

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE  
OR ARRANGEMENT OF IMPERIAL TOBACCO  
CANADA LIMITED AND IMPERIAL TOBACCO  
COMPANY LIMITED

APPLICANTS

**FACTUM OF THE KNIGHT CLASS ACTION PLAINTIFFS  
(Motion to Approve Knight Class Counsel Fee)**

January 22, 2025

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**TO: COMMON SERVICE LIST**

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## PART I: OVERVIEW

1. This is a request for court approval of the Knight Class Counsel Fee. This request is made pursuant to Article 14.9 (l) of the CCAA Plan.<sup>1</sup> It states that the Knight Class Counsel Fee shall be paid out of and deducted from the Knight Class Action Plaintiffs Settlement Amount, subject to the approval of the CCAA Court.

2. The Knight Class Action Plaintiffs and their counsel have advanced their claims against Imperial Tobacco Canada Limited since 2003. They have obtained success and have contributed to the overall result in the CCAA Plan. They support the approval of the CCAA Plan.

3. The fee sought by Knight Class Counsel is reasonable, consistent with the work done, the risk undertaken, the result achieved and the expectations of the client.

4. The Knight Class Action was the first tobacco class action certified in Canada.<sup>2</sup> It was the first lawsuit to deal with the federal government's potential liability for tobacco products which was an issue common to many claims in this CCAA proceeding.<sup>3</sup> Knight was a unique case in that it sought removal of a category of tobacco products from the Canadian marketplace, a regulatory step that Canada finally took after several years of opposing the Knight action.<sup>4</sup> Knight also focused on obtaining *cy pres* relief for class members.<sup>5</sup> That is, that the defendant would be compelled to fund medical research to indirectly benefit injured smokers. The Foundation

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<sup>1</sup> [First Amended and Restated Court Appointed Mediators and Monitor's CCAA Plan of Compromise and Arrangement](#), December 5, 2024, Article 14.9(l), pg. 109 of 1283

<sup>2</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2005 BCSC 172](#)

<sup>3</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2007 BCSC 964](#)

<sup>4</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2005 BCSC 172](#) at para [2 \(vi\)](#)

<sup>5</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2005 BCSC 172](#) at para [3](#)

established by the CCAA Plan tracks the relief sought by Mr. Knight from the very outset of his case.<sup>6</sup>

5. The Knight Class Action Plaintiffs also seek an order permitting Knight Class Counsel to pay a modest honorarium to Mr. Knight for his 22 years of service in this litigation. Such payment, if approved, would come out of the Knight Class Counsel Fee.

## **PART II: THE FACTS**

### **A. Start of the Action**

6. The Knight action was filed in the Supreme Court of British on May 8, 2003.<sup>7</sup> The Defendant filed a Statement of Defence on April 29, 2004<sup>8</sup> and a Third Party Notice against Canada also on that date.<sup>9</sup>

7. At the time the Knight Class Action was filed, the outlook for plaintiffs for tobacco class actions in Canada was grim. A case filed in Ontario in 1995, *Caputo v. Imperial Tobacco*, had been litigated for 8 years and was still not certified.<sup>10</sup> The cases filed by the Quebec Class Action Plaintiffs in 1998 had similarly been litigated for 5 years and were still not authorized as class proceedings.

8. In 2004, Justice Winkler (as he then was) denied class certification in *Caputo*. He wrote at

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<sup>6</sup> [First Amended and Restated Court Appointed Mediators and Monitor's CCAA Plan of Compromise and Arrangement](#), Article 9

<sup>7</sup> Affidavit of Nicola Hartigan, sworn January 13, 2024 ("Hartigan Affidavit"), Exhibit D

<sup>8</sup> Hartigan Affidavit, Exhibit E

<sup>9</sup> Hartigan Affidavit, Exhibit F

<sup>10</sup> *Caputo v. Imperial Tobacco Limited*, [\[1997\] O.J. No. 2576](#) (Ont. Gen. Div.) and *Caputo v. Imperial Tobacco Limited*, [1999 CanLii 14803 \(ON SC\)](#)

paragraph 45:

“In my view, the present action is an amalgam of potential class proceedings that make it impossible to describe a single class sharing substantial “common issues”, the resolution of which will significantly advance the claim of each class member, which is the test to be applied according to *Hollick*. Moreover, this is not a case where the creation of subclasses will address the primary class definition deficiency. Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members. This is not the case here. Rather, the plaintiffs have melded a number of potential classes into a single proceeding. The result is an ambitious action that vastly overreaches and which, consequently, is void of the essential element of commonality necessary to obtain certification as a class proceeding. Simply put, the reason that no acceptable class definition has been posited is that no such definition exists.”<sup>11</sup>

9. Among the different potential classes all jammed together in *Caputo* was a potential action that Justice Winkler described as concerning “health reassurance cigarette products marketed as” light and mild.<sup>12</sup> This was the case Mr. Knight took up in British Columbia.

10. While Mr. Knight did not have the benefit of Justice Winkler’s reasons in *Caputo* when he filed his case, he nevertheless anticipated them. He filed a more focused case, dealing with a single defendant, Imperial Tobacco, the largest of the three major Canadian tobacco companies. Mr. Knight targeted a core marketing strategy over a defined period with respect to a specific product category – light and mild cigarettes.<sup>13</sup>

11. Notwithstanding these efforts to carefully tailor Knight, the lawsuit was highly complex as set out by the expert evidence obtained by Mr. Knight.<sup>14</sup> The lawsuit concerned issues of smoking behaviour, addiction, health risks, cigarette design, and marketing. It engaged matters of expert

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<sup>11</sup> *Caputo v. Imperial Tobacco Canada Ltd.*, [2004 CanLii 24753](#) (ONSC) at para [45](#)

<sup>12</sup> *Caputo, supra* at para [49 \(b\) \(ii\)](#)

<sup>13</sup> Hartigan Affidavit, para 14

<sup>14</sup> Hartigan Affidavit, Exhibits H, I and J

evidence and a lengthy documentary record of industry conduct extending over decades. Light and mild cigarettes were the leading product category for the Canadian tobacco industry going back to the 1970s. The Applicant's light and mild brands, such as Players' Light and Du Maurier Light, were its highest selling brands and at the core of its marketing strategy for many years.<sup>15</sup> At certification, the Applicant argued that despite the plaintiff's efforts to focus the case, the proposed class was still "overly broad and unmanageable".<sup>16</sup>

12. The targeted approach by Mr. Knight focused on critical issues of public health and safety in the marketing of tobacco products. The Plaintiffs' expert, Dr. Hammond, describes the health concerns about light and mild cigarettes as follows:

"The design and marketing of 'light' cigarettes was a direct response to rising health concerns. By the 1970s, most smokers were experiencing 'cognitive dissonance': an unpleasant emotional state due to a conflict between their smoking behaviour and their knowledge that smoking was harmful. One means of reducing cognitive dissonance is to quit smoking; however, nicotine addiction represents a significant barrier to quitting: fewer than 1 in 10 smokers succeed in maintaining long term abstinence for any given quit attempt. Tobacco companies offered 'light' cigarettes as an alternative means of reducing cognitive dissonance – consumers could reduce their guilt and worry without having to quit by switching to what was ostensibly a less harmful cigarette"<sup>17</sup>

13. The Plaintiff's expert, Mr. Crosson calculated that the Applicant sold 15.1 billion light and mild cigarettes in British Columbia during the class period, comprising about 61% of the Applicant's sales.<sup>18</sup> The Applicant was the largest of the three tobacco companies in Canada having an average market share during the class period of 65%.<sup>19</sup> The Knight Class Action

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<sup>15</sup> Hartigan Affidavit, para 15

<sup>16</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2005 BCSC 172](#) at para 41 .

<sup>17</sup> Hartigan Affidavit, Exhibit H, Expert Report of Dr. Hammond, pp.13-14

<sup>18</sup> Hartigan Affidavit, Exhibit J, Expert Report of Mr. Crosson, pg.146, para 2.4, pg.150, para 4.17

<sup>19</sup> *Ibid.*, pg. 150, para 4.11

concerns the rights of many hundreds of thousands of consumers in that province.

## **B. Class Certification**

14. The Knight Class Action was the first tobacco class action certified in Canada with certification granted on February 8, 2005.<sup>20</sup> The Quebec Class Actions were certified 13 days later on February 21, 2005.<sup>21</sup>

15. After class certification was granted, the Applicant and the federal government both appealed. The appeal was largely denied by the British Columbia Court of Appeal on May 5, 2006 with some variance to the common issues and to the class period.<sup>22</sup>

16. No other tobacco class actions achieved certification in any other Canadian province although a number of cases were filed in different provinces and certification was argued and denied in three instances.<sup>23</sup>

## **C. Involvement of the Federal Government**

17. After class certification was largely affirmed by the British Columbia Court of Appeal, the federal government brought a motion in the Knight Class Action to strike the third-party claim against it. This was argued on February 15 and 16, 2006 and April 10, 2007. The Applicant argued that if there was any liability for a tobacco company in the marketing of light and mild cigarettes, then the fault rested with the regulator in permitting or encouraging such a marketing strategy.

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<sup>20</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2005 BCSC 172](#)

<sup>21</sup> *Quebec Council on Tobacco and Health v. JTI-MacDonald Corp.*, [2005 CanLii 4070](#) (QC CS).

<sup>22</sup> *Knight v Imperial Tobacco Canada Limited*, [2006 BCCA 235.](#)

<sup>23</sup> *Caputo v. Imperial Tobacco Ltd.*, [2004 CanLii 24753](#), *Ragoonanan v. Imperial Tobacco Canada Limited*, [2008 CanLii 19242](#) and *Sparkes v. Imperial Tobacco Canada Limited.*, [2010 NLCA 21.](#)

Justice Satanove struck the third party claim against Canada on July 3, 2007.<sup>24</sup>

18. The Knight Class Action was the first tobacco lawsuit in Canada in which the potential liability of the federal government was tested. A similar third party claim was brought against Canada by the tobacco industry defendants in British Columbia's health care cost recovery suit. Canada brought a motion to strike that third party claim in the provincial suit on March 3 to 6, 2008, and the motion was granted on April 10, 2008.<sup>25</sup>

19. The Applicant appealed. On December 12, 2009, the British Columbia Court of Appeal by a 3-2 decision granted the appeal in part, allowing certain portions of the third party claim to survive.<sup>26</sup> Both the Applicant and Canada appealed to the Supreme Court of Canada. The third party claim was struck in its entirety by the Supreme Court of Canada by reasons dated July 29, 2011.<sup>27</sup>

20. Canada opposed certification in the Knight Class Action at the Supreme Court of British Columbia in 2005 and at the British Columbia Court of Appeal in 2006. They adopted arguments in opposition to the Knight Class Action that were aligned with arguments made by the Applicant. After May 2006, however, Canada's position in the litigation changed. First, they now directed their fire at the Applicant instead of at Mr. Knight as they sought to have the third party claim against Canada struck. And second, Canada's regulatory posture towards light and mild cigarettes changed.<sup>28</sup>

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<sup>24</sup> *Knight v. Imperial Tobacco Canada Limited*, [2007 BCSC 964](#)

<sup>25</sup> *British Columbia v. Imperial Tobacco Canada Limited*, [2008 BCSC 419](#)

<sup>26</sup> *Knight v. Imperial Tobacco Canada Limited*, [2009 BCCA 541](#)

<sup>27</sup> *R. v. Imperial Tobacco Canada Ltd.*, [2011 SCC 42](#)

<sup>28</sup> Hartigan Affidavit, para 27



21. The relief sought by the Knight Class Action was not simply monetary. Mr. Knight also sought injunctive relief, and in particular, he obtained certification of a common issue providing for such relief.<sup>29</sup> In other words, the Knight Class Action sought an injunction removing light and mild descriptors from the marketplace.<sup>30</sup>

22. For the first years of the lawsuit, Canada opposed the certification of the Knight Class Action which included this injunctive relief. On November 9, 2006, Canada's tune changed. A deal was announced by the Competition Bureau that the three largest tobacco manufacturers had agreed to remove light and mild descriptors from the marketplace by July 31, 2007 in the face of anticipated regulation.<sup>31</sup>

23. Following the dismissal of the third party claim against Canada, it sought its costs from the Applicant in the Knight Class Action and also in the provincial health care cost suit. Canada delivered a bill of costs in the Knight Class Action of approximately \$5 million.<sup>32</sup>

#### **D. Cy-Pres Relief**

24. A key strategy Mr. Knight had to improve his prospects for certification and success at trial was to pursue claims for aggregate economic relief under provincial trade practices legislation. Specifically, he sought disgorgement of profits earned from a deceptive trade practice, as opposed to damages for personal injury at negligence. This approach avoided potentially complex and expensive issues of individual proof. The British Columbia Court accepted this approach in Knight

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<sup>29</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2005 BCSC 172](#) at para [2 \(vi\)](#)

<sup>30</sup> Hartigan Affidavit, para 29

<sup>31</sup> Hartigan Affidavit, Exhibit G

<sup>32</sup> *HMTQ v. Imperial Tobacco Limited.*, [2015 BCSC 1713](#) at para [3](#)

and certified aggregate monetary relief as a common issue.<sup>33</sup>

25. It was clear from the outset that any aggregate judgement in Knight would benefit class members indirectly through a *cy-pres* distribution to fund medical research. Justice Satanove wrote:

“The plaintiff does not seek damages for each class member, but rather an aggregate damage award that may be distributed in whole or in part to charitable institutions involved in researching and treating illnesses related to smoking.”<sup>34</sup>

26. The creation of the *Cy-pres* Fund in the CCAA Plan is exactly the remedy that Mr. Knight has sought from the outset of this litigation. Mr. Knight supports the creation of the *Cy-Pres* Fund and is pleased to contribute the Knight class settlement amount to the *Cy-Pres* Fund.<sup>35</sup>

#### **E. Discoveries and Quebec Trial**

27. The Plaintiff brought a motion to compel the Applicant to deliver its List of Documents which was argued on March 9, 2009.<sup>36</sup> The Defendants productions were voluminous.<sup>37</sup>

28. After the Supreme Court of Canada decision on the third party claim in Knight in July 2011, the trial of the Quebec cases appeared imminent, and commenced in March 2012.<sup>38</sup> Knight Class Counsel attended the Quebec trial on several occasions to observe and made arrangements to obtain complete copies of the trial record.<sup>39</sup>

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<sup>33</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2005 BCSC 172](#) at para [51](#) and [59](#)

<sup>34</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2005 BCSC 172](#) at para [3](#)

<sup>35</sup> Hartigan Affidavit, para 20

<sup>36</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2009 BCSC 339](#)

<sup>37</sup> Hartigan Affidavit, para 34

<sup>38</sup> Hartigan Affidavit, para 35

<sup>39</sup> Hartigan Affidavit, para 36

29. Following the completion of the Quebec trial, Knight Class Counsel carefully reviewed the trial record and identified exhibits from the Quebec record of relevance to the Knight Class Action. Knight Class Counsel further identified and gathered many other documents concerning the Applicant's light and mild cigarettes which had been produced in other litigation. When this work was complete, Knight Class Counsel served the Applicant with a detailed Notice to Admit.<sup>40</sup>

30. The Applicant initially refused to respond to the Notice to Admit, arguing that the action had been dormant. The Applicant brought a motion to dismiss the Knight Class Action for delay. This was argued before Justice Smith on June 24, 2017 and was dismissed.<sup>41</sup>

31. The parties concluded a Discovery Agreement on January 26, 2018<sup>42</sup> and were actively working under that agreement at the time of the Applicant's CCAA filing.<sup>43</sup>

## **F. Expert Reports**

32. The Plaintiff retained multiple experts including three key experts to assist in proving liability and damages. These are:

- (a) Professor David Hammond, PhD, of the Department of Health Studies and Gerontology at the University of Waterloo;<sup>44</sup>
- (b) Dr. David Burns, M.D., a professor emeritus of family and preventative medicine at the University of California, San Diego School of Medicine;<sup>45</sup> and
- (c) Richard Crosson, a certified business valuator.<sup>46</sup>

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<sup>40</sup> Hartigan Affidavit, para 37

<sup>41</sup> *Knight v. Imperial Tobacco Canada Limited*, [2017 BCSC 1487](#)

<sup>42</sup> Hartigan Affidavit, para 41

<sup>43</sup> Hartigan Affidavit, para 42

<sup>44</sup> Hartigan Affidavit, Exhibit H

<sup>45</sup> Hartigan Affidavit, Exhibit I

<sup>46</sup> Hartigan Affidavit, Exhibit J

33. Professor Hammond assists with the science of light cigarettes and that of smoking behaviour. His proposed testimony is directed at whether light cigarettes are deceptive and harmful to public health.<sup>47</sup> Dr. Burns assisted with historical context. He was one of the key authors of the U.S. Surgeon General's reports on smoking and health and is able to assist with the understanding of regulators of light cigarettes in comparison the tobacco industry.<sup>48</sup>

34. Mr. Crosson's report assists in calculating damages. He reviewed publicly available information to calculate that the Applicant generated \$942 million in revenue and \$484 million in profits from the sale of light and mild cigarettes in British Columbia during the class period.<sup>49</sup>

#### **G. Litigation in Other Jurisdictions**

35. There was considerable litigation in the United States concerning light cigarettes which Mr. Knight's counsel followed closely given the potential overlap of documents, witnesses, experts, science, and legal strategies. There were light cigarette class actions filed in at least a dozen US states, several of which were certified and reached trial, and one case settled. Knight Class Counsel retained the American law firms of Sheller P.C. and Charles Tauman P.C. to assist as consultants given their long experience with light cigarette litigation in the United States.<sup>50</sup>

#### **H. Class Member Damages**

36. If Mr. Knight had been successful on liability and damages at a trial of the Knight Class Action, then the damages sought would have been disgorgement of profits earned by the Applicant from the sale of a deceptive product to class members in British Columbia during the class period.

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<sup>47</sup> Hartigan Affidavit, Exhibit H

<sup>48</sup> Hartigan Exhibit I

<sup>49</sup> Hartigan Exhibit J

<sup>50</sup> Hartigan Affidavit, para 48

Mr. Crosson calculated the profits as \$484 million.<sup>51</sup>

37. In developing the CCAA Plan, the mediator and the monitors assigned the value of \$484 million to the Knight Class Action.<sup>52</sup> This corresponds with Mr. Crosson's expert evidence.

38. The Knight Class Action Plaintiffs Settlement Amount is \$15 million.<sup>53</sup> This is roughly proportionate to the value that the Provinces and Territories are receiving. The total value of the provincial and territorial claims is \$944,518,989,400. They are receiving \$24.725 billion payable over time as their settlement amount. This works out to a recovery of 3.8%. The Knight recovery is a comparable 3.2% but is payable immediately.

#### **I. Retainer Agreement and Class Counsel Experience**

39. Mr. Knight signed a retainer agreement with class counsel for a 33 1/3% contingency fee, plus taxes, disbursements, and interest on those disbursements.<sup>54</sup>

40. Klein Lawyers has 30 years of experience prosecuting class actions across Canada. Its managing partner, David Klein, was called in 1980 and has been repeatedly recognized by *Lexpert* as one of the most frequently recommended lawyers in class action litigation. Klein Lawyers was the first law firm to obtain certification of a class action under the *British Columbia Class Proceedings Act*, the first law firm to obtain certification under the *Manitoba Class Proceedings Act* and the first law firm to obtain certification under the *Newfoundland and Labrador Class*

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<sup>51</sup> Hartigan Affidavit, Exhibit J

<sup>52</sup> [First Amended and Restated Court Appointed Mediators and Monitor's CCAA Plan of Compromise and Arrangement](#), December 5, 2024, Article 1, Value of Claim for Voting Purposes pg. 19 of 1283

<sup>53</sup> [First Amended and Restated Court Appointed Mediators and Monitor's CCAA Plan of Compromise and Arrangement](#), December 5, 2024, Article 16.1, pg. 103 of 1283

<sup>54</sup> Hartigan Affidavit, Exhibit B and C

*Actions Act*. It has successfully resolved many class actions on behalf of its clients and its expertise has been repeatedly recognized by Canadian courts.<sup>55</sup>

## **J. Time and Disbursements**

41. The value of Knight Class Counsel's time in this matter is approximately \$2.9 million.<sup>56</sup> There are also disbursements of \$1,052,25.30, which includes \$183,163.96 for interest on disbursements pursuant to the retainer agreement and the B.C. *Class Proceedings Act*.<sup>57</sup>

42. Knight Class Counsel has carried all of this work in progress and all of these disbursements for the past 22 years. Knight Class Counsel financed these costs internally. There was no outside financing, nor is public financing even an option in British Columbia.<sup>58</sup>

43. Knight Class Counsel hired two American law firms, Sheller P.C and Charles Tauman P.C. as consultants. They provided valuable support and assistance to Knight Class Counsel. There was considerable litigation activity in the United States concerning light cigarettes, including certification hearings and class action trials in a number of states.<sup>59</sup> Bills submitted from these U.S. firms are for \$436,839.50 (USD) and \$47,170 (USD) respectively.<sup>60</sup> These firms agreed to be paid at the conclusion of the case, and as a result, they have assisted Knight Class Counsel for 20 years without payment. In recognition of their deferred billing, Knight Class Counsel has agreed to give them a 50% top up payment on their billing which will come out of the class counsel fees.<sup>61</sup>

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<sup>55</sup> Hartigan Affidavit, Exhibit A

<sup>56</sup> Hartigan Affidavit, para 57

<sup>57</sup> *Class Proceedings Act*, [RSBC, .c50, s.38 \(5\)](#)

<sup>58</sup> Hartigan Affidavit, para 58

<sup>59</sup> Hartigan Affidavit, para 48

<sup>60</sup> Hartigan Affidavit, Exhibit N and O

<sup>61</sup> Hartigan Affidavit, para 60

**K. Honorarium**

44. Knight Class Counsel proposes to pay an honorarium of \$10,000 to the court appointed representative plaintiff, Kenneth Knight. Counsel proposes to make that payment from the fee awarded to their firm provided that such payment to the representative plaintiff is acceptable to the CCAA Court.

45. Mr. Knight has been an active and engaged client for the past 22 years. He has attended many of the court hearings in the Knight Class Action. Counsel have communicated by email, phone and in person with him many times over the years. Mr. Knight has received and reviewed complex and confidential documents in this case and he has asked thoughtful questions. Mr. Knight is an average consumer who smoked light cigarettes when he was younger and then eventually managed to quit after much difficulty. In bringing this case, he was seeking to help others like himself, and to help advance public health.<sup>62</sup>

**PART III: ISSUES**

46. The issues on this motion are:
- (a) Whether the Knight Class Counsel Fee should be approved; and
  - (b) Whether the honorarium to the Representative Plaintiff, Mr. Knight, should be approved.

**PART IV: THE LAW**

**A. Jurisdiction**

47. The jurisdiction to decide the Knight Class Counsel Fee is provided by the CCAA Plan which specifies at Article 14.9(1) as follows:

“The Knight Class Counsel Fee shall be paid out and deducted from the Knight Class

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<sup>62</sup> Hartigan Affidavit, para 62

Action Plaintiffs Settlement Amount. The Knight Class Counsel Fee and the retainer agreement respecting fees and disbursements between the Knight Class Counsel and the representative plaintiff in the Knight Class Action are subject to the approval of the CCAA Court”<sup>63</sup>

48. And Article 1 which defines the “Knight Class Counsel Fee” as follows:

“Knight Class Counsel Fee” means the amount to be determined by the CCAA Court that will be payable from the Knight Class Action Plaintiffs Settlement Amount to the Knight Counsel in respect of their fees, disbursements and costs as Knight Class Counsel and any applicable Sales and Excise Taxes payable thereon. The retainer agreement respecting fees and disbursements between the Knight Class Counsel and the representative plaintiffs, as well as the Knight Class Counsel Fee, are subject to the approval of the CCAA Court.<sup>64</sup>

## **B. Test for Approval of Class Counsel Fees**

49. The Knight Class Action was filed and litigated British Columbia. It is submitted that the applicable law for determining the Knight Class Counsel Fee is British Columbia law. That said, in this case the law of British Columbia and Ontario yield the same result. The fee request by Knight Class Counsel is reasonable and should be approved.

50. Approval of class counsel fees in British Columbia is governed by s.38 of the British Columbia *Class Proceedings Act*.<sup>65</sup> The test for approval of a class counsel fee in British Columbia is whether “the fee charged is fair and reasonable while also ensuring that class counsel is appropriately compensated since class action litigation can be challenging and risk.”<sup>66</sup>

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<sup>63</sup> [First Amended and Restated Court Appointed Mediators and Monitor’s CCAA Plan of Compromise and Arrangement](#), December 5, 2024, Article 14.9(1), pg. 109 of 1283

<sup>64</sup> [First Amended and Restated Court Appointed Mediators and Monitor’s CCAA Plan of Compromise and Arrangement](#), December 5, 2024, Article 1, pg. 16 of 1283

<sup>65</sup> *Class Proceedings Act*, [RSBC, .c50, s.38 \(1\) and \(2\)](#)

<sup>66</sup> *Stanway v. Wyeth Canada Inc*, [2015 BCSC 983](#) at para [51](#)



**(i) One Third Contingency Fee is Standard Practice in British Columbia**

51. Courts in British Columbia have frequently held that a contingency fee of 33% is reasonable, and even standard practice in class actions in that province. In *Cronk v. LinkedIn Corporation*, 2023 BCSC 2165, Justice Francis wrote at para 51:

“A contingency fee of 33% is frequently held to be valid in class proceedings: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2014 BCSC 1936](#) at para. [56](#), *Denluck v. The Board of Trustees for the Boilermakers’ Lodge 359 Pension Plan*, [2021 BCSC 242](#) at para. [42](#).”<sup>67</sup>

52. Similarly, in *Chartrand v. Google LLC*, the British Columbia court held that a contingency fee of 33.33% “is within the typical range for class action in this province.”<sup>68</sup>

53. Likewise, in *Denluck v. The Board of Trustees for the Boilermakers’ Lodge 359 Pension Plan*, the British Columbia court wrote:

“As stated in *Wilson* contingency fees in the range of 33% have been recognized by Canadian courts as reasonable and presumptively valid”<sup>69</sup>

54. A guide to reasonable contingency fees in British Columbia is provided by Rule 8-2 of the *Law Society Rules* which specifies a maximum allowable contingency fee of 40% for complex personal injury claims.<sup>70</sup> The British Columbia court cited this Rule as a basis for approving a 33% contingency fee in a class action in *Stanway v. Wyeth Canada*.<sup>71</sup>

55. Similarly in Ontario, a 33% contingency fee has been considered “the benchmark for class

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<sup>67</sup> *Cronk v. LinkedIn Corporation*, [2023 BCSC 2165](#) at para [51](#)

<sup>68</sup> *Chartrand v. Google LLC*, [2021 BCSC 7](#) at para [60](#)

<sup>69</sup> *Denluck v. The Board of Trustees for the Boilermakers’ Lodge 359 Pension Plan*, [2021 BCSC 242](#) at para [42](#)

<sup>70</sup> British Columbia *Law Society Rules*, [Rule 8-2](#)

<sup>71</sup> *Stanway v. Wyeth Canada Inc.*, [2015 BCSC 983](#) at para [52-55](#)

counsel fees” and that such percentage is considered to be “standard in class action litigation.”<sup>72</sup> In *Cannon v. Funds for Canada Foundation*, the Ontario court held that “a one-third contingency fee agreement, if fully understood and accepted, should be accorded presumptive validity”.<sup>73</sup> This rule of presumptive validity may be modified in a “mega-fund” settlement, where the recovery exceeds \$100 million but that is not relevant concern here.<sup>74</sup> The Knight Class Action Settlement Amount of \$15 million fits comfortably within the normal parameters for one third fee awards.

## **(ii) The Importance of Rewarding Counsel**

56. British Columbia courts have repeatedly emphasized the need to adequately reward successful class counsel so that they will be properly incentivized to take on challenging and worthwhile cases. In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, Justice Masuhara wrote:

“The considerations in approving fees should recognize not only meritorious effort in achieving a positive result but also encourage counsel to take on difficult and risky class action litigation.”<sup>75</sup>

57. Similarly, in *White v. Attorney General of Canada*, Justice Cullen wrote:

“In the circumstances, counsel, in taking on the case involving a significant commitment of time and the ongoing payment of disbursements incurred a significant risk to their own economic interests, which if not adequately compensated for, would discourage similar willingness in the bar to take on difficult cases on such a basis in the future. In such circumstances, there is clearly the expectation of a higher fee than in a non-contingency fee basis.”<sup>76</sup>

## **(iii) Factors to Consider on Fee Approval**

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<sup>72</sup> *Kirsch v. Bristol Myers Squibb*, [2024 ONSC 7191](#) at para 32

<sup>73</sup> *Cannon v. Funds for Canada Foundation*, [2013 ONSC 7686](#) para 3

<sup>74</sup> *McDonald v. BMO Trust Company*, [2021 ONSC 3726](#) at para 2

<sup>75</sup> *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2014 BCSC 1936](#) at para 54

<sup>76</sup> *White v. Attorney General of Canada*, [2006 BCSC 561](#) at para 31

58. In reviewing the fairness and reasonableness of a requested fee, there is a list of ten factors that British Columbia courts may consider:

- a) The results achieved;
- b) The risks undertaken;
- c) The time expended;
- d) The complexity of the matter;
- e) The degree of responsibility assumed by counsel;
- f) The importance of the matter to the client;
- g) The quality and skill of counsel;
- h) The ability of the class to pay;
- i) The client and the class' expectations; and
- j) Fees in similar cases.<sup>77</sup>

59. Each of these factors supports the requested fee by Knight Class Counsel. In terms of results, there were a number of proposed tobacco class actions filed across Canada during the past 30 years.<sup>78</sup> Mr. Knight's case was the first to get certified and the only class action outside of Quebec to achieve that result. In advancing his case, Mr. Knight helped address important issues relevant to many of the creditors in this CCAA proceeding including the potential liability of the federal government for tobacco products.<sup>79</sup> A key goal of Mr. Knight was to seek the removal of light and mild cigarette descriptors from the Canadian marketplace. The Canadian government did this in 2007 after initially opposing Mr. Knight's claim.<sup>80</sup> Another key goal for Mr. Knight, from the very outset of his case, was to obtain a *cy-pres* distribution to fund research to benefit injured smokers.<sup>81</sup> The CCAA Plan does exactly that.

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<sup>77</sup> *Haase v. Reliq Health Technologies Inc.*, [2022 BCSC 1754](#) at para [46](#)

<sup>78</sup> [First Amended and Restated Court Appointed Mediators and Monitor's CCAA Plan of Compromise and Arrangement](#), December 5, 2024, Schedule V, pg. 1270 of 1283

<sup>79</sup> *Knight v. Imperial Tobacco Canada Limited*, [2007 BCSC 964](#)

<sup>80</sup> Hartigan Affidavit, Exhibit G

<sup>81</sup> *Knight v. Imperial Tobacco Canada Limited.*, [2005 BCSC 172](#) at para [3](#)

60. In terms of risk, this was very risky and challenging litigation. Tobacco companies have repeatedly shown themselves to be determined and skilled litigants. A relevant date to consider when assessing risk in this case is 2003 when the contingency fee agreement with Mr. Knight was negotiated. At that point, no tobacco class action had been certified in Canada and the cases filed in Ontario and Quebec had not achieved certification despite 8 years and 5 years of effort, respectively. Knight Class Counsel took on this case even in the face of such known challenges.

61. In terms of time expended, Knight Class Counsel has approximately \$2.9 million in work in progress.<sup>82</sup> The fee sought is a modest uplift on work done and carried over two decades.

62. In terms of complexity, this was a unique and novel approach to addressing harm caused by the tobacco industry. It brought in many fields of study as shown from Mr. Knight's expert reports.<sup>83</sup> It considered evolving areas of class action law in British Columbia. The British Columbia Court of Appeal's decision on certification in *Knight* remains a leading authority.<sup>84</sup>

63. In terms of the degree of responsibility assumed by counsel, Klein Lawyers had sole carriage of the action. It is a litigation boutique with about 50 employees primarily based in Vancouver.<sup>85</sup> Klein Lawyers had no outside financing, whether from a public or private lender. It assumed all financial responsibility for bringing this case to a conclusion.

64. In terms of the importance of the matter to the client, this was summarized by Justice Satanove at the certification hearing in *Knight* as follows:

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<sup>82</sup> Hartigan Affidavit, para 57

<sup>83</sup> Hartigan Affidavit, Exhibit H, I, and J

<sup>84</sup> *Knight v. Imperial Tobacco Canada Limited*, [2006 BCCA 235](#)

<sup>85</sup> Hartigan Affidavit, Exhibit A

“If the plaintiff succeeds in his allegations, the amount of damages could be significant and the ramification to the defendant’s business could be serious. In addition, there are serious and sensitive social issues at stake.”<sup>86</sup>

65. In terms of the skill of counsel, Klein Lawyers has been successfully acting for plaintiffs in class actions for decades. Its experience has been repeatedly recognized by Canadian courts. In *Percival v. Canada*, the federal court wrote:

“The Class Members were represented by Class Counsel and Quebec Subclass Counsel, who have established expertise in class actions. As mentioned earlier, along with Mr. Percival’s tenacity, Class Counsel’s experience coming out of the Sixties Scoop settlement may well have been the impetus for the institution of the underlying class proceeding on a national level, leading to the Settlement Agreement. In fact given their experience in the area of class actions for over 27 years, this Court has previously recognized Class Counsel as highly experienced in class action litigation (see *Merlo* at para [34](#); *Tiller v Canada*, [2020 FC 323](#) at para [36](#))”<sup>87</sup>

66. Similarly, in *Stanway v. Wyeth Canada Ltd.*, the British Columbia court wrote:

“Mr. Klein of Klein Lawyers has over 20 years of experience in the field of class action litigation and has appeared as plaintiffs’ counsel in over 25 certified class actions in six provinces. He has written and presented extensively on the topic and has a particular interest in medical products litigation.”<sup>88</sup>

67. In terms of the ability of the class to pay, this was complex litigation on behalf of consumers under provincial trade practices legislation. There was no reasonable prospect that consumers could have funded this case. The amounts sought for refunds of profits from a deceptively marketed product are substantial in the aggregate but modest for any individual consumer. Knight is the classic example of a class action that is only economically viable when aggregated.

68. In terms of the client’s expectation, the one third fee sought in this case has been found by

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<sup>86</sup> *Knight v. Imperial Tobacco Canada Ltd.*, [2005 BCSC 172](#) at para [3](#)

<sup>87</sup> *Percival v. Canada*, [2024 FC 824](#) at para [86](#)

<sup>88</sup> *Stanway v. Wyeth Canada*, [2015 BCSC 983](#) at para [39](#)

British Columbia courts to be standard practice.<sup>89</sup> It aligns with rules for such fees provided by the British Columbia Law Society.<sup>90</sup> Arguably, given the exceptional risk of tobacco litigation, Mr. Knight's counsel could have sought to negotiate a higher contingency fee of up to 40% under British Columbia rules. They did not. Klein Lawyers offered Mr. Knight the usual fee. And Klein Lawyers has stood by that fee agreement for 22 years.

69. Another measure of reasonable client expectations would be to look at what other parties in the litigation spent. Canada, after 7 years of involvement in Knight, delivered a Bill of Costs to the Applicant of almost \$5 million once the Third Party Claim against it was struck.<sup>91</sup> Knight Class Counsel's fee request is not out of step with Canada's reported costs in Knight.

70. In terms of similar cases, a close comparison can be drawn between Knight and *Stanway v. Wyeth Canada*.<sup>92</sup> Both were product liability suits. Both were commenced at roughly the same time. Both were certified class actions that were litigated in British Columbia over a long period, including appeals of certification to the British Columbia Court of Appeal. Both involved complex expert evidence. Both were led by the same plaintiff firm, Klein Lawyers, and both involved the same standard contingency fee of one third. Moreover, both had similar recoveries, with *Stanway* collecting \$13.65 million and Mr. Knight's settlement amount at \$15 million. A one-third contingency fee was approved as requested in *Stanway*; a similar result should be granted here.

#### **(iv) Disbursements**

71. The disbursements incurred in this case were reasonable and necessary. Interest on those

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<sup>89</sup> *Chartrand v. Google LLC*, [2021 BCSC 7](#) at para [60](#)

<sup>90</sup> *British Columbia Law Society Rules*, [Rule 8-2](#)

<sup>91</sup> *HMTQ v. Imperial Tobacco Limited*, [2015 BCSC 1713](#)

<sup>92</sup> *Stanway v. Wyeth Canada Inc.*, [2015 BCSC 983](#)

disbursements is appropriately charged, particularly where those expenses were carried for so long. Interest on disbursements is provided for under the British *Columbia Class Proceedings Act*,<sup>93</sup> and by Mr. Knight's retainer agreement.<sup>94</sup> Payment of interest on disbursements was approved in *Stanway*.<sup>95</sup>

72. It was reasonable and necessary for Klein Lawyers to hire U.S. law firms as consultants in this case. There was obvious overlap with light cigarette litigation in the United States and U.S. counsel was able to provide access to documents and information that Knight Class Counsel would not have obtained otherwise.<sup>96</sup> British Columbia courts have found that the cost to class counsel of obtaining necessary assistance from an American lawyer may be recoverable as a disbursement.<sup>97</sup>

### **C. Honourarium**

73. The British Columbia Court of Appeal held in *Parsons v. Coast Capital Credit Union* that an honourarium may be awarded to the representative plaintiff for their public service. Justice Saunders defined the test for such an award as follows:

“In other words, I do not consider exceptional service is required. Rather competent service accompanied by positive results should be sufficient for recognition in this way, weighing in this factor the quantum of personal benefit achieved by the representative plaintiff with the overall benefit achieved for the class.”<sup>98</sup>

74. This “competent service” test has been repeatedly applied by British Columbia courts. In *Lam v. University of British Columbia*, the representative plaintiff was awarded an honourarium

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<sup>93</sup> *Class Proceedings Act*, [RSBC, c.50, s.38 \(5\)](#)

<sup>94</sup> Hartigan Affidavit, Exhibit B

<sup>95</sup> *Stanway v. Wyeth Canada Inc.*, [2015 BCSC 983](#) at para [27](#)

<sup>96</sup> Hartigan Affidavit, para 48

<sup>97</sup> *Fairhurst v. Anglo American PLC*, [2014 BCSC 827](#) at para [19](#)

<sup>98</sup> *Parsons v. Coast Capital Savings Credit Union*, [2010 BCCA 311](#) at para [21](#)

of \$10,000 for 12 years of competent service and positive results for the class.<sup>99</sup>

75. The law on honourariums in Ontario is different. While *Parsons* has been cited with approval by the Ontario court in *Redublo v. CarePartners*,<sup>100</sup> the Ontario Divisional Court adopted a more exacting standard in *Doucet v. The Royal Winnipeg Ballet*.<sup>101</sup> Specifically, the Ontario Divisional Court requires “exceptional circumstances” to justify the award of an honourarium.<sup>102</sup> This is precisely the test that the British Columbia court rejected in *Parsons* when it held that “exceptional service” is not required, merely “competent service”.<sup>103</sup>

76. Irrespective of the test applied, Mr. Knight has met the threshold and is deserving of an honourarium. Service of over 22 years in a class action is exceptional and an award of \$10,000 is modest recognition of that effort.

77. Knight Class Counsel wishes to pay the honourarium out of the Knight Class Counsel Fee, subject to the approval of the CCAA Court. Such practice of paying the honourarium out of the class counsel fee was accepted by the federal court in *McLean v. Canada*.<sup>104</sup>

## **PART V: RELIEF REQUESTED**

78. The Knight Class Action Plaintiffs seek the following relief:

- (a) The retainer agreement between Knight Class Counsel and the representative

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<sup>99</sup> *Lam v. University of British Columbia*, [2015 BCSC 1378](#) at para [20](#)

<sup>100</sup> *Redublo v. CarePartners*, [2022 ONSC 1398](#) at para [57](#) and [103](#)

<sup>101</sup> *Doucet v. The Royal Winnipeg Ballet*, [2023 ONSC 2323](#) at para [92](#)

<sup>102</sup> *Ibid*, at para [92](#)

<sup>103</sup> *Parsons v. Coast Capital Savings Credit Union*, [2010 BCCA 311](#) at para [21](#)

<sup>104</sup> *McLean v. Canada*, [2019 FC 1077](#) At para [57](#)



plaintiff, Mr. Kenneth Knight, dated April 22, 2003, is hereby approved.

- (b) The Knight Class Counsel Fee to be paid out of and deducted from the Knight Class Action Plaintiffs Settlement Amount is approved and shall be paid to Knight Class Counsel in accordance with the CCAA Plan in this proceeding in the amount of \$5 million dollars plus applicable sales taxes for class counsel legal fees and \$1,062,746.62 for disbursements; and
- (c) Knight Class Counsel may pay an honorarium to the representative plaintiff, Mr. Knight, from their fee in the amount of \$10,000.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

January 22, 2025



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Douglas Lennox  
Klein Lawyers

Lawyers for the Knight Class Action Plaintiffs

## LIST OF AUTHORITIES

1. *British Columbia v. Imperial Tobacco Canada Limited*, [2008 BCSC 419](#)
2. *Cannon v. Funds for Canada Foundation*, [2013 ONSC 7686](#)
3. *Caputo v. Imperial Tobacco Limited*, [\[1997\] O.J. No. 2576](#) (Ont. Gen. Div.)
4. *Chartrand v. Google LLC*, [2021 BCSC 7](#)
5. *Cronk v. LinkedIn Corporation*, [2023 BCSC 2165](#)
6. *Denluck v. The Board of Trustees for the Boilermakers' Lodge 359*, [2021 BCSC 242](#)
7. *Doucet v. The Royal Winnipeg Ballet*, [2023 ONSC 2323](#)
8. *Fairhurst v. Anglo American PLC*, [2014 BCSC 827](#)
9. *Haase v. Reliq Health Technologies Inc.*, [2022 BCSC 1754](#)
10. *HMTQ v. Imperial Tobacco Limited*, [2015 BCSC 1713](#)
11. *Imperial Tobacco Limited*, [1999 CanLii 14803 \(ON SC\)](#)
12. *Kirsch v. Bristol Myers Squibb*, [2024 ONSC 7191](#)
13. *Knight v. Imperial Tobacco Canada Limited.*, [2005 BCSC 172](#) vard, [2006 BCCA 235](#)
14. *Knight v. Imperial Tobacco Canada Limited*, [2007 BCSC 964](#)
15. *Knight v. Imperial Tobacco Canada Limited.*, [2009 BCSC 339](#)
16. *Knight v. Imperial Tobacco Canada Limited*, [2017 BCSC 1487](#)
17. *Lam v. University of British Columbia*, [2015 BCSC 1378](#)
18. *McDonald v. BMO Trust Company*, [2021 ONSC 3726](#)
19. *McLean v. Canada*, [2019 FC 1077](#)
20. *Parsons v. Coast Capital Savings Credit Union*, [2010 BCCA 311](#)
21. *Percival v. Canada*, [2024 FC 824](#)
22. *Quebec Council on Tobacco and Health v. JTI-MacDonald Corp.*, [2005 CanLii 4070](#)
23. *R. v. Imperial Tobacco Canada Ltd.*, [2011 SCC 42](#)
24. *Ragoonanan v. Imperial Tobacco Canada Limited*, [2008 CanLii 19242](#)
25. *Redublo v. CarePartners*, [2022 ONSC 1398](#)
26. *Sparkes v. Imperial Tobacco Canada Limited.*, [2008 NLTD 207](#)
27. *Sparkes v. Imperial Tobacco Canada Limited*, [2010 NLCA 21](#)
28. *Stanway v. Wyeth Canada Inc.*, [2015 BCSC 983](#)
29. *White v. Attorney General of Canada*, [2006 BCSC 561](#)
30. *British Columbia Law Society Rules*, [Rule 8-2](#)
31. *Class Proceedings Act*, [RSBC, .c50, s.38\(1\) \(2\) \(5\)](#)

**IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended  
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL  
TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED**

Court File No: CV-19-616077-00CL

**APPLICANTS**

***Ontario***  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF KNIGHT CLASS ACTION**  
**PLAINTIFFS**  
**(Motion to Approve Knight Class Counsel Fee)**

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