating to or arising, directly or indirectly, by way of any subrogated or assigned right or otherwise or in any way relating to or arising from:

(a) Trading in Shares;
(b) YBM's business operations;
(c) any claims asserted, or which could have been asserted, whether known or unknown, in any of the Actions including, without limiting the generality of the foregoing:

    (i) any claims arising from the facts and circumstances related to the subject matters of the Actions;
    (ii) any claims under the laws of the United States of America or any of the States therein, including but not limited to claims pursuant to State and/or Federal securities law, rules, and/or regulations;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM, directly or indirectly, or to the General Class Members or to the Prospectus Class Members, directly or indirectly, relating in any way to YBM;
(e) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM; and
(f) any claims arising out of the Plan and the administration of the Plan;

provided that nothing in this Judgment shall release the Receiver, when acting as Administrator, from any claims arising out of the administration of the Plan and providing that nothing in this Judgment affects the right of a General Class Member and a Prospectus Class Member to claim against YBM in the Alberta Action.

17. AND THIS COURT DECLARES, for greater certainty, that the releases referred to in paragraph 16 and the order referred to in paragraph 20 bind each General Class Member and each Prospectus Class Member who does not opt out in accordance with the terms of this Judgment

whether or not he, she or it submits a claim to the Administrator, whether or not he, she or it is eligible under the Plan or whether the claim is accepted in whole or in part.

18. THIS COURT DECLARES that the Defendants and the Third Parties, each of their respective past and present parents, subsidiaries and related or affiliated entities, and their respective employees, agents, officers, directors, shareholders, partners, attorneys, insurers, heirs, subrogees, representatives, executors, administrators, predecessors, successors, transferees and assigns have released and shall be conclusively deemed to have fully, finally and forever released each other (excepting that a Defendant or a Third Party does not hereby release his, her or its own insurer) from any and all actions, causes of action, common law and statutory liabilities, contracts, claims and demands of every nature or kind, available, asserted, or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, expenses and interest, which they ever had, now have or may hereafter have, directly or indirectly, or in any way relating to or arising, directly or indirectly, by way of any subrogated or assigned right or otherwise or in any way relating to or arising from:

(a) Trading in Shares;
(b) YBM's business operations;
(c) any claims asserted, or which could have been asserted, in any of the Actions, including, without limiting the generality of the foregoing:

    (i) any claims arising from the facts and circumstances related to the subject matters of the Actions;
    (ii) and any claims that have been or could have been asserted by any Defendant or Third Party arising out of the OSC proceeding initiated by notice of hearing issued on November 1, 1999;
    (iii) any claims under the laws of the United States of America or any of the States therein, including but not limited to claims pursuant to State and/or Federal securities law, rules, and/or regulations;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM, directly or indirectly, or to the General Class Members or to the Prospectus Class Members, directly or indirectly, relating in any way to YBM; and
(e) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM;

and the Defendants and Third Parties have represented and warranted that they have not assigned any such claims and providing that nothing in this Judgment affects the rights of Connor Clark to claim against YBM in the Alberta Action.

19. THIS COURT DECLARES that the Defendants and the Third Parties (except Connor Clark) have each released and shall be conclusively deemed to have fully, finally and forever released YBM and its respective past and present parents, subsidiaries and related or affiliated entities, employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, heirs, subrogees, representatives, executors, administrators, predecessors, successors, transferees and assigns, except persons determined to be ineligible under the Plan or persons who opt out of the Class Actions in accordance with the terms of this Judgment, from any and all ac-

tions, causes of action, common law and statutory liabilities, contracts, claims and proofs of claim filed with the Receiver in the Alberta Action, claims and demands of every nature or kind, available, asserted, or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, expenses and interest, which they ever had, now have or may hereafter have, directly or indirectly, or in any way relating to or arising, directly or indirectly, by way of any subrogated or assigned right or otherwise or in any way relating to or arising from:

(a) Trading in Shares;
(b) YBM's business operations;
(c) any claims asserted, or which could have been asserted, whether known or unknown, in any of the Actions including, without limiting the generality of the foregoing:

    (i) any claims arising from the facts and circumstances related to the subject matters of the Actions;
    (ii) claims under the laws of the United States of America or any of the States therein, including, but not limited to claims pursuant to State and/or Federal securities law, rules and/or regulations;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM, directly or indirectly, or to the General Class Members or to the Prospectus Class Members, direct or indirectly, relating in any way to YBM;
(e) any indemnity agreements to which YBM was a party;
(f) any proofs of claim filed with the Receiver;
(g) any distribution that the Receiver may make;
(h) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM;

excepting, however, any claim that Decision Strategies LLC or its predecessors and/or Pepper Hamilton LLP may have against YBM for payment for services rendered.

20. THIS COURT ORDERS that each General Class Member and each Prospectus Class Member who does not opt out in accordance with the terms of this Judgment, the Defendants and the Third Parties and each of their respective past and present parents, subsidiaries and related or affiliated entities, employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, heirs, executors, administrators, legal representatives, transferees, predecessors, successors and assigns shall not commence or continue any action or take any proceeding relating to or arising from:

(a) Trading in Shares;
(b) YBM's business operations;
(c) any claims asserted, or which could have been asserted, whether known or unknown, in any of the Actions including, without limiting the generality of the foregoing:

(i) any claims arising from the facts and circumstances related to the subject matters of the Actions;
(ii) any claims under the laws of the United States of America or any of the States therein, including but not limited to claims pursuant to State and/or Federal securities law, rules, and/or regulations;
(iii) any claims that have been or could have been asserted arising out of the OSC proceeding initiated by notice of hearing issued on November 1, 1999;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM or to the General Class Members or to the Prospectus Class Members, directly or indirectly relating in any way to YBM;
(e) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM;
(f) any indemnity agreements to which YBM was a party;
(g) any claims arising out of the Plan, the administration of the Plan, and the administration of the YBM receivership provided that nothing in this Judgment shall release the Receiver, when acting as Administrator, from any claims arising out of the Plan and the administration of the Plan;

against any person or persons who will or could be in or in connection with any such action or proceeding, bring or commence or continue any claim, crossclaim, claim over or any claim for contribution, indemnity or any other relief against any one of the Defendants, Third Parties, the Independent Litigation Supervisor, the Receiver and/or YBM, providing that nothing in this Judgment affects the right of a General Class Member and a Prospectus Class Member to claim against YBM in the Alberta Action and provided that nothing in the foregoing shall preclude a Defendant from asserting a claim alleging an intentional tort by a person who is not a party to the Actions, provided that any such Defendant undertakes to and agrees to wholly indemnify any Defendant or Third Party to the Actions from any and all costs, expenses, damages and expenditures of any nature and kind resulting from the claim and shall, at the request of any affected Defendant or Third Party, post a bond in an amount fixed by the court or pay such amount ordered by the court at any stage of the proceeding, to cover all such costs, expenses, damages and expenditures.

21. THIS COURT ORDERS AND DECLARES that each General Class Member and each Prospectus Class Member who does not opt out in accordance with the terms of this Judgment, any Defendant and any Third Party who has commenced any action or taken any proceeding against any party to any of the Actions or against any other person relating to or arising from Trading in Shares and/or YBM's business operations, and/or any advice or service provided to YBM, and/or any indemnity agreement, and/or any duty, fiduciary or otherwise, and/or relating in any other way to YBM which is not dismissed by this Judgment shall consent and shall be deemed to have consented to its dismissal without costs and with prejudice.

22. THIS COURT DECLARES that YBM and its past and present parents, subsidiaries and related or affiliated entities, successors and assigns have released and shall be conclusively deemed to have fully, finally and forever released the Defendants and the Third Parties, and each of their respective past and present parents, subsidiaries and related or affiliated entities, employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, heirs,

executors, administrators, legal representatives, transferees, predecessors, successors and assigns from any and all actions, causes of action, common law and statutory liabilities, contracts, claims and demands of every nature or kind, available, asserted, or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, reimbursement or repayment of fees, expenses and interest, which it ever had, now has or may hereafter have, directly or indirectly, or in any way relating to or arising, directly or indirectly, by way of any subrogated or assigned right or otherwise or in any way relating to or arising from:

(a) Trading in Shares;
(b) YBM's business operations;
(c) any claims asserted, or which could have been asserted, whether known or unknown, in any of the Actions including, without limiting the generality of the foregoing:

    (i) any claims arising from the facts and circumstances related to the subject matters of the Actions;
    (ii) any claims under the laws of the United States of America or any of the States therein, including but not limited to claims pursuant to State and/or Federal securities law, rules, and/or regulations;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM, directly or indirectly, or to the General Class Members or to the Prospectus Class Members, directly or indirectly, relating in any way to YBM;
(e) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM; and
(f) any claims arising out of the Plan and the administration of the Plan,

and YBM has represented and warranted that it has not assigned any such claims, and providing that nothing in this Judgment shall release the Receiver, when acting as Administrator, from any claims arising out of the administration of the Plan and providing that nothing in this Judgment affects the right of a General Class Member and a Prospectus Class Member to claim against YBM in the Alberta Action.

23. THIS COURT ORDERS AND DECLARES that YBM, its past and present parents, subsidiaries, related or affiliated entities, its successors and assigns may not commence any action or take or continue any proceeding relating to or arising from:

(a) Trading in Shares;
(b) YBM's business operations;
(c) any claims asserted, or which could have been asserted, whether known or unknown, in any of the Actions including, without limiting the generality of the foregoing:

    (i) any claims arising from the facts and circumstances related to the subject matters of the Actions;

(ii) any claims under the laws of the United States of America or any of the States therein, including but not limited to claims pursuant to State and/or Federal securities law, rules, and/or regulations;
(iii) any claims that have been or could have been asserted arising out of the OSC proceeding initiated by notice of hearing issued on November 1, 1999;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM, directly or indirectly, or to the General Class Members or to the Prospectus Class Members, directly or indirectly relating in any way to YBM;
(e) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM;
(f) any indemnity agreements to which YBM was a party;

against any person or persons who could, on a basis that would survive a motion to strike, in or in connection with any such action or proceeding, bring or commence or continue any claim, cross-claim, claim over or any claim for contribution, indemnity or any other relief against any one of the Defendants, Third Parties, the Independent Litigation Supervisor or the Receiver.

24. THIS COURT DECLARES that some of the Defendants and Third Parties have contributed to the Settlement Monies paid to the Prospectus Class Counsel, in trust, pursuant to paragraph 4 of the Order, and that such payments satisfy the obligations, if any, of the Defendants and the Third Parties to the General Class Members, to the Prospectus Class Members and to YBM.

25. THIS COURT DECLARES that, subject to the payments authorized by paragraph 27, the Prospectus Class Counsel shall maintain CDN $75,000,000 of the Settlement Monies in a trust account in Canadian dollars, and U.S. $6,205,000 in a trust account, in U.S. dollars, and shall invest the monies in accordance with a protocol approved by Mr. Justice Winkler.

26. THIS COURT ORDERS that on or before May 15, 2002, the General Class Members and the Prospectus Class Members shall be given notice of this Judgment, substantially in the form of the Notice, and in the following manner which the court declares is the best notice practicable under the circumstances:

(a) by General Class Counsel placing the Notice in the following newspapers:

(i) The Globe & Mail, national edition;
(ii) The National Post, national edition;
(iii) The Philadelphia Inquirer; and
(iv) The Wall Street Journal, including the European and Asian editions;

(b) by the Administrator sending a copy of the Notice to each person who has filed a claim form with the Receiver in the Alberta Action, and to each other person identified in YBM's share register as being a shareholder of YBM between July 1, 1994 and May 14, 1998 at the address indicated in the register;

(c) by General Class Counsel electronically sending a copy of the Notice to the list of brokers in Canada, attached as Schedule 3 and the list of brokers in the United States, attached as Schedule 4, and asking them to bring the Notice to the attention of their clients who Traded in Shares; and

(d) by General Class Counsel placing a copy of the Notice on-line at the web-sites listed on Schedule 5.

27. THIS COURT ORDERS that Prospectus Class Counsel shall pay out of the Settlement Monies:

(a) the costs associated with the Notice particularized in paragraph 26 of this Judgment as these expenses are incurred; and

(b) the reasonable costs of the Administrator, incurred in that capacity, after being fixed by Mr. Justice Winkler on notice to all parties.

28. THIS COURT DECLARES that the Notice satisfies the requirements of s. 17(6) of the Act and is the best notice practicable under the circumstances.

29. THIS COURT ORDERS that forthwith after publication and delivery of the Notice required by paragraph 26 of this Judgment, Class Counsel shall file with the court affidavit(s) confirming publication of and delivery of the Notice in accordance with this Judgment.

30. THIS COURT ORDERS that:

(a) the General Class Members and the Prospectus Class Members may only opt out of the Class Actions by sending a written election to opt out, signed by the General Class Member or the Prospectus Class Member or his, her or its designee, by prepaid mail, courier or fax:

(i) in the case of a person, who is not a minor or a mentally incapable person, to the Administrator at Ernst & Young YBM Inc., P.O. Box 251, 222 Bay Street, Ernst & Young Tower, Toronto, Ontario, M5K 1J7, fax: (416) 943-3300 to the attention of Leslea Gordon;

(ii) in the case of a mentally incapable person to the Administrator, at the address above, and to the Public Guardian and Trustee at 800-595 Bay Street, Toronto, Ontario M5G 2M6, fax: (416) 314-2695; and

(iii) in the case of a minor, to the Administrator, at the address above, and to the Children's Lawyer at the Ministry of the Attorney General, 14th Floor, 393 University Avenue, Toronto, Ontario M5G 1W9, fax: (416) 314-8050;

(b) each election to opt out will only be effective if it is received by the recipient(s) referred to in subparagraphs 30(a)(i), (ii) or (iii) on or before July 15, 2002 at 5:00 p.m. E.D.T.; and

(c) if a person opts out of one of the Class Actions, he, she or it shall be deemed to have opted out of the other class action.

31. THIS COURT ORDERS, to enable the court to give effect to paragraph 36 of this judgment, that if a person seeks to opt out, a written election to opt out is of no force and effect unless and until he, she or it provides to the Administrator:

(a) his, her or its full name, current address and telephone number;
(b) documentation evidencing all of his, her or its Trading in Shares;
(c) particulars of each Trade in Shares, including the date, price, number of Shares Traded and the brokerage fees paid; and
(d) if known or reasonably ascertainable:

    (i) that person's gains or losses on all Shares purchased or acquired pursuant to the Prospectus, calculated based on the cost of those Shares (including brokerage fees) minus the proceeds of sale of all such Shares (including brokerage fees), if any; and/or
    (ii) that person's gains or losses on all Shares purchased or acquired otherwise than pursuant to the Prospectus, calculated based on the cost of those Shares (including brokerage fees) minus the proceeds of sale of all such Shares (including brokerage fees), if any.

32. THIS COURT ORDERS that this Judgment, save and except for this paragraph and paragraphs 36, 51 and 52 is null and void and of no force and effect if General Class Members and Prospectus Class Members having total Net Losses of more than the amount that has been agreed upon by Class Counsel, the Defendants and Third Parties opt out of the Class Actions, unless all of the Defendants and Third Parties who contributed to the Settlement Monies agree to waive this provision.

33. THIS COURT ORDERS that no General Class Member or Prospectus Class Member may opt out of the General Class Action or the Prospectus Class Action unless the written election to opt out is received by the Administrator on or before July 15, 2002 at 5:00 p.m. E.D.T.

34. THIS COURT ORDERS that, notwithstanding the provisions of paragraph 30 of this Judgment, no person may opt out a minor or mentally incapable person without leave of Mr. Justice Cumming.

35. THIS COURT ORDERS that the Administrator shall, on or before July 30, 2002, report to Mr. Justice Cumming by motion and advise as to the names of those persons, if any, who have opted out of the Class Actions, the reasons for the opt out, if known, and the net loss of each opt out, the basis of that calculation, and the Administrator's opinion as to whether the person opting out would have been eligible for payment under the Plan, on seven days' notice to the parties to the Actions, and the Public Guardian and Trustee and/or the Children's Lawyer, as appropriate, in respect of a minor or mentally incapable person and to any person who has opted out of the Class Actions whose rights may be affected by any issue decided on the motion.

36. THIS COURT DECLARES that after the court has received the Administrator's report referred to in paragraph 35 and heard the submissions, if any, of those persons who received notice under paragraph 35 of this Judgment, Mr. Justice Cumming will determine what the total Net Losses are for any person who has opted out of the Class Actions for purposes of paragraph 32 of this Judgment and will issue an order declaring whether this Judgment remains in full force and effect or whether this Judgment is null and void and of no force and effect.

37. THIS COURT ORDERS that each General Class Member and each Prospectus Class Member shall submit his, her or its claim to the Administrator, in accordance with the Plan, on or before September 6, 2002 at 5:00 p.m. E.D.T., and, if he, she or it fails to do so, he, she or it shall not share in any distribution made in accordance with the Plan unless Mr. Justice Winkler orders otherwise.

38. THIS COURT DECLARES that if there is any dispute as to the net loss of any General Class Member or Prospectus Class Member, or as to the entitlement of a person to participate in the Plan, the issue of entitlement and/or the amount of the net loss, if any, shall be determined by the Referee in such manner as she or he directs, with a right to oppose confirmation of the Referee's report, by motion made to Mr. Justice Winkler.

39. THIS COURT ORDERS AND DECLARES that this Judgment and the Plan are binding upon each General Class Member and each Prospectus Class Member who do not opt out, including those persons who are minors or are mentally incapable and the requirements of Rule 7.08(4) of the Rules of Civil Procedure with respect to this Judgment are dispensed with.

40. THIS COURT ORDERS AND DECLARES that no person may bring any action or take any proceedings against the Administrator and members of the Management Committee (as defined in the Plan), their employees, agents, partners, associates, representatives, successors or assigns or against the Referee for any matter in any way relating to the Plan, the administration of the Plan or the implementation of this Judgment except with leave of Mr. Justice Cumming.

41. THIS COURT ORDERS that Reva Devins is appointed as Referee, until further order of this court, with the duties and responsibilities as set out in the Plan.

42. THIS COURT ORDERS AND DECLARES that the Defendants and Third Parties have no responsibility for and no liability whatsoever with respect to the Plan, or any aspect of the administration of the Plan, including, without limiting the generality of the foregoing, the processing and payment of claims and the investment or distribution of the Settlement Monies.

43. THIS COURT DECLARES that any one or more of the Plaintiffs, Defendants or Third Parties in the Actions or the Administrator may apply to Mr. Justice Winkler for directions in respect of the implementation, administration or amendment of the Plan.

44. THIS COURT ORDERS that the United States Attorney for the Eastern District of Pennsylvania be and is hereby granted leave to apply to Mr. Justice Winkler for advice and directions and to be involved in the process of distribution as set out in the Plan.

45. THIS COURT ORDERS that, in accordance with s. 32(2) of the Act, the agreement respecting fees and disbursements made between the General Class Counsel and the plaintiffs, made as at December 16, 1998, be and is hereby approved and:

(a) the fees and G.S.T. of General Class Counsel are fixed at $3,210,000, being $3,000,000 for fees plus $210,000 for G.S.T. thereon;
(b) the disbursements and G.S.T. of General Class Counsel are fixed at $182,349.61, being $170,491.96 for disbursements plus $11,857.65 for G.S.T. thereon; and

(c) General Class Counsel is hereby authorized and directed to submit any further or other disbursements to Mr. Justice Winkler for approval and payment.

46. THIS COURT ORDERS that the amounts particularized in paragraph 45 shall be paid as follows:

(a) the sum of $3,134,849.61, being fees of $2,750,000 plus $192,500 for G.S.T. plus $182,349.61 for disbursements and G.S.T. thereon, shall be paid by the Prospectus Class Counsel to the General Class Counsel from the monies held in trust; and
(b) the sum of $267,500, being fees of $250,000 plus G.S.T. of $17,500, shall be paid to General Class Counsel to be held in an interest bearing trust account until Mr. Justice Cumming authorizes and directs the release of the 267,500 and accrued interest thereon.

47. THIS COURT ORDERS that:

(a) the fees and G.S.T. of Prospectus Class Counsel be and are hereby fixed at $1,621,600.73, being $1,565,376.58 plus $56,224.15 for G.S.T. thereon;
(b) the disbursements and G.S.T. of Prospectus Class Counsel are fixed at $278,628.53, being $273,640.80 for disbursements plus $4,987.73 for G.S.T. thereon; and
(c) Prospectus Class Counsel is hereby authorized and directed to submit any further or other disbursements to Mr. Justice Winkler for approval and payment.

48. THIS COURT ORDERS that the amounts particularized in paragraph 47 shall be paid as follows:

(a) the sum of $1,354,100.73, being fees of $1,315,376.58 plus $38,724.15 for G.S.T. plus $278,628.53 for disbursements and G.S.T. thereon, shall be paid by the Prospectus Class Counsel to the Prospectus Class Counsel from the monies held in trust; and
(b) the sum of $267,500, being fees of $250,000 plus G.S.T. of $17,500, shall be paid to Prospectus Class Counsel to be held in an interest bearing trust account until Mr. Justice Cumming authorizes and directs the release of the $267,500 and accrued interest thereon.

49. THIS COURT ORDERS that the total combined fees and disbursements of all U.S. Plaintiffs' counsel in the Paraschos Action be and are hereby fixed in the amount of U.S. $1,000,000 and that this amount shall be paid by the Prospectus Class Counsel to Beatie & Osborn LLP, in trust, from the monies held in trust and the Defendants and Third Parties have no liability or responsibility for the disbursement of the U.S. $1,000,000 or the manner of distribution among counsel in the Paraschos Action.

50. THIS COURT ORDERS that, after the Administrator reports to the court as required by paragraph 35, and providing that this Judgment remains in full force and effect and providing that

the appeal to the United States Court of Appeals for the Third Circuit in Paraschos et al. v. YBM Magnex et al. No. 01-1390, No. 01-1621 and No. 01-1634 is dismissed with prejudice, then, the Prospectus Class Counsel shall forthwith:

(a) pay the amounts particularized in paragraphs 46, 48 and 49; and, then,
(b) pay the Net Settlement Monies to the Administrator.

51. THIS COURT ORDERS that, in the event that the Judgment is declared to be in full force and effect by order of Mr. Justice Cumming as provided for in paragraph 36 of this Judgment, but General Class Counsel is unable, within 90 days of that order or within such other period of time that the court may direct, to obtain the dismissal of the appeal in Paraschos et al. v. YBM Magnex, et al. No. 01-1390, No. 01-1621 and No. 01-1634 now pending in the United States Court of Appeals for the Third Circuit, unless the parties to the Class Actions, except Igor Fisherman, agree otherwise, a further order will issue that this Judgment is then null and void and of no force and effect.

52. THIS COURT ORDERS that, if this Judgment is declared null and void and of no force and effect pursuant to paragraphs 32, 36 and 51, after the Administrator reports to the court as required by paragraph 35, the Prospectus Class Counsel shall pay the Settlement Monies plus interest less payments made pursuant to paragraph 8 of the Order and paragraph 27 of this Judgment to Hodgson Tough, in trust, for each Defendant and Third Party who has contributed a portion of the Settlement Monies, and Hodgson Tough shall forthwith repay that amount to each payor pro rata according to his or its respective contribution to the Settlement Monies, provided however that the pro rata repayment due to Deloitte & Touche LLP shall be paid by Prospectus Class Counsel directly to Deloitte & Touche LLP.

53. THIS COURT DECLARES that the Consent and Agreement and the settlement were entered into by the Defendants and Third Parties and this Judgment is issued by this court without any admission of liability, that the Defendants and Third Parties deny liability and that the Consent to the settlement is not an admission of liability by conduct by the Defendants and Third Parties and that this Judgment is deemed to be a without prejudice settlement for evidentiary purposes.

54. THIS COURT DECLARES that this Judgment does not affect any claim or causes of action that any party to the Actions has or may have against Igor Fisherman.

55. THIS COURT ORDERS AND ADJUDGES that, save as aforesaid, the Class Actions, including the claims for exemplary and punitive damages and crossclaims, third party actions and counterclaims, if any, be and are hereby dismissed against the Defendants and Third Parties without costs and with prejudice.

56. THIS COURT ORDERS AND ADJUDGES that, save as aforesaid, the YBM Action including crossclaims, counterclaims and third party actions, if any, arising therefrom be and are hereby dismissed without costs and with prejudice.

57. THIS COURT ORDERS AND ADJUDGES that, save as aforesaid, the Deloitte Action including crossclaims, counterclaims and third party actions, if any, be and are hereby dismissed without costs and with prejudice.

58. THIS COURT ORDERS AND ADJUDGES that, save as aforesaid, the YBM Insider Trading Action including crossclaims, counterclaims and third party actions, if any, be and are hereby dismissed without costs and with prejudice.

59. THIS COURT ORDERS that a copy of this judgment be filed in court files No. 00-CV-193345CP, No. 00-CV-186800CP, No. 01-CV-209418, No. 99-CL-3424 and No. 00-CV-202036-CM.

60. THIS COURT ORDERS that General Class Counsel shall send a copy of this Judgment by courier to the Mediation Director of the United States Court of Appeals for the Third Circuit.

Schedule 1 To Judgment

NOTICE TO CURRENT AND FORMER SHAREHOLDERS OF YBM MAGNEX INTERNATIONAL, INC. OF THE CERTIFICATION AND SETTLEMENT OF THE YBM CLASS ACTIONS

This notice may affect your rights. Please read carefully.

NOTICE

This notice is directed to all shareholders and all former shareholders of YBM Magnex International, Inc. and its predecessor Pratecs Technologies, Inc. ("YBM"), wherever resident. Two Class Actions relating to YBM are pending in the Ontario Superior Court of Justice. The actions are Mondor v. Fisherman file no. 00-CV-193345CP (the "General Class Action") and Royal Trust Corporation of Canada v. Fisherman, file no. 00-CV-186800CP (the "Prospectus Class Action").

CERTIFICATION ORDERS

On May 2, 2002 (the "May 2 Hearing"), Mr. Justice Cumming of the Ontario Superior Court of Justice certified the actions as class proceedings, appointed representative plaintiffs and defined the classes as follows:

(1) the General Class as: each and every person, wherever resident, except certain excluded persons, who, during the period July 1, 1994 to May 14, 1998, traded in YBM shares but not including shares purchased or acquired pursuant to the YBM prospectus dated November 17, 1997; and

(2) the Prospectus Class as: each and every person, wherever resident, except certain excluded persons, who purchased or acquired YBM shares pursuant to the YBM prospectus dated November 17, 1997.

YBM shares include all securities of YBM and of Pratecs Technologies, Inc.

A person may be both a General Class Member and a Prospectus Class Member.

Residents of Canada, the United States and other countries are included in the foregoing class definitions and are entitled to make a claim.

If you are a member of either or both of the proposed classes, your rights will be affected. You have until July 15, 2002 to opt out of the settlement of the Class Actions or participate in the settlement by submitting a claim in accordance with a distribution Plan (the "Plan") as approved by the court at the May 2 Hearing.

TERMS OF THE SETTLEMENT

The terms of the settlement are posted at http://www.ybmclassaction.com.

THE SETTLEMENT FUNDS

A summary of the amounts available for distribution follows:

(a) some of the defendants and third parties paid the sum of approximately CDN $85,000,000 in full and final settlement of all claims;

(b) the class members in the Prospectus Class Action will be paid CDN $7,500,000, pro rata, as a priority payment. Based on the information currently available but subject to change, class counsel estimate that this priority will be approximately CDN $0.07 for each CDN $1.00 of net loss;

(c) the class members in the Prospectus Class Action and the General Class Action will then share the balance of the settlement monies, after payment of expenses and lawyers' fees, on a pro rata basis. Based on the information currently available, class counsel estimate that this pro rata distribution, plus the distribution by the Receiver of YBM from the assets remaining in the estate of YBM, will be approximately CDN $0.20 for each CDN $1.00 of net loss; and

(d) the amounts in paragraphs (b) and (c) are estimates only and are made by class counsel without any assumption of liability. The actual priority payment and the payment for each CDN $1.00 of net loss may be substantially different from the estimated amounts depending on the number of claims received, the costs of distribution and the total net losses. The estimated amounts are not intended to be and should not be interpreted to be a guarantee.

RELEASE

Each class member who does not opt out and his or her heirs, legal representatives and assigns or its past and present parent, subsidiary and affiliated corporations, employees, agents, officers, directors, shareholders, partners, attorneys, insurers, heirs, representatives, executors, administrators, successors and assigns shall be conclusively deemed to have released all settling defendants and third parties from all claims of every nature or kind, including any claim in any way relating to or arising directly or indirectly from the trading in YBM shares and/or YBM's business operations and they shall be forever barred from asserting any such claims.

NO ADMISSION OF LIABILITY

The defendants and third parties do not admit any wrongdoing or liability on their part. The settlement is a compromise of disputed claims.

OPT OUTS

Any class member who wishes to opt out of the settlement must do so on or before July 15, 2002 by sending a written election to do so to: Ernst & Young YBM Inc., P.O. Box 251 222 Bay Street, Ernst & Young Tower, Toronto, Ontario M5K 1J7. Attention: Leslea Gordon, fax: (416) 943-3300, tel: (416) 943-3132 stating that he, she or it opts out of the settlement. The written election must be received by 5:00 p.m. EDT on July 15, 2002.

If a person seeks to opt out, a written election to opt out is of no force and effect unless and until he, she or it also delivers to the Administrator his, her or its full name, address, telephone number, documentation evidencing his, her or its trading in shares of YBM, particulars of each trade, including the date, price, number of shares traded, brokerage fees, and if known or reasonably ascertainable, that person's gains or losses on all shares purchased or acquired pursuant to the prospectus dated November 17, 1997 calculated based on the cost of those shares (including brokerage fees) minus the proceeds of sale of all such shares (including brokerage fees) and/or that person's shares purchased or acquired otherwise than pursuant to the prospectus dated November 17, 1997 calculated based on the cost of those shares (including brokerage fees) minus the proceeds of sale of all such shares (including brokerage fees).

No person may opt out a minor or a mentally incapable person without permission of the court after notice to the Public Guardian and Trustee to the attention of Laurie Redden at Office of the Public Guardian and Trustee, 800 595 Bay Street, Toronto, Ontario, M5G 2M6 and/or the Children's Lawyer to the attention of Judith Falkner at The Ministry of the Attorney General, 14th Floor, 393 University Avenue, Toronto, Ontario, M5G 1W9, as appropriate.

All affected persons who do not opt out will be bound by the terms of the settlement whether or not he, she or it makes a claim.

No class member will be permitted to opt out of the Class Actions after July 15, 2002.

If a person opts out of one of the Class Actions, he, she or it will be deemed to have opted out of the other class action.

LEGAL FEES, DISBURSEMENTS AND ADMINISTRATIVE COSTS

The fees and disbursements of class counsel and of counsel in Paraschos et al. v. YBM Magnex, et al. (a class action commenced in the United States) have been fixed by the court in the amount of approximately CDN $7,000,000. This amount will be paid out of the CDN $85,000,000.

The costs of the notice program, the administration of and the distribution under the Plan will also be paid out of the CDN $85,000,000. 2

DISTRIBUTION OF SETTLEMENT FUNDS

A person will only be eligible to participate in the distribution if that person suffered a net loss in trading in shares of YBM and did not contribute to the wrongdoing involving YBM that gave rise to the Class Actions.

Ernst & Young YBM Inc., the current Receiver of YBM, has been appointed as Administrator of the settlement and will operate the Plan. The court will supervise the administration and operation of the Plan and may issue orders as necessary to implement and enforce the provisions of the Plan.

The Administrator will contact known potential class members to inform them of the steps they should take to submit their claims. These names and information about their claims will be posted on a secure web site at www.ybmclassaction.com. Potential class members will receive a password from the Administrator. They should then check to determine if their name, address, net loss information is accurate and, if they are members of the Prospectus Class, whether the information about their purchases pursuant to the YBM prospectus is accurate. If the information is accurate, they should do nothing. If it is inaccurate or if they do not receive a password or cannot access the website, then they must register with the Administrator in accordance with the terms of the Plan. The procedures for registering and processing claims and appealing from decisions made by the Admin-

istrator are described in the Plan. The Administrator may be contacted at: Ernst & Young YBM Inc., P.O. Box 251, 222 Bay Street, Ernst & Young Tower, Toronto, Ontario M5K 1J7. Attention: Leslea Gordon, fax: (416) 943-3300, tel: (416) 943-3132, e-mail: ybm@ca.eyi.com

ADDITIONAL INFORMATION

Any questions about the matters in this Notice should not be directed to the court because its administrative structure is not designed to address this type of inquiry. A complete copy of the judgment, which includes the Plan, may be obtained by visiting the website at www.ybmclassaction.com. Requests for information should be directed by telephone or in writing to one of the following:

Administrator
Ernst & Young YBM Inc.
P.O. Box 251
222 bay Street
Ernst & Young Tower
Toronto, Ontario M5K 1J7
Attention: Leslea Gordon
tel: (416) 943-3132
fax: (416) 943-3300
e-mail: ybm@ca.eyl.com

General Class Action
Harvey T. Strosberg, Q.C.
Sutts, Strosberg LLP
tel 1-800-229-5323
fax: (519) 561-6203
hts@strosbergco.com

Prospects Class action
Earl . Cherniak, Q.C.
Lerner & Associates LLP
tel: (416) 867-3076
fax: (416) 867-9192
echerniak@lerner.ca

This notice is approved by the Honourable Mr. Justice Peter A. Cumming of the Ontario Superior Court of Justice.

SCHEDULE 2 To The Judgment

THE PLAN

DEFINITIONS

1. The Definitions in the Judgment are incorporated by reference into this Plan. For ease of reference, the following definitions are included here but, if there is any difference between the definitions in this Plan and a definition in the Judgment, the definition in the Judgment takes precedence:

(a) "Actions" means collectively the General Class Action, the Prospectus Class Action, the YBM Action, the YBM Insider Trading Action, the Deloitte Action, the Paraschos Action, the third party claims, crossclaims and counterclaims, if any, in each of these actions;

(b) "Administrator" means Ernst & Young YBM Inc. or its successor as appointed by the Ontario Court to administer this Plan;

(c) "Alberta Court" means the Court of Queen's Bench of Alberta, Judicial District of Calgary;

(d) "Class Actions" means collectively the General Class Action and the Prospectus Class Action;

(e) "Connor Clark" means Connor Clark & Lunn Investment Management Ltd.;

(f) "Defendants" means Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, James J. Held, Guy R. Scala, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Inc., formerly known as First Marathon Securities Limited, Griffiths McBurney & Partners, Cassels, Brock & Blackwell, now known as Cassels, Brock & Blackwell LLP, Lawrence Wilder, HSBC Securities (Canada) Inc., Scotia Capital Inc., previously known as ScotiaMcLeod Inc., Canaccord Capital Corporation and HSBC James Capel Inc., formerly Gordon Capital Corporation;

(g) "Deloitte Action" means action No. 00-CV-202036-CM in the Ontario Court;

(h) "Excluded Persons" means the Defendants, the Third Parties (except Connor Clark, Pepper Hamilton LLP and Decision Strategies LLC) and any person claiming, directly or indirectly, on behalf of any Excluded Person, any entity in which any Excluded Person has a controlling interest and the legal representatives, heirs, successors and assigns of any Excluded Person, but shall not include any person, not otherwise named in this definition, for whose benefit a person named in this definition is holding Shares;

(i) "General Class Action" means action No. 00-CV-193345CP in the Ontario Court;

(j) "General Class Members" means each and every person, wherever resident, except Excluded Persons, who, during the period July 1, 1994 to May 14, 1998, Traded in Shares but not including Shares purchased or acquired pursuant to the YBM prospectus dated November 17, 1997;

(k) "Judgment" means the judgment approving the settlement dated May 2, 2002;

(l) "Net Loss" means for the purpose of the Plan the aggregate of the loss of each person, calculating each person's net loss in accordance with the following formula: cost of all Shares purchased or received (including brokerage fees) minus proceeds of the sale of all Shares (including brokerage fees);

(m) "Net Settlement Monies" means the Settlement Monies plus interest resulting from the investments directed by paragraph 25 of the Judgment

minus the payments authorized by paragraph 27 of the Judgment and paragraph 8 of the Order;

(n) "Ontario Court" means the Ontario Superior Court of Justice;

(o) "Order" means the order of the Honourable Mr. Justice Cumming dated March 13, 2002;

(p) "Paraschos Action" means Paraschos et al. v. YBM Magnex, et al. U.S.D.C., E.D., Pa. consolidated action No. 98-CV-6444 and all actions related thereto;

(q) "Plan" means this plan, which is annexed as Schedule 2 to the Judgment;

(r) "Prospectus Class Action" means action No. 00-CV-186800CP in the Ontario Court;

(s) "Prospectus Class Counsel" means Lerner & Associates LLP;

(t) "Prospectus Class Members" means each and every person, wherever resident, except Excluded Persons, who purchased or acquired Shares of YBM pursuant to the Prospectus dated November 17, 1997;

(u) "Receiver" means Ernst & Young YBM Inc. as appointed by the Alberta Court to administer the estate of YBM;

(v) "Referee" means the person or persons appointed by the court to determine disputes with respect to the calculations of net loss and entitlement to participate in the Plan;

(w) "Settlement Monies" means CDN $75,000,000 plus US $6,205,000;

(x) "Shares" includes all securities of YBM and its predecessor Pratecs Technologies, Inc.; and

(y) "Third Parties" means Fogler Rubinoff now known as Fogler, Rubinoff LLP, YBM, Decision Strategies LLC, Pepper Hamilton LLP and Connor Clark;

(z) "Trade," "Traded" and "Trading" include the acquisition, the purchase, the disposition or the sale of Shares;

(aa) "U.S. Plaintiffs' Executive Committee" means the law firms designated as the Executive Committee of Plaintiffs' Counsel by order of the United States District Court for the Eastern District of Pennsylvania dated March 30, 1999 and entered on April 1, 1999 in the Paraschos Action;

(bb) "YBM" means YBM Magnex International, Inc., through its Receiver and Manager, Ernst & Young YBM Inc., and its Independent Litigation Supervisor, Paul Farrar, and its subsidiaries and affiliates;

(cc) "YBM Action" means action No. 01-CV-209418 in the Ontario Court; and

(dd) "YBM Insider Trading Action" means action No. 99-CL-3424 in the Ontario Court.

PURPOSE

2. The purpose of this Plan is to determine the eligibility of persons making a claim and to distribute the Net Settlement Monies to eligible persons in accordance with the Judgment subject to the terms and conditions set out in this Plan.

PLAN IMPLEMENTATION DATE

3. The Administrator shall implement this Plan on a date to be fixed by Mr. Justice Winkler of the Ontario Court.

BINDING EFFECT

4. This Plan is binding on all General Class Members and Prospectus Class Members except those persons who opt out of the Class Actions.

APPOINTMENT OF ADMINISTRATOR

5. By order dated December 8, 1998, the Alberta Court appointed Ernst & Young YBM Inc. as the Receiver. By order dated March 14, 2002, the Alberta Court approved and directed that the Receiver accept the appointment as Administrator, subject to the direction of the Ontario Court.
6. Mr. Justice Winkler shall have the power to replace the Administrator from time to time as may be necessary for the proper implementation, administration and operation of this Plan. With the leave of Mr. Justice Winkler, the Administrator may resign.
7. The Administrator shall implement and administer this Plan and shall report to Mr. Justice Winkler in a manner that he directs.

ADMINISTRATOR'S RECEIPT AND INVESTMENT OF THE NET SETTLEMENT MONIES

8. After payment of the amounts directed by subparagraph 50(a) of the Judgment, the Prospectus Class Counsel shall pay the Net Settlement Monies to the Administrator. The Administrator shall deposit the Net Settlement Monies with a Schedule A Bank, namely, *, who shall invest the Settlement Monies in accordance with the investment policy set out in paragraph 25 of the Judgment.

THE CLAIMS PROCESS

DEADLINE FOR SUBMITTING CLAIMS

9. The court has set September 6, 2002 at 5.00 pm. EDT ("the Cutoff Date") as the deadline by which class members must submit their claims in the Class Actions in a manner as hereafter described.

ESTABLISHMENT OF THE WEB-BASED DATABASE

10. By the order dated February 1, 2000, as amended by the order dated March 16, 2000, the Alberta Court instructed the Receiver to implement a proofs of claim process in the Alberta receivership proceeding.
11. The Receiver received proofs of claim in the Alberta receivership proceeding from approximately 2000 current and former YBM shareholders and from creditors of YBM.
12. In order to simplify the claims process, the Administrator will cause certain information received from the proofs of claim process in the Alberta receivership proceeding and certain additional information it acquires through the claims process described in this Plan to be converted into a web-based database (the "Database").
13. The Database shall include:

(a) the name, address and Net Loss of shareholders and former shareholders of YBM whose claims the Receiver received in the Alberta receivership proceeding; and
(b) the name, address, Net Loss and supporting documents of persons who file a claim in accordance with the provisions of paragraph 19 of this Plan.

14. The Administrator will cause the information in the Database to be posted and accessible at the secure settlement web site http://www.ybmclassaction.com (the "Web Site"), in the manner described hereafter.
15. Information in the Database concerning each class member's claim shall be accessible to that class member either electronically, or in writing by fax or by mail, in accordance with a protocol or protocols to be approved by Mr. Justice Winkler.

PROCESS FOR SUBMITTING CLAIMS BY PERSONS WHOSE CLAIMS WERE RECEIVED IN THE ALBERTA RECEIVERSHIP

16. The Administrator shall provide to each class member whose claim the Receiver received in the Alberta receivership proceeding, in writing, by e-mail or by letter, a user identification name and password to permit the person to access information in the Database concerning his, her or its claim.
17. Each such person shall be deemed to have submitted a claim for purposes of paragraph 26(e) of this Plan.
18. If such person is satisfied with the accuracy of his, her or its name and address, the Administrator's Net Loss determination, eligibility determination, categorization as a General Class Member or Prospectus Class Member, or both, and the number of shares purchased pursuant to the Prospectus and/or on the secondary market, the person need do nothing more and the Administrator's determinations and calculations made shall be treated as final, absent any objection under paragraph 23.

PROCESS FOR SUBMITTING CLAIMS BY ALL OTHER PERSONS

19. In order to submit a claim, a class member who is not a person described in paragraph 11, must, on or before the Cut Off date:

(a) register on the Website, or by mail or by fax, with the Administrator; and
(b) submit documentation to the Administrator supporting his, her or its claim.

20. The particular documents and information required for purposes of paragraph 19 and how they shall be transmitted to the Administrator shall be specified in a protocol to be approved by Mr. Justice Winkler. The name, address and amount claimed by each such person registering at the Web Site in accordance with this paragraph and paragraph 19 shall be added to the Database and the person shall be assigned and provided with an identification name and a password by the Administrator.

DECISIONS ABOUT CLAIMS AND APPEALS FROM DECISIONS

21. In respect of each person described in paragraph 11 and in respect of each person who has registered and submitted a claim in accordance with paragraphs 19 and 20 of this Plan, the Administrator shall decide:

    (a) whether the person is eligible to participate in the distribution process according to the criteria set out in paragraphs 25 and 26;
    (b) the amount of the person's Net Loss; and
    (c) whether the person is a General Class Member or Prospectus Class Member, or both, and if so, determine the number of shares purchased by that person pursuant to the Prospectus.

22. For purposes of paragraph 21, the Administrator shall make a fresh decision, separate and apart from any decision made previously in the Administrator's capacity as Receiver. The Administrator shall post its decisions under paragraph 21 on the Database and/or communicate them electronically or in writing by mail or by fax to the persons affected in accordance with a protocol to be approved by Mr. Justice Winkler.
23. If a person is dissatisfied with the decision of the Administrator relating to eligibility, the determination of Net Loss, or whether the person is a Prospectus Class Member and if so, the number of shares purchased by him, her or it pursuant to the Prospectus, the person may discuss the issue or issues in dispute with the Administrator and/or may appeal the Administrator's decision to the Referee in accordance with a protocol to be approved by Mr. Justice Winkler.
24. The Referee shall hold a hearing in accordance with a protocol to be approved by Mr. Justice Winkler in respect of all appeals pursuant to paragraph 23. The Referee shall deliver a Referee's report containing her decision, which report shall be confirmed at the expiration of 30 days after the date of the report unless a decision of the Referee is appealed to Mr. Justice Winkler in accordance with a protocol to be approved by Mr. Justice Winkler.

ELIGIBILITY

25. A person can be both a General Class Member and a Prospectus Class Member.
26. A person is eligible to participate in the distribution process if he, she or it:

    (a) has suffered a Net Loss in Trading in Shares;
    (b) has not, directly or indirectly, caused or contributed to the loss and damage suffered by the General Class Members and the Prospectus Class Members in Trading in Shares;
    (c) has not, directly or indirectly, caused or contributed to any loss or damage to YBM;
    (d) is not a nominee for a relative of, or an affiliate of, a person who is responsible for or was involved in activity that led to the Guilty Plea Agreement between YBM and the United States Attorney's office for the Eastern District of Pennsylvania. In the case of a relative or an affiliate, that person is eligible if he, she or it proves on the balance of probabilities that he, she or it meets the requirements set out in subparagraphs (b) and (c); and
    (e) has submitted a claim in accordance with the provisions of this Plan.

27. Any person affected by the provisions of paragraph 26 of this Plan has the right of appeal as set out in paragraphs 23 and 24 herein.

THE DISTRIBUTION PROCESS

28. The Prospectus Class Members shall be paid $7,500,000 as a priority distribution pro rata in accordance with a protocol to be approved by Mr. Justice Winkler. Then, the General Class Members and the Prospectus Class Members shall share the net amount available for distribution, pro rata, on the basis of his, her or its Net Loss, after taking into consideration the priority distribution.
29. As soon as practicable after the Cutoff Date, the Administrator will, by motion, report to Mr. Justice Winkler the name, address, Net Loss and proposed percentage of distribution for each person entitled to receive a distribution (the "Distribution List").
30. The Distribution List shall be distributed and/or made accessible in accordance with a protocol to be approved by Mr. Justice Winkler.
31. No distribution shall be made by the Administrator until authorized by Mr. Justice Winkler.
32. The Administrator may make interim distributions if authorized by Mr. Justice Winkler.
33. Each person eligible to receive a distribution shall sign such documents as the Administrator may require in accordance with a protocol to be approved by Mr. Justice Winkler as a condition precedent to receiving any distribution.
34. After the Administrator makes its final distribution, it shall report to Mr. Justice Winkler in a manner he directs and shall obtain an order from him, discharging it as Administrator.

ACCESS TO THE DATABASE AND WEB SITE

35. Mr. Justice Winkler, the Alberta Court, the Administrator and the United States Attorney for the Eastern District of Pennsylvania shall have access to the Database, all parts of the Web Site and all reports generated from the Database.

THE MANAGEMENT COMMITTEE

36. A committee shall be appointed by Mr. Justice Winkler (the "Management Committee"). The Management Committee shall have such powers, rights, duties and responsibilities as Mr. Justice Winkler directs, including:

    (a) establishing any necessary protocols, which must be approved by Mr. Justice Winkler for the acceptance, processing and payment of claims;
    (b) receiving information from the Administrator;
    (c) having access to the Database in a manner directed by Mr. Justice Winkler; and
    (d) applying to Mr. Justice Winkler for advice and directions.

THE COSTS OF THE PLAN

37. The fees, disbursements and other costs of:

    (a) the Administrator for work as Administrator;
    (b) the establishment and maintenance of the Web Site and Database;
    (c) the members of the Management Committee for work done after May 2, 2002 and any work done before May 2, 2002 in respect of the development of protocols and the implementation and development of the Plan; and
    (d) such other persons at the direction of Mr. Justice Winkler;

shall be paid out of the Net Settlement Monies at a time, in a manner and in an amount approved by Mr. Justice Winkler.

NO ASSIGNMENT

38. Any amount payable under this Plan cannot be assigned without the written consent of the Administrator.

THE ALBERTA COURT MAY USE THE DATABASE

39. The Receiver will cause to be prepared from the Database any report or list as the Alberta Court requires.
40. The Receiver may use the Database for the distribution of monies in the Alberta receivership proceeding at the cost of the Receiver.

PROTOCOLS AND AMENDMENTS TO THE PLAN

41. This Plan may be amended and protocols established by order of Mr. Justice Winkler on notice to the Plaintiffs, the Administrator, the Defendants, the Third Parties and the U.S. Plaintiffs' Executive Committee.
42. Any one or more of the General Class Counsel, Prospectus Class Counsel, counsel for the Defendants or Third Parties in the Actions, the U.S. Plaintiffs' Executive Committee or the Administrator may apply to Mr. Justice Winkler for directions in respect of the implementation, administration or amendment of this Plan.

cp/d/qlrme/qlhcc/qlkjg

Case Name:

Hislop v. Canada (Attorney General)

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
George Hislop, Brent E. Daum, Albert McNutt, Eric Brogaard and Gail Meredith, plaintiffs, and
The Attorney General of Canada, defendant

[2004] O.J. No. 1867

[2004] O.T.C. 392

3 C.P.C. (6th) 42

130 A.C.W.S. (3d) 907

Court File No. 01-CV-221056CP

Ontario Superior Court of Justice

E. Macdonald J.

Heard: February 12, 2004.
Judgment: April 30, 2004.

(28 paras.)

Counsel:

J.J. Camp, Patricia LeFebour and Victoria Paris, for the plaintiffs.
Sheila R. Block, for the plaintiffs Counsel Group.

REASONS FOR DECISION

E. MACDONALD J.:--

Introduction and Background

1 This motion is brought by Roy Elliott Kim O'Connor LLP ("REKO") on behalf of the plaintiffs' counsel group ("PCG") under s. 32(2) of the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA") for approval of fees and disbursements (retainers). The retainers are in the form of written agreements with each of the representative plaintiffs. The retainers with George Hislop, Albert McNutt and Brent Daum provide for a contingency fee of 25% plus party and party costs. The retainers with Gail Meredith and Eric Brogaard provide for a contingency fee of 33 1/3%.

2 REKO seeks a fee based on a multiplier of at least 5 for all fees incurred up to and including the final disposition of the matter whether by court order or settlement. Ms. Block submitted that the appropriate multiplier is 6 times up to judgment and 4 times for the appeal. For the administration, the PCG proposes an hourly rate with no multiplier.

3 In the alternative, REKO seeks a fee of 25% on the total value of the award, plus applicable taxes, plus a 1% levy for a disbursement fund. In addition and in accordance with the retainer agreement, REKO asks that it be paid any amount awarded in costs.[1]

4 Each of the representative plaintiffs received notice of this motion. Each of them consents to the orders being sought. The Attorney General of Canada ("AGC"), not being affected by this order, is not entitled to notice. For the reasons set out below, I find that the multiplier approach is most appropriate to the unique circumstances of this case. I fix it at 4.8, which is at the high end of the range of multipliers in class action litigation in Canada. Before dealing with the factors that have influenced my determination of the appropriate multiplier, I refer to Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, wherein Goudge J.A. observed the following after setting out s. 33 of the CPA:

> Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.
>
> ....
>
> The multiplier is in part a reward to the solicitor for bearing the risks of acting in the litigation. The court must determine whether these risks were sufficient that together with the other relevant considerations a multiplier is warranted. While this determination is made after the class proceeding has concluded successfully, it is the risks when the litigation commenced and as it continued that must be assessed.
>
> ....
>
> I recognize that the selection of the precise multiplier is an art, not a science. All the relevant factors must be weighed. Here, while the risk of an adverse finding on liability was minimal, there was a material risk of non-certification. As well, as I have outlined, there were significant elements of success in the manner in

> which the solicitors conducted the proceedings. Weighed against these success factors is the fact that following the April 17, 1997 settlement, individual class members had to incur further legal fees to finally realize on their claims. [emphasis added]
>
> 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.

5 These are the considerations that have influenced my thinking on the choice of multiplier.[2] This case is in the category of "the most deserving case".

Factual Background

6 This action claimed Canada Pension Plan ("CPP")[3] survivors' pensions for surviving same sex partners of persons who died between April 17, 1995 and January 1, 1998. The action was framed under s. 15 of the Canadian Charter of Rights and Freedoms.[4] It also claimed equitable relief that was dismissed in my reasons for judgment released on December 19, 2003. The judgment was in favour of the class members on the s. 15 claims. Interest was awarded on the arrears beginning in February 1992.

7 Ms. Block stated that these class proceedings are the largest class action award after trial in Canadian legal history. The award has the potential value of $81 million.[5] This is the first class action judgment in the world that addressed an infringement of the rights of lesbians and gay men. The appeal from the judgment is being heard in June 2004.

8 Under ss. 32 and 33 of the CPA, a retainer between counsel and the representative plaintiff or plaintiffs cannot be enforced without the approval of the court. Cullity J., appointed as the case management judge, directed that the trial judge approve the form of the retainer. If the retainers are approved as requested by the PCG, the net recovery to the class members should be about 70% of their individual claims after legal fees and all applicable taxes and disbursements are deducted. Each of the representative plaintiffs consents to the approval of the retainers. Each has filed an affidavit in which he/she expresses appreciation for the extraordinary efforts of their counsel and for the results achieved at trial.

Plaintiffs' Counsel Group (PCG)

9 I note the following about the PCG. They are an outstanding group of men and women from across Canada, all of whom have a high level of expertise in class actions and same sex equality rights litigation.

10 Mr. Elliott, lead counsel for the class members, has extensive experience in Charter litigation, especially in cases involving equality rights for gay men and lesbians. Mr. Camp and Ms. Matthews are also very experienced in class proceedings and were the lead counsel in the B.C. action. Ms. Matthews was co-counsel at the trial. The other members of the counsel team from coast to coast were selected by Mr. Elliott because of their past experience and their willingness to work in a national team environment.

11 Because of the nature of the claims being advanced, it was difficult to identify lesbians and gay men who were willing to serve as representative plaintiffs. Many people who would otherwise be eligible as representative plaintiffs were shy about the publicity of this action and the potential for invasion of the privacy of their sexual orientation and their relationships. They knew that this case would attract significant media attention. These factors made it difficult to identify persons who would come forward and who were prepared to endure the glare of publicity that was inevitable from being a representative plaintiff.

The Risks In This Class Action

12 In this case there were significant risks for the PCG. These risks infuse the determination of the appropriate multiplier. Any lawyer, considering a retainer in an action such as this would know that he/she faced the burden of accumulating very significant work in progress without compensation for a long period of time.[6] As the court remarked in Endean v. Canadian Red Cross Society, [2000] B.C.J. No. 1254, this was "bet your firm" litigation.

13 Aside from the financial burden and risk undertaken by the PCG, there are other risks that are set out in paragraph 18 of PCG's factum. Rather than paraphrase these risks, I reproduce them exactly as they appear in the factum:

a. Chance of having the equitable claims struck - There was a risk that the Crown would succeed in having these claims struck in the Rule 21 motion. If this were the case, it could have had the effect of weakening the chances of certification. This risk no longer exists.
b. Failure to certify the equitable claims - There was a risk that even if the equitable claims survived the Rule 21 motion of the Crown, these claims would be unsuccessful on certification. This risk no longer exists.
c. Failure to certify the Charter claims - There was a risk that certification would not occur in B.C. because of the Auton[7] decision. In Ontario, the chances of certifying a class proceeding on a Charter issue alone were significantly less. This risk no longer exists.
d. Failure to succeed at trial - There was a risk that the class members would not succeed on any of the claims advanced. The Crown argued consistently that this Class Action was concerned with Parliament's ability to select an effective date of legislation and was not concerned with discrimination. If the class members were entirely unsuccessful at trial, there would have been no recovery to them and counsel would have received nothing according to the Retainer. This risk no longer exists.
e. Failure to succeed on any of the common issues at trial - There were 17 common issues identified for the trial of this action. There was a material

risk that the plaintiffs could have failed on any or all of those common issues. In fact, the plaintiffs did:

i. Fail to establish any of the equitable claims: This risk materialized. Since there is no cross-appeal there is no hope of an alternate outcome.
ii. Fail to win full interest: For the period since February 1992, the plaintiffs were successful in winning interest. However, since this aspect of the judgment is under appeal, there is still a risk that may materialize. With respect to interest prior to that time, the plaintiffs were unsuccessful. Since there is no cross appeal, there is no hope of an alternate finding on that point.
iii. Fail to win symbolic damages for the class members. This risk materialized. Since there is no cross-appeal there is no hope of an alternate outcome.
iv. Fail to win damages pursuant to s. 24 of the Charter. This risk materialized. Since there is no cross-appeal there is no hope of an alternate outcome.

f. Failure to win the equitable claims at trial - There is a risk that, if the equitable claims were unsuccessful at trial, the class members would have to succeed on the Charter claims, including entitlement to the arrears of the CPP survivor pension, in order to be fully successful. This risk materialized. Since there is no cross-appeal there is no hope of an alternate outcome.
g. Risk of having certain provisions of the CPP struck and others remain - It was possible that the trial judge could have found certain provisions of the CPP, whether or not they were of general application, to be constitutional, while finding others to be in violation of s. 15(1). This could have produced a pyrrhic victory for the class members. This risk still exists because of the appeal.
h. Risk of application of statutes of limitations - If the Crown were successful on having various statutes of limitation apply in this Class Action, the amount recoverable by the class members would be reduced. For example, the arrears could be limited to one year. This risk is extant because of the appeal by the Crown.
i. Risk of application of CPP insulating clause - Section 65 of the CPP precludes any payment from being attached or assigned. If the Court were to rule that these provisions applied, there would be restrictions on the ability of counsel to collect their fees. This risk continues to exist.
j. Failure to succeed on remedy at trial - There was a significant risk that, even if the class members were successful at establishing a s. 15(1) Charter breach which was not saved by s. 1, the court would award the CPP survivor pensions only on a prospective basis, without interest. This outcome would have reduced the recovery to the class members by a considerable

degree and would also have had a negative impact on the fees to counsel. This risk existed up to and including the trial and still exists on the appeal.

k. Risk of having the trial decision overturned on appeal - There is a material risk that, because of the appeal by the Crown from the trial decision, the class members' recovery and payment of counsel's fees will be delayed. Moreover, there is always a risk that the trial decision will be overturned in whole or in part, which will mean either no recovery for the class members or a significantly reduced recovery and accordingly no recovery for counsel. There is also a risk that the defendant will, if unsuccessful at the Court of Appeal, seek leave to appeal to the Supreme Court of Canada.

l. Use of notwithstanding clause - There has always been and continues to be a material risk that if the Crown does not wish to accept a court ruling, it can invoke the notwithstanding clause. In this event, the class members would be powerless and would receive nothing.

14 The AGC put forth a vigorous and able defence to these claims. It brought motions to strike the claims in Ontario and British Columbia. It opposed certification of the class proceeding in British Columbia. There were examinations for discovery of all representative plaintiffs prior to trial. There was documentary production of approximately 3,500 documents. In summary, the AGC was a well-funded opponent. In this high profile case, excellent counsel fought hard on behalf of the AGC.

15 The reality is that there is no vehicle other than a class proceeding by which these claims could have been advanced. Individual class members could not afford to mount a legal challenge on their own to obtain a CPP survivors' pension. Proceeding by way of this class action provided the representative plaintiffs with the opportunity to advance their claims with no financial exposure to them as individuals.

Section 33 of the CPA

16 Under s. 33 of the CPA, a solicitor and a representative party may enter into an agreement which provides for the payment of fees and disbursements only in the event of success in a class proceeding, where success is defined as judgment on common issues or a settlement for the benefit of the class members. A pattern has developed that supports the concept that counsel are to be paid a premium on their base fees in the event of success. A judge hearing a motion such as this selects the method of calculating the fees whether by way of a percentage of the recovery or a multiplier on the base fee amount.

PCG's Approach

17 The PCG have submitted that the percentage approach provided in the retainers is not the preferable method for compensation in this case. I agree. The percentage approach could result in unfairly low compensation if the class size is smaller than anticipated or the "take up rate" is low. It is estimated that there are a maximum 1500 class members. If this were so, the total fees would be approximately $20 million using the percentage approach. This is based on the application of 25% to Chief Actuary Menard's calculation of a total award of approximately $81 million plus costs. However, the reality is that there has never been a class proceeding that has had 100% participation by class members. Class proceedings where there is a high level of participation generally involve cases where there is a known finite group such as patients of a physician. In those cases, class

members are readily identified and contacted. Even in cases with high participation rates such as Nantais v. Telectronics Proprietary (Canada) Limited (1996), 28 O.R. (3d) 523 and Anderson v. Wilson (1997), 32 O.R. (3d) 400 (certification motion), the participation rates did not exceed 75%. I accept Ms. Block's submission that it is rare that a class action has more than a 75% "take-up" rate. To date, despite a well-funded notification campaign and the notoriety of the trial judgment in this case only 500 class members have come forward.

18 In addition, section 65 of the CPP provides that pensions are not to be attached or assigned. This is a consideration that underlies the proposal of the plaintiffs. It is suggested, that in the context of this motion, s. 65 of the CPP has no application to: (a) costs awarded, (b) pre-judgment interest or (c) post-judgment interest. Given the current numbers of class members, there is a risk that these three items will not be sufficient to protect the accounts of the PCG. In order to afford some protection to the PCG and at the same time ensure fairness to the class members, the PCG proposed the following steps once the fee is set:

a. All costs will be paid and applied directly against the amount;
b. All pre-judgment interest will be paid and applied directly against the amount;
c. All post-judgment interest will be paid and applied directly against the amount;
d. The ACG or administrator of the Class Action will withhold 50% of the arrears pending the hearing specified below;
e. On or about September 16, 2004, the situation will be reviewed on notice to the defendant and the representative plaintiffs. At that time, a determination will be made as to whether the balance of the arrears can be released or, alternatively, whether there is a need for argument on s. 65 of the CPP Act.[8]

19 The method of payment proposed by the PCG advantages the class members in the following ways:

a. it ensures that the future monthly pension cheque is available in full in total to meet the needs of class members so long as they live;
b. it provides the class members with certainty, finality and the psychological comfort of paying legal fees at one time when they are receiving a larger lump sum cheque for arrears and interest and without encumbering their future stream of survivor pensions; and,
c. it simplifies administration because once class members are "in pay", they can be paid directly by the Government with no further involvement by class counsel or the Court.

20 This process is fairest to the class members. Class members who have large claims for arrears and reduced expectations of a long stream of future income, (particularly those older class members whose partners died early in the class period), could pay a disproportionately higher burden of the fees compared to the younger class members whose partners died later in the class period. However, all class members will receive some arrears and some interest so all will make a contribution to fees. With the exception of George Hislop, there are no other known class members, who could potentially be affected by this approach. George Hislop has consented to this approach.

Compensation To The Representative Plaintiffs

21 The representative plaintiffs are entitled to payment for their work on the preparation of this case. The amounts that they request are modest. These amounts are to be treated as a disbursement and are recoverable from the class members. I agree that George Hislop should receive the highest amount of compensation with Gail Meredith and Albert McNutt receiving the second highest amounts and Eric Brogaard and Brent Daum receiving the third highest amounts.

22 For George Hislop, the amount is fixed at $15,000. For each of Gail Meredith and Albert McNutt, the amount is fixed at $10,000. For each of Eric Brogaard and Brent Daum the amount is fixed at $5,000. All five agree to the amounts as fixed. These amounts do not in any way compensate the representative plaintiffs for the enormous amount of their personal time and energy devoted to the advancement to these proceedings. It signals recognition of the value of their contributions to the other class members and to their counsel.

The Determination Of The Appropriate Multiplier

23 There have been various choices of appropriate multiplies in class proceedings. In Gagne, supra, the court indicated that in cases where certification is contested, the minimum multiplier that should be awarded is 2 times the hourly rate. The court has also indicated that rarely should the multiplier exceed 4 times the hourly rate.

24 The average multiplier for cases in Ontario that are settled prior to trial is approximately three times. The highest multiplier known in Ontario for a settlement in a class proceeding was 3.8 in Parsons v. Canadian Red Cross Society, [2001] O.J. No. 214, aff'd [2001] O.J. No. 214 (C.A).

25 In the United States multipliers in the range of 2 to 4 are common. Higher multipliers have been awarded in exceptional cases, such as cases that were tried or were exceptionally risky.[9]

26 My choice of a 4.8 times multiplier reflects fair compensation for very devoted and experienced counsel who carried enormous financial burden and risk in their commitment to access justice for the class members. I set out sample calculations of the range of fees that result from the use of multipliers at different levels. Based on total fees as at February 2004, of $3,067,352.15, these sample calculations are:

a. a 3 times multiplier would yield a fee of $9,202,056.45;
b. a 4 times multiplier would yield a fee of $12,269,408.60;
c. a 4.8 times multiplier would yield a fee of $ 14,723,290;
d. a 5 times multiplier would yield a fee of $15,336,760.75; and
e. a 6 times multiplier would yield a fee of $18,404,112.90.

27 The highest fee approved in Canada was in Parsons, supra and Endean, supra. Counsel submitted that in Parsons, the equivalent team was awarded a total of $30 million in a case that did not reach trial.

28 4.8 shall be the multiplier for the trial and for the appeal. Fees for the administration will be at counsel's hourly rate.

E. MACDONALD J.

cp/e/nc/qw/qlrme/qlhcs

1 After I heard this motion I was advised by counsel that the parties were successful in reaching settlement on the quantum of costs to be paid by the AGC as a result of my judgment released December 19, 2003 which awarded costs to the plaintiffs.

2 I am also influenced by the recent decision in Christian Brothers of Ireland in Canada (Re), 68 O.R. (3d) 1, [2003] O.J. No. 4249, (O.C.A.) in which the court allowed a significant premium on fees, and held that a premium provides incentive to counsel to take on difficult litigation and to do it well. As in this case, "the litigation was complex, difficult and time consuming, its outcome uncertain." (See para. 3).

3 Canada Pension Plan, ss. 2(1) and 8(1).

4 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, (the "Charter").

5 This is based on the assumption that there are approximately 1500 people who would be entitled to benefits as a result of the judgment but so far the "take-up" rate is 1/3 of the eligible class members.

6 This risk is so significant that one highly respected plaintiff's lawyer and one large Bay Street firm declined continued involvement in the case. Counsel for the class members also incurred significant disbursements in the course of the action, none of which has been reimbursed by the plaintiffs.

7 Auton v. British Columbia (2001), 197 D.L.R. (4th) 165 (B.C.S.C.); aff'd (2002) 220 D.L.R. (4th) 411 (B.C.C.A.), leave to appeal to the Supreme Court of Canada granted May 15, 2003, [2002] S.C.C.A. No. 510.

8 The PCG are content to have all of the fees awarded paid from the interest and costs on an interim basis with the result that it is premature to resolve the application of s. 65 of the CPP to the solicitors lien on arrears at this time. If need be, I will be available to deal with this matter at some future point.

9 See: H. Newberg, A. Conte, "Newberg on Class Actions, 3rd ed". (1992), Footnote 21 which refers to two American decisions. One is a personal injury class action where a multiplier of 5 was fixed for lead counsel for contingency and superior trial skills. In another American decision, in the California Superior Court in August 1982 non-contingent hourly rates were fixed at up to $150 an hour with a multiplier of up to 10 times the hourly rate.

Case Name:

Wilson v. Servier Canada Inc.

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
Sheila Wilson, plaintiff, and
Servier Canada Inc., Les Laboratoires Servier, Servier Amerique, Institut de Recherches Internationales Servier ("I.R.I.S."), Science Union et Cie, Oril S.A., Servier S.A.S., Arts et Techniques du Progres, Biologie Servier Institut de Developement et de Recherche Servier, Oril Industrie, Bio Recherche Servier, Instituto di Ricerca, Idux, Biopharma Artem, Science Union S.A.R.L., Laboratoires Servier Industrie, I.R.I.S. et Cie Developement, Information Servier, Servier Monde, Servier International, I.R.I.S. Services S.A.R.L., Adir, Servier R&D Benelux, Dr. Jacques Servier and Biofarma S.A., defendants

[2005] O.J. No. 1039

252 D.L.R. (4th) 742

[2005] O.T.C. 217

9 C.P.C. (6th) 83

137 A.C.W.S. (3d) 1104

140 A.C.W.S. (3d) 27

Court File No. 98-CV-158832

Ontario Superior Court of Justice

P.A. Cumming J.

Heard: October 18-19 and November 1-2, 2004.
Judgment: March 21, 2005.

(100 paras.)

Civil procedure -- Settlements -- Approval -- Legal profession -- Barristers and solicitors -- Compensation.

Application by the representative plaintiff, Wilson, for approval of a proposed settlement and for the approval of counsel fees. The class action involved a national class comprising all residents in Canada, except Quebec, and a British Columbia subclass. Counsel for the national class and subclass worked cooperatively. The action related to individuals who had ingested certain diet drugs. They claimed the diet drugs caused primary pulmonary hypertension and valvular heart disease. Scientific studies had verified a causal connection between the drugs and diseases. There had been at least 35 motions in the action. A nine-month trial had been anticipated before a mediation resulted in a settlement agreement three days before trial. Examinations for discovery took 11 weeks and occurred mainly in France. The settlement agreement provided for the defendant Servier Canada to establish a settlement fund of $25 million. A further $15 million was to be made available in the event the fund was insufficient to satisfy the claims made by class members. Any money not exhausted would revert back to Servier. Class counsel sought fees of $13 million.

HELD: Application allowed. The settlement agreement was fair and reasonable and in the best interests of all the class members. The very extensive cost in time and resources in the prolonged litigation was largely due to Servier's refusal to deal with the claims until immediately before trial. Class counsel fees were fixed at $10 million plus $2,619,536 in disbursements. The final amount of class counsel fees could not be determined before the settlement was implemented.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 2002, c. C.6, ss. 29(2), 32, 33.

France Civil Code, Article 15.

Counsel:

Joel Rochon, Vincent Genova and Sakie Tambakos for the National Class

David Klein and Gary Smith for the B.C. Sub Class

William W. McNamara, Stephen A. Scholtz, and Seana Carson for the Defendants

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REASONS FOR DECISION

P.A. CUMMING J.:--

The Motions

1 These Reasons for Decision deal with motions brought by class counsel under the Class Proceedings Act, 1992, S.O. 1992, c. C.6 as am. ("CPA") in respect of this class action: first, for approval of a proposed settlement; and second, assuming settlement approval, approval of the counsel fees.

2 This class action involves a national class comprising all residents in Canada (except for Quebec) and a British Columbia subclass. The national class and B.C. subclass have each made discrete motions but they are conveniently treated together as one. I shall refer to Rochon Genova as National Class Counsel and Klein Lyons as B.C. Class Counsel and collectively, the two firms simply as "class counsel." (Capitalized terms employed in these Reasons are found in the definition section of the Settlement Agreement.)

3 This was a cooperative effort by the two law firms and both gained significantly by the contribution of the personnel and resources of the other in this very demanding and protracted litigation. The two law firms have determined and agreed to a division between the two firms of the global class counsel fees approved by the Court. Thus, on the matter of the second motion as to the approval of class counsel fees, the Court will address the matter as though there is a single class counsel law firm.

4 At the conclusion of the hearing in respect of the first motion, approval of the settlement was granted orally, so that implementation could be expedited, with reasons to follow. These are the Reasons for Decision in respect of that settlement approval and these are the Reasons for Decision in respect of the second motion, being the matter of the determination and approval of class counsel fees.

The Motion for Settlement Approval

5 The representative plaintiff, Ms. Sheila Wilson, moves for approval of the Settlement Agreement in this national class action commenced November 17, 1998 on behalf of all residents in Canada, except for those individuals resident in Quebec, who had ingested the diet drugs Ponderal, Ponderal Recaps and/or Redux (collectively, the "diet drugs" or "Products"). Representative plaintiff Ms. Beverley Greenlees moves for approval on behalf of the B.C. subclass.

6 Fenfluramine, and later dexfenfuramine, the active ingredients in the diet drugs, were anorexigens introduced in Europe in the 1960s and in Canada in the 1970s. The claim alleges that the diet drugs caused primary pulmonary hypertension ("PPH") and/or valvular heart disease ("VHD") in some users of the diet drugs.

7 Ms. Wilson ingested diet drugs between August, 1995 and August, 1996. She became ill in late 1996 and was ultimately diagnosed in March, 1998 as having PPH. This disease reportedly results in diminished right-heart function and leads ultimately to heart failure and death. The reported mean survival period from the onset of symptoms to death for PPH patients is about two to three years.

8 VHD involves the failure of one or more of the valves of the heart to open or close properly. This results in regurgitation or the backwards flow of blood. This can lead to severe and potentially fatal complications, including congestive heart failure, shortness of breath, arrhythmias and bacterial endocarditis. Surgery may be necessary to repair or replace the defective valves.

9 Ms. Greenlees consumed Ponderal and developed VHD. Her daughter also consumed Ponderal. She developed PPH and had a double lung transplant but has died.

10 The first case report of a claimed association between PPH and the use of fenfluramine was published in the scientific literature in 1981. Ultimately, a multi-centre case-controlled epidemiologic study (known as the International Primary Pulmonary Hypertension Study ("IPPHS") led by Dr. Lucien Abenheim published its findings in the New England Journal of Medicine in August,

1996, concluding that there was a "causal relationship" between the use of fenfluramine derivatives and PPH. Several later scientific reports reached the same conclusion, being that a person's use of the diet drugs added definite risk factors for the development of PPH.

11 The diet drugs were withdrawn from the Canadian market and other markets around the world in September, 1997. The claim alleges that the diet drugs increased the risk of developing PPH and VHD, were unfit for the purpose for which they were intended as designed and that the defendants negligently failed to adequately disclose the risks to physicians and consumers and negligently misrepresented the safety of the drugs.

12 The defendant Servier Canada Inc. ("Servier") was the Canadian distributor of the diet drugs. The defendant Biofarma S.A. ("Biofarma"), a corporation in France, is the parent of Servier. Ultimately, several foreign corporations affiliated with Biofarma as well as its founder, Dr. Jacques Servier, were named and added as defendants. It is claimed that one or more of these foreign corporations manufactured and marketed the Products.

13 The certification motion was granted pursuant to written reasons released September 13, 2000. Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219 (Sup. Ct.); motion for leave to appeal to Divisional Court denied November 21, 2000, 52 O.R. (3d) 20; leave to appeal to Supreme Court of Canada dismissed, [2001] S.C.C.A. No. 88.

14 It is believed this class action has involved more court appearances than any other class action seen to date in Canada. There have been countless case conferences with at least thirty-five motions, and fifteen stay and leave applications and related appeals, including: (2000), 50 O.R. (3d) 219 (Sup. Ct.); [2000] O.J. No. 3722 (Sup. Ct.); (2000), 52 O.R. (3d) 20 (Sup. Ct.); [2001] S.C.C.A. No. 88; [2001] O.J. No. 1615 (Sup. Ct.); [2001] O.J. No. 4636 (Sup. Ct.); [2001] O.J. No. 4947 (Sup. Ct.); [2001] O.J. No. 5278 (Div. Ct.); [2001] O.J. No. 4636 (Sup. Ct.); [2001] O.J. No. 4626 (Sup. Ct.); [2001] O.J. No. 4716 (Div. Ct.); [2001] O.J. No. 4717 (Sup. Ct.); [2001] O.J. No. 4947 (Sup. Ct.); [2002] O.J. No. 60 (Div. Ct.); [2002] O.J. No. 1021 (Sup. Ct.); (2002), 58 O.R. (3d) 753 (Sup. Ct.); [2002] O.J. No. 1663 (Div. Ct.); (2002), 213 D.L.R. (4th) 751 (Sup. Ct.); [2002] O.J. No. 2138 (Sup. Ct.); [2002] O.J. No. 3470 (Sup. Ct.); [2002] O.J. No. 3722 (Sup. Ct.); [2002] O.J. No. 3723 (Sup. Ct.); (2002), 220 D.L.R. (4th) 191 (C.A.); [2002] O.J. No. 4566 (Div. Ct.); [2003] O.J. No. 155 (Sup. Ct.); [2003] O.J. No. 156 (Sup. Ct.); [2003] O.J. No. 157 (Sup. Ct.); [2003] O.J. No. 179 (Sup. Ct.); [2003] O.J. No. 280 (Sup. Ct.).

15 The common issues trial was scheduled to commence February 24, 2003. A nine-month trial, conducted largely in the French language, was anticipated. A Court-ordered formal mediation under the supervision of Mr. Justice W. Winkler resulted in a settlement agreement-in-principle, reduced to writing February 21, 2003, three days before the scheduled commencement of the trial. An included provision stipulated that if agreement could not be reached on an implementing specific term, that the issue would be submitted to Winkler J. for a determination. He appointed Mr. Randy Bennett, a Toronto lawyer, as a Court-appointed Monitor, to facilitate the resolution of disputes in the process to achieve a final settlement agreement. A Settlement Agreement was ultimately accomplished with finality after more than 18 months, on September 17, 2004.

The Settlement Agreement

16 Information and detailed particulars as to the Settlement Agreement can be found on the web sites of class counsel: www.rochongenova.com and www.kleinlyons.com. Important matters and details pertinent to the motion for settlement approval at hand are dealt with in affidavits in the

motion records of the plaintiff class and subclass, including the affidavits of: Ms. Sheila Wilson, Ms. Beverley Greenlees, Ms. Annelis Thorsen, Mr. Dana Graves, Dr. John Granton, Dr. Stephen Raskin and Mr. Kerry F. Eaton (of the claim administrator, Crawford Class Action Services).

17 The Settlement Agreement provides for a payment by the defendant, Servier Canada Inc. ("Servier"), to establish a Settlement Fund of $25 million. This Fund is to be administered by Crawford Class Action Services as Settlement Administrator. A further $15 million in "Additional Settlement Funds" is to be made available in the event that the Fund is insufficient to satisfy the claims made by class members. In addition, Servier is obliged to pay the administration costs and the costs of the two notice programs.

18 The Settlement Agreement provides for a reversionary interest in the $25 million Fund whereby, if the claimants' take-up does not exhaust the Fund, the residual unused amount will largely revert to Servier, and an additional amount will revert to provincial health providers.

19 If the $25 million is exhausted by claimants but the entirety of the guaranteed Additional Settlement Funds of $15 million is not necessary for claimants, any residual amount of this committed amount remains with Servier.

20 Given the reversionary interests of Servier in respect of the settlement monies, defendants' counsel asked to make submissions relating to the determination of the question of approved class counsel fees.

21 The Court welcomed this submission. In the usual course of events, a court is left alone when it comes to considering the reasonableness of the requested class counsel fees. Defendants have agreed to a settlement and want it approved in the interest of their own clients and are indifferent to the fees paid to class counsel by class members.

22 Given the reversionary interest of Servier in the instant situation, defendants seek the Court's determination of "reasonable" class counsel fees that accord with their own view of reasonableness.

23 While the Court welcomes the submission of the defendants on this matter as a positive, constructively critical aid, this Court does not view the intervention of the defendants as a "right." The defendants have a clear "interest" in the outcome of the motion for the approval of class counsel fees. They are permitted to make submissions for that reason. But, in my view, they do not have the "right" to intervene in the determination of class counsel fees.

24 In Parsons v. Canadian Red Cross Society, [2001] O.J. No. 214 (C.A.), leave to appeal to Supreme Court of Canada denied, [2001] S.C.C.A. No. 190, the Court of Appeal found at para. 13 that "[t]he settlement agreement ... was the place where the defendants, if they intended to participate in the subsequent fixing of the fees and disbursements of class counsel, could have reserved their rights in this regard. There is no provision in the settlement agreement to this effect." The present case differs slightly in that paragraph 11(c) of the Settlement Agreement provides that the defendants are entitled to notice of a motion to determine "any further amount of Class Counsel Fees." The defendants submit that paragraph 11(c), on its face, clearly permits them to participate fully at the hearing of the motion to approve Class Counsel Fees. I disagree. On its face, the provision entitles them to reasonable notice of the hearing. That provision should not be extended to include a right to make submissions. As in Parsons, the defendants could have, but did not, ensure their right to make submissions by specifically including words to that effect in paragraph 11(c).

25 The defendants further submit that to deny them full participation in the hearing would be contrary to fundamental principles of justice and fairness, given their interest in the issue. They submit that theirs is the only interpretation of paragraph 11(c) that is consistent with the Settlement Agreement. The Settlement Agreement does not require that paragraph 11(c) be interpreted to include a right to standing and a right to make submissions. A contractual right to notice can be consistent with the lack of a corresponding right to full participation. Under various provisions of the Claims Administration Procedures, the defendants have a right to review all information and correspondence regarding approved claims, but no standing with regard to their determination by the claims adjudicators. I note that the defendants cannot challenge a claims adjudicator's determination. The defendants' various rights to information and notice reflect their role in the overall implementation of the settlement, but do not automatically include full participation rights in every hearing.

26 In Parsons, supra, the Ontario Court of Appeal found at para. 12 that having made submissions to assist Winkler J. in approving counsel fees did not mean that the defendants were parties to the motion since they did not seek, and were not granted, party status. While finding that the defendants were not parties, the court went on to say at para. 19 that "[n]othing 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." In this case, the defendants attempt to distinguish Parsons based on the fact that they have "a clearly-defined contractual" interest in any residual Settlement Funds, and control of the Additional Settlement Funds. At para. 17 of Parsons the Court of Appeal recognized that the defendants had an interest in the fund surplus, but that the interest was "highly speculative and contingent." In my view, and I so find, the defendants' interest in the present case is similarly contingent and speculative. That the contingent, speculative interest is a contractual one does not sufficiently distinguish the facts of Parsons.

27 Finally, Servier is committed to pay $3 million in respect of partial indemnity costs to the plaintiff class plus $1 million in compensation for the plaintiffs' litigation disbursements. It is noted parenthetically as well that class counsel was awarded some $626,000 in party and party (or partial indemnity) costs resulting from the plaintiffs' success in motions throughout the course of litigation. Servier has also agreed to pay all reasonable costs of the notice programs and the costs of settlement administration. Thus, the overall global benefits to the plaintiff class from the settlement approximates a potential total of some $45 million.

28 The Settlement Agreement is subject to the express stipulation that there is not any admission on the part of any of the defendants as to liability. In particular, there is no admission that the defendants' products are the cause of any of the injuries for which the class members may claim.

29 Payment from the Fund of a total $1 million is to be made to Canada's provincial and territorial health ministries in satisfaction of their subrogated claims. If monies remain in the fund at the expiration of the Administration Period (a period of five years commencing immediately upon the expiration of the Claim Period - being in turn the period of 15 months following first publication of the Approval Notice) the public health insurers are entitled to a share of such remaining monies.

30 Medical experts have prepared a Medical Conditions List (Exhibit "E" to the Settlement Agreement) ("MCL"). A roster of Canadian physicians with the requisite medical expertise has been created to act as Claims Adjudicators. They will review a claimant's submitted Claim Package and determine whether the claimant is entitled to benefits from the related medical records. An appeal

process allows a claimant to challenge in writing before the Court any final determination regarding a claimant's eligibility for benefits.

31 The MCL stipulates specific eligibility criteria in respect of benefits for a range of levels of disease severity for claimants who have ingested the defendants' Products and who suffer from VHD. Benefits are accorded to a matrix which identifies varying levels of VHD severity. Product Recipients with PPH can also make claims pursuant to the eligibility criteria.

32 The compensation values for Matrix level benefits are incorporated into the Matrix Grid (Exhibit "F" to the Settlement Agreement) and vary based on the level of disease severity and the Product Recipient's age at diagnosis.

33 One level of benefit under the Settlement Agreement is for FDA Positive valvular regurgitation. There will be a per capita payment up to $2,500.00 in recognition of an individual FDA Positive Benefit, subject to an overall ceiling of $3 million for such claimants. An FDA Positive is a defined physiological condition. Product Recipients who qualify for an FDA Positive or greater VHD benefit and whose VHD worsens during the Administration Period can submit a progressive claim such that the initial benefit may be increased accordingly.

34 The estimated class is one of approximately 160,000 members, being the estimated number of individuals who consumed the Products, whether or not any injury has been sustained.

35 National Class Counsel advise they have been contacted by some 886 individuals to date, with 126 of that number providing information regarding injuries or diseases they believe are related to the ingestion of the Products. National Class Counsel estimates on the basis of an initial review that 69 of the 126 have provided medical information which allows a claim to be advanced. Of these 69 class members, 27 may qualify for FDA Positive Benefits with the remaining 42 perhaps qualifying for Matrix-level benefits because of having VHD or PPH.

36 B.C. Class Counsel estimate 29 class members within the B.C. subclass suffer from PPH (15 primary and 14 secondary to VHD) and 86 class members who have VHD (including the 14 who appear to have PPH) with 45 of this number having FDA positive levels as defined in the MCL and the remaining 41 having Matrix level conditions as defined in the MCL.

37 Class members asserting claims which are derivative to the claims of Product Recipients and are based upon the loss of care, guidance and companionship of the Product Recipient may be compensated within a range of $1,000 to $10,000 if the Product Recipient's claim is other than a FDA Positive of Matrix Level I claim.

38 Claimants must submit a Claim Package (which includes a Claim form and Medical diagnosis form along with instructions) to the Settlement Administrator within the Claim Period.

39 A settlement of a class proceeding is not binding unless approved by the Court. In order to approve a settlement, the Court must find that it is fair, reasonable, and in the best interests of the class. See CPA s. 29(2); Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 OR. (3d) 429 at 444 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to Supreme Court of Canada dismissed, [1998] S.C.C.A. No. 372.

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

> all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation: Dabbs v. Sun Life Assurance Co. of Canada, supra, at 440 (Gen. Div.); H. Newberg, A. Conte, Newberg on Class Actions, 3d ed., looseleaf (Colorado: Shepard's/McGraw-Hill Inc., 1992) at 11-104.

41 The representative plaintiffs for both the national class and for the British Columbia sub-class have approved the settlement. There were only two class members who have raised any objections or queries.

42 In determining whether to approve a proposed settlement a court takes into its assessment several factors, including:

(a) the likelihood of recovery or likelihood of success if the action were to proceed to trial;
(b) the amount and nature of discovery, evidence or investigation;
(c) the settlement terms and conditions;
(d) the recommendation and experience of class counsel;
(e) the future expense and likely duration of on-going litigation;
(f) the number of objectors and the nature of objections;
(g) the presence of arms-length bargaining and the absence of collusion; and
(h) the degree and nature of communications by class counsel and the representative plaintiff(s) with class members during the litigation.

See Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 at para. 13 (Gen. Div.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 at paras. 71-72 (Sup. Ct.).

43 As stated above, the litigation in respect of the subject class action has been a very lengthy process with extensive discovery evidence. Settlement was only achieved through the office of an effective mediator at the last moment with a nine-month trial scheduled to commence shortly.

44 Class counsel had significant information about the case and a good understanding of liability and damages issues before embarking upon the settlement negotiation process. Class counsel's grasp of these issues was assisted by medical experts and by experienced American counsel, familiar with like litigation involving diet drugs in the United States.

45 Given that the settlement was achieved only some three days before the scheduled trial, there was considerable trial preparation time required of class counsel. Some 20 expert reports had been exchanged.

46 Given the information available to class counsel, they were well situated to negotiate, and ultimately to agree to a settlement for the resolution of the class action.

47 There is sufficient evidence before the Court to allow it to exercise an objective assessment of the fairness of the proposed Settlement Agreement.

48 There is the risk that if the matter had proceeded to trial, any judgment against Servier might exceed its exigible assets. Servier has $15 million in insurance coverage but that amount is subject to reduction for defence costs which, while unknown, might well have exhausted the coverage. Finally, there are uncertainties regarding any eventual judgment being effectively enforceable in France where the defendants' major assets are located.

49 The function of the Court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the Court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the Court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. See Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 at para. 10 (Gen. Div.); Manual for Complex Litigation, Third ss. 30.42 (1995).

50 Possible concerns, as raised by the Court during the course of submissions, include: that there will be sufficient funds to meet all proper claims, that sufficient and effective notice is given to prospective claimants, that the process for claiming is straightforward and expeditious, and that the latency period for the diseases or injuries alleged to arise from the ingestion of the Products has already passed such that all medical problems will be known by Product Recipients or, at least known well before the end of the Claim Period. Class counsel have provided explanations and assurances in respect of these queries.

51 The Product Recipient class members with viable claims in this class action, such as Ms. Wilson and Ms. Greenlees, have suffered grievous and serious injury and illness (indeed, in some cases, death), because of the defendants' allegedly defective Products.

52 The path to a resolution of the litigation has been long and extremely arduous. Taking into account all the circumstances, in my view and I so find, the Settlement Agreement is fair and reasonable and in the best interests of all the class members.

The Motion for Approval of Class Counsel Fees

53 Class counsel (including Ontario, British Columbia and United States counsel) seek approval of class counsel fees of $13 million at this time. They do this with the express proviso that they will seek additional fees to a maximum of $5 million if at the conclusion of the Claim Period it appears "there will be sufficient funds remaining." About $626,000 in party and party (partial indemnity) costs (an estimated $500,000 toward fees and $126,000 for reimbursement of disbursements) has been paid by the defendants in the course of the proceedings of the litigation to date.

54 Affidavit evidence in support of the motion by class counsel for the approval of fees includes the affidavits of Ms. Annelis Thorsen, Ms. Sheila Wilson, Mr. Dana Graves, and Ms. Beverley Greenlees.

55 Public notice was given in advance of this hearing as to the quantum of fees being requested by class counsel. There has not been any objection by class members to the fees requested.

56 A United States law firm, Lieff Cabraser Heimann & Bernstein, with considerable expertise in product liability class actions, has been joined in the application for class fees by the submission of the Canadian class counsel. The factum of class counsel of Rochon Genova includes the U.S. firm, together with the B.C. subclass counsel, Klein Lyons.

57 I do not question the value of the contribution of the U.S. firm to the conduct of the class action and its successful conclusion. However, in my view, the U.S. firm is properly to be paid from the counsel fees awarded to class counsel. The U.S. law firm was not appointed as class counsel by the Court nor is there anything on record to indicate the firm is licensed to provide legal services directly to the public and to represent the class in court in Ontario.

58 The U.S. firm has provided legal advice to class counsel and it is the responsibility of class counsel to meet their obligation of payment to the U.S. firm, whatever that commitment might be. The services provided by the U.S. firm are, of course, legal services indirectly for the benefit of the class but it is not an obligation of the class to pay this charge. Hence, my use of the term "class counsel" embraces only the counsel for the national class, Rochon Genova, and the counsel for the B.C. subclass, Klein Lyons.

59 Class counsel assumed a truly daunting task in pursuing this class action given that it became quickly apparent the defendants were certain to challenge them in every way possible at every single step of the litigation process.

60 The efficacy of the underlying three policy objectives to the CPA are seen in the litigation at hand. The first policy objective is 'access to justice.' The individual class members most certainly could not realistically have had access to justice if forced to pursue their claims individually. The short answer, in effect, of the defendants throughout the course of the litigation to the Canadian class members' claims (in respect of allegedly defective drugs marketed by the defendants in Canada) was that each claimant should come to France and individually sue the defendants.

61 The second policy objective is to achieve 'efficiency in the use of resources' necessary to the litigation process. By combining all claimants in one class action there is obvious greater efficiency and economy for all participants (including the courts) in the adjudication of common issues. One cannot realistically imagine a nine-month trial for each of a vast multitude of claimants to determine issues common to all, in particular, whether the defendants' Products cause VHD or PPH.

62 Finally, the third policy objective is 'behaviour modification.' There are limited public resources available to ensure that defective drugs are not brought into or maintained in the Canadian market upon it being realized there are possible problems. The public regulator is assisted greatly by the private sector through the CPA enabling class actions. In exchange for the possibility of sizeable legal fees through a class action on behalf of a private group of claimants, class counsel indirectly serves a public purpose. The drug industry knows that it is more likely to be held accountable for unlawful behaviour in the marketplace. Hence, it is more likely that drug companies will act responsibly in the first instance in researching, manufacturing and marketing drugs and in advising and disclosing to the public known risk factors in using drugs.

63 As stated above, there was a plethora of pre-trial motions and appeals (about 50 in total). These included, to give a few examples, several motions by the defendants challenging jurisdiction, challenging the constitutionality of a national class action, asserting the purported 'blocking' provisions of Article 15 of France's Civil Code, and asserting non-compliance with the service rules of the Hague Convention. Court orders were also required for the discovery of representatives from the Health Protection Branch of Health Canada.

64 Class counsel were obliged to bring several motions to add defendants as knowledge of the defendants' large corporate empire gradually unfolded. To gain meaningful access to documentary

production, some seven motions were necessary for answers to undertakings given and for answers which had been improperly refused.

65 There was voluminous documentary production. The initial production was reportedly some 2,895 documents without an index nor a searchable database or electronic coding. Some 80,000 individual documents were reportedly delivered by the defendants unbound (albeit each separated by a blue sheet of paper) on April 2002 in 122 banker's boxes without being organized according to chronology or subject matter. A later agreement between counsel for production of electronic copies with a searchable index was in fact reportedly not searchable by keyword.

66 Class counsel was required to bring a motion to force the release of relevant documents produced in the U.S. Multi-District Litigation Re: Diet Pills. Another motion was required to gain access to the non-privileged documents in the defendants' electronic database of over 300,000 documents.

67 Class counsel were required to develop a database maintained by a California-based document management company.

68 The oral discovery took place mainly in France. Discovery had to be conducted to a considerable extent before there was any meaningful production. Examinations for discovery took an approximate total of 11 weeks. There were hundreds of thousands of pages of production. Court orders were required for consular authority to gain access to the release of documents.

69 There were extreme difficulties in piercing the corporate maze of the defendants' business empire consisting of dozens of privately-held companies whose interconnectivity was not readily apparent. An order was required to force the defendants to produce a meaningful organizational chart identifying the various corporate entities involved in bringing the Products to the Canadian market. This ultimately resulted in the plaintiff class moving successfully to add 19 new defendants.

70 Two excerpts from decisions of this Court in the course of the litigation are illustrative, as examples, of the nature of the litigation faced by class counsel. The first is from Wilson v. Servier, [2001] O.J. No. 4717 at paras. 22-23 (Sup. Ct.):

> It is fundamental to the administration of justice in Canada that plaintiff consumer users of an alleged defective product which allegedly has caused very severe health problems (and allegedly death for some class members) have a determination of the common issues on the merits through their certified class action in a timely way. Even if they are successful in the trial of the common issues there will then remain a lengthy process to determine individual issues.
>
> Our society's concept of justice dictates that fairness is inherently fundamental to our court processes. Timeliness in the determination of claims on their merits is critical to achieving fairness to the parties. Justice must be done and it must be seen to be done in a timely way and manner. It is prejudicial to plaintiffs to deny them fairness through further substantial delays by granting Servier's motion. To grant Servier's motion would inevitably have the result of delaying and frustrating a determination of the common issues on their merits. A basic objective of the judicial system is access to justice. Indeed, that is an express policy objective underlying the CPA [citation omitted]. Access to justice means access to timely

> justice. A fair judicial process requires much more than simply an endless war of attrition waged by defendants with considerably greater resources than an individual representative plaintiff and the plaintiff class.

71 The second excerpt is from Wilson v. Servier, [2003] O.J. No. 157 at paras. 31-33 (Sup. Ct.):

> The record establishes that the defendants resist providing any fulsome understanding as to the role of Dr. Servier and the nature of the vast and complex structure of the Servier enterprise which manufactured and marketed the subject diet drugs sold in Canada. The defendants have volunteered nothing and have confronted the plaintiff with a confusing, complex and extensive corporate enterprise which is largely situated in France. Plaintiff's counsel has been forced to comb through more than 100,000 documents and endure a multitude of discoveries with many objections, simply to try to establish incrementally the nature of the Servier enterprise and the structure of decision-making in respect of the subject diet drugs. See (2000), 50 O.R. (3d) 219 at 228 (Sup. Ct.), leave to appeal denied (2000), 52 O.R. (3d) 20, leave to appeal to S.C.C. denied September 6, 2001; [2002] O.J. No. 1002 (Sup. Ct.) at para. 10.
>
> The approach of the defendants could have been to elucidate voluntarily and in a straightforward manner upon the true nature of the Servier enterprise and its relationship to the subject diet drugs in Canada, and proceed to meet the issues in this class action directly on their merits.
>
> However, the defendants have chosen to resist the plaintiff at every stage in this proceeding on every procedural and asserted legal basis imaginable, through seemingly endless motions. The defendants have attempted to try to throw up an impenetrable defensive wall whereby plaintiff's counsel has been forced to expend extensive resources and time simply to attempt to determine the factual history and corporate structure underlying the manufacturing and marketing of the subject drugs in Canada.

72 The technical subject matter involved emerging, complex and unsettled areas of medicine and medical science. Topics requiring expert reports included: whether epidemiological principles supported a conclusion of causation between the use of the Products and the development of PPH and VHD; the incidence, diagnosis, latency period, treatment options and prognosis for patients suffering form PPH or VHD; the issue of progression in the disease process of VHD; the applicable regulatory and industry standards relating to adverse reaction reports and whether the defendants complied with such standards; whether there was adequate disclosure of known risks associated with use of the Products and whether potential benefits from the use of the Products outweighed the attendant risks.

73 The fixing of counsel fees is governed by sections 32 and 33 of the CPA. The essential criterion is whether the requested fees are fair and reasonable.

74 Factors to consider include the time expended by class counsel, the legal and factual complexity of the matters dealt with, the risk of success or failure assumed by class counsel in pursuing

the litigation, the degree of skill and competence demonstrated by class counsel, the degree of responsibility assumed by class counsel, the results achieved, the benefits achieved for class members through a settlement, the importance of the matter to the class members, and the client's expectation as to the quantum of fees to be paid.

75 The fairness and reasonableness of the requested fee is commonly measured by several standards. One is the use of a multiple of the base fee for the docketed time expended, that is, for the opportunity cost to class counsel of not being able to bill for his/her time as would be done in the normal course in respect of a fee paying client.

76 The retainer contingency fee agreement of National Class Counsel with Ms. Wilson in the first instance set forth a 25 percent fee plus any award of costs, disbursements and applicable taxes. Ms. Wilson has signed a revised retainer authorizing an award of legal fees to class counsel in accordance with the amount now sought in total.

77 The retainer contingency fee agreement with Ms. Greenlees in respect of the B.C. subclass provides for 40 percent of the recovery; however, B.C. Class Counsel have agreed to request fees on the same basis as National Class Counsel. That is, class counsel as a single group, seek for fees 25 percent of the settlement amount of $40 million plus applicable taxes plus the $3 million in the partial indemnity costs and $1 million in disbursements contributed by the defendants, plus an additional $5 million if there are funds which remain after all claims are met.

78 Rochon Genova state that they have docketed time of some 14,800 hours (this includes 2,000 hours in respect of discovery, 2500 hours in reviewing documentary productions, 5,500 hours in respect of court appearances and some 1,500 hours in respect of settlement negotiations and drafting) resulting in docketed fees of about $5 million. Rochon Genova spent some 11 weeks in examinations for discovery of representatives of the defendants in France, Canada and Belgium. They say they have disbursements of $720,883.32, inclusive of G.S.T. They advise that their American legal advisers, Lieff Cabraser, have docketed time of some 3,661.5 hours with docketed fees of about CDN $1.5 million and disbursements totaling $465,926.61.

79 The defendants question two aspects of the base fee as calculated by Rochon Genova. First, they say that 700 hours of time up to the successful certification motion was not included in an earlier Bill of Costs given to defendants' counsel. Rochon Genova answer that the earlier lesser calculation was an error. Second, defendants question the hourly rates employed, asserting that 2004 rates are used retrospectively.

80 As an aside, it is noted that defendants' counsel do not volunteer their own docketed time, fees and disbursements in support of this class action. They are, of course, under no obligation to do so. Yet their own fees would offer an additional rough standard by which to measure the reasonableness of class counsel's base fee and requested counsel fees.

81 B.C. Class Counsel put their docketed time at some 8700 hours, including more than 3000 hours by Mr. Gary Smith of the Klein Lyons firm. The defendants say that these rates are higher than prevailing market rates. They also assert that some of the time charges relate to administrative matters for which costs have been awarded and paid.

82 The defendants hired KPMG Forensic Inc. ("Forensic") to thoroughly analyze the charges comprising the asserted base fee by class counsel. That analysis would reduce the base fee to $3,005,681 from the base fee calculated by Rochon Genova of $4,997,884. Forensic's analysis

would reduce the base fee of Klein Lyons from $3,753,270 to $2,452,811. Thus, the two base fees would be reduced in the range of some 35 to 39 percent by the analysis of Forensic.

83 Taking the combined reduced base fee from the analysis of Forensic of $5,458,492 one is in all events left with a very substantial base fee. Moreover, this omits a notional revised base fee of CDN $1,349,732 as calculated by Forensic for the value of the contribution by Lieff Cabraser.

84 It is not necessary for me to deal with the differences in the calculation of the base fee and determine which figure is more probably accurate. I say this because, in my view, the counsel fee approved in this case, taking into account all the circumstances (putting aside for the moment the factor of the total amount of recovery), could certainly justify a multiplier of 4 times the base fee.

85 It is enough to say that the record establishes a base fee of class counsel of at least $5,458,492. The defendants themselves submit that a reasonable base fee would be this figure of $5,458,492.

86 As class counsel are seeking maximum fees of $18 million, if approval of this amount were to be granted, it would imply a multiplier of only 3.3 upon the base fee (i.e., 3.3 times $5,458,492).

87 The defendants also have done an analysis of the claimed disbursements. The defendants take the position that $2,619,536 represents the total reasonable disbursements (this includes the notional base fee of $1,349,732 of Lieff Cabraser being treated as a disbursement).

88 The defendants propose a formula for class counsel fees which would cap the overall fees at a maximum of $9.4 million. The defendants propose that class counsel receive an interim payment of fees at this time of $6.4 million, $2.6 million for disbursements and the right to apply for additional fees when the 'take-up' by claimants is known. The defendants would fix such additional fees at an amount equal to the lesser of 10 percent of the settlement take-up by claimants or $3 million. By this approach, the maximum in additional fees would be $3 million.

89 By the defendants' formula, the maximum possible fees of $9.4 million would imply a multiplier of only 1.72 on the base fee (said by the defendants to be reasonable) of $5,458,492. If the take-up was less than $30 million the effective multiplier would be even less.

90 The defendants submit in their factum that "even when fees are awarded on the basis of a fixed sum or a multiplier basis, the percentage of the potential fee awarded as compared to the quantum of the settlement or judgment becomes a significant factor in determining the fee awarded" (Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 at 425). Certainly, the amount of the settlement or judgment is one important factor to be taken into account. If the base fee as multiplied constitutes an excessive portion of total recovery, the multiplier may be too high. As I have said above, leaving this single factor of total recovery aside, a multiplier of 4 is appropriate in this case, given all other factors.

91 But other significant factors must also be kept in mind given the idiosyncratic nature of this class action. Class counsel could not reasonably estimate the total number of class members actually injured by ingestion of the defendants' diet drugs. Even if it is determined ultimately it is only a relatively few of the total users who have been injured, their injuries are severe (including death in several instances) and these persons would not have achieved any redress at all but for the efforts of class counsel.

92 Finally, the very extensive cost in time and resources in respect of this prolonged litigation has been largely because the defendants refused to deal with their customers' claims (notwithstand-

ing cogent evidence suggesting a foundation to the claims) until just immediately before trial, but rather 'circled the wagons' and imposed every hurdle imaginable (as was their legal right, if not the preferred moral position) at every step of the legal process to block the claimant customers and their counsel in seeking to gain justice.

93 As an aside, I mention that one can argue that any provider for profit of prescription drugs to consumers in the marketplace, as a responsible corporate citizen, should want to see a neutral, independent process established immediately upon any plausible medical problems surfacing, whereby the medical/scientific issues of causation and effect are addressed expeditiously, seriously and authoritatively with an administrative/arbitral regime then established to provide appropriate compensation if suggested by the results of the medical/scientific inquiry.

94 It is hardly an appropriate answer for an off-shore multinational, global enterprise drug provider to say, in effect, to individual Canadian consumers 'if you claim our drug has seriously injured you, come to France and prove it.' Nor is it arguably an appropriate answer for the Canadian Government, as the public health regulator through Health Canada, to remove a drug from the market when serious medical problems for consumers surface, and not then also require the drug seller to agree to an appropriate mechanism to address immediately in a cost-effective and fair manner the consequences of the medical problems left in the wake of the marketing.

95 National Class Counsel requests a separate payment for Ms. Wilson from the Settlement Fund of $15,262 as compensation on a quantum meruit basis based on some 230 hours at $65 per hour. I do not dispute Ms. Wilson's significant contribution to the carriage of this class action. However, National Class Counsel can deal with this add-on claim by making the requested payment to her out of their pocket.

96 Class counsel have stipulated that there will not be any additional fees payable by class members for their services beyond those awarded pursuant to the motion at hand. In particular, this means that even if there might be separate contingency fee agreements with individuals who are now in the B.C. subclass there will be no extra fees charged to such individuals. (That is, there will be no so-called double-dipping.)

97 The individual class members have a maximum fund available for their claims of $43 million (provincial health authorities receiving $1 million from the $40 million Fund). I consider the $3 million added in the settlement for partial indemnity of costs and the $1 million added for partial indemnity of disbursements to be properly considered as part of the global fund available for class members.

Disposition

98 In my view, and I so find, class counsel fees in the amount of $10 million plus applicable G.S.T. of $700,000 plus $2,619,536 (inclusive of any taxes on disbursements) are approved and to be paid at this time. (The disbursement calculation includes $619,699 allocated for Rochon Genova, $203,566 for Klein Lyons and $1,796,271 to Rochon Genova on account of Lieff Cabraser.) (The party and party costs awarded throughout the litigation process, about $700,000, are apart from, and over and above, the $10 million in fees awarded. However, the $4 million in partial indemnity costs paid as part of the settlement are credited to the global Fund or considered otherwise, are credits against the $10 million in fees and $2,619,536 for disbursements hereby awarded.)

99 It is appropriate for the Court to know how the claims process has worked for claimants, the actual take-up by claimants, and the overall achievement of the settlement for class members before determining with finality the full and final amount of class counsel fees.

100 Without implying any appropriate overall final quantum of class counsel fees at this time, I will remain seized of the motion for approval of class counsel fees. The hearing is adjourned for a continuance to a date to be fixed by the Court. A further hearing on the matter is appropriate after the Settlement Administrator, Crawford Class Action Services, has provided a comprehensive report on the implementation of the settlement. Such report should not be provided until after at least a year following the expiry of the Claim Period i.e., until after at least a full year has been completed in the Administration Period. Given the reversionary interest of Servier in respect of the settlement monies, the defendants are permitted to make such submissions as they consider appropriate at the continued hearing to assist the Court in its determination of the appropriate overall final quantum of class counsel fees.

P.A. CUMMING J.

cp/e/qlalc

Case Name:

Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.

PROCEEDING UNDER the Class Proceedings Act, 1992
(Biotin) (Bulk Vitamins) (Choline Chloride)
(Methionine) (Niacin) (Supplemental Choline Chloride)
(Suppplemental Ontario Methionine)
Between
Glen Ford, Vitapharm Canada Ltd., Fleming Feed Mill Ltd. and Marcy David, plaintiffs, and
F. Hoffmann-La Roche Ltd., Hoffmann-La Roche Ltd., Merck KGaA, Lonza AG, Alusuisse-Lonza Canada Inc., Sumitomo Chemical Co. Ltd., Sumitomo Canada Limited/Limitée and Tanabe Seiyaku Co. Ltd., defendants
And between
Glen Ford, Vitapharm Canada Ltd., Fleming Feed Mill Ltd., Aliments Breton Inc., Oger Awad and Mary Helen Awad, plaintiffs, and
F. Hoffmann-La Roche Ltd., Hoffmann-La Roche Limited/Limitée, Rhône-Poulenc S.A., Aventis Animal Nutrition S.A., Rhône-Poulenc Canada Inc., Rhône-Poulenc Animal Nutrition Inc., Rhône-Poulenc Inc., BASF Aktiengesellschaft, BASF Corporation, BASF Canada Inc., Eisai Co. Ltd., Takeda Chemical Industries Ltd., Takeda Canada Vitamin and Food Inc., Merck KGaA, Daiichi Pharmaceutical Company, Ltd., Reinhard Steinmetz, Dieter Suter, Hugo Strotmann, Andreas Hauri, Kuno Sommer and Roland Brönnimann, defendants
And between
Fleming Feed Mill Ltd., Aliments Breton Inc., Len Ford and Marcy David, plaintiffs, and
BASF Aktiengesellschaft, BASF Corporation, BASF Canada Inc., Chinook Group Ltd., Chinook Group, Inc., DCV Inc., Ducoa L.P., Akzo Nobel NV, Akzo Nobel Chemicals BV, Bioproducts Inc., Russell Cosburn, John Kennedy, Robert Samuelson, Lindell Hilling, John L. ("Pete") Fischer and Antonio Felix, defendants
And between
Glen Ford, Fleming Feed Mill Ltd., Aliments

Breton Inc. and Kristi Cappa, plaintiff, and Rhône-Poulenc S.A., Rhône-Poulenc Canada Inc., Degussa-Hüls AG, Degussa Corporation, Degussa Canada Inc., Novus International Inc. and Aventis Animal Nutrition S.A., defendants
And between
Vitapharm Canada Ltd., Fleming Feed Mill Ltd., Aliments Breton Inc., and Kristi Cappa, plaintiffs, and
Degussa-Hüls AG, Degussa Corporation, Degussa Canada Inc., Reilly Industries Inc., Reilly Chemicals S.A., Vitachem Company, Alusuisse-Lonza Canada Inc., Lonza AG, Nepera Incorporated, Roger Noack and David Purpi, defendants
And between
Fleming Feed Mill Ltd., Aliments Breton Inc., Glen Ford and Marcy David, plaintiffs, and UCB S.A. and UCB Chemicals Corporation, defendants
And between
Glen Ford, plaintiff, and Novus International (Canada) Inc., defendant

[2005] O.J. No. 1117

[2005] O.T.C. 208

138 A.C.W.S. (3d) 20

12 C.P.C. (6th) 226

2005 CarswellOnt 1094

Court File Nos. 00-CV-202080CP, 00-CV-200045CP,

00-CV-198647CP, 00-CV-201723CP, 00-CV-200044CP,

40610, and 42267CP

Ontario Superior Court of Justice

P.A. Cumming J.

Heard: March 8 and 9, 2005.
Judgment: March 23, 2005.

(115 paras.)

Civil procedure -- Parties -- Class or representative actions -- Legal profession -- Barristers and solicitors -- Compensation -- Measure of compensation -- Reasonable charges, reasonably performed.

Application for the approval of class counsel fees. In 1999 multiple putative class actions were commenced in Ontario, British Columbia and Quebec that alleged a complex price-fixing and market-sharing conspiracy related to the sale of vitamins in Canada. Ultimately, five class actions were reconstituted and pursued in Ontario and dealt with discrete vitamins and separate representative plaintiffs. Two additional actions were pursued. Some of the defendants entered into a proposed settlement with some of the plaintiffs in the Ontario class actions. The agreement was lengthy and complex. It was approved in separate reasons and sought to compensate all class members across Canada. The settlement compared favourable to the results achieved in American litigation even though there was a higher scale of damages available in the United States. Class counsel agreed with the representative plaintiffs to be paid counsel fees equal to 15 per cent of the settlement funds. It was anticipated that the class counsel fee would be $14,732,906. The agreement allocated a maximum of $18 million for the payment of administration expenses and class counsel fees. The base fee for class counsel's time was $5.3 million. The anticipated class counsel fee was based on a multiplier of 2.78 on the base fee. It also represented a 14.73 per cent fee on a recovery of $100 million after settlement credits. The settlement was based on a total value of $140 million and a total payable to the administrator of $100 million after settlement credits. The damages suffered by the class members was in the range of $103 to $138 million.

HELD: Application allowed. The legal issues were complicated and challenging. The litigation approach was designed to maximize recovery for the classes. Class counsel faced many risks. There was a multiplicity of actions throughout Canada against many defendants in different jurisdictions. There was a possibility that certification could be denied and that some or all of the actions could be dismissed. Price fixing civil litigation was novel in Canada when the actions were commenced. There was also the possibility that the actual recovery could be much smaller than the settlement amount. There was a chance that the value of counsels' time could be disproportionate to the amount involved. A further risk was that the settlement would not be approved. The amount of $15 million for fees was fair and reasonable if the actual recovery was $100 million. If the recovery was higher counsel would receive slightly more than this amount.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, S.O. 1992, c. 6, s. 32, s. 33, s. 33(2), s. 33(7)(b), s. 33(7)(c), s. 33(9).

Counsel:

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

Glenn M. Zakaib, for the Defendant Merck KGaA

John Callaghan, for Sumitomo Chemical Co. Ltd.

William Vanveen and François Baril, for the Defendants Hoffmann-La Roche Limited, F. Hoffmann-La Roche Ltd.

Ariane Farrell, for Sumitomo Canada Ltd.

Donald Houston, for Lonza AG

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

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

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

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

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

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

James Doris, for Bioproducts, Inc.

Tycho Manson, for Chinook Group, Ltd.

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

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

Donald Houston, for Lonza AG (acting previously discontinued agent) for Alusuisse-Lonza Canada Inc.

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

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

Donald Houston, for Wippon Soda Co. Ltd.

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

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

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

[Editor's note: A corrected copy was released by the Court April 5, 2005; the corrections have been made to the text and the corrigendum is appended to this document.]

CLASS PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992
REASONS FOR DECISION

P.A. CUMMING J.:--

The Motion

1 This is a motion for approval of class counsel fees in respect of a group of class actions under sections 32 and 33 of the Class Proceedings Act, S.O. 1992, c. 6 ("CPA").

2 In 1999, multiple putative class actions were commenced in Ontario, British Columbia, and Quebec alleging a complex, global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete Vitamins and with separate representative plaintiffs. Two additional, so-called "supplemental", class actions have also been initiated. Certain "Settling Defendants" have now entered into a proposed settlement with certain "Settling Plaintiffs" in these class actions in Ontario, culminating in what is called the "Amended Canadian Vitamins Class Actions National Settlement Agreement" ("Agreement") made as of November 1, 2004 and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will take place before the Courts in those provinces. (The status of the several class actions, following upon the successful motions for certification and settlement approval, is set forth in paragraph 106 of the separate Reasons for Decision in respect of the certification motions and for settlement approval released contemporaneously with these Reasons for Decision.)

3 The Agreement is lengthy and complex with several schedules and can be found (together with additional information), online: <http://www.vitaminsclassaction.com>. (See Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of Motion Record). There are also very recent, trailing, additional, separate Settlement Agreements for three Defendants (Akso Nobel Chemicals BV ("Akso"), UCB S.A. ("UCB"), and Reilly Industries Inc. ("Reilly")) which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

4 The alleged conspiracies remain simply that, i.e. "alleged" conspiracies, although it is to be noted that many of the Settling Defendants have pleaded guilty to charges of conspiracy in separate criminal proceedings with consequential fines.

5 The motion for certification and Court approval of the proposed settlement was heard on March 8, 2005 with the motion for the approval of "Class Counsel Fees" being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of fees for class counsel.

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

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

8 Class Counsel decided at an early stage that the litigation would be pursued in Ontario ahead of the actions in British Columbia and Quebec. Lawyers J.J. Camp and Joe Fiorante of the British Columbia bar both obtained a special call in Ontario to assist in the Ontario litigation.

9 Alleging distinct conspiracies, Class Counsel devised a theory which had not previously been postulated. Simply put, in separate actions (collectively called the "Vitamins class actions"), they alleged damage on behalf of all persons in Canada injured as a result of each alleged conspiracy. The class members have been divided into three groups, namely, Direct Purchasers, Intermediate

Purchasers and Consumers. Class Counsel have sought to assess damages for them on a global basis. This theory has been pleaded in subsequent price-fixing actions and, indeed, approved by this Court in Alfresh Beverages Canada Corp. v. Hoechst AG, [2002] O.J. No. 79.

10 Several pre-certification motions have been heard. Class Counsel brought a carriage motion to defeat a challenge by other counsel in Ontario seeking to prosecute class actions on behalf of only Consumers (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2000] O.J. No. 4594). Then, some Defendants unsuccessfully challenged the Ontario Court's jurisdiction (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2002] O.J. No. 298). Some Defendants challenged the plaintiffs' right to obtain evidence in the U.S. (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2001] O.J. No. 237). This issue was argued in the District of Columbia and, ultimately, in the Ontario Court of Appeal where the plaintiffs prevailed ([2003] O.J. No. 868 (C.A.)).

11 The settlement Agreement, now approved by this Court (and if approved by the British Columbia and Quebec Courts), seeks to compensate all class members across Canada. As discussed in the Reasons for Decision relating to the settlement approval, the cy-près mechanism is employed to some extent in giving effect to the distribution of the settlement funds.

12 The settlement compares favourably to the results achieved in U.S. litigation even though in the U.S. there is a regime of statutory treble damages and a jury culture. As well, the settlement falls within the range of damages estimated by the plaintiffs' expert economist, Dr. Thomas Ross.

13 The proposed overall class action settlement totals by far the largest amount recovered in class actions relating to price-fixing in Canada. The settlement is based on a total damage assessment in excess of $140,000,000 including interest, expenses and costs and results in an expected payment by the Settling Defendants to the Administrator of about $100,000,000 after the deduction of "Settlement Credits" (being credits against the overall Canadian assessment of damages by excluded customers, that is, Direct Purchasers or Distributors who have already settled their individual claims with Settling Defendants separate and apart from the Agreement at hand).

14 Class Counsel in Ontario agreed with the representative plaintiffs to be paid counsel fees equal to 15% of the settlement funds or monetary award plus applicable taxes plus recovered costs, plus their unrecovered disbursements and applicable taxes.

15 Section 18.1 of the Agreement deals with "Class Counsel Fees and Disbursements and Administration Expenses." Paragraph 13 of the factum of Class Counsel sets forth the expected calculations under that provision:

Amount for Administration Expenses and Class Counsel Fees	$ 18,000,000
Plus Fees on Additional Settlements	$ 75,000
Plus estimated Costs and Interest recovery from Mr. Borden and/or his clients	$ 70,000

Subtotal	$ 18,145,000	
Less Administration Expenses (actual and estimated)		($ 1,390,709)
Less Quebec Counsel's Disbursements and GST (estimated)		($ 40,000)
Less Class Counsel Disbursements (paid and payable)		($ 1,552,392)
Less interest authorized by CPA s. 33(7)(c)		Not calculated
Less GST on Class Counsel Disbursements where applicable		($ 94,667)
Subtotal	$ 15,067,232	
Less GST on Class Counsel Fees and Quebec Counsel Fees		($ 985,707)
Maximum amount available for Class Counsel Fees and Quebec Counsel Fees		$ 14,081,525
Percentage for Class Counsel Fees and Quebec Counsel Fees based on $100,000,000 recovery		14.08%
Less Quebec Counsel Fees (estimated) net of GST and disbursements		($ 2,000,000)
Maximum amount available for Class Counsel Fees		$ 12,081,525

Multiplier inherent in Class Counsel Fees 2.28

16 An "Expense Fund" of $10,000,000 was negotiated by Class Counsel as part of the Agreement. This is often seen in the practice in Ontario in class action and general litigation. For example, in a personal injury action involving a minor or a person under a disability, plaintiff's counsel will negotiate a fixed amount for "costs" as part of a settlement which is tendered to the court for approval.

17 There are problematic aspects to a discrete amount being labeled in a settlement agreement as being a contribution for class counsel fees. On the one hand, as the class is going to be required in all events to pay class counsel their fees, this factor is a necessary consideration in looking to the overall quantum of the funds being sought by the class in negotiating a settlement.

18 On the other hand, the structure for any sum isolated and labeled in any settlement agreement as going toward counsel fees requires careful scrutiny to ensure that the determination of class counsel fees is ultimately fair and reasonable.

19 A Court must be cognizant that any amount so labeled in a class action as being "on account of Class Counsel Fees" does not imply the minimum starting point in a determination of the quantum of fair and reasonable legal fees. The isolated amount, if such there is, should properly be seen as simply an indistinguishable part of the total global recovery for the class with fair and reasonable fees then being determined by looking to the global recovery along with all other appropriate factors.

20 I turn now to the Agreement at hand. Section 6.1(1) of the Agreement "notionally" allocates the "Settlement Amount" (defined in s. 1.1(65) as being "$132.45 million, including an amount of $10 million on account of Class Counsel Fees and Administration Expenses," plus interest) into five funds, including an "Expense Fund of $10 million."

21 Section 18.1(1) then proceeds to state, "The $10 million allocated to the Expense Fund is a payment by the Settling Defendants on account of Class Counsel Fees and Administration Expenses." Section 18.1(2) then provides that "The maximum amount the Courts shall allocate for Class Counsel Fees and Administration Expenses is $18 million." Section 18.1(10) states that as a result of this $18 million cap the Settling Defendants agree not to oppose the approval of Class Counsel Fees and Administrative Expenses.

22 Further elaboration on the regime for Class Counsel Fees and Administration Expenses is set forth in the remaining subsections of s. 18.1.

23 Class Counsel in their Factum emphasize that they "agreed to an $18,000,000 cap on Administration Expenses and Class Counsel Fees during the negotiations of the Amended Settlement Agreement knowing that this could result in a payment to them of less than Class Counsel agreed to and expected as a result of their fee agreements with each plaintiff." Presumably this was because the calculation as shown in the above chart would result in Class Counsel Fees of only 14.08% whereas the contingency fee agreements provide for a 15% fee of the recovered amount.

24 The written agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds states:

Solicitor's Fees

4. Whether or not Success is achieved in the Action, the CLIENTS agree that the SOLICITOR shall be paid and shall receive all recovered party and party costs in the Action irrespective of the scale upon which the party and party costs are awarded, applicable taxes and any interest accruing on account of party and party costs.
5. In addition to any fees recovered as party and party costs paid to the SOLICITOR pursuant to the provisions of paragraph 4 above, in the event of Success in the Action the CLIENTS agree that the SOLICITOR shall be paid and shall receive the aggregate of the following:

(a) to the extent that any disbursements are not received and recovered as party and party costs, an amount equivalent to the cost of the unrecovered disbursements plus applicable taxes; and

(b) 15% of the settlement funds or monetary award plus applicable taxes.

Disbursements

6. The CLIENTS agree that disbursements to be paid to the SOLICITOR shall include all amounts incurred or which may be incurred by the SOLICITOR and his firm and the Associate Counsel in connection with the representation of the CLIENTS and the Class in relation to the trial of the Common Issues and/or settlement, including but not limited to expenses incurred for investigation, court fees, duplication, travel, lodging, long distance telephone calls, the cost of a toll-free telephone line, the cost of specialized computer equipment and management systems software, the cost of a website, courier, postage, telecopier, imaging, and all services provided to the SOLICITOR by consultants, experts and agents. [Emphasis added]

25 Class Counsel take the position that the written agreement between each plaintiff in the B.C. Actions and Camp provides for Camp to be compensated on the same basis except that there is no provision for costs because no costs may be awarded in favour of or against a plaintiff in a B.C. class action. (It is noted the B.C. action retainer agreements apparently provide for legal fees that vary, depending on the stage of litigation, from 15% to 25% of all benefits obtained for class members, plus disbursements and applicable taxes.)

26 The representative plaintiffs each signed the Settlement Agreement and thereby agreed to $18,000,000 for Administration Expenses and Class Counsel Fees. However, it is noted that the expectations of the Ontario class action representative plaintiffs in doing so are that there is about $100 million in actual settlement benefits and that the legal fees being requested are consistent with the retainer agreements' stipulation of legal fees being in the amount of 15% of all benefits obtained for class members, plus disbursements and applicable taxes. See for example the affidavit of Ms. Kristi Cappa, a representative plaintiff in the Ontario Methionine Action and the Ontario Niacin Action. Indeed, the affidavit of Ms. Heather Rumble Peterson of the lead plaintiff counsel firm, Strosberg, reiterates this intent and expectation.

27 Section 18.1(3) limits the maximum amount of fees for Quebec Counsel at $2.18 million, inclusive of taxes and disbursements.

28 Section 18.1(4) states that Class Counsel Fees and Administration Expenses "shall first be paid from the Expense Fund." Section 18.1(5) goes on to state that if there is Court approval to greater fees and expenses that the excess shall be paid from the four funds in given percentages (Direct Purchaser Fund - 80%, Methionine Fund - 4%, Intermediate Purchaser Fund - 8%, and Consumer Fund - 8%).

29 Section 18.1(6) provides that, "Class Counsel Fees and Administration Expenses shall constitute a first charge upon and shall be paid as the first payments from each fund."

30 In my view, there are some required adjustments to the calculations as shown in the chart above. First, some of the claimed disbursements in reality are notionally properly considered as fees for legal services implicit to the services provided by Class Counsel.

31 The factum of class counsel in the first instance sought to treat a payment to another Canadian law firm of some $200,000 as a simple disbursement. This payment arose because of an agreement resulting from a commitment by the other law firm to drop out of the contest in respect of the carriage motion back in 2001. There was nothing improper about this arrangement and it was made known to the Court at the point of the agreement. However, the payment should properly come out of the quantum determined as Class Counsel Fees and not be treated as a disbursement before determination of the quantum of Class Counsel Fees.

32 As well, the factum sought in the first instance to treat the $451,381 to be paid to American law firm advisors as a simple disbursement outside the determination of the quantum of Class Counsel Fees. This amount is notionally for legal services as a part of the overall legal services being provided by Class Counsel. Such amount is properly payable by Class Counsel out of the Class Counsel Fees after the determination of the quantum of Class Counsel Fees. Such amount is not properly treated as a disbursement by Class Counsel outside of the determined quantum of Class Counsel Fees. (It is noted incidentally as well that payment to the Canadian law firm of the $200,000 and to the American law firms of the $451,381 was agreed to by Class Counsel to be contingent upon success in the class actions at hand.)

33 Class Counsel were first alerted to the alleged conspiracies by several groups of U.S. counsel with experience in prosecuting antitrust cases, some of whom were involved in the prosecution of vitamins anti-trust litigation in the U.S. Federal court. U.S. counsel provided advice and guidance that assisted in a preliminary manner in shaping the general strategy and in developing expert evidence. They provided information about the alleged Vitamin conspiracies that was not readily available, even though not subject to U.S. protective orders. They introduced Class Counsel to some of the representative plaintiffs and to their expert economist, Dr. Beyer. They also assisted in the motion seeking access to evidence in the District of Columbia. The U.S. firms are: Much Shelist Freed Denenberg Ament & Rubenstein P.C.; Freed and Weiss LLC; Gallagher, Shrap, Fulton & Norman; Cohen, Milstein, Hausfeld & Toll P.L.L.C.; Levin, Fishbein, Sedran & Berman; and The Cuneo Law Group. Class Counsel negotiated with some of the U.S. counsel in an attempt to formalize a working relationship with them; however, no agreement was ever finalized and signed.

34 Thus, in my view, there should be added into the quantum of Class Counsel Fees actually being received the two sums of $200,000 and $451,381 or a total add-in of $651,381. (There is a corresponding deduction to Class Counsel disbursements of this amount of $651,381, resulting in

the adjusted anticipated expenses of Class Counsel being only $901,011 (rather than $1,552,392, as shown on the above chart)).

35 Thus, the chart, as properly adjusted in my view, would be as follows:

Amount for Administration Expenses and Class Counsel Fees	$ 18,000,000
Plus fees on additional settlements	$ 75,000
Plus estimated costs and interest recovery from Borden and/or his clients	
Plus potential costs and interest recovery on jurisdiction motions	
Subtotal	$ 18,075,000
Less Administration Expenses (actual and estimated)	($ 1,390,709)
Less Quebec Counsel's disbursements and GST (estimated)	($ 40,000)
Less Class Counsel disbursements (paid and payable)	($ 901,011)
Less interest authorized by CPA s. 33(7)(c)	Not calculated
Less GST on Class Counsel disbursements where applicable	($ 63,071)
Subtotal	$ 15,680,209
Less GST on Class Counsel Fees	($ 1,025,808)

Maximum amount available for Class Counsel Fees	$ 14,654,401
Percentage for Class Counsel Fees based on $100,000,000 recovery	14.654%
Less fees of Quebec Counsel (estimated) net of GST and disbursements	($ 2,000,000)
Estimated amount available for fees of Class Counsel	$ 12,654,401
Less $651,381 payable to other counsel excluded from the multiplier	($ 651,381)
Estimated amount available for Class Counsel	$ 12,003,020
Multiplier inherent in fees of Class Counsel on base fee of $5,306,189	2.26

36 The s. 18.1 regime as illustrated in the above charts makes Class Counsel Fees the residual amount after the payment of Administration Expenses. Class Counsel know with certainty the specific amounts for disbursements, taxes and administration expenses (having negotiated with the intended Administrator a capped fixed fee - see s. 17 of the Agreement). The adjusted chart shows anticipated total Class Counsel Fees of $14,654,401. In my view, it is quite possible that the Administration Expenses will be less than anticipated, which would mean some further increase to the residual calculation of Class Counsel Fees.

37 Class Counsel estimate that they will expend further time valued at approximately $350,000 and approximately $40,000 in disbursements. These future activities of Class Counsel (excluding the Methionine Actions) will include: preparation for and attendance at the motions for the approval of the settlement agreements and fees in the three jurisdictions; responding to questions from class members and their lawyers regarding the settlement and questions from, and interacting with, industry and consumer organizations; and bringing motions to declare the settlements operative.

38 Class Counsel will not be paid any additional fees or disbursements (except in relation to the Methionine Actions) for these further services. Therefore, the estimated value of these future services has been included by Class Counsel in the calculation of the base fee and factored into the calculation of the multiplier, as are their estimated future disbursements.

39 The result is that the regime set forth in the Agreement for the suggested overall Class Counsel Fees amounts to a reasonable certainty of expectation to Class Counsel of approximately $14,654,401 to $15,000,000.

40 Subject to the Court's approval, the Agreement allocates a maximum of $18,000,000 for the payment of Administration Expenses and Class Counsel Fees. The chart prepared by Class Counsel assumes the recovery and distribution of about $100 million in settlement funds. A recovery of $100 million is the premise underlying the estimate that Class Counsel Fees will be less than 15% of the recovered amount.

41 But the s. 18.1 regime is not dependent upon a recovery of $100 million. As drafted, the calculation of Class Counsel Fees does not change if the recovery in fact falls below $100 million due to opt outs. If the total Purchase Price of Vitamins by Direct Purchasers and Distributors who opt out of the Settling Proceedings exceeds the "Opt Out Threshold" the Settling Defendants may elect to terminate the Agreement (s. 15 of the Agreement). However, if there is no termination the s. 18.1 regime provides in effect that the Class Counsel Fees will always be calculated as set forth in the chart which should result in at least $14,654,401. (The "Opt Out Threshold" has been fixed by the agreement of counsel but will remain unknown to others (the set amount has been placed in a sealed envelope deposited with the Court) until the Opt Out date has passed.)

42 Suppose hypothetically that there is an opt out by Direct Purchasers such that recovery is only $90 million. In such event, Class Counsel Fees of $14,654,401 would be 16.28% of the actual settlement recovery.

43 In the course of submissions, given concerns expressed by the Court, various possibilities were mooted as alternatives to the proposal of Class Counsel as to a regime to determine the quantum of fees. One alternative considered as a possibility was that of a 'hard cap' in respect of Class Counsel fees, being determined as the least amount resulting from two calculations: first, 15% of the actual recovered amount for the classes and second, $15 million (inclusive of payment to Quebec counsel of $2,180,00.00) (plus any recovery of costs in the Borden court proceedings and the Methionine motion). The concept of a so-called 'hard cap' is based upon the underlying contingency fee agreement of 15% of any recovery of damages (plus any recovery in respect of the so-called "Borden court proceedings," discussed hereafter).

44 Quebec Counsel would be paid $2,180,000 out of the total fees allowed for counsel or such lesser amount as the Quebec Court directs.

45 If the British Columbia Court also gives its approval to the proposed settlement and the Quebec Court approves a payment of $2,180,000 to Quebec Counsel for fees, disbursements and taxes, then it is estimated Class Counsel (i.e. counsel for the plaintiff classes apart from Quebec Counsel) would receive under the hypothetical hard cap maximum:

(a) the balance of the $18,000,000 available after payment of Administration Expenses and Quebec Counsel to a maximum of $12,820,000.00 (i.e. the cap of $15 million less Quebec counsel fees of $2,180,000,00); plus
(b) any recovery of the costs and interest in respect of the Borden court proceedings.

46 The base fee representing the value of Class Counsel's time expended to about February 23, 2005 and their estimated time to completion is $5,306,189. (However, this amount excluded any inclusion for the unknown figure for the time of Quebec counsel.) With a base fee of about $5,306,189, the maximum of $12,003,020 (after deduction of $651,381 payable to non-class coun-

sel, as their time has not been included in the base fee calculation of $5,306.189) for Counsel Fees would imply a multiplier of 2.26 on the base fee.

47 A court may fix as a fee a lump sum or a base fee increased by a multiplier or a percentage of the recovery. In the case of a lump sum, the court should test the reasonableness of the result by considering it as a multiplier and as a percentage of the amount recovered. Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 at 393 (Ont. Gen. Div.); Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 at 425 (C.A.).

48 The adjusted chart shows that, in total, it is estimated Class Counsel and Quebec Counsel would actually receive an amount of about $14,654,401 for fees or a percentage fee of about 14.654% based on a recovery of $100,000,000 after Settlement Credits. To the extent the recovery may be greater than $100 million and/or the estimated charges against the recovery in the above chart are less than the estimates, the fees would increase but could not exceed $15 million if there was a 'hard cap' of that amount.

49 If there are greater amounts for expenses, disbursements or taxes than as contemplated in the above calculations, such debits will reduce the amount of Class Counsel Fees as they are calculated as the residual after the various deductions as seen in the chart. However, as discussed above, the estimation as to the quantum of expenses, disbursements and taxes seems to have a fair degree of certainty.

50 Class Counsel express concerns as to a possible hard cap of 15% of the actual recovery. They suggest that if this approach were to be favoured by the Court then a protective proviso would be appropriate. They suggest that to the extent there are opt outs up to $6,000,000 of the settlement's Direct Purchasers Fund (the figure of $6,000,00 being calculated from $50 million in sales, i.e. 12% of sales) the 15% limiting factor for Class Counsel Fees would not apply. That is, if there were to be a reduction in recovery monies within the range of $100 million to $94,000,000 due to opt outs, the possible 15% hard cap limiting factor would not apply. At $94 million, total Counsel Fees of $14,654,401 would then represent a 15.59% return to Class Counsel and Quebec Class Counsel.

51 Under this possible regime for Class Counsel Fees, if the opt outs were to exceed $6,000,000 (i.e., the recovery for the classes fell below $94 million) it was mooted in the exchanges with the Court during submissions that an adjusted limiting factor might then apply. The Class Counsel fees would be reduced by a percentage, say perhaps 10% hypothetically, times the amount of the shortfall in recovery below $94 million.

52 For example, suppose only $90 million were to be recovered after the impact of opt outs. Then under this hypothetical regime the Class Counsel Fees of $12,654,401 (after payment to Quebec Counsel of $2,000,000) would be decreased by $4,000,000 ($94,000,000 minus $90,000,000), times 10% = $400,000, leaving an amount of $12,254,401 as Class Counsel Fees. In the example, the total Class Counsel Fees of $14,254,401 would then be 15.84% of the amount recovered, $90 million. However, Class Counsel would also propose that their fees should never be allowed to fall below a given figure, say, $13,500,000.

53 As I have said, s. 18.1 of the Agreement serves the function of calculating Class Counsel Fees, subject to Court approval. There is an explicit cap in the formula of about $15 million for Class Counsel Fees given the overall ceiling of $18 million for Administration Expenses and Class Counsel Fees. This is arguably appropriate, fair and reasonable. But it is based upon the underlying premise of an actual recovery of $100 million.

54 There is, however, also an implicit floor in respect of Class Counsel Fees through the s. 18.1 regime. That is, the Class Counsel Fees would always amount to about $15 million, no matter what the actual recovery is through the settlement after possible opt outs, so long as a settlement survives (i.e. the Agreement is not terminated because the Opt Out Threshold is exceeded and the Settling Defendants elect for termination).

The Law

55 A solicitor and a representative party may enter into a written agreement providing for the payment of fees and disbursements only in the event of success in the class proceeding, that is, on a contingency basis.

56 Subsection 33(2) of the CPA defines success in a class proceeding to include a settlement that benefits one or more class members.

57 The contingency agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds is set forth above. Each contingency agreement states that counsel fees shall be "15% of the settlement funds[.]" Class Counsel state that the contingency agreements with B.C. counsel are to be read the same way.

58 The CPA has the following three principal goals:

(a) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;
(b) improved access to the courts for those whose actions might not otherwise be asserted (put otherwise, potentially meritorious claims might have legal costs implications so disproportionate to the amount of each claim that plaintiffs would not be able to pursue their legal remedies without the assistance afforded by the statute); and
(c) modification of the behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore legal obligations.

(a)

See generally Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 at paras. 27-29.

59 The realization of the foregoing objectives is achieved by providing appropriate rewards to counsel prepared to assume the manifold risks of the litigation. Professor Garry Watson of Osgoode Hall Law School of York University has expressed the need for adequate compensation for class counsel in the context of the CPA:

> This [issue of compensation] is a vitally important subject, not just because it determines what will go into class counsel's pocket but because it will determine whether or not the legislation is successful. In the final analysis whether or not the Class Proceedings Act will achieve its noble objectives will largely depend upon whether or not there are plaintiff class lawyers who are prepared to act for

> the class and hence bring the actions. This in turn depends on two factors [:] (a) the level of monetary reward given to class counsel, and (b) the predictability and reliability of the award. In the final analysis, both of these aspects are crucial. Class actions will simply not be brought if class counsel are not adequately remunerated for the time, effort and skill put into the litigation and the risk they assume (under contingency fee arrangements) of receiving nothing. Equally important is that such remuneration be reasonably predictable i.e., that class counsel can take on class actions with a reasonable expectation that in the event of success they will receive reasonable remuneration. It is vital to the viability of class actions that class counsel not be met on "judgment day" with judicial pronouncements (issued with the "benefit" of hindsight) that class counsel "spent too much time, had hourly rates that were too high and in any event were conducting a case which was not really risky at all" and awarded a low base fee and a niggardly multiplier - except in very clear cases. Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996) at 3-4.

60 A frequently quoted passage supporting the introduction of contingency fee arrangements in class proceedings is found in the Report of the Ontario Law Reform Commission on the then-proposed legislation:

> Under the kind of fee arrangement permitted by the Act, the class lawyer will receive a fee only in the event of success. If he agrees to act on this basis, the class lawyer will be assuming a risk that, after the expenditure of time and effort, no remuneration may be received. It is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential representatives may be unable or unwilling to retain them. Ontario Law Reform Commission, Report on Class Actions, vol. 3 (Toronto: Ministry of the Attorney General, 1982) at 737.

61 If individuals are to have access to capable and effective legal representation, an incentive must be provided for counsel to act for plaintiffs and class members who would not otherwise have the means to retain counsel. In support of this incentive, the CPA and the courts have provided the rationale and the means for premium fees to be paid to counsel who are willing to act for class members and who seek payment only in the event of success. Winkler J. has observed:

> In furtherance of the intent of the legislation -- that counsel be encouraged to accept the risk associated with litigation of this type, and encouraged to pursue it diligently in circumstances where they may never be remunerated for their efforts -- it is necessary to reward the successful resolution with a reasonable multiplier of the base fee. Serwaczek, supra, at 399. See also Gagne, supra, at 422-423 and Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83 at 88 (Gen. Div.).

62 Courts must be cognizant of many problematic factors, including: whether legal fees are based on the benefits actually received by class members and are not illusory; whether fees awarded to class counsel are proportionate to what class counsel actually accomplish for the benefit of the

class members; whether the proposed settlement is reversionary with repayment to the defendant of unclaimed monies such as to potentially reduce the claimed settlement; whether the defendant agrees to pay class counsel's fees or purports to set their fees; and the expectations of class counsel and the representative plaintiffs as reflected in any fee agreement.

63 I turn now to a further consideration of the structure of the proposed settlement before the Court.

64 There is explicit expert economic evidence from Dr. Thomas Ross that the damage suffered by the class members is in the range of $103,000,000 to $138,000,000. The settlement is based on a total value of $140,676,928 (including interest) and a total payable to the Administrator of about $100,000,000 after Settlement Credits.

65 Significantly, the settlements have no reversionary aspect for unclaimed monies. That is, no unclaimed money will be repaid to the Settling Defendants. Any monies not paid out of the Direct Purchaser Fund will trickle down to the Consumer Fund. The Intermediate Purchaser Fund and Consumer Fund will be fully distributed cy-près.

66 The negotiations underlying the settlement of the class actions at hand were long and adversarial and involved mediation.

67 Factors relevant in assessing the reasonableness of the fees of any class counsel include the following:

(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.

See generally Serwaczek, supra, at 393; Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 at 376 (Gen. Div.); Endean v. Canadian Red Cross Society, [2000] B.C.J. No. 1254 at paras. 44-89 (S.C.).

68 The classes in the class actions at hand are comprised of three groups: Direct Purchasers numbering in the thousands, Intermediate Purchasers numbering in the tens of thousands and Consumers numbering in the millions.

69 The legal issues have proven to be complicated and challenging. The litigation approach was designed to maximize recovery for the classes by first quantifying the overcharges on all Canadian Vitamin sales and, thereafter, to distributing the amount recovered under court supervision.

70 Factual complexities arose because of the global nature of the alleged conspiracies among major corporations and some individuals. The carriage action involved a novel situation at the time for a Canadian court. The challenges to the jurisdiction of the Ontario Court and the need to attend outside of Canada for cross-examinations added cost and expenses, as did the attempts of some of the Defendants to block the plaintiffs' from gathering evidence in the United States.

71 When fixing class counsel fees after a settlement is reached, the Court should look at the matter not only from the present perspective of the conclusion but should also be mindful of the challenges and risks that confronted class counsel at the outset and over the course of the action. The risks involved in prosecuting the class action should be assessed as they existed when the litigation commenced and as it continued. Risk ought not to be assessed with the benefit of hindsight. See Gagne, supra, at 423, Goudge J.A.; Maxwell v. MLG Ventures Ltd. (1996), 30 O.R. (3d) 304 at 311 (Gen. Div.).

72 In addition to the traditional analysis which addresses litigation risk, the Court has considered "certification risk" and "resolution strategy risk" as substantial factors to consider in assessing whether the proposed fees in a class proceeding are fair and reasonable. Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281 at 293, 295 (S.C.J.).

73 Some of the risks affecting Class Counsel in respect of the class actions at hand included:

(a) the fact of the multiplicity of actions in Ontario (seven), British Columbia (seven) and Quebec (two);
(b) the fact of the multitude of Defendants in different jurisdictions;
(c) the possibility that certification might be denied generally, a national class might not be certified or certification might be denied in Quebec or British Columbia or Ontario (in particular, that certification for a class of consumers seemed problematical, given the decision in Chadha v. Bayer Inc. (2003), 63 O.R. (3d) 22 (C.A.), aff'g (2001), 54 O.R. (3d) 520 (Div. Ct.) (certification denied), rev'g (1999), 45 O.R. (3d) 29 (Gen. Div.) (certification granted), leave to appeal to S.C.C. denied, [2003] S.C.C.A. No. 106, and if certification was denied in one of the provinces, the Canada-wide approach to damages would have been problematical;
(d) the possibility the actions, or some of them, might be dismissed at a trial of the common issues;
(e) the possibility that actual recovery might be much smaller than that seen through the settlement;
(f) the chance that the value of counsels' time expended might be disproportionate to the amount involved;
(g) the possibility the litigation might be delayed, resulting in any recovery being postponed for a significant period of time.;
(h) the possibility of liability for wasted significant out-of-pocket disbursements (including for expert reports);
(i) the possibility that some of the Non-Settling Defendants could object to the settlement because of the form of the proposed bar order;
(j) the possibility that objectors might persuade the court not to approve the settlement;

(k) the possibility the settlement may not be approved in British Columbia and Quebec giving some of the Settling Defendants the right to terminate the Amended Settlement Agreement; and

(l) the possibility the Opt Out Threshold may be exceeded and the settlement thereby declared null and void.

74 Class Counsel assumed significant risk in undertaking the class actions at hand. At the time the actions were commenced, price fixing civil litigation was novel in Canada (although the American experience served as a beacon of possibility for Canadian class action counsel). During the course of this litigation, other price-fixing actions have been defended in Ontario. There has been a refusal to certify an action brought on behalf of consumers that alleged the defendant sought to maintain prices of various audio-visual products in breach of Canadian competition laws. Price v. Panasonic Canada Inc., [2002] O.J. No. 2362 (S.C.J.). The Ontario Court of Appeal declined to certify an action brought on behalf of a group of consumers who alleged that manufacturers conspired to fix the price of iron oxide. Chadha v. Bayer Inc., supra.

75 Risks continue even if the settlements are approved in all three Courts. The "blow out" provision in s. 14.4 of the Agreement puts the settlements at risk if the Opt Out Threshold is exceeded.

76 Although the expert economic evidence applied in respect of all of the class actions, it was necessary to draw separate motion material seeking certification in each of the actions because the factual underpinnings for each were different.

77 There are about 21 firms defending in Ontario and 15 firms in British Columbia. In the context of settlement negotiations, it was necessary to deal with many of these firms.

78 The interests of each of the Defendants differed depending upon the Vitamin involved. For example, the "Degussa" Defendants settled the Niacin Actions but refused to settle the Methionine Actions.

79 The definition of class in Ontario includes Quebec corporations but not individuals. The considered view is that the class action legislation in Quebec in 1999 only allowed class actions for the benefit of individuals: Book IX, C.C.P. That is, corporations could not then be members of any Quebec class action. Consequently, the definition of the class in Ontario includes Quebec corporations. For this reason, and also because of the need to deal with Quebec Counsel, Class Counsel was expanded to include Desmeules.

80 Moreover, it was necessary to have negotiations that were really on two planes: first, with some of the Defendants and concurrently with Quebec Counsel and, then, with other Defendants.

81 When the carriage motion was decided in December, 2000, it was the first carriage motion in Ontario. Six separate groups initially sought carriage of the Vitamins class actions. Ultimately, the Court gave carriage to Strosberg and Siskinds.

82 In Quebec, similar jockeying went on. Initially, there was a dispute between Desmeules and the other Quebec law firms about who would have carriage of which Vitamin action in Quebec. Ultimately, all plaintiffs' counsel agreed to cooperate, but this took substantial time and effort on Class Counsel's part.

83 Mr. Perry Borden Q.C. was one of the counsel in Ontario seeking carriage of the Vitamins class actions on behalf of retail purchasers or individual consumers. The affidavit of Ms. Patricia A. Speight of the Strosberg law firm, dated February 28, 2005, sets forth the history of the Borden

court proceedings. Although other potential plaintiffs ceased their involvement after this Court's decision in respect of the carriage motion in favour of the present Class Counsel and consequential order dated December 4, 2000 (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2000] O.J. No. 4594, supra), Mr. Borden's clients did not.

84 Mr. Borden has represented a series of persons seeking to commence a class action on behalf of retail purchasers. The putative representative plaintiff Horvath, represented by Mr. Borden, initially appealed the carriage order to the Court of Appeal. She abandoned her appeal on a without costs basis and Class Counsel state they anticipated that there would be no further proceedings.

85 However, Mr. Borden then subsequently appeared on behalf of other individuals, being Messrs. Curran, Webster, Nightingale and Soderstrom, seeking to commence a new class action relating to retail purchasers. The motion for leave to commence a new action was dismissed by this Court September 14, 2001 (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche, [2001] O.J. No. 3682) and the appeal of this order was quashed by the Court of Appeal May 14, 2002 (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2002] O.J. No. 2010).

86 Leave to appeal was also sought by Mr. Borden in Divisional Court with several appearances in the fall of 2002, and a lengthy saga involving a multitude of proceedings, as set forth in Ms. Speight's affidavit, ensued, which proceedings are as yet incomplete.

87 Class Counsel say that they have expended in excess of $250,000 in the value of their time in dealing with Mr. Borden's attempts to seek leave on behalf of his clients to commence actions on behalf of retail purchasers. I agree with the submission of Class Counsel that they could not reasonably have foreseen these continuing collateral attacks on their authority to prosecute the class actions following upon this Court's decision in respect of the carriage motion December 4, 2000.

88 The following are reportedly the outstanding costs orders in favour of the plaintiffs relating to the interventions of Mr. Borden's clients:

(a) $10,000, inclusive of GST and disbursements, plus interest payable at the rate of 6% per annum, as a result of the dismissal of the leave application on September 14, 2001;
(b) $10,000 as a result of the Court of Appeal quashing the appeal of the September 14, 2001 order on May 14, 2002;
(c) $3,500 as a result of the November 4, 2002 order dismissing the motion for leave to appeal the September 14, 2001 order to the Divisional Court;
(d) $17,500 plus disbursements of $1,637.01, plus GST as a result of the November 7, 2003 decision of Madam Justice McFarland; and
(e) an amount, estimated by Class Counsel to be about $25,000, to be determined at a hearing scheduled for April 8, 2005, as a result of the August 21, 2003 order by the Divisional Court dismissing the motion for an order setting aside the November 4, 2002 order.

89 On August 18, 2003, Mr. Curran paid $20,000 into court in partial satisfaction of the costs awarded against him. These monies have not yet been paid out.

90 On April 8, 2005, the Divisional Court is scheduled to hear and determine the issue of costs as a result of its August 21, 2003 order. That is, the court will decide whether or not Mr. Borden's

client and/or Mr. Borden must pay the costs of the appeal. Class Counsel estimate that the Divisional Court will fix costs in an amount of about $25,000.

91 Mr. Borden commenced yet another new, pending application February 23, 2005 on behalf of Mr. Lars Soderstrom seeking to advance a claim on the basis of an alleged infringement of the Canadian Charter of Rights and Freedoms.

92 The above proceedings relating to Mr. Borden's clients have been collectively referred to herein as "the Borden court proceedings." In my view, given the very exceptional circumstances of these continuing proceedings, it is reasonable that any recovery of costs in respect of the Borden court proceedings by Class Counsel should fairly go to Class Counsel, as requested, without reduction to the quantum of fees otherwise awarded to Class Counsel by the motion at hand in achieving a settlement.

93 Class Counsel and The Cuneo Law Group obtained an order from Hogan J. granting the plaintiffs leave to intervene in the Niacin litigation pending in the District of Columbia (In re Vitamins Antitrust Litigation, 2001 WL 34088808). However, Hogan J. deferred his ruling on whether to allow Class Counsel to participate in the deposition and have access to documentary productions until authorized by the Ontario Court.

94 Some Defendants then sought an order preventing or enjoining plaintiffs' access to the Niacin productions and depositions in the U.S. No such order had ever before been argued. By reasons released on January 26, 2001, this Court dismissed the motion, stating that there was "no consequential unfairness to the defendants" if the plaintiffs were given the access they sought to documents and depositions (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2001] O.J. No. 237).

95 Some of the Defendants challenged the jurisdiction of the Ontario Court in some of the Ontario Actions. Counsel from Siskinds and Camp attended in the United States and Europe for the purposes of cross-examinations. On January 28, 2002, this Court dismissed the jurisdiction motions (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2002] O.J. No. 298). This Court held that it had jurisdiction over the Ontario Actions and that Ontario was the forum conveniens.

96 The degree of success achieved is a relevant consideration in assessing whether the fees sought by counsel are fair and reasonable. Total recovery or the nature of payment is not the only criterion on which to judge the settlement. A court should also give weight to the relative ease or difficulty of access to the benefits achieved through the settlement for class members. Parsons, supra, at 289; Gagne, supra, at 424; Roberts v. Morana (1998), 37 O.R. (3d) 333 (Gen. Div.) at 343, aff'd (2000), 49 O.R. (3d) 157 (C.A.).

97 Class Counsel estimate that it would cost another $3,000,000 to prosecute the class actions to trial if the settlements were not approved. In such event, it is estimated it would take another three to five years before the class members might gain any compensation through a favourable result at trial.

98 The overall settlement is based upon total damages of $140,676,928 (inclusive of interest). It is estimated the Administrator will have about $100,000,000 (after deduction for Settlement Credits) in its hands by the time of distribution.

99 The amount of this settlement is the largest in Canadian legal history for price-fixing. It provides an expeditious claims process for a large number of Direct Purchasers who will receive the amount the Administrator calculates as due, unless a Direct Purchaser specifically disagrees.

100 Class Counsel proposes a plan of distribution which fairly deals with all members of the classes. The constituent Funds achieve this result. The cy-près distribution protocols and governing rules developed are precise and detailed. The precise formulation of this settlement "demonstrated ingenuity and imagination" in the face of "real and substantial risk." Roberts, supra, at 343.

101 The cost of prosecuting an individual action would be beyond the financial capability of most class members except for substantial Direct Purchasers. The disposition of these class actions through the overall settlement achieved represents an exemplary example of the public policy objective underlying the CPA of deterring wrongful conduct and achieving behaviour modification in the public interest. Put otherwise, public regulation by government authorities is often ineffectual. By encouraging the private sector of class action attorneys to police such behaviour through civil class actions (with the inducement of sizeable legal fees when successful) the realization of the public policy objectives of the regulators is enhanced. Wrongful anti-competitive behaviour through price-fixing in the marketplace is discouraged. Meritorious claims that would otherwise go uncompensated are effectively dealt with.

102 IDRC, now known as Micronutrient Initiative, is a Crown corporation. It was the only Intermediate Purchaser which commenced an individual court action. IDRC contracted with Accucaps, a Direct Purchaser, to put vitamins into capsules. IDRC then distributed these vitamin capsules, without charge, through UNICEF to persons in Third World countries. IDRC was not a typical Intermediate Purchaser because it was involved in a unique, non-profit situation.

103 The recovery of at least $11,400,000 for each of the Intermediate Purchaser Fund (see Schedule F to the Agreement) and the Consumer Fund (Schedule G to the Agreement) compensates these class members by means of a cy-près distribution.

104 There are two factors specifically enumerated in the CPA to determine a multiplier. The first factor, specified under clause 33(7)(b), is the risk which class counsel "incurred in undertaking and continuing the proceeding." The second factor, set out under subsection 33(9), is "the manner in which the solicitor conducted the proceeding." Also to be considered is the degree of success achieved by counsel, either at trial or through settlement of the proceeding.

105 In Gagne at 422 to 424, Goudge J.A. reasoned that a multiplier is a necessary ingredient if the CPA is to successfully achieve its goal of providing access to justice for claimants otherwise excluded.

106 In Gagne, the Court concluded that the determination of a multiplier is an art, not a science. All relevant factors must be weighed in order to determine an appropriate multiplier. Goudge J.A. said at 425:

> 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 rea-

> sonable 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.

107 Using a percentage calculation in determining class counsel fees properly places the emphasis on the quality of representation, and the benefit conferred to the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours." In Re Warner Communications Securities Litigation, 618 F. Supp. 735 at 747 (D.C.N.Y. 198); see also Endean, supra, at para. 74.

108 Class Counsel intend to continue to prosecute the Methionine Actions in respect of "Non-Settling Defendants." The existing Methionine Fund of $6,000,000 created as the result of a Settling Defendant is to be held for the benefit of the Settlement Class Members who are Direct Purchasers or Distributors of Methionine and shall be paid as the Court directs on later motions brought by Class Counsel.

109 Class Counsel have advised that they may, at some future time, ask this Court to approve an amendment to the fee agreement with the plaintiffs in the Methionine Actions to provide, among other things, that if the plaintiffs in the continuing Methionine Actions become liable for costs, that the costs will be paid out of the Methionine Fund.

110 As I have discussed above, I agree that Class Counsel have achieved remarkable results and a successful overall settlement. They are experienced, imaginative, thorough and diligent counsel. However, they embarked upon this venture on the basis of contingency agreements providing for, inter alia, 15% of the recovery. Class Counsel throughout the submissions and in their factum have emphasized that their claim to fees is justified in large part on the basis of the significant risk as to whether they might be successful ultimately and what might be recovered. With respect, in my view, that risk must properly continue in the determination of their ultimate fees. The risk of a shortfall in the anticipated recovery having an adverse impact upon fees (because of the 15% contingency fee arrangement) should not be shifted to class members in the event there are opt outs from the Settling Plaintiff classes.

111 Class Counsel calculate their requested fees in the chart they prepared as part of their factum by emphasizing that they would receive not more than what they agreed upon with their clients through the contingency agreements, i.e. 15% of the recovery. Yet the regime in s. 18.1 is drafted to guarantee them about $15 million in Class Counsel Fees so long as the Agreement is not terminated due to the Opt Out Threshold being exceeded and Settling Defendants then making the election to terminate the Agreement. In effect, the s. 18.1 regime transfers the risk of opt outs reducing the recovery below $100 million (but not being sufficient to trigger the termination) to the class members and means that Class Counsel Fees might rise beyond 15% of the actual recovery.

112 It was argued in the course of submissions that the implicit multiplier of about 2.26 upon the base fee is modest and a higher multiple would be supportable. In my view, the implicit multiplier applied to the base fee is one standard to measure whether the fees sought are fair and reasonable. The $15 million sought for fees is reasonable if the actual recovery is $100 million. In my view, the agreed-upon standard for fees of 15% of actual recovery as set forth in the bargained-for

contingency agreements governing the Ontario actions must properly set a ceiling. Moreover, it is an appropriate ceiling. The results achieved, i.e. the actual recovery, is a seminal factor in determining fair and reasonable fees in any class action settlement.

113 In my view, the Class Counsel Fees should be limited to being not greater than 15% of the actual recovery through the overall settlement. If the actual recovery is more than $100 million, counsel may receive slightly more than $15 million in Class Counsel Fees (but subject to the agreed-upon cap with the Settling Defendants in s. 18.1(2) of $18 million (plus $75,000 in respect of the trailing, additional settlement agreements), less Administration Expenses, disbursements and applicable taxes). If their estimate of a recovery of $100 million proves accurate they will receive about $15 million. If there are opt outs such that the actual recovery falls below $100 million then they will receive less than $15 million in fees. Moreover, there should not be payment of fees until the actual recovery is known with certainty and precision.

114 Taking all factors into consideration, in my view, and I so find, Class Counsel Fees to a ceiling of 15% of the actual recovered amount for the class members (i.e. after the impact of any opt outs) is fair and reasonable. For the reasons given, it is stipulated that the s. 18.1 regime is to operate to accord with these Reasons for Decision. Considering all relevant factors, in my view, and I so find, the quantum of fair and reasonable Class Counsel Fees through the overall settlement at hand is fixed with a ceiling of 15% of the settlement funds or monetary award actually recovered.

DISPOSITION

115 For the reasons given, subject to the Agreement not being terminated in accordance with its provisions, but rather coming into full force and effect, an order shall issue that accords with these Reasons for Decision:

(1) declaring that an amount up to a ceiling of $18,075,000, calculated in accordance with subparagraph (2), for Class Counsel Fees (plus qualifying disbursements and applicable taxes) and Administration Expenses relating to the overall settlement of the subject class actions is fair and reasonable;

(2) declaring that Class Counsel Fees shall be calculated and paid, after deduction for the payment of qualifying disbursements, applicable taxes and Administration Expenses, on the basis of being limited to 15% of the actual recovery of monies for class members through the overall settlement; and

(3) declaring that it is fair and reasonable that Class Counsel are entitled to all costs and interest, if any, recovered in the Borden court proceedings and the methionine jurisdiction motion, in addition to the amount received under subparagraph (1) as calculated under subparagraph (2).

P.A. CUMMING J.

* * * * *

Corrigendum
Released: April 5, 2005

Minor changes have been made to the chart in para. 35 to achieve greater clarity and accuracy, with follow-on consequential minor changes in some amounts and percentages seen in paragraphs 36, 39,

41, 42, 46, (also with the added explanatory note therein in brackets), 48, 50 and 52. The words "and the Methionine jurisdiction motion" have been added in paragraphs 43 and 115 for greater certainty. Also, in paragraph 112, 1st line, the multiplier reference has been changed to 2.26.

cp/e/qlalc/qlhcs/qlhcs/qlkjg/qlhcs

Case Name:

Garland v. Enbridge Gas Distribution Inc.

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
Gordon Garland, Plaintiff, and
Enbridge Gas Distribution Inc. (formerly the Consumers Gas Company Limited), Defendant

[2006] O.J. No. 4907

153 A.C.W.S. (3d) 785

56 C.P.C. (6th) 357

2006 CarswellOnt 9605

Court File No. 94-CQ-50711

Ontario Superior Court of Justice

M.C. Cullity J.

Heard: November 21, 2006.
Judgment: December 8, 2006.

(54 paras.)

Civil procedure -- Parties -- Class or representative actions -- Representative plaintiff -- An order certifying the class proceedings and approving the settlement would issue when the final amount of compensation to be paid to the representative plaintiff Mr. Garland had been determined -- The class counsel fee of $10,130,469 was approved, and $25,000 was an amount that would represent fair and reasonable compensation for the representative plaintiff's exceptional contribution.

Civil procedure -- Settlements -- Approval -- An order certifying the class proceedings and approving the settlement would issue when the final amount of compensation to be paid to the representative plaintiff Mr. Garland had been determined -- The class counsel fee of $10,130,469 was approved, and $25,000 was an amount that would represent fair and reasonable compensation for the representative plaintiff's exceptional contribution.

Legal profession -- Barristers and solicitors -- Compensation -- Measure of compensation -- An order certifying the class proceedings and approving the settlement would issue when the final amount of compensation to be paid to the representative plaintiff Mr. Garland had been determined -- The class counsel fee of $10,130,469 was approved, and $25,000 was an amount that would represent fair and reasonable compensation for the representative plaintiff's exceptional contribution.

Professional responsibility -- Professions -- Legal -- Lawyers -- An order certifying the class proceedings and approving the settlement would issue when the final amount of compensation to be paid to the representative plaintiff Mr. Garland had been determined -- The class counsel fee of $10,130,469 was approved, and $25,000 was an amount that would represent fair and reasonable compensation for the representative plaintiff's exceptional contribution.

The parties in this class proceeding brought a motion approving a settlement -- After an initial hearing the decision was deferred to allow the parties to consider amending the minutes of settlement in certain respects -- Now, the ultimate question to be decided was whether the fee the court was asked to approve exceeded an amount that would fairly and reasonably compensate counsel for the services they have provided to representative plaintiff and the class -- HELD: An order certifying the class proceedings and approving the settlement would issue when the final amount of compensation to be paid to the representative plaintiff Mr. Garland had been determined -- If the net savings to the class were added to the gross recovery under the settlement, the class counsel fee of $10,130,469.20 requested would be approximately 26.7% of the resulting amount -- On that basis, even if the court were to ignore the benefit to customers of Enbridge who were not members of the class, the fee was not excessive and would be approved -- The court found that the representative plaintiff Garland did contribute to the success of the proceeding to an extent that exceeded significantly what might properly have been expected of a representative plaintiff in the circumstances of this case, and $25,000 was an amount that would represent fair and reasonable compensation for his exceptional contribution.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 32, s. 33

Solicitors Act, R.S.O. 1990, c. S.15, s. 21

Counsel:

W.A. Derry Millar -- for the Moving Parties, Fraser Milner Casgrain LLP and Michael McGowan Professional Corporation

Barbara L. Grossman -- for the Moving Party/Plaintiff, Gordon Garland

John Longo -- for the Respondent/Defendant, Enbridge Gas Distribution Inc.

Sean Dewart -- for Gordon Garland in his personal capacity

REASONS FOR DECISION

1 **M.C. CULLITY J.**:-- In my endorsement released on September 25, 2006, after the initial hearing of the motion to approve a settlement of this proceeding, I deferred my decision to provide the parties with an opportunity to consider whether they wished to amend the minutes of settlement in certain respects, and to provide further information with respect to the proposed *cy pres* distribution to be administered by the United Way of Greater Toronto ("United Way"). Since then the minutes of settlement have been amended and my requests for information with respect to the proposed *cy pres* distribution have been adequately addressed. Counsel have also dispelled the concerns I expressed with respect to the method of giving notice of the settlement, and the duration of the obligation of the defendant to continue to contribute to the Winter Warmth Program under paragraph 8(f) of the proposed implementation order.

2 Submissions on the amendments to the minutes of settlement were made at a hearing on November 21, 2006.

THE PROPOSED *CY PRES* DISTRIBUTION

3 The amendments to paragraph 8(c)(iii) and 8(d), with a few minor suggestions I made at a case conference before the second hearing, have received the consent of the United Way. These relate to the distribution of surplus in any year, and the application of the funds if the Winter Warmth Program is terminated. Notwithstanding that it is prepared to accept the amendments, the United Way has expressed a preference for the original provisions of the two paragraphs which would provide the organisation with a greater degree of discretion. On this question, I am prepared to defer to the views of the organisation with respect to the most efficient method of benefiting members of the class and other members of the community in like circumstances. In consequence, I will leave it to the United Way to decide whether the original provisions, or those included in class counsel's factum after Schedule B, are to be included in the implementation order. I note that the United Way has indicated that it is not its intention to discontinue the Winter Warmth Program as long as there is a need in the community for such a program, and that - as the need for assistance from the programme far exceeds the current level of funding - it is not anticipated that, after 2007, there will be any surplus.

FEES OF CLASS COUNSEL

4 In the endorsement, I declined to approve the settlement on the ground that it made the benefits to be provided to the class conditional on the court's approval of the amount requested as fees for class counsel. I indicated that, in insisting on this condition - rather than deferring to the jurisdiction of the court to reduce the fees - counsel were improperly preferring their own interests over those of the class.

5 In an affidavit filed before the second hearing, Ms Dorothy Fong - one of the solicitors with the class counsel firms - stated that at no time did counsel insist that the condition I considered to be obnoxious was to be included in the settlement agreement. I must accept that clarification but it does not alter the fact that, in accepting the condition and insisting on it in this court, counsel were acting exclusively in their own interests at the expense of those of the class. I remain quite unconvinced by counsel's insistence that they had no option but to accept the mediator's recommendation in respect of their fees with the condition attached. The only interests affected were those of class counsel and the class, and neither the defendant, nor Mr Garland, could possibly have had any objection to the deletion of the condition in the interests of the class. The fact that the mediator's recommendation was made on a take-it-or-leave-it basis has no relevance. Settlements are made be-

tween the parties and a mediator's interests are not involved if a settlement is ultimately reached that, in some particulars, departs from the mediator's recommendations. Subject to my acceptance of Ms Fong's point of clarification, I adhere to the views expressed in the endorsement.

6 The matter is now moot because, as a consequence of my decision after the first hearing, the minutes of settlement have been amended to provide that, if the fees are reduced by the court in an exercise of its discretion, and the settlement is otherwise approved, the settlement will be binding and the amount payable to the United Way will be increased to the extent of the fee reduction.

7 It remains now to consider whether the provisions relating to the fees in the settlement, and in the 2006 agreement, should be considered to represent fair and reasonable compensation for counsel for the work they have done throughout this protracted proceeding.

1. The fee agreements

8 By way of background, the original retainer agreement between class counsel and Mr Garland provided for a fee based on a multiplier to be set by the court. There was a provisional agreement between the parties to a rather complex formula for determining the multiplier that the parties considered would be appropriate in different circumstances.

9 On October 29, 1998, shortly before the release of the decision in *Garland #1*, the original agreement was amended to substitute a fee that would be determined as a percentage of the damages and interest recovered plus 50 per cent of all party and party costs. Under this agreement - which remained in force for eight years - the solicitors would be entitled now to a fee of $5,247,500, or approximately 52 per cent of the fee they are requesting.

10 The 1998 agreement was intended to be superseded by the minutes of settlement executed on July 19, 2006 and the original retainer agreement was amended in accordance with the settlement on August 18, 2006. These documents contain the fee agreement that I am asked to approve.

2. Evidence

11 At each of the hearings, a considerable amount of time was devoted to the circumstances in which Mr Garland agreed to the fees payable pursuant to the settlement. The relevant evidence was provided in instalments by Ms Dorothy Fong - a solicitor with one of the class counsel firms - in affidavits delivered prior to the first hearing, and before the second. Further information was provided by Mr Dewart on the instructions of his client at the second hearing. After I had reserved my decision, a further affidavit was delivered by Ms Fong.

12 In view of the decision I have reached on the appropriateness of the fee, it is unnecessary to refer to the evidence in detail. In summary, it appears that discussions between class counsel and Mr Garland on the question of the fee occurred in August and December, 2005 and that, from the outset, Mr Garland agreed that the 1998 fee agreement should be revisited. He did not agree with counsel's proposal for a fee that would reflect a multiplier of 5 - or, indeed, any multiplier - and he proposed a higher percentage of recovery than that in the 1998 agreement.

13 At the time of these discussions, the parties were preparing for a mediation in an attempt to obtain a settlement of the proceedings. No agreement on an appropriate fee was reached between class counsel and Mr Garland, the question of the fee became part of the mediation and, ultimately, it was addressed in the settlement proposal put to the parties by the mediator, Mr Justice Winkler.

14 Prior to the mediation, Mr Garland had decided to accept whatever the mediator recommended. After the mediator's proposal had been received, but shortly before the deadline for its acceptance or rejection had passed, Mr Garland retained Mr Dewart to advise him in his personal capacity. Mr Dewart was not retained to advise on the question of the fees. The principal reasons for his retainer were Mr Garland's concerns to obtain compensation for his own efforts in advancing the proceeding, and with respect to certain details of the proposed cy pres arrangement with United Way. Although Mr Dewart could not remember the contents of the 1998 agreement, he assured me that he had discussed it with Mr Garland and had satisfied himself that his client was aware of his rights under it and considered the mediator's proposal to be fair and reasonable. Mr Dewart stated that his advice with respect to the 1998 fee agreement was provided in the context of the leverage it might give Mr Garland on the matters that were his principal concern, and for which Mr Dewart had been retained.

3. Sections 32 and 33 of the CPA

15 Sections 32 and 33 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") are central to any consideration of a motion to approve class counsel fees. The sections read as follows:

> 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.
>
> (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.
>
> (3). Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.
>
> (4). If an agreement is not approved by the court, the court may,
>
> (a) determine the amount owing to the solicitor in respect of fees and disbursements;
> (b) direct a reference under the rules of court to determine the amount owing; or
> (c) direct that the amount owing be determined in any other manner.
>
> 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 or a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

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

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

(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; "multiplier" means a multiple to be applied to a base fee.

(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.

(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. ...

(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, ...

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

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

16 Section 32 is concerned with fee agreements - contingent or otherwise - in general. Section 33 is confined to a particular type of contingent fee agreement: one that contemplates, and permits, the solicitor to make a motion to the court to have his or her fees increased by a multiplier. The jurisdiction under the section appears to be premised and conditioned on the existence of such an agreement.

17 Section 32 has a wider application. It does not, in its terms, authorize fee agreements. These were always permitted at common law and, since 1909, they have been authorized specifically in sections 15-32 of the *Solicitors Act,* R.S.O. 1990, c. S.15 and their predecessors. Following the decision of the Court of Appeal in *McIntyre Estate v. Ontario (Attorney-General)* (2002), 61 O.R. (3d) 257, the sections were expanded to confirm that contingency fee agreements are permitted in civil

proceedings in Ontario. This development was, of course, preceded by the enactment of sections 32 and 33 of the CPA.

18 Some questions of statutory interpretation that arise under sections 32 and 33 have been considered in this court. In particular, in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (G.D.) and *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (G.D.), it was held that contingency fee agreements that could be approved by the court were not limited to those that contemplated the application of a multiplier to a base fee. In *Nantais,* Brockenshire J. held that an agreement that provided for a lump sum plus any award of party and party costs could be approved pursuant to section 32, and, in *Crown Bay*, Winkler J. followed that decision in approving an agreement for a fee calculated as a percentage of the settlement proceeds including costs.

19 If the matter were one of first impression, I would interpret sections 32 and 33 as not intended to displace the general principles and statutory provisions that govern solicitor and client costs, except when a solicitor has moved for approval of an agreement that satisfies the conditions of one of those sections. I would then be inclined to interpret section 32(4) as limited to cases where, on a motion by a solicitor pursuant to section 32(2), the court declines to approve an agreement. In the absence of such a motion, the provisions of the *Solicitors Act* would apply including section 21 which applies to fee agreements in general and reads as follows:

> 21. Such an agreement excludes any further claim of the solicitor beyond the terms of the agreement in respect of services in relation to the conduct and completion of the business in respect of which it is made, except such as are expressly excepted by the agreement.

20 The position at common law, and that under the *Solicitors Act,* are discussed in *Clare v. Joseph*, [1907] 2 K.B. 369 (C.A.) and *Fitch v. Fort Frances Pulp and Paper Co.* (1927), 61 O.L.R. 252 (App. Div.). In *Clare*, at page 376, Fletcher Moulton L.J. stated:

> Agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his clients expense. But when it appeared that the agreement was favourable to the client, the courts often held a solicitor to his bargain, for there was no ground in equity why they should be suspicious of a bargain of that kind.

21 In *Fitch*, Middleton J.A. commented:

> As we understand the decisions of the Court of Appeal in *Clare v. Joseph*, [1907] 2 K. B. 369, and in *Gundry v. Sainsbury*, [1910] 1 K.B 645, it is now established that the provisions of the Solicitors Act in question were intended to confer upon

> the solicitor the right to make an agreement with his client if he complies with the terms of the Act and to invalidate against the solicitor any agreement that does not comply with the provisions of the Act. But the statute does not take from the client the right to rely on any parol agreement which the solicitor may make.

22 The interpretation of the CPA that I would prefer is, I believe, supported by the fact that section 32 of the CPA does not appear to deal with the possibility that a client, and not the solicitor, might wish to rely on a fee agreement.

23 It is my understanding that the above interpretation is not consistent with the practice of the court and the understanding of the profession that has developed under the CPA. It appears to be accepted that a motion can be made under section 32(4) even where the court has not been asked to approve a fee agreement: see, for example, *Hislop v. Attorney General of Canada* (2004) 3 C.P.C. (6th) 42 (S.C.J.). On this interpretation - which I believe I should accept and apply - the section would, to at least some extent, replace the common law and statutory rules governing solicitor and client costs in other proceedings with a general statutory discretion. Given the recognition of an inherent jurisdiction to approve a bonus in *Desmoulin v. Blair* (1994), 21 O.R. (3d) 217 (C.A.) and *Walker v. Ritchie*, [2006] S.C.J. No. 45, in cases where there is no fee agreement in existence, there may be no significant difference under either approach as to the powers of the court, and the facts that should influence its decision. Where, however, there is such an agreement the difference could be important if it is the client and not the solicitor who wishes to rely on the agreement. It has not, to my knowledge been held that - contrary to the provisions of section 21 of the Solicitors Act - the discretion under section 32(4) would permit the court to approve a fee in excess of that provided in such an agreement.

24 The scope of section 32(4) bears directly on the degree of leverage class counsel will have when an attempt is made, as here, to renegotiate a contingent retainer agreement after the contingent facts have occurred. In such negotiations the question whether the court has power to override the agreement - may be crucial.

4. Negotiation of the 2006 fee agreement

25 The question of interpretation is relevant to the extent to which Mr Garland was informed of the status of the 1998 agreement during the negotiations with class counsel with respect to the possible amendment of the agreement. While Mr Dewart informed me that he could not remember turning his mind to the provisions of the CPA when he was advising Mr Garland, Mr Millar was emphatic that section 32(4) gave the court power to override the 1998 fee agreement and to approve a higher fee in the exercise of its discretion. It has been a concern to me that the evidence of the negotiations between Mr Garland and class counsel was more than consistent with the possibility that they were conducted on the basis that counsel had a right to request the court to override the provisions of the 1998 fee agreement pursuant to section 32(4) of the CPA simply on the ground that a higher fee would be more reasonable. I consider that to be a doubtful proposition but, if it is correct, I cannot believe that a court should be anything but extremely reluctant to relieve solicitors from the terms of retainers they had freely accepted, if the client wished to enforce them. In attempting to negotiate a fee greater than that they had bargained for in the 1998 contingency fee agreement, counsel were not seeking merely to negate the terms of the agreement - they were actually attempting to obtain additional compensation for the fact that contingencies contemplated in, and to be compensated generously under, the agreement had materialised. The possibility that the litigation

would be protracted, and the time expended underestimated, were two of the contingencies. In my opinion, it would be inconsistent with the grounds on which contingent fee agreements are justified to accept the possibility that, on a motion by counsel in circumstances such as these, the court may override their provisions without the consent of the representative party. At the very least, the existence of such an agreement must surely be a highly important factor to be considered in the exercise of the discretion conferred in section 32(4).

26 I was particularly concerned with Mr Garland's understanding of the legal position when counsel attempted to obtain his agreement to replace the provisions of the 1998 fee retainer with, initially - according to Ms Fong's first and second affidavits - a multiplier of 4.8 to be applied irrespective of the amount recovered from the defendant. In their factum, counsel stated that there would have been no settlement if they had insisted on "their right to pursue a fee equivalent to a multiplier of 4 or 4.8." (Correspondence filed subsequently discloses that, as late as December 21, 2005, counsel were seeking Mr Garland's agreement to a multiplier of 5.)

27 To some extent, but not entirely, my concerns were removed by the further affidavits filed before, and after, the second hearing and by the very helpful submissions of Mr Dewart who represented Mr Garland on each occasion. In particular, it is clear that, for at least several months while the parties were preparing for a mediation, Mr Garland had accepted that the manner of determining fees in the 1998 agreement would no longer provide fair and reasonable compensation for counsel.

28 I continue to have some reservations about Mr Garland's understanding of the limited role of the mediator and his decision, made in advance, to abide by whatever recommendation was made - a decision that ultimately led him to agree to a fee of approximately twice the amount that, a few months earlier, he had considered to represent fair and reasonable compensation. His final acceptance of the mediator's recommendation occurred at a time when his principal concerns related to the compensation he wished to receive and other aspects of the settlement for which Mr Dewart was retained, and on which Mr Garland was evidently not prepared to rely on the advice of class counsel. I am concerned that the dynamics of the settlement discussions and the mediation of the issues with the defendant may have had a significant influence on Mr Garland's decision with respect to the fees. Having failed to reach agreement prior to the mediation, I believe that counsel should have insisted that the question be postponed until after issues with the defendant had been resolved, and the maximum amount it was to pay had been decided. Mr Garland could not subsequently have been compelled to enter into a new fee agreement that, in his opinion, would unduly reduce the amount to be distributed *cy pres*. If he had been given to understand, and was concerned, that, in the absence of a new agreement, the court could override the terms of the 1998 retainer agreement - a proposition that I have described as doubtful - he was in my opinion under a misapprehension about the likelihood that it would do so without his consent, and about the responsibility of the court to protect the interests of the class.

29 Mr Garland supports the motion to approve the fees determined pursuant to the settlement, and has not resiled from his opinion that a fee calculated in accordance with the 1998 agreement would not provide counsel with fair and adequate compensation. In view of his position on the motion, I do not think I could properly hold counsel to the terms of the 1998 fee agreement. In these circumstances, it appears that, under the existing practice of the court - and whether or not approval of the 2006 agreement might be withheld in the light of the considerations I have mentioned - the ultimate question to be decided is whether the fee I am asked to approve exceeds an amount that would fairly and reasonably compensate counsel for the services they have provided to Mr Garland

and the class. Despite this, I have mentioned the above concerns because, in my judgment, the submissions made by class counsel at the first hearing, and those of Mr Millar at the second, did not give sufficient recognition to the nature and extent of the conflicts of interest that inevitably arise - and the implications of counsel's fiduciary responsibilities - when they are seeking to reopen a binding fee agreement during the course of settlement discussions with another party. I refer to the comments of the Ontario Law Reform Commission in its *Report on Class Actions* (1982), at pages 729-731. The interests of the class must be paramount when counsel are engaged in negotiations to settle the issues with an opposing party. In my opinion, they should not permit their personal interests - and particularly those that are adverse to the interests of the class - to be involved in the negotiations. This is simply an application of the long-established rule that a fiduciary is not permitted "to put himself in a position where his interest and duty conflict": *Bray v. Ford*, [1896] A.C. 44 (H.L.), at page 51.

30 I should note that the comments made in the immediately preceding paragraphs, and earlier in these reasons, are intended to indicate my disagreement with legal submissions advanced by, and on behalf of, class counsel and my concern that they may reflect the approach taken by them when they were seeking to renegotiate the fee agreement with Mr Garland. They are not intended to reflect on their professional integrity, or to suggest that any collusion - or appearance of collusion - occurred or arises in the circumstances of this case: see the comments of Cumming J. in *Directright Cartage Ltd. v. London Life Insurance Co.*, [2001] O.J. No. 4073 (S.C.J.), at paras. 63 and 64.

5. Approval of the fee

31 Under the settlement, the gross amount recovered from the defendant will be $22 million. This amount comprises $19,175,000 for damages and interest, $2 million party and party costs and $825,000 in costs already paid by the defendant. If the provisions for fees in the settlement are approved, and if Mr Garland is to receive compensation out of the amount approved as the fees of class counsel, they project that the application of the $22 million would be as follows:

Cy pres distribution	$ 9,000,000
Class Proceedings Fund levy	$ 1,917,500
Repayment of disbursements to Class Proceedings Fund	$ 311,825.30
Disbursements and GST not paid by Class Proceedings Fund	$ 31,050.55
Counsel fees, (including costs and compensation for the	

representative plaintiff)	$10,130,469.20
GST	$ 609,154.95

$22,000,000

32 In determining the fee that would provide class counsel with fair and reasonable compensation, I have no hesitation in accepting their submissions with respect to the difficulty of the litigation, and the considerable success they achieved before the settlement discussions began in 2004. While managing to defeat motions for summary judgment at the final appellate level might not always be considered to be an overwhelming victory, there is no doubt that it was a highly significant - and, most probably, a crucial - factor in obtaining the settlement of the proceeding. Counsel's contribution to the success achieved was notable and in view of this, the degree of success, their perseverance and their initial acceptance of a contingent fee retainer, there is no doubt in my mind that they should fairly be compensated at a level significantly in excess of an amount that might be considered to be a reasonable base fee. Notwithstanding this conclusion, it was my initial impression that a fee that exceeded the amount to be applied for the benefit of the class, and that constituted 46% of the gross recovery, was too large.

33 In the submission of counsel, it would be inappropriate - in the special circumstances of this case - to look merely at the amounts payable under the settlement in measuring the total financial benefits obtained for the class. In her first affidavit, Ms Fong referred to, and included as an exhibit, a letter from Professor Adonis Yatchew, of the Faculty of Economics at the University of Toronto. In the letter Professor Yatchew provided estimates of the present value of the amount saved by class members between 2002 and September 2006 and thereafter over various time frames ranging from 20-30 years. This saving resulted from the reduction of late payment penalties from 5% to 2% in the first of those years and the abolition of illegal penalties in October 2005. On the basis of his calculations, he concluded that the net saving to class members from the abolition of the payments was in the range $73 million to $107 million.

34 I accept counsel's submissions, and Professor Yatchew's methodology, with respect to the savings achieved during the class period that ended on October 1, 2005. Only persons who incurred penalties during that period were members of the class. Other persons who would have incurred late payment penalties if they had not been abolished are not members of the class although they are undoubtedly persons that the action was intended, and effective, to benefit. Behavioural modification is one of the goals of class proceedings but members of the public who benefit from it - even those who but for the class-closing date would have been members of the class - are not thereby elevated to the status of class members.

35 I have no difficulty in accepting on the facts of this case, that the degree of behavioural modification achieved is one of the factors that could properly influence the size of an acceptable fee, but I do not accept that a dollar value that might be placed on the benefit obtained by other customers of Enbridge can be transmuted into an amount recovered for the benefit of the class.

36 The savings realised before October 2, 2005 were those of class members. When Professor Yatchew's estimates are adapted to accommodate the cut-off date for class membership, the present value of such benefits would be in the vicinity of $32 million. On the basis of what counsel submitted, and the evidence suggests, are reasonable assumptions, the value of the net benefit would be approximately one-half of that amount.

37 The net savings in the period 2002 to October 1, 2005 were a direct result of the decisions of the Supreme Court of Canada and left class members with funds they would otherwise have paid to the defendant. While a reduction in the damages a person would otherwise have suffered from illegal activities might not ordinarily be considered to be tantamount to an amount recovered, I believe it might properly be so regarded for the purpose of attempting to measure the degree of success achieved, and the amount that would be fair and reasonable compensation for counsel whose efforts were instrumental in obtaining it. The position should be no different than if the defendant had not reduced the penalties in the period 2001 to October 2005 and an additional amount of $16 million had been provided for the class under the settlement.

38 If the net savings to the class are added to the gross recovery under the settlement, the fee of $10, 130,469.20 requested would be approximately 26.7% of the resulting amount. On that basis - and even if I were to ignore the benefit to customers of Enbridge who were not members of the class - the fee is not excessive and will be approved. I would not have approved it if I had considered that the sole measure of the success achieved was the gross recovery of $22 million under the provisions of the settlement.

39 The fee would represent an application of a multiplier of 2.78 to the amount that I would determine to be a reasonable base fee if section 33 were applicable. For this purpose, I have reviewed the dockets that record the time expended by counsel since the commencement of the proceedings on April 25, 1994. The time, and the work done, is certainly prodigious as is to be expected in view of the course of the proceedings. For most of that period, however, two firms acted as co-counsel and I am satisfied that - almost inevitably - some otherwise unnecessary duplication of work occurred. The dockets are replete with references to members of one firm reviewing e-mails and material from the solicitors in the other firm. I am also not satisfied that - with the knowledge that the fee would not be charged to their client - counsel were entirely successful in resisting the temptation to be less than completely scrupulous with their time as the parties began to move towards a settlement of the proceeding. In the two years immediately leading up to the settlement, $1,354,122 of time were docketed as compared with $2,682,385 in the preceding 10 years, which included the appeals to the Court of Appeal and the Supreme Court of Canada. I accept that the issues, and the research required, on the question of damages were complex but I am not satisfied that all of the time docketed could properly be charged to a client. The determination of a reasonable base fee is difficult in a case like this. Although I do not doubt that the dockets record time actually spent, I am of the opinion that a reasonable base fee would be $3,632,857 - reflecting a reduction of 10 per cent from the amount recorded.

REPRESENTATIVE PARTY COMPENSATION

40 In the earlier endorsement I described this as one of the exceptional cases in which a representative party should receive compensation for his contribution to the success of the litigation. The circumstances in which compensation should be allowed out of settlement proceeds were most fully discussed in *Windisman v. Toronto College Park Ltd*, [1996] O.J. No. 2897 (G.D.) and *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.). Although the amount requested in this

case would reduce the fees approved for class counsel, Mr Dewart relied on the principles stated in these cases, and did not suggest that any other approach should be adopted.

41 In *Windisman,* Sharpe J. awarded a representative plaintiff $4,000 out of the net recovery for the class. His reasoning appears in the following paragraph:

> Ordinarily, an individual litigant is not entitled to be compensated for the time and effort expended in relation to prosecuting an action. In my view, there is an important distinction to be drawn with reference to class proceedings. The representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will, if the action is successful, benefit by virtue of the representative plaintiff's effort. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, 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 her class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such award should not be seen as routine. The evidence here is that Ms Windisman took a very active part at all stages of this action. It seems clear that the case would not have been brought but for her initiative. She assumed the risk of costs and she devoted an unusual amount of time and effort to communicating with other class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding.

42 In *Windisman*, the gross recovery for the plaintiff class was $2.6 million including prejudgment interest. In *Sutherland*, the recovery was $2.25 million and the representative plaintiffs had requested $80,000 to be paid out of the amount recovered. In distinguishing *Windisman,* Winkler J. stated:

> In the present circumstances the work of the Representative Plaintiffs was unnecessary to the preparation or presentation of the case. Indeed, their work did not begin until after the settlement had been structured. Their work did not result in any monetary success for the class. If they were to be compensated in the manner requested they would be the only class members to receive any direct monetary compensation. The entire settlement is in the form of Cy-pres distribution. The representative plaintiffs are seeking some $80,000 in total which is to be deducted from the settlement. By way of contrast, in Windisman, the representative plaintiff took an active part at all stages of the proceeding, the case would not have been brought except for her initiative, she assumed the risk of costs, and devoted an unusual amount of time communicating with class members and assisting counsel. The class members received a direct monetary benefit due in part to her efforts.
>
> While the work of the representative plaintiffs is commendable, to compensate them for the work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class

> member would be contrary to the precept of the Cy-pres distribution in particular and to a class proceeding generally. Compensation for representative plaintiffs must be awarded sparingly. The operative word is that the functions undertaken by the Representative Plaintiffs must be "necessary", such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that could be purely compensatory on a quantum meruit basis. Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. This request is denied.

43 My understanding of the analysis in those cases is that compensation is to be awarded only where the representative's contribution is greater than that which would normally be expected of a representative party in the circumstances of the case. Such a contribution must have related to functions necessary for the preparation or presentation of the case and have resulted in a direct financial benefit of the class. It will often be indicated - and, perhaps, usually - by an extraordinary commitment of time and effort, or the application of special expertise.

44 It may also be relevant, I think, if the contribution is referable to the representative's obligation to fairly and adequately represent the class rather than, for example, to time spent considering and communicating with counsel with respect to the legal issues and tactics and strategies in the litigation. Finally, I note that each of the learned judges would attribute importance to the initiative shown by the representative party in connection with decisions to commence and continue the proceedings. All these factors, in my opinion, must be weighed in the light of the benefit that the class received from the representative's contribution.

45 In the light of the above considerations, Mr Garland has, in my judgment, made out a strong case for compensation. He took the initiative in seeking legal advice with respect to the legality of late payment penalties and in instructing counsel to commence the proceedings. He was instrumental in keeping the legal team together when members of the class counsel sought to withdraw from the proceedings on the ground of a business conflict, and he accepted a large part of the responsibility for communicating with class members personally or through interviews with representatives of the media. He also played an active part in the settlement negotiations and, in particular, in obtaining agreement to the nature and details of the *cy pres* distribution - one of the matters for which he found it desirable to retain separate counsel.

46 The litigation was commenced, and continued, by Mr Garland in the public interest and, I am satisfied, that throughout it his primary concern has been to protect and serve the interests of the class. It was on this ground that he firmly opposed counsel's proposal to replace the method of calculating their fee under the 1998 fee agreement with the application of a multiplier to be applicable irrespective of the gross recovery.

47 The more difficult question relates to the amount of the compensation that should be allowed. Mr Garland has kept track of his time over the past 12 years. His records - in the form of dockets - disclose that he has spent 1584 hours and incurred expenses of $464.93. His counsel, Mr

Dewart, has estimated that, if Mr Garland had billed out his time to the clients of his consulting practice, he would have earned an additional income of between approximately $102,960 and $134,640. He seeks $95,000 in compensation to be paid out of the amount I have approved as the fees of class counsel.

48 There is no precedent for an award of such an amount in this jurisdiction. That, of course, is not determinative as the extent of Mr Garland's special contribution may well be unprecedented. The largest award to my knowledge was the $15,000 approved for one of the plaintiffs in *Hislop* where the claims were said to have a potential value of $81 million but the duration of the proceedings was relatively short.

49 On the basis of my review of Mr Garland's dockets, and the principles to which I have referred, I would have no difficulty in finding that an order for compensation of $15,000 could be justified. Without further elaboration, the dockets which record substantial amounts of time devoted to meetings, and phone calls, with class counsel are equivocal and insufficient to justify the addition of any further specific amount for the purpose of determining whether Mr Garland was providing necessary assistance to counsel. For that purpose, time recorded simply as spent thinking about the issues in the litigation is even less helpful.

50 Class counsel have filed an affidavit strongly supporting Mr Garland's request for compensation for the contribution he made as a representative plaintiff - although they do not suggest an appropriate amount. Ms Fong refers to him in the affidavit as a valued member of "our team" and as "an active and effective class representative who always tried to keep the interest of the class at the forefront". She deposes, in particular, to the assistance he gave counsel and various experts in analyzing issues relating to damages, his advice during the settlement negotiations and in the formulation of the terms of the *cy pres* distribution and, generally, to the thoughtful comments he provided to them throughout the proceedings. She confirms, also, Mr Garland's insistence that the class counsel's fees should not unduly consume the settlement funds.

51 Overall, I am satisfied that Mr Garland did contribute to the success of the proceeding to an extent that exceeded significantly what might properly have been expected of a representative plaintiff in the circumstances of this case. He appears to have been in close communication with counsel on every aspect of the proceeding and, while it is it is impossible to estimate precisely the value of the assistance he provided over a period of 12 years - and the extent to which it provided a direct monetary benefit to the class - I believe that $25,000 is an amount that would represent fair and reasonable compensation for his exceptional contribution. I am not prepared to approve an additional amount for the particular disbursements - relating for the most part to travel expenses - or for the prejudgment interest Mr Garland has claimed, nor for any part of the solicitor and client costs he has incurred in connection with his claim to compensation. On the state of the record - and without having heard submissions on the question - I am inclined to add the part of such costs that are reasonably applicable to the retainer of Mr Dewart for the purpose of finalising the details of the *cy pres* distribution. If class counsel wish to contest either the addition, or the quantum, of such costs, I may be spoken to for such purpose.

52 In arriving at that result, I have not ignored the comments of Winkler J. with respect to the possible inconsistency between the concept of a *cy pres* distribution and an award of an amount of compensation to a representative plaintiff. I respectfully accept that the inconsistency - and an appearance of a conflict of interest - could arise if such compensation were to be awarded routinely. However, I do not think the problem arises here where the compensation is for the direct benefit Mr

Garland has obtained for the class by his special contribution, and where I have approved, as fair and reasonable compensation to class counsel, the amount from which Mr Garland's compensation is to be paid.

CONCLUSION

53 For the above reasons, and those in the endorsement of September 25, 2006, there will be an order certifying the proceedings and approving the settlement when the final amount of the compensation to be paid to Mr Garland has been determined.

54 The forms of notice in Schedule A and Schedule C of the draft implementation order are approved subject to the insertion in the former of a reference to the compensation awarded to Mr Garland.

M.C. CULLITY J.

cp/e/qlbxm/qlslc/qlbrl/qlhcs

Case Name:

Martin v. Barrett

Between
Marsha Martin and Fern Camirand, Plaintiffs, and Michael Barrett, John Rebry, Lloyd Crawford, William Demerling, Claude Gauthier, Clare Hayes, Jim Madill, Michael Stevens, Brian Ashford, John Black, John Hill, Charles Macdaid, Joseph Martin, June McFarlane, Larry Melnyk, John Stafford, as trustees of the Participating Co-operatives of Ontario Trusteed Pension Plan (FSCO Reg. No. 345736), The Canada Trust Company, CIBC Mellon Trust Company, CIBC Mellon Global Securities Services Company, Canadian Imperial Bank of Commerce, Mark Edward Whittacatt carrying on business as Whittacatt Consulting Associates, Whittacatt Holdings Ltd., Turnbull and Turnbull Ltd., the Estate of John A. Turnbull, deceased, Louis Ellement, Anthony F. Cooper and Anthony F. Cooper Actuarial Services Ltd. and Torys LLP, Defendants

[2008] O.J. No. 2105

67 C.C.P.B. 102

2008 CarswellOnt 3151

55 C.P.C. (6th) 377

168 A.C.W.S. (3d) 643

Court File No.: 03-CV-244195 CP

Ontario Superior Court of Justice

M.C. Cullity J.

Heard: April 16-17, 2008.
Judgment: May 29, 2008.

(57 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Procedure -- Settlements -- Approval -- Settlement of class action arising as a consequence of serious under-funding of a pension plan approved by the court -- The court had no doubt that the settlement, including the entitlement of the 80 members of the Plan who purported to revoke their elections to opt out, was fair and reasonable in the circumstances and ought to be approved in the interests of the class members.

Legal profession -- Barristers and solicitors -- Compensation -- Contingency agreements -- Measure of compensation -- Reasonable charges, reasonably performed -- Settlement of a class action approved, while counsel's fee put forth at $4,750,000 was reduced to $4,086,748 -- The time expended was inordinately high, and the base fee charged was reduced from $2,116,354 to $1,634,748 -- However, the multiplier was increased from 2 to 2.5, which was more reflective of the risk incurred, and the highly professional and expert manner in which the proceedings were conducted.

Professional responsibility -- Professions -- Legal -- Lawyers -- Settlement of a class action approved, while counsel's fee put forth at $4,750,000 was reduced to $4,086,748 -- The time expended was inordinately high, and the base fee charged was reduced from $2,116,354 to $1,634,748 -- However, the multiplier was increased from 2 to 2.5, which was more reflective of the risk incurred, and the highly professional and expert manner in which the proceedings were conducted.

Motion for approval of a class settlement and for approval of class counsel's fees. The claims asserted by the plaintiffs arose as a consequence of a serious under-funding of the Participating Co-Operatives of Ontario Trusteed Pension Plan that occurred after June 1, 1994. The plaintiffs claimed, among other things, restitution, or alternatively damages, for significant investment losses to the Plan allegedly caused by the negligence, breach of trust and breach of fiduciary duty of the current and former trustees, current and former Plan custodians, actuaries, former legal counsel, and a former investment consultant and asset manager of the Plan. Under the proposed settlement, the remaining defendants other than Workman and Whittacatt Holdings Ltd., were to pay $13,926,196 in return for releases of all claims against them. After counsel fees and the levy payable to the Class Proceedings Fund were paid, the balance was to be paid into the Plan and be used to provide the benefits that Plan members would be entitled to as of the Wind-Up date. Counsel proposed a base fee of $2,116,354 for their work plus $219,000 for the work of a firm retained to advise on securities issues. This included 7,900 hours worked, plus 627 hours for the second firm. The combined fee requested was $4,750,000 before GST, with a multiplier of approximately two.

HELD: settlement approved. Counsel approved at $4,086,748. The settlement was recommended by experienced class counsel, and the court had no reason to believe it was negotiated other than as a result of arm's length bargaining and an absence of collusion. It was supported by each of the representative plaintiffs as being in the best interests of the class. The court had no doubt that the settlement, including the entitlement of the 80 members of the Plan who purported to revoke their elections to opt out, was fair and reasonable in the circumstances and ought to be approved in the interests of the class members. The fees requested were 34 per cent of the total recovery, which was unduly high. While the time expended was inordinately high, there was no doubt that the legal and

factual issues were complex, counsel assumed complete responsibility for the prosecution of action, the matter was of the utmost importance to the plaintiffs and the class, and a very high degree of skill and competence was demonstrated by counsel. The primary firm had over-lawyered. Their approach to providing their services in this and other class proceedings had departed quite radically from that traditionally adopted by solicitors representing clients in other litigation. The discipline imposed by the normal constraints in acting for a client who would be personally liable for the fees had been abandoned. A reduction of 30 per cent from the total base fee claimed would not be unfair to counsel or unreasonable. The base fee was set at $1,634,748. The multiplier would be 2.5, which was more reflective of the risk incurred, and the highly professional and expert manner in which the proceedings were conducted. The fee would be roughly $4 million, which was 29 per cent of the gross recovery.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29(2), s. 32, s. 33

Law Society Act, R.S.O. 1990, c. L.8,

Counsel:

Kirk Baert, Michael Mazzuca and ***Nicole D. Brown***, for the Moving Parties/Plaintiffs.

Graeme Mew, Boyd Balogh, David E. Leonard and ***A. Salyzyn***, for the Trustees Respondents/Defendants.

J.A. Prestage, for the defendants Canadian Imperial Bank of Commerce and CIBC Mellon Global Securities Services Company.

Mark Gelowitz, for the Respondent/Defendant The Canada Trust Company.

Jessica Kimmel, for the Respondent/Defendant Torys LLP.

Mark Bailey, for the Superintendent of Financial Institutions.

R.J. Walker, for Participating Co-operatives.

Lori E.J. Patyk, for the Minister of Finance of Ontario.

REASONS FOR DECISION

1 **M.C. CULLITY J.**:-- A hearing to determine whether a settlement of this class action should be approved was held on April 16, 2008. A motion for the approval of class counsel's fees was heard on the following day. After hearing from counsel, and considering the submissions from class members in writing and orally, I indicated at the end of the hearing on April 16 that I considered the settlement to be fair and reasonable and in the interests of class members in the circumstances of the case, and that there would be an order approving it. Brief oral reasons were given to be supplemented in writing.

2 I reserved my decision on the fees of class counsel pending a hearing of a motion by the Law Foundation of Ontario on April 30, 2008 for directions with respect to the correct calculation of the levy payable to the Class Proceedings Fund pursuant to Regulation 771/92 under the *Law Society Act*, R.S.O. 1990, c. L.8, as amended. The decision on that motion was released on May 12, 2008. In what follows I will expand on my comments relating to the approval of the settlement, and will then deal with the motion in respect of the fees of class counsel.

BACKGROUND

3 The action was commenced by notice of action issued under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("CPA") on February 19, 2003 in which the plaintiff sought to represent a class of current and deferred vested members, pensioners and beneficiaries of the Participating Co-operatives of Ontario Trusteed Revised Pension Plan, Registration No. 0245726 (the "Plan"). The Plan was established on October 1, 1959 for employees and former employees of participating agricultural co-operatives in Ontario.

4 The action was certified by order of Winkler R.S.J., dated February 10, 2005, under which the plaintiffs were appointed to represent a class comprising -

> All persons, wherever resident, who, after June 1, 1994, were entitled to payments, current or deferred, under the Participating Co-Operatives of Ontario Trusteed Pension Plan.

5 The claims asserted by the plaintiffs arose as a consequence of a serious under-funding of the Plan that occurred after June 1, 1994. The plaintiffs claimed, among other things, restitution, or alternatively damages, for significant investment losses to the Plan allegedly caused by the negligence, breach of trust and breach of fiduciary duty of the current and former trustees, current and former Plan custodians, actuaries, former legal counsel, and a former investment consultant and asset manager of the Plan. Pursuant to the order certifying the proceeding, the claims against two of the trustees - Michael Barrett and John Rebry - were dismissed, as well as the claims against CIBC Mellon Trust Company. The claims against Turnbull and Turnbull Ltd., the Estate of John A. Turnbull, Louis Ellement, Anthony F. Cooper and Anthony F. Cooper Actuarial Services Limited were discontinued.

6 The plaintiffs claimed that the acts, errors and omissions of the defendants caused the Plan's financial position to decrease by $29.4 million on a going concern basis and by $30.4 million on a solvency basis between September 1997 and September 2001. By September 2002, the Plan's solvency liabilities are alleged to have exceeded its assets by approximately $56 million.

7 By this time, the Financial Services Commission of Ontario ("FSCO") had commenced an examination of the Plan's investment policies and practices and, in January 2003, its Examinations Unit identified a number of concerns including:

(a) a lack of operational investment policies and procedures, particularly in investments involving derivatives;
(b) an apparent lack of internal monitoring to ensure directions given by the administrator were being followed;
(c) inadequate supervision of agents;
(d) areas of potential conflicts of interest involving agents;

(d) an apparent lack of an independent review of fees paid to investment agents of the administrators; and

(f) a potential contravention of the *Pension Benefits Act* arising from the apparent investment of some assets not in the Plan's name.

8 Subsequently, in 2003, the trustees of the Plan, on the advice of the Plan's actuary, concluded that the Plan was no longer financially viable, proposed certain amendments to reduce benefits to retirees, and survivors' benefits, by 50 per cent, and announced the Wind-Up of the Plan effective March 31, 2003 (the "Wind-Up date"). As of that date, the Plan provided benefits to approximately 2,421 present and former employees of 24 agricultural co-operatives and other employers in Ontario. The Plan's membership then comprised approximately 921 active members and 1,500 former members, including 971 retired members. The largest constituent group of members was made up of retirees, whose average age at that time was approximately 75 years old. The average annual pension for retired members was approximately $8,000, reduced in 2003 to $4,000. After the Wind-Up date, the financial position of the Plan continued to deteriorate; some of the contributing employers became insolvent, or ceased to carry on business; and more than 181 Plan members died.

9 From the outset, the defendants indicated that they intended to defend the claims and allegations against them in this proceeding and, initially, to contest certification. Extensive productions were reviewed and written and oral examinations for discovery were conducted. The discovery process has not been completed.

10 Settlement conferences with Winkler R.S.J. took place in 2004 and, again, in March 2006. In April, 2006 the settlement process was assisted significantly when the Superintendent of Financial Services issued a notice of proposal to the trustees and 19 employers who participated in the Plan. The Superintendent proposed to make orders refusing to approve the Wind-Up report filed by the trustees, or to register the proposed amendments to the Plan. It was also proposed to order the participating employers to make payments into the Plan to eliminate the Plan's funding deficiency.

11 In December, 2006, after the trustees and some of the employers had requested a hearing before the Financial Services Tribunal, a mediation of the issues before the Tribunal commenced with Ms. Leslie Macleod, appointed by the Ontario Ministry of Finance, as the mediator. Although the proceeding was separate from this action, the class members had a substantial interest in the mediation and its outcome. Class counsel represented a number of class members who were named parties in the proceeding before the Tribunal and participated actively in the mediation.

12 Negotiations for the settlement of the two proceedings were conducted in tandem throughout 2007, and agreements in principle were reached by the end of the year.

13 The agreement with respect to the FSCO proceeding provided for the wind-up of the Plan as of the Wind-Up date and a payment of approximately $14.5 million into the Plan by the settling employers, less amounts paid by them since the Wind-Up date. Other employers would remain liable for their share of the funding deficiencies. The agreement was conditional on the settlement of the class action. In addition - but subject to the same condition - the government of Ontario agreed to contribute a further $20 million to the Plan.

14 On February 13, 2008, I approved notices to be mailed to members of the Plan, and to be inserted in 13 newspapers, informing the members that the motions to approve the settlement of the class action and the fees of class counsel would be heard on April 16 and 17, and that the members

were entitled to make submissions on the fairness and adequacy of the settlement, and the fees, in writing, or orally at the hearing. The terms of the settlement were summarized in the notices and class members were informed that they could obtain copies of the entire document from class counsel.

15 The formal terms of settlement in the FSCO proceeding, and the settlement agreement in this action, were executed on, or as of, March 28, 2008, and April 11, 2008, respectively.

SETTLEMENT APPROVAL

16 Under the proposed settlement of this action - subject to a condition that I will mention - the remaining defendants other than Mark Edward Workman and Whittacatt Holdings Ltd., are to pay $13,926,195.50 in return for releases of all claims against them. After the fees of class counsel and the levy payable to the Class Proceedings Fund have been paid, the balance of the amount is to be paid into the Plan and is to be used to provide the benefits that Plan members would be entitled to as of the Wind-Up date. Such benefits are to be determined by an administrator appointed by the Superintendent of Financial Services.

17 Mr. Workman is believed to be a resident of the Cayman Islands and is alleged to own and control Whittacatt Holdings Ltd. He did not participate in the settlement negotiations and the claims against him and his corporation remain outstanding.

18 The condition referred to above relates to 85 members of the putative class who opted out of the class proceeding and who, in consequence, are not members of the class. From the viewpoint of the trustees it was crucial to any settlement that the claims of virtually all these members should be released. The trustees were unpaid volunteers of whom a number are members of the Plan with limited financial resources other than $10 million of insurance coverage. It was a condition of the settlement that all the opted-out members of the Plan - or all of them other than those whose shortfall in their benefits is less than $25,000 in the aggregate - should agree in writing to be part of the class so that they will be bound by the settlement. I was informed that, of the 85 opted-out Plan members, all but five have now, in writing, purported to revoke their exercise of the election to opt out and that the shortfall suffered by the remaining five members does not exceed $25,000.

19 I indicated at the hearing that I did not find it necessary to confront the question whether elections to opt out of a class proceeding can be revoked. It is proposed that the 80 members will be entitled to participate in the benefits under the settlement. In these circumstances, I believe that I am entitled to treat the purported revocations as agreements to release the settling defendants and to be bound by the settlement in return for a share of the benefits it provides. I am satisfied, also, that, if approval of the settlement is otherwise in the best interests of the class members, I can approve the inclusion of the 80 opt-outs in order to assure the consent of the settling defendants.

20 The required approach to the approval of a settlement pursuant to section 29(2) of the CPA is not in dispute. The overriding principle is whether the settlement is fair, reasonable and in the best interests of the class as a whole, and not whether it meets the demands of a particular member. There is a strong initial presumption of fairness when a settlement is negotiated at arms-length: *Ford v. F. Hoffman-La Roche* (2005), 74 O.R. (3d) 758 (S.C.J.), at paras. 113-114. In determining whether to grant approval, the court is not expected to dissect the provisions of the settlement with an eye to perfection in every aspect. It is sufficient if it falls within a zone or range of reasonableness.

21 The factors that may be relevant to the application of the general principle have been discussed in numerous cases including *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) and *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 (S.C.J.). Of particular relevance in this case is the likelihood of success in the proceeding and the likely degree of success. The former requires a consideration of the litigation risks of proceeding to trial. In a case such as this, the latter involves not only a consideration of the amount - discounted for risks - of any judgment that might be obtained, but also the amount that is likely to be recoverable from the defendants.

22 Other factors that should bear on the decision in this case are the future expense and likely duration of the proceedings. In cases involving pension benefits for retired persons, long delays are particularly adverse to their interests.

23 The settlement here is recommended by class counsel who are experienced both in class proceedings and pension matters and I have no reason to believe that it was negotiated other than as a result of arm's-length bargaining and an absence of collusion. It is supported by each of the representative plaintiffs as being in the best interests of all of the class members.

24 Counsel filed with the court a lengthy affidavit, and a factum, which discussed at length the factors that they consider support their recommendation. They estimated that the plaintiffs' case against the settling defendants was strongest against the trustees, and weakest against the corporate defendants whose resources for satisfying a judgment would be greatest. This disparity in resources must, of course, be discounted by the fact that any degree of negligence of a corporate defendant would make it jointly and severally liable with the trustees for the full amount of any damages. Success against the corporate defendants, and legal advisers, was, however, by no means assured.

25 In addition to the litigation risks, there is the fact that the benefits under the FSCO Settlement, and the amount to be paid by the Government of Ontario, are expressly conditioned on the settlement of this action, and there is no guarantee that the same benefits will be forthcoming if this matter proceeds to trial.

26 In looking at the degree of success achieved - when compared with the amount that might have been recovered in the action - I believe counsel were correct in their submission that, from the viewpoint of the class members, this was a battle that was advanced on two - and, perhaps, three - fronts. The benefits under the settlement complement those provided in the FSCO Settlement and the $20 million to be provided by the government of Ontario, and cannot fairly be weighed in isolation.

27 In counsel's submission, a gross recovery of $48.5 million when the litigation risks and the amount likely to be recovered if those risks are overcome, falls well within the required zone of reasonableness. In accepting his submission at the hearing, I was also strongly influenced by my belief that, in the circumstances of the case, it is very much in the interests of the class members that the delay and expense of proceeding to trial should be avoided.

28 This consideration was also foremost in the mind of two members, or beneficiaries, of the Plan who expressed their disappointment at the size of the settlement amount, but refrained from objecting to the settlement.

29 Counsel's time summaries indicate that, throughout the proceeding, they have had frequent and extensive communications with class members. I was informed that it is counsel's understand-

ing that the settlement is accepted by an overwhelming majority of the class members as the best that can reasonably be achieved in the circumstances. Despite the extensive notice given to the members, only one formal objection was received. This objection arose out of an attempt by the trustees to make deductions from the objector's pension benefits to compensate for a previous overpayment made as a result of a miscalculation by the Plan's former actuary who is now deceased and is no longer a party to this proceeding. The proposed deductions amount to approximately $60,000. At the hearing, I agreed with the submission of class counsel that this question was not in issue in the litigation. It may possibly be addressed in the future administration of the Plan by the administrator or, if necessary, by the Financial Services Tribunal.

30 Overall, I have no doubt that the settlement - including the entitlement of the 80 members of the Plan who purported to revoke their elections to opt out - is fair and reasonable in the circumstances and should be approved in the interests of the class members. It is inevitable in a case of this kind that class members will be disappointed that the amounts recovered will not compensate them fully for losses for which they were in no way responsible. That, however, is the invariable consequence of any settlement that involves a compromise of issues of law and fact that are in dispute between the parties.

FEES OF CLASS COUNSEL

31 Koskie Minsky LLP ("Koskie Minsky") and Groia & Company Professional Corporation ("Groia and Company") moved for an order approving their retainer agreement with the representative plaintiffs; an order approving their fees and disbursements plus taxes as applicable; and an order for the fees and disbursements to be paid out of the settlement proceeds. Additionally, they requested an order for the payment to the Class Proceedings Fund of the undisputed part of the levy to which the Law Foundation is entitled. The disputed part of the levy would be retained by class counsel in trust pending any appeal, or appeals, from my decision released on May 12, 2008. No issue was raised in connection with these additional orders and, subject to a final determination of the relevant amounts as a consequence of my decision on counsel's fees, they will be granted.

32 Koskie Minsky were the original solicitors of record and I will refer to them as "class counsel". Groia & Company were originally retained by class counsel to assist with securities-related matters as was permitted by the retainer agreement. I was informed that they were subsequently appointed as co-counsel.

33 The retainer agreement executed by the representative plaintiffs and class counsel is dated March 26, 2003. It provides for fees payable to counsel only in the event that judgment on the common issues is obtained in favour of some or all class members, or that there is a settlement that benefits one or more of them. The fees are up to be calculated by applying a multiplier approved by the court to a base fee determined by the usual hourly rates of the lawyers and other legal professionals who worked on the case multiplied by the number of hours worked.

34 Although the multiplier is to be selected by the court, the parties "provisionally" agreed that it should be at least the sum of 3.0 and 0.01 for every month between the date of the agreement and the date of either a final judgment, or the approval of any settlement of the action.

35 The motion for approval of the agreement assumes that, notwithstanding the adoption of the fee calculation method set out in section 33 of the CPA, the provisions of section 32 that require fee agreements - including contingency fee agreements - to be approved are applicable. I believe this is a correct interpretation of the statute and that no grounds for refusing approval are evident. The

representative plaintiffs have sworn affidavits deposing to their execution of the retainers and, in my opinion, they comply with the provisions of section 32 and 33 of the CPA.

36 Section 33 is as follows:

> 33(1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of the 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.
>
> (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.
>
> (3) For the purposes of subsection (4)2(7),
>
> "base fee" means a result of more applying the total number of hours worked by an hourly rate;
>
> "multiplier" means a multiple to be applied to a base fee.
>
> (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.
>
> (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.
>
> (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.
>
> (7) On a 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 resolves 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.

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

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

37 The agreement recognizes and does not purport to oust the jurisdiction of the court to determine the appropriate multiplier - or, in my opinion, to determine the amount of a reasonable base fee - and I interpret the provisional agreement for a multiple of 3.6 (on the facts of this case) accordingly. In this motion, the multiple counsel have requested to be applied to the base fee they propose is approximately 2.

38 The method of determining fees in accordance with section 33 - the "lodestar" method - was imported into the CPA from the United States. It has no counterparts in other Canadian jurisdictions and has been expressly rejected in British Columbia as an "undesirable and unnecessary" approach: *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Pearson v. Boliden Ltd.*, [2006] B.C.J. No. 1512 (S.C.). In *Endean,* the court accepted the strong criticisms of the lodestar method enumerated in the report of a taskforce set up by a federal court in the United States. These criticisms were as follows:

1) It increases the workload on an already overtaxed judicial system; 2) the elements of the process are insufficiently objective and produce results that are far from homogeneous; 3) the process creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law; 4) the process is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement Fund or the amounts recovered by the plaintiffs or of an overall dollar amount; 5) the process, although designed to curb abuses, has led to other abuses, such as encouraging lawyers to expend excessive hours engaging in duplicative and unjustified work, inflating their normal billing rates, and including fictitious hours; 6) it creates a disincentive for the early settlement of cases; 7) it does not provide the ... court with enough flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered; 8) the process works to the particular disadvantage of the public interest bar because, for the example, the lodestar is set lower in civil rights cases than in securities and anti-trust cases; and 9) despite the apparent simplicity of the lodestar approach, considerable confusion and lack of predictability remain in its administration.

39 I am not aware of anything in the experience in this jurisdiction that would suggest that the above criticisms are not equally applicable under the CPA. Section 33 does, however, remain in the statute and, unlike the position in British Columbia, there is no doubt that counsel here are entitled to adopt the lodestar method. There is also no doubt that in a case like these it presents the court with a task of some difficulty.

40 The practical problems of determining an appropriate fee pursuant to section 33 are by no means confined to the selection of an appropriate multiplier. The factors that should influence the exercise of the court's discretion for this purpose were clearly and authoritatively set out by Goudge J.A. in *Gagne v. Silcorp Ltd.,* [1998] O.J. No. 4182 (C.A.). The requirement in section 33(8) that the court shall allow only a reasonable base fee gives rise to more difficulty in many cases, including this one.

41 Counsel have proposed a base fee of $2,116,354 for their work plus $219,000 for the work of Groia & Company who were retained originally to advise on securities issues as was permitted in the retainer agreement. The time included for class counsel represents approximately 7,900 hours worked and does not include an additional 772 hours spent on the FSCO proceeding for which they have been remunerated, in part, at significantly lower hourly rates than those they usually charge to their clients. The reported fee of Groia & Company is said to represent a further 627 billable hours. The combined fee requested is $4,750,000 before GST is added. This represents a multiplier of approximately 2. If the additional time expended by class counsel on the preparation of the motions were added, the multiplier would be less than 2.

42 In *Gagne*, at paras. 25 and 26, Goudge J.A. recognized that the selection of the appropriate multiplier is an art and not a science and that all relevant factors must be weighed. He continued:

> In the end, these considerations must yield a multiplier that, in the words of section 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.

43 Applying the first yardstick mentioned by the learned judge, the fees requested would be approximately 34 per cent of the total recovery which, in this case, I consider to be unduly high - and particularly so if the amounts to be deducted in determining the net recovery for the Plan are also to be considered. Under the second test, no objection could be taken to the proposed multiplier of 2 in the circumstances of this case. The third test would obviously be satisfied and counsel indicated that they believed that the fee requested would give them an appropriate economic incentive to take other cases.

44 In applying section 33, I do not believe it is permissible, or acceptable, to work backward and ask what would be fair and reasonable compensation, and then determine the appropriate multiplier to apply to the hours actually worked at the usual rates of the professionals involved. The starting point must be the determination of a reasonable base fee as this will be an essential, and ever-present, consideration when determining what is fair and reasonable compensation for the risk incurred pursuant to section 33(7)(b). It is the determination of the base fee that has caused the most concern in this, as well as other cases.

45 In *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.), Winkler J. agreed with, and adopted, the approach to determining a reasonable base fee that had been approved by Ground J. in *Maxwell v. MLG Ventures Ltd.*, [1996] O.J. No. 2644 (Gen. Div.) and Sharpe J. in *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.). In these cases, the learned judges concluded that "the proper approach was to proceed by way of analogy to the role of the judge in fixing costs, namely, to determine what the services devoted to the proceeding are worth in light of the submissions of counsel and his own experience.": *Serwaczek*, at para. 15. I understand this to refer to cases in which costs would be determined on the basis of a full indemnity - or what used to be described as costs between a solicitor and his own client - and not according to a lesser scale. The factors relevant to this approach were described by Sharpe J. as -

> ... the usual factors ... namely: (a) the time expended by the solicitors; (b) the legal complexity of the matters to be dealt with; (c) the degree of responsibility assumed by the solicitors; (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 solicitors; (g) the results achieved; (h) the ability of the client to pay; and (i) the client's expectation as to the amount of the fee: (*Windisman*, at para. 8).

46 Applying these factors, while the time expended is, for the reasons I will give, inordinately high in my judgment, there is no doubt that the legal and factual issues were complex; counsel assumed complete responsibility for the prosecution of action; the matter was of the utmost importance to the plaintiffs and the class; and a very high degree of skill and competence was demonstrated by counsel.

47 In considering the results achieved, I do not think I can properly look only to the settlement proceeds and ignore the additional amounts totalling $34.5 million that are to be contributed to the Plan by the government of Ontario, and by employers as a result of the FSCO proceeding. At the hearing, submissions made by, and on behalf of, members of the class suggested that counsel were over-estimating the extent to which these amounts resulted from their efforts, and not from the efforts of others including the employers, and in particular, those of Leslie Macleod, the mediator appointed by the Government of Ontario. I was impressed and assisted by those submissions - and particularly the comments of Mr. Jim Campbell, who is a class member, and those of Ms. Macleod. I am, however, satisfied that counsel's contribution was significant and, to that extent, the additional amounts can reasonably be considered to be attributable in part to their efforts. Ms. Macleod saw the two proceedings as linked and stated that she had thought that neither would be settled without the other.

48 Although the terms of the retainer agreement indicated to the clients the approach that counsel would ask the court to approve, and to that extent reflected their expectations, I would not place great weight on them for the purpose of determining a reasonable base fee, and I do not agree with counsel's tendentious references in their factum to their entitlement under the agreements, or that the "amount owing under the retainer agreement is over $8 million" (para. 81(o)). I know nothing about the circumstances in which the retainer agreements were executed, but I do not interpret them as giving their counsel *carte blanche* to work unnecessary, or an unreasonable number of, hours. The plaintiffs have indicated their agreement with the fees counsel have proposed, but there is nothing to suggest that the plaintiffs had, or have, the knowledge and information that would enable them to determine the reasonableness of the base fee counsel are suggesting or, more generally,

to measure the computation of the fees requested by reference to the principles that the court would apply in making the determination referred to in the retainer agreement.

49 For the purpose of evaluating the reasonableness of the base fee that counsel propose, the starting point, and the most important consideration, is the amount of time expended by counsel and the hourly rates applied by them. The latter gave me no concern in this case. The amount of time, however, is, in my judgment, significantly in excess of what counsel might reasonably expect to charge to a client if there was no agreement for a contingency fee and this was not a class proceeding.

50 I have been provided with 168 pages of time summaries for class counsel alone. These reveal an over-lavish expenditure of the resources of the firm. 58 "lawyers" - in whom, I assume, paralegals and students were included - are said to have worked on the file. Of these, 25 recorded more than 20 hours. Not surprisingly in these circumstances, a very large number of the dockets record communications and discussions internally and the dispatch, receipt and review of e-mails to other lawyers within the firm. Considerable time is recorded in drafting internal memoranda and summarising documents. Approximately $725,000 was recorded for work prior to, and including, certification. Subsequently, one lawyer, alone, recorded 1,460 hours largely spent on organising, reviewing or summarizing documents. This time was valued at $285,551 and included approximately 1,000 hours reviewing, revising, analysing, and drafting memoranda on, the trustees' affidavit of documents.

51 Over-lawyering rarely, if ever, achieves economies of scale *vis-a-vis* particular clients. Delegation of different tasks among numerous partners, associates and others may sometimes be an efficient way for a law firm to deal with many files simultaneously but, as between the firm and any particular client, over-lawyering inevitably involves a duplication of work and an inefficient expenditure of time.

52 A number of factors that distinguish class actions from other proceedings can create obvious temptations for plaintiffs' counsel to exercise less control of the time they spend on a file. First and foremost is the absence of a client who will be directly affected and concerned with the level of the fees claimed. Class members may, at times, express their reservations - and even their shock - at fairness hearings at the size of the fees requested but, because of the absence of any close solicitor-and-client relationship, these are generally somewhat muted. The potential size of the fees that reflect the large amounts at stake in the litigation is also a factor that may lead to an unreasonably extensive expenditure of time. I do not believe one can properly estimate the amount of a reasonable base fee without giving some consideration to the distinctions between productive, and unproductive time, and between work that is reasonably required and that which should be regarded as overkill. Counsel are, of course, perfectly entitled to dot every *i* and cross every *t* more than once if they so choose, and to keep track of every minute of time spent thinking about a file, but it does not follow that all of their time will then be reflected in a reasonable base fee.

53 The charge of over-lawyering does not apply to the same extent to the fees of Groia & Company, but, again, the time recorded is, in my opinion, out of line with what could properly be charged in an ordinary solicitor and client relationship. Apart from the initial work they performed in advising on the securities issues, the firm subsequently assisted class counsel in retaining and instructing experts and conducting examinations for discovery. On these matters they recorded over 540 hours which they valued at $187,195. Of this amount $27,375 was attributed to the time of a student.

54 I am satisfied that the approach of plaintiffs' counsel to the provision of their services in this and other class proceedings has departed quite radically from that traditionally adopted by solicitors representing clients in other litigation. The discipline imposed by the normal constraints in acting for a client who will be personally liable for the fees has been abandoned. The issues in this case were of some complexity but no more so than those that arise in cases in which the plaintiffs represented no one but themselves, and in which the expenditure of over 8,000 hours of preparation would not be considered acceptable.

55 It would undoubtedly take several days - and, possibly, some weeks - to conduct a full assessment of fees as between solicitors and their clients based on the time and work expended by counsel in this case. That is not my function. However, based on the material provided to me, I cannot accept that the amount of $2,335,354 - even if it is not to be augmented by the additional time recently expended - is a reasonable base fee. I am satisfied that a reduction of approximately 30 per cent from the total base fee claimed, representing the exclusion of a portion of time expended, would not be unfair to counsel, or unreasonable in the circumstances. Accordingly the base fee is determined to be $1,634,748. To that I will apply a multiplier of 2.5 which I consider to be more reflective of the risk incurred, and the highly professional and expert manner in which the proceedings were conducted by counsel. On that basis, the fee would be $4,086,870 which is approximately 29 per cent of the gross recovery - a percentage that I consider is not out of line with those awarded in previous cases involving, and not involving, the application of a multiplier. The multiplier is towards the higher end of the range suggested in *Gagne,* and I am satisfied that it is not too low to create any economic disincentive to plaintiffs' counsel in subsequent cases.

56 In determining the amount of the fees that I will approve, I have not made any reduction because of the existence of the levy payable to the Class Proceedings Fund. The retainer agreements contemplated that financial assistance might be obtained from it to cover disbursements. Although class counsel had no obligation to incur disbursements in excess of $25,000 without immediate reimbursement from the Fund, or from class members, they have done so in a total amount of at least $144,047.64 - an amount almost equal to that contributed from the Fund. There is no basis in my opinion for penalising counsel for seeking these contributions. I leave open the possibility that, on other facts, the amount of the levy could be reflected in a disparity between net recovery by class members and the amount of counsel's fees otherwise determined that might justify a reduction in the fees.

57 I have not been able to reconcile the amount of the disbursements, claimed in the affidavit and factum filed in the motion, with the supporting material filed. Further submissions on the disbursements that should be approved may be made at a case conference to be arranged to deal with them and the amendments to the draft order - including the amount of the levy of the Law Foundation of Ontario - that will be required to comply with these reasons.

M.C. CULLITY J.

cp/e/qlmxm/qlclg/qlbrl/qlaxw/qlcxm/qlaxw/qlced

Case Name:

Cassano v. Toronto-Dominion Bank

Between
Paul Cassano and Benjamin Bordoff, Plaintiffs, and
The Toronto-Dominion Bank, Defendant
PROCEEDING UNDER the Class Proceedings Act, 1992.

[2009] O.J. No. 2922

79 C.P.C. (6th) 110

2009 CarswellOnt 4052

98 O.R. (3d) 543

Court File No. 97-CV-128598 CP

Ontario Superior Court of Justice

M.C. Cullity J.

Heard: April 24, 2009.
Judgment: July 9, 2009.

(64 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval -- Motion for approval of a class action settlement allowed -- The defendant bank levied undisclosed charges for foreign currency transactions on Visa cards -- The $55 million settlement was negotiated by experienced counsel after 11 years of litigation -- The application of $28.4 million in funds cy pres was approved -- Promoting access to justice and advancing financial literacy were worthy methods of applying the cy pres amount -- A counsel fee of $11 million was approved together with disbursements of $138,000.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 26, s. 29(2)

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.),

Law Society Act, R.S.O. 1990, c. L.8, s. 56(2), s. 59.1

Perpetuities Act, R.S.O. 1990, c. P.9, s. 16

Counsel:

Harvey T. Strosberg, QC and ***Patricia A. Speight*** -- for the plaintiffs.

Lyndon A. J. Barnes and ***Laura K. Fric*** -- for the defendant.

REASONS FOR DECISION

1 **M.C. CULLITY J.**:-- The parties moved for approval of the settlement of this action commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").

2 The claims advanced on behalf of the class concern allegedly undisclosed and unauthorised charges levied by the defendant (the "Bank") for foreign currency transactions conducted with Visa credit cards it had issued. The Bank asserts that these were not fees but rather part of the exchange rates that it was authorized by the provisions of the cardholder agreements to determine from time to time.

3 The proceeding was certified by the Court of Appeal on November 14, 2007. Certification had previously been denied by the Divisional Court and in this court. Actions involving similar claims were previously certified and settlements approved by Winkler J. (now Winkler C.J.O.) in *Gilbert v. Canadian Imperial Bank of Commerce*, [2004] O.J. No. 4260 (S.C.J.) and by Brockenshire J. in *Meretsky v. Bank of Nova Scotia* (Unrep. January 23, 2009).

The Settlement

4 Section 29(2) of the CPA provides that a settlement of a class proceeding is not binding unless it is approved by the court. In *Gilbert*, the principles to be applied for this purpose were summarized by Winkler J. (now Winkler C.J.O.) as follows:

> There is a presumption of fairness when a proposed class settlement negotiated at arms length by class counsel is presented to the court for approval. The court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.
>
> The test to be applied is whether the settlement is fair and reasonable and in the best interests of the class as a whole. This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give-and-take. It is a question of weighing the settlement in comparison to the alternative of litigation with its inherent risks and associated costs.
>
> There are a number of factors, not all to be given equal weight, which are to be considered in determining whether to approve a settlement. These include likeli-

hood of success, degree of discovery, the terms of the settlement, recommendation of counsel, expense and duration of litigation, number of objectors, presence of arms length bargaining, extent of communications with the class and the dynamics of the bargaining.

5 It follows that, in all cases, the court must weigh the benefits to be conferred on the class against the risks of continuing the litigation.

6 From the inception of the proceeding, the Bank has denied that the charges were fees rather than part of the exchange rates it was authorised to determine from time to time. It has also asserted that the rates were reasonable and that the plaintiffs' interpretation of the cardholder agreements was contrary to the intentions of the parties, as well as inconsistent with commercial realities and the competitive practices adopted by other financial institutions. At the hearing of the motion, the Bank's counsel emphasised that it was the economic considerations of proceeding to trial and not any acknowledgement of the validity of the claims advanced by the plaintiffs that influenced its agreement to settle. The Bank has not resiled from its position that the alleged charges were disclosed to cardholders.

7 While strongly contesting the correctness of the Bank's characterisation of the charges, class counsel were conscious that, on the main issue, this was all-or-nothing litigation, and that it would be vigorously defended. Even if the plaintiffs were successful in characterising the charges as fees, there were still limitations defences that potentially affected a significant number of the class members' claims. They were also concerned about the length and future expense of the litigation if it proceeded to trial and the difficulty that class members would have in proving their damages if individual determinations were found to be required.

8 In an affidavit sworn for the purpose of the approval motion, one of the plaintiffs' solicitors, Mr Paul J. Pape, indicated that, based on reports prepared for the Bank, class counsel had estimated that the maximum amount recoverable for the class was approximately $161.5 million. After taking into account the risk that the Bank would succeed at trial, class counsel targeted $50 million-$60 million as a reasonable range for settlement. Mr Pape stated that they had this in mind when, in December 2008, they agreed to mediation by the Honourable George Adams. The plaintiffs' subsequent acceptance of the Bank's offer to pay $55 million in settlement of the claims was recommended by the mediator.

9 The settlement amount was negotiated at arm's-length by experienced counsel after more than 11 years of litigation and after extensive productions by the Bank. There is, in my judgment, nothing in the record before me to suggest that the decision to settle for $55 million falls outside the zone of reasonableness and displaces the presumption of fairness referred to by Winkler J. In this case, the most difficult questions relate not to the amount the Bank has agreed to contribute in settlement of the claims advanced by the plaintiffs but rather to the nature and extent of the distributions that are proposed.

10 As in *Markson v. MBNA Canada Bank,* [2007] O.J. No. 1684 (C.A.) -- where, again, certification was ordered by the Court of Appeal after having been denied at first instance and in the Divisional Court -- the class consists of several million cardholders whose transactions were entered into over a period of many years. In view of the difficulty of identifying class members with potential claims and quantifying the harm each had suffered, the requirement that the procedure of the CPA must be manageable was given considerable weight in this court and in the Divisional Court.

In *Markson*, the proceeding was held be manageable because, it seems, of the Court of Appeal's conclusion that there was a reasonable likelihood that an aggregate assessment of damages would be possible. The question whether difficulties of distributing damages had any bearing on the issue of manageability was not discussed, and it is notable that, in deciding that certification should be granted, the court did not find it necessary to consider whether a "workable" litigation plan had been produced by the plaintiff as required by section 5(1)(e) of the CPA.

11 A similar conclusion that an aggregate assessment of damages might be available was reached by the Court of Appeal in this case where, however, Winkler C.J.O. also concluded that the conditions for certification would have been satisfied if the court at a trial of common issues determined that individual assessments were necessary. Moreover, on either approach to the assessment of damages, it appears that the Chief Justice accepted that problems of distribution may have some relevance to the issue of manageability that is inherent in the requirement that a class proceeding is the preferable procedure. Paras. 67-68 of the reasons of the Court of Appeal read as follows:

> [67] The CPA also provides a range of options for distributing amounts awarded under ss. 24 or 25. For example, s. 26(2)(a) permits the court to require the defendant to distribute monetary relief directly to class members "by any means authorised by the court, including abatement and credit". I draw particular attention to s. 26(3), which states:
>
> > 26(3) In deciding whether to make an order under clause (2)(a), a court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, *including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the Bank.* (emphasis in the original).
>
> [68] Evidently, the CPA provides a procedural mechanism on which the trial judge could rely to distribute amounts awarded under either s. 24 or s. 25. Thus, in my view, the preferable procedure requirement is satisfied in this case regardless of whether the assessment and distribution of damages, if necessary, are to be conducted on an aggregate or individual basis.

12 In this context, I note that the learned Chief Justice attributed no significance to the Bank's evidence that "it would take 1500 people about one year to identify and record the foreign exchange transactions on the cardholder statements that are available only on microfiche and that this would cost about $48,500,000": para. 48. As in *Markson*, this "economic argument" was specifically rejected.

13 Despite the emphasis given to section 26(3) of the CPA, I do not understand the Chief Justice to have excluded the possibility that the trial judge might rely on other provisions of section 26, including section 26(4) and (6) that read as follows:

> 26(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is

> satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.
>
> 26(6) the court may make an order under subsection (4) even if the order would benefit,
>
> (a) persons who are not class members; or
>
> (b) persons who may otherwise receive monetary relief as a result of the class proceeding.

14 These provisions contemplate what are often called cy pres orders by analogy to the cy pres jurisdiction that courts of equity have traditionally applied in cases involving charities and rules against remoteness. As was the case in *Gilbert,* such orders are commonly made in settlements approved by the court by a further analogy to the provisions of section 26. In *Gilbert*, the settlement that was approved by the court provided for a payment of $1 million out of the settlement amount of $16.5 million to the United Way in order to benefit past cardholders who could no longer be identified.

Winkler J. stated (at paras. 15-16):

> One might observe that a situation such as this could be addressed with a settlement that is entirely Cy pres. However, it is not the role of this court to substitute its settlement for that fashioned by the parties. Also, a disadvantage of settlement that is entirely Cy pres is that it does not compensate individual class members.
>
> Past cardholders are not part of the distribution list. The payment to the United Way on their collective behalf is in lieu of this and is acceptable given the peregrinations involved in pursuing these claims. This approach is acceptable in the present circumstances given the impossibility of identifying such class members. The CPA specifically contemplates a cy pres distribution in s. 26(6).

15 Under the proposed settlement in this case, approximately $39,100,000 would be available for distribution for the benefit of class members after the payment of the counsel fees and disbursements requested, the levy payable to the Law Foundation and administrative expenses out of the settlement amount of $55 million. From the amount of $39,150,000, approximately $10,750,000 would be paid directly to cardholders whose cards were issued before certain dates included in the class definition, and who were in good standing and active as of June 1, 2009. The balance of approximately $28.4 million would be applied cy pres as, despite the Court of Appeal's reference to section 26(3) of the CPA, the parties are in agreement that it would be impracticable to attempt to identify more than a relatively small percentage of the class members who are potential claimants.

16 Before finalising their proposals for the division between direct and indirect benefits to class members, counsel devoted considerable time and energy in considering different alternatives. The task of identifying cardholders who had engaged in foreign currency transactions - - as well as the amounts involved -- was hampered by the absence of records including some that had been destroyed inadvertently during the course of the proceeding. The various alternatives were discussed at case conferences prior to the hearing before counsel agreed on a final proposal.

17 I am satisfied that, in the light of these difficulties and when compared with the other alternatives, the proposed division between direct and indirect benefits strikes a reasonable balance between reimbursing class members and applying funds cy pres and should be approved. Although, as a general rule, cy pres distributions should not be approved where direct compensation to class members is practicable, the allocation of $10.75 million to be paid directly to cardholders is on the generous side as proof that one subgroup of them engaged in foreign currency transactions -- and, in consequence, were within the class definition -- will not be required.

18 As a general rule, the court's jurisdiction on motions under section 29(2) of the CPA is limited to granting, or withholding, approval. Exceptionally in this case, the minutes of settlement provide that, as part of the approval process, the court may change the amount proposed to be applied cy pres, the cy pres recipients and the division of funds between them. This provision reflects the parties' understanding that, in view of the size of the cy pres amount and the nature of the claims in this case, outright payments to charitable or other non-profit organisations -- the most common form of cy pres distributions -- might not be appropriate. For this reason, it was proposed that special purpose gifts would be made in order to ensure that the purposes for which the funds would be applied bore a sufficient relation to the interests and claims of the class members to justify a conclusion that the distribution would be for their benefit.

19 The question of the most appropriate cy pres distributions was discussed in a number of case conferences. Proposals by the plaintiffs with respect to one half of the cy pres amount of $28.4 million, and by the Bank for the other half were considered.

Cy Pres: The Plaintiffs' Proposal

20 The plaintiffs' original proposal involved grants to Canadian common law law schools to be used to foster professionalism and ethical conduct among practising lawyers. The amounts each law school would receive would reflect the distribution of class members across the country. It was suggested that teaching law students to be more professional and ethical in their behaviour when practising law would benefit class members and the public. It was said that:

> Contracts such as those in issue in this action may be more carefully drafted, banks, commercial institutions and all clients may be better advised and, as a result, disputes such as in this action and others may be avoided.

21 Apart from the establishment of a committee of five to seven members of the legal profession, with volunteers from the judiciary, to receive proposals and to disburse the funds to the law schools, no method of supervising or controlling the expenditure of the funds by the recipients was suggested. It may have been contemplated that the use of the funds would be entirely within the discretion of the recipients subject only to a moral obligation to apply them for the approved purposes.

22 Without -- I hope -- being unduly cynical about the optics of the plaintiffs' proposal in the present context, I suggested that a preferable alternative would be to create a trust fund to be administered by the Law Foundation of Ontario for the purpose of advancing public access to justice in Canada. Although in a number of cases -- including *Gilbert* -- cy pres distributions that benefit class members together with other members of the public have been approved, the suggested alternative would confer benefits on the class more directly than the original proposal and would do so in a manner that is consistent with, and would advance, one of the objectives of the CPA. Access to

justice was relied on heavily by the Court of Appeal in *Markson* and in this case as a ground for certifying the proceeding. Class members have benefited thereby and they and other members of the public would benefit from its enhancement in the future.

23 This suggestion was discussed with representatives of the Law Foundation -- including the Chair of its Board of Trustees and they have indicated that it is acceptable in principle.

24 The proposal contemplates the creation of a special trust fund to be administered by the Trustees of the Foundation. Section 56(2) of the *Law Society Act,* R.S.O. 1990, c. L. 8 provides that the Trustees have power to accept gifts and donations on trust in furtherance of the objects of the foundation. The objects include "legal aid" -- a term that, I am informed, has been construed broadly by the Trustees and has, correctly in my opinion, not been confined to financial aid provided to Legal Aid Ontario -- a corporation that is incorporated pursuant to the Legal Aid Services Act, 1998, S.O. 1998, c. 26 for the purpose of providing access to justice for low-income individuals, and is referred to by name in section 55 of *the Law Society Act.*

25 There are, of course, special difficulties that can be encountered in establishing valid purpose trusts under the laws of Ontario. Such trusts are not valid unless they are exclusively charitable, or can be treated as powers of appointment pursuant to section 16 of the *Perpetuities Act,* R.S.O. 1990, c. P. 9. In my opinion, this limitation is as applicable to trusts created pursuant to an order of the court as it is to other trusts and, if that is not correct, it is still one that the court should respect.

26 Is the purpose of promoting and advancing access to justice a charitable purpose? Given the repeated endorsement by courts, as well as by the Law Reform Commission, of access to justice as a socially valuable objective of the CPA -- and even ignoring some of the rather more dubiously valuable purposes that have been accepted as charitable over the years -- it would, I believe, be extraordinary if it were held that it is not worthy of recognition as a possible object of a valid trust.

27 The law on charities is notoriously technical and arcane. Numerous judicial pleas for legislative intervention have fallen on deaf ears. Judicial attempts in cases such as *Re Laidlaw* (1984), 48 O.R. (2d) 549 (Div. Ct.) and *Re Levy* (1989), 68 O.R. (2d) 385 (C.A.) to rid the law of its antiquated foundations in the *Statute of Elizabeth, 1601* are uncertain in their effects and, since the comments of Rothstein J. in *A.Y.S.A. Amateur Soccer Association v. Canada*, [2007] 3 S.C.R. 217, at paras 37-39, their correctness is not free from doubt. In one of the most recent cases in the Supreme Court of Canada -- *Vancouver Society of Immigrant and Visible Minority Women v. Canada,* [1999] 1 S.C.R. 10 -- the court was divided (5-4) on, among other things, the question whether a purpose of assisting immigrant women to obtain employment was charitable. The lengthy judgments delivered are replete with conflicting views on the same authorities that have been the subject of inconclusive analyses in a legion of cases stretching back over at least two centuries.

28 Access to justice connotes access by persons to whom it would not otherwise be available for the purpose of protecting and enforcing their legal rights. Although barriers to access to justice are very commonly -- although by no means exclusively -- financial in nature, a purpose of removing the barriers cannot, I think, be considered to fall exclusively within the first of the three traditional heads of charity -- the relief of poverty: see the Law Reform Commission's *Report on Class Actions*, pages 119-129. Nor would such a purpose be considered to be religious, or educational even in the expanded sense in which that term was given in *Vancouver Society*. That leaves only the

fourth head -- other purposes beneficial to the public -- with, or without, in Ontario, the qualification that they must also be within the spirit and intendment of the *Statute of Elizabeth, 1601*.

29 I do not think there is any doubt that a purpose of providing or promoting access to justice must be considered to be beneficial to the public. As the Law Reform Commission stated, at page 139 of its report:

> Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights.

30 Access to justice is, in other words, an essential component of the rule of law which, in turn, is one of the constitutional underpinnings of our democratic constitutional system of government.

31 If, despite the views expressed in *Re Laidlaw* and *Re Levy,* access to justice will not be a valid charitable purpose unless it is within the spirit and intent of the Elizabethan statute, I believe that requirement is also satisfied.

32 In *Incorporated Council of Law Reporting for England and Wales v. Attorney-General*, [1972] Ch. 73 (C.A.), different approaches for ascertaining whether a purpose was within the spirit and intent of the statue -- or within its "mischief" or "equity" were discussed. The Court of Appeal held that the publication of law reports by a non-profit corporation was a charitable purpose. Russell L.J. placed the purpose under the fourth head of charity. In his view, the correct approach was to apply a presumption that a purpose that benefits the public will be within the equity of the Statute of Elizabeth, and charitable in the absence of good reasons for a contrary conclusion. Sachs and Buckley JJ. preferred to characterise the purpose as educational but agreed that it would otherwise be upheld on the basis of the reasoning of Russell L.J.

33 Russell L.J. also considered whether the purpose of the Council would fall within the spirit and intendment of the statute if the correct approach was to find an analogy with purposes previously held to be charitable. The judge at first instance had referred to the very early judicial acceptance that the purpose of building a courthouse was charitable and Russell L.J. concluded that no distinction could properly be drawn between the provision of physical facilities for the administration of justice, and a dissemination of knowledge of the law to be administered in them.

34 On either of these approaches, I am satisfied that a trust to provide access to the courts and the administration of justice must be held to be charitable. Access to justice is presupposed by the provisions of the Canadian Charter of Rights and Freedoms and, without it, the provision of courthouses and law reports would be otiose.

35 For these reasons, I am satisfied that the proposed establishment of a fund to promote access to justice would create a valid charitable trust. I am also satisfied that such a trust could properly be administered by the Law Foundation as falling within its corporate object of "legal aid". As I have mentioned, this is consistent with the information provided by the Chair of the board of Trustees of the Foundation that the object has in the past been construed broadly and has not been confined to financial aid provided to Legal Aid Ontario.

36 For reasons of completeness, I note, also, that if, contrary to my opinion, a trust to promote and advance access to justice is not charitable, it could I believe be upheld as a specific non-charitable purpose trust that, pursuant to section 16 of the *Perpetuities Act*, is to be treated as a power of appointment over capital and income for a maximum period of 21 years.

37 The precise terms of the trust will be included in the order approving the settlement but, subject to any further submissions of counsel, or representations of the Law Foundation, my present preference would be for the Trustees of the Foundation to have discretion as to the application of funds for the approved purpose subject only to the limitation that they are not to form part of the Class Proceedings Fund established pursuant to section 59.1 of *The Law Society Act*.

Cy Pres: The Bank's Proposal

38 The bank proposed that the other half of the cy pres amount should be used to improve the financial literacy of low-income and otherwise economically disadvantaged Canadians. For this purpose, the funds would be paid to, and administered and distributed by, a non-profit charitable organisation, Social and Enterprise Development Innovations ("SEDI").

39 SEDI was incorporated as a corporation without share capital under Part III of the *Corporations Act* on March 14, 1995. Its objects, as amended by supplementary letters patent of April 21, 1997, are as follows:

1. To establish, maintain and supervise non-profit centres for the encouragement of people who are both poor and unemployed to develop self-employment projects with the objective of preventing and reducing unemployment and its attendant poverty;
2. To provide counselling and supportive services for the benefit of persons who are both poor and unemployed and otherwise economically disadvantaged persons including youth;
3. To set up programmes to carry out the foregoing objects;
4. To consult with other charitable, non-profit community and governmental agencies and organisations in developing programmes to carry out the foregoing objects and to provide funding for same;

40 SEDI is registered as a charitable organisation within the meaning of the *Income Tax Act* (Canada). It complies with the annual reporting obligations under the statute. To date it has been funded largely through grants and donations from federal, provincial and municipal governments, banks and other financial institutions, and private charitable foundations.

41 The promotion of financial literacy has been one of SEDI's principal activities since its creation. To this end it has worked with governmental agencies and community organisations to develop courses, programmes and projects and to train personnel whose employment brings them in contact with unemployed, poor and otherwise disadvantaged Canadians. SEDI's activities are founded on a conviction that there are social, market and governmental pressures that limit the ability of such persons to make informed financial decisions that are essential to their well-being and their capacity to become economically self-sufficient. Accordingly, financial literacy, in the sense understood by SEDI, refers to the knowledge, skills and ability to understand, analyse and use information to make informed judgments about financial decisions. Such decisions range from simple budgeting skills, to understanding choices between banking and credit products, to understanding rights and obligations created by financial documents such as credit card agreements, to understanding how to effectively save for retirement, home-ownership, or post-secondary education.

42 SEDI is administered under the supervision of a nine-member board of directors who serve without remuneration. In 2008 it had ten permanent and four part-time employees.

43 By a resolution of the board of directors of October 9, 2008, SEDI's financial literacy activities were expanded and organised by the creation of a new internal division known as the "Canadian Centre for Financial Literacy" (the "Centre"). This is dedicated to assisting and training the staff of community organisations to deliver literacy counselling and supportive services to needy and otherwise disadvantaged groups in society.

44 The Bank's proposal is for 50 per cent of the cy pres amount to be paid to SEDI. $3.5 million of this would be used for the support of the Centre for a period of five years and the balance would be held as a fund (the "TD Financial Literacy Fund") that, over a period of six years, would be applied in making grants to non-profit organisations who work with economically disadvantaged groups -- such grants to be used by the recipients to promote and support financial literacy among the members of such groups. All such grants would require the approval of SEDI's directors.

45 Counsel for the bank made submissions and filed extensive material in support of its proposals. This included a description of SEDI's activities during the past five years, the annual reports filed with Canada Revenue Agency, explanation of its financial reporting, and a legal opinion of SEDI's solicitor, Fasken Martineau, that the promotion of financial literacy is charitable in law as educational and for the relief of poverty, and is within the objects of SEDI. I share that opinion.

46 In addition, letters attesting to the valuable work performed by SEDI in promoting financial literacy among low-income Canadians were provided by five individuals who have either participated in SEDI's activities, or occupied positions with governmental organisations that have been involved with them.

47 On the basis of the submissions of counsel and the material filed, I am satisfied that the advancement of financial literacy is a worthy method of applying the cy pres amount for the benefit of the class members. I am also satisfied that SEDI is an appropriate entity to administer the funds for this purpose.

48 For the purpose of settling the terms of the approval order, counsel should consider whether it is necessary to have a trust agreement between the Bank and SEDI with respect to the administration of the funds. In view of the relatively simple and short-term obligations of SEDI, in may be possible to define those obligations adequately in the body of the order. It must, however, be made clear that the funds provided to the Centre for the support of its work are intended to enhance it and not simply to make available for SEDI's other purposes funds that would otherwise be used for the support of the Centre. Given the provisions of the *Law Society Act* that govern the administration of gifts received by the Trustees of the Law Foundation, a separate trust agreement with respect to the other half of the cy pres amount should not be necessary to complement the provisions of the order.

49 Subject to settling the terms of the order, the settlement will be approved.

Fees of Class Counsel

50 Counsel have requested a fee of $11 million which represents 20 per cent of the settlement amount and approximately 28 percent of the net amount that would be distributable to, or for the benefit of, class members.

51 Provision for a fee of 20 per cent of the gross recovery was made in retainer agreements with Dr Cassano and Dr Bordoff executed in April 2002 and September 2004 respectively. These written agreements are said to reflect the terms of an oral agreement made at the inception of the proceeding with Dr Cassano in 1997. Dr Bordoff was added as a plaintiff on March 9, 2005.

52 Each of the plaintiffs has supported the request for approval of a fee of $11 million and has expressed appreciation of the quality of the services performed by their counsel.

53 Contingent fee agreements that provide for fees to be calculated as a percentage of gross recovery have been approved in many class proceedings in this jurisdiction, and an application of percentages in excess of 20 per cent has been approved in several of them. In *Garland v. Enbridge Gas Distribution Inc*, [2006] O.J. No. 4907 (S.C.J.), for example, I considered the fee awarded to represent approximately 26.7 per cent of the value of the compensation and other benefits recovered for the class members. In *Stastny v. Southwestern Resources Corporation* (Unrep. November 3, 2008) and *Casselman v. CIBC World Markets Inc.* (Unrep. December 21, 2007) percentages in excess of 20 per cent were approved by Brockenshire J., and, in *Meretsky* -- one of the companion actions to this case -- the same learned judge indicated that 20 per cent was acceptable.

54 Counsel's intention to request a fee of 20 per cent of the gross recovery was communicated to the numerous class members who contacted counsel at different times throughout this lengthy litigation, the information was provided on its website and it was disclosed in the notice of the fairness hearing. Only one member of the class of several million persons has objected to the size of the fee.

55 This was hard-fought litigation -- conducted with tenacity and skill by counsel who, in effect, snatched victory from the jaws of defeat by persevering with it through successive appeals from the initial decision that denied certification. It is inherent in percentage of recovery agreements that counsel may receive large fees where, as here, the degree of success achieved is substantial. Equally, of course, they take the risk that the results achieved will provide them with little or no compensation.

56 Taking into account the course of the litigation, the risks accepted by counsel and the extent of the recovery achieved for the class, a fee of $11 million will be approved together with the disbursements claimed of $138,000.

57 There are three other matters on which I believe I should comment.

58 The first is that Dr. Cassano is the spouse of Ms. Pat Speight who is a "non-equity partner" in the firm of Sutts Strosberg who acted as co-counsel for the plaintiffs. A relationship of this kind is one that in some cases will call for close examination and, perhaps, suspicion. It was, however, disclosed at the hearing of the certification motion, and again at the fairness hearing, and Dr. Cassano was accepted as a suitable representative plaintiff and, with Dr. Bordoff, was appointed as such in the order of the Court of Appeal. In these circumstances, I see no reason for considering the relationship to be a factor that should have any bearing on the amount of counsel's fee.

59 The second matter is that the fee of $11 million represents the application of a multiplier of approximately 5.5 to counsel's approved time. This might well be considered to be excessive if the retainer agreements had provided for the adoption of the "lodestar approach" reflected in section 33 of the CPA. They did not do this.

60 While it has been said that the appropriateness of a fee calculated in the lodestar manner might be tested by comparing it with the percentage of gross recovery it represents, I would be hesitant to use the lodestar method as a firm indicator of the reasonableness of a fee determined by the application of a percentage to the amount recovered. In *Martin v. Barrett*, [2008] O.J. No. 2105 (S.C.J.), at paras. 38-39, I referred to criticisms of the lodestar method. One of these that has been

repeatedly mentioned in other cases in this jurisdiction and elsewhere is that the application of a multiplier to a base fee may not only encourage an inefficient use of time and a padding of dockets, it may also fail to reward efficient time-management and the exercise of superior skill by class counsel.

61 As Smith J. stated in *Endean v. Canadian Red Cross Society,* [2000] B.C.J. No. 1254 (B.C.S.C.), at para. 74:

> Good counsel should not be penalised for their acuity and efficiency by basing their fees only on the amount of time it took them to accomplish their client's objectives.

62 In contrasting the percentage of recovery approach with the application of a multiplier, Cumming J. stated in *VitaPharm Canada Ltd v. Hoffman -- La Roche Ltd*, [2005] O.J. No. 1117 (S.C.J.), at para. 107:

> Using a percentage calculation in determining class counsel fees properly places the emphasis on quality of representation, and the benefit conferred on the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours".

63 Of course, if counsel accept a retainer on the basis that the lodestar method is to apply, the requirements of section 33 -- including that of a reasonable base fee -- must be observed. Class counsel did not choose to adopt that method and, having achieved an excellent result, they submit that it would be unreasonable to reduce their fee by reference to the time they expended to do so. They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial, and there is nothing in the manner in which the proceeding was conducted that, in my judgment, would justify a refusal to approve a fee determined in accordance with the terms on which the retainers were accepted.

64 The final matter relates to the contents of the objection received from Mr Andrew Martin of Toronto. This was the only objection received from the members of the enormous class. I have not commented on it previously in the above reasons because, to the extent that his criticisms have not been met by the changes I have made to the proposed cy pres distributions, I believe that the authorities I should properly follow foreclose acceptance of them. At the same time, Mr. Martin's comments address quite fundamental issues relating to settlements of class actions such as this. As it may be that his views are shared by other class members who thought it useless, or just too much trouble, to voice their objections, I have included the substance of Mr. Martin's email letter as an appendix to these reasons together with my brief comments

M.C. CULLITY J.

* * * * *

APPENDIX

From: Andrew Martin

To: [Objections]

I am writing to object to the proposed settlement.

My reasons relate to the overall terms of the settlement. The amount that will be paid may (or may not) be appropriate relative to the allegations, but I do not believe that this settlement is in the interests of the plaintiff class. Specifically:

> -- Either TD did or did not levy unauthorised, undisclosed or inadequately disclosed charges. This needs to be determined so that in future, conditions of use can be drafted and interpreted correctly. [While no one could deny that clarification is desirable, the class action procedure has costs and risks for the representative plaintiffs and their counsel that are not shared by the other class members who, in effect, have a free ride. Simply as one example, the plaintiffs incurred an expense of approximately $67,000 in respect of the fees of the firm of chartered accountants who received and dealt with the 11,500 cardholders who opted out of the litigation.]
>
> -- In my personal view, given that certain costs were going to be charged in respect of these uses of the credit cards, the plaintiff class has not been disadvantaged and I suspect would have used the cards in any circumstances. The consequences of this litigation may well be to increase future charges. [I do not disagree but the Court of Appeal did, or did not consider these considerations to be relevant.]
>
> -- I strongly object to the proposal to distribute $14 million to charitable organisations. The purpose of a settlement should be to compensate people to who have suffered actual loss, and while these are laudable charitable purposes, I see no way reason for a publicly-owned financial institution, as custodian of its shareholders' money, should make such a payment as part of a class action settlement. [Mr Martin does not indicate his preferred position on the facts of this case that involve more than 4.5 million cardholders of whom only a relatively small number of those who entered into foreign currency transactions can be identified.]
>
> -- I also object to the proposal to distribute $14 million to law schools. This is highly offensive and, again, an inappropriate use of shareholder money (to support what are presumably ethical shortcomings of lawyers). It also poses a conflict of interest for the judiciary, which might feel reluctant to query or disallow such a proposal giving their own ties to the profession. [I do not disagree.]
>
> -- The proposal to pay up to $11 million to the lawyers is outrageous. While only (only!) 20 per cent of the total, it is a huge multiple of legal fees likely to have been incurred. This does not seem a particularly complicated case and cannot have consumed that much time. For instance, if it is a 4x multiplier that suggests 7,000 bars at $400/hour. This seems unrealistic, and so the multiplier is presumably much higher. And yet the risk in a case like this is, historically, quite low. I therefore object to any payment of legal fees in excess of 3x docketed hours at a reasonable hourly rate. Any excess between that and $11 million can either be added to the distribution to cardholders, or distributed to organisations providing free legal services to those unable to pay the fees now charged by lawyers. [I am

not sure why Mr Martin believes the risk in cases like this is, historically, quite low. His support of imposing the multiplier approach irrespective of the terms of counsel's agreement with the plaintiffs, the criticism to which the approach has been subjected, and the difficulties of applying it in practice, is not consistent with the provisions of the CPA as judicially interpreted in previous cases.]

It is not currently my intention to appear at the hearing on April 24.

Andrew Martin

cp/e/qlrxg/qlpxm/qlaxw/qlaxr/qlced/qlhcs

Case Name:

Lawrence v. Atlas Cold Storage Holdings Inc.

Between
Paul Lawrence, Anne Eagles and Charles Simon, Evelyn Simon and Erica Prussky, in their capacity as Trustees of the Charles Trust, Plaintiffs (Appellants), and
Sutts, Strosberg LLP, Koskie Minsky LLP, and Groia & Company, Appellants, and
Atlas Cold Storage Holdings Inc., Patrick A. Gouveia, Susan Elizabeth Peters, as Executrix of the Estate of Andrew W. Peters, deceased, Ronald Perryman, Joseph Wiley, Robert W. Martin, Albrecht W.A. Bellstedt, J. Nicholas Ross, Michael H. Wilson, Ernst & Young LLP and BMO Nesbitt Burns Inc., Defendants (Respondents), and
Rosetim Investments Inc. and PBMH Investments Ltd., Objectors (Respondents)

[2009] O.J. No. 4067

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78 C.P.C. (6th) 208

311 D.L.R. (4th) 323

2009 CarswellOnt 5789

257 O.A.C. 39

Docket: C50192

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, M. Rosenberg, and J.L. MacFarland JJ.A.

Heard: July 2, 2009.
Judgment: October 1, 2009.

(43 paras.)

Civil litigation -- Civil procedure -- Class or representative actions -- Procedure -- Appeal by class counsel from order fixing fees dismissed -- The class proceeding related to securities misrepresentations and had been settled for $40 million -- Class counsel had sought approval of a $12 million fee -- The motion judge approved a fee of $6.3 million -- A preliminary motion by two class members to quash the appeal was rejected, as class counsel had sufficient standing to bring the appeal and leave was not required -- The appellate court upheld the fee -- The motion judge applied the proper test in considering the relevant factors for consideration of a fair and reasonable class counsel fee -- Class Proceedings Act, ss. 32, 33.

Appeal by class counsel, Sutts, Strosberg LLP, Koskie Minsky LLP, and Groia & Company, from an order fixing class counsel fees. The underlying class proceeding had alleged that the defendant income trust overstated its earnings in press releases, prospectuses, and financial statements. The action was settled for $40 million after mediation and prior to examinations for discovery. The motion judge was asked to approve a class counsel fee of $12 million, of which the base fee was approximately $3.5 million. The judge approved a fee of $6.3 million plus GST based on what was fair and reasonable in light of the risk undertaken and degree of success achieved. The judge also cited the principle of proportionality, the stage of proceedings at which settlement occurred, and the fact that the initial contingency fee agreements had been superseded by a later agreement. The appellants argued that the amount fixed by the motion judge was one-half of the amount agreed upon in their contingency fee agreements. Two members of the class, Rosetim Investments and PBMH Investments, moved to quash the appeal on the basis that neither class counsel nor the representative plaintiffs had a right of appeal, that leave was required for an appeal from a costs order, and that the appeal was an abuse of process as a conflict of interest between class counsel and members of the class.

HELD: Appeal dismissed. Sections 32 and 33 of the Class Proceedings Act contemplated a motion for approval of an agreement between class counsel and a representative party in respect of fees. Thus the order under appeal was a final order with a concomitant right of appeal. The order was not a costs order requiring leave, but was more appropriately characterized as approval of a contingency fee retainer agreement. As parties to the motion, class counsel had sufficient standing to appeal. The alleged conflict of interest was without merit. The motion judge applied the proper test in considering the relevant factors for consideration of a fair and reasonable class counsel fee. No palpable or overriding error was established. The judge properly found that the risks and complexities were not as great as contended by class counsel. No error in principle occurred in concluding that the multiplier applied to the base fee created adequate economic incentive for counsel to prosecute similar actions.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 32, s. 32(2), s. 33, s. 33(4), s. 33(7)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6(1)(b)

Appeal From:

On appeal from the order of Justice Joan Lax of the Superior Court of Justice, dated February 12, 2009. Only the appellants and the objector respondents participated in the appeal. The other respondents, although present through counsel, took no part in the argument.

Counsel:

Paul J. Pape, for the appellants Paul Lawrence, Anne Eagles, Charles Simon, Evelyn Simon, and Erica Prussky.

David Stratas, for the appellants Sutts, Strosberg LLP, Koskie Minsky LLP, and Groia & Company.

Jeffrey S. Leon, for the respondent Patrick A. Gouveia.

Brendan Van Niejenhuis, for the respondent Ronald N. Perryman
Larry Lowenstein and Andrea Laing, for the respondent Atlas Cold Storage Holdings Inc.

Timothy Fellowes, Q.C., for the objector respondent Rosetim Investments.

R. Brian Foster, Q.C., for the objector respondent PBMH Investments Ltd.

The following judgment was delivered by

1 **J.L MacFARLAND J.A.**:-- This is an appeal by Sutts, Strosberg LLP, Koskie Minsky LLP, and Groia & Company ("Class Counsel") from the order of Lax J. dated February 12, 2009, wherein she fixed Class Counsel's fees at $6,300,000, plus $315,000 for G.S.T. The appellants argue that this amount is approximately one-half the amount agreed upon in their contingency fee agreements.

2 At the outset of the hearing in this court, two members of the class, Rosetim Investments Inc. ("Rosetim") and PBMH Investments Ltd. ("PBMH"), referred to collectively as "Objector Respondents", moved to quash the appeal on three grounds. First, they argued that neither Class Counsel nor the representative plaintiffs had a right of appeal. Second, they argued that the within appeal was a "costs" appeal and, as such, leave to appeal was required. In their final ground of appeal, they argued that the conflict of interest between Class Counsel and members of the class was such as to render the appeal an abuse of process. The motion was dismissed without calling on the appellants (respondents on the motion).

3 Sections 32 and 33 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 are relevant to case at bar. Section 32(2) sets out the following requirement:

> Court to approve agreements
>
> 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.

4 Sections 33(4) and (7) specifically govern agreements to increase fees by a multiplier, providing that:

> 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.
>
> ...
>
> 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.

5 Both sections contemplate the motion by a solicitor for approval of an agreement respecting fees and disbursements between Class Counsel and a representative party, as well as for the fixing of a multiplier in relation to fees being made by Class Counsel. The resulting order is a final order of a Superior Court judge, from which an appeal lies to this court by virtue of s. 6(1)(b) of the Courts of Justice Act, R.S.O. 1990, c. C-43.

6 Class Counsel brought the motion which led to the order of Lax J. Although not parties to the proceedings in which the motion was brought, they very clearly were parties to the motion. Moreover, Class Counsel had a direct interest in the subject matter of the motion and the order eventually made. Their status as a party to the motion, and their direct interest in the order made, are sufficient to give Class Counsel standing to appeal: see Parsons v. Canada Red Cross Society (2001), 11 C.P.C. (5th) 16 (Ont. C.A.).

7 The moving parties' argument that the order of Lax J. is a costs order simply cannot succeed. The order approves the contingency fee retainer agreement executed on March 3, 2008 which set out the fees owed to Class Counsel by their clients, to be paid out of a settlement fund. Lax J. made an order for the payment of money to Class Counsel, as well as a declaratory order approving the fee agreement. It is not an order with respect to costs payable by one party to the litigation to another party, referable to the other party's legal costs in the litigation.

8 There is simply no merit to the final ground for quashing the appeal. The alleged conflict of interest between Class Counsel and some of the members of the class is utterly without merit. The requirement for court approval of any agreement respecting fees and disbursements between a solicitor and a representative party resolves any concern for potential "conflict". It was for these reasons that the motion to quash the appeal was dismissed.

9 The nature of the proceeding was succinctly described in the motion judge's reasons at paras. 2 - 4:

> Nature of the Claim

> Atlas was an income trust that was intended to pay trust unit holders regular income distributions and provide them with the opportunity for capital appreciation as a result of its ownership of Atlas Cold Storage Holdings Inc. ("Atlas Holdings"), operators of North America's second largest temperature-controlled distribution network. The trust units traded only on the TSX. Following an investigation that revealed that its net earnings were overstated, Atlas announced[,] following the close of trading on August 29, 2003, that it would be restating its financial statements for fiscal years 2001 and 2002.
>
> The Plaintiffs allege that misrepresentations were made by Atlas in its prospectuses, financial statements and press releases. The defendants in the action are Atlas Holdings and several of its former officers and directors; the former Trustees of Atlas, Ernst & Young LLP ("E&Y") (Atlas Holdings' auditors) and BMO Nesbitt Burns Inc. ("Nesbitt"), the underwriter of two offerings of trust units during the class period. The causes of action pleaded against some or all of the defendants are negligence, negligent and fraudulent misrepresentation, conspiracy, breach of fiduciary duty, breach of s. 130 of the Securities Act, R.S.O. 1990, c. S. 5 ("OSA") and declarations.
>
> Nature of the Settlement
>
> Some of the defendants agreed to pay $40 million in full and final settlement of all claims in exchange for a release of the claims. After payment of administration costs, a 10% levy to the Class Proceedings Fund and class counsel's fees, each eligible class member will receive the amount of the actual net loss based upon the number of eligible trust units to a maximum loss of $4.50 per eligible trust unit. Under settlement, there is a claim administration process that has been designed so that class members can prepare their claims easily and then have those claims processe[d] fairly and efficiently. Eligibility and calculation of net loss is determined by the Administrator, Deloitte and Touche LLP, and is subject to appeal to a Referee. If the value of all valid claims exceeds the value of the settlement fund net of expenses, a class members' loss may be pro-rated. If all valid claims against the settlement are paid in full, the balance, if any, will be paid as prejudgment interest pro-rata to each class member receiving a distribution up to an amount equal to 17% of their net loss, and the balance, if any, cy-prés as the court directs.

10 The motion judge reviewed the background of the litigation in detail, both in terms of procedure and substance, at paras. 7-22 of her reasons before beginning her analysis of the three issues before her.

11 The analysis begins at para. 7, with the motion judge's observation that Class Counsel's fees "are to be fixed and approved on the basis of whether they are fair and reasonable in all the circumstancs". Lax J. goes on to state that what is "fair and reasonable" must be determined "in light of the risk undertaken and the degree of success or result achieved" (citations omitted).

12 The motion judge was asked to approve a fee of $12 million where the base fee claimed was approximately $3.25 million. The motion judge summarized the amounts sought by the three law

firms, which acted together in the prosecution of this litigation, the disbursements which totalled $434,474.09, with a total base fee of $3,226,023.00 (both exclusive of G.S.T.).

13 At para. 49, the motion judge summarized the three objections taken by the Objector Respondents to fixing Class Counsel's fees in the amount requested as follows:

> 1. There was no justification for fees in this amount for an action that settled after cross-examinations and three days of mediation with no trial, defence pleadings, or examinations for discovery.
> 2. One objector complained that his loss was greater than the maximum loss of $4.50 per trust unit agreed to in the settlement, and that this should be addressed before approving fees and disbursements in the amounts requested.
> 3. The requested fees are disproportionate to the settlement achieved.

14 The motion judge found all three objections valid. She considered that the representative plaintiffs had entered into fee agreements in 2006 and 2007, but that those agreements were replaced by the agreement executed March 3, 2008, effective as of February 1, 2004. Lax J. concluded at para. 50:

> There is no reason to refuse to approve the fee agreement as I am satisfied that it complies with sections 32 and 33 of the CPA. The retainer agreement was executed at a time when the settlement amount had been finalized and the affidavits that have been filed support class counsel's request for fees. It is nonetheless my task to assess the reasonableness of the fee.

15 She then went on to list the factors that are relevant in determining the reasonableness of the fee at para. 51, including:

> (a) the time expended;
> (b) the factual and legal complexities of the matters to be dealt with;
> (c) the degree of responsibility assumed by the lawyer;
> (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 lawyer;
> (g) the results achieved;
> (h) the ability of the client to pay; and
> (i) the expectations of the client as to the amount of the fee.

16 At para. 52, the motion judge accepted counsel's submissions that this was

> ... difficult, risky litigation that was prosecuted against eleven well-resourced defendants in which the plaintiffs advanced novel legal arguments that may not have succeeded. The litigation risk was exacerbated by the leveraged buyout and the risks relating to collection. The plaintiffs were largely successful on the motions brought under Rules 21 and 25 and class counsel vigorously and capably prosecuted the action in preparation for the certification motion.

Lax J. observed that the result that was achieved was probably the best that could be attained in the circumstances. In reaching this conclusion, she considered each of the factors outlined above, as well as a number of other class action cases which considered the use of a multiplier.

17 The motion judge ultimately concluded that the 7,400 docketed hours for a three day pleadings motion, preparation for a certification motion that was never argued, which included 12 days of cross-examination, and a three day mediation was not justified. She further held that the base fee of $3.25 million was not a reasonable base fee for the work that was performed.

18 In my view, the motion judge applied the proper test in considering the relevant factors enumerated above at para. 14 and in concluding that a 25% reduction in the base fee was warranted. It was her call to make. Absent any palpable and overriding error, of which none have been demonstrated, it is not for this court to interfere. As noted by Goudge J.A. in Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417(C.A.) at p. 425, "the selection of [a] precise multiplier is an art, not a science".

19 The motion judge considered the submissions of Class Counsel, including their argument that this "was the third largest securities class action settlement in Canadian history." On the basis of the authorities submitted by the parties, Lax J. concluded that if the Atlas Settlement was the third largest, then it was quite a distant third. She compared the results achieved in the only shareholder approval decisions cited to her, including, Mondor v. Fisherman (2002), 22 C.P.C. (5th) 346 (Ont. S.C.) and Frohlinger v. Nortel Networks Corp., (2007) 40 C.P.C. (6th) 62 (Ont. S.C.). She concluded that the amount sought for fees in the case before her, compared with those cases, "could represent up to 52% of the net recovery" and that "[t]his offends the principle of proportionality". Her conclusion is supported by several authorities, including the words of Cumming J. in Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117 at para. 112:

> It was argued in the course of submissions that the implicit multiplier of about 2.26 upon the base fee is modest and a higher multiple would be supportable. In my view, the implicit multiplier applied to the base fee is one standard to measure whether the fees sought are fair and reasonable. The $15 million sought for fees is reasonable if the actual recovery is $100 million ... The results achieved, i.e. the actual recovery, is a seminal factor in determining fair and reasonable fees in any class action settlement.

20 Those words have been effectively approved by this court in Gagne v. Silcorp Ltd., supra, where Goudge J.A. at p. 425 wrote:

> 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.

21 The appellants argue that the motion judge erred in dismissing their submission that they achieved a percentage recovery for the class that is more than six time greater than the average recovery of $5 million in U.S. securities class action settlements. I concur with Lax. J.'s conclusion, at para. 59 of her reasons, that this line of argument is irrelevant. In my view, the appellants' submission could be of little or no assistance to the motion judge. Her obligation was to determine what

was a fair and reasonable fee on the specific facts of the case before her and averages from another jurisdiction do not assist in that determination. She considered Mondor, supra, being factually similar and from this jurisdiction, to be more relevant and I agree with her conclusion in that regard.

22 She did not ignore the fee agreement, but rather considered it as she was bound to do. She was not obliged to accept it. That agreement is but one factor which "can" be considered "in determining what is fair and reasonable": see Gagne v. Silcorp Ltd., supra, p. 425.

23 The motion judge then considered the multiplier, noting correctly that "[i]t is extremely rare to find a case where a multiplier of 3.7 or 4 has been awarded".

24 In short, she considered all of the required factors in coming to her conclusion of what a fair and reasonable fee would be in all the circumstances. Her conclusion is well summarized at para. 54 of her reasons, where she states:

> I believe that it is important to encourage experienced counsel to take on meritorious cases that are tough and this is particularly so in shareholder class actions, which are really in their infancy in Canada. I accept that the result achieved was probably the best that could be achieved in the circumstances. I accept that the risks were great, although perhaps not as great as counsel contend. I do not, for example, accept that this was a "bet your firm" litigation referred to in Endean v. Canadian Red Cross Society, [2000] B.C.J. No. 1254. The risks were spread across three firms and support was obtained from the Class Proceedings Fund. The members of the class counsel team are very experienced, very creative and they did a thorough and diligent job. They are deserving of being fairly compensated at a level significantly above an amount that might be considered a reasonable base fee given the risks involved. However, I do not believe that the base fee of $3.25 million is reasonable or that the requested fee of $12 million, representing 30% of the gross recovery and a much greater percentage of the net recovery is fair and reasonable. In my opinion, it is excessive in relation to the recovery for the class.

25 I agree with her conclusion and specifically endorse her observation that the risks here were not as great as counsel contend, nor were the complexities. The settlement was completed by way of contribution from the insurers of the directors and officers of Atlas, and did not come from the deep-pocketed defendants, against whom the risk of obtaining judgment was much greater.

26 The appellants argue that the motion judge's finding that the multiplier chosen would create "more than adequate incentive" to prosecute actions of this kind was an error in principle.

27 There can be no doubt that the motion judge was alive to need for fees to provide the necessary economic incentive to encourage lawyers to take these cases on and prosecute them. At paragraph 54 of her reasons she stated:

> I believe that it is important to encourage experienced counsel to take on meritorious cases that are tough and this is particularly so in shareholder class actions, which are really in their infancy in Canada.

28 As this court noted in Gagne, supra:

> Finally, fair and reasonable compensation must be sufficient to provide real economic incentive to solicitors in the future to take on this sort of case and to do it well.

29 The motion judge accepted that the members of the class counsel team were very experienced, very creative and that they did a thorough and diligent job and were "... deserving of being fairly compensated at a level significantly above an amount that might be considered a reasonable base fee given the risks."

30 The base fee claimed for all three firms on the basis of their dockets was $3.23 million which represented an expenditure of some 7,400 hours of docketed time at counsel's full billing rates.

31 After reducing the base fee by 25%, the motion judge applied a multiplier of 2.6 and concluded:

> I consider this to be not only at the higher end of the range, but more than adequate incentive to prosecute actions of this kind. This produces a fee of $6,290,746 rounded to $6.3 million and represents roughly 16% of gross recovery and a more equitable sharing of net recovery as between class members and class counsel. This falls within the range of percentages of gross recovery that have been accepted in other cases.

32 Even after the 25% reduction, the approved fee represents nearly twice the full docketed fee. I agree with the motion judge's observation that a fee in this range would be more than adequate incentive to solicitors to take on and prosecute an action of this nature.

33 In conclusion, I see no error on the part of the motion judge. She considered all the relevant factors and applied the proper legal authorities. There is no basis to interfere with her decision. Accordingly, I would dismiss the appeal.

34 At the outset of the oral submissions, counsel for the appellants began with an argument based on the interpretation of the statutory language in ss. 32 and 33 of the Class Proceedings Act. It was argued that once the motion judge approved the fee agreement under s. 32(2), she had no jurisdiction to go on and test the reasonableness of the fees in accordance with s. 33 of the Act. Counsel argued that a declaration proclaiming the agreement enforceable took it outside the specific constraints of s. 33.

35 This argument was not made before the motion judge, nor was it set out in the Notice of Appeal or referred to in the appellants' factum. Counsel for the respondents on the appeal contend that they had not had adequate notice of this argument and that it should not be permitted to proceed.

36 While there is much merit in the respondents' position, in the course of oral argument, counsel for the appellants acknowledged that, regardless 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.

37 For the reasons set out above it is both unnecessary and inappropriate to address the merits of the statutory interpretation of s. 32 and s. 33 put forward in oral argument by counsel for the appellant.

38 At the conclusion of argument, counsel for the appellants submitted that in his view, the Objector Respondents, who appeared and participated in the appeal, should be entitled to their costs of the appeal, irrespective of the result, on a partial indemnity basis, fixed in the all inclusive sum of $10,000 each.

39 If the appellants were successful on the appeal, those costs should be payable out of the settlement fund. If unsuccessful, those costs should be paid by Class Counsel.

40 The Objector Respondents did not have their cost outlines available at the conclusion of argument. Bills of costs were subsequently submitted by Mr. Fellowes on behalf of Rosetim and by Mr. Foster on behalf of PBMH.

41 Mr. Fellowes claims costs of $112,976.79, on a full indemnity scale, for 134 hours at $800 per hour. Mr. Foster claims costs of $89,464.73, on a full indemnity scale, for 104.7 hours at $800 per hour.

42 In a somewhat unusual turn, also subsequent to the completion of oral argument, the court received a letter from a Mr. Peter Hyde, who describes himself as President and director of PBMH, claiming additional personal costs for his attendances and time spent in assisting Messrs. Fellowes and Foster, including travel costs and incidental related expenses, in the total sum of $8,929.96. It was always the understanding that Mr. Foster was counsel to PBMH and it was that corporation that was the member of the class, not him. Costs cannot be claimed both on behalf of the corporation and on behalf of the directors and/or officers individually unless they are parties in their personal capacity. There can be but one set of costs for PBMH.

43 In my view, the amounts claimed by the Objector Respondents are excessive. While entitled to be present and make the arguments, in my view, they should not be entitled to claim fees separately. Their interests were those of the class and the same objections applied to all members of that class. They were, in effect, representational of some of the members of the class although not the representative plaintiffs. In such circumstances, it seems fair that only one set of costs be awarded. I see no reason why costs should be on anything other than a partial indemnity scale, and, on that basis, I would fix costs of the Objector Respondents in the sum of $10,000 inclusive of disbursements and G.S.T., to be paid by Class Counsel.

MacFARLAND J.A.
D.H. DOHERTY J.A.:-- I agree.
M. ROSENBERG J.A.:-- I agree.

cp/e/qlecl/qljxr/qlmxl/qlcas/qlced/qlhcs

Case Name:

Fantl v. Transamerica Life Canada

Between
Joseph Fantl, Plaintiff, and
Transamerica Life Canada, Defendant
PROCEEDINGS UNDER the Class Proceedings Act, 1992

[2009] O.J. No. 4324

83 C.P.C. (6th) 265

81 C.C.L.I. (4th) 18

2009 CarswellOnt 6264

Court File No. 06-CV-306061-CP

Ontario Superior Court of Justice

P.M. Perell J.

Heard: October 7, 2009.
Judgment: October 15, 2009.

(101 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Procedure -- Costs -- Particular items -- Counsel fees -- Application by class counsel for approval of fees following settlement allowed in part -- Settlement provided defendant would pay fees court determined were fair and reasonable -- Fees provided for under contingency agreement of $12 million far exceeded amount payable to counsel according to dockets -- Docketed amount of $2.4 million multiplied by 2.75 to reflect risk taken by firm in accepting case and excellent success achieved by counsel -- Fees inclusive of disbursements and GST approved at $7 million -- Class Proceedings Act, 1992, s. 32.

Legal profession -- Barristers and solicitors -- Compensation -- Contingency agreements -- Fair and reasonable -- Application by class counsel for approval of fees following settlement allowed in part -- Settlement provided defendant would pay fees court determined were fair and reasonable -- Fees provided for under contingency agreement of $12 million far exceeded amount payable to

counsel according to dockets -- Docketed amount of $2.4 million multiplied by 2.75 to reflect risk taken by firm in accepting case and excellent success achieved by counsel -- Fees inclusive of disbursements and GST approved at $7 million.

Professional responsibility -- Self-governing professions -- Remuneration -- Contingency fees -- Legal proceedings -- Costs -- Professions -- Legal -- Barristers and solicitors -- Application by class counsel for approval of fees following settlement allowed in part -- Settlement provided defendant would pay fees court determined were fair and reasonable -- Fees provided for under contingency agreement of $12 million far exceeded amount payable to counsel according to dockets -- Docketed amount of $2.4 million multiplied by 2.75 to reflect risk taken by firm in accepting case and excellent success achieved by counsel -- Fees inclusive of disbursements and GST approved at $7 million.

Application by REO, counsel for Fantl in a class proceeding against Transamerica, for approval of its counsel fees. The counsel fees claimed were in the range of $12 to $13 million, based on a 30 percent share of the settlement achieved of $40.5 million. Based on the hours expended by REO on the proceeding, fees would have been in the range of $3 million. The settlement reached between Transamerica and Fantl resulted from negotiations during which Transamerica indicated its intention to investigate any inappropriate charges it had been applying to its customers and to compensate all of them, including non-class members, for these overcharges. REO was content to allow Transamerica to conduct its investigation and determine what it owed, and largely accepted its position. The settlement provided that Transamerica would pay counsel fees as determined fair and reasonable by the court, and that this payment would have no bearing on the amount received by class members. REO and Transamerica both issued press releases about the settlement, setting out the positive steps Transamerica had taken to remedy the situation. Fantl subsequently acknowledged the contingency agreement he had originally executed with REO. During the course of proceedings, a dispute arose between REO and a departing member of the firm over carriage of Fantl's file. This resulted in significant expenditures on counsel for REO and Transamerica.

HELD: Application allowed. Counsel fees for REO were allowed at $7 million, inclusive of disbursements and GST. Transamerica had standing to argue against REO on the fee approval motion. It was clearly interested in the outcome as the party responsible to pay REO's fees. Transamerica had bound itself to pay what the court determined was fair and reasonable for counsel fees. The court was not required to determine whether or not the settlement of the class proceeding was defendant-driven or the extent to which REOO could take credit for modifying Transamerica's behaviour. Fairness could not be determined based on the interests of the class members, as their award would not be affected by the outcome of the fee approval application. Fees associated with the carriage motion were not payable by Transamerica. As a result, the appropriate base fee to start with, taken from REO's dockets, was $2.4 million. A multiplier of 2.75 was applied to take into account the risks associated with REO taking on Fantl's case and the excellent result achieved. Transamerica benefited from REO publicly endorsing its action to remedy the possible overcharges to its customers.

Statutes, Regulations and Rules Cited:

Champerty Act,

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12, s. 32, s. 32(2)

Counsel:

C. Scott Ritchie QC, for the Plaintiff.

William G. Horton, for the Defendant.

REASONS FOR DECISION

P.M. PERELL J.:--

Introduction

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 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 not 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.

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 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.

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 policy-

holders. 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.

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 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.

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 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.

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 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.

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.

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.*, [2009] O.J. No. 4271, (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).

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 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. No. 2105 (S.C.J.) 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.
>
> [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, [1998] Q.B. 785, supra*, at pp. 788, 790 Q.B. The applications judge in this case, [2001] O.J. No. 713, 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.

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.

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 hav-

ing 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.

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.

P.M. PERELL J.

cp/e/qllxr/qljxr/qlced/qlaxw/qlced

Case Name:

Smith Estate v. National Money Mart Co.

Between
Kenneth Smith, as Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, and Ronald Oriet, Plaintiffs (Appellants), and
Sutts, Strosberg LLP, Heenan Blaikie LLP, Paliare Roland Rothstein Rosenberg LLP and Koskie Minsky LLP, Appellants, and
National Money Mart Company and Dollar Financial Group, Inc., Defendants (Respondents)

[2011] O.J. No. 1321

2011 ONCA 233

276 O.A.C. 237

331 D.L.R. (4th) 208

199 A.C.W.S. (3d) 1077

106 O.R. (3d) 37

3 C.P.C. (7th) 223

2011 CarswellOnt 1920

Docket: C51893

Ontario Court of Appeal
Toronto, Ontario

M.J. Moldaver, R.P. Armstrong and R.G. Juriansz JJ.A.

Heard: October 25, 2010.
Judgment: March 28, 2011.

(137 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Class counsel -- Fees -- Retainer agreement -- Representative plaintiff -- Appeal by class counsel in class proceeding from $14,500,000 award of counsel fees allowed in part -- Settlement amount was not as great as class counsel submitted -- Fees of $14,500,000 were reasonable and fair -- Having rejected retainer agreement with respect to counsel fees, judge was entitled to fix fees as fit -- Lawyer and non-lawyer experts retained for discrete tasks by counsel were not entitled to premium, and their fees were properly treated as disbursements -- Judge erred in ordering compensation for representative plaintiff to be paid from counsel fees -- Class Proceedings Act, ss. 32, 33.

Legal profession -- Barristers and solicitors -- Compensation -- Contingency agreements -- Fair and reasonable -- Fees and disbursements -- Measure of compensation -- Appeal by class counsel in class proceeding from $14,500,000 award of counsel fees allowed in part -- Settlement amount was not as great as class counsel submitted -- Fees of $14,500,000 were reasonable and fair -- Having rejected retainer agreement with respect to counsel fees, judge was entitled to fix fees as fit -- Lawyer and non-lawyer experts retained for discrete tasks by counsel were not entitled to premium, and their fees were properly treated as disbursements -- Judge erred in ordering compensation for representative plaintiff to be paid from counsel fees.

Professional responsibility -- Self-governing professions -- Remuneration -- Fees -- Contingency fees -- Professions -- Legal -- Barristers and solicitors -- Appeal by class counsel in class proceeding from $14,500,000 award of counsel fees allowed in part -- Settlement amount was not as great as class counsel submitted -- Fees of $14,500,000 were reasonable and fair -- Having rejected retainer agreement with respect to counsel fees, judge was entitled to fix fees as fit -- Lawyer and non-lawyer experts retained for discrete tasks by counsel were not entitled to premium, and their fees were properly treated as disbursements -- Judge erred in ordering compensation for representative plaintiff to be paid from counsel fees.

Appeal by four law firms, acting for the plaintiffs in a class proceeding, from an order fixing their counsel fees. The action was certified as a class proceeding against two payday lending companies. The plaintiffs alleged they were charged criminal rates of interest for small loans with a repayment date connected with their payday. The action was strongly resisted by the lenders. After a 17-day trial, an agreement was reached that the lenders would pay $27,500,000 to the settlement class, would forgive outstanding loans totalling $56,000,000, would provide transaction credits totaling $30,000,000 to class members who did not have outstanding debts to the lenders, and would pay $2,000,000 in settlement administration costs. In March 2010, the class definition was expanded to include borrowers who entered into transactions with the defendants between the publication of the original certification order and December 15, 2009. Class counsel fees were fixed at $14,500,000, inclusive of fees, GST and disbursements of $1,053,621. The disbursements included amounts paid to experts and other lawyers retained by class counsel to perform discrete tasks. The representative plaintiff was to be compensated $3,000 from class counsel fees. Class counsel had sought approval of a counsel fee of $27,500,000 million. On appeal, the firms sought $20,000,000 in fees. They had docketed time valued at $9,750,000. Their retainer agreement provided counsel was entitled to the greater of one-third of the recovery, or the base fee increased by a multiplier of four less the fee portion of any costs already paid, plus taxes and disbursements. It also provided that the court had to approve counsel's entitlement to costs payable to the client. The judge rejected the agreement as it pertained to counsel fees because he did not agree with class counsel's characterization of the set-

tlement as excellent. He did not consider the transaction credit portion of the settlement equivalent to cash, and he discounted the value of the debt forgiveness as this was part of the lenders' ordinary business.

HELD: Appeal allowed in part. The retainer agreement did not permit the firms to ask the court to increase their base fees by a multiplier. By rejecting the agreement as it dealt with counsel fees, the judge was therefore entitled to determine counsel's fees himself. He was not bound by any fee/multiplier analysis. He did not err in finding the settlement was worth nothing like the $120,000,000 proposed by class counsel. There was no basis for interfering with the judge's finding that $14,500,000 was a fair and reasonable fee for class counsel. He did not err in treating the fees charged by non-lawyer experts retained by counsel as disbursements rather than increasing them as contingency fees. Other lawyers retained by class counsel to perform discrete tasks were not entitled to a premium either, because neither the representative plaintiff nor the court had approved them as counsel. There was no reason to depart from the rule that compensation for the representative plaintiff be paid from the settlement fund as opposed to from counsel fees.

Statutes, Regulations and Rules Cited:

An Act Respecting Champerty, R.S.O. 1897, c. 327

Class Action Fairness Act of 2005, 28 U.S.C (2005), s. 1712(d)

Class Proceedings Act, S.O. 1992, c. 6, s. 32, s. 32(1), s. 32(2), s. 32(3), s. 32(4), s. 33, s. 33(1), s. 33(2), s. 33(3), s. 33(7), s. 33(7)(a), s. 33(7)(b), s. 33(7)(c)

Criminal Code, R.S.C. 1985, c. C-46

Ontario Rules of Civil Procedure, Rule 13.02

Rules of Professional Conduct of the Law Society of Upper Canada, Rule 2.08(8)(a)

Solicitors Act, R.S.O. 1990, c. S.15

Appeal From:

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice dated March 3, 2010, with reasons reported at (2010), 94 C.P.C. (6th) 126.

Counsel:

Terrence J. O'Sullivan and James Renihan, for the appellants.

Chris Hubbard, for Money Mart (not participating in appeal).

Mahmud Jamal and Jason MacLean, for Dollar Financial Group, Inc. (not participating in appeal).

[Editor's note: A corrigendum was released by the Court April 5, 2011; the corrections have been made to the text and the corrigendum is appended to this document.]

The judgment of the Court was delivered by

1 R.G. JURIANSZ J.A.:-- This is an appeal from the order of Perell J. fixing the appellants' counsel fees in this class proceeding. The appellants are four law firms that acted as class counsel in this class proceeding.

2 By order dated March 3, 2010, Perell J. varied the certification order by expanding the class definition, approved the settlement of the class action, allowed the representative plaintiff compensation of $3,000 to be paid out of class counsel fees, and fixed class counsel fees in the amount of $14.5 million, being $12,806,074.94 for fees, $640,303.75 for GST and $1,053,621.31 for disbursements including GST. The disbursements included the fees of certain consultants and other counsel retained by class counsel that the appellants had requested be treated as contingency fees.

3 The class definition was expanded to add a group of payday loan borrowers who entered into transactions between the publication of the original certification order and December 15, 2009. The date December 15, 2009, is significant. As of that date, because of legislative changes, it could no longer be alleged that the transactions contravened the *Criminal Code*'s provisions prohibiting criminal rates of interest.

4 Before Perell J., class counsel sought approval of a counsel fee of $27.5 million. On appeal, they seek a fee of $20 million. They also seek, as they did before Perell J., to have fees, disbursements and taxes of other counsel - who had provided their services on a contingency basis - treated as a component of the class counsel base fee rather than as disbursements, to have the fees of consultants - who had also provided their services on a contingency basis - increased by the multiplier the court awarded to class counsel, and to have the compensation paid to the representative plaintiff paid out of the class fund rather than out of class counsel fees.

5 For the reasons that follow, I would allow the appeal in part. I would vary the motion judge's order so that the fees of the representative plaintiff are paid out of the class fund. I would dismiss the remainder of the appeal.

6 I add the observation that in a case such as this, the motion judge should give serious consideration to the appointment of *amicus curiae* or a guardian of the settlement fund on the hearing of counsel's application for approval of their fees.

Background

7 In this class proceeding, the plaintiffs alleged that they were charged a criminal rate of interest by the defendants for small loans with a due date for repayment connected to their payday. The issue in the action was whether the various charges, i.e. a finance charge, a cash checking fee and an item fee, should be characterized as interest under the *Criminal Code*'s provisions prohibiting criminal rates of interest.

8 The class action was strenuously resisted. There were many interlocutory proceedings. According to the motion judge's count, there were 39 orders, 12 endorsements, and four judgments. There was one leave application to the Divisional Court, four appeals to the Court of Appeal, and three leave applications to the Supreme Court of Canada. The issues litigated included whether the order for service of the claim, *ex juris*, on the defendant Dollar Financial Group, Inc. was valid, whether the loan agreements required the plaintiffs to mediate or arbitrate their disputes, whether the defendants' franchisees should be added as defendants, and whether the plaintiffs were entitled to partial summary judgment.

9 The trial began on April 27, 2009, and proceeded for 17 days. It was established that during the class period, class members had paid cheque cashing fees and interest totalling $224,791,507. Money Mart counterclaimed for the class members' indebtedness from payday loans that were in default. The amount of that indebtedness was ultimately calculated to be $56,388,071 at the time of the motion.

10 Following a mid-trial mediation, the parties agreed to a settlement on the following terms:

i. The defendants would pay $27.5 million to the settlement class;
ii. the defendants would forgive the class members' indebtedness to them, in the amount of $56,388,071;
iii. the defendants would make available fully transferable transaction credits in the amount of $30 million to reduce the cost of using the defendants' services in the future, to be allocated among those class members who were not indebted to Money Mart;
iv. the defendants would pay to the Class Proceedings Fund the sum of $3 million, in annual instalments of 10% of the transaction credits as they are used, and 10% of the unused transaction credits after the expiration date; and
v. the defendants would pay the costs of administering the settlement, in the amount of $2 million.

11 At the motion, class counsel asserted the value of the settlement was in the range of $120 million. The time value of the hours docketed by class counsel was $9,750,024.

Issues

12 The appellants resist the characterization of the appeal as primarily involving a claim for higher fees. Rather, they say that the appeal raises important issues about access to justice, since it concerns the legal principles that govern the determination of fair fees for class counsel. The fees awarded must not only provide adequate compensation to class counsel but must also provide a suitable incentive to skilled lawyers to take on complex and expensive class proceedings, all without unreasonably diminishing the fund available for distribution to the class. The appellants say that contingency fees should be available to firms who provide essential but non-legal services to the class and that it is important that class counsel be able to retain, on a contingency basis, the expert services necessary to effectively assert the class' claim. Finally, they say that as a matter of principle, a representative plaintiff's compensation should be paid out of the fund and not out of class counsel fees.

13 I summarize the appellants' arguments as follows:

i. The motion judge erred by failing to apply the base fee/multiplier approach provided for in s. 33(7);
ii. the motion judge erred by failing to allow class counsel fees in an amount that was fair and reasonable;
iii. the motion judge erred by refusing to treat the fees payable to the consultants, Price Waterhouse Cooper ("PWC") and Mr. Anand, in accordance with the contingency basis on which class counsel had retained them;

iv. the motion judge erred by refusing to consider the fees of Fraser, Milner, Casgrain LLP ("FMC") and Prof. Krishna as class counsel fees because the court had not appointed them as part of the class counsel group; and

v. the motion judge erred by ordering that the representative plaintiff's compensation be paid from class counsel fees.

14 There is another matter worth discussing though, strictly speaking, it is not a legal issue raised by the appeal. During oral argument, the court raised with counsel the difficulties that stem from the fact that class counsel fees are determined in a non-adversarial forum. Counsel for the appellants frankly acknowledged the difficulties and suggested that it would be useful to the profession for this court to discuss the issue. I begin with that discussion.

The non-adversarial forum

15 Our system of justice is based on the basic tenet that the court will be able to reach the most informed, considered, impartial and wise decision after presiding over the confrontation between opposing parties, in which each side can identify issues, lead evidence, cite law, discuss policy considerations, and seek to undermine the position of the other. Motions for the approval of settlements and class counsel fees in class proceeding depart from this basic tenet as a matter of routine. They usually proceed unopposed in large part because individual class members often have too small a stake to be compelled to participate.

16 The motion judge was troubled by what he described at one point as the "*ex parte*" nature of the hearing before him and included a lengthy comment about it in his reasons, a comment that is worth reading. The comment emphatically observes that it is "well known" that the court is placed in a difficult position in determining whether a settlement and class counsel fees should be approved without "the dynamics of the adversary system where opposing views are heard".

17 Winkler J. in *McCarthy v. Canadian Red Cross Society* (2001), 8 C.P.C. (5th) 349 (Ont. S.C.) also compared unopposed motions in class action to *ex parte* proceedings. After referring to authorities that highlighted that "there is no situation more fraught with potential injustice and abuse of the Court's powers than application[s] for an ex parte injunction", he stated that counsel in unopposed motions in class proceedings are under a special duty to make full and frank disclosure, just as in *ex parte* proceedings. He stated,

> By comparison, a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination. This is especially important where

> the motion is for the approval of settlement agreements, class counsel fees or consent certifications for the purpose of settlement.

18 In one respect, counsel's duty to make full and frank disclosure is more significant in unopposed class action motions than in *ex parte* motions. An order obtained *ex parte* is very often brought back before the court by an interested party not present at the *ex parte* hearing. This does not happen with orders approving counsel fees in class proceedings. This court recently found that a class member lacks standing to appeal an order approving class counsel fees: *Lawrence v. Atlas Cold Storage Holdings Inc.* (2009), 311 D.L.R. (4th) 323 (Ont. C.A.).

19 On appeal, counsel for the appellants summed up the court's concern well. The process, he said, places the court in the position of adversary and adjudicator at the same time; the court must test the case being put to it, while impartially adjudicating it. He suggested this was "perhaps a flaw in the legislation".

20 Nothing in the legislation, however, discourages the court from exercising its inherent jurisdiction to ensure the proceedings before it are fair or resorting to its authority under rule 13.02 to appoint an *amicus*. In fact, counsel for the appellants advised that now some judges of the Superior Court appoint *amicus* to present an opposing view in such motions. As well, "monitors" have been appointed in several Ontario cases. In the United States, it is not uncommon for the courts to appoint a *guardian ad litem* for the settlement fund.

21 An uncontested motion for fees also places counsel in an awkward position. Lawyers are expected to be zealous but personally disinterested advocates of their clients' positions. On an uncontested motion for fees, the lawyer represents the class whose interest is in maintaining the maximum settlement amount possible for distribution among class members. The lawyer, on the other hand, seeks fees that will diminish the amount of the settlement available for distribution. The lawyer's interests appear to be pitted against those of the client. In appropriate cases, class counsel may, on their own initiative, seek to reduce the awkwardness of this position by arranging for independent counsel to advise the representative plaintiff in relation to class counsel's application for fees. Class counsel have taken this action in at least one reported Canadian case.

22 I discuss each of these strategies briefly.

Amicus

23 The court has jurisdiction to appoint an *amicus* to preserve the fairness of the proceedings before it. In Ontario, though, there is no judicial discussion of the appointment of *amicus* in the context of class action proceedings. Commentators, however, have pointed out the benefits of allowing *amicus* to assist the court in the approval of settlements and class counsel fees, which are often dealt with together. The motion judge cited Prof. Garry Watson, who, in his paper "Settlement Approval - The Most Difficult and Problematic Area of Class Action Practice" prepared for the NJI Conference on Class Actions in April 2008, argued that "judges should give serious thought to precipitating an adversarial hearing by appointing counsel to advise the court and oppose the settlement if appropriate".

24 Another significant paper is "Caught In a Trap - Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings" authored by Winkler C.J.O. and Sharon D. Matthews, presented at the 5th Annual Symposium on Class Actions April 11, 2008 and available online at

"http://www.ontariocourts.on.ca/coa/en/ps/speeches/caught.htm" . The authors note the effect of the absence of an adversary in these situations and suggest the use of *amicus*:

> Depending on the terms of the settlement, the defendant may not have standing on the fee approval and in such cases there will be no effective adversary to assist the court on either settlement or fee approvals. Class counsel may find themselves in a conflict in supporting settlement approvals. ... It may be appropriate to appoint *amicus curiae* to assist courts in understanding the merits of the settlement generally and as it relates to fees in particular.

25 The only Canadian case that actually discusses the appointment of an *amicus* in the context of approving a class settlement or class counsel fees seems to be *Killough v. Canadian Red Cross Society* (2001), 85 B.C.L.R. (3d) 233 (S.C.). K.J. Smith J. of the B.C. Supreme Court cautioned against too quickly resorting to the appointment of an *amicus* in motions to approve class counsel fees:

> In my opinion, there is merit in [the] submission that *amicus curiae* should not be appointed as a matter of course in these matters. It may be that, in a particular case, the class-action judge will consider that *amicus* would be helpful, but to make such an order in the absence of some special circumstances warranting it would be to add an unnecessary layer of complexity and expense to the fee-approval process.

26 He found the appointment of an *amicus* was premature because it appeared the court would have the benefit of an independent perspective. Class counsel had retained separate independent counsel to advise the representative plaintiff as to the fairness and reasonableness of the proposed fees and class counsel had undertaken to file independent counsel's opinion with the court. Moreover, the Public Guardian and Trustee had sought standing to take a position and that application had not yet been dealt with. When the matter eventually came on for hearing, see *Killough v. Canadian Red Cross Society* (2001), 91 B.C.L.R. (3d) 309 at para. 40 (S.C.), K.J. Smith J. declined to give the Public Guardian formal standing, but did allow the Public Guardian to participate in the hearing:

> Counsel have an inherent conflict of interest on applications for approval of their own fees and disbursements. While those of us who are trained in the workings of the legal system understand that counsel put aside their own self-interest in such matters, as they are ethically bound to do, decisions that take into account the objective, perhaps adversarial, submissions of other interested parties will generally better withstand scrutiny. Accordingly, if the Public Guardian and Trustee wishes to address the Court on behalf of legally incapable persons in the class, it is my view that the Court should hear those submissions.

Monitors

27 Monitors have been appointed in a number of Ontario class actions. The published reasons do not always make clear the role assigned to the monitor. For example, in *Baxter v. Canada* (2006), 83 O.R. (3d) 481 (S.C.) and *Frohlinger v. Nortel Networks* (2007), 40 C.P.C. (6th) 62 (Ont. S.C.), court-appointed monitors are included in the list of those appearing before the court, but no

mention of them is made in the reasons. Both of these cases involved a motion for the approval of class counsel fees as well as other issues.

28 Monitors can assist the court by analyzing the volumes of information that may be filed on approval motions. For example, on a fee approval motion, a monitor could be assigned to review in detail the dockets of counsel with a view to understanding the fees charged in respect of each step in the litigation, identifying duplicated effort and instances in which a greater number of hours than reasonably necessary has been expended.

Guardian ad litem

29 American jurisprudence, as one would expect, is more mature given the much longer experience with class proceedings in the United States. American courts do appoint *amicus*: see e.g. *Zucker v. Franklin*, 374 F.3d 221 (3d Cir. 2004); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991). However, the predominant American approach appears to be the appointment of a *guardian ad litem* for the settlement fund.

30 The landmark case seems to be the 1976 decision *Miller v. Mackey International Inc.*, 70 F.R.D. 533 (S.D. Fla. 1976). The court considered a class counsel fee application to be analogous to litigation between a guardian and a ward. The substantive interests of the members of the class are at stake because the benefits they receive are reduced by the compensation sought by counsel representing the class. Therefore, over the strenuous objections of class counsel, the court appointed a *guardian ad litem* for the members of the class saying, "The appointment of a *guardian ad litem* is appropriate where there is litigation between a Guardian and Ward - herein, the attorneys for the class and the class." Since the guardian is charged with the protection of the fund for the class, his fee was to be charged against the fund. The court observed:

> [T]his procedure both achieves protection for the members of the class and enables the trial judge to remain in an impartial position. Counsel for the class strenuously objected to the appointment of a guardian ad litem and asserted that the court should conduct cross examination of the witnesses testifying for plaintiff's counsel. However, that contravenes the court's traditional role, tending to cast the court into an advocate's role.

31 The legislation in the United States is more mature as well. The Class Action Fairness Act of 2005, 28 U.S.C. (2005), which brings most large class actions within the jurisdiction of the federal courts, specifically authorizes judges to have the value of "coupon settlements" assessed by an independent expert before approval: see s. 1712(d).

Independent counsel

32 Class counsel may consider going beyond their strict duty to make full and frank disclosure on an unopposed motion for fees and retain separate counsel to provide independent advice to the representative plaintiff regarding the fairness and reasonableness of the fees class counsel is seeking. Class counsel took this step in *Killough*.

33 It seems to me that counsel who bring and proceed with a motion without ensuring that an independent perspective is put forward have little cause for complaint if the court departs from the passive role it traditionally plays by raising new issues, dealing with arguments not advanced and actively challenging the uncontradicted evidence. A court, though, should not appear confrontation-

al. The line between a sceptical and confrontational approach may be difficult to navigate for a court that bears the full responsibility for testing the merits of the position put forward by counsel in order to fulfill its responsibility to protect members of the class. Courts should not be reticent in resorting to one of the strategies discussed above when they consider that confrontation of counsel's unopposed position would be helpful and reasonably warranted in the circumstances. Such resort is, of course, discretionary. Appointment of *amicus* or a guardian is neither necessary nor desirable in every case.

Application to this case

34 A glance at the major features of the case placed before the motion judge might suggest it was appropriate for the court to consider exercising its discretion to appoint a guardian for the fund or an *amicus* or monitor. Nonmonetary items figured prominently in the settlement. Class counsel was seeking fees of $27.5 million. The fees class counsel sought would exhaust all the cash in the settlement fund, leaving only the nonmonetary benefits for distribution to the class members. While the record was huge, an accounting firm reviewed much of the voluminous documentation produced by the defendants. The hourly rates charged by counsel were substantial; they were described by the motion judge as "not bargain-basement". The total time value of class counsel's docketed hours was $9,750,024. Class counsel was comprised of four law firms, raising the possibility of duplication of effort in becoming familiar with this very large file and dealing with it. Class counsel had not placed before the court any independent evidence of the value of the various components of the settlement.

35 No doubt, the motion judge faced a difficult task.

36 In our adversarial system, in which the case is prepared by the parties, the court should not be expected to scrutinize in detail a massive set of counsel's dockets for duplicative or excessive hours. Winkler J.'s comments in *McCarthy* are worth repeating: "The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself". A court must also guard against appearing confrontational by embarking on a cross examination of counsel about the dockets or on matters such as whether they perform work at other than the "usual" rates indicated in the fee agreement, and if so, at what rate and for what type of client.

37 The motion judge, after underscoring that "the tasks are difficult and made more difficult by the adversarial void", considered that he was "up to the task" and proceeded. However, the adversarial void did affect his reasoning and the way he dealt with the case. The motion judge did not resolve the fundamental question whether a court under the CPA could allow a premium for service providers engaged by class counsel on a contingency basis. He declined to deal with that question on "what is essentially an *ex parte* motion where the voices against any change are not being heard". He added that the matter "should be attended to by the Legislature and not as an exercise of law reform on an uncontested fee approval motion."

38 The motion judge should not have felt inhibited from seeking the assistance he considered necessary to address the question. He could have appointed *amicus* and invited intervention from interested groups, such as the Law Society in regard to the interpretation of its Rules of Professional Conduct.

39 Before leaving this topic I add the observation that the adversarial void also affects the case on appeal. The appellant decides what issues will be raised on appeal and what material will be in-

cluded in the Appeal Book. There is no respondent to raise additional issues or to focus the court's attention on different material in the exhibit books. In crafting the appeal, the appellant is able to attack some findings of the court below and leave others undisturbed. For example, here the applications for approval of the settlement and determination of counsel fees were brought before the court in one motion; the motion judge dealt with both matters at one hearing, and he rendered one set of intertwined reasons. In those intertwined reasons, he expressly stated, at paras. 95, 104 and 113,[1] that his approval of counsel fees in the amount of $14.5 million was one of the factors on which his approval of the settlement was based. Yet, this appeal seeks to modify the motion judge's order only in respect of fees divorced from his approval of the settlement.

40 This court, no less than the motion court, had the discretion to appoint an *amicus* or guardian to articulate opposition to the appeal. In hindsight, the appointment of *amicus* or guardian may have been of great assistance in this appeal. The analysis upon which this appeal turns was not raised in the appellants' material and did not come up at the appeal hearing. After the hearing, the court found it necessary to seek the appellants' written submissions on further issues.

41 With that preface, I turn to the issues raised by the appellants.

Quantum of Fees

42 The appellants advance two arguments regarding the quantum of fees assessed by the motion judge.

43 First, at the appeal they argued that the motion judge was bound to use the analytical framework of s. 33(7) of the CPA in assessing what would be an appropriate counsel fee and that he erred in law by failing to do so. In their supplementary factum filed after hearing, they argue that a motion judge determining fees under s. 32(4) must apply the analytical framework of s. 33(7) in a case in which counsel seek a premium by the application of a multiplier.

44 Second, in their supplementary factum they argue that any mode of analysis should result in the approval of fees that are fair and reasonable. Here, they submit, the counsel fee that the motion judge approved was not fair or reasonable.

Sections 32 and 33 of the CPA

45 In advancing their initial argument, the appellants presumed that the motion judge was bound to apply the two-step analysis of s. 33(7). Under s. 33(7), the court must first determine the number of hours worked and the hourly rate to be allowed in order to calculate a "base fee". Second, the court must determine the appropriate multiplier to be applied to the base fee in order to arrive at fair and reasonable compensation to class counsel for the risk they have assumed in representing the class on a contingency basis.

46 The appellants contend that the two steps of s. 33(7) are distinct and must be separately applied. In determining the base fee the court may consider a number of factors including the time expended by class counsel, the legal complexity of the action, the importance of the matter to the client, class counsel's skill, the results achieved and the ability of the client to pay. By contrast, they say, the court may consider only two factors - the degree of risk undertaken and the degree of success achieved - in determining the multiplier to be applied to the base fee.

47 The appellants argue that the motion judge conflated the first and second steps. Because he failed to distinguish between the two steps, they say, he considered factors relevant to the base fee in determining the multiplier to be applied to the base fee. They submit that he improperly weighed

all the factors in one stage and, as a result, the class counsel fee he approved was lower than was warranted.

48 In setting out the analysis the motion judge should have carried out, the appellants begin by submitting that the motion judge found that their base fee was reasonable. Although he made no express finding on that point, they say it is clear he approved their hourly rates and all the hours they recorded in their dockets. Using a base of $10,327,525.20 for fees and GST, they calculate that the "premium" the motion judge allowed amounts to a multiplier of only 1.29. Fees in the amount of $20 million, which they request on appeal, would amount to a multiplier of 1.78. They say that 1.78 is a modest multiplier in the circumstances.

49 I note in passing that the appellants' calculations are not in accordance with the CPA. Section 33(3) defines the base fee as "the result of multiplying the total number of hours worked by an hourly rate". Under the statutory definition, the GST does not get multiplied. If the GST included the appellants' calculations is excluded, the premium granted by the motion judge would amount to 1.48, and fees of $20 million would represent a multiplier of 2.05.

50 As noted, the appellants presumed that s. 33(7) of the CPA governs the determination of counsel fees in this case. I set out s. 33(7) in the context of the section as a whole:

> 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. 1992, c. 6, s. 33(1).
>
> 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. 1992, c. 6, s. 33(2).
>
> 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; ("honoraries de base")
>
> "multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33(3).
>
> 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. 1992, c. 6, s. 33(4).
>
> 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. 1992, c. 6, s. 33(5).

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. 1992, c. 6, s. 33(7).

Idem

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33(8).

Idem

(9) In making a determination under clause (7)(b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33(9).

51 It is readily apparent that the motion judge did not proceed in the manner contemplated by s. 33(7). He made no express finding of counsel's "base fee" under s. 33(7)(a). He made no determination of the "multiplier" to be applied to the base fee under s. 33(7)(b). Instead, the motion judge considered a number of factors, including counsel's rates and the hours they docketed. Instead of applying a multiplier, he indicated he was allowing counsel a "premium" and concluded that a counsel fee in the amount of $14.5 million was fair and reasonable.

52 While I agree that the motion judge did not apply the analysis contemplated by s. 33, I do not agree that he erred. The determination of counsel fees, on the facts of this case, is not governed by s. 33(7) of the CPA, but by s. 32(4). Section 32 provides:

> 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. 1992, c. 6, s. 32(1).
>
> 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. 1992, c. 6, s. 32(2).
>
> Priority of amounts owed under approved agreement
>
> (3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32(3).
>
> Determination of fees where agreement not approved
>
> (4) If an agreement is not approved by the court, the court may,
>
> (a) determine the amount owing to the solicitor in respect of fees and disbursements;
> (b) direct a reference under the rules of court to determine the amount owing; or
> (c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32(4).

53 Section 32 is mandatory and generally applies to all fee agreements. Its own terms leave no doubt that it applies to contingency fee agreements as well. Section 32(1) requires that all fee agreements meet certain formal requirements. All fee agreements must be in writing and must state the terms under which fees and disbursements are to be paid, must provide an estimate of the expected fee, and must state the method of payment. Section 32(2) provides that fee agreements in class proceedings are *prima facie* unenforceable. They are only enforceable after being approved by the court. Section 32(3) provides that amounts owing under an enforceable agreement, i.e. one that is approved by the court, are a first charge on any settlement monies or monetary award. Finally, "if an agreement is not approved by the court", s. 32(4) gives the court the authority to determine class counsel fees or to direct the manner in which class counsel fees are to be determined or calculated.

54 The court's authority to determine class counsel fees under s. 32(4) is distinct from its authority to determine class counsel fees under s. 33(7). The court's authority to determine fees under s. 32(4) arises "if an agreement is not approved by the court". The court's authority to determine fees under s. 33(7) arises "on the motion of the solicitor who has entered into an agreement under [s. 33(4)]".

55 In their supplementary factum, the appellants contend that it should make no difference which one of these sections apply, as both should lead to the same result - the approval of fees that are fair and reasonable. What is clear is that the mode of analysis open to the court under the two sections is different. The court's authority under s. 32(4) is far more expansive than its authority under s. 33(7). Section 33(7) provides only for the base fee/multiplier approach, whereas s. 32(4) provides the court with broad discretion to set the fee, direct a reference or direct the fee be determined "in any other manner".

56 The relationship between ss. 32 and 33 has been the subject of previous judicial comment. Winkler J., in *Crown Bay Hotel Limited Partnership v. Zürich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (C.J. (Gen. Div.)), observed that "[T]he scheme of the CPA seems to envisage that sections 32 and 33 operate independently of one another. Hence the duplicate provisions for court approval." In *Crown Bay Hotel*, Winkler J. concluded that the court had authority under s. 32(4) to approve a contingent counsel fee based on a percentage of the recovery, rather than on a base fee/multiplier as contemplated by s. 33(7).

57 In an earlier case, *Nantais v. Telectronics propriety (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (C.J. (Gen. Div.)), Brockenshire J. commented that the arrangement of sections 32 and 33 was "somewhat confusing". He suggested that "it would have been clearer if s. 33(1) and (2) had come first, followed by s. 32 and then followed by s. 33(4) through (9)." That is because sections 33(1) and (2) apply generally to make it clear that a contingency fee agreement is permitted by the CPA, despite the provisions of the *Solicitors Act*, R.S.O. 1990, c. S.15 and *An Act Respecting Champerty*, R.S.O. 1897, c. 327. Section 32(3) also applies generally. Sections 33(3) through (9), in Brockenshire J.'s view, apply in cases in which there is "an arrangement under which hourly rates are quoted, with a provision for applying to the court after the fact, for an increase in such hourly rate, based on the risk incurred in undertaking the case under an agreement to be paid only if successful."

58 In *Crown Bay Hotel*, Winkler J. quoted and approved of Brockenshire J.'s comments in *Nantais*.

59 Cullity J. in *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C. (6th) 357 (Ont. S.C.) at para. 16 said:

> Section 32 is concerned with fee agreements - contingent or otherwise - in general. Section 33 is confined to a particular type of contingent fee agreement: one that contemplates, and permits, the solicitor to make a motion to the court to have his or her fees increased by a multiplier. The jurisdiction under this section appears to be premised and conditioned on the existence of such an agreement.

60 I agree with these earlier decisions. The court's jurisdiction to determine class counsel fees under s. 33(7) is premised and conditioned on the existence of a fee agreement providing for payment of fees and disbursements only in the event of success and which permits class counsel to make a motion to the court to have his or her fees increased by a multiplier. To spell this out, I ob-

serve that the court's jurisdiction under s. 33(7) is brought into play by a motion of a solicitor "who has entered into an agreement under subsection (4)". An agreement under s. 33(4) is one that permits counsel to make a motion to the court to have his or her fees increased by a multiplier.

61 Illustrative of a fee agreement to which s. 33(7) applies is the fee agreement that was before this court in *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.). *Gagne* is the main authority on which the appellants relied in this appeal. In *Gagne*, Goudge J.A. provided the following description of the fee agreement:

> As required by the Act, the appellant solicitors executed a written agreement with the representative plaintiff respecting their fees and disbursements. It provided that the payment of any legal fees was contingent on the class action being concluded successfully as defined by the Act. It also provided that the base fee would be the product of the hours worked by the solicitors and their usual hourly rates. In addition, it set out that the solicitors could seek court approval for a multiplier to be applied to that base fee. Finally, the agreement described two examples of how this might work. ... [Emphasis added.]

62 In the case on appeal, the agreement is quite different. Paragraph 9 of the agreement provides:

> In the event of Success in the Action, and in addition to any costs paid by the Defendants to the Solicitor, the Solicitor shall be paid and shall receive the aggregate of the following in accordance with paragraph 8:
>
> (a) an amount equal to any disbursements not paid by the Defendant(s) as costs, plus applicable taxes plus interest thereon in accordance with s. 33(7)(c) of the Act;
>
> plus
>
> (b) the greater of:
>
> (i) one-third of the Recovery; or
> (ii) the Base Fee increased by a multiplier of four;
>
> less
>
> (iii) the fee portion of any costs paid to the Solicitor in accordance with paragraph 8;
>
> plus
>
> (iv) applicable taxes.

63 This paragraph, which is the agreement regarding class counsel fees, does not provide that counsel may bring a motion to have the court increase the base fee by a multiplier. Rather, if paragraph 9 were given effect, counsel fees may not even be premised on the base fee/multiplier approach, but on one third of the recovery.

64 Nowhere else in the agreement is it stipulated that class counsel is permitted to bring a motion to have their fees increased by a multiplier. Recital D of the agreement merely states that "[t]he Act provides, among other things, that a Fee Agreement: ... (d) may permit a solicitor to be paid by having a Base Fee increased by a multiplier or as a percentage of the Recovery". While this is accurate as a general statement, it does not bring the fee agreement under s. 33(4) of the CPA. It does not, as a matter of contract, "permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier".

65 The distinction is not merely technical. Class members may understand the phrase "[t]he Act ... may permit a solicitor to be paid ... a base fee increased by a multiplier" to mean that such fees are payable if specified in the fee agreement. On the other hand, an agreement that precisely complies with s. 33(4) of the CPA can leave no doubt in the mind of class members that the size of the multiplier and the fees themselves rest completely within the discretion of the court. It is a matter of emphasis. A fee agreement that simply states that "the Act provides that a Fee Agreement may permit a solicitor to be paid by having a Base Fee increased by a multiplier" does not emphasize that the court must, in every case, approve both the base fee and the multiplier before the fee agreement is enforceable.

66 The agreement in this case does make clear the court must approve it. Paragraph 4 of the fee agreement states, "This agreement requires Court approval. If this agreement is approved by the Court, it shall bind the Solicitor, the Client, and all members of the Class who do not opt out of the Action". Paragraph 4 speaks to the fee agreement as a whole. No provision of the agreement, however, expressly indicates that the court must determine what fees will be allowed to counsel.

67 It is interesting to note the difference between paragraph 8, which deals with costs paid by the defendants, and paragraph 9 which deals with counsel fees. Paragraph 8 expressly provides that counsel's entitlement to costs payable to the client is specifically subject to the approval of the court. Paragraph 9 sets out precisely how counsel fees are to be calculated, but unlike paragraph 8, does not state that counsel fees are subject to the approval of the court.

68 I conclude that the fee agreement in this case does not satisfy the requirements of s. 33(4). It does not permit counsel to apply to the court for a multiplier but instead stipulates how counsel fees are to be calculated. The agreement for the fees stipulated would become enforceable only if it were approved by the court under s. 32(2). If the agreement was not approved then, under s. 32(4), the court could determine the amount owing to counsel.

69 In this case, the motion judge did not expressly state that he was disapproving the fee agreement. Section 32(4), however, does not require that a fee agreement be expressly disapproved before it applies. Section 32(4) applies whenever there is no approval of the fee agreement. This is made clear by the opening words of s. 32(4), which clearly state that the court's authority to determine the amount owing to class counsel in respect of fees and disbursements under that subsection arises "if an agreement is not approved by the court". Cullity J. put it well in *Martin v. Barrett*, [2008] O.J. No. 3813 (S.C.), at para. 35: "If the court withholds approval, it then has a discretion to determine the fee pursuant to section 32(4)(a)."

70 There can be no doubt the motion judge withheld approval of the fee agreement in this case. Had he approved it, it would be enforceable and the fees owing under paragraph 9 would be a first charge on the settlement fund by virtue of s. 32(3) of the CPA. By assessing fees in a different amount, the motion judge made evident he was not approving the fee agreement. Section 32(3)

makes apparent that a substantive as well as a formal review of the fee agreement is necessary for court approval. The current practice of some trial courts to approve the fee agreement simply upon being satisfied that it contains the formal requirements of s. 32(1) ignores the effect of s. 32(3). The motion judge in this case followed the correct approach by withholding approval of the fee agreement.

71 Because the fee agreement in this case was not approved and because it does not meet the requirements of s. 33(4), I conclude that class counsel were not entitled to invoke the application of s. 33(7). Rather, counsel's fees in this case fell to be determined under s. 32(4).

72 I do not accept the contention advanced in the appellants' supplementary factum that, even if s. 32(4) applies, the court must apply the analytical framework of s. 33(7) when counsel who have taken the case on a contingency basis apply for a multiplier. The wording of s. 32(4) is clear. The court has broad authority to itself determine the "the amount owing to the solicitor in respect of fees", or even to direct that the amount owing be determined "in any other manner". *Gagne*, the only Court of Appeal authority on which the appellants rely for this argument, was a s. 33(7) case. The proper view is that the court acting under s. 32(4)(a) has the authority to determine the fees owing to the solicitor after considering and weighing all relevant factors. It is within the court's discretion to test the reasonableness of the quantum of a lump sum fee by looking at the result as a multiplier, as Cumming J. suggested in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.). It is, however, a matter of discretion.

73 I conclude that the motion judge was not bound to apply the base fee/multiplier analysis provided for in s. 33(7) of the CPA. He committed no error in exercising his authority under s. 32(4) of the CPA to determine class counsel fees without determining the amount of the appellants' base fee and applying a multiplier to it.

74 Before leaving this issue I add that it is not apparent to me that, before the motion judge, class counsel pressed the application of the base fee/multiplier analysis, which they now allege he erred in failing to apply. The notices to the class members and the notice of motion filed with the motion court are more consonant with the application of s. 32(4) than with s. 33(7) of the CPA.

75 The notice of certification, drafted and advertised by class counsel, advised the class members that the agreement "which must be approved by the court to be effective, provides for a contingency fee of at least one-third of the amount recovered in the class action." The notice of the approval hearing stated that "[c]lass counsel will ask the court to approve their fee agreement with the plaintiffs and award $27.5 million in cash in full payment of the plaintiffs' obligations to class counsel." Neither indicates that counsel would apply to the court for the application of a multiplier to their base fee.

76 Paragraph 1(d) of the notice of motion sought an order "approving the agreements as to fees, disbursements and taxes between [the representative plaintiffs] and Harvey T. Strosberg ('Agreements')". Paragraph 1(e) sought an order "fixing the amount of class counsel's fees at $27.5 million". The notice of motion refers generally to both ss. 32 and 33, but does not seek to have counsel's base fees increased by a multiplier, as contemplated by s. 33(7). Nowhere in the notice of motion is there a reference to either the base fee or a multiplier. The supporting affidavits filed on the motion do not refer to a multiplier.

77 Finally, the motion judge made no reference to any argument by the appellants that he was bound to apply the base fee/multiplier analysis, as would be expected had the argument been ad-

vanced. He only referred to the position in the appellants' notice of motion and notices to the plaintiff class that they were seeking a specific dollar amount - namely $27.5 million.

78 I would not give effect to this ground of appeal. Before moving on, I caution that these reasons should not be taken to indicate acceptance of the appellants' submissions on how s. 33(7) should be interpreted and applied.

Reasonableness of class counsel fees

79 I turn then to the second leg of the appellants' argument, that, irrespective of the mode of analysis used, the quantum of fees allowed by the motion judge was too low. The appellants submit that the amount of $14.5 million is inadequate to achieve the policy objective of providing incentives for lawyers to undertake complex and protracted class actions, and that the amount is not fair and reasonable compensation given the work they performed, the risk they undertook and the success they achieved.

80 At para. 24 of his reasons, the motion judge set out the general principles that apply to the assessment of class counsel fees:

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

81 There can be no quarrel that these factors are relevant in assessing the reasonableness of class counsel fees. These factors have been applied in a number of cases, including those cited by the motion judge.

82 The motion judge found that the class proceeding dealt with matters of high factual and legal complexity, had a substantial monetary value, was important to the class, and that class counsel performed with competence and admirable skill. The motion judge also considered that class counsel had assumed a high risk in taking on the class proceeding and he recognized that that risk should be rewarded. He also attached weight to the fact that "Class Counsel's compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well".

83 The motion judge, however, refused to accept class counsel's contention that they deserved fees in the amount of $27.5 million for achieving a settlement worth $120 million because, in his view, the settlement was not worth $120 million. The motion judge seemed taken aback by class counsel's insistence that the settlement had a value of $120 million as he "would have thought it obvious that the settlement in the case at bar, which involves cash, coupons, and releases, is not worth $120 million". He repeated that the settlement was not worth $120 million "for the purposes of the contingency fee agreement". He described the result as "adequate or satisfactory" and said it was "to spin a silk purse from a sow's ear to suggest that the result was excellent." He added that an objecting class member "was right in expressing disappointment about the settlement".

84 The motion judge had a solid foundation for finding that the settlement did not have a value of $120 million. To begin with, the motion judge did not regard the transaction credits as having a benefit to the class members equal to their face value. He was sceptical that there would be much take-up and stated his view that the most likely beneficiaries would not be class members but future Money Mart customers. The implication that class counsel do not earn a premium in fees by obtaining benefits for persons outside the class is sound.

85 The motion judge also observed that the transaction credits could be viewed "as a business promotion scheme under which Money Mart discounts its price and makes less profit from a profitable transaction" but "obtains business it would otherwise not have obtained". He also drew attention to the fact that the settlement provided that a maximum of five dollars in transaction credits could be used per transaction. This meant that class members would have to enter into a number of further transactions with Money Mart repeatedly in order to exhaust their transaction credits.

86 The motion judge was not impressed with class counsel's argument that the transaction credits should be considered to have marketable value because Money Mart's competitors would likely honour the transaction credits. That competitors would find acceptance of the transaction credits attractive confirmed that credits were a business promotion scheme for more payday loans, in the motion judge's mind.

87 The motion judge, in making the point that the transaction credits were not equivalent to cash, surmised that class counsel would likely not accept an assignment of $27.5 million worth of transaction credits as payment of their fees. In my view, this was a fair inference based on class counsel's position that the entire cash remnant of $27.5 million should be devoted to paying their fees rather than them taking a share of the "marketable" transaction credits. The motion judge concluded that it was "hard to paint [the transaction credits] as a success for the mission of this class proceeding."

88 The motion judge also substantially discounted the value of the debt forgiveness component of the settlement. He considered that payday loans were uneconomical to recover given their small value and the expense of collecting them. The evidence indicated that much of the debt forgiveness component of the settlement released debts that were already written off or reserved in Money Mart's financial records.

89 The motion judge did recognize that the $30.5 million in cash that the settlement provided was solid value, though he observed it "should be present-valued because it is being paid in instalments over approximately two and a half years and there is no interest until the payments are due".

90 These matters provided an abundant basis for the motion judge's finding that the settlement was not worth $120 million. The appellants' arguments at the appeal hearing and in their written submissions were all premised on the settlement being worth $120 million. However, they did not establish that the motion judge made any error in arriving at the clear finding of fact that it was not. The appellants complain that the motion judge made no finding as to what the settlement was worth. The record before the motion judge, compiled by the appellants, provided a poor basis for doing so. There was no independent expert opinion on the value of the transaction credits or the debt reduction.

91 Besides finding that the settlement was worth less than the appellants contended, another important factor in the motion judge's approval of the settlement was the $13 million in cash that

would become available for distribution to the class upon class counsel fees being fixed in the amount of $14.5 million instead of the $27.5 million that the appellants sought.

92 Placing importance on providing fair and reasonable compensation to counsel and providing incentives to lawyers to undertake class actions, as the motion judge noted, does not mean that the court should "ignore the other factors that are relevant to the determination of a reasonable fee." In this light, it was an important aspect of the motion judge's analysis that the settlement he approved provide some cash for distribution among the class members. The motion judge stressed that the settlement he was approving was one in which "Class Counsel's fee does not take up all the cash portion of the settlement".

93 The motion judge found that "[h]aving regard to all the factors, an all-inclusive award of $14.5 million is a reasonable fee in the circumstances of this case." He concluded that $14.5 million was "ample compensation and a reasonable fee" and there was "no necessity to award more having regard to the success achieved and the risk taken".

94 The appellants submit that the motion judge made errors in his analysis of specific issues. I agree he may have overstated one or two things, but this does not undermine his central reasoning and the conclusion that he reached.

95 For example, the appellants submit that the motion judge's comment that the settlement failed to achieve behaviour modification is unreasonable because the section of the *Criminal Code* prohibiting criminal rates of interest was amended in May 2007 to exempt from its application small short-term loans in provinces that enact legislation to regulate the payday loan industry. At the time of the hearing before the motion judge, British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan and Ontario had introduced such legislation. The provisions of Ontario's *Payday Loans Act, 2008*, S.O. 2008, c. 9, which regulate the cost of payday loans borrowing, came into force on December 15, 2009. The appellants make the point that it was impossible for the settlement to achieve "behaviour modification" because the new legislation legalized the defendants' business practices. The motion judge erred, they say, by minimizing the success they achieved on the basis that the settlement did not accomplish "behaviour modification".

96 The motion judge could have explained more clearly why he commented that "there was not a peep about behaviour modification" during the settlement approval motion. As I understand his reasons, the point he was making is that the settlement, by providing coupons for the defendants' services, provided support for the payday loan industry and hence diminished the degree of success achieved. The settlement did not sever the business relationship between the defendants and the class members who receive transaction credits under the settlement but rather continued that business relationship. I gather this because, after observing there was no behaviour modification, the motion judge said,

> [B]ut for the members of the Transaction Credit group, if they are to obtain a benefit under this settlement it is by abandoning the original purposes of this class action, which was to enjoin, not encourage, payday loans pricing policies. Once again, it is hard to paint this as a success for the mission of this class proceeding.

97 I have no doubt that the motion judge did not expect that a settlement or judgment could have resulted in the modification of the defendants' business practices. The motion judge was aware

of the new legislation. He set out the evolution of the legislative changes and noted the irony that the defendant's charge for the representative plaintiff's loan was now apparently legal in Ontario and that, indeed, Money Mart could even charge him an additional two dollars. The motion judge could have meant nothing more than that there was no "behaviour modification" as far as these members of the class were concerned because the scheme of the settlement destined them to continue to borrow payday loans from the defendants on essentially the same, albeit now unquestionably legal, terms.

98 In any event, I do not see the motion judge's comment about the lack of behaviour modification as the foundation for his conclusion that the value of the settlement was much less than the claimed $120 million.

99 The appellants also take strenuous and justified umbrage to the motion judge's description of the settlement as the self-serving design of class counsel. The motion judge said,

> With respect to the factor of the class' ability to pay, the settlement has been structured in a way that the class is able to pay Class Counsel's fee, but that is the self-serving design of Class Counsel, and as I have already explained, the class would not have been able to pay the contingency fee if Class Counsel had been able to enforce the contingency fee agreement based on its own self-serving evaluation of the value of the settlement.

100 I agree with the appellants that a court ought not to attribute self-interest to counsel in the absence of a proper evidentiary basis. There was, in this case, no evidentiary basis for the modifier "self-serving". Regrettably, the risk of such an overstatement is increased in a non-adversarial motion brought by class counsel that requires the court to depart from its traditional neutrality and take on an active role to protect the interests of the class. In fulfilling that active role, the motion judge could allude to the fact that the settlement was structured to provide for a cash payment of $27.5 million and that class counsel was seeking approval of fees in the amount of $27.5 million, and highlight that this would leave the class members only with transaction credits and debt forgiveness. His use of the modifier "self-serving" in making that observation was unfortunate.

101 None of the isolated comments that the appellants objected to provide any reason to interfere with the motion judge's exercise of discretion in setting class counsel fees.

102 The motion judge's determination was discretionary. The appellants have not established any basis for interfering with his determination that $14.5 million was a fair and reasonable fee for class counsel in this case.

The fees of PWC and Mr. Anand

103 Class counsel retained PWC and Mr. Anand to perform certain work on the basis that they would only be paid if and when the action was successful and then on the same basis as class counsel. For example, PWC agreed to the following:

> We understand that our fees will be payable on a contingency basis. We will accumulate our hours. In the event that your action is successful when you achieve either a settlement or an award from the court, our fees will be payable on a pro rata basis with payment of your own fees and the fees of other members of your team. To this end, our usual fees for time incurred would attract the same multi-

> plier applied to usual hourly rates as the multiplier applied to each of your team's members.
>
> Our expenses incurred will also be on a contingency basis. They will be paid, pro rata, with the disbursements of the members of your team from any proceeds received before distribution of any fees to the team members.
>
> In the event that your action does not result in a settlement or an award from the court, no amount will be payable to us on account of fees for time incurred or expenses.

104 The motion judge decided that the fees of PWC and Mr. Anand would be treated as disbursements of class counsel. The appellants submit that the motion judge erred by failing to approve PWC and Mr. Anand's fees in an amount consistent with the contingency basis on which they were retained. The time value, taxes and disbursements for the work of PWC amounted to $835,629.03; those of Mr. Anand amounted to $16,800. Though the motion judge treated these amounts as disbursements incurred by class counsel, class counsel say they remain contractually obligated to pay these service providers on the basis on which they were retained.

105 By way of relief, the appellants seek an order that a premium be added to the fees of PWC and Mr. Anand in proportion to the premium added to the fees of the appellants. The unstated premise of this request seems to be that treating the consultants' fees as contingency fees would enlarge the aggregate quantum of fees allowed. I do not agree that this would necessarily be so.

106 Insofar as the premium granted depends on the risk undertaken in a contingency case, the issue is the quantum of that risk, not the number of risk-takers who have shared it. It is illogical that the total amount of the premium allowed for a given total risk should be higher because there are more risk-takers. For example, the premium allowed should not increase because class counsel in this case was comprised of four law firms. Thus, if the premium allowed to class counsel is predicated on the risk of counsel's fees and disbursements, granting service providers a contingency premium should result in a redistribution of the premium rather than an enlargement of the premium. After all, the risk undertaken by class counsel is diminished by the amount of risk the service providers undertake when they are retained on a contingency basis. If the CPA permits the court to allow contingency premiums to service providers, the appellants, to obtain an increase in the total premium allowed, would have to demonstrate that the motion judge did not base his determination of the premium on the total risk of undertaking the case, including the disbursements for the services of PWC and Mr. Anand.

107 As I mentioned earlier, the motion judge considered it unwise to determine the general question whether the CPA could be interpreted to permit contingency fee arrangements with service providers on what was "essentially an *ex parte* motion where the voices against any change are not being heard". He decided to treat the accounts of PWC and Mr. Anand as disbursements in this case because he was troubled by the appellants' contention for four reasons. First, as non-lawyers, the service providers could not be appointed class counsel. Second, the CPA does not envisage contingency fee agreements with anyone other than properly appointed class counsel. He pointed out that s. 32(2) of the CPA refers to an agreement respecting fees and disbursements "between a solicitor and a representative party". Third, it was not clear that the arrangement complied with the Law Society's Rules of Professional Conduct. Rule 2.08(8)(a), for example, provides that a lawyer shall not

"directly or indirectly share, split, or divide his or her fees with any person who is not a licensee". And fourth, the arrangement with the non-lawyers might well be champertous. The motion judge pointed out that *An Act Respecting Champerty* was still in effect.

108 I agree that the appellants placed before him a fundamental question with far-reaching implications for the future of class actions, and that it is usually desirable to hear the perspectives of all the interests that might be affected before deciding such questions.

109 While that may be generally so, in my view the answer to the far-reaching question raised in this case is straightforward. The CPA does not contemplate contingency fee arrangements with persons other than class counsel and does not give the court the jurisdiction to allow a service provider a premium on its fees.

110 Section 33(1) allows a contingency agreement "between a solicitor and a representative party". Section 32(1) requires all agreements between a solicitor and a representative party, including contingency agreements, to meet certain formal requirements. Section 32(2) interferes with freedom of contract by providing that all agreements between a solicitor and a representative party are unenforceable unless approved by the court. If contingency agreements with service providers are allowed under the CPA as the appellants contend, I find it odd that the Act does not set out formal requirements for such agreements or make them unenforceable unless approved by the court.

111 Section 33(7), which the appellants wish to have applied in this case, could not be clearer. Read in context, s. 33(3)'s definition of "base fee" clearly refers to the hours worked by counsel multiplied by counsel's hourly rates. The only multiplier that the court has jurisdiction to grant under s. 33(7)(b) is one that results in a fair and reasonable compensation to the solicitor for the risk undertaken. Under s. 33(7)(c) the court has jurisdiction to determine the amount of disbursements, but these are disbursements "to which the solicitor is entitled". The text of s. 33 is not concerned with fair and reasonable compensation to others for risk incurred in undertaking work on the action on a contingency basis.

112 Section 32(4) may not be as rigidly structured, but still provides the court with authority to determine the amount owing to the solicitor in respect of fees and disbursements. As the appellants argue in their supplementary submissions, the application of the two sections should theoretically lead to roughly the same result - fair and reasonable compensation for class counsel. I do not read the broader more general authority granted to the court by s. 32(4) as extending to allow a premium to service providers in order to achieve fair and reasonable compensation for them for the risk undertaken in the provision of their services.

113 The grammatical and ordinary sense of ss. 32 and 33, read in the context of the entire statute and considered in light of its purpose, leads me to conclude that the legislature did not intend to grant the court jurisdiction to allow service providers a premium for providing their services on a contingency basis. The legislature's intent was to authorize the court to allow class counsel a premium or multiplier for the risk incurred by investing their time and underwriting disbursements, if they take on the case on a contingency basis. The representative plaintiff's selection of counsel who is prepared and able to carry the case on a contingency basis is relevant to the court's determination whether the plan for the proceeding sets out a workable method of advancing the proceeding on behalf of the class.

114 As I find the text of the current legislation to be clear, I do not find it necessary to deal with the other legal and policy arguments advanced by the appellant. Suffice it to say I agree with the

motion judge that what the appellants seek "would amount to a fundamental change to the design of the Act". The policy issues are not confined to access to justice considerations, the only one identified by the appellants. For example, the broad proposition the appellants assert, that contingency agreements with service providers should be allowed, would apply to expert witnesses and others whose work products are tendered in evidence. This could give rise to concerns about the quality and reliability of the work product.

115 I might add, I do not anticipate that this decision will have the dire impact on access to justice that the appellants assert. In the almost 20 years the CPA has been in effect, a great number of class actions have proceeded without the court allowing premiums to service providers.

The fees of FMC and Prof. Krishna

116 Class counsel also retained FMC and Prof. Krishna to perform certain specialized discrete tasks. The total time value of the work they performed was $32,002.96 and $10,237.50, respectively. Class counsel's agreements with them are not in the record, but the motion judge found that they too were retained by class counsel on a contingency basis. Class counsel requested that the multiplier or premium the motion judge granted to class counsel also be applied to the fees of FMC and Prof. Krishna. The motion judge refused this request and treated their fees as disbursements incurred by class counsel. On appeal, the appellants ask that the order of the motion judge be varied to treat Prof. Krishna and FMC as part of class counsel, and that a premium be added to their fees in proportion to the premium added to the fees of the appellants.

117 Different considerations apply to the work of FMC and Prof. Krishna because they are lawyers. The same concerns of fee splitting and champerty do not arise in relation to lawyers who have actually worked on the client's file.

118 The appellants' position is that FMC and Prof. Krishna became part of the class counsel team and their fees should be treated as class counsel fees. They say that the motion judge refused to recognize them as class counsel on the erroneous belief that court approval was necessary for any change in the plaintiff's representation. The motion judge did note that the litigation plan that the representative plaintiff had approved by the court defined class counsel to be the four law firms Sutts, Strosberg, Paliare Roland, Koskie, Minksy, and David Stratas of Heenan, Blaikie.

119 The appellants rely on this court's decision in *Fantl v. Transamerica Life Canada* (2009), 95 O.R. (3d) 767 (C.A.) to submit that no court approval was required to enlarge the class counsel group to include FMC and Prof. Krishna. *Fantl* merits closer examination. In *Fantl*, the law firm acting for the representative plaintiff in a class action split up and its former members disputed who should continue as class counsel. The narrow issue was whether the representative plaintiff could choose to retain one of the successor firms and serve a notice of change of solicitors without court approval. Winkler C.J.O. writing for this court said that he did not view it "as necessary for the plaintiff to seek and obtain approval of the court for every decision involving the selection or change of counsel." Yet he immediately added, "However, I am of the view that the case management judge charged with responsibility for the supervision of the proceeding should be immediately and directly notified of such a change."

120 *Fantl* is of little assistance to the appellants in this case.

121 First, in this case there is no indication the representative plaintiff made a decision to change the makeup of the class counsel team indicated in the litigation plan. In *Fantl* what was in

issue was the client's choice of new counsel. Winkler C.J.O. said at para. 44 of *Fantl* that "[t]he representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report." I can see no indication in the record that the representative plaintiff made or participated in any decision to retain FMC and Prof. Krishna as class counsel in this action. While counsel may require assistance and may incur disbursements on the clients' behalf, clients decide who are their counsel.

122 Second, if there was a change in the composition of class counsel, the court was never immediately and directly notified of the change as *Fantl* indicates is required.

123 Moreover, the record does not indicate that Prof. Krishna or FMC were intended to have a solicitor-client relationship with the representative plaintiff. It is not clear to me in what sense FMC and Prof. Krishna are said to be class counsel except for the purpose of being entitled to the same premium allowed to class counsel. I briefly review the relevant portions of the record.

124 The affidavit of Patricia A. Speight, sworn February 1, 2010, in support of the motion under the heading "Class Counsel" states that "[t]he four law firms acting on behalf of the Class are SS [Sutts, Strosberg], Heenans [Heenan Blaikie], PR [Paliare Roland Rosenberg Rothstein] and KM [Koskie, Minksy]." It adds that other lawyers from other firms "assisted class counsel as required".

125 The affidavit goes on to describe the role fulfilled by each of Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy, but does not mention Prof. Krishna or FMC in this section. The motion material includes costs briefs for Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy setting out the supporting details for their fees and disbursements. The motion material before the motion judge did not contain costs briefs for FMC and Prof. Krishna. Without details of their rates and hours worked, it was not possible to treat their fees as class counsel fees under the CPA.

126 In a later section of Ms. Speight's main affidavit under the heading "Class Counsel Obtained Advice From Others" the affidavit sets out that "class counsel expanded the counsel group to include Professor Vern Krishna who is an expert in international taxation". In the same paragraph, it indicates that a U.S. insolvency firm was also retained and that Prof. Krishna and the U.S. counsel had "reviewed and approved the parts of this affidavit stating their information, opinions and beliefs." The affidavit does not mention FMC.

127 The details of FMC's retainer are set out in the supplementary affidavit of Ms. Speight sworn February 11, 2010:

> Money Mart had entered into a settlement agreement with counsel in an Alberta payday class action at the time that the Ontario action was structured as a national class. A class member, resident in Alberta, retained SS to file an objection to the proposed Alberta settlement. Mr. Strosberg attended in Alberta and met with plaintiffs' counsel in the Alberta action. As a result of this meeting, Alberta counsel did not proceed to tender the settlement to the Alberta court for approval. Money Mart then sued the objector and sought damages against him and plaintiffs' counsel in Alberta. ... [Class counsel] arranged for Fraser Milner to act on behalf of the objecting class member ... with the responsibility of defending the action for the objector. ...

128 The material indicates that class counsel used FMC and Prof. Krishna as consultants to perform discrete, specialized tasks. FMC was retained on a different action to represent an individual other than the representative plaintiff in this case. Prof. Krishna's work product seems to have been treated like that of an expert witness on international taxation issues.

129 The appellants claim that paragraph 5(d) of the retainer agreement allowed them to include FMC and Prof. Krishna in the class counsel group. I disagree. Paragraph 5(d) authorizes the Solicitor to:

> use such persons or resources from the firms Paliare Roland LLP, Koskie Minsky LLP, Heenan Blaikie LLP and any other firm as the Solicitor deems necessary and their services shall be deemed to be provided as members of the Solicitor's law firm.

130 I do not read the paragraph as purporting to allow class counsel to unilaterally establish a solicitor-client relationship on behalf of the representative plaintiff with any person or resource "used" by class counsel. If the paragraph does intend to do so, it would be unacceptable as it is inconsistent with Winkler C.J.O.'s observation in *Fantl* that the representative plaintiff is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report. Whatever the import of this paragraph, to the extent it deals with fees, it is part of the fee agreement that was not approved and is not enforceable.

131 The appeal, which is brought on behalf of class counsel, indicates the appellants are the four law firms Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy. Prof. Krishna and FMC are not included as part of class counsel for the purposes of this appeal.

132 The motion judge had the general discretion to determine the allowable fees and disbursements in this case. As the material before him did not show that the representative plaintiff made or was even aware of any change in the composition of counsel representing him, or that FMC and Prof. Krishna functioned in a solicitor-client relationship with him, I see no error in his treatment of the fees of FMC and Prof. Krishna as disbursements rather than as part of class counsel's base fee.

Compensation for the representative plaintiff

133 The motion judge agreed that the representative plaintiff's "contribution to the class action exceeded that which is normally expected of a representative plaintiff" and granted him compensation in the amount of $3,000 as requested by class counsel. However, without discussion, he ordered that the representative plaintiff's compensation be paid out of class counsel fees. The appellant argues that the motion judge erred by not ordering the representative plaintiff's compensation to be paid out of the settlement fund.

134 In advancing this argument, class counsel relied upon the decision of Sharpe J. in *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369 (C.J. (Gen. Div.)). Counsel did not draw the court's attention to the more recent decisions of Cullity J. in *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C. (6th) 357 (Ont. S.C.) and *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (S.C.), and Cumming J. in *Walker v. Union Gas Ltd.* (2009), 74 C.P.C. (6th) 366 (Ont. S.C.). It seems that the most that can be said is that judges of the Superior Court have different approaches with respect to the payment of the representative plaintiff's fees. This court has never dealt with the issue.

135 I take the view that 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. Allocating a part of that fee to a layperson, especially a representative plaintiff, raises the spectre of fee splitting, a concern the motion judge expressed at an earlier point in his reasons.

136 In the absence of any reason for providing otherwise, I conclude that the $3,000 compensation for the representative plaintiff should be paid out of the settlement fund. I would vary the motion judge's order accordingly.

Conclusion

137 I would allow the appeal in part by varying para. 31 of the motion judge's order to provide that the compensation for the representative plaintiff be paid out of the settlement fund. I would dismiss the appeal in all other respects.

R.G. JURIANSZ J.A.
M.J. MOLDAVER J.A.:-- I agree.
R.P. ARMSTRONG J.A.:-- I agree.

* * * * *

Corrigendum
Released: April 5, 2011

This judgment was released on March 28, 2011. We are reissuing an amended version due to some formatting and minor changes. The changes are as follows:

* The Citation is now **Smith Estate v. National Money Mart Company;**
* In para. [17], a comma was added in the second sentence, directly after the quotation mark in the word "injunction";
* In para. [39], in the fifth sentence starting "For example, here the motion ...", the word "motion" has been amended to "**applications**";
* In para. [50], s. 33(3), the "base fee" definition has been amended to ""base fee" ... ("**h**onararies de base")" and in 33(7), "**(c)**" has been added;
* In para. [52], s. 32(1), "**(c)**" has been added. In s. 32(4), "**(c)**" has been added and "H992" has been amended to "**1992**";
* In para. [58], a comma was deleted after the word "in";
* In para. [62], "(iv)" is amended to "**(a)**";
* In para. [72], in the first sentence, "s. 33(4)" is amended to "s. **32**(4)";
* In para. [74], in the first sentence, the word "**class,/b>" was added before "counsel";**
* **In para. [88], in the second sentence, the word "economic" is amended to "economical"; and**
* **In para. [121], in the first sentence, the word "the**" was added before "class counsel".

cp/e/qllxr/qljxr/qlmll/qljxh/qlhcs/qlced/qlhcs/qlana

1 There is an error in the paragraph numbering in the reasons released by the motion judge. I refer to the corrected paragraph numbering in the Quicklaw version of his reasons.

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 COMPRISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Commercial Court File No.: CV-12-9667-00CL

The Trustees of the Labourer's Pension Fund of Central and Eastern Canada, et al.

Plaintiffs

and

Sino-Forest Corporation, et al.

Defendants

Superior Court File No: CV-10-414302

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List
Proceeding under the *Class Proceedings Act, 1992*
Proceeding commenced at Toronto

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