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

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 AND ARRANGEMENT OF SINO-FOREST CORPORATION

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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

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, 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*

BOOK OF AUTHORITIES OF THE PLAINTIFFS
FEE APPROVAL
(Returnable May 11, 2015)

May 1, 2015

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TO : THE ATTACHED SERVICE LIST

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22. *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (S.C.J.)

23. *Martin v. Barrett*, [2008] O.J. No. 2105 (S.C.J.)

24. Order of Justice Morawetz dated December 27, 2013

25. Ontario Law Reform Commission, *Report on Class Actions*, vol. 3

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al. v. Sino-Forest Corporation et al.

[Indexed as: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.]

110 O.R. (3d) 173

2012 ONSC 1924

Ontario Superior Court of Justice,
Perell J.
March 26, 2012

Civil procedure -- Class proceedings -- Certification -- Plaintiffs bringing proposed class action and moving for leave to assert causes of action pursuant to ss. 138.3 and 138.8 of Securities Act -- Leave motion and certification motion ordered to be heard together -- Securities Act, R.S.O. 1990, c. S.5, ss. 138.3, 138.8.

Civil procedure -- Class proceedings -- Pleadings -- Plaintiffs bringing proposed class action and moving for leave to assert causes of action pursuant to ss. 138.3 and 138.8 of Securities Act -- Defendants objecting to delivering statement of defence before leave motion and certification motion were heard -- Pleadings should generally be completed before certification motion -- Defendants who delivered affidavit pursuant to s. 138.8(2) of Securities Act ordered to deliver statement of defence -- Delivery of statement of defence not precluding defendant from bringing Rule 21 motion at leave and certification motion or from contesting that plaintiffs had shown cause of action -- Securities Act, R.S.O. 1990, c. S.5, ss. 138.3, 138.8.

The plaintiffs brought a proposed class action against the defendants, alleging that the defendants made misrepresentations in the primary and secondary markets. They also claimed against some of the defendants for a corporate oppression remedy, negligence, negligent misrepresentation, conspiracy and unjust enrichment. They had moved for leave to assert causes of action pursuant to ss. 138.3 and 138.8 under Part XXIII.1 of the Securities Act. The plaintiffs brought a motion for an order requiring the defendants to deliver a statement of defence. The defendants objected to filing a statement of defence before the certification motion and before leave was granted pursuant to s. 138.8 of the Securities Act. The plaintiffs also sought to have the certification motion and the leave motion under s. 138.8 of the Securities Act heard together. The defendants submitted that a series of motions should be scheduled, beginning with the leave motion, followed by Rule 21 (of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194) motions, followed by the certification motion.

Held, the motion should be granted in part.

It was the clear intention of the legislature that the pleadings be closed before certification. It would not be contrary to law or a denial of due process to order the pre-certification delivery of a statement of defence. While it would be inappropriate to order all the defendants to deliver a statement of defence to a secondary market claim under the Securities Act, it would be proper to order any defendant who delivered an affidavit pursuant to s. 138.8(2) of the Act to also deliver a statement of defence. Any other defendant may, if so advised, deliver a statement of defence. The delivery of the statement of defence was not a fresh step, and any defendant who did so was not precluded from bringing a Rule 21 motion at the leave and certification motion or from contesting that the plaintiffs [page174] had shown a cause of action under s. 5(1)(a) of the Class Proceedings Act, 1992, S.O. 1992, c. 6.

It would be fair and efficient to hear the certification motion and the leave motion together. If a sequential approach were adopted, there would be appeals at each stage, leading to

increased delay.

Cases referred to

Pennyfeather v. Timminco Ltd. (2011), 107 O.R. (3d) 201, [2011] O.J. No. 3286, 2011 ONSC 4257; Sharma v. Timminco Ltd., [2012] O.J. No. 719, 2012 ONCA 107; Sharma v. Timminco Ltd., [2010] O.J. No. 469, 2010 ONSC 790, consd

Other cases referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2004), 70 O.R. (3d) 182, [2004] O.J. No. 865, 184 O.A.C. 298, 50 C.P.C. (5th) 25, 129 A.C.W.S. (3d) 455 (Div. Ct.), affg (2002), 62 O.R. (3d) 535, [2002] O.J. No. 4781, [2002] O.T.C. 963, 28 C.P.C. (5th) 135, 118 A.C.W.S. (3d) 530 (S.C.J.) [Leave to appeal granted (2003), 64 O.R. (3d) 42, [2003] O.J. No. 1089, 169 O.A.C. 343, 121 A.C.W.S. (3d) 655 (S.C.J.)]; Ainslie v. CV Technologies Inc. (2008), 93 O.R. (3d) 200, [2008] O.J. No. 4891, 304 D.L.R. (4th) 713, 171 A.C.W.S. (3d) 964 (S.C.J.) [Leave to appeal granted [2009] O.J. No. 730 (Div. Ct.)]; Anderson v. Wilson (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494, 175 D.L.R. (4th) 409, 122 O.A.C. 69, 36 C.P.C. (4th) 17, 89 A.C.W.S. (3d) 441 (C.A.) [Leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 476]; Bell v. Booth Centennial Healthcare Linen Services, [2006] O.J. No. 4646, 153 A.C.W.S. (3d) 828 (S.C.J.); Cannon v. Funds for Canada Foundation, [2010] O.J. No. 314, 2010 ONSC 146; Cetinalp v. Casino, [2009] O.J. No. 5015 (S.C.J.); Dobbie v. Arctic Glacier Income Fund, [2011] O.J. No. 932, 2011 ONSC 25, 3 C.P.C. (7th) 261; Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, 2004 SCC 25, 237 D.L.R. (4th) 385, 319 N.R. 38, J.E. 2004-931, 186 O.A.C. 128, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 130 A.C.W.S. (3d) 32, revg (2001), 57 O.R. (3d) 127, [2001] O.J. No. 4651, 208 D.L.R. (4th) 494, 152 O.A.C. 244, 19 B.L.R. (3d) 10, 110 A.C.W.S. (3d) 21 (C.A.); Glover v. Toronto (City), [2008] O.J. No. 604 (S.C.J.); Healey v. Lakeridge Health Corp., [2006] O.J. No. 4277, 38 C.P.C. (6th) 145, 152 A.C.W.S. (3d) 372 (S.C.J.); Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, J.E. 90-1436, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 23 A.C.W.S. (3d) 101; Kang v. Sun Life Assurance Co. of Canada, [2011] O.J. No. 4792, 2011 ONSC 6335; Mangan

v. Inco Ltd. (1996), 30 O.R. (3d) 90, [1996] O.J. No. 2655, 10 O.T.C. 231, 3 C.P.C. (4th) 342, 64 A.C.W.S. (3d) 921 (Gen. Div.); Silver v. Imax Corp., [2009] O.J. No. 5585, 86 C.P.C. (6th) 273 (S.C.J.) [Leave to appeal refused (2011), 105 O.R. (3d) 212, [2011] O.J. No. 656, 2011 ONSC 1035, 80 B.L.R. (4th) 228 (Div. Ct.)]

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1)(a), 12, 28, 35

Securities Act, R.S.O. 1990, c. S.5, ss. 130 [as am.], (3), (4), (5), Part XXIII.1 [as am.], ss. 138.3 [as am.], 138.8 [as am.], (2)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.04, 20, 21, 25.06(1), 25.07

MOTION for an order requiring the defendants to deliver a statement of defence.

Kirk M. Baert and Michael Robb, for plaintiffs. [page175]

Michael Eizenga, for Sino-Forest Corporation, Simon Murray, Edmund Mak, W. Judson Martin, Kai Kit Poon and Peter Wang.

Emily Cole and Megan Mackey, for Allan T.Y. Chan.

Peter Wardle and Simon Bieber, for David J. Horsley.

Laura Fric and Geoffrey Grove, for William E. Ardell, James P. Bowland, James M.E. Hyde and Garry J. West.

John Fabello and Andrew Gray, for 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 Banc of America Securities LLC.

Peter H. Griffin and Shara Roy, for Ernst & Young LLP.

Kenneth Dekker and Michelle Booth, for BDO Limited.

John Pirie and David Gadsden, for Pyry (Beijing) Consulting Company Limited.

PERELL J.: --

A. Introduction

[1] A motion for an order requiring a defendant to deliver a statement of defence or for an order setting a timetable for a motion should not be a momentous matter. But scheduling is a very big deal in this very big case under the Class Proceedings Act, 1992, S.O. 1992, c. 6.

[2] The defendants strenuously resist delivering a statement of defence before the certification motion, and they submit that it would [be] both contrary to law and a denial of due process to require them to plead in the normal course of an action.

[3] The defendants submit that having to plead their statement of defence is contrary to law because the plaintiffs' statement of claim can be commenced only with leave pursuant to s. 138.8 of the Securities Act, R.S.O. 1990, c. S.5 and in Sharma v. Timminco Ltd., [2012] O.J. No. 719, 2012 ONCA 107 the Court of Appeal ruled that the statement of claim does not exist until leave is granted. The defendants submit that having to plead their statement of defence is a denial of due process because the plaintiffs' statement of claim includes causes of action that might not survive a challenge under Rule 21 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. One of the defendants, BDO Limited, also argues that claims against it are statute-barred, and, therefore, it should not be required to deliver a statement of defence but should be permitted to bring a Rule 21 motion before the certification hearing. [page176]

[4] The position of the defendants is set out in para. 2 of the defendant Sino-Forest Corporation's factum as follows:

2. The Responding Parties oppose the relief relating to the delivery of a statement of defence because, as a result of the Ontario Court of Appeal's decision in Sharma v. Timminco, the secondary market action has yet to be commenced and will not have been commenced unless and until leave has been granted by this Honourable Court. Accordingly, the Defendants cannot be required to deliver a statement of defence to a proceeding that has yet to be commenced. Moreover, the secondary market claims are intertwined with the balance of the allegations in the statement of claim, such that it would not be realistic to provide a partial or bifurcated defence. In addition, the Responding Parties expect to be bringing a motion to strike the Statement of claim, at least in respect of the portion of the claim that purports to be brought on behalf of Noteholders, who are prohibited from commencing such a claim by virtue of the no suits by holder clause.

[5] In response, the plaintiffs submit that just as defendants are entitled to know the case they must meet, plaintiffs are entitled to know the defence they confront. The plaintiffs submit that the law and the dictates of due process do not preclude ordering the delivery of a statement of defence in accordance with the Rules of Civil Procedure, and the plaintiffs' rely on the court's power under s. 12 of the Class Proceedings Act, 1992 and on what I said in Pennyfeather v. Timminco Ltd. (2011), 107 O.R. (3d) 201, [2011] O.J. No. 3286, 2011 ONSC 4257 about the desirability of the pleadings being closed before the certification motion.

[6] In the immediate case, the defendants also strenuously resist the plaintiffs' request that the leave motion under s. 138.8 the Securities Act and the certification motion under the Class Proceedings Act, 1992 be heard together. Instead of a combined leave and certification motion, the defendants submit that a series of motions be scheduled, beginning with the leave motion, followed by Rule 21 motions, followed by the certification motion. Some defendants would begin with the Rule 21 motions before the leave motion, but all wish a sequence of separate motions.

[7] The defendants submit that a combined leave and

certification motion would be both inappropriate and also unfair, and particularly so if they are also required to plead their defences. The defendants submit that fairness dictates that leave be determined in advance of certification and that their right to attack all or part of whatever pleading emerges from the leave motion be preserved. They submit that it would be inefficient to deliver a statement of defence when the statement of claim is likely to be amended in a substantial manner depending on the outcome of the plaintiffs' leave motion and the Rule 21 motions. [page177]

[8] The plaintiffs regard the defendants' proposal of a sequence of motions as something akin to having their action being sentenced to a life of imprisonment on Devil's Island.

[9] For the reasons that follow, I adjourn the motion as it concerns BDO Limited, and I order that there shall be a combined leave and certification motion on November 21-30, 2012 (ten days).

[10] I order that the "Proposed Fresh as Amended Statement of Claim" be the statement of claim for the purposes of the leave and certification motion and that this pleading shall not be amended without leave of the court. Further, I order that with the exception of the plaintiffs' funding motion, there shall be no other motions before the leave and certification motion without leave of the court first being obtained.

[11] I do not agree that it would be contrary to law or a denial of due process to order the pre-certification delivery of a statement of defence; nevertheless, I shall not order all the defendants to deliver their statements of defence before the combined leave and certification.

[12] Rather, I shall order that a statement of defence be delivered by any defendant that delivers an affidavit pursuant to s. 138.8(2) of the Securities Act. I order that any other defendant may, if so advised, deliver a statement of defence. Further, I order that if a defendant delivers a statement of defence, then the delivery of the statement of defence is not a fresh step and the defendant is not precluded from bringing a

Rule 21 motion at the leave and certification motion or from contesting that the plaintiffs have shown a cause of action under s. 5(1)(a) of the Class Proceedings Act, 1992.

[13] In my reasons, I will explain why it may be advantageous to a defendant to deliver a statement of defence although it may not be obliged to do so.

[14] Finally, in my reasons, I will establish a timetable for the funding motion and for the leave and certification motion, which timetable may be adjusted, if necessary, by directions made at a case conference.

B. Factual and Procedural Background

[15] Sino-Forest is a Canadian public company whose shares formerly traded on the Toronto Stock Exchange. At the moment, trading is suspended because on June 2, 2011, Muddy Waters Research released a research report alleging fraud by Sino-Forest. The release of the report had a catastrophic effect on Sino-Forest's share price. [page178]

[16] On June 20, 2011, the Trustees of the Labourers' Pension Fund of Central and Eastern Canada ("Labourers") retained Koskie Minsky LLP to sue Sino-Forest. Koskie Minsky issued a notice of action in a proposed class action with Labourers as the proposed representative plaintiff.

[17] The June action, however, was not pursued, and in July 2011, Labourers and another pension fund, the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario ("Engineers") retained Koskie Minsky and Siskinds LLP to commence a new action, which followed on July 20, 2011 by notice of action. The statement of claim in Labourers v. Sino-Forest, which is the action now before the court, was served in August 2011.

[18] On November 4, 2011, Labourers served the defendants in Labourers v. Sino-Forest with the notice of motion for an order granting leave to assert the causes of action under Part XXIII.1 of the Ontario Securities Act.

[19] At this time, there were rival class actions. Douglas Smith had retained Rochon Genova, LLP. Rochon Genova issued a notice of action on June 8, 2011. The statement of claim in Smith v. Sino-Forest followed on July 8, 2011. Northwest & Ethical Investments L.P. and Comit Syndical National de Retraite Btirente Inc. retained Kim Orr Barristers P.C., and on September 26, 2011, Kim Orr commenced Northwest v. Sino-Forest.

[20] On December 20 and 21, 2011, there was a carriage motion, and on January 6, 2012, I released my judgment awarding carriage to class counsel in Labourers v. Sino-Forest. I granted leave to the plaintiffs to deliver a Fresh as Amended Statement of Claim, which may include the joinder of the plaintiffs and the causes of action set out in Grant v. Sino-Forest, Smith v. Sino-Forest and Northwest v. Sino-Forest, as the plaintiffs may be advised.

[21] On January 26, 2012, the plaintiffs delivered an Amended Statement of Claim.

[22] On March 2, 2012, the plaintiffs initiated a motion seeking leave to assert causes of action pursuant to ss. 138.3 and 138.8 under Part XXIII.1 of the Securities Act.

[23] Plaintiffs' motion materials included a draft Fresh as Amended Statement of Claim for the eventuality that leave is granted ("Proposed Fresh as Amended Statement of Claim"). The Proposed Fresh as Amended Statement of Claim substantially amends and extends the allegations contained in the pleading delivered in January 2012.

[24] In their various pleadings, the plaintiffs allege that Sino-Forest and the other defendants made misrepresentations in the [page179] primary and secondary markets. The plaintiffs claims include US$0.8 billion for primary market claims, US$1.8 billion for noteholders and US$6.5 billion for secondary market claims. There are also claims against some of the defendants for a corporate oppression remedy, negligence, negligent misrepresentation, conspiracy and unjust enrichment. The following chart describes the claims against each defendant:

[QL:GRAPHIC NAME="110OR3d173-1.jpg"/]

[25] On March 6, 2012, there was a case conference, and I scheduled ten days of hearings from November 21 to November 30, 2012. Apart from deciding that the leave motion must be [page180] heard, I did not decide what would be the subject matter of those hearing dates.

[26] None of the defendants has served a statement of defence. None has advised which, if any, statutory or common law defences they will advance in response to the plaintiffs' claims. In this regard, it may be noted that the plaintiffs advance claims under s. 130 of the Securities Act with respect to misrepresentations in the primary market. These claims raises at least eight possible statutory defences, which are set out in s. 130(3), (4) and (5) of the Securities Act. If leave is granted, the plaintiffs also advance claims under Part XXIII.1 of the Securities Act. As noted in Sino-Forest's factum for this motion, there are at least 11 defences to secondary market claims.

C. Discussion

1. Introduction

[27] In this introductory section, I will address the one relatively easy issue, i.e., the problem of the "moving target" statement of claim.

[28] In the sections that follow, I will address the more difficult issues of (a) whether the defendants can and should be ordered to deliver statements of defence; (b) whether the leave motion should be combined with the certification motion or instead there should be a sequence of motions; (c) what other motions, if any, should be permitted before the certification motion; and (d) what should the timetable be for the motions.

[29] Beginning with the relatively easy problem, at the argument of this motion, the defendants vociferously complained that the plaintiffs keep changing their statement of claim. The defendants pointed to substantial differences among the

statement of claim delivered before the carriage motion, the statement of claim delivered after the carriage motion and the Proposed Fresh as Amended Statement of Claim offered up for the purposes of the leave motion.

[30] This complaint about a "moving target" statement of claim was advanced as part of the defendants' arguments that they cannot legally be ordered to deliver a statement of defence. I, however, do not see how this complaint supports that particular argument.

[31] I rather regard the "moving target" complaint as a proper objection that if the defendants are to be ordered to deliver a statement of defence, the content of the statement of claim needs first to be finalized. [page181]

[32] I agree that for the purposes of a leave or a certification motion, the content of the statement of claim needs to be finalized, and thus the approach should be to order a pleading to be finalized and to order that this pleading not be amended without leave of the court. I so order.

[33] The problem then becomes one of selecting which pleading to finalize for the purposes of the leave and certification motion. It makes common sense to select the pleading for which leave is being sought under the Securities Act, i.e., the Proposed Fresh as Amended Statement of Claim, and that indeed is my selection.

2. The delivery of the statement of defence in class actions

[34] I turn now to the difficult issues of whether the defendants can be ordered to deliver statements of defence, and if they can be ordered to plead, whether they should be ordered to plead.

[35] As will be seen shortly, the defendants submit that they cannot be ordered to plead to a secondary market claim that does not exist unless and until leave is granted under s. 138.8 of the Securities Act. For present purposes, I will accept the correctness of this submission, but it does not follow that the

defendants cannot plead to that portion of the Proposed Fresh as Amended Statement of Claim that is not exclusively referable to the secondary market claims. Assuming that the defendants are correct that there is a portion of the Proposed Fresh as Amended Statement of Claim to which they cannot be obliged to plead does not negate that there are portions of the Proposed Fresh as Amended Statement of Claim that can and should be answered by a statement of defence.

[36] The defendants' submission, rather, means that rule 25.07 of the Rules of Civil Procedure, which provides the rules of pleading applicable to defences, needs to be amended for the purpose of the leave and certification motion so that defendants do not have to plead to a pregnant action under Part XXIII.1 of the Securities Act that may never be born.

[37] Rule 25.07 states:

Admissions

25.07(1) In a defence, a party shall admit every allegation of fact in the opposite party's pleading that the party does not dispute.

Denials

(2) Subject to subrule (6), all allegations of fact that are not denied in a party's defence shall be deemed to be admitted unless the party pleads having no knowledge in respect of the fact. [page182]

Different Version of Facts

(3) Where a party intends to prove a version of the facts different from that pleaded by the opposite party, a denial of the version so pleaded is not sufficient, but the party shall plead the party's own version of the facts in the defence.

Affirmative Defences

(4) In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading.

Effect of Denial of Agreement

(5) Where an agreement is alleged in a pleading, a denial of the agreement by the opposite party shall be construed only as a denial of the making of the agreement or of the facts from which the agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the agreement.

Damages

(6) In an action for damages, the amount of damages shall be deemed to be in issue unless specifically admitted.

[38] To repeat, for the purposes of the leave motion where a party cannot be obliged to plead and for the combined certification motion, rule 25.07 needs to be revised to accommodate s. 138.8 of the Securities Act.

[39] Pursuant to the authority provided by s. 12 of the Class Proceedings Act, 1992, which authorizes the court to make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination, I have the jurisdiction to revise the procedure for a class proceeding to accommodate s. 138.8 of the Securities Act, and I do so by notionally adding a new subrule 25.07(7) as follows:

(7) In an action under the Class Proceedings Act, 1992 for which leave is also being sought to commence an action under section 138.3 of the Securities Act (liability for secondary market disclosure), in a defence, a party who does not file an affidavit pursuant to rule 138.8(2) and who delivers a statement of defence shall decline to either admit or deny the allegations of fact referable solely to his or her

liability for secondary market disclosure and not referable to any other pleaded cause of action.

[40] Practically speaking, notional subrule 25.07(7) divides the defendants into three classes.

[41] First, there are those defendants who deliver a s. 138.8(2) affidavit under the Securities Act. These defendants must deliver a statement of defence for the reasons expressed below.

[42] Second, there are those defendants against whom there are no allegations of fact referable to liability for secondary market disclosure, who thus have no right or need to deliver a s. 138.8(2) affidavit under the Securities Act and who choose to deliver a [page183] statement of defence. These plaintiffs may, if so advised, simply plead in the normal course.

[43] Third, there are those defendants against whom there are allegations of fact referable to liability for secondary market disclosure and who do not deliver a s. 138.8(2) affidavit but who deliver a statement of defence.

[44] Under notional rule 25.07(7), these defendants shall decline to either admit or deny the allegations of fact referable solely to his or her liability for secondary market liability and not referable to any other pleaded cause of action. These defendants must state that they neither admit nor deny the allegations contained in those paragraphs (identify paragraph numbers) of the statement of claim referable solely to liability for secondary market liability and not referable to any other pleaded cause of action. As will become clearer after the discussion below, by being required to neither admit nor deny allegations referable solely to secondary market liability, these defendants cannot circumvent the requirements of s. 138.8(2) of the Securities Act that they must file an affidavit in order to set forth the material facts upon which they intend to rely for the leave motion.

[45] This brings the discussion and the analysis to whether there might be other reasons not to order the defendants to

deliver a statement of defence. The convention in class actions, which existed from 1996 to 2011, was that a defendant not be required to deliver a statement of defence pre-certification because of the likelihood that the statement of claim would be reformulated as a result of the certification decision and based on the view that the statement of defence had little utility before certification. See Mangan v. Inco Ltd. (1996), 30 O.R. (3d) 90, [1996] O.J. No. 2655 (Gen. Div.), at pp. 94-95 O.R.; Glover v. Toronto (City), [2008] O.J. No. 604 (S.C.J.), at para. 8.

[46] In Pennyfeather, I suggested that the convention should be revisited and that it was desirable that the pleadings be closed before the certification motion. See, also, Kang v. Sun Life Assurance Co. of Canada, [2011] O.J. No. 4792, 2011 ONSC 6335.

[47] In Pennyfeather, at paras. 37-38, 84-92, I stated:

> Class actions are subject to the Rules of Civil Procedure, and there is nothing in the Class Proceedings Act, 1992 that precludes defendants from pleading before the certification motion. It is informative that the convention of not closing the pleadings is not a statutory rule, and if the plaintiff insists on the delivery of a pleading, a defendant may need to seek the permission of the court to delay the delivery of the pleading.
>
> Moreover, the provisions of the Class Proceedings Act, 1992 indicate that it was the Legislature's intention that the general rule is that the statement of defence should be delivered before the certification motion. Section 2(3) of [page184] the Act indicates that the timing of the certification motion is measured by the delivery of the statement of defence[.]
>
> . . . . .
>
> . . . it would be advantageous for the immediate case and for other cases, if the current convention ended and defendants were required in the normal course to deliver a statement of defence before the certification motion. As I will

illustrate, there would be several advantages to this approach, and as I mentioned above, the Legislature intended that the general rule should be that the pleadings should be completed before the certification motion.

Before I provide some examples of the advantages of closing the pleadings before certification, it is helpful to recall that under s. 5(1) of the Class Proceedings Act, 1992, a plaintiff must satisfy five interdependent criteria for his or her action or application to be certified as a class proceeding. The Plaintiff must: (1) show a cause of action; (2) identify a class; (3) define common issues; (4) show that a class proceeding would be the preferable procedure; and (5) qualify as a representative plaintiff with a litigation plan and adequate Class Counsel.

A major advantage of closing the pleadings is that controversies about the first of the five criteria for certification might be resolved or at least narrowed or confined before the certification motion.

The delivery of a statement of defence could be a fresh step that could foreclose any subsequent attack by the defendant for any pleadings irregularities and, more to the point, typically defendants do not deliver a statement of defence if there is a substantive challenge to the statement of claim. Rather, they bundle all their challenges to the statement of claim and bring a motion to have the statement of claim or portions of it struck out on both technical and substantive grounds[.]

In other words, the requirement of delivering a statement of defence will call out the defendant to make its challenges to the statement of claim and, thus, the s. 5(1)(a) criterion might be removed as an issue as would any challenge to the pleading for wanting in particulars or for breaching the technical rules for pleading. The s. 5(1)(a) criterion for certification might be decided before the certification motion.

If the defendant brings a comprehensive pleadings challenge

before the certification motion, then, the s. 5(1)(a) criterion would be resolved before the certification hearing one way or the other. It would be particularly useful to resolve a s. 5(1)(a) challenge before the certification motion when the challenge is based on the court not having subject-matter jurisdiction over the plaintiff's claim. If that challenge is upheld, then the class action would be dismissed or stayed and the enormous costs of a comprehensive certification motion is avoided.

Further, hearing an interlocutory motion about the sufficiency of the pleading might be preferable to having the challenge heard at the certification motion as an aspect of the s. 5(1)(a) analysis because a common outcome of this analysis is to grant the plaintiff leave to amend his or her statement of claim, which outcome, at a minimum, exacerbates the complexities of determining the certification motion because of the interdependency of the certification criteria. [page185]

In many cases, the technical or substantive adequacy of a plaintiff's statement of claim is not an issue and, therefore, requiring the completion of the pleadings will involve no interlocutory steps and the analysis of the other four certification criteria would be facilitated by a completed set of pleadings.

For instance, having the statement of defence before the certification motion would provide useful information for analyzing the preferable procedure criterion and the plaintiff's litigation plan. Moreover, it may emerge that there are issues worthy of certification in the defendant's statement of defence.

[48] For present purposes, I do not retreat from what I said in Pennyfeather, and I shall emphasize several points and add a few more. In this regard, I emphasize that it was the clear intention of the legislature that the pleadings be closed before certification. I add that this makes sense because the certification criteria of class definition, common issues, preferable procedure and litigation plan are best adjudicated

in the context of the parameters of the action and it may emerge that the defendant has pleaded issues that may usefully be added to the list of common issues.

[49] Further, I add that the legislature also indicated by s. 35 of the Class Proceedings Act, 1992 that the Rules of Civil Procedure apply to class proceedings, reserving the courts' authority to make adjustments to that procedure under s. 12 of the Act. Generally speaking, it is desirable to normalize class actions with the procedure under the Rules of Civil Procedure. The Rules are the norm for a fair procedure, and the norm of civil procedure is that both sides must disclose the case that their opponent must meet. Defendants are not like an accused in a criminal proceeding with a right to remain silent. It is not regarded as unfair or abnormal to compel a defendant to plead a statement of defence in response to a statement of claim.

[50] Further still, I add that having a complete set of pleadings recognizes the maturity of the class action jurisprudence. There already have been many Rule 21 and s. 5(1)(a) challenges, and the viability of many causes of action or types of claim as being suitable for class actions has been informed by 20 years of cases. Recognition of the maturity of the case law in and of itself calls for a rethinking of the convention of not delivering a statement of defence, because assisted by precedents of what has been certified in the past, plaintiffs are better able to exit the certification hearing with their pleadings intact.

[51] In other words, in contemporary times the defendants' concern that they will have wasted time and effort pleading to a statement of claim that may be different after certification will not be borne out. In any event, the complaint of a wasted effort [page186] is overblown. Unless pleadings are to be regarded as a work of fictional literature, claims and defences are based on the material facts that existed, and competent counsel will take instructions about all the possible claims and defences that emerge from those set of facts before the certification motion.

[52] I find it hard to believe that the accomplished lawyers

in the case at bar are waiting for the outcome of the leave motion and the certification motion before investigating the material facts and researching the applicable law and advising the defendants about what defences are available to them. The truth of the matter is that the defendants and their lawyers are not concerned about wasted time and effort, but rather they do not wish to plead because they believe it is tactically better to avoid the disclosure of their case that the Rules of Civil Procedure would normally mandate.

[53] I see no unfairness of denying defendants a tactical maneuver that may be inconsistent with general principle of rule 1.04 that the rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".

[54] I also see no unfairness in denying defendants the tactical maneuver of not delivering a statement of defence before certification when the exchange of pleadings may be tactically and substantively beneficial to defendants. The defendants arguments that class membership is overinclusive or under-inclusive, that the proposed common issues want for commonality, that the action is not manageable as a class action, that a class proceeding is not the preferable procedure, and that the litigation plan is deficient are best made when the defendants shows the colour of his or her eyes by pleading a defence and these arguments will be stronger than the "is! -- is not! -- is too!" sandbox arguments of many a certification motion. For whatever it is worth, my own observation from recent certification motions where defendants have pleaded before certification is that both sides and the administration of justice are better for it.

[55] Finally, from a public relations point of view -- and class actions are by their nature of considerable interest to the public -- I would have thought that many defendants would like to seize the opportunity by pleading the material facts of their defence to take the sting out of the plaintiff's argument that the defendants need behaviour management and to level the playing field about the certification criteria.

[56] Thus, generally speaking, I persist in my view that the pleadings issues should be completed before the certification [page187] motion. The defendants' argue, however, that whatever may be the situation for class actions generally, the Court of Appeal's decision in Sharma v. Timminco, supra, has overtaken Pennyfeather, and Sharma means that in a proposed secondary-market class action, a statement of defence cannot be demanded or delivered before leave is granted under s. 138.3 of the Securities Act. A defendant cannot be asked to plead to a pregnant statement of claim.

[57] The defendants take the Sharma decision to be authority that a class proceeding is not an action commenced under s. 138.3 until leave is granted and leave is required to add the s. 138.3 cause of action to the class proceeding. The defendants submit that without leave, a s. 138.3 action cannot be enforced. As Sino-Forest put it in its factum: "Until leave has been granted, the plaintiff has nothing: no limitation periods are tolled, and no steps in the proceeding -- including the filing of a defence -- can be taken."

[58] This hyperbolic submission by Sino-Forest and by the rest of the defendants is not true. Whatever the effect of Sharma, it did not take away s. 138.8 of the Securities Act, under which subsection (2) requires for the leave motion that the plaintiff and each defendant swear under oath the "material facts upon which each intends to rely".

[59] Section 138.8 of the Securities Act, which provides the test for leave and which governs the procedure for the leave motion, states:

Leave to proceed

138.8(1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

(a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the

plaintiff.

Same

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

Same

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

[60] Subsection 138.8(2) may be usefully compared and contrasted with rule 25.06(1) of the Rules of Civil Procedure, [page188] which is the predominant rule about pleading in an action. Rule 25.06(1) states:

25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

Both the subsection and the rule require the party to disclose to their opponent the "material facts" on which the party "relies". The pleadings rule, however, does not require that the disclosure of material facts be under oath. Assuming that a defendant does file an affidavit under s. 138.8(2), then the affidavit is, in effect, an under-oath version of 25.06(1)'s requirement that a defendant disclose the material facts upon which he or she relies.

[61] I concede that filing an affidavit under s. 138(8) is not mandatory and that it cannot be assumed that a defendant will deliver an affidavit for a leave motion under the Securities Act, and that he or she cannot be compelled to do so. In Ainslie v. CV Technologies Inc. (2008), 93 O.R. (3d) 200, [2008] O.J. No. 4891 (S.C.J.), at paras. 14-20, 24-25, Justice Lax interpreted s. 138.8(2), and she stated:

Section 138.8(1) sets out a two-part test for obtaining

leave to bring an action under Part XXIII.1 of the OSA and places the onus on the plaintiffs to demonstrate that (1) their proposed action is brought in good faith and (2) has a reasonable prospect for success at trial. As s. 138.8(1) requires an examination of the merits, the plaintiffs submit that the section is supplemented with s. 138.8(2) and (3). They rely on the mandatory language in s. 138.8(2) ("and each defendant shall") and submit that without the benefit of this requirement and the ability to cross-examine, a plaintiff would be deprived of the tools necessary to meet the standard the legislature created in s. 138.8(1).

This submission ignores the legislative purpose of s. 138.8. The section was not enacted to benefit plaintiffs or to level the playing field for them in prosecuting an action under Part XXIII.1 of the Act. Rather, it was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings. No onus is placed upon proposed defendants by s. 138.8. Nor are they required to assist plaintiffs in securing evidence upon which to base an action under Part XXIII.1. The essence of the leave motion is that putative plaintiffs are required to demonstrate the propriety of their proposed secondary market liability claim before a defendant is required to respond. Subsection 138.8(2) must be interpreted to reflect this underlying policy rationale and the legislature's intention in imposing a "gatekeeper mechanism".

The plaintiffs appear to be interpreting s. 138.8(2) as if it read: "Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits." But, the subsection continues: "setting forth the material facts upon which each intends to rely". If there are no material facts upon which a defendant intends to rely in responding to a leave motion, how can it be that a defendant is required to file an affidavit? Similarly, if a defendant files one or more affidavits, how can a plaintiff require [page189] that defendant to file other affidavits? By discounting this language, the plaintiffs are proposing an interpretation which relieves them of their obligation to demonstrate that their proposed action meets the pre-

conditions for granting leave under the Act.

The plaintiffs' interpretation also fails to address the language used in subsections (3) and (4). Section 138.8(3) reads: "The maker of such an affidavit may be examined on it in accordance with the rules of court." Section 138.8(4) reads: "A copy of the application for leave to proceed and any affidavits filed with the court shall be sent to the Commission when filed". Had it been the intention of the Legislature to require the parties to file affidavits, irrespective of the onus placed upon the moving party, the legislature would have substituted the word "the" for "any" in s. 138.8(4) and the words "the plaintiff and each defendant" for "maker" in s. 138.8(3). I also note that the legislature attached no consequences to the failure of "each defendant" to file an affidavit.

In terms of onus, a useful analogy can be found in the summary judgment rule, Rule 20, of the Rules of Civil Procedure. Rule 20.04 provides:

> 20.04(1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

Similar to s. 138.8(2), rule 20.04 utilizes language suggesting that a responding party "must" or "shall" file affidavit material. Notwithstanding the use of such language, under Rule 20, a responding party retains the option to counter the motion by simply cross-examining the moving party, rather than by leading any direct evidence on the motion. In this regard, Rule 20.04 has been interpreted as requiring the respondent to a summary judgment motion to "lead trump or risk losing". Notably, however, the onus to establish that there is no genuine issue for trial remains with the moving party. The onus does not shift to the respondent to show that a genuine issue for trial does in fact exist.

Similarly, in a motion under s. 138.8 of the Act, the onus to demonstrate that the proposed claim meets the required threshold remains with the plaintiffs. The onus does not shift to the defendants. A defendant that does not "lead trump" by filing affidavit evidence in response to a motion under s. 138.8 may well take the risk that leave will be granted to the plaintiffs. It does not follow, however, that a defendant is obligated to file evidence or produce an affidavit from each named defendant. It is a well-established principle that, as a general proposition, it is counsel who decides on the witnesses whose evidence will be put forward.

. . . . .

In my view, the "gatekeeper provision" was intended to set a bar. That bar would be considerably lowered if the plaintiffs' view is correct. As I have already indicated, a defendant who does not file affidavit material accepts the risk that it may be impairing its ability to successfully defeat the motion for leave and is probably foregoing the right to assert the statutory defences under Part XXIII.1 of the Act. However, parties are entitled to present their case as they see fit and this includes the right to oppose the leave motion on the basis of the record put forward by the plaintiffs as GT intends, or on the basis of the affidavits of experts as CV intends. [page190]

To accept the plaintiffs' submissions would require each defendant to produce evidence that may not be necessary for the leave motion and would serve no purpose other than to expose those defendants to a time-consuming and costly discovery process. It would sanction "fishing expeditions" prior to the plaintiffs obtaining leave to proceed with their proposed action. This is an unreasonable interpretation of s. 138.8(2). It is inconsistent with the scheme and object of the Act. Properly interpreted, the ordinary meaning of s. 138.8(2) is that a proposed defendant must file an affidavit only where it intends to lead evidence of material facts in response to the motion for leave.

[Emphasis in original]

[62] In Ainslie, leave to appeal was granted ([2009] O.J. No. 730 (Div. Ct.)), but it appears that the appeal was never argued. In Sharma v. Timminco Ltd., [2010] O.J. No. 469, 2010 ONSC 790, at para. 32, I agreed with Justice Lax's interpretation of s. 138.8(2).

[63] In the case at bar, I do not know whether any of the defendants will deliver affidavits under s. 138.8(2), but I do know that if a defendant does deliver an affidavit, then its protest that it would be unfair to require a statement of defence loses its potency as does the urgency of the plaintiffs' request that the defendants be ordered to deliver their statements of defence. Delivering an affidavit under s. 138.8 is essentially the same as delivering a statement of claim or defence. As Justice Lax notes, a defendant who does not file affidavit material accepts the risk that it may be impairing its ability to successfully defeat the motion for leave. Justice Lax also notes that the defendant is probably foregoing the right to assert the statutory defences under Part XXIII.1 of the Act, but I would not necessarily go that far.

[64] Where this analysis takes me is that it while it would be inappropriate to order all the defendants to deliver a statement of defence to a secondary market claim under the Securities Act, it would be proper to order that any defendant who delivers an affidavit pursuant to s. 138.8(2) of the Act shall also deliver a statement of defence. I so order.

[65] Although I am ordering only defendants who deliver s. 138.8(2) affidavits to deliver a statement of defence, I order that any other defendant may, if so advised, deliver a statement of defence. I leave them to make the tactical decision whether or not to deliver a pleading. As I discussed above, there are advantages for a defendant to plead in a class action.

[66] For reasons that I will come to next, if a defendant does deliver a statement of defence, the delivery is without prejudice to the defendant's right to bring a Rule 21 motion or to challenge whether the plaintiffs have shown a cause of action as required by s. 5(1)(a) of the Class Proceedings Act,

1992. [page191]

[67] Here, it should be noted that the "plain and obvious" test for disclosing a cause of action from Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, which is used for a Rule 21 motion, is used to determine whether the proposed class proceedings discloses a cause of action; thus, a claim will be satisfactory under s. 5(1)(a) unless it has a radical defect or it is plain and obvious that it could not succeed: Anderson v. Wilson (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494 (C.A.), at p. 679 O.R., leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 476; 1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2002), 62 O.R. (3d) 535, [2002] O.J. No. 4781 (S.C.J.), at para. 19, leave to appeal granted (2003), 64 O.R. (3d) 42, [2003] O.J. No. 1089 (S.C.J.), affd (2004), 70 O.R. (3d) 182, [2004] O.J. No. 856 (Div. Ct.); Healey v. Lakeridge Health Corp., [2006] O.J. No. 4277, 38 C.P.C. (6th) 145 (S.C.J.), at para. 25.

[68] In this last regard, the defendants submitted that a defendant has a right to challenge whether the plaintiff has pleaded a reasonable cause of action by bringing a Rule 21 motion and a defendant would lose this procedural right if he or she delivered a statement of defence. Pleading over is a fresh step that deprives a defendant of the right to subsequently challenge the substantive adequacy of a pleading: Bell v. Booth Centennial Healthcare Linen Services, [2006] O.J. No. 4646, 153 A.C.W.S. (3d) 828 (S.C.J.), at paras. 5-7; Cetinalp v. Casino, [2009] O.J. No. 5015 (S.C.J.). From this true premise, the defendants submit that since some or all of them wish to bring a Rule 21 motion or some or all will be challenging the reasonableness of the plaintiffs' statement of claim as an aspect of the s. 5(1)(a) criterion of the of test for certification, they should not be required to deliver a statement of defence before the certification motion.

[69] The court's typical but not inevitable response to a defendant's request to bring a Rule 21 motion before certification is to direct the motion to be heard at the certification hearing because the test for granting a Rule 21 motion is the same test that is applied for the s. 5(1)(a)

criterion for certification. Typically, when this direction is made the defendant is not required to deliver a statement of defence.

[70] As already noted, in the case at bar, several defendants have indicated that they wish to bring Rule 21 motions on the basis that several of the plaintiffs' claims do not disclose a reasonable cause of action or on the basis that the bonds contain a "no suits" clause, and BDO Limited wishes to bring a Rule 21 motion based on the argument that it is plain and obvious that claims against it are statute-barred. [page192]

[71] I agree that the right of defendants to challenge the reasonableness of the plaintiffs' statement of claim should be preserved and protected, and I also believe that this objective can be accomplished while still permitting defendants to deliver a statement of defence.

[72] Once again, using the authority of s. 12 of the Class Proceedings Act, 1992, I order that if a defendant delivers a statement of defence, then the delivery of the statement of defence is not a fresh step and the defendant is not precluded from bringing a Rule 21 motion at the leave and certification motion or the defendant is not precluded from disputing that the plaintiffs have shown a cause of action under s. 5(1)(a) of the Class Proceedings Act, 1992.

3. Leave and certification

[73] The above discussion addresses the matter of the plaintiffs' request that the defendants be ordered to deliver statements of defence and the discussion also lays the foundation for the discussion of the plaintiffs' request that the leave motion under s. 138.8 [of] the Securities Act and the certification motion under the Class Proceedings Act, 1992 be heard together and the defendants' counter-submission that the motions should be sequenced leave motion, Rule 21 motion and certification motion.

[74] In the case at bar, there is a general consensus that the leave motion should go first and, in any event, because of the Court of Appeal's ruling in Sharma that s. 28 of the Class

Proceedings Act, 1992 is useless in protecting claims under Part XXIII.1 of the Securities Act from limitation periods, the leave motion must go first, and I have scheduled ten days of hearing commencing November 21, 2012.

[75] The question then is whether the certification motion should be combined with the leave motion.

[76] The plaintiffs submit that hearing the two matters together is consistent with the direction from the Ontario Court of Appeal and [the] Supreme Court of Canada that litigation by installments should be avoided wherever possible because "it does little service to the parties or to the efficient administration of justice." Garland v. Consumers' Gas Co. (2001), 57 O.R. (3d) 127, [2001] O.J. No. 4651 (C.A.), at para. 76, revd [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, at para. 90. The plaintiffs note that leave and certification were dealt with together in Silver v. Imax Corp., [2009] O.J. No. 5585, 86 C.P.C. (6th) 273 (S.C.J.), leave to appeal refused (2011), 105 O.R. (3d) 212, [2011] O.J. No. 656 (Div. Ct.) [page193] and in Dobbie v. Arctic Glacier Income Fund, [2011] O.J. No. 932, 2011 ONSC 25.

[77] An admonition is different from a prohibition, and while the Court of Appeal and the Supreme Court may frown on litigation in installments, they did not prohibit it. Whether to permit motions before the certification motion is a matter of discretion. In exercising its discretion whether to permit a motion before the certification motion, relevant factors include (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined; (b) the likelihood of delays and costs associated with the motion; (c) whether the outcome of the motion will promote settlement; (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification; (e) the interests of economy and judicial efficiency; and (f) generally, whether scheduling the motion in advance of certification would promote the fair and efficient determination of the proceeding: Cannon v. Funds for Canada Foundation, [2010] O.J. No. 314, 2010 ONSC 146, at paras. 14-15.

[78] Thus, in my opinion, the question to be decided in the immediate case is whether it is fair (the most important factor) and efficient to hear the certification motion and the leave motion together.

[79] Provided that any defendants who deliver s. 138.8(2) affidavits or any defendants who deliver statements of defence may bring Rule 21 motions or otherwise challenge all of the certification criteria as they may be advised, I see no unfairness in having the certification motion heard along with the leave motion. Because of the orders that I shall make, already discussed above, a defendant may challenge all of the certification criteria regardless of whether the defendant has pleaded or not. Pursuant to notional rule 25.07(7), defendants who do not file a s. 138.8(2) affidavit and who deliver a statement of defence "shall decline to admit or deny the allegations referable solely to liability for secondary market disclosure and not referable to any other pleaded cause of action". I see no unfairness to the defendants who may resist both the certification motion and the leave motion as they may be advised.

[80] In contrast, the sequential approach being advocated by the defendants is unfair to the plaintiffs and to the proposed class and will impede fulfilling the purposes of the class proceedings legislation, which are, first and foremost, access to justice, secondarily, judicial economy and thirdly, behaviour modification, all the while providing due process and fairness to all parties. Unfortunately, the suffocating expense of motions in class actions [page194] along with the excruciating delays and the additional costs of the inevitable leave to appeal motions and appeals that follow class action orders is a serious barrier to achieving the purposes of the legislation for both plaintiffs and defendants and a substantial disincentive to class counsel employing the legislation for other than the huge cases that would justify the litigation risks.

[81] As night follows day, if I agreed to schedule sequentially, there would be a ten-day leave motion, followed

by the unsuccessful party launching the appeal process which will take several years to resolve. Whatever the outcome of the appeal, the action will return to the Superior Court for the certification motion of the claims not referable solely to liability for secondary market disclosure.

[82] In the case at bar, if Rule 21 motions were permitted before the certification hearing although work that could be done at the certification hearing will be accomplished, this will come at the cost of another round of appeals that will take several years to resolve only for the action to return again to the Superior Court for the determination of whether the balance of the certification criteria have been satisfied. That determination will also be appealed.

[83] In contrast, if I combine the leave motion, the Rule 21 motions and the certification motion into one hearing, as night follows day, the determination will be appealed but the superior court and the appellate courts, including the Supreme Court of Canada, will be denied the pleasure of three visits from one or two generations of class and defence counsel.

[84] The defendants argue that there will be no efficiencies in a sequential ordering of the motions because the criteria for leave differs from the certification criteria, as does the burden of proof for these motions. However, courts are obliged to have the perspicacity to be able to deal with different criteria and different onuses of proof but, more to the point, the evidentiary footprint for the leave and certification motions are the same, and it makes for little efficiency for the parties and little judicial economy to have the evidence and argument for leave and for certification heard more than once.

[85] Putting aside the somewhat unique circumstances of BDO Limited, I conclude that the certification hearing should be combined with the leave motion and that with the exception of the plaintiffs' funding motion, which has already been scheduled, there shall be no other motions before the leave and certification motion without leave of the court first being obtained. [page195]

4. BDO Limited's request for a Rule 21 motion

[86] As noted at the outset of these reasons, I am adjourning the motion as it concerns BDO Limited, whose circumstances may be unique.

[87] BDO was a party to the Smith v. Sino-Forest and the Northwest v. Sino-Forest rival class actions and it was added to the case at bar after the carriage motion. It submits that all of the statutory claims against it are statute-barred as in one of the main common law misrepresentation claims. It submits that it can diminish its involvement in this expensive litigation by a Rule 21 motion based on the pleadings and without evidence.

[88] The plaintiffs' response was that if BDO wished to assert a limitation period defence it should be a pleaded defence to which the plaintiffs would file a reply demonstrating that it was not plain and obvious that the claims were statute-barred or demonstrating that there were defences to the running of the limitation period, presumably based on fraudulent concealment or estoppel or waiver. The plaintiffs also asserted that there were other common claims against BDO that were not statute-barred and thus there was no utility in permitting a Rule 21 motion that would see BDO only partially out of the action.

[89] BDO's response was that there were no defences that could withstand the ultimate limitation periods of the Securities Act and fairness dictated that it should be permitted to substantially reduce being embroiled in this litigation.

[90] My own assessment was that the plaintiffs were correct in submitting that in the circumstances of this case, BDO should plead its limitation defence and the plaintiffs should have an opportunity to deliver a reply.

[91] Once BDO has pleaded, I will be in a better position in determining whether to permit a Rule 21 motion or perhaps a Rule 20 partial summary judgment motion.

[92] Accordingly, I am adjourning the motion as it concerns BDO Limited to be brought on again, if at all, after BDO has pleaded its statement of defence and the plaintiffs their reply.

5. The timetable

[93] In light of the discussion above, it is ordered that subject to adjustments, if necessary, made at a case conference, the timetable for the plaintiff's funding approval motion and for the leave and certification motion is as follows:

Funding Approval Motion

March 9, 2012: plaintiffs to deliver motion record (completed)

March 30, 2012: defendants to deliver responding records, if any [page196]

April 6, 2012: plaintiffs to deliver factum

April 13, 2012: defendants to delivery factum

April, 17, 2012: Hearing of the motion

Leave and Certification Motion

April 10, 2012: plaintiffs to deliver motion record

June 11, 2012: defendants to deliver responding records

July 3, 2012: plaintiffs to delivery reply records, if any

September 14, 2012: Cross-examinations to be completed

October 19, 2012: plaintiffs to deliver factum

November 9, 2012: defendants to deliver factum

November 21-30, 2012: Hearing of the motion

D. Conclusion

[94] An order shall issue in accordance with these reasons with costs in the cause.

Motion granted in part.

CITATION: The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2012 ONSC 2937
COURT FILE NO.: 11-CV-431153CP
DATE: May 17, 2012

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, Sjuunde 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 Banc of America Securities LLC

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- Charles Wright, Kirk Baert, Serge Kalloghlian for the Plaintiffs
- John Fabello for the underwriter defendants
- Shara Roy for Ernst & Young LLP
- Kenneth Dekker for BDO Limited
- John Pirie and David Gadsden for Pöyry (Beijing) Consulting Company Limited
- Christopher Scotchmer for David Horsley
- Megan MacKey for Allen Chan

HEARING DATE: May 17, 2012

PERELL, J.

REASONS FOR DECISION

[1] 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, David C. Grant, Robert Wong, and Sjuunde AP-Fonden are the Plaintiffs in a proposed securities misrepresentation class action. Some of the claims may not be brought without leave granted under Ontario's *Securities Act*, R.S.O. 1990, c. S.5. The Plaintiffs claim that the proposed class members suffered losses in the billions of dollars.

[2] The action concerns the affairs of the Defendant Sino-Forest Corporation. There are 23 defendants, including certain directors and officers of Sino-Forest, underwriters, auditors, and consultants. The Plaintiffs seek damages in an amount equal to the losses that they and the other class members suffered as a result of purchasing or acquiring Sino-Forest securities at prices artificially inflated by an alleged misrepresentation respecting, among other things, Sino-Forest's compliance with generally accepted accounting principles.

[3] In this motion, the Plaintiffs seek court approval of a third-party funding agreement, which they submit they require to protect themselves from the adverse costs consequences of the proposed class action should any of the numerous Defendants successfully resist certification or successfully mount a defence to the Plaintiffs' claims.

[4] There is no question that if they are unsuccessful, the Plaintiffs would be exposed to a gigantic costs liability.

[5] Koskie Minsky LLP and Siskinds LLP, the lawyers of record and proposed Class Counsel have agreed to fund the disbursements required to prosecute the Plaintiffs' claims.

[6] Claims Funding International, PLC ("CFI") has entered into a proposed litigation funding agreement with the Plaintiffs. The terms of this agreement provide that CFI will pay $50,000 toward disbursements, and it will pay any adverse costs orders issued against the Plaintiffs in return for a scaled and capped commission on any settlement or judgment obtained by the Plaintiffs on behalf of the class.

[7] In the case at bar, the Defendants were served with notice of the motion for approval as were some members of the proposed class for the action. By letter dated February 21, 2012, notice was given to Sino-Forest's 20 largest independently-run institutional investors as measured by the number of Sino-Forest's securities held during the proposed class period.

[8] There is no opposition to the court granting approval to the third party funding agreement.

[9] An agreement nearly identical to the one proposed in this case was approved by Justice Strathy in *Dugal v Manulife Financial Corp*, 2011 ONSC 1785 ("*Dugal*").

[10] In *Dugal,* Justice Strathy also concluded that the court had jurisdiction to make the approval order binding on putative class members before the certification of the action. I recently came to the same conclusion as an aspect of a decision about the

procedure to follow on a third party funding approval motion. See *Fehr v. Sun Life Assurance Company of Canada* 2012 ONSC 2715

[11] In *Fehr*, I discuss the current law about litigation funding, and I reviewed the key judgements; namely: the key judgments are: *McIntrye Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.), *Metzler Investment GMBH v. Gildan Activewear Inc.* [2009] O.J. No. 3315 (S.C.J.), and *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, additional reasons 2011 ONSC 3147. I rely on but will not repeat that analysis here.

[12] In *Fehr*, I concluded that third party funding agreements are not categorically illegal on the grounds of champerty or maintenance, but a particular third party funding agreement might be illegal as champertous or on some other basis. I also concluded that Plaintiffs must obtain court approval in order to enter into a third party funding agreement.

[13] In the case at bar, the principle terms of the third party funding agreement are:

- CFI agrees to pay the Plaintiffs' adverse costs orders in exchange for a commission on any settlement or judgment made in relation to the claims asserted by the Plaintiffs on behalf of the class
- in the event a settlement or judgment is reached at any time before the filing of the Plaintiffs' pre-trial conference brief, a commission representing 5% of the amount of such settlement or judgment, after deduction of lawyers fees and disbursements, including applicable tax, and any administration expenses associated with such settlement or judgment, will be paid to CFI, capped at a maximum of $5 million
- in the event a settlement or judgment is reached at any time on or after the filing of the Plaintiffs' pre-trial conference brief, the commission shall be 7% of the amount of such settlement or judgment, after deduction of lawyers fees and disbursements, including applicable tax, and any administration expenses associated with such settlement or judgment, capped at a maximum of $10 million
- if the judgment or settlement concerns other actions in addition to the within proceeding, then the same stage-dependent commission percentages and caps apply unless the commission can otherwise be determined in a manner satisfactory to all parties to the resolution
- although there is an obligation on Class Counsel to inform CFI about any significant issue in the action including prospects, strategy, quantum, proof and material changes, CFI acknowledges that the Plaintiffs provide the instruction to their lawyers and that the lawyers' professional duties are owed to the Plaintiffs and not CFI
- CFI must pay, into court, security for the Defendants' costs on an escalating scale reflecting the progress of the litigation
- CFI is bound by the deemed undertaking rule (Rule 30.1.01).

[14] Much for the same reasons that commended themselves to Justice Strathy in the *Dugal* case, I conclude that the third party funding agreement in the case at bar should be approved.

[15] It is a fair and reasonable agreement that facilitates access to justice while protecting the interests of the Defendants. The Defendants have the comfort that money for their legal costs has been paid into court.

[16] In the circumstances of this case, the third party funding agreement is preferable to the alternative of funding from the Class Proceedings Fund. The commission is less than the 10% uncapped levy that would be extracted by the Fund.

[17] For the above Reasons, I grant approval of the third party funding agreement.

Perell, J.

Released: May 17, 2012

CITATION: The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2012 ONSC 2937
COURT FILE NO. 11-CV-431153CP
DATE: May 17, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, et al.

Plaintiffs

- and -

Sino-Forest Corporation et al.

Defendants

REASONS FOR DECISION

Perell, J.

Released: May 17, 2012.

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 7041
COURT FILE NO.: CV-12-9667-00CL
DATE: 20121210

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION, Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for Sino-Forest Corporation**

Derrick Tay, Jennifer Stam, and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Kenneth Rosenberg, Kirk Baert, Max Starnino, and A. Dimitri Lascaris, for the Class Action Plaintiffs

Won J. Kim, James C. Orr, Michael C. Spencer, and Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc.

Peter Griffin, Peter Osborne and Shara Roy, for Ernst & Young Inc.

Peter Greene and Ken Dekkar, for BDO Limited

Edward A. Sellers and Larry Lowenstein, for the Board of Directors of Sino-Forest Corporation

John Pirie and David Gadsden, for Poyry (Beijing)

James Doris, for the Plaintiff in the New York Class Action

David Bish, for the Underwriters

Simon Bieber and Erin Pleet, for David Horsley

James Grout, for the Ontario Securities Commission

Emily Cole and Joseph Marin, for Allen Chan

Susan E. Freedman and Brandon Barnes, for Kai Kit Poon

Paul Emerson, for ACE/Chubb

Sam Sasso, for Travelers

HEARD: DECEMBER 7, 2012

ENDORSEMENT

[1] The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning the Plan of Compromise and Arrangement dated December 3, 2012, as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA"), and ancillary relief as set out in the proposed sanction order (the "Sanction Order").

[2] The Plan is supported by:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Committee");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee" including the "Class Action Plaintiffs") has agreed not to oppose the Plan.

[3] The Plan was approved by an overwhelming majority of Affected Creditors voting on the Plan in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

[4] Invesco Canada Ltd. ("Invesco"), Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds request an adjournment of the motion for a period of one month.

Alternatively, the Funds request that the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants".

[5] This endorsement fully addresses the adjournment request of the Funds. In this endorsement, defined terms have been taken from the motion record.

[6] The Funds are institutional, public and private equity funds that owned 3,085,786 common shares of SFC on June 2, 2011. The Funds alleged that they suffered substantial losses after the market in SFC shares collapsed following a public issuance of a report suggesting that fraud permeated SFC's assets and operations.

[7] Following the collapse of SFC's share price, class actions were commenced against SFC, certain of its directors and officers, the auditors, the Underwriters and other expert firms.

[8] On January 6, 2012, Perell J. granted carriage of the class action to Koskie Minsky LLP and Siskinds LLP ("Class Counsel"). The class has not been certified.

[9] Counsel to the Funds takes the position that Class Counsel does not represent the Funds.

[10] In his affidavit sworn December 6, 2012, Mr. Eric J. Adelson, Senior Vice President, Secretary and head of Legal of Invesco stated that on December 3, 2012, Class Counsel and E&Y announced that they had entered into a settlement by which E&Y would pay $117 million into a "Trust" formed as part of the CCAA proceedings, in return for releases of all claims that could be brought against E&Y by any person in connection with SFC.

[11] Mr. Adelson also states that on December 3, 2012, an Amended Plan was issued that, for the first time in the CCAA proceedings, contained provisions for settlement of claims against Third Party Defendants (Article 11), including specific provisions concerning the settlement by and releases for E&Y, and also allowing other Third Party Defendants to avail themselves of similar provisions for unspecified settlements and releases in the future.

[12] Mr. Adelson acknowledges that on December 5, 2012, counsel for E&Y advised Invesco's counsel that the parties had decided not to request court approval of the proposed E&Y Settlement at the motion scheduled for December 7, 2012. However, Mr. Adelson takes the position that provisions of the Plan, even apart from the E&Y Settlement, appear to affect the legal and practical ability of Invesco and other investors to seek adjudication of their claims against defendants in the SFC litigation on the merits, rendering it vital that sufficient time be provided to fully understand the present matters.

[13] Mr. Adelson also details "preliminary reasons for objecting to the Plan's release provisions":

> 15. If the effect of the Plan is to allow a Third Party Defendant (such as E&Y) to settle its liability to investors in connection with Sino-Forest through a settlement agreement with Class Counsel, and to bind the investors to that settlement without giving them the opportunity to opt out and pursue their claims on the merits

> outside the Class Action, then Invesco would strenuously object and oppose approval of such an arrangement.
>
> 16. The Class Action has not been certified, so Invesco does not view Class Counsel, with whom we have no other relationship, as authorized to represent its interests in connection with Sino-Forest. Our views have not been heard and our interests have not been represented in connection with the Plan and the proposed settlement. It is my understanding that Invesco, as an investor with claims against Sino-Forest and the other defendants in the Class Action, is not a "creditor" with respect to the Plan. Invesco accordingly submits that it would be contrary to its rights to bind it to a release or a settlement involving Third Party Defendants unless Invesco directly participated in proceedings or unless in certified class proceedings it was given the opportunity to opt out. We do not understand the CCAA to authorize releases of third parties, that is, parties other than the Applicant and certain officers and directors under certain circumstances, as part of a Sanction Order. Invesco objects to any such provisions or results in this matter.

[14] Counsel to the Funds made specific reference to Article 11.2 of the Plan which, counsel submits, if approved, establishes an open-ended mechanism for eligible Third Party Defendants, defined to include the 11 Underwriters named as defendants in the class action, BDO and/or E&Y (if its proposed settlement is not already concluded), to enter into a "Named Third Party Defendant Settlement" with "one or more of (i) counsel to the plaintiffs in any of the class actions…".

[15] Counsel to the Funds further submits that under Articles 11.2 (b) and (c), once a settlement is concluded among the specified parties, the settling defendant will obtain releases and bar orders in the CCAA proceeding, preventing the continued litigation of any SFC-related claims against them. If a settlement is reached in the future, counsel submits that the CCAA release and bar orders will remain available notwithstanding that the CCAA process may have concluded. Accordingly, counsel submits that it appears that these provisions purport to vest authority in the parties as described to enter into settlements that may have the effect of barring any claimants (such as the Funds) from prosecuting SFC-related claims against the Underwriters, BDO and/or E&Y, subject to the approval of this court. This bar, counsel submits, would be imposed without compliance with establishes prerequisites of the *Class Proceedings Act* ("CPA") – including class certification, a fairness hearing, approval by the court supervising the class action, and provision of opt-out rights – necessary to impose releases or other restrictions on class members who are not named parties before that court.

[16] Stated more succinctly, counsel submits that the Plan appears designed to unnecessarily fetter the powers of a future court, namely, the class action case management court, by assigning to the CCAA court the power to approve and effectuate class-wide settlements without regard to established statutory and rule-based procedural safeguards found in the CPA.

[17] The adjournment request was opposed, primarily on the basis that the Funds had misunderstood the terms of the Plan. Oral submissions were made by counsel on behalf of the

Monitor, SFC, Ad Hoc Noteholders, SFC Board, Ontario Securities Commission, E&Y and the Class Action Plaintiffs. Specifically, these parties submit there was a misunderstanding on the part of the Funds as to what was before the court for approval and, perhaps more importantly, what was not before the court for approval.

[18] Counsel to the Monitor also submits that SFC has limited funds and time is critical.

[19] The thrust of the arguments of the combined forces opposing the adjournment request is that the court is not being asked, at this time, to approve the settlement. Rather, what is before the court is a motion to approve the Plan, which includes approval of a framework with respect to a proposed settlement of claims against Third Party Defendants.

[20] Essentially, if certain conditions are met and further court approvals and orders are obtained, it is conceivable that E&Y will get a release. However, such a release is not being requested at this time. Further, it is not a condition of Plan Implementation that the E&Y matter be settled.

[21] To support this position, counsel referenced a number of provisions in the Plan including:

1. The defined term "Settlement Trust Order", which means a court order that establishes the Settlement Trust (section 11.1 (a) of the Plan) and approves the E&Y Settlement and the E&Y Release...;

2. Section 8.2, which outlines the effect the Sanction Order and includes a reference in Section 8.2 (z) that the E&Y Release shall become effective on the E&Y Settlement Date in the manner set forth in section 11.1;

3. Section 11.1, which details settlement of claims against Third Party Defendants and specifically E&Y. This provision sets out a number of pre-conditions to the required payment to be made by E&Y as provided for in the E&Y Settlement. These pre-conditions are:

   (i) the granting of the Sanction Order;

   (ii) the issuance of the Settlement Trust Order;

   (iii) the granting of an order under Chapter 15 of the United States Bankruptcy Code recognizing and enforcing the Sanction Order and the Settlement Trust Order in the United States;

   (iv) any other order necessary to give effect to the E&Y Settlement;

   (v) the fulfillment of all conditions precedent in the E&Y Settlement and the fulfillment by the Ontario Class Action Plaintiffs of all of their obligations thereunder; and

(vi) the Sanction Order, the Settlement Trust Order and all E&Y Orders being final orders and not subject to further appeal or challenge.

[22] Having reviewed these documents, it is apparent that approval of the E&Y Settlement is not before the court on this motion and no release is being provided to E&Y as a result of this motion. In the event all of the pre-conditions are satisfied and if all of the required court approvals and orders are issued, the position of the Funds could be affected. However, the Funds will have the opportunity to make argument on such hearings.

[23] I have also reviewed the form of Sanction Order being requested specifically paragraph 40. This provision provides that the E&Y Settlement and the release of the E&Y Claims pursuant to section 11.1 of the Plan shall become effective upon the satisfaction of certain conditions precedent, including court approval of the terms of the E&Y Settlement, the terms and scope of the E&Y Release and the Settlement Trust Order and the granting of the Settlement Trust Order.

[24] Paragraph 41 of the draft Sanction Order also provides that any Named Third Party Defendant Settlement, Named Third Party Defendant Settlement Order and Named Third Party Defendant Release, the terms and scope of which remain in each case subject to further court approval in accordance with the Plan, shall only become effective after the Plan Implementation Date and upon the satisfaction of the conditions precedent, set forth in section 11.2 of the Plan.

[25] The requested Sanction Order confirms my view that the arguments put forth by counsel on behalf of the Funds are premature and can be addressed on the return of the motion to approve the specific settlements and releases.

[26] In the result, I have not been persuaded that the adjournment is necessary. The motion for the adjournment is accordingly denied.

MORAWETZ J.

Date: December 10, 2012

COURT OF APPEAL FOR ONTARIO

CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2013 ONCA 456
DATE: 20130626
DOCKET: M42068 & M42399

MacFarland, Watt and Epstein JJ.A.

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and in the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation

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, Poyry (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 Incorported (successor by merger to Banc of America Securities LLC)

Proceedings under the *Class Proceedings Act, 1992*

Defendants

James C. Orr, Won J. Kim, Megan B. McPhee and Michael C. Spencer, for the moving parties, Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc.

Ken Rosenberg, Massimo Starnino, Jonathan Ptak, Jonathan Bida, Charles M. Wright and A. Dimitri Lascaris, for the *Ad Hoc* Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action

Benjamin Zarnett, Robert Chadwick and Brendan O'Neill, for the respondent *Ad Hoc* Committee of Noteholders

Peter R. Greene, Kathryn L. Knight and Kenneth A. Dekker, for the responding party DBO Limited

Robert W. Staley, Kevin Zych, Derek J. Bell, Raj Sahni and Jonathan Bell, for Sino-Forest Corporation

David Bish, John Fabello and Adam M. Slavens, for the Underwriters

Derrick Tay, Clifton Prophet and Jennifer Stam, for FTI Consulting Canada Inc., in its capacity as Monitor

Peter H. Griffin, Peter J. Osborne and Shara N. Roy, for Ernst & Young LLP

Heard in writing

On appeal from the orders of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated December 10, 2012, with reasons reported at 2012 ONSC 7050, and March 20, 2013, with reasons reported at 2013 ONSC 1078.

ENDORSEMENT

[1] Leave to appeal is denied.

[2] The test for granting leave to appeal in *CCAA* proceedings is well-settled. It is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining

whether leave ought to be granted, this court is required to consider the following four-part inquiry:

- Whether the point on the proposed appeal is of significance to the practice;
- Whether the point is of significance to the action;
- Whether the proposed appeal is *prima facie* meritorious or frivolous; and
- Whether the appeal will unduly hinder the progress of the action.

See *Re Country Style Food Services Inc.* (2002), 158 O.A.C. 30 (C.A.).

[3] In our view the proposed appeals fail to meet this stringent test.

[4] These motions for leave to appeal relate to the supervising judge's approval of a settlement releasing Ernst & Young LLP from any claims arising from its auditing of Sino-Forest Corporation.

[5] The Ernst & Young settlement is part of Sino-Forest's Plan of Compromise and Reorganization ("the Plan") following a bankruptcy triggered by allegations of corporate fraud. The settlement has the support of all parties to the *CCAA* proceedings, including the Monitor, Sino-Forest's creditors and a group of plaintiffs seeking to recover their investment losses in a contemplated, but not yet certified, class action ("the Ontario Plaintiffs").

[6] These motions for leave to appeal are brought by a single group of Sino-Forest investors, collectively known as Invesco, who together held approximately 1.6% of Sino-Forest's outstanding shares at the time of its collapse. Invesco

chose not to participate in any of the *CCAA* proceedings leading to the Ernst & Young settlement. It appeared for the first time at the hearing to sanction the Plan. Invesco objects to the Ernst & Young settlement because it wishes to preserve its right to opt out of any class proceedings and pursue an independent claim against Ernst & Young.

[7] Invesco is represented by Kim Orr LLP, the firm that ranked last in a fight for carriage of the Ontario class action against Sino-Forest and its auditors and underwriters. In January 2012, Perell J. awarded carriage of that action to Koskie Minsky and Siskinds LLP, with the Ontario Plaintiffs as the proposed representative plaintiffs. No appeal was taken from the order of Perell J.

[8] There are two motions for leave to appeal before the court.

- **M42068** – Invesco seeks leave to appeal the supervising judge's order dated December 10, 2012, sanctioning a Plan of Compromise and Reorganization for Sino-Forest (the "Sanction Order")

- **M42399** – Invesco seeks leave to appeal the supervising judge's orders dated March 20, 2013, approving the Ernst & Young settlement and dismissing Invesco's motion for an order to

represent all prospective class members who oppose the settlement (the "Settlement Order" and the "Representation Dismissal Order").

[9] By order of Simmons J.A. dated May 1, 2013, the motion for leave to appeal the Sanction Order was ordered to be consolidated and heard together with the motion for leave to appeal the Settlement Order and the Representation Dismissal Order.

[10] The motions for leave to appeal are opposed by Sino-Forest, the Monitor, Sino-Forest's auditors and underwriters, the Ontario Plaintiffs, and a group representing Sino-Forest's major creditors.

The Sanction Order

[11] The supervising judge dismissed Invesco's arguments opposing the Sanction Order on the ground that, since the settlement was not part of the Plan at that point, its objections were premature. It could raise those objections when the court considered whether or not to approve the settlement.

[12] Invesco did not move to stay this order and the Plan has since been implemented. This proposed appeal is moot, and in any event, we see no basis to interfere with the supervising judge's decision.

The Settlement Order and the Representation Dismissal Order

[13] In approving the settlement, the supervising judge applied the test set out in *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647. And because the proposed settlement provided for a release to Ernst & Young, he went on to consider the test prescribed by this court in *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513, leave to appeal refused, [2008] S.C.C.A. No. 337 (*"ATB Financial"*). He found that the proposed settlement met those requirements. He concluded that the Ernst & Young settlement was fair and reasonable, provided substantial benefits to relevant stakeholders and was consistent with the purpose and spirit of the *CCAA*.

[14] There is no basis on which to interfere with his decision. The issues raised on this proposed appeal are, at their core, the very issues settled by this court in *ATB Financial*.

[15] Having dismissed their objection to the settlement order, it follows that Invesco's motion for a representation order would also be dismissed.

[16] The motions for leave to appeal are dismissed.

[17] Costs are to the responding parties on the motions on a partial indemnity scale fixed in the sum of $1,500 per motion inclusive of disbursements and applicable taxes.

"J. MacFarland J.A."

"David Watt J.A."

"Gloria Epstein J.A."

CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2013 ONSC 1078
COURT FILE NO.: CV-12-9667-00CL
CV-11-431153-00CP
DATE: 20130320

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION, Applicant

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

AND:

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

BEFORE: **MORAWETZ J.**

COUNSEL: **Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, and Jonathan Ptak, for the Ad Hoc Committee of Purchasers including the Class Action Plaintiffs**

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

John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.

Robert W. Staley, for Sino-Forest Corporation

Won J. Kim, Michael C. Spencer, and Megan B. McPhee, for the Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.

John Fabello and Rebecca Wise for the Underwriters

Ken Dekker and Peter Greene, for BDO Limited

Emily Cole and Joseph Marin, for Allen Chan

James Doris, for the U.S. Class Action

Brandon Barnes, for Kai Kit Poon

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Derrick Tay and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Simon Bieber, for David Horsley

James Grout, for the Ontario Securities Commission

Miles D. O'Reilly, Q.C., for the Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam

HEARD: **FEBRUARY 4, 2013**

ENDORSEMENT

INTRODUCTION

[1] The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

[2] Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

[3] For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

FACTS

Class Action Proceedings

[4] SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

[5] SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

[6] All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

[7] Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

[8] Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

[9] The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

[10] Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

[11] In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

CCAA Proceedings

[12] SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

[13] Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

[14] In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

[15] On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

[16] The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in

the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

[17] Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

[18] The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

[19] Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to opt-out was required to be exercised.

[20] Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

[21] The opt-out made no provision for an opt-out on a conditional basis.

[22] On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

[23] In reasons released July 27, 2012 [*Re Sino-Forest Corp.*, 2012 ONSC 4377], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was

subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Re Sino-Forest Corp.*, 2012 ONCA 816].

Ernst & Young Settlement

[24] The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

[25] On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

[26] On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

[27] Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

(a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);

(b) the issuance of the Settlement Trust Order;

(c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;

(d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and

(e) all orders being final orders not subject to further appeal or challenge.

[28] On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the

sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

[29] At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

[30] The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

[31] On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

[32] On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

[33] According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

LAW AND ANALYSIS

Court's Jurisdiction to Grant Requested Approval

[34] The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

[35] The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter.

The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

[36] The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

[37] It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647 [*Robertson*].

[38] As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

[39] In this case, the notice and process for dissemination have been approved.

[40] The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

[41] In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

[42] In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

Should the Court Exercise Its Discretion to Approve the Settlement

[43] Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

CCAA Interpretation

[44] The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial

Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Re Nortel Networks Corp.*, 2010 ONSC 1708, paras. 66-70 ("*Re Nortel*")); *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99, para. 43 (Ont. C.J.)]

[45] Further, as the Supreme Court of Canada explained in *Re Ted Leroy Trucking Ltd. [Century Services]*, 2010 SCC 60, para. 58:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ...When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

[46] It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 ("*ATB Financial*"); *Re Nortel, supra*; *Robertson, supra*; *Re Muscle Tech Research and Development Inc.* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ontario S.C.J.) ("*Muscle Tech*"); *Re Grace Canada Inc.* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J.); *Re Allen-Vanguard Corporation*, 2011 ONSC 5017].

[47] The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial, supra*:

> 69. In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> 70. The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan ...

71. In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72. Here, then – as was the case in T&N – there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed …

73. I am satisfied that the wording of the CCAA – construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation – supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

…

78. … I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

…

> 113. At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here – with two additional findings – because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

[48] Furthermore, in *ATB Financial, supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given".

Relevant CCAA Factors

[49] In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson, supra*:

> (a) whether the settlement is fair and reasonable;
>
> (b) whether it provides substantial benefits to other stakeholders; and
>
> (c) whether it is consistent with the purpose and spirit of the CCAA.

[50] Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the

restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?

(b) Are the claims to be released necessary for the plan of arrangement?

(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and

(d) Will the plan benefit the debtor and the creditors generally?

Counsel Submissions

[51] The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting third-party releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

[52] The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.*, (1998) 16 C.P.C. (4th) 165 38 O.R. (3d) 703 (Ont. C.J.)].

[53] Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

[54] Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the

circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

[55] Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

(a) class members are not releasing their claims to a greater extent than necessary;

(b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;

(c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and

(d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

[56] SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

[57] Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

Analysis and Conclusions

[58] The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial, supra*, para. 70, as quoted above.

[59] In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

[60] Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

[61] Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

[62] Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

[63] Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

[64] Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

[65] Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

[66] In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

[67] In *Re Nortel*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex

litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

[68] In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

[69] At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

[70] Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Re Nortel, supra*, paras. 73 and 81; and *Muscle Tech, supra*, paras. 19-21.

[71] Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders. The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

[72] I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

[73] Even if one assumes that the opt-out argument of the Objectors can be sustained, and opt-out rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into

account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial, supra*.

[74] Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

[75] Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

[76] The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

[77] It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Re Sammi Atlas Inc.,* (1998) 3 C.B.R. (4th) 171 (Ont. Gen. Div. (Commercial List)).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

[78] SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

[79] Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

[80] Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice...to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148, paras. 43-46 (Ont. S.C.J.); and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299.]

Miscellaneous

[81] For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

DISPOSITION

[82] In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

MORAWETZ J.

Date: March 20, 2013

No. 35541

March 13, 2014

Coram: LeBel, Karakatsanis and Wagner JJ.

BETWEEN:

Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion Férique, and Montrusco Bolton Investments Inc.

Applicants

- and -

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 SP-Fonden, David Grant, Robert Wong, Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (formerly known as BDO McCabe Lo Limited), Allen T. Y. Chan, Kai Kit Poon, David J. Horsley, 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

Le 13 mars 2014

Coram : Les juges LeBel, Karakatsanis et Wagner

ENTRE :

Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion Férique et Montrusco Bolton Investments Inc.

Demanderesses

- et -

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 SP-Fonden, David Grant, Robert Wong, Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (anciennement connue sous le nom de BDO McCabe Lo Limited), Allen T. Y. Chan, Kai Kit Poon, David J. Horsley, 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

No. 35541

Placements Canada Inc., Credit Suisse Securities (USA) LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated (Successor by merger to Bank of America Securities LLC) and Pöyry (Beijing) Consulting Company Limited

Respondents

JUDGMENT

The applications for leave to appeal from the judgments of the Court of Appeal for Ontario, Numbers M42068 and M42399, 2013 ONCA 456, dated June 26, 2013 and Numbers C566961, M42436 and M42453, dated June 28, 2013, are dismissed with costs to the respondents 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 SP-Fonden, David Grant and Robert Wong, the respondent Sino-Forest Corporation, the respondent Ernst & Young LLP and the respondents 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 Bank of America Securities LLC).

Inc., Credit Suisse Securities (USA) LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated (société remplaçante à l'issue de la fusion de Bank of America Securities LLC) et Pöyry (Beijing) Consulting Company Limited

Intimés

JUGEMENT

Les demandes d'autorisation d'appel des arrêts de la Cour d'appel de l'Ontario, numéros M42068 et M42399, 2013 ONCA 456, daté du 26 juin 2013 et numéros C566961, M42436 et M42453, daté du 28 juin 2013, sont rejetées avec dépens en faveur des intimées 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 SP-Fonden, David Grant et Robert Wong, de l'intimée Sino-Forest Corporation, de l'intimée Ernst & Young LLP et des intimées 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 et Merrill Lynch, Pierce, Fenner & Smith Incorporated (société remplaçante à l'issue de la fusion de Bank of America Securities LLC).

J.S.C.C.

CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2014 ONSC 62
COURT FILE NO.: CV-12-9667-00CL
CV-11-431153-00CP
DATE: 20140203

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

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

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

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

Plaintiffs

- and -

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

Defendants

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

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

John Fabello and Rebecca Wise for the Underwriters and initial Purchasers

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

Jennifer A. Whincup, for Kai Kip Poon

Caroline Descours, for the Ad Hoc Committee of Noteholders

Kenneth Dekker, for BDO Limited

Jonathan G. Bell, for Sino-Forest Corporation

David Sterns, for the Objector, Robert Wong

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

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

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

ENDORSEMENT

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

(a) Motion Record of the Plaintiffs

(Claims and Distribution Protocol)

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

(b) Motion Record of the Plaintiffs

(Motion for Fee Approval)

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

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

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

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

Background

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

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

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

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

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

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

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

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

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

(a) Claims and Distribution Protocol

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

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

The Protocol

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[18] The Protocol has wide support.

The Objections

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) the risks that class counsel assume; and

(b) the success achieved.

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Fee Approval – U.S. Class Counsel

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

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

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

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

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

MORAWETZ R.S.J.

DATE: February 3, 2014

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

SUPERIOR COURT OF JUSTICE – ONTARIO

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

AND:

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

BEFORE: G.R. Strathy J.

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

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

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

HEARD: November 22, 2011

ENDORSEMENT (CLASS COUNSEL FEE APPROVAL)

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

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

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

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

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

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

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

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

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

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

Background

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

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

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

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

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

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

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

This Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Settlement

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

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

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

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

Settlement Approval

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

The Position of Class Counsel

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

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

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

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

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

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

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

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

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

Objections

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

The Objection of WCMC

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

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

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

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

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

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

[49] WCMC's letter continues:

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

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

The Objection of Universal

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

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

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

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

The Objection of the Collectives

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

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

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

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

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

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

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

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

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

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

Discussion

Approval of Class Counsel's Retainer

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

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

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

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

Fee Approval

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

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

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

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

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

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

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

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

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

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

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

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

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

> (a) the factual and legal complexities of the matters dealt with;
>
> (b) the risk undertaken, including the risk that the matter might not be certified;
>
> (c) the degree of responsibility assumed by Class Counsel;
>
> (d) the monetary value of the matters in issue;
>
> (e) the importance of the matter to the class;
>
> (f) the degree of skill and competence demonstrated by Class Counsel;
>
> (g) the results achieved;
>
> (h) the ability of the class to pay;
>
> (i) the expectations of the class as to the amount of fees; and
>
> (j) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation and settlement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Compensation for Representative Plaintiffs

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

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

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

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

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

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

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

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

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

Summary and Order

[97] An order will therefore issue:

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

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

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

G.R. Strathy J.

Date: November 30, 2011

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

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: MICHAEL CANNON / Plaintiff / Moving Party

AND

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

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

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

HEARD: October 18, 2013

APPROVAL OF LEGAL FEES

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

- Class counsel's legal fees would be more easily understood, more principled and more "reasonable" than under the "multiplier" approach.[3]
- The contingency fee approach would inject a much-needed measure of predictability into class counsel's compensation calculus, which in turn would encourage greater use of the class action vehicle, enhancing access to justice.

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

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

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

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

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

Disposition

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

Belobaba J.

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

Date: December 19, 2013

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 likelihood 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

Indexed as:

Parsons v. Canadian Red Cross Society

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
Dianna Louise Parsons, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, Executrix of the Estate of Harry Kotyk, deceased and Elsie Kotyk, personally, plaintiffs, and
The Canadian Red Cross Society, Her Majesty the Queen in Right of Ontario and the Attorney General of Canada, defendants
And between
James Kreppner, Barry Issac, Norman Landry, as Executor of the Estate of the late Serge Landry, Peter Felsing, Donald Milligan, Allan Gruhlke, Jim Love and Pauline Fournier, as Executrix of the Estate of the late Pierre Fournier, plaintiffs, and
The Canadian Red Cross Society, the Attorney General of Canada and Her Majesty the Queen in Right of Ontario, defendants

[2000] O.J. No. 2374

49 O.R. (3d) 281

[2000] O.T.C. 968

46 C.P.C. (4th) 236

97 A.C.W.S. (3d) 1082

Court File Nos. 98-CV-141369 and 98-CV-146405

Ontario Superior Court of Justice

Winkler J.

Heard: February 14-16, 1999.
Judgment: June 22, 2000.

(77 paras.)

Counsel:

Harvey Strosberg, Q.C., Heather Rumble Peterson and Patricia Speight, for the plaintiffs.
R.F. Horak and Michèle Smith, for Her Majesty the Queen in Right of Ontario.
Michel Lapierre, for the Attorney General of Canada.
Beth Symes, for the Thalassemia Foundation of Canada, friend of the Court.
William P. Dermody, for the intervenors, Hubert Fullarton and Tracey Goegan.
Terrence J. O'Sullivan and Vanessa Jolles, for the plaintiffs.
R.F. Horak and Michèle Smith, for Her Majesty the Queen in Right of Ontario.
Michel Lapierre, for the Attorney General of Canada.
Janice E. Blackburn, for the Canadian Hemophilia Society, friend of the Court.

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1 **WINKLER J.**:-- This is a motion for approval of the counsel fees in two companion class proceedings, Parsons et al. v. The Canadian Red Cross Society et al. (the "Transfused Action") and Kreppner et al. v. The Canadian Red Cross Society et al. (the "Hemophiliac Action") commenced under the Class Proceedings Act 1992, S.O. 1992, c. 6. These actions were brought on behalf of all individuals in Canada, except for those in the provinces of Quebec and British Columbia, who were infected with Hepatitis C from the Canadian blood supply during the period of January 1, 1986 to July 1, 1990. There are concurrent class proceedings before the courts of Quebec and British Columbia for individuals in those provinces. The parties in all of the class proceedings across Canada have entered into a pan-Canadian settlement of the litigation. In reasons released on September 22, 1999, I approved the settlement as it applied to the national classes in the Transfused Action and the Hemophiliac Action. The settlement has also been approved by the courts in Quebec and British Columbia as it relates to the actions in those provinces.

2 The Settlement Agreement was presented to the courts for approval by all of the parties to the litigation. It contemplated payment of total class counsel fees for all of the actions in the amount of $52,500,000.00. That figure was used in the actuarial calculations in order to permit the courts to assess the settlement and the sufficiency of the Trust Fund established for the payment of claims to the class members in the litigation. The Ontario class counsel groups in the Transfused Action and in the Hemophiliac Action now bring this motion for the approval of their fees specifically.

BACKGROUND

3 The defendants in the Ontario class actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario and The Attorney General of Canada. In addition, all other provinces and territories of Canada, with the exception of British Columbia and Quebec, intervened

for the purposes of joining the settlement. Only the governments participated in the settlement, the proceedings against the CRCS having been stayed as a result of an Order of Mr. Justice Blair in respect of ongoing proceedings concerning the CRCS under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36.

4 The Transfused Action and the Hemophiliac Action were commenced as a result of the contamination of the Canadian blood supply with the Hepatitis C virus ("HCV") during the 1980s. The classes in the Actions, however, are described more narrowly as those persons infected by HCV from the blood supply between January 1, 1986 and July 1, 1990.

5 The classes are confined to the 1986-90 time period because of the basis of the claims asserted in the Actions. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The federal, provincial and territorial governments ("FPT governments") provided funding to the CRCS and staffed an overseer committee known as the Canadian Blood Committee ("CBC") which was composed of their representatives. The claims in these Actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after "surrogate" testing for HCV became available and had been put into widespread use in the United States. It was alleged by the plaintiffs in both Actions that had the defendants taken steps to implement the surrogate testing, the incidents of HCV infection from contaminated blood and blood products would have been reduced by much as 75% during the class period. Consequently, the plaintiffs brought actions on behalf of the classes described above in which claims were asserted in negligence, breach of fiduciary duty and strict liability as against all of the defendants.

6 As a result of the pan-Canadian Settlement Agreement, these claims have been settled, although without any admission of liability on the part of any of the defendants. Pursuant to the terms of the Settlement Agreement the class counsel in each of the Actions now seek court approval of their fees. This motion is in respect of the fees in the class actions commenced in Ontario on behalf of the national classes. Similar motions have been brought in the actions in British Columbia and Quebec.

7 The motion was heard over a three day period during which submissions were made by or on behalf of the class counsel in both actions, by counsel for the federal and Ontario governments and by counsel for certain intervenors and friends of the court. In addition, the parties filed affidavit evidence, transcripts of the cross-examinations on the affidavits and, in the case of the federal and Ontario governments, a document which was purported to be an expert's report in respect of fees. The author of this report was cross-examined and a transcript of the cross-examinations was included in the record.

8 It was apparent at the conclusion of this extensive hearing that there is agreement among the all of the participants with respect to certain facts. These are as follows:

(1) The Settlement Agreement contemplates that total lawyers fees in the Ontario, Quebec and British Columbia actions may amount to $52,500,000. There will be

no impact on the sufficiency of the Fund to provide the benefits to the claimants set out in the Agreement so long as the counsel fees do not exceed this amount.

(2) All participants are of the view that class counsel conducted the litigation in a skilful and effective manner and achieved an excellent result for the class members through the negotiated settlement.

(3) There is no issue with the total number of hours docketed by class counsel during the proceedings, nor is there any issue with respect to the number of law firms or lawyers engaged in negotiating this settlement on the part of the plaintiffs.

(4) The factual account of the conduct of the negotiations as set out in the affidavits of the class counsel group are accepted as being accurate.

(5) All participants acknowledge that the class counsel are entitled to a fair and reasonable fee.

9 Where the defendants and the intervenors part company with class counsel is in respect of the characterization of what, in principle and quantum, constitutes a "fair and reasonable fee".

LAW

10 The fixing of fees in a class proceeding is governed by ss. 32 and 33 of the CPA. These sections provide in pertinent part:

> 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.
>
> ...
>
> (4) If an agreement is not approved by the court, the court may,
> (a) determine the amount owing to the solicitor in respect of the 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 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.

11 The leading Ontario case on the quantification of appropriate fees in class proceedings is Gagne v. Silcorp Limited (1998), 41 O.R. (3d) 417 (C.A.). Goudge J.A., writing for the court, addressed the purpose of awarding premium fees in respect of successful class proceedings. He stated at 422-23:

> [a] fundamental objective [of the CPA] is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so 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 fulfil its promise, that opportunity must not be a false hope. (Emphasis added.)

12 Although the issue before, the Court of Appeal in Gagne involved a premium fee in the form of a multiplier of a base fee, it has been held that this is not the only acceptable form of premium fee arrangement in class proceedings conducted under the CPA. (See Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523 (Gen. Div.); Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83 (Gen. Div.)).

13 Notwithstanding the different forms that a premium fee arrangement may take, the principle enunciated by Goudge J.A. regarding the purpose of awarding premium fees in a class proceeding has a general application. If the CPA is to achieve the legislative objective of providing enhanced access to justice then in large part it will be dependent upon the willingness of counsel to undertake litigation on the understanding that there is a risk that the expenses incurred in time and disbursements may never be recovered. It is in this context that a court, in approving a fee arrangement or in the exercise of fixing fees, must determine the fairness and reasonableness of the counsel fee. Accordingly, the case law that has developed in Ontario holds that 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 solicitor in conducting the litigation and the degree of success or result

achieved. (See Maxwell v. MLG Ventures Ltd (1996), 3 C.P.C. (4th) 360 (Ont. Gen. Div.); Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.); Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.)). This approach was approved by Goudge J.A. in Gagne where he stated at 423:

> ... In my view, [it is correct to focus] 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 conducted the proceedings.

ANALYSIS

14 In my view, there are a variety of methods that may be utilized under the CPA to determine an acceptable premium on fees. It is appropriate to utilize this flexibility in fixing the fees in class proceedings where necessary. Here, class counsel seek to have their fees fixed on a lump sum basis pursuant to the retainer agreements with the representative plaintiffs and the provision in the Settlement Agreement. While this is acceptable in form, in my view, the court must still adhere to the principles discussed in Gagne in assessing the fairness and reasonableness of the counsel fee, whether that fee is calculated on a lump sum basis or otherwise.

A. Result Achieved in the Litigation

15 I will deal first with the success or result achieved in the instant litigation. I note in passing that one of the most staking aspects of the fee hearing was the number of issues upon which all participants expressed agreement. As stated above, it was common ground that an excellent result was obtained for the class members through the negotiated settlement of the litigation.

16 Nonetheless, the court, in fulfilling its role in the approval of fees, must form its own view of the success achieved. The characterization of the result by the parties and other participants is but one factor to be considered. The court's analysis must be objective. In this regard, I concluded in approving the settlement that class counsel have produced the best possible result short of trial. (See Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 at para. 91). Moreover, the settlement provides for payments according to the degree of harm suffered by the class members, as well as for progressive increases in those payments to class members should their condition worsen. This avoidance of the "once and for all" lump sum payment approach commonly applied in personal injury tort litigation entails an overriding advantage for class members and consequently must augur favourably for class counsel in any considered analysis of the result.

17 From the perspective of the class members, however, the total compensation or nature of payment cannot be the only criteria on which to judge the result obtained through settlement. Significant weight must also be given to the relative ease or difficulty of access to the benefits achieved through the settlement by a class member. (See also Gagne at 425.) In this case, a

procedure for claims administration has been wrought into the settlement that will see most class members able to obtain compensation without the need for further legal assistance or proceedings. This contrasts favourably with many class proceedings where, despite a global settlement, class members are still required to engage in extensive legal proceedings to obtain the benefits. The relative ease of access to compensation is an important feature. It provides some certainty as to the quantum of compensation that class members will receive at each level, but more so, it demonstrates the thoroughness of class counsel in fashioning a satisfactory settlement.

B. Risk Undertaken by Class Counsel

18 I turn now to the risk factor. In the context of the CPA, the premium on fees for undertaking risk in litigation means that there should be a reward for taking on meritorious but difficult matters. Conversely, this does not mean that there should be a reward for bringing forward speculative cases of dubious merit. In my view, the instant matter falls squarely into the first category. Nonetheless, it was strongly contended by the defendants and intervenors that the extra-legal considerations at play in these actions mitigated the risk. The underlying premise for this submission was that this was not litigation in the ordinary sense because the government defendants were inclined to settle for policy and political reasons that had little or nothing to do with the merits of the litigation or the vigorous manner in which it was being pursued. Accordingly, the defendants and intervenors took the position that the risks attendant to litigation generally were not present here. I disagree.

19 It was common ground among the parties that there were political overtones to the litigation. Nonetheless, to accept the proposition that any extra-legal influence reduced the risk of the litigation would be to engage in a purely speculative, after the fact interpretation of the events that transpired during the course of this litigation. But, more to the point, this proposition is contradicted by the evidence. It is clear that this settlement was driven by the threat of litigation and not by political considerations. This is demonstrated by the chronology of the events, set out in the chart below, leading up to the announcement by the federal, provincial and territorial governments ("FPT governments") on March 27, 1998 that a fund of $1,100,000,000 would be set aside to satisfy the claims of those persons infected by HCV from the blood supply.

	DATE	EVENT
1.	June 21, 1996	Quebec Transfused Class Action is filed.
2.	September 9 to 11, 1996	The FPT governments announced their decision declining compensation to blood victims.

3.	December 19, 1996	The British Columbia Transfused Class Action is commenced.
4.	October 24, 1996	The FPT Health Ministers announce that they have decided against compensation.
5.	May 22,1997	The British Columbia Transfused Class Action is certified.
6.	July 7, 1997	There is an agreement on lead counsel for the Ontario HCV Class Action.
7.	September 16, 1997	Notice of the Ontario Transfused Class Action is given to Ontario and the other provincial governments.
8.	November 26, 1997	The final report of the Krever Inquiry is released.
9.	February 10, 1998	The Statement of Claim in the Ontario Transfused Class Action is issued on behalf of a national class.
10.	February 23, 1998	The Quebec Transfused Class Action is certified.
11.	March 27,1998	On behalf of the FPT Ministers of Health, the Honourable Allan Rock announces a financial assistance package to persons infected with HCV between 1986 to 1990 of up to $1,100,000,000.00.

20 It can be seen from this sequence of events that the FPT governments did not make any overtures toward compensating defendants until class proceedings had been certified in British Columbia and Quebec and there was a potential for certification of a national class encompassing all those persons in the rest of Canada in the Ontario proceedings. It must also be noted that even though the announcement of March 27, 1998 could hardly be considered a formal binding offer of settlement, it was only intended to apply to those persons included in the class proceedings. The litigious nature of the settlement negotiations is further evidenced by the length of time and effort taken to reach a binding agreement. Even then, there were still numerous conditions attached because of the desire of the FPT governments to,have one pan-Canadian settlement for all of the actions. Furthermore, there has never been any admission of liability by the defendants. Indeed the final Settlement Agreement contains a specific disclaimer of liability.

21 The evidence of Douglas Elliot, a member of the class counsel group, is instructive. Mr. Elliot is a highly experienced lawyer in blood litigation in Canada. As a result of his involvement with the issues surrounding the Hepatitis C litigation and his participation at the Krever Commission inquiry, he attempted to assemble a counsel group to prosecute a class proceeding on behalf of those infected with HCV from the blood supply.

22 In his affidavit, Mr. Elliot chronicles three years of unsuccessful attempts to find counsel in Ontario willing to lead and participate in a class proceeding related to the HCV problems stemming from the contamination of the Canadian blood supply. He deposed that it was difficult to find any law firm, large or small, willing to take on the litigation, especially in the role of lead counsel. It is his evidence that none of the counsel he approached regarded the potential political considerations as altering the fundamentally litigious nature of these proceedings. Their rejections were based strictly on the legal problems which the case presented. He states in paragraph 41 of his affidavit:

> 41. I believe that there were few lawyers who were knowledgeable about the operation of the blood system in Canada to begin with, and many regarded tainted-blood cases on behalf of plaintiffs as unattractive owing to their complexity and their prohibitive costs. The trial in Pittman, which was by this time completed, had lasted almost one year. To put the matter simply and directly, the lawyers to whom I spoke well understood that, in relation to this class action and the complex issues of liability, there were simply much easier ways to earn a living. And so they declined to become involved.

His evidence in this respect was not challenged by the defendants or intervenors. In the result, I must conclude that any suggestion that the political implications of the issues made the litigation less risky, apart from being inaccurate, was not apparent to most of the lawyers in Ontario at the outset of the litigation.

23 In consideration of the chronology of the events in this litigation and the uncontested evidence of Mr. Elliot, I am unable to accept the contention that political considerations operated to either transform this litigation or diminish the risk associated with it in any material way.

24 This leads in turn to another argument that was advanced by the government defendants. They contended that, even if the proceedings were considered to be litigation in the ordinary sense, the inherent risks diminished with time as the negotiations progressed. In consequence, they submit that any premium on the fee should reflect this diminishing risk. In support of this proposition, these defendants filed the report of Michael Ross, a vice-president of the accounting firm KPMG. Mr. Ross, in accordance with his instructions, attempted in his report to apply mathematical parameters, including a factor for changing risk, to the determination of an appropriate counsel fee in a class proceeding. However, this report was less than helpful, in part because of the flaws in the underlying premise that the risk factor in litigation can be ascertained with mathematical precision, and in part because of his fundamental misconception of the nature of a class proceeding and the CPA.

25 That said, I realize that Mr. Ross was given an impossible task. His assignment was, in reality, to attempt to define a subject with more precision than the subject would bear. As Goudge J.A. stated in Gagne, the fixing of an appropriate fee in a class proceeding is "an art, not a science". As such, the court must be wary of attempts to measure appropriate fees by the application of

pseudo-scientific or mathematical methods. Such an approach is inherently unreliable when a subject with as many variables as this litigation is considered.

26 Mr. Ross based his evidence on the premise that the premium on a fee should be reflective of the "judgmental probability of success" in the litigation. In his opinion, the amount of the premium over the ordinary fees should be a reciprocal of the risk of the litigation. As a theoretical example, this would ensure that counsel taking on litigation with an estimated 50% probability of success would not suffer any economic prejudice if the fee earned in the successful actions was multiplied by a factor of 2. For every two actions, one unsuccessful, one successful, that counsel undertake, the fees would balance out and there would be no loss.

27 This mathematical approach is fundamentally flawed. The probability of success in any litigation cannot be fixed with mathematical precision at any stage of the proceeding. The vagaries of litigation simply do not permit it.

28 Mr. Ross also propounded the theory that the risk of the litigation changed as it progressed and that therefore, the premium should reflect the changing risk. While there may be some truth to the assertion that the risk of litigation changes over the course of the proceeding, it must be considered that changes can occur which both diminish and exacerbate risk at different points in the litigation. There is no more prospect of assigning a precise mathematical value to the risk on a segmented, progressive basis than there is at the outset of the litigation.

29 Moreover, class action litigation introduces additional complications. Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some consideration must also be given to the commitment of resources made by the class counsel and the impact that this will have in the event the litigation is unsuccessful. Winning one of two class actions may be a reasonable hallmark of success. However, for the lawyer who's first action turns out to be a loser, the complete exhaustion of resources may leave him or her unable to conduct another action. Thus the real risk undertaken by class counsel is not merely a simple reciprocal of the "judgmental probability of success" in the action, even if that calculation could be made with any degree of certitude. There is a point in complex class action litigation where, degree of risk notwithstanding, class counsel may truly be, as Mr. Strosberg put it in his submissions, "betting his or her law firm". This must be considered in assessing the "risk" factor in regard of the appropriate fee for counsel.

30 Equally troubling is the fact that Mr. Ross did not consider the unique features of the CPA in formulating his theory regarding the "judgmental probability of success". This was apparent from the transcript of his cross-examination. For example, it was clear that Mr. Ross did not appreciate the risk induced into class action litigation by the additional element of the requirement to attain certification. In the result, the probability of success or failure on the certification motion was not a factor that Mr. Ross considered. This is a significant omission if his fee theory is to be applied to class proceedings. More importantly, it is illustrative of the inherent unreliability of this evidence,

and further, is indicative that Mr. Ross is offering an opinion to the court that is clearly outside his area of expertise.

31 In the result, I conclude that the report of Mr. Ross is of no value in determining either the risk assumed by class counsel or the reasonableness of the fee in these actions.

32 The government defendants chose to rely heavily on this report and did not offer any other evidence on the assessment of the risk involved in the litigation. They did not file affidavits from any member of the counsel group that were involved in the negotiations on behalf of the governments, nor did they provide any evidence from any person at a senior administrative level in the governmental departments responsible for the litigation. Instead, the government defendants conceded that the accounts of the negotiations proffered by the affiants deposed on behalf of the class counsel group were accurate. Interestingly in this regard, the government defendants chose to file as part of their evidence the affidavits of class counsel in the British Columbia and Quebec actions.

33 A picture emerges from the affidavits preferred by class counsel and the government defendants of negotiations that were logistically difficult, intense and time-consuming, adversarial and hard fought. There were obvious points at which potential "deal-breaking" issues surfaced and the success of the negotiations hung in the balance. The various affiants cite examples.

34 Bonnie Tough, the lead counsel for the Hemophiliac Action, states in her affidavit:

> 107. There was throughout the negotiations and even following the Framework Agreement in December of 1998 the risk that one or more governments would not approve the settlement. It was never clear to me the extent to which the various provinces and territories were represented at the negotiating table. It was clear that to the extent they were represented by one or more lawyers, those lawyers were without authority to conclude a deal.
>
> 108. Even within the governments, it was not clear who was instructing the lawyers, i.e. Attorneys' General, Department of Justice, Ministries of Health, Cabinet, Treasury Boards, etc. I was concerned that the successful conclusion of any deal depended upon the attitudes and conduct of a phantom group with whom I was not directly speaking. I did not know the extent to which political differences might influence the acceptance or rejection of any settlement. Changes in governments throughout the time only exacerbated this concern.

35 Heather Peterson, a member of the class counsel group in the Transfused Action, states in her affidavit:

> 78. During [the] last stages of negotiations additional issues arose, some of which also threatened to undermine the negotiations. Two of the most serious examples come to mind:

(a) The Framework Agreement provides ... that the [Settlement] Fund would generate interest as if the amount had been notionally invested at the interest rate paid "from time to time on Long Term Government of Canada Bonds from April 1, 1998 for the duration of the Plan." However during negotiations, the federal government took the position that only the T-bill rate should be paid. Class Action Counsel took the position that maintenance of this position by the FPT governments would be a "deal breaker".

(b) On or about May 9 and 10, 1999, at a negotiation meeting in Vancouver, the FPT Governments raised the prospect of including in the settlement persons who had contracted HCV from immune globulins. The Framework Agreement and all of the ensuing negotiations until that date had not included any reference at all to this group.

> ... [the Ontario governments took the position that [it] wished to be finished with all HCV blood litigation and thus wanted persons who contracted HCV from immune globulins in the Class Period included in the settlement. Strosberg's response was that there was simply no basis to include these persons in the plaintiffs' class. The end of these discussions came on May 13, 1999 at the Toronto offices of McCarthy Tetrault ... [when] Strosberg told counsel to the FPT Governments that their insistence upon including recipients of immune globulins in the class was a "deal breaker," that it was their choice, but under no circumstances would he accept this group in the class. Strosberg intended to break off negotiations if the FPT Governments did not yield on the issue. Strosberg and I left that session uncertain as to whether negotiations had broken down. Thankfully, the FPT Governments eventually relented.

36 It is apparent from the record that even though this litigation was conducted from the middle of 1998 forward as a negotiation toward a settlement, the risks assumed by class counsel were no less real at any point than if that time had been devoted to a disposition through a trial process.

37 In addition, the legislation enabling class proceedings introduces several features that distinguish these actions from ordinary litigation. One aspect that bears on the risk inherent in class actions is the requirement of court approval of any settlement reached. Protracted negotiations involve a commitment of the time and resources of counsel and the litigants. However, in a class proceeding, a court will not approve a settlement that it does not regard as being in the best interests of the class, regardless of whether class counsel take a different view. Thus, class counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement, that they believe is in the best interests of the class, only to find that the court will not approve the settlement achieved. While this creates a risk simpliciter, it also creates an advantage for a defendant who can successfully extend the negotiations to the point that class counsel's resources are exhausted before making a "final settlement offer" that may not ultimately receive

court approval. In those cases, class counsel may have exhausted their resources attempting to obtain a reasonable settlement only to find themselves, as a consequence, unable to pursue the litigation. Accordingly, the risk in a class proceeding is not merely a function of whether or not litigation is anticipated and whether or not that litigation will be successful. Rather, there are risks inherent in the adoption of, and commitment to, any particular strategy for achieving a resolution.

38 In view of the foregoing, I am unable to accept the contention that there was less risk in this proceeding merely because the parties chose to proceed down a negotiation route. Moreover, contrary to the submissions made by certain of the intervenors, it is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an insurmountable impasse increased rather than diminished. This made the negotiations more perilous as they progressed. In that respect, one need look no further than to the actual settlement approval process which required a review of the settlement by this court. In order to obtain the approval of this court, modifications were required to the settlement agreement. Although the court took the view that these modifications were "non-material" as that term was set out in the agreement, the federal government took a different view, as related in the affidavit of Ms. Peterson. She deposed as follows:

> 92. After Mr. Justice Winkler's [sic] delivered his reasons on December 22, 1999 counsel for the federal government and counsel for Ontario asserted orally that the modifications he had suggested and the reasons were indeed "material differences".
>
> 93. After delivery of Mr. Justice Winkler's reasons, counsel for the federal government urged class action counsel to join with him in attempting to persuade Mr. Justice Winkler that his suggested modification relating to the surplus should be abandoned. He told us that if we did not agree he would recommend to the federal government to take issue at Mr. Justice Winkler's suggested modification. He said that, in his opinion, the modification was a "material difference" and that, therefore, there was not court approval of the settlement agreement. He urged class action counsel to make those fundamental choices before the telephone conference he was having with the FPT Deputy Ministers of Health to be held on October 14, 1999. Strosberg believed strongly that the FPT governments would ultimately accept the three modifications proposed by Mr. Justice Winkler. Class action counsel deferred to Strosberg's political judgement and did not agree with counsel for the federal government, and ultimately the FPT governments consented to the three modifications. Even after the delivery of Mr. Justice Winkler's reasons, then, fundamental tactical decisions were required and considerable uncertainty remained over whether or not there was actually a settlement. (Emphasis added).

Clearly the risk continued up until the final judgment was entered.

39 There was an additional submission by one of the intervenors that despite the fact that there may have been risk associated with the negotiations, there was a general cooperative tenor to the negotiations that lessened the risk. I cannot accede to this submission for several reasons. First, It is contrary to the evidence. J.J. Camp, lead counsel for the class in the British Columbia action, whose affidavit was filed on this motion by the federal government, deposed:

> 95. On July 9, 1998 I had an extensive telephone conference with [government counsel] during which they proposed a new counter offer. The tenor of the discussion at times became quite acrimonious with both sides alleging how disappointed they were with the position of the other ...

This is echoed in the affidavit of Bonnie Tough, lead counsel for the class in the Hemophiliac Action. She states:

> 79. Finally, in November of 1998, there was a meeting in Ottawa with Transfused Class Counsel, Hemophilia Class Counsel and counsel for the governments. The meeting was acrimonious and ended with all parties walking from the table in frustration.

40 But, in any event, risk is not synonymous with acrimony in a negotiation process. Even if the tenor of the negotiations changed somewhat for the better after certain points of contention were resolved, there is nothing in the record which would indicate that these negotiations were anything less than hard fought to the end. As such, they were capable of being derailed at any point, regardless of the level of acrimony between the participants. Indeed, the federal government chose to characterize the negotiations in exactly this manner in its submissions to the court on the settlement approval motion. As stated in the factum filed on that motion by counsel for the federal government:

> 106. It is common ground between the parties that the agreement was reached only after an excess of a year of hard fought negotiations between the Parties.
> 108. The March 1998 announcement expressly contemplated that:
>
> "details of assistance will be determined through a negotiation process submitted to the courts for approval. This should ensure fairness. Victims and their legal representatives will be part of this process."
>
> Apart from this direction, however, Ministers [sic] merely outlined certain "principles" and "suggestions" for what the final negotiated arrangement would look like ...

> 111. Further negotiations and an extensive drafting exercise took place subsequent to the Agreement in Principle which resulted in the Agreement before the court today. There can be no dispute but that the Agreement is the product of intense negotiations between counsellor the plaintiffs and FPT governments. (Emphasis added).

41 Further evidence of the tone of the negotiations, or at least the position taken by the parties, can be found in the affidavit of Ms. Peterson. She stated:

> 79. During the negotiations, counsel for the federal government occasionally observed that the option always remained for the FPT governments, or one or some of them, to legislate a program in place of a court-approved negotiation settlement within the framework of the class actions. This option was always a real and substantial risk for class action counsel and our counsel group ...
>
> 81. Settlement was always dependent upon formal cabinet approval by all 14 FPT governments. During the negotiations, tensions were palpable among the FPT governments. Counsel for the various FPT governments at times asserted differing, disconsolate positions; so also did class action counsel. Through it all, it became clear to me that, from the FPT government side of the negotiating table, political considerations were as important as legal issues. The concerns about political ramifications was a constant risk, because there were numerous provincial elections and changes in provincial governments (including the creation of a new territory) in the course of the negotiations from April 1998 to October 1999.

42 While I do not equate acrimony with risk, complexity, on the other hand, breeds risk in any proceeding. In this case, the logistical complexity was overwhelming. The insistence of the governments that there be one pan-Canadian settlement of all of the actions meant that any settlement attained required approval of 14 FPT governments, each with differing political agendas and policies. Although obtaining approval from this group alone was daunting enough, the class counsel groups in the various actions on the other side of the bargaining table were by no means speaking in a unified voice at all times. In the Transfused and Hemophiliac Actions in Ontario, the combined class counsel groups were comprised of over 60 lawyers and supporting legal personnel. In addition, the negotiations were played out against the backdrop of changes in the provincial and territorial governments, changes in the Ministers of Health for all of the governments, and political activism directed at attaining a universal settlement for all persons infected with HCV by blood in Canada, regardless of the date of infection. The expenditures of class counsel in terms of time and money were at risk of loss if any politician in authority decided as a matter of expediency or policy not to settle the class proceedings or decided to unilaterally institute a no-fault compensation program and thereby bypass class counsel and the litigation. There was always the inherent danger

that the pan-Canadian settlement would be impossible to achieve, either because of a reluctance on the part o a particular government or a class in a particular action to approve an agreement.

43 The evidence is compelling. This litigation, notwithstanding the fact that it was conducted as a protracted negotiation, was redolent with risk. Moreover, insofar as it is appropriate to assess the risk assumed by class counsel on a sliding scale or range depending on the nature of the action in comparison to other actions, I am satisfied that the risk enuring to class counsel in these actions should be considered to be at the high end of any such scale.

C. Fair and Reasonable Fee

44 A fair and reasonable fee must be reflective of the risk undertaken by class counsel and the result attained for the class in the action. My analysis of those factors is set out in the foregoing. The next step is to determine, through their application, whether the fees being sought by the class counsel groups, $15,000,000 in the Transfused Action and $5,000,000 in the Hemophiliac Action, constitute fair and reasonable fees in the circumstances.

45 In considering this, I cannot accede to the submissions of the various intervenors with respect to the fees. Taking their submissions as a group, the intervenors submitted that fees ranging between approximately $6,000,000 and $11,000,000 should be awarded in the Transfused Action. In the Hemophiliac Action, the range of the intervenors' submissions was from approximately $2,000,000 and $3,500,000. Although the intervenors did not seriously question the allocation of lawyers and legal staff, they did attack the hourly rates of certain counsel. This attack lacked any evidentiary basis however and thus must be rejected. The second, and main, submission of the intervenors was that there was a diminution of risk either because of the political considerations or the fact that these proceedings were conducted as a negotiation rather than as a completely adversarial trial process. Since I have rejected these underlying propositions as being unsupported by the evidence, it follows that the submission founded on them must be rejected as well.

46 I have considerable difficulty with the submission of the government defendants on different grounds. While I have rejected the intervenors' submissions as founded on erroneous assumptions, there was, to their credit, an implicit acknowledgement, and application, within those submissions of the dual factors of result and risk to be considered in determining a fair and reasonable fee. In contrast, the government defendants submitted figures in respect of the fees that represented less than the monetary value of the docketed time of the class counsel groups. This submission was made despite the acknowledgement by the government defendants of the "high degree of competence of the class counsel" and the recognition of the satisfactory result attained for the classes. Further they took no issue with the hours expended by the class counsel groups, the number of counsel within those groups, or the class counsel evidence with respect to the difficulty of the negotiations. The fee proposed by the governments was arrived at by combining an arbitrary reduction of the hourly rates of the class counsel group and an addition of a premium of approximately 10% of the reduced amount. If accepted, the net effect of the governments'

submission would be to deprive class counsel of any premium, multiplier or reward of any nature reflecting risk or result.

47 The position taken by the government defendants is untenable. Considered in the context of these proceedings, the fees they propose are not reflective of either the result obtained or the risk undertaken even if just one of those factors were to be considered in isolation. More so however, the fees proposed by the government defendants are at variance with the apparent underlying policy of the CPA and the interpretation of that policy by the Court of Appeal in Gagne.

48 It was suggested by Mr. O'Sullivan, who appeared on behalf of the class counsel group in the Hemophiliac Action, that it was obvious that the government defendants' position was driven by political expediency rather than by a sincere effort to assist the court in determining an appropriate fee. In support of this analysis, he provided several press clippings, including some culled from newspaper editions published during the three days of this hearing, that were critical of the fees being sought by the class counsel group. He suggested that the government position, when compared to the positions taken by class counsel and the intervenors, was so far outside the range of reasonableness that it could only be inferred that political, rather than legal considerations must be at play.

49 Notwithstanding these submissions, it is not within the purview of the courts role on this motion to impute ulterior motives to any party and I make no finding in respect of the submissions of Mr. O'Sullivan. As I stated in my reasons regarding the settlement approval, "extra-legal concerns, even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review ...".

50 Nonetheless, the concern expressed over extra-legal considerations may well be symptomatic of a general lack of understanding of the legal framework in which these proceedings evolved. The court was invited to address this issue in these reasons by Mr. Dermody, counsel for the intervenors. He expressed a concern that there was a general misunderstanding regarding the nature of these proceedings that had the potential to create animosity between the class members, their counsel and the FPT governments which might, in turn, erode the salutary benefits of the settlement and reflect negatively on the fair compensation of counsel. This point is well taken.

51 In addressing the issue, the starting point must be an understanding that the proceedings were litigious in nature and that the settlement offered by the FPT governments was driven by the prospect of an unfavourable determination, however probable or improbable, if the litigation proceeded to a conclusion. There is no evidence to support any assertion to the contrary. In the result, there was nothing untoward in the way that the government defendants or the class counsel groups conducted themselves in resolving the litigation. Hard bargaining is a fact of life in any high stakes negotiation. Outright capitulation from either side of the table is not a realistic expectation. There were arguable defences and a legitimate question as to the ultimate liability of the governments. While recognizing that the victims had suffered a tragedy, the governments, as

litigants, always had to bear in mind that they were the representatives of all of the people and the keeper of the public purse. The tension created by these two concerns obviously complicated matters for the FPT governments and for the class counsel groups. Despite these complexities, the parties persevered through arduous negotiations and reached an agreement to settle the outstanding litigation within a legal framework.

52 In recognition of the legal framework within which the settlement was negotiated, the Agreement crafted speaks directly to the question of class counsel fees in that it stipulates a limit on those fees. All counsel agreed that the fees sought would not exceed $52,500,000 in total. The details of the background negotiations that led to this provision are contained in the affidavits of the British Columbia and Quebec class counsel. The government elicited an agreement from the class counsel groups that they would not seek fees on the basis of a percentage of the total settlement and further, that the counsel group would agree to a cap on the total amount of fees. In addition to the other concessions extracted by the governments, counsel were required to surrender any fee agreements that they may have executed with individual class members. Mr. Camp deposes to this at para. 148:

> 148. Under my fee agreement, [the class counsel group] were entitled to charge up to one-third of the settlement amount attributed to the British Columbia class action. Quebec class counsel also had a percentage contingency fee agreement with their representative plaintiff. Class Counsel in both the Framework Agreement and the Settlement Agreement have waived their rights to seek recovery of class counsel fees based on a percentage of the settlement amount. Without doubt, in my opinion, the compromise by class counsel of their right to claim class counsel fees on the basis of percentage of any settlement or judgment, which in my case amounted to up to one-third, was a significant concession which assisted the parties in coming to an agreement.

Mr. Lavigne similarly stated in Ms affidavit:

> 145. It should be noted that 166 of the 450 victims who are on the M.M.M.F. lists have agreed, by giving a written mandate, a copy of which is attached hereto, to pay a sum amounting to 20% of any amount that was obtained by a judicial process or negotiation process or by government compensation;
> 146. The client's expectations in this respect have been clearly established since 1995 and have always comprised a clear, plain and precise working basis for all of the people who came into contact with our firm;
> 147. This percentage agreement, which is entirely proper and legal in Quebec, has been set aside as regards a claim of 20% in the total amount of the settlement;
> 148. In the final quibbling during the negotiations that led to the Agreement of June 15, 1999, the applicant solicitors agreed to this additional concession, which was demanded by the governments, and particularly by the federal government, so

that the Agreement could be concluded;

149. However, consideration for this was provided: that an agreement would be negotiated and concluded after the Agreement was signed to avoid any question of conflict of interest. Those negotiations have never taken place, and so it is impossible for us to take a position jointly with the respondents regarding the amount of the fees;

53 A final agreement regarding fees was never negotiated. Nevertheless, in consideration of the negotiated surrender of the individual contingency fee agreements, the undertaking by class counsel not to seek a fee on a percentage basis and the express cap of $52,500,000 on total fees, there is no other reasonable conclusion than that there was a tacit understanding between class counsel and the governments that this amount represented a fair and reasonable fee for counsel in the circumstances.

54 To put this in its proper context, it must be remembered that over 400 of the then identified class members in British Columbia and Quebec had negotiated individual contingency fee arrangements whereby they would have paid between 20% and 33% of any compensation received. This arrangement would produce a counsel fee of over $220,000,000, at a minimum, if extrapolated against the total settlement and the estimated class size as a whole. In comparison, the cap on fees negotiated by the governments is very favourable indeed.

55 However, while this tacit agreement between the parties regarding fees is instructive, it is not in itself determinative. In order to arrive at the appropriate premium fee, "all the relevant factors must be weighed".

56 The fees being sought are substantial. However, the quantum of a counsel fee, in and of itself, does not provide a valid basis for attacking the fee. The test in law, as set out in Gagne, is whether the fees are fair and reasonable in the circumstances. The legislature has not seen fit to limit the amount of fees awarded in a class proceeding by incorporating a restrictive provision in the CPA. On the contrary, the policy of the CPA, as stated in Gagne, is to provide an incentive to counsel to pursue class proceedings where absent such an incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel foes may accompany a class proceeding. To this effect, the authors of the Ontario Law Reform Commission's Report on Class Actions (1982) stated at 135-138:

> Critics of class actions often compare the total amount of administrative costs and lawyer's fees with the amount of each class member's claim, and then suggest that these costs and fees have the effect of depriving class members of any significant recovery. However, a comparison of total costs and fees with an individual class member's claim gives a rather myopic view of the issue. A better sense of whether the costs and fees of a class action are reasonable can be achieved by determining the percentage of the class recovery consumed by such costs and fees.

> Empirical data also has been collected concerning the percentage of class recoveries consumed by lawyers' fees alone. [in the United States] the data collected ... indicates that, in slightly more than fifty percent of the cases for which such information was available, lawyers' fees represented twenty-five percent or less of the recovery, while in only 10.7 percent of the cases did such costs exceed fifty percent of the recovery.
>
> These percentages of class action awards consumed by lawyers' fees and administrative costs do not appear particularly unreasonable, given the complexity of class suits. Moreover, the figures revealed by the empirical studies do not appear to be out of line with the proportion of individual recoveries consumed by lawyers fees and disbursements in individual litigation in Ontario, if the Law Society of Upper Canada was correct in suggesting that Ontario clients tend to receive a "net recovery" reduced by fifteen to twenty-five percent.
>
> In evaluating the fairness of lawyers' fees documented by the empirical studies, it is important to remember that, at least in the case of individually non-recoverable claims, any attempt to assert the claim through an individual suit would, by definition, consume 100 percent of the claim. Measured by this standard, the proportion of an individual class member's recovery consumed by class lawyers' fees in the United States does not appear inherently unreasonable. Moreover, in some cases, the costs of individual litigation may consume, a substantial proportion of even those claims that are individually recoverable and, in such situations, the class action will also result in cost savings, even if the share consumed by lawyers fees remains substantial.

57 The OLRC Report has been widely acknowledged to be the most sophisticated and extensive analysis of class actions undertaken in the world. (See the Report of the Attorney General's Advisory Committee on Class Action Reform, (Ontario, February 1990) at p. 20.) The pragmatic approach it displays towards counsel fees in class actions was based on careful study and analysis. It is significant that the authors of the report did not consider counsel fees representing 25% of the total recovery "inherently unreasonable".

58 However, the appropriateness of a premium fee, whether as a lump sum, as a percentage of the recovery or as a multiplier of a base fee must be assessed against the facts of each case. The adoption of any standard multiplier or percentage fee would undoubtedly result in fee awards that have little relation to the risk undertaken or the result achieved. This was recognized by Goudge J.A. in Gagne. To use these proceedings as an example, notwithstanding the OLRC Report and the

typical awards in class proceedings, a fee based on 20% or more of the recovery would be clearly excessive and represent a windfall for the counsel groups.

DISPOSITION

59 Class counsel in the Transfused Action and the Hemophiliac Action seek court approval of "lump sum fees" in the amounts of $15,000,000 and $5,000,000 respectively, and ask that the fees be fixed in those amounts, pursuant to written retainer agreements with the representative plaintiffs. This lump sum method of payment is expressly contemplated by s. 32(1)(c) of the CPA and by the Settlement Agreement, which provides at para. 13.03:

> The fees, disbursements, costs GST and other applicable taxes of Class Action Counsel will be paid out of the Trust. Fees will be fixed by the Court in each Class Action on the basis of a lump sum, hourly rate, hourly rate increased by a multiplier or otherwise, but not on the basis of a percentage of the settlement amount. (Emphasis added.)

60 Moreover, it has been held that the contingency fee provisions of the CPA are not limited to a base fee and multiplier arrangement, but instead permit of fee arrangements of various types, including lump sums and as percentages of recovery. In Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523 (Gen. Div.), Brockenshire J., in approving a lump sum fee, stated at 528:

> The special provisions relating to "multipliers" for hourly rates [do not prevent], in any way, other arrangements as specifically authorized under s. 32(1)(c). I view s. 33(1) and (2) as permitting, despite other statutes, all kinds of fee arrangements contingent upon success, and not just hourly rate multipliers.

61 In Crown Bay Hotel v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83 (Gen. Div.), this court stated at 87-88:

> A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in Nantais ... is in place, such a fee arrangement encourages rather than discourages settlement ... Fee arrangements which reward efficiency and results should not be discouraged.

62 However, regardless of the manner in which a premium fee is awarded in a class proceeding, whether by lump sum or otherwise, to adopt the words of Goudge J.A. in Gagne, the premium must be one that "results in fair and reasonable compensation to the solicitors" having regard for the risk

undertaken and the result achieved.

63 In Gagne, Goudge J.A. set out a series of useful corroborating tests for analysing the fairness and reasonableness of the fee. These involve, variously, testing the fee as a percentage against recovery, as a multiple of base fees, as against the retainer agreement and whether, in the circumstances, the fee will provide sufficient incentive for counsel to take on difficult cases in the future. As he stated at 425:

> In the end, [these considerations must result] 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 will 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 ease [sic] and to do it well.

64 The first of the corroborating factors is a test of the fee as a percentage of the class recovery. I note that the Settlement Agreement expressly prohibits class counsel from asking that their fees be fixed as a percentage of the settlement amount. Nevertheless, it remains a valid basis for comparison purposes. The fees sought in the Transfused Action represent 2.36% of the portion of the Settlement apportionable to the Ontario national class victims. The work in the Hemophiliac Action was for the benefit of all Hemophiliacs. The fees sought in the Hemophiliac Action equate to 3.33% of the total amount of the Settlement apportionable to the Hemophiliac class members. On this basis, the fees, although large, are more than reasonable.

65 Secondly, the fee should be tested as a multiple of the base fees docketed by class counsel. On this basis, the fees sought are consistent with the suggested range set out in Gagne for "the most deserving case". I note that the calculation is made more complex by the fact that class counsel continued to do work necessary to ensure the implementation of the settlement after the date of the expiry of the period for appeal of the approval. The Settlement Agreement contemplates that additional fees will be paid to counsel for certain administrative work, over and above the class counsel fee, at an hourly rate. However, as stated above, an important consideration in measuring the result achieved is whether or not the job is complete. Accordingly, it is my view that the work that has been performed to date was properly required of class counsel to ensure that the settlement was implemented. Counsel have valued the additional work at approximately $675,000 for counsel in the Transfused Action and $148,000 for counsel in the Hemophiliac Action from the end of the appeal period on January 22, 2000 to May 14, 2000. They have made a written submission to the court that their work as class counsel was completed on May 14, 2000. I cannot accede to this

submission. While the administration is functional and claims are now being received, processed and paid, some details must still be completed. Thus, there will be no further compensation to counsel for any additional time spent in attending to these matters. The premium fee being sought in these actions is being sought on the basis of a "job well done". The court will not approve an additional fee for this work, or any additional work remaining to be done in order to complete the implementation of the settlement and its administration.

66 Without considering the value of the "additional work", the lump sum fees constitute a multiplier of 3.57 in the Transfused Action and 4.29 in the Hemophiliac Action. When the fees for this additional work are included however, the multipliers are 3.07 and 3.80 respectively. For the Hemophiliac Action, the base fee and multiplier approach yields a figure at the high end of the range set out in Gagne, but the result obtained for the Hemophiliac class members justifies such an award. The qualifying threshold negotiated by class counsel eliminates a potentially insurmountable burden of proof that those class members would otherwise have faced.

67 Thirdly, the fees may also be measured by the expectation of the representative plaintiff as evidenced by the retainer agreement. Here, unlike the usual case, the specific amount of the fees were agreed to by reasonably informed representative plaintiffs. Moreover, the retainer agreements executed by the representative plaintiffs are a marked improvement over the individual fee agreements signed by the class members in Quebec and British Columbia.

68 The fee must also provide a sufficient economic incentive to attract counsel to cases of a similar nature in the future. The words of Goudge J.A. bear repeating. As he stated in Gagne at 422-23:

> 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 fulfil its promise, that opportunity must not be a false hope. (Emphasis added.)

In the present circumstances, given the difficulty in securing counsel for the classes, let alone the experienced counsel that were ultimately retained, the incentive of a reasonable premium was necessary to ensure that these victims had counsel of the highest calibre without the benefit of whom this settlement could not have been achieved. The lump sum fees set out in the retainer agreements meet this test.

69 Additionally, the fees compare favourably with the fees awarded in other major class proceedings in Canada as shown by the following chart:

Action	Total Class Recovery	Class Percentage Counsel of Fees Recovery	Further Legal Fees Anticipated

			to be Incurred by Class Members
Harrington v. Dow Corning Corp. [1999] B.C.J. No. 320 (S.C.) (Quicklaw)	$40,000,000	$6,000,000	15%	Yes
Doyer v. Dow Corning Corp. (Sept. 1, 1999), 500-06-000013-834 Superior Court of Quebec, Tingley J.S.C.	$52,000,000	$10,400,000	20%	Yes
Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523 (Gen. Div.)	$23,140,000	$6,000,000	26%	Yes
Pelletier v. Baxter Health Care Corp.*, [1999] Q.J. No. 3038 (S.C.) (Quicklaw)	$21,525,000	$3,648,000	16.9%	Yes

* combined with Jones v. Baxter Health

Care Corp. in Ontario

70 Finally, the fees, as set out in the retainer agreements, if approved, will not impair the sufficiency of the Trust Fund established to provide the benefits to the class members. The actuarial report prepared by Eckler and Partners specifically addresses this issue.

71 These class proceedings have been described throughout as the largest personal injury case in Canadian legal history. The global settlement amounts to over $1.5 billion dollars when all benefits are included. The settlement is Pan-Canadian in scope. The defendants include all of the federal, provincial and territorial governments in Canada. The prime defendant, CRCS, is under court protection pursuant to the CCAA. The benefits are to be paid out of Trust Fund established for the class members rather than out of the general revenue accounts of the governments. The nature of the benefits provided through the settlement is imaginative and incorporates some of the innovative measures regarding compensation in personal injury lawsuits that courts have been advocating for over 20 years.

72 The logistics of the litigation must also be considered. It took almost three years to find lawyers willing to undertake the case because of the size and complexity. The investment required of class counsel, and the inherent risk of non-recovery, were daunting. Over 60 lawyers and legal staff were involved in bringing this litigation to a successful conclusion. Neither the governments nor the intervenors challenged the number of people or the hours required of those people to finalize the settlement.

73 The evidence of class counsel regarding the negotiations was accepted. Indeed, the government defendants echoed the evidence of class counsel in their own submissions on the earlier motion for settlement approval. It was common ground that class counsel did an excellent job. There was unanimity as to the quality of the settlement. Further, in so far as there were arbitrary points of contention raised on this motion, the evidence of class counsel on those points stands unchallenged and uncontradicted. Simply put, neither the intervenors nor the government defendants have put forward any principled or evidentiary basis for reducing the proposed counsel fees. Accordingly, I cannot accept their submissions; that the fees specified in the retainer agreements should be reduced.

74 To look back with the clarity of hindsight and re-evaluate the relevant factors in light of subsequent events when fixing fees is unfair. A court must, as best as it is able, consider the elements of the litigation as they would have appeared to the parties at the material times. To do otherwise would be inconsistent with the underlying policy of the CPA. Here, the fees sought as agreed to by the representative plaintiffs are large but so were the lawsuits and the settlement. The Settlement Agreement evidences that the size of the fee was anticipated by the governments who now object. As Goudge J.A. stated, the opportunity for class counsel to receive a premium for taking on difficult litigation and doing it well must not be "a false hope". It is an essential ingredient of the CPA that counsel be provided with a significant incentive to take on meritorious class

proceedings. This means that premium fee awards must reflect the reality of the risk and the success of the efforts of class counsel in a meaningful way. Without this, injured parties will be denied the services of the most experienced counsel.

75 This litigation was of the most difficult kind on a number of fronts. It epitomized risk as that term is used in the context of fee awards under the CPA. It is questionable whether any single member of the class would have had the financial resources to prosecute a lawsuit to a successful conclusion in consideration of the scope, the factual complexity of such a case, the myriad of legal issues that would have arisen and the countless years that such litigation would consume. In contrast, this settlement provides class members with access to immediate benefits without any further legal impediments to their claims. Given the risk undertaken and result achieved by class counsel in this litigation, the lump sum fees contemplated in the retainer agreements are "fair and reasonable".

76 Accordingly, the retainer agreements in the Transfused and the Hemophiliac Actions are approved. The lump sum fees set out therein are also approved and fixed. Counsel may attend before me to address the matter of disbursements. The final order will address the outstanding work to be done by class counsel.

77 In light of the magnitude of these Actions, and the issues involved, the court permitted and indeed, encouraged submissions from persons with a stake, in one form or another, in the litigation. The fees submitted by counsel for these stakeholders, identified variously as intervenors and friends of the court, are also approved.

WINKLER J.

CITATION: Sayers v. Shaw CablesystemsLimited ., 2011 ONSC 962
COURT FILE NO.: 04-CV-276846CP
DATE: February 10, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Trevor Sayers and Victor Miranda

Plaintiffs

- and -

Shaw Cablesystems Limited and Shaw Communications Inc.

Defendants

Proceedings under the *Class Proceedings Act, 1992*

COUNSEL:

- Malcolm N. Ruby for the Plaintiffs
- M. Paul Michell for the Defendants

HEARING DATE: February 10, 2011

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] Trevor Sayers and Victor Miranda move to certify this action as a class proceeding against the Defendants Shaw Cablesystems Limited and Shaw Communications Inc. They also request the court's approval of a settlement and the agreement with counsel respecting fees and disbursements.

[2] For the Reasons that follow, I grant the relief requested.

B. Factual Background

[3] Between 1997 and 2000, Mr. Sayers and Mr. Miranda installed cable and internet services for the customers of Shaw Cablesystems Limited and Shaw Communications ("Shaw") under an "Owner-Operator Agreement." Under the agreements, Messrs. Sayers and Miranda, were described as independent contractors. During this period, Messrs. Sayers and Miranda were part of a group of contractors working for Shaw under the Owner-Operator Agreement.

[4] On the understanding that the Owner-Operator Agreement did not create an employment relationship, Shaw did not deduct or submit Canada Pension Plan ("CPP") or Employment Insurance ("EI") payments or make source deductions for income tax for the group of contractors. Messrs. Sayers and Miranda and the other contractors filed tax returns and claimed deductions on the understanding that they were earning income as independent business persons.

[5] In or about 2000, the Minister of National Revenue ruled that class members were Shaw employees and not independent contractors. As a result, the Minister determined that Shaw was required to remit CPP and EI payments on their behalf. The Ministry of National Revenue also advised some of the contractors that deductions claimed for business expenses on tax returns filed for the years between 1997 and 1999 would not be allowed.

[6] Shaw appealed the Minister's ruling to the Tax Court of Canada, but the appeal was dismissed on June 13, 2002. A further appeal to the Federal Court of Appeal was dismissed on April 1, 2003.

[7] Several of the contractors, including Mr. Miranda, objected to the disallowance of the business expenses as deductions. Ultimately, Mr. Miranda received a Notice of Reassessment indicating that he owed $26,760.44.

[8] In September 2004, Mr. Sayers commenced a proposed class action against Shaw. He alleged negligence, breach of implied terms of contract, and negligent misrepresentation. He alleged that Shaw owed the contractors a duty to properly characterize the relationship under the Owner-Operator Agreement and, having failed in that duty, must compensate the contractors for foreseeable damages suffered, including the amount of unanticipated additional tax liability. A claim was also made for the contractors' statutory benefits such as vacation pay.

[9] The proposed class comprises 106 individuals. The proposed class definition is:

> *All persons who entered into Owner-Operator Agreements with Shaw relating to the sale or installation of its cable television and/or Internet services that were found by the Tax Court of Canada to create employment rather than independent contractor relationships.*

[10] The proposed common questions are:

(a) Did Shaw owe a duty to class members who signed Owner-Operator Agreements to ensure that the agreements created independent contractor, rather than employment, relationships? If so, did Shaw breach its duty?

(b) Was Shaw negligent in representing to class members, in the Owner-Operator Agreements, that the agreements gave rise to independent contractor relationships when in law they gave rise to employment relationships?

(c) Did Shaw owe class members a duty to warn that the Owner-Operator Agreements may give rise to employment, rather than independent contractor relationships and did Shaw breach that duty?

(d) Did Shaw breach the terms of its contracts with class members by failing to create an independent contractor, rather than an employment, relationship?

(e) Did the Owner-Operator Agreements contain an implied contractual term that Shaw would pay business income, rather than employment income, from which class members would be entitled to deduct business expenses?

(f) Is Shaw liable to compensate class members for any amounts for which they were re-assessed by the CRA based on their status as employees rather than independent contractors?

(g) Is Shaw liable to compensate class members for any amounts that were ordinarily payable to them as employees, including time spent in training, statutory overtime pay, vacation pay, termination pay, or severance benefits?

(h) Is Shaw liable to class members for punitive damages?

[11] Shaw denied liability and resisted certification. Shaw's position was that the class members voluntarily entered into the Agreement and accepted responsibility for their own tax liability. Shaw's position was that the action was not suitable for certification because each contractor's tax situation is an individual issue.

[12] The affidavit of Ms. Bashnick delivered in response to the motion for certification indicates that Shaw suggests that those class members who were reassessed failed to mitigate their damages by obtaining and filing CRA T2200 forms that would have permitted at least some "business" expenses, "including motor vehicle expenses and supplies", to be deducted from employment income. Ms. Bashnick also takes the position that some class members were reassessed for reasons other than the independent contractor/employment distinction because they claimed deductions for "personal and living expenses" that "would not have been deductible even if the CRA had considered the owner-operators to be independent contractors."

[13] The action moved towards a certification hearing, but after the exchange of certification materials, the parties began settlement discussions. The negotiations were intense and adversarial. Messrs. Sayers and Miranda were represented by Malcolm N. Ruby of Gowling Lafleur Henderson, who is an experienced counsel with expertise in class action litigation. Shaw was represented by Charles Scott and M. Paul Michell of Lax O'Sullivan Scott Lisus LLP, both experienced litigation lawyers.

[14] In advancing the case for the contractors, a major challenge for proposed class counsel was obtaining details of the tax situations of the various members of the proposed class. Letters were sent out to the contractors whose addresses were known. A private investigator was hired to locate contact information for other contractors.

[15] In the settlement negotiations, Messrs. Sayers and Miranda, were disadvantaged by the factor that even if success was achieved on a contested certification motion, the chances of recovering from Shaw on the merits of the claim were uncertain and would involve substantial time and expense. Uncertainty arises, among other reasons, from the novelty of the negligence claim and the possibility that the claims based on statutory entitlements were statute-barred. In

addition, assuming the case went to individual issue trials, there were significant mitigation issues.

[16] Between April and October 2010, the parties, through their counsel, arrived at a settlement. The Defendants do not admit liability. The settlement involves consent certification, creation of three funds, and a claims process.

C. ***Details of the Settlement***

[17] Details of the settlement are as follows:

- A fund of $137,800 is created for fixed payments of $1,300 (less legal fees and costs) to all class members for vacation pay and other statutory entitlements. To qualify for a payment, a class member must submit a claim stating that he or she entered into an Owner-Operator Agreement between 1997 and 1999 and provided services under the Agreement to Shaw clients during that period.

- A fund of $200,000 is created for payments (less legal fees and costs) to those class members who were reassessed by the CRA for additional income taxes based on misclassification as independent contractors rather than employees. To qualify for a payment, a class member must (a) show that he or she was reassessed by the CRA for any taxation year between 1997 and 1999 in an amount greater than $2,250, and (b) submit a properly documented claim demonstrating that his or her reassessment by CRA was attributable to being classified as an independent contractor rather than employee.

- Unclaimed amounts from the statutory benefits fund will be allocated to the income tax payments fund.

- Counsel for the parties will administer all claims. They may obtain, if necessary, the assistance of a small business tax accountant, David Gellman, C.A, to deal with individual claims.

- If a disagreement arises as to whether a particular claim qualifies for payment, the claim will be submitted to a neutral claims officer for resolution. If, at the conclusion of the claims process, there are any unclaimed monies, the monies will revert to Shaw.

- A fund of $50,000 is created for legal fees and disbursements required to obtain settlement approval and for claims administration.

- The Settlement Agreement provides for a claims bar date of 90 days from the date of settlement approval or until May 2, 2011.

- The opt-out period for all class members is May 2, 2011.

[18] Messrs. Sayers and Mirandas' counsel recommended the settlement because it provided a small payment to all class members and a potentially significant payment to class members who were reassessed by the CRA and who can demonstrate that the reassessment was for

unanticipated tax liability relating to disallowance of business deductions. Messrs. Miranda and Sayers have accepted counsel's recommendation to seek approval of the settlement.

D. Notification of the Proposed Settlement

[19] On November 8, 2010, the court approved a notice informing class members that a settlement approval hearing would take place on February 10, 2011.

[20] The November Notice appended claim forms. Class members were encouraged to fill out and return the forms by December 31, 2010 because, in the words of the notice, "the number of forms received and the amounts claimed by class members [would] assist the court in determining whether the proposed settlement is fair, reasonable, and in the best interests of the class." The Notice also appended opt-out forms for those class members who did not wish to participate in the class proceeding and/or the proposed settlement.

[21] Subsequently, letters were prepared and sent to each class member (including those located by the investigator) containing copies of the notice and claim/opt out forms. To date, 30 claim forms have been received. The total value of known reassessment claims is now $356,817.44.

[22] No objections to the settlement have been received.

E. Certification

[23] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[24] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16; *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 (S.C.J.) at para. 8; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9.

[25] I am satisfied that for settlement purposes, all the criterion for certification have been satisfied in the case at bar. I, therefore, certify this application as a class proceeding pursuant to the *Class Proceedings Act, 1992*.

F. Settlement Approval

[26] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[27] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[28] When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (i) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998, [1998] S.C.C.A. No. 372; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[29] In my opinion, the settlement in this case is fair, reasonable, and in the best interests of the Class Members.

G. Fee Approval

[30] Mr. Sayers entered into a Class Action Retainer Agreement in August 2004. The Fee Agreement provides, among other things, that Gowlings will be paid 30% of any settlement recovered on behalf of the class.

[31] Lawyers, students, and paralegals have docketed about 320 hours on the file since it was opened in March 2004. If billed at normal hourly rates, the current value of the accumulated fees, disbursements and taxes would be about $155,000.

[32] The disbursements are currently $3,245.41 and applicable taxes are $9,707.70. The total disbursements will likely increase to cover the costs of a chartered accountant, David Gellman C.A., who will be retained by Gowlings to review all reassessment information provided by class members in support of their claims.

[33] Under the terms of the settlement, assuming all funds are paid to class members, Gowlings will recover 30% of $337,800 ($137,800 + $200,000) or about $101,340 plus $50,000 for a total of $151,340 for fees, disbursements, and all applicable taxes to cover services rendered until all claims are processed and/or adjudicated.

[34] The total settlement amount, taking into account all taxes, fees and disbursements incurred to date, and fees and disbursements anticipated to complete the settlement (including a

chartered accountant), is less than the actual value of Gowlings' fees and disbursements to date without any fee or premium and would represent a substantial but not full, indemnity award.

[35] 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: *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Smith v. National Money Mart,* [2010] O.J. No. 873 (S.C.J) at paras. 19-20.

[36] Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee which may include a premium for the risk undertaken and the result achieved, but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the Class Members as a whole: *Smith v. National Money Mart, supra*, at para. 22.

[37] 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: *Smith v. National Money Mart, supra*, at para. 23.

[38] 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: *Smith v. National Money Mart, supra*, at paras. 19-20.

[39] In my opinion, class counsel's fee should be approved. Gowling, LaFleuer Henderson LLP expended considerable time over a six-year period without any guarantee of payment. The case called for ingenuity and creativity in negotiating a settlement that would provide a payment for every class member and a potentially significant contribution toward the reassessed tax liability of others. While the recovery is only partial, it is doubtful any recovery at all would have been possible but for the lawyers' willingness to assist the class. If the lawyers were not paid a substantial portion of their actual time, there would be no incentive to take on this type of proceeding.

[40] I approve the counsel fee. I believe that the lawyers have earned their fee. The fee is fair and reasonable compensation in all the circumstances.

H. Conclusion

[41] For the above Reasons, I certify this action as a class proceeding, approve the settlement, and approve the counsel fee.

Perell, J.

Released: February 10, 2011

CITATION: Sayers v. Shaw CablesystemsLimited ., 2011 ONSC 962
COURT FILE NO.: 04-CV-276846CP
DATE: February 10, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Trevor Sayers and Victor Miranda

Plaintiffs

- and -

Shaw Cablesystems Limited and Shaw Communications Inc.

Defendants

REASONS FOR DECISION

Perell, J.

Released: February 10, 2011

Indexed as:

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

41 O.R. (3d) 417

167 D.L.R. (4th) 325

113 O.A.C. 299

39 C.C.E.L. (2d) 253

27 C.P.C. (4th) 114

83 A.C.W.S. (3d) 125

1998 CarswellOnt 4045

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 product 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 conducted 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 degree 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.

Indexed as:

Endean v. Canadian Red Cross Society

Between
Anita Endean, as representative plaintiff, plaintiff, and
The Canadian Red Cross Society, Her Majesty the Queen in Right of British Columbia, and the Attorney General of Canada, defendants, and
Prince George Regional Hospital, Dr. William Galliford, Dr. Robert Hart Dykes, Dr. Peter Houghton, Dr. John Doe, Her Majesty the Queen in Right of Canada, and Her Majesty the Queen in Right of the Province of British Columbia, third parties
(Vancouver Registry No. C965349)
And between
Christopher Forrest Mitchell, plaintiff, and
The Canadian Red Cross Society, the Attorney General of Canada, and Her Majesty the Queen in Right of the Province of British Columbia, defendants
(Vancouver Registry No. A981187)

[2000] B.C.J. No. 1254

2000 BCSC 971

[2000] 8 W.W.R. 294

78 B.C.L.R. (3d) 28

45 C.P.C. (4th) 39

97 A.C.W.S. (3d) 550

Vancouver Registry Nos. C965349 and A981187

British Columbia Supreme Court
Vancouver, British Columbia

K.J. Smith J.

Heard: December 8 - 10, 1999 and January 18 - 20, 2000.
Judgment: June 22, 2000.

(103 paras.)

Barristers and solicitors -- Compensation -- Agreements, contingent fees -- Review and approval -- Calculation of (incl. multiplier) -- Measure of compensation -- Class actions.

Application by lawyers in a class action for court approval of their fees. The lawyers represented British Columbia claimants in a national action against the Canadian Red Cross. The claimants formed two groups, the Endean group and the Mitchell group. The Endean group comprised British Columbia hemophiliacs who contracted hepatitis C because of Red Cross practices. The Mitchell group comprised others in the province who contracted the disease by transfusion. Nationally, lawyers reached a settlement totalling $1.6 billion, with legal costs to be paid out of the trust fund established to handle the award. The parties agreed that legal fees were not to exceed $52.5 million. All lawyers involved across Canada agreed to a global fee of $45 million for the Endean-type claimants and $7.5 million for the Mitchell-type. The Endean lawyers themselves sought $15 million plus disbursements and the Mitchell lawyers sought $500,000. The lawyers had engaged in extremely complex litigation as well as research into medical topics and public health care. One of the Endean lawyers was the first in the country to achieve certification of a class in the action, energizing the litigation nationally. He also served on a committee overseeing the structuring of the compensation. The Endean group's fee request amounted to a multiplier of 3.75. The multiplier for the Mitchell lawyers' request, on a somewhat more favourable result per claimant, was 5.5, although the Mitchell lawyers agreed that the bulk of the work on their case had been performed in Ontario.

HELD: Application allowed. Fees were approved as requested. Concerning the Endean group, counsel went far beyond the scope of services usually rendered by lawyers. They devoted a large percentage of their time to the case and turned down other retainers because of it. The litigation was highly complex and important, involving the largest settlement of a personal injury claim in Canadian history. Counsel were of high standing, acting for claimants who could not otherwise have paid for their services. They achieved excellent results against substantial risk of no recovery. Contingent fees were meant to reflect the risks involved, and British Columbia counsel sought reasonable fees commensurate with their participation in the result. Their requested fee represented only 4.26 per cent of the recovery. Many of the same considerations applied to the Mitchell group's counsel, whose requested fee represented only three percent of the result achieved for 11 per cent of the claimants nationally.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 8-4(2).

Class Proceedings Act, s. 38.

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Infants Act, R.S.B.C. 1996, c. 223.

Law Society of British Columbia Rules, Rule 8.

Legal Profession Act, S.B.C. 1998, c. 9, ss. 66(2), 68(2), 68(6).

Counsel:

J.J. Camp, Q.C., David P. Church, Sharon D. Matthews and Bruce W. Lemer, for the plaintiff, Anita Endean.
Marvin R.V. Storrow, Q.C., and David E. Gruber, for the plaintiff, Christopher Forrest Mitchell.
Gordon Turriff, D. Clifton Prowse and Keith Johnston, for the defendant/third party, Her Majesty the Queen in Right of the Province of British Columbia.
Gordon Turriff and John R. Haig, Q.C., for the defendant, the Attorney General of Canada and the third party, Her Majesty the Queen in Right of Canada.

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1 **K.J. SMITH J.**:-- This application raises the question of the proper approach to the compensating of plaintiffs' counsel in class actions brought in British Columbia.

I. INTRODUCTION

2 These are two of six parallel lawsuits commenced in British Columbia, Quebec, and Ontario on behalf of residents of Canada infected directly and secondarily with Hepatitis C virus ("HCV") by the Canadian blood supply between January 1, 1986, and July 1, 1990. The Endean action concerns those British Columbia residents whose claims result from transfusion and the Mitchell action deals with infected haemophilic residents of the province. The background of these actions is described in Endean v. Canadian Red Cross Society (1997), 148 D.L.R. (4th) 158, [1997] 10 W.W.R. 752, 36 B.C.L.R. (3d) 350, 37 C.C.L.T. (2d) 242, 11 C.P.C. (4th) 368, rev'd in part (1998), 157 D.L.R. (4th) 465, [1998] 9 W.W.R. 136, 106 B.C.A.C. 73, 48 B.C.L.R. (3d) 90, 42 C.C.L.T. 222 (C.A.), leave to appeal granted, [1998] S.C.C.A. No. 260 (S.C.C.) ("Endean No. 1"), wherein I certified the Endean action as a class proceeding pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50.

3 A settlement was ultimately reached between the plaintiffs and the Federal, Provincial, and Territorial Governments (the "FPT Governments") in one pan-Canadian negotiation and was approved by orders granted in each of the British Columbia Supreme Court, the Ontario Superior Court of Justice, and the Quebec Superior Court. The terms of the settlement and the reasons for

approval are described in my decision in Endean v. Canadian Red Cross Society (1999), [2000] 1 W.W.R. 688, 68 B.C.L.R. (3d) 350, the decision of Winkler J. in Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (S.C.J.), and the decision of Morneau J. in Honhon c. Canada (Procureur général), [1999] J.Q. no 4370 (S.C.).

4 The settlement agreement requires the FPT Governments to pay monies into a trust fund to be invested and managed for the benefit of the class plaintiffs. Payment of fees to class counsel is provided for in clause 13.03 of the agreement as follows:

> The fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel will be paid out of the Trust. Fees will be fixed by the Court in each Class Action on the basis of a lump sum, hourly rate, hourly rate increased by a multiplier or otherwise, but not on the basis of a percentage of the Settlement Amount.

Although it was not spelled out in the formal agreement, the parties agreed, as well, that the fees as approved by the courts shall not exceed $52,500,000 in total.

5 Counsel for the plaintiffs have agreed among themselves to seek approval of fees of $7,500,000 for those representing the haemophilic classes and $45,000,000 for those representing the transfused classes. Mr. Camp and Mr. Lemer, counsel for Ms. Endean and the class she represents, seek approval of a fee of $15,000,000 plus disbursements. From their fee, they will pay the fees of several other lawyers who acted for particular members of the British Columbia transfused class. Mr. Storrow, counsel for the plaintiffs in the Mitchell action, seeks approval of a fee of $500,000 plus disbursements. Each of the applicants has a contingent-fee contract with his representative plaintiff providing for payment of a lump-sum fee in the amount claimed and disbursements.

II. THE LAW

1. The Class Proceedings Act

6 The applications are brought pursuant to s. 38 of the Class Proceedings Act, which provides, in relevant part, as follows:

> 38. (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must
>
> (a) state the terms under which fees and disbursements are to be paid,
> (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and
> (c) state the method by which payment is to be made, whether by lump

sum or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.

. . .

(7) 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 an inquiry, assessment or accounting under the Rules of Court to determine the amount owing,
(c) direct that the amount owing be determined in any other manner, or
(d) make any other or further order it considers appropriate.

7 The agreements in question satisfy the requirements of s-s. 38(1). The issue is whether they should be approved pursuant to s-s. 38(2) and, if not, what disposition should be made pursuant to s-s. 38(7).

8 The Class Proceedings Act provides no guidance as to how the court should approach the approval. Accordingly, the statutory and common law of general application in respect of solicitors' fees must apply. I will return to this aspect of the discussion after considering the approach proposed by Mr. Turriff on behalf of the FPT Governments.

2. The approach proposed by the FPT Governments

9 I preface these comments by observing that I requested the assistance on this application of counsel for the FPT Governments. In my view, they are in a uniquely advantageous position to comment on the litigation risks run by plaintiffs' counsel and on the value of the contributions made by them to the ultimate settlement, which are the two issues upon which Mr. Turriff focussed his submissions. However, Mr. Turriff did not put before me any evidence of the opinions or observations of Messrs. Whitehall, Haig, or Prowse, who carried these actions for the FPT Governments and negotiated the settlement with plaintiffs' counsel. That is unfortunate, as I remain of the view that their opinions would have been helpful.

10 Mr. Turriff suggested a method of assessing lawyers' fees based on an approach that has been used in Ontario and in the United States, known in those jurisdictions respectively as the "base-fee/multiplier" approach and the "lodestar/multiplier" approach. In Mr. Turriff's submission, this method is grounded in economic theory and is a rational and scientific approach to the assessment of lawyers' fees. He contrasted this with the traditional approach in British Columbia, which he characterized as based on "intuition and impression."

11 As the multiplier method has a history in Ontario and in the United States, I will first consider

the situation in those jurisdictions.

12 The Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6, provides, in s-s. 33(1), that lawyers for a representative plaintiff may enter into fee agreements providing for payment of fees only in the event of success. Sub-sections 33(3) to (8) provide for the multiplier approach advocated by Mr. Turriff. "Base fee" is defined in s-s. (3) as the product of the total number of hours worked by the solicitor and an hourly rate, and "multiplier" is defined as a multiple to be applied to the base fee. Sub-sections (4) through (8) enact that the solicitor may apply to have his or her fees increased by a multiplier and that, on such an application, the court must determine a "reasonable" base fee and may then apply a multiplier that "results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding."

13 However, contingent fees derived other than from a base fee/multiplier are not prohibited in class actions in Ontario: see Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523 (Gen. Div.) and Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83 (Gen. Div.). In the latter decision, Winkler J. approved a percentage contingent fee and observed, at p. 88, that percentage contingent fees may be desirable to promote the policy objective of judicial economy in that they encourage efficiency in the litigation and discourage unnecessary work that might otherwise be done by the lawyer simply in order to increase the base fee.

14 Mr. Justice Winkler's observation has support in the American experience, which is discussed in the decision of the United States Court of Appeals, District of Columbia Circuit, in Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993). In that case, the Court observed, at pp. 1265-66, that the percentage-of-the-fund method of calculating fees was the most common approach in the United States until 1973. The rationale underlying this method is that plaintiffs' attorneys who create a common fund for a class of individuals should be paid a reasonable fee from the fund as a whole in order to avoid the unjust enrichment of class members who would not otherwise contribute to the legal costs [p. 1265].

15 The Court recounted that, in Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), the Third Circuit introduced the "lodestar/multiplier" approach in reaction to a perception that percentage fees sometimes resulted in large fee awards. The lodestar, like the base fee in Ontario, is the product of the hours reasonably spent and a reasonable hourly rate. Under this approach, the lodestar is to be adjusted upward or downward by a multiplier to reflect such factors as the contingency nature of the case and the quality of the lawyers' work.

16 The Court went on to explain, at p. 1266, that the lodestar approach gained predominance in the United States until the Third Circuit appointed a task force to compare the respective merits of the two approaches. The task-force report described the lodestar method as a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues

the Bench and Bar." The report enumerated several criticisms of the lodestar approach, which are summarized at pp. 1266-67 as follows:

> 1) it "increases the workload of 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 engag[ing] in duplicative and unjustified work, inflat[ing] their 'normal' billing rate[s], and includ[ing] fictitious hours"; 6) it "creates a disincentive for the early settlement of cases"; 7) it "does not provide the district 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 example, the "lodestar" is set lower in civil rights cases than in securities and antitrust cases; and 9) despite the apparent simplicity of the lodestar approach, "considerable confusion and lack of predictability remain in its administration."

17 The task force concluded, as is set out at p. 1267, that the lodestar approach should be retained in "statutory fee" cases but that the percentage fee was the best approach for "common fund" cases. This distinction is significant for the present analysis, and is explained in In Re Prudential Ins. Co. of America Sales Litigation, 148 F.3d 283 (3d Cir. 1998) at p. 333:

> ... The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund "in a manner that rewards counsel for success and penalizes it for failure." ... The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation.... It may also be applied in cases where the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method....

Clearly, the actions presently under consideration are analogous to the common fund cases in the American jurisprudence.

18 Class actions are new to British Columbia: the Class Proceedings Act was enacted in 1995 and the Ontario Class Proceedings Act, 1992, from which it drew heavily, was enacted in 1992. In M.

Eiezenga, M. Peerless, and C. Wright, Class Actions Law and Practice (Markham: Butterworths, 1999) at s. 1.12, p. 1.4, the authors noted that class actions for damages first became available in the United States in 1938 and observed:

> The American experience is thus more mature than its newer Canadian counterpart and was available as relevant background for Canadian legislators to draw upon.

Accordingly, there is much to be learned from the long experience of American courts with the methods of compensating successful class counsel, and the cases that I have just mentioned provide a valuable context in which to view the issue presently up for decision.

19 I reject Mr. Turriff's submission that the base-fee/multiplier approach should be imported into British Columbia as the method of assessing the fees of plaintiffs' class counsel pursuant to s. 38 of the Class Proceedings Act. The deficiencies in this methodology were identified by the Third Circuit task-force report, supra, and its introduction into our jurisprudence is undesirable and unnecessary. Its role should be confined to serving in appropriate circumstances as a tool for testing the court's initial assessment.

20 One of the disadvantages inherent in the multiplier approach is exemplified in this case, where Mr. Turriff applied for an order compelling production for his inspection of all plaintiffs' files and plaintiffs' counsels' billing records in the transfusion action and for leave to cross-examine Mr. Camp on his affidavit. I reserved judgment on the application to cross-examine Mr. Camp, and I will come to that shortly. I dismissed the application for production of records because it would have constituted an unwarranted invasion by the defendants of the plaintiffs' solicitor-client privilege and, as well, because it was unnecessary.

21 I reiterate the opinion that I expressed in that oral ruling that the review of fees pursuant to s. 38 of the Class Proceedings Act is similar to the review of fees in an infant settlement conducted pursuant to the Infants Act, R.S.B.C. 1996, c. 223, and that the approach should therefore be similar. I referred to Harrington (Guardian ad litem of) v. Royal Inland Hospital (1995), 131 D.L.R. (4th) 15, 69 B.C.A.C. 1, 14 B.C.L.R. (3d) 201, 45 C.P.C. (3d) 105 (C.A.) and, in particular to the remarks of Finch J.A. at para. 253 to the effect that, except in unusual cases, it is not necessary to examine the lawyers' files and accounting records. In that case, the solicitor obtained approval of his fee from a judge of this Court after another judge had adjourned his initial application and requested further submissions. When this anomaly came to light, the second judge revoked her approval and the first judge embarked on an examination of the solicitors' files from which he concluded that the solicitor had grossly exaggerated the amount of time that he had claimed to have spent on the matter.

22 There has been no suggestion of any conduct of that sort here, and I remain of the opinion that the type of discovery sought by Mr. Turriff is not appropriate in this context. The course that Mr. Turriff was set upon would have resulted in a separate, lengthy, and complex proceeding to assess

the reasonableness of the proposed fees and would set a precedent that is neither necessary nor contemplated by s. 38 of the Act.

23 As well, I give no weight to the evidence of the economist, Mr. Ross, which was offered by Mr. Turriff as expert opinion on, as Mr. Ross described it in his written report:

> ... the appropriate framework for determining the amount, if any, that should be added to what would otherwise be a reasonable market value fee for professional legal services provided by plaintiffs' counsel to ensure an economic incentive for competent lawyers to take on class action contingency work that should be taken forward.

24 Mr. Ross advocated formulae for the mathematical calculation of fees. They involved, at the first stage, an "earnings equivalent multiplier" to be used to calculate the base fee using "judgmental probability", that is, the probability that the action will succeed. At the second stage, a "risk aversion multiplier" was offered to measure such things as the particular lawyer's risk of erratic long-term income resulting from a series of unsuccessful contingency cases. The proper fee in any given case, according to Mr. Ross, is the result produced by the following formula:

> REASONABLE FEE = Reasonable hours worked X reasonable hourly rates X (earnings equivalent multiplier X risk aversion multiplier)

where the multipliers change as the risks change from time to time throughout the retainer.

25 The chance of success in a given lawsuit and the risks to be run by an individual lawyer in taking it involve a myriad of objective factors and many quintessentially subjective considerations. These chances and risks are incapable of scientific calculation. The proposal advanced by Mr. Ross gives the impression of mathematical precision but, at its heart, is no less arbitrary and subjective than the approach conventionally followed by the courts of this province. The economic opinion evidence is, therefore, not helpful.

26 As I understand Mr. Turriff's submission, his application to cross-examine Mr. Camp on his affidavit is not based on the usual ground that Mr. Camp's assertions of fact were put in issue by contrary evidence from Mr. Turriff's clients. There was no such evidence. Rather, he wished to investigate Mr. Camp's actions and state of mind at various times throughout his retainer for the purpose of establishing a factual basis for the application of the formula offered by Mr. Ross. As I have rejected the formula, there is no need for the cross-examination. Moreover, any attempt to quantify changes in litigation risk as events transpired would likely be futile and would consume an unwarranted amount of time. Accordingly, the application to cross-examine Mr. Camp is dismissed.

27 Mr. Turriff's submissions on the effects of changing risks deserve comment. He identified a number of events that he characterized as "risk-reducing." All of them, but one, related to the evolving settlement agreement. It is true that the parties were moved along the path to settlement by

such things as the publication in November 1997 of the Final Report of the Commission of Inquiry on the Blood System in Canada (the "Krever report") and the announcement in March 1998 by the FPT Governments of the availability of $1,100,000,000 to settle these actions. However, I cannot accept that these events reduced the risk of failure of the negotiations in any real or measurable way. The risk of failure continued to hinge on a multitude of factors any one of which could have aborted the negotiations, a danger that continued even after the settlement had received court approval.

28 The other "risk-reducing" factor identified by Mr. Turriff was the certification of the Endean action. However, it would be wrong to treat counsel's success on this application as justification for reducing the contingent fee on the theory that the skill and effort of counsel have made a successful result more probable. At the outset of the retainer, counsel and clients knew that the enterprise would fail if certification were denied. The chance of success or failure at this stage was therefore a factor in the percentage fee initially agreed upon and, as well, by reason of the settlement agreement, in the lump sum fee that was later substituted for it. It would be wrong to use hindsight to give different weight to that risk than the lawyers and clients gave to it at the outset.

2. The proper approach to assessing reasonableness

29 Mr. Turriff began his submission with the proposition that the courts of Quebec, Ontario, and British Columbia must consider and weigh the evidence presented in all jurisdictions in order to ensure "that no lawyer in any of the three jurisdictions becomes entitled to a fee which does not accurately reflect his or her relative contribution towards the pan-Canadian settlement agreement." In his submission, there is a possibility for conflicting judgments in this respect that, he contends, would impair the integrity of all three awards and would undermine the legitimacy of all three courts.

30 I agree that gross inconsistency between the fee awards in the three provinces should be avoided if possible. On the other hand, it cannot be forgotten that each province has its own laws and traditions in respect of solicitors' fees. I must act on the evidence presented in this Court and I must apply the laws of British Columbia to arrive at my decision. However, in doing so, I must have appropriate regard to the national context in which the legal actions have been resolved.

31 Section 66 of the Legal Profession Act, S.B.C. 1998, c. 9 governs contingent fee agreements. Sub-section 66(2) provides that the benchers may make rules respecting contingent fee agreements, including rules regulating the limits to lawyers' charges. By s-s. 68(2), the client has the right to have the registrar examine a fee agreement and, by s-s. 68(6), the registrar is empowered to modify or cancel the agreement if it is found to be unfair or unreasonable "under the circumstances existing at the time the agreement was entered into."

32 Part 8 of the Law Society Rules, entitled "Lawyers' Fees", sets up a standard of fairness and reasonableness. The relevant provisions say:

> 8-1 (1) A lawyer who enters into a contingent fee agreement with a client must ensure that, under the circumstances existing at the time the agreement is entered into,
>
> (a) the agreement is fair, and
> (b) the lawyer's remuneration provided for in the agreement is reasonable.
>
> (2) A lawyer who prepares a bill for fees earned under a contingent fee agreement must ensure that the total fee payable by the client
>
> (a) does not exceed the remuneration provided for in the agreement, and
> (b) is reasonable under the circumstances existing at the time the bill is prepared.

33 In addition to the statute law, the court has inherent jurisdiction to review the reasonableness of solicitors' fees arising out of contingent fee agreements and, as well, inherent parens patriae jurisdiction to ensure the reasonableness of legal fees incurred on behalf of class members who are under legal disability: see Harrington (Guardian ad litem of) v. Royal Inland Hospital, supra at p. 264, para. 192 and pp. 266-67, paras. 197-99.

34 The meanings of the words "fair" and "reasonable" were considered in Commonwealth Investors Syndicate Ltd. v. Laxton (1990), 50 B.C.L.R. (2d) 186 (C.A.) ("Commonwealth No. 1"). There, the Court was considering a predecessor of s. 66 of the Legal Profession Act, namely, s. 99 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, which, for present purposes, did not differ in any material way. At pp. 198-99 of Commonwealth No. 1, the Court set out a two-step inquiry:

> The first step investigates the mode of obtaining the contract and whether the client understood and appreciated its contents. . . .
>
> The second inquiry, assuming the contract is found to be "fair" involves an investigation of the "reasonableness" of the contract. On this investigation, extending from the time of the making of the contract until its termination or its completion, all of the ordinary factors which are involved in the determination of the amount a lawyer may charge a client are to be considered . . . .

Thus, "reasonableness" relates to the amount of the fee.

35 In a second appeal in the Commonwealth case, reported as Commonwealth Investors Syndicate Ltd. v. Laxton (1994), 94 B.C.L.R. (2d) 177 (C.A.), app. for leave to appeal dis'd, [1994] S.C.C.A. No. 427, March 30, 1995 ("Commonwealth No. 2"), the Court dealt with the meaning of

"reasonableness". McEachern C.J.B.C., speaking for the Court, referred to the oft-cited decision in Yule v. Saskatoon (1955), 1 D.L.R. (2d) 540 (Sask. C.A.) and to the factors set out therein, namely: the extent and character of the services rendered; the labour, time and trouble involved; the character and importance of the litigation; the amount of money and the value of the property involved; the professional skill and experience called for; the character and standing of counsel in the profession; the results achieved; and, to some extent at least, the ability of the client to pay. He observed, at pp. 183-84, para. 25, that further considerations apply in respect of contingent fees including, at least, the risk of no recovery at all and the expectation of a larger fee based upon the result than would be warranted in non-contingency cases.

36 However, the assessment is not produced by simply summing the results of the considerations of each factor. McEachern C.J.B.C. made that clear at p. 187, para. 47, where he said:

> All the circumstances must be considered, including the Yule factors, the risks and expectations, and the terms of the bargain which is the subject matter of the inquiry. With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession?

37 Mr. Laxton's contingent fee agreement in the Commonwealth cases related to a conventional lawsuit, not to a class action. In my view, the approval of counsels' fees in class actions involves additional considerations that are not present in the ordinary case.

38 First, the rationale for using percentage fees in "common fund" cases in the United States is relevant. Class actions differ from conventional actions in that the beneficiaries of the action do not participate actively in it, leaving the instruction of counsel to the representative plaintiff. As was observed in Swedish Hosp. Corp. v. Shalala, supra at p. 1265, fees in these cases must be shared by the beneficiaries of the fund in order to avoid their unjust enrichment. American courts have recognized that this approach shifts the emphasis from the fair value of the time expended by counsel, or what we would refer to as a quantum meruit fee, to a fair percentage of the recovery: see Swedish Hosp. Corp. v. Shalala, supra at p. 1266.

39 In my opinion, the equitable sharing of fees by the recipients of the award or settlement is a proper consideration in assessing the reasonableness of lawyers' fees in class actions. What is a fair fee for the work done by the lawyer is important, but equally important is that each member of the class should share in payment of a fair fee for the result achieved, as viewed from his or her perspective. This notion has been recognized as a proper consideration in the approval of class counsel fees in British Columbia. In Harrington v. Dow Corning Corp. (1999), 64 B.C.L.R. (3d) 332 (S.C.), at para. 18, E.R.A. Edwards J. observed that the factors that ought to be considered include "the individual claimants' contribution to the fee as a portion of their recoveries." This passage was applied by Brenner J. (as he then was) in Sawatzky v. Soci t Chirurgicale Instrumentarium Inc. (8 September 1999), Vancouver C954740 (B.C.S.C.) at para. 8 and by

Williamson J. in Fischer v. Delgratia Mining Corporation, [1999] B.C.J. No. 3149, (7 December 1999), Vancouver C974521 (B.C.S.C.) at para. 22. Accordingly, the proportion that the proposed fee bears to the recovery is prominent in the analysis.

40 A second consideration arises from the unique nature of class proceedings. In a conventional action, the causal relationship between the lawyers' work and the result achieved is normally unquestioned. That is not necessarily so in class actions where the extent of the benefit brought about by the lawyer's work must be ascertained. This concept is illustrated in In Re Prudential Ins. Co. of America Sales Litigation, supra, where a class action was brought on behalf of millions of policyholders alleging deceptive sales practices by a life insurer. The Court held that class counsel should not be given full credit for the result when it was based, in part, on a compensation scheme implemented as a result of an investigation by the New Jersey Insurance Commissioner, who recommended a remediation plan to compensate affected policyholders, to prevent future violations, and to restore public confidence in the insurance industry. In remarks that are apposite here, the Court said, at p. 337:

> While a party need not be the only catalyst in order to be considered a "material factor" and may be credited for extra-judicial benefits created, there must still be a sound basis that the party was more than an initial impetus behind the creation of the benefit. Allowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs attorneys to "minimize the costs of failure . . . by free riding on the monitoring efforts of others."

41 As I have already remarked, the American experience with class actions is instructive. I adopt that reasoning and conclude that it is necessary, in considering the reasonableness of the fee in relation to the results achieved, to consider the causal relationship between the efforts of class counsel and the benefits conferred on the class claimants by the resulting recovery.

42 I turn now to a consideration of the fees proposed in these actions.

III. ANALYSIS AND CONCLUSIONS

1. Fees in the transfused class action

43 While an examination of the factors identified as relevant to the inquiry is necessary and will be useful, it ought not to overwhelm the recognition of the "judgment, audacity and legal skill" of counsel, to adopt a descriptive phrase used by McEachern C.J.B.C. in Commonwealth No. 2, supra at p. 187, para. 46. In my view, Mr. Camp is one of only a few lawyers in this province with the combination of legal talent, experience, and boldness necessary to have achieved this outcome.

(a) The extent and character of the services rendered

44 The scope of the services rendered by counsel in this case extended far beyond what is normally encountered in the practice of law. Mr. Camp and Mr. Lemer had to deal with difficult legal issues pertaining to product liability, professional negligence, and public policy in the context of public blood-banking and infectious diseases. As well, they had to become familiar with the epidemiology and natural history of HCV, a disease about which little was known at the outset and about which medical opinion was evolving throughout the course of their retainer. Further, they had to learn and to understand the workings of the public health care system in Canada and the interplay between federal, provincial, and territorial governments in the administration of these matters. The medical and political issues were overarching and were, to a large extent, out of their control. They had to react to these things and to accommodate their approach as matters evolved. Throughout, they were faced with disagreements between groups of infected persons and with the changing political winds as these issues were debated in the public media and as governments and government officials changed. At the same time, they had to deal with the many class members who were understandably pressing them for a resolution of the matter. In short, the gravity and difficulty of the task they faced was of the highest order.

(b) The labour, time and trouble involved

45 It is necessary at this point to consider the duration of the retainer of class counsel.

46 The effective approval date for the settlement was January 22, 2000. Since that time, however, Mr. Camp and Ms. Matthews have expended considerable time, along with counsel in the other jurisdictions, in getting the settlement plan up and running to the point where benefits could be paid to class members. Much of that time was necessitated by the removal and replacement of the initial plan Administrator and, as well, considerable time was invested in preparing the many documents required for the processing of claims.

47 The issue arises because the terms of the settlement provide for the creation of a Joint Committee, comprised of three class counsel from the transfused class actions and one class counsel from the haemophilic class actions. The terms of the settlement invest the Joint Committee with the overall supervision of the administration of the plan, including the recommending of persons for appointment by the courts as plan Administrator and the preparation of all necessary protocols. The fees of the members of the Joint Committee are to be submitted to the courts for approval from time to time throughout the life of the plan.

48 Mr. Camp is a member of the Joint Committee and, as I understand it, Mr. Turriff's position is that the time expended by Mr. Camp and Ms. Matthews since January 22, 2000, should be billed as Joint Committee fees and should not be taken into consideration on the approval of class counsel fees.

49 I cannot agree. Class counsel were retained to recover money for the class plaintiffs on

account of their claims, and the work of counsel under their retainer agreements is not finished until that has happened. I understand that payments to class plaintiffs have begun this month. Accordingly, now is the appropriate time to measure the reasonableness of the proposed fees. It should be noted that Mr. Camp does not take the position that he should be entitled to charge for this work as Joint Committee work in addition to his fee as class counsel. Quite properly, in my view, he asks that his work to date be considered in relation to the reasonableness of his contingent fee.

50 A second preliminary issue concerns the relevance of the time and effort expended by counsel in preparing for and conducting the hearing of the application to approve class counsel fees. Mr. Turriff's position is that this time was not spent for the benefit of class plaintiffs and is therefore not relevant to the reasonableness of the proposed fee. However, s. 38 of the Class Proceedings Act requires class counsel to seek court approval of their fees. This requirement is an integral part of the statutory scheme for class actions. Moreover, it is a term of each of the fee agreements in issue that the agreed fee will be subject to court approval. Accordingly, the obtaining of court approval of their fees is part of the work plaintiffs' counsel were required to do and the time spent by them in doing so must be considered in the assessment of the reasonableness of their fees.

51 In addition to their efforts in relation to the lawsuit and to the settlement, members of Mr. Camp's firm have spent a great deal of time over the past four years dealing with the questions and concerns of class claimants. As well, much time was devoted to meeting with HCV support groups across the country and with the media. As of June 12, 2000, Mr. Camp's firm has docketed approximately $3,200,000 in work in progress on this file. Mr. Camp and Ms. Matthews have devoted the majority of their time to this action since it was commenced and, as a result, they have declined many other retainers. For his part, Mr. Lemer has recorded more than $500,000 in time on this file since its inception and has spent a large proportion of his professional time on it at the expense of turning down remunerative work.

(c) The character and importance of the litigation

52 The character of the litigation and its importance to the plaintiffs bear mentioning. As a class action, this action involved many procedural and practical difficulties not encountered in conventional litigation. As well, it was a highly complex product liability/medical negligence case attendant with great risk. The members of the plaintiff class are infected with a debilitating disease that will, in many cases, lead to a protracted and uncomfortable death. The events that precipitated this lawsuit constituted a national public-health disaster. This case was therefore of immense importance to the class plaintiffs and was important, as well, to the Canadian public for the light that it shed on the problems that gave rise to this national tragedy.

(d) The amount of money involved

53 The total value of the settlement, in present-value terms, is in the order of $1,600,000,000. So far as I am aware, this is the largest settlement of a tort claim for damages for personal injuries in

Canadian history.

(e) The professional skills and experience called for

54 Mr. Turriff conceded that the work done by plaintiffs' counsel required a high level of skill; that it was complex, difficult, and well-done; and that the result achieved was excellent. These points cannot be understated. To handle all of these matters and to persevere through to the settlement ultimately achieved involved a quality of representation by counsel that is uncommon. As was observed by McEachern C.J.B.C. in Commonwealth No. 2, supra at p. 185, para. 36:

> ... Because of the breadth of their experience, and their special adversarial skills ... senior counsel are quick learners who master the details, understand the issues, conceptualize the difficulties, and figure out how to achieve the desired result. The problems faced by Mr. Laxton were complex and formidable.

Those remarks aptly describe Mr. Camp and the difficulties he faced. This view is shared by Jack Giles, Q.C., a highly-regarded barrister of some forty years experience. In his opinion letter, which was filed in evidence, he said that the result was:

> ... a truly remarkable achievement. It was obtained in the face of daunting obstacles and grave risks. It called for a high degree of experience, skill, courage and determination.

(e) The character and standing of counsel

55 Mr. Giles commented, as well, that Mr. Camp was uniquely fitted by his experience and standing for the role of lead counsel in this matter. The evidence supports that view. Moreover, Mr. Lemer has a wealth of experience in blood-related litigation and made good use of his knowledge and experience and, as well, of his relationships with experts in the related fields and with counsel of similar interests.

(f) The ability of the clients to pay

56 The class plaintiffs began with doubtful claims and it is highly unlikely that any of them could have afforded to pay for individual legal representation in this case. Certainly, Ms. Endean could not have done so. The cost of lawyers and experts, and the potential costs payable to the defendants in the event of failure, were simply prohibitive. These actions were able to go forward only because they were carried by counsel pursuant to contingent fee agreements.

(g) The results achieved

57 The class members will recover full and generous benefits as a result of the settlement and they will do so through a simple, administrative procedure without the necessity of engaging

lawyers. Moreover, their costs of claiming compensation are to be covered by the settlement fund. The results achieved can only be described as excellent.

(h) The Risk of No Recovery

58 The risk of no recovery at all was substantial.

59 A demonstration of that proposition is the fact that the other two law firms consulted by the prospective class plaintiffs were unwilling to take the case on a pure contingency. One was prepared to take it only if paid hourly rates, with the plaintiffs to pay disbursements, and the other, although prepared to act for a contingent fee, insisted that the plaintiffs pay the disbursements. Of the three candidates for the action, only Messrs. Camp and Lemer were willing to undertake the action on a contingent fee at no cost to the plaintiffs.

60 The plaintiffs' best chance of establishing liability was against the Canadian Red Cross, but those hopes were dashed when this action was stayed against that organization and it was granted protection from its creditors pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, leaving minimal assets available for satisfaction of any judgment. As well, the stay impeded the ability of counsel for the plaintiffs to obtain important evidence from the Canadian Red Cross through pre-trial discovery. On the other hand, the risk of failure on liability against the FPT Governments was real and significant.

61 It was not only the risk of failure in the lawsuit that counsel had to contend with. There were also political risks. The danger existed throughout that the FPT Governments might establish a no-fault compensation scheme that would undermine these actions. This risk was heightened when the Krever Commission recommended in November 1997 that a no-fault compensation scheme be implemented by government for all those infected with HCV. Had that happened, these actions would have been for naught and plaintiffs' class counsel would have had to absorb the considerable costs they had incurred in carrying them.

62 There was also a significant risk that the settlement negotiations might fail. This was a matter of grave concern because the prospects of achieving comparable recovery through a trial were poor. Throughout the negotiations, counsel were frequently faced with potentially deal-breaking issues. As well, there were disputes between the class plaintiffs and other groups of infected persons that threatened to thwart a comprehensive settlement. There was, further, the risk that the courts would not approve the settlement. After that obstacle was overcome, the risk of the settlement negotiations aborting continued because of the modifications suggested by the courts. The FPT Governments initially took the position that these modifications were material, which would have allowed them to withdraw from the settlement, and it was only through further arduous bargaining that they were persuaded to accept the changes.

63 Accordingly, the risk of no recovery was a substantial and omnipresent risk that did not diminish over the course of the retainer but continued until the FPT Governments finally accepted

the court-suggested modifications to the settlement agreement.

64 Moreover, the consequences of failure to Mr. Camp and Mr. Lemer would have been devastating. Mr. Camp correctly described this enterprise during his submission as "bet-your-firm-litigation."

(i) The expectation of a larger fee than in a non-contingency case

65 It is the nature of contingent fees that counsel and client expect that the fee, if success is achieved, will exceed what would otherwise be appropriate for the work done. Counsel shoulder the risk of failure in these cases and they and their clients legitimately expect that they will recover an enhanced fee for doing so. The evidence of Ms. Endean on this application bears this out.

(j) The contribution of counsel to the result

66 I do not think that it can be said that counsel are seeking to take advantage of any "extra-judicial" benefit to the class plaintiffs, as was the case in In Re Prudential Ins. Co. of America Sales Litigation, supra. The first indication of a willingness by the FPT Governments to pay compensation was on March 27, 1998, after the transfused class actions in British Columbia and Quebec had been certified on behalf of residents of those provinces and after the action on behalf of all other class members resident in Canada had been commenced in Ontario. Moreover, the announcement of the available $1,100,000,000 limited the potential recipients to the claimants in the class actions. In my view, the pre-eminent cause of the recovery in the context of this discussion was the effort of class counsel, and it would not be proper to give them less than full credit for the result.

67 As already noted, Mr. Turriff argued that I must measure the relative contribution of class counsel in each province to the pan-Canadian settlement so that there will be no chance of counsel in one province being credited in fees for value contributed by counsel in other provinces. However, it is impossible in hindsight to unravel the many factors that influenced the ultimate outcome in this case. The efforts of counsel in the other provinces undoubtedly played a large role. As well, the voices of lobby groups and others heard through the media likely entered into the deliberations of the FPT Governments. It is not necessary to identify the discrete causal contributions and to measure their respective force. It is sufficient to ascertain whether the efforts of Mr. Camp and Mr. Lemer were a material cause of the result achieved to the extent that they should receive full credit in their fees for the outcome. I have concluded that they were.

68 In that regard, it should be noted that Mr. Camp and Mr. Lemer were the first to obtain class-action certification. Although the Quebec action had been commenced, it had not been certified at that time. The Ontario action had not yet even been commenced. The certification was no small accomplishment given the vigour with which the application was contested and the fact that the only previous Canadian attempt to obtain certification for a mass tort action involving infected blood had met with failure: see Sutherland v. Canadian Red Cross Society (1994), 17 O.R.

(3d) 645 (Gen. Div.). Whether the actions in the other provinces would have gone forward otherwise or not, it appears that the certification in British Columbia was the catalyst that gave them life.

69 The certification also energized plaintiffs' counsel nationally and Mr. Camp played a role in bringing approximately twenty of them together to form a coalition for the purpose of advancing their clients' claims. He made other significant contributions, as well. He was the chair of the coalition's first negotiating committee and, when that committee became unwieldy, he was one of three counsel delegated to negotiate for the transfused class, along with Mr. Strosberg of Ontario and Mr. Lavigne of Quebec. Mr. Camp was the first to bring representatives of the FPT Governments to the bargaining table when he met with Mr. Whitehall and Mr. Prowse, representing the federal and British Columbia governments respectively, on February 11, 1998. This meeting led to the further meetings that ultimately resulted in settlement. Mr. Camp and Ms. Tough, Ontario counsel for the haemophilic classes, were instrumental in bridging the differences between the transfused class members and the haemophilic class members. This accommodation resulted in their bargaining jointly with the FPT Governments, which was critical to the success of the negotiations. Mr. Camp's judgment and tactical decisions from time to time throughout the negotiations were important to their success.

70 Mr. Lemer and Ms. Mathews made significant contributions as well. Both served on the subcommittees formed by the coalition of lawyers for the purpose of facilitating negotiations and moving the lawsuits forward. I have already commented on Mr. Lemer's depth of knowledge and his value as a resource in relation to blood-related litigation.

71 I am satisfied that British Columbia class counsel made a substantial contribution to the result and that their efforts were at least as valuable as those of class counsel in the other provinces. It would not be proper in the circumstances to give them less than full credit for the result in the assessment of the reasonableness of their proposed fees.

(k) The integrity of the legal profession

72 Next, Mr. Turriff submitted that the fee proposed here is "simply too much". He suggested that a fee of this magnitude would "impair the integrity of the legal profession". That phrase appears in the remarks of McEachern C.J.B.C. in Commonwealth No. 2, supra, where, at p. 187, para. 47, in a passage that I have already quoted, he said:

> . . . With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession? . . .

73 Esson C.J. (as he then was) commented on this concept in Richardson (Guardian ad litem of) v. Low (1996), 23 B.C.L.R. (3d) 268 (S.C.) at paras. 29-30. I think that what he envisaged in using the phrase "integrity of the profession" was the decency, honour, and high-mindedness of the

profession, both in substance and in public perception. He referred, for example, to the willingness of lawyers to readily reduce the amount payable under a contingent fee agreement when circumstances are such that the agreed fee would be disproportionate to the amount of effort, risk, and cost involved; that the lawyer will be able to fill with other remunerative work the time set aside to try a case that was settled; and that the client needs the funds and cannot really afford to pay them to the lawyer despite the agreement.

74 Here, the fees proposed are very large. The total value of the time docketed by all plaintiffs' counsel for the transfused class, including those who acted for individual plaintiffs and who will be paid their fees by Mr. Camp, amounts to approximately $4,000,000. Accordingly, the proposed fee is roughly 3.75 times the value that they have ascribed to their work. However, that is not necessarily a reliable measure, as I have already noted. Moreover, it must be remembered that good counsel can often achieve with a minimal effort what it might take less skillful counsel a great deal of time to achieve, as was seen in Commonwealth No. 1 and Commonwealth No. 2. Good counsel should not be penalized for their acuity and efficiency by basing their fees only on the amount of time that it took them to accomplish their clients' objectives.

75 Mr. Camp and Mr. Lemer do not seek approval of a percentage fee in this case. However, percentage contingent fees have long been common in British Columbia and have been approved in class proceedings in this province: see Harrington v. Dow Corning Corp., supra, Campbell v. Flexwatt Corp. (22 February 1996), Victoria 2895/95 (B.C.S.C.), and Fischer v. Delgratia Mining Corporation, supra. A comparison between the proposed fees as a percentage of the settlement amount and percentage fees approved in previous class actions will therefore be informative, although I must not lose sight of the principle identified by Esson C.J. (as he then was) in Richardson (Guardian ad litem of) v. Low, supra at para. 35:

> The question "what is the reasonable fee?" must be answered, not as a percentage, but in dollars.

76 There is evidence that British Columbia has approximately 22% of the transfused HCV-infected cohort. On that basis, for purposes of rough estimation, approximately $352,000,000 of the $1,600,000,000 settlement can be notionally credited to the clients represented by Mr. Camp and Mr. Lemer, and their proposed fee of $15,000,000 is 4.26% of the recovery.

77 A contingent percentage fee of that magnitude in an action for damages for personal injuries is virtually unheard of in British Columbia. Rule 8-4(2) of the Law Society Rules permits a maximum percentage of 40% in cases such as this. The vast majority of percentage contingent fees in British Columbia range between 15% and 33 1/3%. In Harrington v. Dow Corning Corp., supra E.R.A. Edwards J. observed that class counsel fees in the United States commonly range between 15% and 50%, and that a "presumptively reasonable rate" is 30%. He approved a contingent fee of 15%, which produced a fee in the order of $6,000,000 for plaintiffs' class counsel. In Sawatzky, supra a contingent fee of 20% amounting to $760,000 was approved. In Fischer, supra a fee of 30% of

shares in a public company issued in settlement was approved, although the value of the fee in monetary terms is not apparent.

78 The fee proposed here compares favourably in percentage terms with contingent fees approved in Ontario and Quebec, as well. In Nantais, supra Brockenshire J. approved a percentage fee of 30%, which yielded a fee of approximately $6,000,000. In Doyer v. Dow Corning Corp. (1 September 1999), Montreal 500-06-000013-934 (Q.S.C.) a percentage of 20% was approved yielding a fee of $10,400,000. In Pelletier v. Baxter Health Care Corp., [1999] Q.J. No. 3038 (S.C.), a percentage of 16.9% yielding $3,648,000 in fees was approved.

79 I note, as well, the observation of McEachern C.J.B.C., speaking for the Court in Commonwealth No. 2, supra at p. 188, para. 49, that he saw nothing unreasonable or threatening to the integrity of the profession in a fee of 25% "for the skillful recovery of $6.5 million." Further, Mr. Giles, who is an experienced Vancouver barrister, as I have already noted, does not appear to consider that Mr. Camp's proposed fee is unseemly: he expressed the opinion that it is reasonable in all the circumstances.

80 I accept that a percentage fee should generally be lower where the recovery is higher. However, 4.26% is modest by any standard.

81 Another important factor in this connection is that the fees are not to be deducted from the compensation payable to the individual plaintiffs, as the settlement agreement provided for an allocation of $52,500,000 for legal fees in addition to that compensation. It could be said that this observation is illusory, as the $52,500,000 could have been allocated in part to plaintiffs' claims. However, two facts cannot be overlooked. First, the individual compensation awards provided for in the fund are full and generous and are available to the class members without further legal proceedings. Secondly, the FPT Governments tacitly agreed to fees up to this amount when they agreed upon the structure of the settlement fund.

82 Another perspective can be gained by considering the fee from the point of view of each member of the class. It appears that there are approximately 22,000 class members in British Columbia and the fee therefore works out to about $682 each. This is a modest fee for individual awards ranging from a minimum of $10,000 in non-pecuniary compensation to a maximum of $225,000 for non-pecuniary compensation plus loss of income, cost of care and home services, and other expenses, particularly when the fee is not deducted from the award.

83 It is also important to note that the representative plaintiff, Ms. Endean, considers the fee to be reasonable and urges the court to approve it.

84 While public perception is difficult to gauge, there is some interesting anecdotal evidence here. On July 11, 1999, Mr. Camp appeared on a "hot line" radio show in Vancouver, on a station that has coverage throughout the province, to discuss the $52,500,000 allocated for plaintiffs' lawyers' fees in this case. After Mr. Camp explained his justification of that amount, the host took

several calls from listeners. The majority of callers supported Mr. Camp's position and, of those who were not supportive, none were overly critical. I do not give this evidence any weight as a measure of public opinion on this matter, but it does suggest that at least some members of the public would not think less of the profession if the fee proposed in this case should be approved.

85 In my opinion, to say that the fee is "simply too much" invites a completely arbitrary assessment, one that depends upon the subjective opinions and whims of the particular judge hearing the application. If the proposed fees are to be reduced on the ground that they impair the integrity of the profession, some principled basis must be suggested for doing so. None has been suggested and I cannot agree that the proposed fee should be reduced by an arbitrary amount ostensibly to protect the integrity of the profession.

(l) Public policy

86 Mr. Turriff also advanced a public policy argument. He said that his clients want this Court to establish an upper limit for fees in class actions generally. One of his clients, the Province of British Columbia, enacted the Class Proceedings Act just a few years ago, in 1995, but did not impose any upper limit on fees at that time. Under our system of government, the introduction of a public policy of this nature is a matter for our elected representatives, not for this Court, and I decline Mr. Turriff's invitation to judicially legislate an upper limit.

87 There is, however, an aspect of public policy that is relevant. It was captured by Professor Garry D. Watson Q.C. in a paper entitled Class Actions: Uncharted Procedural Issues. In discussing the issue of compensation for plaintiffs' class counsel in the context of the Ontario statute, he said this:

> This 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.

88 These comments flow from the objectives of the class action legislation, which include the improvement of access to the courts for those whose actions might have merit but who would not otherwise pursue them because the legal costs of proceeding are disproportionate to the amount of the individual claims: see Endean No. 1, supra at para. 23. Given that objective, the courts must ensure, first, that plaintiffs' lawyers who take on risky class actions on a contingent basis are adequately rewarded for their efforts and, second, that hindsight is not used unfairly in the assessment of the reasonableness of their fees.

89 On a consideration of all of the circumstances in this case, I am satisfied that the contingent fee contract was fair at the time it was made and that the fee of $15,000,000 proposed by Mr. Camp and Mr. Lemer is reasonable.

2. Fees in the haemophilic class action

90 I turn now to the fee proposed by Mr. Storrow in the haemophilic class action.

91 Actions were commenced on behalf of the haemophilic claimants in Ontario, Quebec, and British Columbia in 1998. The Ontario action was commenced by Ms. Tough, then of the firm of Blake, Cassels & Graydon, who coordinated and supervised the actions in Quebec and British Columbia as well. On May 1, 1998, the Vancouver office of that firm commenced the Mitchell action in this Court. The nature and extent of the work done in the Vancouver office of the firm is described in the following extract taken from Mr. Neaves' affidavit:

> 4. Blakes Vancouver delegated to Ms. Tough the responsibility of acting as national lead counsel on behalf of each plaintiffs' class in the British Columbia, Ontario and Quebec Hemophiliac Class Actions. However, I spent a considerable amount of time preparing for and participating in negotiation sessions with the FPT governments on behalf of the Representative Plaintiff in this action and in support of Ms. Tough's efforts. As a member of the Blakes Vancouver team, I provided advice to senior personnel in the Canadian Hemophilia Society and to members of the steering committee [of plaintiffs' class counsel]. I frequently consulted with and took instructions from the Representative Plaintiff. Mr. Gruber spent a considerable amount of time preparing for the hearing to approve the settlement that was ultimately reached and dealing with subsequent matters. Throughout our involvement, Mr. Storrow provided the Blakes Vancouver team with direction and advice and supported Ms. Tough in her national efforts.

92 Counsel for the haemophilic classes agreed to seek a collective fee of $7,500,000 and to share it in proportion to the amount of work done in each province. According to Mr. Neaves, the

$7,500,000 "primarily represents the work of Ms. Tough". In Mr. Neaves' words, the Vancouver office did "the least amount of work on its own." As lawyers in the Vancouver office spent most of their time assisting Ms. Tough, they agreed to seek $500,000 for their fees and Mr. Mitchell executed a contingent fee contract with Blake, Cassels & Graydon in that amount on June 2, 1999.

93 Counsel for this group ran similar risks to counsel for the transfused group, including the risks that for political reasons the FPT Governments would institute a no-fault compensation scheme and that negotiations would fail. These risks had heightened consequences for counsel for the haemophilic classes because of the greater litigation risk arising out of the grave difficulties they would necessarily encounter in attempting to prove causation. In the case of the transfused plaintiffs, it would be possible to identify a discrete transfusion as the source of the infection. However, haemophilic plaintiffs have been receiving blood and blood products regularly, many since before 1986, and the blood products were manufactured from pooled blood donations, making proof of causation at a trial very difficult if not impossible. The settlement was therefore particularly valuable for this group.

94 The compensation plan for these claimants is very similar to that agreed upon for the transfused class. However, haemophilic plaintiffs have a better result than transfused plaintiffs in some respects. First, haemophilic plaintiffs will not have to establish that their infection occurred within the class period. This is a critical provision because of the inability of most haemophiliacs to identify the source of their infection. Second, haemophiliacs will not be required to submit to liver biopsies for the purpose of identifying the relevant stage of their illness for compensation purposes. This is important because of the danger of uncontrollable bleeding from such an invasive procedure. Next, estates and family members of haemophiliacs who died prior to January 1, 1999, and who were infected with both HIV and HCV at the time of death may elect to receive a payment of $72,000 without proof that HCV was the cause of death. Finally, haemophilic plaintiffs infected with both HIV and HCV may avoid the stress and anxiety of participating in the long-term compensation program by electing to take a lump sum payment of $50,000.

95 It is apparent that, in comparison to Mr. Camp and his colleagues, British Columbia counsel for the hemophilic class made a smaller contribution to the outcome. The weight of the following factors accrues largely to Ms. Tough: the extent and character of the services rendered, the professional skills and experience called for, the character and standing of counsel, the results achieved, and the contribution of counsel to the result. On the other hand, although Ms. Tough deserves the lion's share of credit for the result, there is no doubt that the efforts of British Columbia counsel assisted her significantly in her efforts.

96 Other factors involved in the assessment of reasonableness are directly applicable to the claim by British Columbia counsel. The risks of failure of the action and of the negotiations were assumed by Mr. Storrow and his colleagues, though the consequences of failure were of a much lesser order of magnitude to them than to Mr. Camp and Mr. Lemer. As well, it must be remembered that the risk of failure in the litigation was far higher for this class than for the transfused class. The

litigation was profoundly important to the haemophilic class members, the amount recovered is generous, and the plaintiffs would not have been able to achieve the settlement without the assistance of class counsel acting on a contingent fee agreement. Moreover, the character and standing in the profession of Mr. Storrow and his colleagues is undisputed.

97 It must be noted that the Vancouver office of Blakes docketed no time on this matter until March 28, 1998, the day following the announcement on behalf of the FPT Governments that they would make $1,100,000,000 available to settle the actions. In pointing this out, Mr. Turriff suggested that there was no significant risk run by British Columbia counsel. There is an initial appeal to this assertion, but it does not tell the whole story. As I have already observed elsewhere in these reasons, the risk that negotiations might founder was a real and present risk until well after the judgments granting conditional approval of the settlement. Thus, the time invested by British Columbia counsel was at risk of being valueless. As well, the Toronto arm of the firm had invested substantial time and effort, through Ms. Tough, on behalf of haemophiliacs in the preceding years. The thoroughness and quality of Ms. Tough's work stands out clearly on the evidence. While her agreement to a fee of $500,000 for her Vancouver colleagues may seem generous, it is undoubtedly an expression of her view of the value of their work to the overall result and of the extent of the risk that they ran. As such, I consider it to be evidence supporting the reasonableness of the proposed fee.

98 Of the total amount of the settlement, it is estimated that approximately $150,300,000 should be allocated notionally to the haemophilic classes. Of the approximately 1,650 haemophilic plaintiffs nationally, approximately 180 are residents of British Columbia, or roughly 11%. If it is assumed that the total recovery for British Columbia haemophilic plaintiffs is 11% of the $150,300,000, that is, $16,533,000, the $500,000 share of the fee allocated to British Columbia counsel is 3% of the recovery. That is a manifestly reasonable percentage.

99 Assuming a cohort of 180 plaintiffs resident in British Columbia, the fee represents a charge of approximately $2,800 per plaintiff. While these are rough estimations, that is a reasonable amount for each claimant to pay in relation to the benefits recovered for them.

100 If the matter is examined from the base fee/multiplier approach, the proposed fee does not fare as well. A rough estimate of the value attributed to the time docketed by the Vancouver office of Blakes is $90,000. The proposed fee therefore represents a multiplier of 5.5, which is at the high end of the range of permissible multipliers using this approach.

101 The sorts of checks on reasonableness that I have just performed are useful as guides but, at bottom, the question is whether the proposed fee is reasonable having regard to all of the relevant circumstances. Having considered the circumstances, I conclude that this proposed fee of $500,000 meets the test for reasonableness.

3. Disbursements

102 As I understand it, Mr. Camp claims disbursements in the amount of $75,376 and Mr. Turriff, having scrutinized the items comprising that total, agrees that the amount claimed is reasonable and that the disbursements involved are properly payable. Accordingly, the claim for disbursements totalling that amount is approved.

103 Mr. Storrow advised during his submission that the disbursements for which he claims reimbursement total approximately $35,000. Mr. Turriff indicated that he wished to have some time to review the disbursements claimed and to make a written submission if he should think it necessary. I have not received anything further from counsel in this regard. Accordingly, if counsel can agree on the disbursements, they may insert the agreed amount in the order to be drawn up consequent on these reasons. There will be liberty to apply in the event that there are disbursement items requiring adjudication.

K.J. SMITH J.

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

SUPERIOR COURT OF JUSTICE - ONTARIO

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

Toronto Hydro-Electric System Limited, Defendant/Respondent

BEFORE: G.R. Strathy J.

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

Kelly Friedman, for the Defendant/Respondent

DATE HEARD: April 30, 2012

ENDORSEMENT

(Settlement Approval and Fee Approval)

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

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

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

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

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

(a) Settlement Approval

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

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

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

(a) The Defendant will consent to certification of a class proceeding for the purposes of settlement. The Class will consist of:

> All persons that were customers (retail, commercial or otherwise) of the Defendant, who were billed at some time within the period from July 1, 2000 through to and including December 8, 2010, and who paid interest on an unpaid account billed during that period.

(b) The Common Issue will be:

> Did the Defendant breach the *Interest Act* by charging interest on unpaid customer accounts at a monthly rate which equated to more than 5% per annum without disclosing the equivalent annual rate on its bills dated between July 1, 2000 and December 8, 2010, inclusive?

(c) The Defendant will provide CAD$5,835,882.00 in compensation to the Class, to be distributed as follows:

> (i) The Defendant will make repayment, less applicable court-approved Class Counsel Fees, by mailed cheque or account credit, of interest paid in excess of 5% per annum ("Excess Interest") to Class Members who, between December 7, 2008 and June 29, 2011, paid an amount equal to or greater than $30.00 in Excess Interest in respect of a bill issued on or before December 8, 2010 ("Refund Eligible Class Members").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Class Counsel Fee Approval

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Honorarium for Representative Plaintiff

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

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

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

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

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

G.R. Strathy J.

DATE: May 8, 2012

CITATION: *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292
COURT FILE NO.: 07-CV-325223
DATE: 20110531

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **Thaddeus Griffin, 1339850 Ontario Limited (c.o.b. as Griffin Leasing) and Ian Andrews**, Plaintiffs/Moving Parties

AND:

Dell Canada Inc., Defendant/Respondent

BEFORE: G. R. Strathy J.

COUNSEL: *Joel Rochon & Sakie Tambakos*, for the Plaintiffs/Moving Parties

Mahmud Jamal & Jean-Marc Leclerc, for the Defendant/Respondent

HEARD: April 26, 2011 and by written submissions and case conference May 25, 2011

REASONS FOR SETTLEMENT APPROVAL

[1] This is a motion, pursuant to s. 29 of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 (the "*C.P.A.)*", for the approval of a settlement between the plaintiffs and the defendant, Dell Canada Inc. ("Dell"). The plaintiffs also seek approval of class counsel's fees and disbursements.

Background

[2] This is a consumer class action involving five allegedly defective models of the Dell Inspiron computer, which was sold in Canada between March 2003 and May 2005. During that time, Dell sold approximately 118,629 Inspiron computers at an average price of about $2,000.

[3] The plaintiffs allege that these computers were prone to overheating, power failure, an inability to "boot up" and unexpected shutdowns. They allege that the computers had an inadequate or defective cooling system, and a defective motherboard. The expert retained by class counsel expressed the opinion that the computers had improper circuit board soldering, a defect that was capable of being demonstrated on a class-wide basis.

[4] Details of the allegations of the plaintiffs, and their specific experience, are set out in the decision of Lax J., certifying the proceeding as a class action: *Griffin v. Dell Canada Inc.,* [2009] O.J. No. 418, 72 C.P.C. (6th) 158.

[5] The action has had a lengthy procedural history. There have been numerous motions and appeals. In response to the plaintiff's motion for certification, Dell brought a cross-motion to stay the action in favour of arbitration, based on a provision in Dell's standard terms and conditions which required that disputes be arbitrated in the State of Minnesota, in the U.S.A.

[6] On February 3, 2009, Lax J. dismissed Dell's motion to stay and conditionally certified the action, subject to the plaintiffs producing a workable litigation plan.

[7] Dell's motion for leave to appeal the certification decision was dismissed by Wilson J.: [2009] O.J. No. 3438.

[8] Dell moved, in March 2009, before Justice Lax for an order reconsidering the stay decision. That motion was dismissed: [2009] O.J. No. 1592.

[9] Dell's appeal from the decision of Lax J. on the stay and reconsideration motions was dismissed by the Court of Appeal: [2010] O.J. No. 177. An application for leave to appeal was dismissed by the Supreme Court of Canada: [2010] S.C.C.A. No. 75.

[10] As is so often the case, there was parallel class action litigation in the United States. Two U.S. class actions were settled in 2010 on the basis that purchasers of the 1150, 5100 and 5160 Inspiron models would receive compensation, in whole or in part, for "eligible repairs" – that is, repairs to their computers that were performed by Dell or its authorized repair facilities. In the case of the Inspiron 5160 model, the compensation was "capped" at $150. There was no compensation provided to purchasers of the 1100 Inspiron model, because its repair record was better than the industry norm at the time. An earlier class action settlement had been concluded in 2006 with respect to the Inspiron 5150 model. That settlement provided reimbursement for certain out-of-pocket expenses and qualifying repairs and a new, limited warranty on the computer to cover qualifying repairs.

[11] These developments encouraged the parties to discuss settlement of this proceeding and a two-day mediation was held in August 2010, with the Honourable Frank Iacobucci Q.C. as mediator. An agreement in principle was reached, and a settlement agreement was signed on January 9, 2011, subject to court approval.

The Settlement Agreement

[12] Under the terms of the settlement, as in the U.S. settlements, class members (which Dell has agreed will include, for the purposes of settlement, persons who leased their computers directly from Dell) who paid for certain "reimbursable repairs" – that is, repairs of a specific kind that were made by Dell or one of Dell's authorized service providers – are entitled to receive a refund of all or a certain percentage of the repair cost. "Reimbursable repairs" include:

(a) repairs addressing clogged vents or restricted airflow, including fan repair or replacement;

(b) heat sink replacements;

(c) AC adaptor replacements;

(d) motherboard replacements addressing power failure, shutdown, failure to boot, and/or freezing situations; and

(e) battery replacements addressing failure to take a charge or to hold a charge.

[13] The amount of the reimbursement depends on which model of computer is involved and how long the class member owned the computer prior to repair. In the case of the Inspiron 1150, 5100 and 5160 models, the refund will be equivalent to:

(a) 100% of the cost of repairs between 12 and 18 months of the purchase date;

(b) 75% of the cost of repairs between 18 and 24 months of the purchase date;

(c) 40% of the cost of repairs that occurred between 24 and 30 months of the purchase date; and

(d) 20% of the cost of repairs that occurred over 30 months after the purchase date and before the deadline for claims.

[14] Unlike the settlement in the United States, there is no cap on eligible repairs to the Inspiron 5160 computer.

[15] The payment of a different percentage of repair cost depending on the age of the computer is intended to reflect the fact that the consumer has obtained a greater use of the computer, there is greater likelihood that the need for repair is attributable to ordinary wear and tear, and the remaining working life of the computer is proportionately less.

[16] Owners of the Inspiron 5150 will also receive a cash refund, on a sliding scale depending on when the repairs took place. The refund will be:

(a) 100% of the cost of repairs that occurred before September 30, 2007;

(b) 75% of the cost of repairs between October 1, 2007 and March 31, 2008;

(c) 40% of the cost of repairs that occurred between April 1, 2008 and September 30, 2008; and

(d) 20% of the cost of repairs that occurred between October 1, 2008 and the deadline for claims.

[17] The following will not be covered under the settlement:

(a) as in the United States, owners of the Inspiron 1100 are not entitled to compensation under the settlement, as the failure rate for that computer was below the industry average. It was the experience of class counsel in Canada that the problems with this model were not as widespread as those affecting the other models – that said, some 70 of the 735 class members who contacted class counsel were model 1100 owners;

(b) repairs that were carried out by repairers other than Dell or its authorized repairers – if the owner found it more convenient, and perhaps less expensive, to have his or her computer repaired by a local repair shop, those costs will not qualify for reimbursement[1];

(c) computers that failed on one or more occasions, but were never repaired; and

(d) computers that were simply scrapped or replaced because they were unusable.

[18] To reflect the fact that the settlement does not cover some of these claims, which in many cases would be difficult to prove and expensive to administer, Dell has agreed to contribute $200,000 worth of computers (at retail value) or, where that is not practical, to make equivalent cash donations, to various Canadian children's hospitals and other youth programs in Canada.

[19] In addition, Dell will be responsible for payment of the costs of notice of the settlement to class members and the costs of administration of the settlement.

[20] Dell has also agreed to pay the sum of $2 million, inclusive of taxes and disbursements, in full satisfaction of the fees of class counsel. Class members will have no obligation to make any payment towards costs.

[21] As Dell has an excellent customer database, it has been able to estimate, with some precision, the number of purchasers who are likely to qualify for reimbursement under the settlement. It estimates that there are approximately 435 customers who will automatically be eligible for settlement. Over 700 people have contacted class counsel with respect to the settlement, although a number of these may be ineligible. I was advised that the average repair cost was likely in the range of $400-$800. As noted above, only a portion of this cost will be recoverable in some cases.

Notice of Settlement and Objections

[22] On January 11, 2011, I made an order giving notice of certification and of the proposed settlement. Analytics Inc. was appointed the notice and opt-out administrator. Class members were provided with an opportunity to file written objections to the settlement. There are approximately 118,000 class members and approximately 90% of those actually received direct written notice of certification and of the settlement approval motion. There was also a program for national newspaper advertisement and notice on class counsel's web site. There were six objections to the settlement. There were opt-out requests from 101 class members.

[23] The primary concern of the six objectors is that the settlement only covers repairs carried out by Dell or its authorized service providers and that the compensation is confined to the reimbursement of repair costs. They complain that there is no compensation for owners who simply decided that they had had enough, and bought new computers and scrapped the old ones

[1] No doubt Dell's warranty would be voided if repairs were carried out by anyone other than an authorized repairer.

which were defective and had no trade-in or market value. One of the class members objected that class counsel received a large fee, whereas some class members were excluded from the settlement. I will discuss these objections below.

Discussion

[24] In considering whether to approve a settlement, the court must ask whether the settlement is fair and reasonable and in the best interests of the class as a whole: *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429, [1998] O. J. No. 2811 (Gen. Div.) at paras. 30-46, aff'd (1998), 41 O.R. (3d) 97, [1998] O.J. No. 3622 (C.A.), leave to appeal refused [1998] S.C.C.A. No. 372 ("*Dabbs*").

[25] Consideration must be given to all the circumstances, including the factual context of the proceedings, the legal issues, the claims made and defences raised, as well as any objections to the proposed settlement. The relevant factors, which will vary from case to case, were summarized by Perell, J. in *Corless v. KPMG LLP*, [2008] O.J. No. 3092, 170 A.C.W.S. (3d) 464 at para. 30 (S.C.J.) at para. 38:

> When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arms length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[26] The test is easy to state. It is more difficult to apply. It is particularly difficult to apply because the adversary process is generally absent from the settlement approval motion. Both parties support the settlement and neither party is inclined to highlight its deficiencies. The Court of Appeal has recently noted that in appropriate cases, the motion judge may appoint an *amicus*

or monitor to investigate and comment on a proposed settlement: *Smith Estate v. National Money Mart Co.*, [2011] O.J. No. 1321, 2011 ONCA 233 at paras. 23-41.

[27] Settlement approval is all the more difficult because in many cases, including this one, the risk of the settlement not being approved falls disproportionately on class counsel. If the settlement is not approved, and the case goes to trial and the plaintiff loses, the loss to each class member is a few hundred dollars, which they would not have recovered in any event without the class action. Class counsel stands to lose not only the substantial time and and disbursements invested in the file to date, but also is at risk of the considerable costs of taking the case to trial and, potentially, the risk of an adverse costs award.

[28] Mr. Rochon properly acknowledges that no settlement is perfect and that this settlement is not perfect. It clearly is not perfect as far as the six objectors are concerned. Some class members are being left out of the settlement. On the other hand, as was noted in *Dabbs* at para. 30, "[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."

[29] I propose to briefly summarize my conclusions with respect to the factors mentioned in *Dabbs.*

[30] *Likelihood of success:* It has been my experience on settlement approval motions, particularly where the settlement reflects a significant compromise, that the parties are reluctant to make detailed submissions about the likelihood of success. This is probably because neither party wants to admit to weaknesses in its case, in the event the action does not settle. In this case, one could say that the plaintiff has a good arguable case, but the defendant has some weighty potential defences, including absence of negligence, contractual exclusions and the limited nature of the purchaser's warranty. This is definitely a case in which a prudent plaintiff would accept a significant discount in order to avoid the litigation risks associated with trial.

[31] *Amount and nature of discovery:* There has been no discovery, but the plaintiff's counsel has had the benefit of information gleaned from the proceedings in the United States and has also, as I have noted, retained an expert witness. I am satisfied that class counsel has a full appreciation of the strengths and weaknesses of the case.

[32] *Settlement terms and conditions:* I have set out the settlement terms above. There is a rational basis for the exclusion of certain claims based on difficulties of proof.

[33] *Recommendations and experience of counsel:* The settlement comes with the recommendation of experienced and highly reputable class counsel.

[34] *Future expense and likely duration of litigation:* There is absolutely no question that if this action is not settled, the plaintiffs will be faced with an adversary with deep pockets, which is strongly motivated to resist any attack on its brand. Dell has shown a willingness to engage in costly litigation, using experienced, hard-nosed and well-nourished counsel, to defeat these claims. With the litigation in the United States settled, the plaintiff in Canada would have to go it alone. There is no question that taking this action to trial will be an expensive and time-

consuming process. It will likely cost at least another $1 million in unbilled fees and three or more years to take this action through discovery and to trial. These are circumstances that militate strongly in favour of settlement and are factors that any fee-paying litigant would take into account in assessing the value of an immediate settlement against the possibility of a future recovery.

[35] *Recommendations of neutral parties:* The mediator has not, quite properly, expressed an opinion on the settlement. He has, however, confirmed that the negotiations were adversarial, lengthy and hard fought. I am satisfied that the settlement was the product of a true adversarial process and that class counsel sought to achieve a settlement that was in the best interests of all class members.

[36] *Number and nature of objections:* The objections come from six individuals who will be excluded from the settlement class. Their objections are fair, reasonable and principled. Their main complaint is that the settlement does not include purchasers who had their computers repaired by someone other than Dell or its authorized service providers or who simply scrapped their computers without having them repaired.

[37] This issue was addressed in the plaintiffs' motion for settlement approval and also by way of supplementary submissions, at my request. The issue was raised in the settlement negotiations and Dell took the position that any settlement in Canada would have to be modelled on the settlements in the U.S., which did not include compensation for anything other than eligible repairs. In addition to this position, which appears to have been a "deal breaker", there was a genuine concern about the ability to identify claimants for non-eligible repairs and the administrative costs of verifying their claims. Ultimately, the proposed cy-près payment was put forward, and agreed upon, as a means of making some acknowledgment of these claims.

[38] As well, of course, class members not included in the settlement have the right to opt-out, and it appears that approximately 100 class members have decided to do so.

[39] Having considered this issue, I have concluded that although the objectors' concerns are legitimate, and the settlement can be described as less than perfect to that extent, this settlement, like all settlements, is the product of compromise. While the court might prefer a more inclusive compromise, I am not prepared to say that the compromise was not a reasonable one.

[40] *Good faith and absence of collusion:* I am satisfied that the settlement is made in good faith and that there was no collusion.

[41] *Communication between class counsel and class members:* Class counsel has been in communication with the class through its web site.

[42] *The dynamics of the negotiations:* As described above, the negotiations were adversarial and took place over two days. It is noteworthy that class counsel was given the opportunity to participate in the settlement negotiations involving the U.S. litigation. He declined to do so, based on the assessment that an independent settlement was in the best interests of the class. The settlement in Canada is a modest improvement on the settlement achieved in the United States.

The Cy-Près Component

[43] Sub-section 26(4) of the *C.P.A.* provides:

> The court may order that all or a part of an award under section 24 [an aggregate assessment of damages] 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.

[44] Subsection 26(6) provides that the court may make such an order even if the order would benefit persons who are not class members.

[45] The proposed award in this case is set out above. Considering that the contribution of computers can be made in kind, and is calculated at retail value, the cost to Dell is quite modest. I assume that the contributions will also have a goodwill element that benefits Dell.

[46] The cy près distribution will provide children in hospitals and in youth programs with Dell computers for their education, training and recreational use. To that extent, it can reasonably be expected to benefit certain members of the proposed class. Further, to the extent the contribution represents additional damages payable by Dell, it may be regarded as accomplishing the goal of behaviour modification, and thus advances the goals of the *C.P.A.*

Conclusion on Settlement Approval

[47] For the foregoing reasons, I approve the settlement.

Class Counsel Fees

[48] The settlement includes a payment of $2 million for the fees and disbursements, together with taxes, of class counsel. That fee was negotiated after agreement in principle had been reached on the main terms and structure of the settlement with class members.

[49] The fee component is approximately $1.7 million which represents a multiple of approximately 1.3 on the base time of class counsel. The retainer between class counsel and the representative plaintiffs calls for a fee based on the higher of 25% of the total amount recovered or a multiple of three times the time spent. The proposed fee falls well within the latter.

[50] Class counsel requests approval of the fee. It is the responsibility of the court to determine whether the fee is "fair and reasonable", having regard to the factors usually considered in the approval of a lawyer's fee, as well as the goals of the *C.P.A.*

[51] The factors to be considered include:

(a) the time expended by the lawyer

(b) the complexity of the matter;

(c) the responsibility assumed by the lawyer;

(d) the monetary value of the matter;

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

(f) the degree of skill and competence demonstrated;

(g) the results achieved;

(h) the ability of the client to pay;

(i) the client's expectation as to the amount of the fee.

[52] A fee of $2 million is undoubtedly large. It may well exceed the total compensation payable to class members under the settlement. In considering this fee, I keep in mind the following:

(a) the fee is consistent with the retainer agreement and with the expectations of the representative plaintiffs;

(b) no portion of the fee falls on class members – they are entitled to compensation without deduction for fees;

(c) this was a complicated class action, both procedurally and substantively – Dell was a sophisticated and tough-minded opponent and it put up an aggressive defence;

(d) the result achieved for the class is reasonable; and

(e) a very substantial amount of time was expended on this matter by class counsel, over a period of more than four years, without any compensation and with no assurance of compensation unless the action was successful.

[53] Class action legislation in Ontario was prompted, in part, by a concern that consumer claims could not be economically advanced on an individual basis. The costs of individual action, against large corporations, is simply too high. Consumer class actions simply will not be undertaken by first rate lawyers, such as class counsel in this proceeding, unless they are assured of receiving fair – and I would add "generous" – compensation in appropriate cases. That compensation must take into account the risks they undertake – including the real risk of no payment at all, the risk of exposure to costs, and the cost of deferred recovery of compensation. Plaintiffs' class action work is not for the faint-hearted. The defendants are frequently represented by large firms, with substantial hourly rates, which deploy teams of partners and

associates who are able to mount an aggressive defence and no doubt endeavour to wear down plaintiffs' counsel. Unless there are generous rewards for cases that are won, the number and quality of plaintiffs' counsel will inevitably decline.

[54] Considering the foregoing, I approve class counsel's fee and disbursements.

Claims Administration and Reporting

[55] The court will continue to exercise supervisory jurisdiction over the claims administration process until its conclusion. Class counsel will also remain involved. I wish to arrange a case conference with the claims administrator and counsel at an early date to discuss the claims administration protocol. This should include a provision to ensure that disallowed claims are subject to review by class counsel and ultimately by the court. The court should be copied on all reports from the claims administrator to counsel.

G.R. Strathy J.

Date: May 31, 2011

CITATION: *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292
COURT FILE NO.: 07-CV-325223
DATE: 20110531

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Thaddeus Griffin, 1339850 Ontario Limited (c.o.b. as Griffin Leasing) and Ian Andrews

Plaintiffs

and

Dell Canada Inc

Defendants

REASONS FOR SETTLEMENT APPROVAL

G.R. Strathy J.

Released: 20110531

CITATION: Abdulrahim v. Air France, 2011 ONSC 512
COURT FILE NO.: 05-CV-294746 CP
DATE: 20110121

ONTARIO SUPERIOR COURT OF JUSTICE

RE: **Hussein Abdulrahim and Fadi Abedrabbo,** Plaintiffs

Air France, Greater Toronto Airports Authority, NAV Canada et al., Defendants

BEFORE: G.R. Strathy J.

COUNSEL: *J.J. Camp Q.C.*, for the Plaintiffs

Robert Fenn, for NAV Canada

Timothy Trembley, for Air France

DATE HEARD: January 14, 2011

ENDORSEMENT

(Class Counsel Fee Approval)

[1] This is a motion for approval of the fees of class counsel with respect to the global settlement reached in this action.

[2] The details of the action, and of the settlement, are set out in my endorsement approving the settlement, which is being released this day: *Abdulrahim v. Air France*, 2011 ONSC 398. It is not necessary to repeat the details, save to highlight that the settlement was for the total sum of $20,750,000, inclusive of costs. The settlement will result in compensation to approximately 250 passengers on Air France Flight 358 and some 454 relatives who claim under the *Family Law Act*, R.S.O. 1990, c.F.3.

[3] Class counsel is requesting a fee of $6,225,000, plus disbursements and taxes. This is based on 30% of the settlement amount. The retainer agreement between class counsel and the representative plaintiff provides for a fee of 33%. This is, of course, subject to the review and approval of the court.

[4] Counsel also seek approval of the following costs, all of which I approve:

(a) applicable GST of $311,250.00 on class counsel fees;

(b) a further payment of disbursements from July 16, 2009 to December 31, 2010, in the amount of $154,406.50 plus applicable taxes of $10,768.49 for a total of $165,174.99;

(c) payment of G.S.T. in the amount of $18,403.76 which was overlooked in previously approved class counsel disbursements;

(d) a disbursement of $22,275.00 for payment of expert accounting fees which were deferred pending settlement (as set out in the affidavit of Paul Miller, filed); and

(e) a reserve of $25,000.00 to cover reasonable expenses incurred after January 1, 2011 up to February 28, 2011.

[5] In addition, class counsel agreed to protect the accounts of certain medical facilities that provided services to seventeen class members and that agreed to defer their fees pending settlement. The total amount owing is $155,413.70. On presentation of appropriate evidence, I will issue an order directing the administrator to pay the relevant portions of this amount out of the damages awarded to the affected class members.

[6] The right of representative plaintiffs to enter into contingency fee arrangements with class counsel is recognized in the *Class Proceedings Act, 1992*, S.O. 1992 c. 6 (the "*C.P.A.*"). Section 32(1) of the *C.P.A.* provides that an agreement respecting fees and disbursements 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.

[7] On January 21, 2010, Madam Justice Lax approved the retainer agreements between class counsel and the representative plaintiffs, and payment of the disbursements sought by class counsel in the amount of $1,155,420.69. The retainer agreement entered into between class counsel and the representative plaintiffs complies with the *C.P.A.* and is approved.

[8] The following factors, among others, may be considered in determining the reasonableness of a lawyer's fee:

(a) the time expended by the lawyer;
(b) the legal complexity of the matters dealt with;

(c) the risks undertaken and 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; and

(h) the ability of the client to pay and the client's expectation as to the amount of the fee.

See: *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369, [1996] O.J. No. 2897 at para. 8 (Gen. Div.); *Serwaczek v. Medical Engineering Corp.* (1996), 3 C.P.C. (4th) 386, [1996] O.J. No. 3038 (Gen. Div.); *Jones v. American Heyer-Schulte Corp.*, [1998] O.J. No. 6293 (Gen. Div.); *Gariepy v. Shell Oil Co.* (2003), 48 C.P.C. (5th) 340, [2003] O.J. No. 2490 at para. 13 (S.C.J.); *McArthur v. Canada Post Corp.*, [2004] O.J. No. 1406 (S.C.J.); *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344, [1985] O.J. No. 160 (C.A.).

[9] In class action litigation, the court must also consider the goals of class proceedings, particularly in terms of access to justice. The fee of class counsel must be both fair and reasonable. It should not only reward counsel for meritorious efforts, but it should also encourage counsel to take on difficult and risky class action litigation. The risk undertaken by the lawyer, and the success achieved, are important considerations in determining the fee: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304, [1996] O.J. No. 2644 (Gen. Div.); *Windisman v. Toronto College Park Ltd.*, above; *Serwaczek v. Medical Engineering Corp.*, above; *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (S.C.J.).

[10] The courts have recognized that the objectives of the *C.P.A.* – judicial economy, access to justice and behaviour modification – are dependent, in part, upon counsel's willingness to take on class proceedings. This, in turn, depends on the incentives available to counsel to assume the risks and accept the financial burden of carrying class proceedings. A premium on fees is the reward to class counsel for accepting this risk and taking on meritorious but difficult matters: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61 (S.C.J.); *Parsons v. Canadian Red Cross Society*, above, at 287.

[11] In my view, the following factors are particularly significant in determining the fee:

(a) <u>The result</u>

[12] As I observed in my endorsement approving the settlement with NAV, the result of the settlement is an excellent one for every member of the class, who will be indemnified for approximately 80% of his or her compensable damages. Considering that the settlement leaves no individual issues for determination, this is a very significant accomplishment. No class member has objected to the settlement.

(b) The contingent fee arrangement

[13] A contingency fee of one-third is standard in class action litigation and has been commonplace in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases.

(c) The time spent by class counsel

[14] The counsel team included J.J. Camp, Q.C. and Mr. Fiorante at Camp Fiorante Matthews, as well as other lawyers at Will Barristers LLP and the firm of Sutts, Strosberg LLP. Class counsel retained French counsel to assist with respect to the law of France, civil procedures in France, and specific issues arising with respect to some of the French passengers, including subrogated claims of various French agencies, and more particularly, the claims associated with Mr. Haddad, Mr. M. Fawaz and Mr. K. Fawaz. Also part of the class counsel team is Laura Bruneau, a bilingual lawyer and class action administrator, who had the primary responsibility for day-to-day contact with the class members as well as the compilation of an electronic file for each class member, which included all relevant hospital, medical, economic, and other reports and data. In addition, she orchestrated the frequent reports by class counsel to the class members and was responsible for management of class members' personal information, communications with class members and design of the claims process.

[15] As of December 31, 2010, the time docketed by all class counsel in this proceeding, including the time docketed on the Haddad and Fawaz Claims, amount to $4,717,155.02 (exclusive of applicable taxes). The time spent by Mr. Camp's firm alone is almost $2.5 million.

[16] It should be noted in this regard that this action was commenced in 2005. Thus, for over five years class counsel has undertaken this action without any remuneration. In the meantime, rent had to be paid, lawyers and staff had to be paid salaries, and expenses were incurred and paid. Without a substantial firm infrastructure and resources, an action of this kind would be an impossible undertaking.

(d) The complexity of the matter

[17] This was complex litigation involving challenging factual and legal issues, including:

- the cause of the crash;
- the application of two international conventions on carriage by air, the *Montreal Convention* and the *Warsaw Convention* (the "*Conventions*");
- jurisdiction under the *Conventions*;

- the extent of damages recoverable from the carrier under the *Conventions*;
- contribution and indemnity under the *Conventions:*
- the proper scope of a bar order in the settlement of complex, multi-party litigation;
- the liability of the various defendants other than Air France; and
- individual issues of damages including psychological harm, loss of earning capacity, future care and baggage loss.

[18] In order to address these issues, class counsel were required to:

- conduct extensive discoveries – there were approximately 25 days of oral discovery;
- undertake extensive investigations into the cause of the crash in order to conduct examinations for discovery and prosecute the claim. In particular, class counsel retained and worked with numerous experts to investigate a wide range of liability issues including pilot experts, crash investigation experts, weather experts, air traffic control experts, an airport safety expert, an airport runway expert and human factors experts;
- retain experts, both in Canada and in France, to assist in the analysis and work-up of the individual damages issues including expert physicians, psychiatrists, psychologists, economists and future care experts;
- prepare work-ups based on detailed questionnaires sent to all members of the passenger class. In addition, class counsel conducted interviews, in person and by phone, with virtually all passenger class members in Canada and in France. In most cases, the briefs were extensive and included detailed accounts of each passenger's recollection of the accident, physical and psychological injuries and their impact, symptoms, any income loss, any future care claims, baggage loss, and out-of-pocket expenses. All of this was backed up by hospital records, medical records, loss of earnings records and other expert reports as required; and

- perform extensive legal research with regard to a number of complex legal issues arising under the *Conventions*, including jurisdiction and the scope of compensable damages - these issues had a significant impact on the structure of the settlements achieved and the terms of the bar order.

(e) Efforts to settle

[19] Class counsel expended considerable effort to settle with all defendants. I have outlined the scope and nature of these settlement discussions in my reasons approving the settlement and it is not necessary to restate them. Suffice to say that these settlements were accomplished as a result of a focused, strategic, well-prepared and arduous process. I am as satisfied as I possibly can be that these efforts led to a superior result which is extremely beneficial to all members of the class.

[20] In considering the approval of counsel's fee, it is appropriate to recognize that, had these efforts to settle been entirely unsuccessful, class counsel would have expended a very large amount of time and resources without bearing any fruit in this litigation.

(f) The skill and diligence of class counsel

[21] I am convinced that this settlement would not have been possible but for the skill and diligence displayed by class counsel, particularly by Mr. Camp, Mr. Fiorante, Mr. Miller and Ms. Bruneau. No doubt others deserve credit. Mr. Camp and Mr. Fiorante have extensive experience in both class action and aviation litigation. Mr. Miller has considerable experience in personal injury litigation and was the lawyer primarily responsible for the work-up of damages. Ms. Bruneau is an experienced lawyer. As I have noted, she was responsible for the creation of the administrative structure that managed the damages documentation and she handled the communication of class members in both French and English. It was the creation of this impressive system that made it possible for class counsel to assess the damages of each class member and to effectively negotiate with the defendants based on a reasoned and persuasive calculation of the damages.

[22] I am also convinced that class counsel pursued these claims aggressively and were able to negotiate favourable settlements because the defendants and their counsel were well aware that if a settlement was not achieved, they would be facing a skilled adversary who was quite prepared to take the case to trial if necessary.

(g) Risks assumed by class counsel

[23] In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, above, the court recognized that class counsel take on significant risk in undertaking a class proceeding on a contingency basis and that it is important to reward successful lawyers for accepting this risk.

[24] There is a risk in every case that the action will ultimately be unsuccessful. While this risk was mitigated in this case, to some extent, by the liability provisions of the *Warsaw*

Convention pertaining to Air France, it was by no means a sure thing against the other defendants, all of which were substantial entities with significant resources. In taking on a case of this magnitude, class counsel was required to incur and carry disbursements in excess of $1 million. Vast amounts of time have been spent on the case and also carried on the books of counsel's firm.

[25] There was, in this case, a real risk that the action would not be successful against some defendants and that the efforts, time and resources spent by class counsel would go unrewarded.

(g) The progress of the opt-out actions

[26] While not directly relevant to the issue before me, a measure of the success of class counsel, who pursue this matter on behalf of some 700 class members (including passengers and their families), is that some of the opt-out actions, which seek to pursue individual actions on behalf of passengers who opted out of the class action, have not advanced particularly expeditiously – see my reasons dismissing NAV's motion for a common liability trial: *Abdulrahim v. Nav Canada*, 2010 ONSC 5542, [2010] O.J. No. 4660. While some of these actions are barely off the ground, or bogged down in procedural battles, class counsel has successfully managed to prosecute this action to a state of trial readiness and has persistently and successfully orchestrated its complete resolution.

[27] I would add to this that the Fawaz and Haddad claims were languishing until they were taken over by class counsel.

(h) Importance of the matter to the class

[28] It is quite obvious that involvement in a traumatic air crash is an experience from which no one emerges unscathed and obtaining fair compensation for their injuries was vitally important to all passengers on the flight. The settlements will result in substantial monetary compensation to all class members.

(i) Communications with class members

[29] This is a case in which class counsel's communications with members of the class have been exemplary. Class counsel has met at least once with every single passenger class member. This includes two meetings of class counsel, together with local French counsel, with all passengers living in France. Class counsel have had extensive communications with all class members, ranging from personal interviews to periodic reports via e-mails and letters. To date, class counsel have reported to the passenger class members approximately fifteen times.

Conclusion

[30] In summary, the hard work, outstanding organization, tactical and legal skills, and persistence of class counsel have resulted in an excellent result in this class action. It has achieved real justice for real people who were victims of a very serious aviation accident. It will give them significant compensation through a simple and expeditious claims process. The

benefits will begin to flow almost immediately. While the proposed fee is a large one, it was well-earned and it is fair and reasonable in the circumstances.

[31] For these reasons, an order will issue approving the retainer agreement between class counsel and the representative plaintiffs and approving fees in the amount of $6,225,000.00 as well as the taxes and disbursements set out above.

[32] In accordance with counsel's undertaking, these fees will not be paid until the claims of all class members have been paid.

[33] I will remain seized of the matter for the purpose of any issues that may arise with respect to the implementation of the settlement or with respect to class counsel's fees.

G.R. Strathy J.

DATE: January 21, 2011

CITATION: Ainslie v. Afexa Life Sciences Inc., 2010 ONSC 4294
COURT FILE NO.: 07-CV-336986PD1
DATE: 20100805

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
DAVID AINSLIE and MURIEL MARENTETTE	)	*William Sasso and Jay Strosberg*, for the Plaintiffs/Moving Parties
	)	
Plaintiffs	)	
and	)	
	)	
	)	
AFEXA LIFE SCIENCES INC., GRANT THORNTON LLP, JACQUELINE J. SHAN, GORDON G. TALLMAN and HARRY BUDDLE	)	*Patrick O'Kelly and Simon Bieber,* for the Defendants/Respondents Afexa Life Sciences Inc. and others
	)	
	)	*Matthew Fleming*, for the Defendant/Respondent, Grant Thornton LLP
Defendants	)	
	)	

HEARD: June 28, 2010

Proceeding under the *Class Proceedings Act, 1992*

REASONS ON MOTION FOR CERTIFICATION, SETTLEMENT APPROVAL AND APPROVAL OF FEE OF CLASS COUNSEL

G.R. Strathy J.

[1] This is a proposed class action in which the plaintiffs claim that the defendant CV Technologies Inc. (now known as "Afexa Life Sciences Inc." and referred to herein as "CV"), the manufacturer of a cold and flu medicine known as "Cold-fX®", misrepresented its financial

results, causing the price of its shares to be artificially inflated. The plaintiffs claim that they and other shareholders suffered a loss when the truth was disclosed. They seek to hold CV, and its auditors Grant Thornton LLP ("GT"), responsible for the loss. After three years of litigation, the parties have reached a settlement in the amount of $7.1 million, inclusive of costs. That settlement is subject to court approval.

[2] The plaintiffs now move for an order certifying this proceeding as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*C.P.A.*") and approving the settlement. For the reasons that follow, that order will be granted. The plaintiffs also ask for approval of class counsel's fee of $1,378,749.49, plus disbursements. I approve immediate payment of two-thirds of that fee, plus all disbursements and G.S.T. Approval of the balance of the fee will take place after class counsel makes a final report to the court requesting authorization for the distribution of the settlement.

Background

[3] The plaintiffs bring this action on behalf of certain holders of securities of CV, which is a public company. Although CV is incorporated under the laws of the Province of Alberta, it maintains a corporate office in Toronto and its securities are publicly traded only on the Toronto Stock Exchange ("TSX").

[4] The proposed class is defined as:

> All persons, other than Excluded Persons, who acquired securities of CV on the TSX during the class period and who held some or all of those securities on March 26, 2007.

[5] The class period is December 11, 2006 to March 23, 2007.

[6] Before May, 2006, CV had marketed its product in Canada. In May, 2006, it began to market Cold-fX® in the United States and it reported significant revenues from U.S. sales in its audited financial statements for the fiscal year ended September 30, 2006 and in its unaudited financial statements for the first quarter of 2007, ended December 31, 2006.

[7] On March 26, 2007, CV issued a press release stating that:

> While reported U.S. sales in the fourth quarter of 2006 and the first quarter of 2007 were $8.6 million, this primarily represented sales to retailers for stocking their shelves. The actual sell through to consumers has been disappointing and is estimated to be $1.5- $2.5 million for the first six months of 2007. Slow U.S. sales will likely result in rebalancing of seasonal inventory by some retailers. *Significant rebalancing and product returns could have a serious impact on the Company's cash position and working capital. The anticipated second quarter loss is dependent upon the degree and extent of possible returns.* [Emphasis added.]

[8] Following the issuance of this press release, the price of CV's shares declined by approximately 20 per cent from $2.37 (the closing price on March 23, 2007, which was the last trading day before March 26, 2007) to $1.89, the closing price on March 26, 2007.

[9] On April 11, 2007, CV issued a second press release announcing that its financial statements for 2006 and for the first quarter of 2007 required restatement due to a revenue deferral issue in the U.S. Following this disclosure, the price of CV's shares declined by approximately 6 per cent from $1.47 (the closing price on April 10, 2006) to $1.38 (the closing price on April 11, 2007).

[10] The restated financial statements for 2006 were released on June 14, 2007. They disclosed that CV's net sales were approximately 12 per cent lower than originally reported, before-tax earnings were approximately 51 per cent less than originally reported, and net earnings were approximately 85 per cent less than originally reported.

[11] The restated consolidated financial statements for the first quarter of 2007 disclosed that CV's net sales were 10 per cent lower than originally reported, earnings before income tax were 141 per cent lower than originally reported, and net loss was 130 per cent greater than originally reported.

[12] Contemporaneous with the release of these restated financial statements, CV issued a press release stating that:

> [i]n the fourth quarter of fiscal year 2006, the Company entered the U.S. market and recognized revenue with the same revenue recognition criteria as used in Canada, a market with a strong history and nominal product returns. Given that the U.S. was a new market and that Cold-fX® was a new product for this market, the Company has now realized that in the absence of any history of returns, the criteria to recognize revenue were not met. The appropriate application of the revenue recognition policy would have prevented the recognition of such revenues until the right of return has expired.

[13] The plaintiffs allege that CV misrepresented its financial results, including its income, revenue and earnings, during the class period and that the individual defendants and GT participated in the misrepresentation.

[14] The plaintiffs allege that, as a result of the misrepresentation, the trading price of CV's common shares was artificially inflated during the class period. It is alleged that the sharp decline in the trading price of CV's shares following the March 26, 2007 public correction of the

misrepresentation, caused loss to investors who had purchased CV securities during the class period and continued to hold those securities at the time of the correction.

[15] There is a parallel class action in the province of Alberta. As part of the settlement, that action has been dismissed, on consent, but the order is being held in escrow pending the outcome of this motion. The class members in the Alberta action are included in the proposed class in this action. There are no other known actions in Canada that have been commenced against CV, GT or the individual defendants relating to the claims at issue in this action.

[16] The principal terms of the proposed settlement are as follows:

> (a) the total settlement amount is $7.1 million. The defendants, other than GT, will contribute $6.6 million and GT will contribute $500,000;
>
> (b) the settlement will apply to all class members in Canada or elsewhere who acquired CV securities during the class period;
>
> (c) there is no right of reversion or opt-out credit available to the defendants. The settlement amount will be distributed, after payment of any administration costs and legal fees and expenses as awarded by the court, among all class members who submit valid claim forms to the administrator on a timely basis;
>
> (d) in exchange for the payment of the settlement amount, it is intended that the defendants will be released from all claims of class members;
>
> (e) the Alberta action will be dismissed;
>
> (f) there is an opt-out threshold, which gives the defendants the ability to terminate the settlement if opt-outs exceed the threshold;
>
> (g) approximately $5.325 million of the settlement will be available for distribution to members of the class, after payment of administrative expenses ($129,950), notice costs ($100,000) and the fees and disbursements claimed by class counsel ($1,541,900);

(h) notice will be published in the manner described below;

(i) Marsh Risk Consulting Canada will provide claims administration services and disputes as to entitlement will be resolved by Ms. Reva E. Devins, an experienced and well-respected referee;

(j) the plan of allocation creates a user-friendly claims process - there is no requirement that each claimant prove reliance upon the alleged misrepresentation. Each class member will complete a claim form and will submit evidence of purchase and sale of CV shares;

(k) allowable claims will be pro-rated against the settlement fund;

(l) prior to distribution of the settlement fund to eligible claimants, class counsel and the administrator will report to the court;

(m) the court will continue to supervise the administration, implementation and distribution of the settlement;

(n) in the event that there is a surplus of the settlement available after distribution to all eligible class members, the court will receive further submissions on an appropriate *cy-pres* award.

[17] An opt-out threshold is a common form of protection for a defendant wishing to settle a class action. The defendant does not want to pay a large amount of money to settle, only to find that an unanticipated number of class members opt-out, leaving it exposed to their claims. The opt-out threshold is confidential to the settling parties, for obvious reasons. I have been informed of the threshold and I am satisfied that it is appropriate.

[18] Notice of settlement approval will be given to the class by short-form and long-form notices, which will be disseminated to class members pursuant to the settlement agreement and the plan of notice. These notices will advise class members of the court's approval of the settlement agreement and will provide them with information concerning their right to participate in the settlement by filing a claim form or to opt out of the action by submitting an opt-out form.

[19] Class members will have 60 days after the date of publication of the short form notice to opt out of the settlement.

[20] A long form notice of settlement approval will also be sent by direct mail to as many class members as possible, using the services of Broadridge Financial Solutions Inc., a company specializing in communications with corporate shareholders. Class counsel are confident that notice of settlement approval and of the claims process will come to the attention of a large number of class members.

Certification

[21] In order to give effect to the settlement, and to make it binding on members of the class who do not opt out, it is necessary that the action be certified as a class action under the *C.P.A.* Section 5 of that statute provides that the court shall certify the action as a class proceeding where the following test is met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class;

(ii) has a plan which sets out a workable method for the advancement of the proceeding on behalf of the class, including notification of class members; and

(iii) does not, on the common issues, have an interest in conflict with the interests of other class members.

[22] It is well-established that the requirements for certification need not be as rigorously applied in the settlement context - the certification test will be satisfied if there is a *prima facie* case favoring certification: *Baxter* v. *Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Sup. Ct.) at para. 24; *Osmun* v. *Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (Sup. Ct.) at para. 21.

[23] I do not propose to review these criteria in detail. The defendants support the settlement and certification is necessary in order to give effect to the settlement. There is no opposition to the settlement in spite of extensive publication of notice of this hearing. A similar sort of case, involving alleged misrepresentation in the secondary securities market, *Silver* v. *Imax Corp.*, [2009] O.J. No. 5585 (Sup. Ct.), has been certified on a contested basis and others have been certified for the purposes of settlement: see *Pysznyj v. Orsu Metals Corp.*, 2010 ONSC 1151.

[24] In summary:

(a) the pleadings disclose a properly pleaded cause of action for negligent misrepresentation: *Queen* v. *Cognos Inc.*, [1993] 1 S.C.R. 87 at p. 110; *Elliott* v. *NovaGold Resources Inc.*, 2010 ONSC 2683 (Sup. Ct.);

(b) the class definition is set out in objective terms and enables members of the class to readily identify themselves as such. The definition is not dependent on the merits of the case and satisfies the purposes of the class definition set out in leading case of *Bywater* v. *Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.)). In securities class actions the class is typically those who owned the securities at the material time: *Hollick* v. *Toronto (City)*, [2001] 3 S.C.R. 158 at para. 20; *Frohlinger* v. *Nortel Networks Corporation* (2007), 40 C.P.C. (6th) 62 (Ont. Sup. Ct.) at paras. 14-15;

(c) I am satisfied that in the circumstances of this case, where the shares of CV were traded only on the TSX, it is appropriate to certify a "global" class as was done in *Silver* v. *Imax Corporation*, above. A purchaser of securities of CV, a Canadian company with a presence in Ontario, a reporting issuer under the Ontario *Securities Act*, with shares trading only on the TSX, could reasonably expect that his or her rights in relation to those securities would be determined by the courts of Ontario. There is a real and substantial connection between the claims asserted in this action and Ontario and this province is a natural forum for the action. The requirements of order and fairness will be met by a comprehensive notice plan that will ensure, to the extent reasonably possible, that actual notice is received by all members of the class: see *Currie* v. *McDonalds Restaurants of Canada Ltd.*, 74 O.R. (3d) 321 (C.A.); *Ramdath v. George Brown College of Applied Arts and Technology*, [2010] O.J. No. 1411 (Sup. Ct.); *Silver* v. *Imax Corporation*, above, at para. 117; *Mondor* v. *Fisherman* (2002), 22 C.P.C. (5th) 346 (Ont. Sup. Ct.) at para. 12; *Elliott* v. *NovaGold Resources Inc.*, above, at paras. 11-12;

(d) the common issue proposed by the plaintiff[1] is acceptable for certification and meets the requirement of avoiding duplication of fact finding and legal analysis: *Western Canadian Shopping Centres Inc.* v. *Dutton*, [2001] 2 S.C.R. 534 at para. 39. A similar common issue was approved by van Rensburg J. in *Silver* v. *Imax Corporation*, above. In *McKenna v. Gammon Gold Inc.* [2010] O.J. No. 1057, I declined to certify a common issue based on common law misrepresentation in the securities context because of the need to establish reliance as an element of the cause of action. In this case, the settlement will extend to all members of the class regardless of whether they relied upon or were even aware of the alleged misrepresentation. Accordingly, bearing in mind the relaxed test for certification on settlement, the common issue is appropriate;

(e) the requirement that a class proceeding be the preferable procedure for the determination of the common issue is of less significance in the context of the settlement of this case because the settlement provides a mechanism for ensuring compensation of all eligible class members. I am satisfied that the proposed settlement is an efficient and manageable method of resolving the claims of the class and that it fulfills the goals of judicial economy, access to justice and behaviour modification.: *Hollick* v. *Toronto (City)*, above, at paras. 27-28. Many individual claims by shareholders would be for relatively small amounts and would be uneconomical to pursue

[1] "Did the Defendants, or any of them, misrepresent the results of CV's revenue for fiscal 2006 and the first quarter of 2007?"

> individually. Without an action of this kind, it is probable that the claims of most shareholders would not be satisfied. The action also supplements the deterrent effects of regulatory oversight and encourages public companies to take precautions to protect investors: see *Allen v. Aspen Group Resources Corp.*, [2009] O.J. No. 5213 (Sup. Ct.) at paras. 144-5;
>
> (f) the proposed representative plaintiffs fairly and adequately represent the interests of the class. Both purchased shares of CV during the class period and continued to own them after the corrective disclosures were made. They have a clear interest in the litigation and there is no evidence that they have any conflict with the class. They have diligently and faithfully prosecuted the claim to a successful conclusion by way of settlement. I am also satisfied that the litigation plan, as set out in the settlement agreement, is a workable method of resolving the action.

[25] The settlement agreement incorporates the plaintiffs' damages theory that the value of CV's shares was artificially inflated by the misrepresentation made by the defendants during the class period and that the inflation was removed from the share value as a result the March 26, 2007 corrective disclosure.

[26] The class members' entitlements under the settlement agreement will be calculated in a manner analogous to the damages provisions in s. 138.5 of the *Securities Act*, R.S.O. 1990, c. S.5 *("O.S.A.")*. The plan of allocation sets out formulae to calculate damages: (a) for shares disposed of on or before the tenth trading day following the corrective disclosure; in this case, on or between March 26 and April 9, 2007; (b) for shares disposed of after the tenth trading day following the corrective disclosure; in this case, after the close of trading on April 9, 2007; and (c) for shares that have not been disposed of, or are otherwise still held by the claimant.

[27] Ultimately, the amount of each class member's actual compensation will depend upon: (i) the number and the price of shares purchased by the class member; (ii) the time and the price at

which the class member sold such shares; and (iii) the total number and value of claims for compensation filed with the administrator.

[28] I agree with class counsel that the plan of allocation methodology treats the class members fairly and that the plan of allocation is a fair and reasonable manner of distributing the settlement proceeds to authorized claimants under these circumstances.

Settlement approval

[29] Section 29(2) of the *C.P.A.* provides that a settlement of a class proceeding is not binding unless it has been approved by the court. The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement. A settlement need not be perfect. It need only fall "within a zone or range of reasonableness": *Bilodeau* v. *Maple Leaf Foods Inc.*, [2009] O.J. No. 1006 (Sup. Ct.) at paras. 45-46; *Parsons* v. *Canadian Red Cross Society*, [1999] O.J. No. 3572 (Sup. Ct.) at para. 69; *Dabbs* v. *Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at pp. 439-440; *Frohlinger* v. *Nortel Networks Corp.*, [2007] O.J. No. 148 (Sup. Ct.) at para. 8; *Ontario New Home Warranty Program et al.* v. *Chevron Chemical Company et al.* (1999), 46 O.R. (3d) 130 (Sup. Ct.) at paras. 70, 89.

[30] In determining whether to approve a settlement, the court may take into account factors such as:

- the likelihood of recovery or likelihood of success;

- the amount and nature of discovery, evidence or investigation;
- the proposed settlement terms and conditions;
- the future expense and likely duration of litigation;
- the recommendation of neutral parties, if any;
- the number of objectors and nature of objections;
- the presence of arm's-length bargaining and the absence of collusion;
- the information conveying to the court the dynamics of, and the positions taken, by the parties during the negotiations;
- the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and
- the recommendation and experience of counsel.

See: *Bilodeau* v. *Maple Leaf Foods Inc.*, above, at para. 47; *Ford* v. *F. Hoffmann-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (Sup. Ct.) at para. 117; *Dabbs* v. *Sun Life Assurance Co. of Canada,* [1998] O.J. No. 1598 (Gen. Div.) at para. 10; *Parsons* v. *Canadian Red Cross Society*, above, at paras. 126-132.

[31] The "zone of reasonableness" concept is helpful in guiding the exercise of the court's supervisory jurisdiction over the approval of a settlement of class actions. It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented – as they clearly are in this case – by highly reputable counsel with expertise in class action securities litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[32] As stated in *Dabbs* v. *Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at p. 440, there is a strong initial presumption of fairness when a proposed class

settlement, which was negotiated at arm's length by class counsel, is presented for Court approval:

> [T]he recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

[33] In this case, I accept the submission of class counsel that the settlement was the product of hard negotiations at arm's length in the face of formidable opposition by experienced counsel for the defendants. The settlement appears to be favourable to the class, consistent with a reasonable risk-based analysis of the potential recovery after trial, grounded in a principled approach to the assessment of damages and reasonably reflective of the litigation risks, costs and delays that would result from taking the matter to trial.

[34] The following factors are particularly significant in leading me to conclude that the settlement is fair, reasonable and in the best interests of the class:

> (a) at the time the settlement was reached, there was uncertainty regarding how the leave test in Part XXIII.1 of the *O.S.A.* would be interpreted and a significant risk that the leave test would not be met and/or that the court would not certify the claims in Part XXIII.1 of the *O.S.A.*;
>
> (b) there was, at least in my respectful view, a serious risk that the court would not certify the common law misrepresentation claims – I declined to do so in *McKenna v. Gammon Gold Inc.*, above, although I recognize that there is authority to the contrary;
>
> (c) the statutory limits of liability in Part XXIII.1 of the *O.S.A.* would be in the range of $14 million to $17.2 million if the action was entirely successful and the total value of the settlement (before costs and expenses) is about 50 per cent of that;

> (d) the plaintiffs' expert estimated the total damages recoverable by the class in the range of about $9.8 million – this figure would no doubt be disputed by the defendants and there is at least a possibility that the damages would be less than this amount;
>
> (e) on a practical level, there is no guarantee that a judgment would be fully collectible. CV's liability insurance is $10 million, inclusive of defence costs, and counsel for CV advises that costs have eroded the insurance to around $8 million at this time. If the matter were to proceed to a contested trial and possibly appeals, there is a probability that the available insurance would be less than the amount of the settlement; and
>
> (f) there were at least some issues concerning the underlying merits of the plaintiffs' claims as the defendants took the position that there had in fact been disclosure during the class period as a result of management discussion and analysis reports that were delivered to shareholders at the same time as the financial statements.

[35] All these considerations support my conclusion that, viewed objectively, the settlement falls within the zone of reasonableness and is a fair reflection of the merits of the claim and the risks of litigation, taking into account as well the value of an early settlement. The settlement comes with the recommendation of experienced counsel, the support of the representative plaintiffs and, despite extensive pre-hearing publication, there is not a single voice raised in opposition to the settlement. If the opt-out threshold is exceeded, the defendants will be entitled to terminate the settlement and the proceedings will continue. Absent that, any shareholder who does not wish to accept the settlement and to "go it alone" and maintain an individual action, may opt out of the action and the settlement.

[36] Approval of Fees of Class Counsel

[37] Class Counsel request a fee of $1,378,749.48, including taxes. Disbursements are claimed in the amount of $163,150.52. The costs of administration are fixed at $129,950.00, the costs of the notice plan at $100,000.00 and the cost to receive objections at $3,150.

[38] The task for the court on a motion of this kind is to determine a fee that is "fair and reasonable" in all of the circumstances: *Parsons* v. *Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Sup. Ct.) at paras. 13 and 56.

[39] In *VitaPharm Canada Ltd.* v. *F. Hoffmann-La Roche Ltd.,* [2005] O.J. No. 1117 (Sup. Ct.) at para. 67, Cumming J. summarized some of the factors to be considered by the court when fixing class counsel's fees:

> 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 fees; and

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

[40] It seems to me that one of the most important factors in this list, particularly where the lawyer seeks a contingent fee, as is invariably the case in class actions, is the result achieved in relation to the amount at issue and the complexity of the case. An excellent result will deserve a higher fee than a modest result. All other things being equal, the settlement of a $7 million claim for $7 million would deserve a greater fee than the settlement of a $70 million claim for $7 million. It is important to ask, then, what was the client's claim "worth" and what did they get for it? Regard must always be had to the complexity and difficulty of the case, because the $7 million claim may have been a "slam dunk" whereas the $70 million claim may have been a "long shot", settled only through the persistence and skill of counsel.

[41] A second important factor is the time spent and financial risks incurred by the lawyers. What fee are the lawyers requesting in relation to the time they have spent on the case and the costs and risks they have incurred in prosecuting it? In this case, the lawyers have incurred some $500,000 in unbilled fees and over $150,000 in actual disbursements, in a period of more than three years.

[42] The third important factor is the fee agreement between class counsel and the representative plaintiff, which of course impacts the reasonable expectations of the class as to the amount of the fees. The fee formula in this case, a contingent fee on a sliding scale of 25-30-33.3

per cent depending on the timing of settlement, is typical. In this case, class counsel say that they are actually requesting a fee that is 19.4 per cent of the gross recovery, which is somewhat less than the fee to which they would be entitled under the fee agreement with the plaintiffs.

[43] A fourth important factor is the level of fees awarded in other proceedings of a similar nature, with a view to achieving predictability and consistency in fee awards.

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

[45] Turning to the above factors, what was the result achieved in relation to the amount at issue and the complexity of the case? What was the case worth? I have mentioned that the upper limit of recovery, based on the *O.S.A* limits, was between $14 and $17 million, but that the plaintiffs' expert put the recoverable damages in the range of $9.8 million and that, as a practical matter, there was insurance available (after deduction of defence costs) of around $8 million.

Viewed practically, a settlement at $7.1 million must be regarded, as I have found, as being in the zone of reasonableness – it appears to be a good settlement.

[46] I also accept the submission that there were significant risks undertaken by class counsel in taking on the case. It was by no means a "slam dunk". Class counsel had every reason to believe that it would be vigorously defended by experienced counsel.

[47] The fee agreement between class counsel and the plaintiffs contemplated a fee of 25 per cent of the recovery if the action was settled prior to discovery, as it was. This is a common provision in contingent fee agreements. The fee sought is less than the amount of class counsel's contractual entitlement. It is comparable to the percentage fees awarded in other recent proceedings.

[48] The following chart summarizes four awards, including the award I made on settlement approval in *Osmun* v. *Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093 (Sup. Ct.):

Decision	Amount Recovered	Fee	Percentage
Martin v. Barrett[2]	$13,926,195	$4,086,870	29%
Garland v. Enbridge Gas Distribution Inc.[3]	$22 million plus savings	$10.13 million	27%
Stone Paradise Inc. v. Bayer Inc.[4]	$3,321,712 plus interest	$834,000	25%
Osmun v. Cadbury Adams Canada Inc.[5]	$5,340,940	$1,335,235,12	25%

[2] *Martin* v. *Barrett*, [2008] O.J. No. 2105 (Sup. Ct.)
[3] *Garland* v. *Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (Sup. Ct.)

[49] For the reasons set out earlier, I am satisfied that the services of class counsel have resulted in a settlement that fulfills the objectives of the *C.P.A.* It will result in real access to justice for real investors. It has achieved significant judicial economy. It will result in behaviour modification not only by the defendants, but in the securities industry generally. The significance of these accomplishments should not be understated.

[50] The remaining issue is whether the fee should be payable immediately or whether all or some part should be deferred until the claims process has been completed. It was vigorously argued by Mr. Strosberg that all the criteria necessary to assess the reasonableness of the fee are known at this time and that there is no reason to defer compensation. It is also fair to note that class counsel has gone without compensation for some three years, all the while incurring disbursements, paying lawyers and incurring substantial overheads. Deferred compensation means less compensation.

[51] I have concluded that there are several reasons why it is more fair and reasonable to approve payment of two-thirds of the amount claimed as fees now and to defer approval of the balance until after the results of the claims process are known. This is similar to the procedure I adopted in *Boulanger v. Johnson & Johnson Corp.*, [2010] O.J. No. 1913 and I believe that it is appropriate to do so in this case.

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[4] *Stone Paradise Inc. v. Bayer Inc.* (19 April 2006), London 45604CP (Ont. Sup. Ct.).
[5] *Osmun* v. *Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093 (Sup. Ct.).

[52] First, in the case of a results-based fee, there is nothing inherently unfair in requiring the lawyer to wait for payment until the client actually receives his or her money. Any delay in payment can be compensated by interest.

[53] Second, an important test of the value of the settlement will be the number and amount of claims actually paid to the class as a result of the settlement and the extent to which the settlement fund is sufficient to satisfy the claims of the class. If the projections of counsel and their expert are correct, and if all eligible class members make claims, each class member might be expected to receive around 50 per cent of his or her loss. If, at the end of the claims process, the recovery is substantially less than that, one might have reason to question the value of the settlement. If, on the other hand, there are a very small number of claims, or the total amount of compensation awarded is small, one might question the real value of the settlement in terms of access to justice.

[54] Third, class counsel acknowledges an ongoing responsibility to the class to respond to inquiries concerning the claims process, to supervise the implementation of the settlement and to report to the court prior to the distribution of funds. The responsibilities of class counsel after settlement are important and the court must rely on class counsel to ensure that the settlement is in fact efficiently implemented in accordance with its terms. It is no reflection on the diligence of class counsel to suggest that the fee should not be paid in full until such time as counsel's responsibilities have been fully discharged.

[55] For this reason, I will order payment of two-thirds of the fees claimed by class counsel, together with all disbursements, at this time. The balance of counsel's fees will be reviewed at the same time as the request for distribution of the settlement.

[56] The draft form of order submitted by class counsel at the hearing of the motion is generally satisfactory. Counsel may submit to me, care of Judges' Administration, a clean copy, approved as to form and content.

G.R. Strathy J.

Released: August 5, 2010

CITATION: Ainslie v. Afexa Life Sciences Inc., 2010 ONSC 4294
COURT FILE NO.: 07-CV-336986PD1
DATE: 20100805

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DAVID AINSLIE and MURIEL MARENTETTE

Plaintiffs

and

AFEXA LIFE SCIENCES INC., GRANT THORNTON LLP, JACQUELINE J. SHAN, GORDON G. TALLMAN and HARRY BUDDLE

Defendants

Proceeding under the *Class Proceedings Act, 1992*

REASONS ON MOTION FOR CERTIFICATION, SETTLEMENT APPROVAL AND APPROVAL OF FEE OF CLASS COUNSEL

G.R. Strathy J.

Released: August 5, 2010

CITATION: Robertson v. ProQuest Information and Learning LLC, 2011 ONSC 2629
COURT FILE NO.: 03-CV-252945CP
DATE: 20110502

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	
HEATHER ROBERTSON Plaintiff	*Kirk Baert* and *Celeste Poltak*, for the Plaintiffs
– and –	
PROQUEST INFORMATION AND LEARNING LLC, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC. Defendants	*Donald A. Cameron* and *Christina Capone-Settimi*, for the Defendant, ProQuest Information and Learning LLC *Wendy Matheson* and *Andrew Bernstein*, for the Defendant, Rogers Publishing Limited *Ernest M. Chan*, for the Defendant, Cedrom-SNI Inc. *Ryder Gilliland*, for the Defendant Toronto Star Newspapers Ltd
	HEARD: April 11, 2011

C. HORKINS J.

[1] This is a motion for approval of the settlement of this class action and class counsel fees pursuant to s. 29 of the *Class Proceedings Act*, 1992, S.O. 1992, c. C.6 ("*CPA*"). Notice of this approval hearing has been given to the class and no objections have been delivered.

BACKGROUND

[2] This action was commenced on July 25, 2003, and certified on October 21, 2008. The statement of claim alleges that the defendants breached class members' rights to their articles and

literary works under the *Copyright Act*, R.S.C. 1985, c. C-42. The claim alleges that class members had granted print publishers the limited one-time right to reproduce their works in only print editions of newspapers or magazines. By the defendants' reproduction, distribution and communication of these works to the public in electronic media, such as online databases, without the permission of authors or the copyright holders, the plaintiff claimed the defendants had infringed the class members' copyrights.

[3] The plaintiff, Heather Robertson, is a well-known and prolific Canadian freelance writer. Ms. Robertson has published more than 15 fiction and non-fiction books and has been contributing to Canadian magazines and newspapers for over 40 years. Ms. Robertson is also a founding member and past president of the Professional Writers' Association of Canada ("PWAC").

[4] The plaintiff brought a similar class action against Thomson Canada Ltd. The court approved a settlement in that action in 2009: *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (S.C.J.).

[5] Each of the defendants vigorously defended this action. They have asserted a number of different statutory and common law defences including, their own statutory copyrights in newspapers and magazines as collective works, an implied licence to make freelance works available in electronic databases, consent of the authors, acquiescence, limitation periods, laches and fair dealing.

[6] After the plaintiff delivered her certification motion materials and after certification had been granted in the *Thomson* action, the defendants consented to certification of this action on October 21, 2008. However, as a result of a plethora of third and fourth party claims (some 204 in total), which were commenced following certification, the original certified class definition was subsequently amended twice, on September 15, 2009 and July 19, 2010.

[7] The numerous third and fourth party claims created complexity and delay, and had the potential to undermine the progress of the plaintiff's entire action, including its very manageability as a class proceeding. Eventually, the problems that the third and fourth party actions created were resolved. On July 19, 2010, Justice Cullity ordered that the class definition would be amended so that it would be limited only to the creators or assignees of literary works published in print by Toronto Star, Rogers, Canwest, or their predecessors in interest.

[8] A two-day mediation was held in May 2010. While a settlement was not reached at the mediation, negotiations followed and a settlement was reached with Toronto Star, Rogers and CEDROM in December 2010. A settlement agreement with ProQuest followed in January 2011.

[9] The insolvency of the defendant Canwest Publishing Inc. ("Canwest") created a unique challenge for the plaintiff and her counsel in their efforts to settle this action.

THE CANWEST INSOLVENCY

[10] As a result of Canwest's insolvency, it sought protection from its creditors under the *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36 ("*CCAA*"). Justice Pepall granted an initial order pursuant to the provisions of the *CCAA* in favour of Canwest. As a result of this order, actions against Canwest, including this class action, were stayed.

[11] Ms. Robertson filed a claim in the *CCAA* proceedings covering all claims advanced against Canwest in this class action. In June 2010, Ms. Robertson's claim was settled. The Canwest settlement valued the class members' claims against Canwest at $7.5 million in the insolvency. The class members received shares arising out of the insolvency. In return, the settlement provided a licence for class members' Canwest works and a release of all claims relating to Canwest content, except for claims against ProQuest which would continue.

[12] On June 16, 2010, Justice Pepall approved the settlement with Canwest, finding that the settlement represented "a reasonable, pragmatic and realistic compromise of the class claims" and was in the best interests of the class (*Robertson v. ProQuest Information and Learning Co.* [2011] O.J. No. 1160). The settlement provided a "possible avenue for recovery" from Canwest in the insolvency, while at the same time preserving the claims of the class against the other defendants, as well as the claims against ProQuest for alleged violations relating to Canwest content.

[13] As a result of Canwest's insolvency and this settlement, Ms. Robertson was ultimately issued 166,451 Class C Voting Shares of Postmedia Network Canada Corp. (the successor to Canwest).

[14] Ms. Robertson then retained RSM Richter, a financial services firm, to assist in the valuation of these shares and to maximize recovery for class members through the sale of the shares. RSM Richter solicited interest in the shares and contacted more than 28 potential buyers. RSM Richter estimated (as of March 16, 2011) that the value of the Postmedia shares was in the range of approximately $12 to $15.50 per share.

[15] On April 19, 2011, on the recommendation of RSM Richter, Ms. Robertson accepted an offer of $14.40 per share ($2,396,894.40).

THE SETTLEMENT

[16] Under the terms of the settlement agreements, Toronto Star, Rogers and CEDROM have agreed to pay $3.475 million and ProQuest has agreed to pay $2 million. In addition, there will be the proceeds from the sale of the Postmedia shares ($2,396,894.40) for a total of $7,871,894.40 million.

[17] This amount will be available for distribution to the class after deducting the costs of administering the compensation program (including notice to the class), class counsel fees,

disbursements and taxes, reimbursement to the Law Foundation of Ontario for paid disbursements and the 10% levy owing to the Law Foundation of Ontario

[18] William Dovey of Duff & Phelps will administer this settlement. Mr. Dovey was the claims administrator for the *Thomson* settlement. With the benefit of his experience, an improved claims process has been designed to administer the settlement in this action. The administrator will charge a flat fee of $175,000 plus reasonable disbursements and taxes.

[19] The relative contribution of each defendant's contribution to settlement is fair. Amongst Toronto Star, Rogers and Canwest publications, the Canwest publications were accessed from ProQuest's databases 2.16 times more often than the Toronto Star and Rogers publications (i.e. of the three publishers, Canwest works represented 68% of those accessed, Rogers works represented 15%, and Toronto Star works represented 17%). Accordingly, at a trial, the plaintiff would have expected a smaller recovery for Toronto Star and Rogers works than for Canwest works in any event. In that context, the settlement of $3.475 million for Toronto Star and Rogers works is fair and reasonable.

[20] Given the risk created by Canwest's insolvency, the settlement amount for Canwest works is fair and reasonable. Canwest was the main defendant with respect to Canwest works. After Canwest sought creditor protection, full recovery from it became unrealistic. The Canwest settlement and subsequent sale of the shares, made the best of this difficult situation.

[21] After the Canwest settlement, ProQuest became the only defendant from whom the plaintiff could recover for Canwest works. ProQuest's position in this action is different than the print publisher defendants' position and it may have been more difficult to establish liability and damages against it.

[22] As a result of these settlements, the continuing claims against ProQuest would have been limited to Canwest content only. Any future judgment against ProQuest would likely have taken into account the sale of the Postmedia shares. ProQuest would have argued that the proceeds from the sale of the shares be deducted from whatever amount they were found liable to pay.

[23] Since the claims against Canwest and ProQuest related to the same content, the value of the settlement for the Canwest content requires one to combine ProQuest's proposed payment of $2 million with the proceeds from the sale of Postmedia shares.

[24] Under the terms of the various settlement agreements, the class members will benefit from a claims-based compensation scheme for freelance works at issue in this action on the following general basis:

(a) class members will file a claims form with the Administrator;

(b) the claims form will identify the works for which a class member claims compensation and the publication in which the works was first published;

(c) the Administrator will allocate points to a class member who files a claim according to a points allocation system based on length of work and dissemination level of publication;

(d) twelve (12) of the most frequently accessed Toronto Star, Rogers and Canwest publications have been designated in this process as "Tier 1" publications, twenty-three (23) publications have been designated as "Tier 2" and all other eligible publications as "Tier 3";

(e) once the time for making claims has expired, the Administrator will calculate the points to be awarded for each claiming class member; and

(f) subject to a maximum cap of 1% for any individual or one individual class member and a minimum payment of $5, compensation owing will be determined on a pro rata basis on the basis of total points awarded.

[25] As eight years have passed since this action was commenced, the parties wish to give class members another opportunity to opt out. Further, they have agreed that the defendants can unilaterally terminate the settlement if more than 300 class members opt out.

[26] After the expiry of the second opt out period (whereby class members can choose not to participate in the settlement), the settlement funds (the global proceeds less payments to class counsel and the costs of providing notice) will be paid to the Claims Administrator. The reasonable fees and costs incurred by the Claims Administrator in administering the claims process and the Class Proceedings Fund levy described above will also be paid out of the settlement funds.

[27] The Claims Administrator will collect claims from class members, calculate each claimant's entitlement and distribute the funds to those class members. If there are any funds remaining, those amounts will be paid to PWAC, with no reversionary entitlement to the defendants.

[28] Toronto Star and Rogers have agreed to publish the notice of settlement approval hearing and notice of settlement approval at no expense in The Toronto Star, Hamilton Spectator, Waterloo Region Record, Guelph Mercury, Macleans, Chatelaine, Canadian Business, Châtelaine and l'Actualité. This agreement to provide essentially free notice has saved class members a significant amount of money for the notice program, likely over $200,000, which has real and measurable value for the class.

COMPARING THIS SETTLEMENT WITH THE *THOMSON* SETTLEMENT

[29] It is expected that many of the class members who will apply for compensation in this action, have received compensation in the *Thomson* settlement. In *Thomson,* the defendants paid $11 million, an amount greater than what is being paid to settle this action. Since class members are being given another opportunity to opt out and since a comparison between the two

settlements is inevitable, it is important to appreciate why this settlement compares favourably with the *Thomson* settlement.

[30] In *Thomson,* the gross settlement was $11 million. After deducting class counsel fees ($4 million and $200,000 in G.S.T.), disbursements ($85,074.19), the cost of notice (approximately $455,000), charitable payments to PWAC, the Writers' Union of Canada and the Canadian Association of Photographers and Illustrators in Communications ($75,000), payments to the Class Proceedings Fund ($602,050.59) and the costs of administration ($160,662.78), the net sum of $5.4 million was available for distribution to class members.

[31] Many of the deductions will be less in this action, leaving a larger percentage of the global fund for distribution to the class. In particular, class counsel is seeking fees in the range of $1.9 million (exclusive of taxes and disbursements), the cost of the notice program will be less because Toronto Star and Rogers are providing notice in several of their respective publications at no cost and the levy owing to the Class Proceedings Fund will be less.

[32] As a result, a higher proportional percentage of the settlement funds will be available for distribution to class members than in the *Thomson* settlement. Specifically, some $5 million, or about 63% of $7,871,894.40, versus $5.4 million, or 49% of $11 million as in *Thomson.*

[33] In addition, there are critical differences between the class members' claims in this action and those in the *Thomson* action. These differences, set out below, demonstrate that the two settlements are not strictly comparable:

(a) There are arguably stronger defences in this action than in the *Thomson* action. *Thomson* was commenced in 1996 when fewer freelance writers were likely aware of the existence of electronic databases.

(b) This action was commenced in 2003 and the 3-year limitation period in the *Copyright Act* could bar claims arising before 2000 as the existence of electronic databases was well known by 2000 and class members whose claims arose before 2000 would have discovered their claims by that time.

(c) After the *Thomson* action was commenced, many print publishers began using freelance agreements in order to obtain a licence for the electronic rights in class members' works. Rogers disclosed approximately 7,603 freelance agreements in its affidavit of documents. Works covered by these agreements could be excluded from this action.

(d) The defendants claim that they have more information than what was available in the *Thomson* action relating to the royalties print publishers received for licensing works to electronic databases. They argue this royalty information demonstrates the defendants did not earn profits even close to the range of the damages sought in this action.

(e) The notional minimum statutory damages in the *Copyright Act* may be out of proportion with the royalties and could be reduced or dispensed with entirely.

(f) The defendants in this action have learned from the claims process in the *Thomson* settlement that there may be fewer class members in this action than initially expected. In the *Thomson* action, it was estimated that there were between 5,000 and 10,000 class members. In fact, the number of claimants was far less (837). Ms. Robertson expects a similar number of claimants in this action.

SETTLEMENT APPROVAL

Legal Framework

[34] Section 29(2) of the *CPA* provides that a settlement of a class proceeding is not binding unless it has been approved by the court. The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement.

[35] When considering the approval of negotiated settlements, the court may consider, among other things the following factors: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arm's length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: See *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[36] These factors provide a guide for analysis rather than a rigid set of criteria that must be applied to every settlement. In practice, it may be that all of the factors are not applicable or should not be given equal weight. (See *Parsons v. Canadian Red Cross Society*, *supra*, at para. 73.)

[37] The court is not required to have evidence sufficient to decide the merits of the issue. This "is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture. This is imperative in order that the court might be satisfied that the settlement delivers adequate relief for the class in exchange for the surrender of litigation rights against the defendants" (*Ontario*

New Home Warranty Program v. Chevron Chemical Co., [1999] O.J. No. 2245 (S.C.J.) at para. at 92).

[38] A settlement does not have to be perfect. It need only fall "within a zone or range of reasonableness": *Ontario New Home Warranty Program v. Chevron Chemical Co., supra,* at para. 89: See also *Parsons*, at para. 69 (S.C.J.); *Bilodeau v. Maple Leaf Foods Inc.,* [2009] O.J. No. 1006 (S.C.J.) at paras. 45-46; *Dabbs v. Sun Life Assurance Co. of Canada, supra*, at pp. 439-440; *Frohlinger v. Nortel Networks Corp., supra,* at para. 8.

[39] The "zone of reasonableness" concept helps to guide the exercise of the court's supervisory jurisdiction over the approval of a settlement of class actions. It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented, as they are in this case, by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[40] As stated in *Dabbs v. Sun Life Assurance Co. of Canada, supra*, at p. 440, there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by class counsel, is presented for Court approval:

> [T]he recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

Factors Supporting Approval

[41] I accept that the settlement was the product of hard fought negotiations conducted by experienced counsel at arm's length. The settlement is grounded in a principled approach to the assessment of damages and reasonably reflective of the litigation risks, costs and delays that would result from taking the matter to trial.

[42] It is significant that Ms. Robertson supports and recommends approval of the settlement. She played an active role in this action and in the *Thomson* action. I agree with Justice Cullity's statement in *Thomson* at para 18 "[t]his is obviously a case in which the court must give considerable weight to Ms. Robertson's opinion that the settlement and its terms are in the best interests of the class." As well, there are no objections to the settlement.

[43] Before embarking on settlement negotiations, Class Counsel had significant information about the liability and damage issues from their involvement in the *Thomson* action, and the document discovery process in this action. Given the information available to Class Counsel, they were well situated to evaluate the risks, to negotiate and agree on a resolution of the action for the benefit of all Class Members.

[44] Class Counsel had an appropriate evidentiary basis to evaluate settlement. Also, there is sufficient evidence before the court to allow it to exercise an objective, impartial and independent assessment of the fairness of the proposed settlement agreement.

[45] In particular, the likelihood of recovery or success leads me to conclude that the settlement is fair, reasonable and in the best interests of the class. The following analysis explains why this factor is so critical to the court's approval of the settlement.

[46] From the outset of this action, there were considerable risks at both the certification and merits stages, including the risk that a resolution would take many years, that the plaintiff would fail to establish copyright infringement, that the action would fail because of limitations defences or a court would award damages on a much smaller scale than anticipated.

[47] Success at a common issues trial was by no means guaranteed. The defendants argued that freelance writers granted an implied licence to use the works in electronic media. In particular, the class members each licensed the print publishers to use their works. The scope of that licence was arguably unclear and the defendants claimed it included an express or implied term permitting the right to publish the works in electronic media. The plaintiff has always taken the position that class members merely licenced a one-time right to publish their works in print. However, an adverse determination at trial on this issue would end the litigation for class members and provide no recovery.

[48] Further, the defendants argue the class members are barred from recovery by their acquiescing in the use of their works. They rely on the doctrines of estoppel, waiver, acquiescence and laches. In the alternative, the defendants argue that all claims in respect of infringements before July 25, 2000 (three years before the claim was commenced) are barred by the limitation period prescribed in the *Copyright Act.*

[49] If the defences failed, there was still a risk that the trial judge would find that a global award of aggregate damages pursuant to s. 24 of the *CPA* was not appropriate. Such a ruling would trigger individual issues trials or references to deal with damages.

[50] Assuming aggregate damages were awarded, there would still be considerable uncertainty about the quantum of damages. While the plaintiff could rely on s. 38.1 of the *Copyright Act* to pursue statutory damages for copyright breach, there has been no case that has awarded damages on the scale sought in circumstances similar to this action.

[51] It is anticipated that the defendants, and in particular the print publishers, would have argued that the royalties they received pale in comparison to the statutory damages sought, or that the statutory amounts would be grossly disproportionate to actual losses and that the court should exercise its discretion to award damages below the statutory minimums.

[52] Even if the plaintiff succeeded on all issues at a common issues trial, recovery may have been delayed and uncertain in the event of an appeal.

[53] In addition to the monetary aspect of this settlement, Ms. Robertson explains that the settlement will have important implications for future practice in the publishing industry. The proposed settlements will assist in normalizing relationships between publishers and freelance writers in addition to delineating the respective rights and obligations of the parties surrounding copyright ownership. Given that this litigation has already caused many major publishers to use written agreements with freelancers, there is every reason to believe that this industry standard will continue.

[54] In summary, I conclude that this settlement is fair and reasonable and in the best interests of the class as a whole.

APPROVAL OF CLASS COUNSEL FEES

[55] Class Counsel seeks approval of their retainer agreement and asks that the court fix their fees at $1.9 million (exclusive of taxes). They also request approval of incurred disbursements of $214,762.33.

Legal Framework

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

[57] In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at para. 67, Cumming J. summarized some of the factors to be considered by the court when fixing class counsel's fees:

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

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

(c) the degree of responsibility assumed by class counsel;

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

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

(f) the degree of skill and competence demonstrated by class counsel;

(g) the results achieved;

(h) the ability of the class to pay;

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

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

[58] With these factors in mind, the following review confirms the reasonableness of the proposed fee.

The Retainer Agreement

[59] By agreement dated March 5, 2007, Ms. Robertson retained Koskie Minsky LLP to act as lead counsel in this litigation and to prosecute the claim through to the end of the common issues trial. The retainer agreement provides that payment of legal fees and disbursements would be contingent upon success at trial or settlement of this matter.

[60] The retainer agreement provides that legal fees are based upon the multiplication of a base fee by a multiplier to be determined by the court. As well, the retainer agreement provides that the law firms of Dimock Stratton LLP and Theall Group LLP were to continue to assist in the litigation, primarily to provide substantive intellectual property advice.

The Time and Fees Incurred

[61] The value of Class Counsel's total docketed time as of March 29, 2011 is $1,118,873.32. Among all class counsel this reflects an average of 267 hours per year.

Law Firm	Total Hours	Total Fees	Total Disbursements	Total
Koskie Minsky LLP	1,872.70	$975,358.10	$127,244.10	$1,102,602.20
Dimock Stratton LLP	104.50	$52,081.58	$282.05	$52,363.63
Theall Group LLP	27.41	$14,781.06	$663.92	$15,444.98
McGowan & Co.	134.70	$76,652.58	$2,342.08	$78,994.66
Total (with tax)	**2,139.31**	**$1,118,873.32**	**$130,532.15**	**$1,249,405.47**

[62] Koskie Minsky LLP had docketed time as of March 29, 2011, valued at approximately $975,358.10. This represents about 1,870 hours of billable time over the last eight (8) years, or an average of 234 hours per year, or 20 hours per month.

[63] Dimock Stratton LLP has been involved since the inception of this litigation. It has advised on all substantive copyright and intellectual property law issues, provided litigation strategy including issues arising out of the structure of the settlement agreements, and attended the mediation. McGowan & Co. (later Theall Group LLP) has extensive experience in the area of class proceedings and has also acted in this litigation since its commencement.

[64] The fees and disbursements cover a variety of work that was undertaken: case conferences, certification, amendments to the class definition, motions to deal with the numerous third and fourth party claims, documentary production, review of documents, research of liability, and damage issues and the steps leading to this settlement.

Risks Assumed, Results Achieved and the Plaintiff's Support

[65] I have already reviewed the risks that class counsel assumed and the positive results of Class Counsel's efforts. Class Counsel collectively acted under the terms of a contingency fee arrangement. They faced the considerable risk that this action would not succeed and no fees would be recovered for the efforts undertaken on behalf of the class and Ms. Robertson. The settlement is the product of extensive negotiations and the skill of all counsel involved.

[66] Ms. Robertson supports the fees that Class Counsel request. In her view, the quantum is reasonable in the circumstances. From the start of this action, Ms. Robertson has had frequent contact with class counsel and she has played an active role in the litigation. Given Ms. Robertson's involvement in this class action, her support and approval of the fees is significant. As well, no one in the class has objected to the settlement and the fees requested.

The Fee is Reasonable

[67] The fees are substantially less than the $4 million that Ms. Robertson supported and were approved in the *Thomson* action. Furthermore, there were complications in this action that did not arise in *Thomson*. For example, there were multiple defendants in this action each with their own counsel and approach to the litigation. As well, numerous third and fourth party actions added to complexity of this class action. Lastly, the plaintiff was confronted with the insolvency of Canwest and the risk that there may be no recovery from this defendant.

[68] A $1.9 million fee represents approximately 24% of the global settlement proceeds (or about a 1.7 multiplier). In Ms. Robertson's view, the fees requested "reflect the significant efforts put forward by my counsel in this action and the success achieved for the class."

[69] The purpose of a multiplier was discussed in *Gagne v Silcorp Ltd.*, [1998] O.J. No. 4182 (C.A.) at para. 16 as follows:

> 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.

[70] The risks that I have described warrant a multiplier being applied to the base fee. The base fee is $1,118,873.32. Section 33(7) of the CPA states that a court may apply a multiplier to

a base fee that results in fair and reasonable compensation. The multiplier requested is justified and allows for fair and reasonable compensation.

[71] Lastly, the disbursements were all necessary and reasonable and are allowed.

COMPENSATION FOR HEATHER ROBERTSON

[72] Class Counsel request that Ms. Robertson receive $5,000 as compensation for acting as a representative plaintiff. While I do not doubt that Ms. Robertson diligently fulfilled her role as the representative plaintiff, I am not prepared to award her compensation for this role.

[73] Compensation orders for representative plaintiffs are not routine. As stated by McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41 it is expected "that the proposed representative will vigorously and capably prosecute the interests of the class." Fulfilling this role does not lead to compensation.

[74] Compensation for representative plaintiffs must be awarded sparingly and limited to those cases where "a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class" (*Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 at para. 28).

[75] In *Windisman v. Toronto College Park Ltd.,supra,* evidence was presented to justify compensating the representative plaintiff. For example the court explained at para. 28:

> 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. She kept careful records of her time and effort.

[76] However, active participation alone will not justify compensation. As Winkler J. noted in *Sutherland v Boots Pharmaceutical PLC, supra*, at para. 22, the work of the representative plaintiff must be "necessary" and "result in monetary success for the class". Further, if compensation is justified it should be "purely compensatory on a quantum meruit basis."

[77] There is good reason for limiting compensation in this manner as explained in *Sutherland* at para. 22 as follows:

> ... 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.

[78] Class Counsel submit that Ms. Robertson played a significant role in directing the litigation and communicating with class members just as she did in the *Thomson* action. In *Thomson*, the court ordered that Ms. Robertson be paid $5,000 in compensation for acting as a representative plaintiff. However, beyond the court order there are no reasons discussing the justification for the compensation order. It does not follow that compensation should be paid in this action because it was paid in *Thomson*.

[79] I was not provided with affidavit evidence to explain the basis for a compensation order and why this is one of the exceptional cases justifying such an order. The submissions of Class Counsel are not enough to support a request for compensation. Care must be taken to ensure that there is a sufficient evidentiary basis for allowing compensation, particularly since the compensation is taken from the settlement fund as recently directed in *Smith Estate v National Money Mart Co.*, [2011] O.J. No. 1321 (C.A.) at para. 135.

[80] In these circumstances, I decline to allow Ms. Robertson compensation.

CONCLUSION

[81] In summary, I approve the settlement and the Class Counsel fees and disbursements. I direct that Class Counsel report to the court when the administration of the settlement is completed.

C. Horkins J.

Released: May 2, 2011

CITATION: Robertson v. ProQuest Information and Learning LLC, 2011 ONSC 2629
COURT FILE NO.: 03-CV-252945CP
DATE: 20110502

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HEATHER ROBERTSON

Plaintiff

– and –

PROQUEST INFORMATION AND LEARNING LLC, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC.

Defendants

REASONS FOR JUDGMENT

Horkins J.

Released: May 2, 2011

CITATION: Osmun v. Cadbury Adams Canada Inc., 2010 ONSC 2752
COURT FILE NO.: 08-CV-347263PD2
DATE: 20100513

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
DAVID OSMUN and METRO (WINDSOR) ENTERPRISES INC.	)	*Harvey T. Strosberg Q.C.* and *Charles M. Wright*, for the plaintiff
Plaintiffs	)	
– and –	)	
CADBURY ADAMS CANADA INC., THE HERSHEY COMPANY, HERSHEY CANADA INC., NESTLÉ CANADA, INC., MARS, INCORPORATED, MARS CANADA INC. and ITWAL LIMITED	)	
Defendants	)	**HEARD:** April 21, 2010 and by written submissions

Proceedings under the *Class Proceedings Act, 1992*

REASONS FOR DECISION – FEE APPROVAL

G.R. STRATHY J.

[1] This is a motion for approval of fees and disbursements of class counsel with respect to partial settlements reached in this action. The settlements are conditional upon approval of the courts in each of Ontario, British Columbia and Québec. In reasons released on May 5, 2010, I approved the settlements. A motion for settlement approval will be heard by the Supreme Court of British Columbia on May 25, 2010 and by the Québec Superior Court on June 8, 2010.

[2] The details of these proceedings, and of the settlements, are set out in my reasons on the settlement approval: *Osmun v. Cadbury Adams Canada Inc,* 2010 ONSC 2643. The key terms for present purposes are:

> (a) Cadbury has paid $5,795,695.60 inclusive of pre-deposit interest for the benefit of settlement class members. Cadbury is also obligated to pay the costs of notice that exceed $250,000;
>
> (b) Cadbury has agreed to cooperate with the plaintiffs in pursuing their claims against the non-settling defendants;
>
> (c) ITWAL is required to assign to the settlement class its claims against the non-settling defendants and to pay the costs of notice up to $25,000; and
>
> (d) ITWAL has agreed to cooperate with the plaintiffs in pursuing their claims against the non-settling defendants.

[3] I have found that the settlement is fair and reasonable and in the best interests of the class. It is the product of cooperation between class counsel in Ontario, B.C. and Québec. Approval of a combined counsel fee, to be shared with B.C. class counsel, is being sought in this action and in the B.C. action, based upon the share of the settlement amount notionally allocated to these two proceedings. A separate counsel fee will be sought in the Québec action based upon the share of the settlement amount notionally allocated to that proceeding. Class counsel in Ontario and B.C. are seeking a combined fee award because they have pursued the proceedings on a national basis outside Québec, with the litigation being focused in Ontario. B.C. class counsel has assisted in the prosecution of the Ontario action.

[4] By agreement amongst class counsel in Ontario, Québec and B.C., 7.2% ($414,383.31) of the settlement amount has been notionally allocated as the recovery of the Québec settlement class for the purpose of their fee request. The remaining 92.8% of the settlement amount, ($5,340,940.48), has been notionally allocated to the recovery of the Ontario and B.C. settlement classes for the purpose of this fees request. Class counsel in the three provinces have agreed to collectively request court approval of legal fees in a total amount equal to 25% of the Cadbury settlement amount (including accrued interest), plus disbursements and applicable taxes.

[5] Class counsel also commenced actions in Alberta, Manitoba, Saskatchewan, Newfoundland, Nova Scotia, and New Brunswick, working with local counsel in each province. Other lawyers have also commenced actions in some of these provinces as well as in other provinces. Class counsel have worked cooperatively with the lawyers in those actions and it has been agreed that the plaintiffs is those actions will resolve their claims as part of the settlement agreements made in this action and the B.C. action.

[6] From the outset, Ontario class counsel agreed to pursue this action on a contingent fee basis, accepting responsibility for all costs and seeking court approval for a fee if successful.

[7] The retainer agreement entered into with the plaintiffs in this action as of December 1, 2007, provides that in the event of success in the action, Ontario class counsel will be paid any disbursements (not already recovered from the defendants as costs), plus applicable taxes and interest in accordance with s. 33(7)(c) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 (*"C.P.A."*), plus the greater of:

> (a) the base fee increased by a multiplier of 4, less any fees already recovered as costs, plus applicable taxes; or
>
> (b) if a settlement is reached before examinations for discovery, 30% of the settlement, less any fees already paid, plus applicable taxes.

[8] "Success" is defined in the retainer agreement to include "a settlement that benefits some or all of the Class members." Under the heading "Interim Distributions," the agreement provides that "The Court may authorize payments to the Solicitor and/or to the Class from time to time."

[9] The retainer agreement entered between the plaintiff in the B.C. action and B.C. class counsel also provides for payment on a contingency basis. It provides that class counsel will be paid a fee calculated as 30% of the value of any settlement including any partial settlement and will be payable on all amounts, including prejudgment interest and post judgment interest.

[10] The fee agreement in this case complies with the requirements of s. 32(1) of the *C.P.A.*

[11] Class counsel in Ontario and B.C. request fees of $1,335,235.12 with respect to the settlement, plus disbursements of $81,231.04 and G.S.T. in the amount of $70,729.60, for a total of $1,487,195.76. The fee represents 25% of the portion of the settlement amount allocated to the Ontario and B.C. settlement classes ($5,340,940.48) and is less than the 30% permitted by the retainer agreements entered into with the plaintiffs in this action and the B.C. action.

Analysis

[12] The court has inherent jurisdiction to supervise the conduct of lawyers, including the jurisdiction to supervise the fees they charge to clients: *Glanc v. O'Donaghue,* 2008 ONCA 395, 90 O.R. (3d) 309. In class proceedings, the court exercises that supervisory jurisdiction over the fees charged by class counsel. Subsection 32(2) of the *C.P.A.* states that an agreement respecting fees and disbursements between a solicitor and representative party is not enforceable unless approved by the court. Subsection 32(1) sets out the terms that must be included in such an agreement.

Interim Fee Awards

[13] I am satisfied that there is jurisdiction to make an interim fee award and that it is appropriate to do so in this case. It is permitted by the retainer agreement. Since the settlement class is defined to include all persons in Canada who purchased chocolate products during the settlement period, regardless of whether they purchased from Cadbury or a non-settling defendant, there is no concern that the interim fee award will be an excessive or unfair burden on some members of the class. This is similar to the form of settlement in *Catalyst Paper Corp. v. Atofina Chemicals Inc.,* 2009 BCSC 1659, [2009] B.C.J. No. 2409, in which an interim fee was approved on a partial settlement. The court noted, at paras. 59-60:

> All plaintiffs share in the success that has been achieved to date. Similarly, all plaintiffs share an interest in ensuring that the litigation continues to conclusion as against the non-settling defendants.
>
> As a result of this structure, no group of plaintiffs can say that legal fees fall disproportionately upon those whose claims have been settled early or those whose claims have not yet been settled.

[14] I accept the submission of class counsel that the payment of an interim fee award is a salutary measure that will help to promote early settlement. Similar observations were made in *Catalyst Paper Corp. v. Atofina Chemicals Inc.,* at para. 63:

> In my view, the court should seek to establish a regime that is conducive to settlements generally. Permitting the payment of counsel fees on interim settlements is an important element of such a regime.

[15] The payment of interim fees is in keeping with sound business practice. Most paying clients (and undoubtedly most defendants in class actions) expect to be billed and to pay on an ongoing basis.

[16] There is precedent in this jurisdiction for the award of interim fees on partial settlement: *Nutech Brands Inc. et al* v. *Air Canada et al*, above, (19 February 2009), London, 50389CP (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117, [2005] O.T.C. 208 (S.C.J.).

Contingent Fee Arrangements

[17] The *C.P.A.* expressly permits contingent fee arrangements – fees payable only in the event of success: s. 33(1). It is a common practice, indeed an almost invariable practice, for class counsel to enter into an agreement for a contingent fee based on a percentage of the recovery.

[18] A number of cases have recognized that such arrangements reward results achieved rather than time spent: *Cogan (Re)* (2007), 88 O.R. (3d) 38, [2007] O.J. No. 4539 (S.C.J.) at paras. 37 and 50; *Crown Bay Hotel Ltd. Partnership* v. *Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 at 88, [1998] O.J. No. 1891 (Gen. Div.) at para. 11.

[19] In the context of class proceedings, a contingent fee agreement focuses on the benefit achieved by the class: *Vitapharm Canada Ltd.* v. *F. Hoffmann-La Roche Ltd.*, above, at para. 107; *Endean* v. *Canadian Red Cross Society*, 2000 BCSC 971, [2000] B.C.J. No. 1254 (S.C.) at para. 74.

[20] Section 33(4) of the *C.P.A.* provides that a contingent fee arrangement may include a provision that permits the lawyer to move to the court to have his or her fees increased by a multiplier. On such motion, the court is to determine a "base fee" (i.e., time multiplied by an hourly rate) and may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success. This "multiplier" approach has been regarded by some as encouraging inefficiency and discouraging early settlement: *Martin* v. *Barrett*, [2008] O.J. No. 2105, 55 C.P.C. (6th) 377 (S.C.J.) at para. 38-39; *Cassano* v. *The Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543, 2009 CarswellOnt 4052 (S.C.J.) at paras. 55, 60, 63.

[21] There is much to be said in favour of contingent fee arrangements. Litigants like them. They provide access to justice by permitting the lawyer, not the client, to finance the litigation. They encourage efficiency. They reward success. They fairly reflect the considerable risks and costs undertaken by class counsel, including the risk that they will never be paid for their work, the risk that their compensation may come only after years of unpaid work and expense, and the risk that they will be exposed to substantial cost awards if the action fails. Effective class actions simply would not be possible without contingent fees. Contingent fee awards serve as an incentive to counsel to take on difficult but important class action litigation.

[22] It is appropriate to use other methods of measurement, such as time multiplied by hourly rate, or a multiplier, or the result, as a check against the reasonableness of the fees claimed; but, in my respectful view, courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple - of the mathematical calculation of hours docketed times the hourly rate.

Factors to be considered

[23] Some of the factors to be considered by the court in the determination of class counsel's fee include:

> (a) the time expended by the solicitor;
> (b) the legal complexity of the matters to be dealt with;
> (c) the degree of responsibility assumed by the solicitor;
> (d) the monetary value of the matters in issue;
> (e) the importance of the matter to the client;
> (f) the degree of skill and competence demonstrated by the solicitor;
> (g) the results achieved;
> (h) the ability of the client to pay;
> (i) the client's expectations as to the amount of the fee;
> (j) the risks undertaken by counsel in taking on the case, including the risk that the action may not be certified; and
> (k) the position taken by any objectors.

[24] In this case, the following factors are particularly important.

Time expended

[25] Significant time and money have been expended by class counsel in pursuing this litigation. As of March 22, 2010, Class Counsel had docketed time worth $632,743.75 and incurred disbursements of $81,231.04 plus applicable taxes. A good deal of additional time has been docketed in preparation for the settlement and fee approval hearings.

[26] Class counsel has funded all of the disbursements associated with the Ontario and B.C. actions. The plaintiffs in this action have not applied to the Class Proceedings Fund for assistance. If the class had received disbursements funding from the Fund, it would now be obligated to repay any financial support provided by the Fund and pay an additional 10% of the settlement funds.

Result achieved

[27] I have concluded that the partial settlement is an excellent result for the class, with major financial and non-financial benefits. The result achieved is an important consideration in determining the reasonableness of the fee: *Parsons* v. *Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (S.C.J.), at paras. 15-17.

Complexity, importance and value of the litigation

[28] This is legally and factually complex litigation. The issues are of significant private importance to the class, but they also raise concerns of public importance. The amounts at issue are in the many millions of dollars. Counsel should be well compensated for bringing this stage of the litigation to a conclusion.

Skill and diligence

[29] The settlement is the product of many months of negotiation. It is complex and it has been carefully crafted. It required negotiation with the settling defendants but it also required negotiation and discussion with numerous counsel across the country. Bringing all these lawyers, and their clients, on side was no small task. The settlement has been achieved relatively early in the litigation and it seems probable that it will substantially improve the plaintiffs' prospects in the litigation.

Reasonableness of contingent fee

[30] The contingent fee permitted by the retainer agreements is 30%. Class counsel seeks a fee of 25%. I accept the submission of Mr. Wright that this is consistent with the terms of retainer agreements and fees awarded by the courts in other price-fixing conspiracy cases: *Nutech Brands Inc. et al* v. *Air Canada et al*, above, (25% plus disbursements) at paras. 7-8; *Bona Foods Ltd. et al.* v. *Ajinomoto U.S.A., Inc et al.,* [2004] O.J. No. 908, 2 C.P.C. (6th) 15 (S.C.J.) (25% plus disbursements) at paras. 40-42; *Minnema et al.* v. *Archer Daniels Midland Company et al.,* (28 February 2003), Barrie Court File No. G23495-99CP (S.C.J.) (25% plus disbursements) at pp. 4-5.

[31] As I have noted, on a straight "time and hourly rate" basis, class counsel's charges would be $632,743.75, excluding disbursements. The effective multiplier being requested, therefore, is about two, which is not out of the reasonable range. That range has been expressed as being from slightly greater than one (at the low end) to four or higher in the most deserving cases: *Gagné* v. *Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at p. 425, [1998] O.J. No. 4182 (C.A.) at paras. 16-27.

Absence of objection from class members

[32] The notice to class members identified the fee being sought by class counsel. There has been no opposition from the class. Both representative plaintiffs support the proposed fee.

Conclusion

[33] The amount claimed is in line with the fee agreement and, in fact, it is somewhat less. The partial settlement can be regarded as a successful piece of work by class counsel. It is a success in its own right and it may well pave the way for further settlements. If not, it provides the settlement class with both a reasonable recovery and a strategic advantage. In the result, class counsel's fee in the amount of $1,487,195.76 is approved.

[34] In the event of future fee approval motions, the time spent by counsel to date will effectively be cleared off the ledger as covered by this award. This will not preclude class counsel from referring to that time as a factor to be considered in the context of the overall fees claimed in the future.

G.R. Strathy J.

Released: May 13, 2010

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID OSMUN and
METRO (WINDSOR) ENTERPRISES INC.

Plaintiffs

– and –

CADBURY ADAMS CANADA INC.,
THE HERSHEY COMPANY, HERSHEY CANADA INC.,
NESTLÉ CANADA, INC., MARS, INCORPORATED,
MARS CANADA INC. and ITWAL LIMITED

Defendants

REASONS FOR DECISION – FEE APPROVAL

G.R. Strathy J.

Released: May 13, 2010

CITATION: Pichette v. Toronto Hydro, 2010 ONSC 4060
COURT FILE NO.: 94-CQ-50878 and
COURT FILE NO.: 98-CV-158062
DATE: 20100722

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

BETWEEN:	
TAMAR L. PICHETTE Plaintiff	Michael McGowan, Dorothy Fong and Barbara Grossman, for the Plaintiffs
– and –	
TORONTO HYDRO Defendant	Alan H. Mark, Kelly Friedman and Jennifer Teskey, for the Defendants
AND BETWEEN:	
JONATHAN GRIFFITHS Plaintiff	
- and –	
TORONTO HYDRO-ELECTRIC COMMISSION Defendant	
	HEARD: July 16, 2010

CUMMING J.

REASONS FOR DECISION

The Motions

[1] The putative representative plaintiffs in these two class actions bring motions under sections 5, 12, 19, 20, 24, 25, 26, 29, and 32 of the *Class Proceedings Act,1992* ("*CPA*"): for (1) consolidation of the two class actions; (2) certification for the purpose of settlement; (3) approval of a settlement; and (4) approval of class counsel fees. Notice of the hearing at hand was published and served in accordance with the "Fairness Hearing Order" dated May 20, 2010.

[2] The class action by the putative representative plaintiff, Tamar Pichette was commenced April 28, 1994. The class action by the putative representative plaintiff, Jonathan Griffiths, was commenced November 5, 1998. In the latter class action, the defendant Toronto-Hydro was sued both in its personal capacity and as a representative defendant for the defendants as a class.

[3] There is common ground that the two plaintiffs' class actions are properly to be consolidated. The claims advanced are virtually identical other than having different commencement dates. Mr. Griffiths is the putative representative plaintiff in respect of the consolidated class action which shall continue as action #98-CV-158062.

Background

[4] The defendant Toronto Hydro, and the other defendant municipal electric utilities in Ontario historically charged their customers so-called late payment penalties ("LPPs") of 7% or 5% when utility bills submitted to their customers were not paid by the time required. On July 1, 2000, Toronto Hydro reduced its late payment interest charges to simply 1.5% per month. By the first quarter of 2002, the other municipal electric utilities had done the same.

[5] Section 347 of the *Criminal Code*, R.S.C. 1985, c. C-46 prohibits collecting interest at a rate above 60% per annum. The class proceeding at hand is based upon the claim that the LPPs were contrary to that provision. If a utility bill was paid one day late, the 5% LPP could have an extremely high effective annual interest rate percentage. The expert retained on behalf of the plaintiff class, Melvyn Fuss, Professor Emeritus of Economics at the University of Toronto, estimated in his report that the present value of savings (because of the reduction in the LPP percentage rate payable) to late paying customers of Toronto Hydro alone amounts to some $96.8 million as of December 31, 2009.

[6] In *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 ["*Garland #1*"] and *Garland v. Consumers' Gas Co.*, [2004] 1S.C.R.629 [*"Garland #2"*] the Supreme Court of Canada held that similar LPPs imposed by the defendant gas utility violate s. 347 of the *Criminal Code*. This litigation was ultimately settled, the settlement approval decision being reported as *Garland v.*

Enbridge Gas Distribution Inc. (2006) 56 C.P.C. (6th) 357, 2006 CarswellOnt 9605, 2006 CanLII 41291 (Ont. S.C.J.), varied on consent, 2008 ONCA 13 (Ont. C.A.) ["*Garland*"]. A like case, *Walker v. Union Gas Ltd.* (2009), 74 C.P.C. (6th) 366, 2009 CarswellOnt 662, 2009 CANLII 4858 (S.C.J.), has also been settled ["*Walker*"].

[7] Somewhat different issues arise in the case at hand involving electrical utilities, from that seen in respect of the aforementioned decisions involving gas utilities. The gas utilities are regulated by the Ontario Energy Board ("OEB") under the *Ontario Energy Board Act*, 1998, c.15 (Schedule B). The electrical utilities are more recently also regulated by the OEB as a result of the *Electricity Competition Act*, 1998, S.O. 1998, c. 15. The electrical utilities have an argument that the special limitation period previously contained in s. 33 (now repealed) of the *Public Utilities Act,* R.S.O. 1990, c. P.52 protects them for LPPs collected during all but the final six months of the time period before they were sued. There are also other distinguishing issues, such as the possible applicability of the so-called *de facto* doctrine to electrical utilities.

The Certification Motion

[8] The *CPA* is a procedural statute. Section 5 sets forth the test for certification. If all of the five criteria set forth in s. 5(1) are met, then a Court must certify a class proceeding unless there is some other extraordinary reason to refuse to make the order.

[9] The record in the instant situation sets forth an evidentiary base in respect of all the requirements of s. 5(1). The pleadings disclose a cause of action, there is an identifiable class of persons who would be represented by the representative plaintiff, Griffiths, the claims of the class members raise common issues, a class proceeding is the preferable procedure for the resolution of those common issues, and the putative representative plaintiff is fairly and adequately representing the interests of the class and does not have, on the common issues for the class, any interest in conflict with the interests of the other class members.

[10] The cause of action advanced is for restitution for LPPs. The plaintiff class members are all customers at any time after April 1, 1981 of Toronto Hydro or of any other local municipal electrical distribution company in Ontario who paid any LPP to such defendant utilities. The plaintiff class is thus comprised of hundreds of thousands of customers each of whom has a very modest individual claim.

[11] The defendant class consists of Toronto Hydro and all other local municipal electricity distribution companies (or their successor corporations) in Ontario, estimated to be some 146 electric utilities, which have charged LPPs on overdue electrical utility bills at any time after April 1, 1981. There is common ground that Toronto Hydro is a suitable representative defendant on behalf of the defendant class. Accordingly, Toronto Hydro is recognized by the Court as representative defendant for the defendant class.

[12] The common issues are twofold:

-the defendant class members' liability for restitution of LPPs received from the plaintiff class members; and

-the aggregate quantum of monetary relief payable by the defendant class.

[13] In my view, and I so find, certification is properly made for the purpose of settlement approval.

The Settlement Approval Motion

[14] The parties have engaged in lengthy negotiations, reaching an agreed settlement in principle through mediation on January 13, 14 and 15, 2010 and culminating in Minutes of Settlement dated April 21, 2010 with Addenda dated July 7, 2010 and July 8, 2010.

[15] In my view, and I so find, the proposed settlement agreement is in the best interests of the class and is fair and reasonable in respect of their interests. My reasons follow.

[16] The Court is satisfied that it is both administratively very problematic and excessively costly to attempt to ascertain the specific LPPs incurred by individual customers of the defendants such as to attempt to allocate individual payments in restitution. Therefore, it is efficacious to have a *cy pres* distribution as seen in the earlier disposition through settlement in the *Garland* and *Walker* cases with respect to the gas utilities.

[17] There are recognized apparent paradoxes seen in the proposed settlement in the class proceeding at hand.

[18] First, the members of the plaintiff class are not directly compensated for their damages suffered through the wrongful past actions of the defendant class. In each of *Garland, Walker* and the case at hand, the distribution of the net proceeds goes to a recipient group the membership of which is not coincidental to the membership of the plaintiff class. Moreover, the distribution of the net proceeds does not, and cannot, track a quantification of underlying individual claims of class members who have paid LPPs. As stated above, the only efficacious and efficient remedy possible is through a *cy pres* distribution. Any attempt to determine an individual refund payment scheme would be cost-prohibitive. Given the practical necessity of a *cy pres* remedy, the merits of the "low income energy assistance programs" ("LEAP") in the case at hand are certainly apparent and a public and social good is clearly provided.

[19] Second, in each of *Garland, Walker* and as intended by the defendant class in the case at hand, there is an application to the OEB to recover the costs of the settlement through rate increases in favour of the utilities in respect of the cost of services. Such rate increases are spread, of course, across all customers of the utilities, including the plaintiff class. Thus, the aggrieved members of the plaintiff class do not individually receive a monetary remedy for the wrong done to them and pay for the *cy pres* remedy effectuated through the settlement which goes to benefit persons, some of whom are beyond the plaintiff class. However, it is recognized that customers who are in financial difficulty or are relatively impecunious (and thus receive

LEAP program benefits) tend to be persons who have incurred LPPs and therefore tend to be class members.

[20] The litigation has contributed to achieving behaviour modification by causing Toronto Hydro and the members of the defendant class to abolish the unlawful LPPs. This has resulted in an estimated reduction of more than $100 million to date in respect of what late paying customers of Toronto Hydro would have otherwise paid in LPPs if the utility had not altered its LPP regime because of the litigation. Moreover, a class proceeding has been the only practical means of providing access to justice in pursuing redress as individual claims were so modest that it would not be practical to advance individual claims.

[21] Notice of the motion to consider approval of the settlement has been published and no class members have filed objections to the proposed settlement. Class action counsel have managed a web-site to keep class members informed of the settlement. Those class members who have responded to the published notice of the hearing at hand reportedly are supportive of the settlement.

[22] The proposed settlement is for $17,037, 500 comprised of:

Monetary compensation and prejudgment interest	$16,250,000
Partial indemnity legal costs	750,000
GST/HST in respect of costs	37,500

	$17,037,500

[23] The settlement monies are to be distributed as follows:

LEAP programs	$11,932,000
Legal fees and disbursements	4,862,500
GST/HST	243,000

	$17,037,500

[24] The settlement proposes *cy pres* payments via municipal "low income energy assistance programs" ("LEAPs") to needy resident customers, which funds are to be administered by the United Way of Greater Toronto for the entirety of the territories relating to the defendant class other than Ottawa where the Administrator will be the United Way/Centraide Ottawa.

[25] As mentioned above, there is an arguable special limitation of action statutory provision which may impact adversely upon the claim of the plaintiff class if it were to proceed to trial. There are also a number of damage quantification issues which could significantly reduce the otherwise recoverable damages. The litigation at hand has already been underway for more than 16 years. If the present litigation is not settled, there are a number of costly and time-consuming steps which will be necessary to advance the progress of the case to the ultimate destination of a trial.

[26] The settlement at hand represents about 10.5% of the estimated LPPs Toronto Hydro and the members of the defendant class collected between the point in time of being first sued until the 5% LPPs were abolished, plus prejudgment interest and costs. In contrast, the *Garland* settlement represented about 19.3% of the LPPs collected within the same parameter standards and the *Walker* settlement represented about 8.8% of the LPPs collected within the same points of reference. There are a number of issues relating to both liability and the quantification of damages which justify the lower settlement percentage in the case at hand as compared to *Garland.*

[27] Toronto Hydro has collected consents and waiver of opt out rights from the overwhelming majority of defendant class members.

The Motion for Approval of Counsel Fees

[28] The determination of class counsel fees is subject to Court approval.

[29] The docketed time to June 30, 2010, by counsel for the plaintiff class totals some 2,221 hours with a value at regular billing rates of some $1,042,486. Disbursements amount to $31,146.19. Additional time will be required until the settlement has been implemented after notice, processing any opt out coupons received and dealing with ongoing administrative matters. The requested fees are equivalent to a multiplier of about 4.42.

[30] The requested fees are about 28.5% of the total settlement amount. The retainer agreement provides for a contingency fee of 25% plus partial indemnity costs. The inclusion of the partial indemnity costs result in the overall 28.5% figure.

[31] Where the retainer agreement provides for a percentage fee, the equivalent multiplier is not generally considered a major factor. See *Cassano v. Toronto Dominion Bank* (2009), 79 C.P.C. (6th) 110 (Ont. S.C.J.) at paras. 59-63. Class counsel accepted their retainer on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. As I stated in *VitaPharm Canada Ltd. v. Hoffman-LaRoche 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".

[32] Class counsel are well-experienced who have managed this difficult class action over a considerable period of time. The risks of very problematic litigation with respect to any ultimate successful finding of liability were particularly significant until the Supreme Court of Canada

decision in *Garland #2* in 2004. There were also significant risks involved with respect to issues relating to the quantification and distribution of damages.

[33] In my view, and I so find, the fees, GST/HST and disbursements requested are fair and reasonable taking into account all the circumstances and accordingly, are approved.

[34] The requisite Order shall issue and notices shall be published with respect to these Reasons for Decision.

CUMMING J.

Released: July 22, 2010

CITATION: Pichette v. Toronto Hydro, 2010 ONSC 4060
COURT FILE NO.: 94-CQ-50878 and
COURT FILE NO.: 98-CV-158062
DATE: 20100722

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

BETWEEN:

TAMAR L. PICHETTE

Plaintiff

– and –

TORONTO HYDRO

Defendant

AND BETWEEN:

JONATHAN GRIFFITHS

Plaintiff

- and –

TORONTO HYDRO-ELECTRIC COMMISSION

Defendant

REASONS FOR DECISION

CUMMING J.

Released: July 22, 2010

Case Name:

Robertson v. Thomson Canada Ltd.

RE: Heather Robertson (Plaintiff), and Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Globemedia Publishing Inc., Defendants

[2009] O.J. No. 2650

80 C.P.C. (6th) 77

2009 CarswellOnt 3660

Court File No. 96-CU-110595CP

Ontario Superior Court of Justice

M.C. Cullity J.

Heard: June 16, 2009.
Judgment: June 24, 2009.

(44 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Procedure -- Settlements -- Approval -- Motion by parties for approval of settlement of class proceeding provisionally allowed -- The plaintiff alleged that defendants breached rights of freelance creators by electronically disseminating work previously published in print media -- The settlement involved a compensation fund of $11 million, with a limit of one per cent payable to any particular claimant -- The court provisionally approved the settlement as reasonable, subject to alleviation of concerns regarding the efficiency and expense of the claims process and further submissions regarding timing, costs, reporting and fees in respect of claims administration.

Intellectual property law -- Copyright -- Infringement -- Procedure -- Settlements -- Motion by parties for approval of settlement of class proceeding provisionally allowed -- The plaintiff alleged that defendants breached rights of freelance creators by electronically disseminating work previously published in print media -- The settlement involved a compensation fund of $11 million, with a limit of one per cent payable to any particular claimant -- The court provisionally approved the settlement as reasonable, subject to alleviation of concerns regarding the efficiency and expense

of the claims process and further submissions regarding timing, costs, reporting and fees in respect of claims administration.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29, s. 39

Copyright Act, R.S.C. 1985, c. C-42, s. 3

Counsel:

Kirk Baert, and Celeste Poltak, for the plaintiff.

Wendy Matheson and Andrew Bernstein, for the defendants.

Barbara L. Grossman, for class counsel.

ENDORSEMENT

1 **M.C. CULLITY J.**:-- After 13 years of litigation, the parties agreed to a settlement of this action. They have now moved jointly for its approval by the court pursuant to section 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6 ("CPA"). In the same notice of motion, class counsel seek approval of their fees.

2 In the statement of claim, the plaintiff alleged that the defendants had infringed the rights of freelance creators, or assignees, of original literary or artistic works ("Works") published in print media in Canada by disseminating or authorizing the dissemination of copies of the Works through electronic media such as databases, contrary to the Canadian *Copyright Act,* R.S.C. 1985, c. C-42. The plaintiff sought compensatory, punitive and exemplary damages, as well as injunctive relief, on behalf of writers, artists and photographers who created the Works, their estates and assigns. The defendants contested the plaintiff's claims on the ground of rights they had acquired through implied licences, their own rights under the *Copyright Act*, the common law principles of acquiescence and waiver, and the doctrine of fair dealing. They also argued that much of the claim, which goes back to 1979, is time barred.

3 The action was certified under the CPA by Sharpe J. in *Robertson v. Thomson* (1999), 43 O.R. (3d) 161 (G.D.). Following certification, the plaintiff brought a motion for summary judgment in respect of two of her Works, and for certain declarations of law. The motion raised the main issues of copyright law in the action.

4 On October 3, 2001, the motion for summary judgment was dismissed on the ground that there were genuine issues to be tried with respect to the customs and practice in the publishing industry that were relevant to the defences pleaded. A declaration under section 3 of the *Copyright Act* was made affirming the right of publishers of print media to make microfilm, microfiche and daily electronic editions available notwithstanding their inclusion of Works produced by freelancers. On the other hand, it was declared that this right did not extend to freelance Works in electronic databases comprising a compilation of articles printed from different published sources, or in CD Roms. Other declarations affirmed the right of the defendants to rely on oral licences from the authors, and the exclusion of employees from the authors copyright attaching to articles in electronic databases or CD Roms.

5 Appeals to the Court of Appeal from these findings were dismissed for reasons delivered on October **6**, 2004 with Blair J.A. dissenting in favour of a newspaper's statutory right to make freelance articles available in electronic databases and on CD Roms. Further appeals were made to the Supreme Court of Canada which, on October 12, 2006 held unanimously that the newspapers' rights of publication extended to Works on CD Roms and, by a majority (after a rehearing) of five judges to four, that they did not extend to Works available in the electronic databases.

6 In view of the finding of the majority of the Supreme Court of Canada, the class action continued and, after extensive discussions between the parties, common issues were settled by an order of this court dated November 20, 2007.

7 In 2008 the parties agreed to mediation. This was conducted over two days in July, 2008 with the Honourable George Adams QC as mediator. After further intensive negotiations, a settlement agreement was executed by the parties on May 1, 2009. Notice of the fairness hearing was then provided to class members and any who had objections to the proposed settlement were requested to contact class counsel. No objections were received as of the date of their hearing.

The Settlement

8 For the purpose of the settlement, the Works are those reproduced electronically between April 24, 1979 and the date of the settlement agreement. They include articles in CD Roms. Class members are the authors or creators of the Works other than those who had assigned their copyrights, or granted a licence to publish, to the defendants, or their predecessors in interest.

9 Under the terms of the settlement, the defendants will provide an amount of $11 million that, after payment of administration expenses - including the expense of giving notice - legal fees and the levy of the Class Proceedings Fund, is to be applied for the benefit of the class members. This is to be accomplished by payments of $25,000 to each of three associations established to advance the interests of class members, and - after payment of administration expenses, counsel fees and the Class Proceedings Fund levy - by placing the balance in a compensation fund that will be divided among members who submit timely claims.

10 The schedules to the settlement agreement contain an elaborate system for determining the amounts payable to members who make claims. This requires a claims administrator to allocate payments in respect of the claims according to a points system that will take into account the paid circulation of the relevant publication of the defendants and the opinion of a points classification committee of the relative influence - regionally or nationally - of the publication of the particular work.

11 There is a limit of one per cent of the net contents of the compensation fund on the amount payable to any particular claimant.

12 In view of the fact that 10 years have passed since the proceeding was certified, the parties have considered it appropriate that class members should be given a further opportunity to opt out. This provision is accompanied by a unilateral right of the defendants to withdraw from the settlement and terminate it if more than 300 members have opted out. I was informed that the number of persons who did so in accordance with the previous notice of certification was negligible.

13 Customary releases are to be provided by the class members and the defendants are to have licences to reproduce, distribute and use the Works in the future. As alternative to granting the licences and receiving payments under the distributions process, class members may elect to have their Works removed from commercially-available electronic databases.

Settlement approval

14 In determining whether to approve a settlement of a class proceeding, the court is exercising a supervisory jurisdiction for the purpose of ensuring that it is in the best interests of the class members. The jurisdiction exists because of a possibility that the agreement may have been motivated, or influenced, by other extraneous considerations. The drafters of the CPA, as well as the Ontario Law Reform Commission in its Report on Class Actions (1982), were sensitive to the potential conflict between the interests of the class members and class counsel's desire to secure their fees, as well as the likelihood that, in many cases, a representative plaintiff will not be well-equipped to evaluate and - if appropriate - to resist, class counsel's recommendation that a settlement should be accepted.

15 In my opinion, no weight should be attributed to either of these considerations in the circumstances of this case. The settlement agreement was negotiated at arm's-length by experienced class counsel after lengthy negotiations following mediation by a similarly experienced mediator. The plaintiff, Ms Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an MA from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms Robertson has been in communication with class members about the litigation since

its inception, and has obtained funds from them to defray disbursements. She has clearly been a driving force behind the litigation.

16 In providing her strong support for the settlement, Ms Robertson stated in an affidavit sworn on June 8, 2009:

> ... I believe that the proposed settlement of this case will have important implications for practice in the publishing industry, particularly as it relates to freelance writers and artists. This proposed settlement will assist in normalizing relationships between publishers and freelance creators, as well as to delineating the respective rights and obligations of the parties in relation to copyright ownership and the right to reproduce works in electronic media. Briefly stated, I believe the settlement will ultimately lead to behaviour modification on the part of larger publishers in Canada.

17 Ms Robertson referred to the endorsement that the settlement has received from the Professional Writers Association of Canada and the Writers Union who have referred to it as "historic and a great achievement for the freelance writing industry" and as a "major victory on behalf of Canadian writers".

18 This is obviously a case in which the court must give considerable weight to Ms Robertson's opinion that the settlement and its terms are in the best interests of the class. Although the majority decision in the Supreme Court of Canada was a breakthrough in the copyright law affecting class members, and a significant achievement by itself, the common issues that remained raised difficult and important questions of law and fact that were essential to the validity of the class members' claims and that, if decided against them, could undercut their success in the appeal. It seems likely that individual issues would have remained to be determined even if common issues were decided in favour of the class at the end of what was predicted to be a very lengthy trial. The expense of claiming damages on an individual basis - if this was necessary - would almost certainly have been a serious obstacle to attempts by many class members to enforce their claims.

19 I believe counsel for the plaintiff were correct in characterising the action as being high-risk litigation at its outset, and if it proceeded to trial.

20 Ms Robertson's best estimate is that there may be 5000 to 10,000 members of the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in US litigation and, given the risks and likely expense attached to a continuation of the proceeding, it does not appear to be out of line. On this question, I would, in any event, be very reluctant to second-guess the recommendation of experienced class counsel, and their well-informed client, who have been involved through all stages of the lengthy litigation.

21 I do have some concerns on points of detail arising under the settlement agreement and, in

particular, with respect to the likely efficiency and expense of the claims process. I anticipate that it should be possible to resolve these matters at a case conference to be arranged in the near future. Apart from these concerns, the settlement is, in my judgment, well within the required zone of reasonableness and will be approved provisionally.

Class counsel fees

22 Class counsel have requested a fee of $4 million to be paid out of the settlement amount of $11 million. Although a fee representing 36 per cent of the gross settlement proceeds would not be unprecedented in this jurisdiction, it is greater than those most commonly approved.

23 My initial reaction to this request was that the fee requested was probably too large and particularly so when it is measured against the likely net amount available to class members after the levy of the Class Proceedings Fund and the expenses of administration are paid.

24 For the purpose of the fee approval motion, class counsel were represented at the hearing by Ms Barbara Grossman who provided several grounds for her submissions that, in the circumstances, a fee of $4 million should be approved.

25 Ms Grossman referred, in the first place, to a retainer agreement executed by Ms Robertson and Koskie Minsky LLP on March 5, 2007. Paragraph 6 of that agreement provides, in part:

> The legal fees shall be the Base Fee (consisting of the value of the docketed time of Lead Counsel, Assistant Counsel and the other firms which previously acted for the Client in the Litigation ...) multiplied by a Multiplier determined by the court. In setting the Multiplier the court shall consider all relevant factors including, without limitation, the amount of money obtained under any settlement or judgment, any future revenue to class members obtained under, or as a result of, any settlement or judgment, and the modification of behaviour by the defendants as a result of the Litigation.

26 The agreement of March 52007 was expressed to supersede all previous retainer agreements in the litigation. It was entered into after Mr Baert who was then, and is now, a member of the firm of Koskie Minsky LLP became lead counsel for the plaintiff and the class. Mr Baert had previously been involved in the litigation at times when Mr Michael McGowan had been lead counsel.

27 Two previous retainer agreements had been executed in 1996 between Ms Robertson and McGowan & Associates. The second, dated September 9, 1996, replaced the multiplier approach previously adopted, with provision for a fee of 20 per cent of the amount recovered for the class under any judgment or settlement. This agreement remained in place until the execution of that of March 5, 2007 on which counsel now rely.

28 The timing of the change to a formula that would produce a significantly higher fee requires

some comment.

29 Justification for the large contingency fees commonly approved in class actions is to be found in the risks counsel had assumed and the unpredictability that they would eventuate. The degree of risk reflects not only the possibility that the action would be unsuccessful so that counsel would not be compensated for their work but, also, that, because of the amount of time expended, a fee approved when success has been achieved may not compensate counsel for agreeing to a fee contingent on success. This risk is probably most likely to arise when a retainer agreement provides for a fee based on a percentage of recovery.

30 A question that arises in this case is whether, having agreed to a percentage fee, counsel can subsequently seek approval of an amendment that increases the fee after many years of litigation and a considerable expenditure of time.

31 If counsel were adhering to the formula in the 1996 agreement they would be seeking approval of a fee of approximately $2.2 million rather than one of $4 million. The amendment of 2007 was made at a time when more than 3100 hours had been expended - this representing approximately 78 per cent of counsel's time up to June 9, 2009. Essentially the issue is whether counsel are to be held to agreements they made at the outset of the litigation, and approval withheld from amending agreements made when the course of the litigation may have changed counsel's assessment of the fee they are likely to receive under the initial agreement. While it would seem unlikely that approval would be given when a fee contingent on success in the litigation is negotiated for the first time after a settlement has been reached or is imminent, it does not follow that hindsight should not be allowed to influence amendments that affect the amount of a contingency fee previously negotiated at the inception, or in the early stages, of the proceeding.

32 The CPA does not in its express terms require that fee agreements be made at the inception of, or at an early stage of, the litigation. (In this respect, there is a contrast with section 39 of the Class Proceedings Act of Alberta). Amendments to contingent fee agreements have been approved in this jurisdiction even though they were made in the course of ultimately successful settlement negotiations when the contingency that would result in no fee had virtually disappeared. In consequence, in this case, while I believe a degree of judicial vigilance is required in order to be satisfied that the representative plaintiff provided her free and informed consent to the amendment - and that the formula it provides is fair and reasonable from the standpoint of the class - I do not consider that it is objectionable *per se*.

33 For the purpose of determining the fee of $4 million requested, Ms Grossman submitted that, based on the time summaries of the lawyers who had acted for Ms Robertson in the litigation, I should determine that $1,661,777.67 would represent a reasonable base fee, so that the fee would reflect a multiplier of approximately 2.4. When compared with multipliers approved in other cases, this, she submitted, was on the low side.

34 Ms Grossman submitted further that, given the results achieved in the Supreme Court of

Canada, and by virtue of the settlement, a fee equivalent to 36 per cent of the gross recovery was not unreasonable. In this connection, as well as in respect of the multiplier requested, she referred to an agreement made by one of the defendants in December 1996, to make additional payments to freelance writers in respect of electronic rights. The amendment to the defendant's standard form of contract was offered approximately three months after the action was commenced. In Ms Grossman's submission, I should infer that this was no coincidence and that it represented not only behavioural modification - one of the objectives of the CPA - but also a significant financial benefit that should have a bearing on the size of a reasonable fee.

35 Finally, Ms Grossman referred to suggestions in the Report of the Law Reform Commission that fees representing as high as 50 per cent of the gross recovery might be acceptable in cases of "individually non-recoverable claims" - where the expense of an individual action would exceed the value of the claim asserted.

36 I believe weight should be attributed to each of the factors relied on by Ms Grossman. In my judgment, this is not a case where the change in the fee calculation made in the retainer agreement of March 2007 is a cause of any serious concern.

37 Nor do I believe there are problems with the calculation of the base fee proposed by Ms Grossman. Given the length and history of the litigation, the time expended does not appear unreasonable and the docket summaries are generally informative and lack the familiar indicia that suggest over-lawyering, duplication of work and a prodigal expenditure of time. Repeated daily entries of seven or more hours devoted to research or reviewing documents are notable by their absence.

38 Overall, and possibly of more weight than the previous considerations, this is a case where the views of the representative plaintiff with respect to the degree of success achieved, and its importance for, the members of the class should, again, be given considerable respect and deference. Ms Robinson's background and the extent of her involvement with the class members during the litigation have made her unusually well-qualified to represent their interests before the court. She and another freelance writer, Ms Elaine Dewar, attended the hearing and informed me of their support both for the settlement and the fee request of class counsel. Ms Dewar, as well as Ms Robertson and the late Ms June Callwood, were involved in the initial decision to retain McGowan & Associates for the purpose of the litigation. Ms Robertson and Ms Dewar were complimentary about the manner in which class counsel had performed their responsibilities, and Ms Robertson stated that she was confident that the class members would endorse her support of the fee requested.

39 In these circumstances, I see no sufficient reason to withhold approval of the fee agreement with the suggested multiplier of approximately 2.4 and, in consequence, I will approve the fee of $4 million that counsel have requested. The disbursements claimed are also approved.

40 This approval, like that of the settlement, is provisional pending further submissions of counsel on the matters to which I will now refer.

Outstanding questions

41 I have given provisional approval to the settlement because, in principle, it represents a fair and reasonable compromise of the rights of class members and it is in their best interests that it should be implemented in the manner intended, if this is likely to occur. As I have indicated, for the most part my residual concerns relate to the efficiency and expense of the claims distribution process. Included in these concerns are questions with respect to the role of the court and of class counsel. I believe it will be appropriate for these points of detail to be discussed at a case conference at which I would want to receive counsel's views on the following questions in particular:

1. What is the estimated time for completion of the claims administrator's responsibilities? Am I correct in my understanding that no distributions will be made until all appeals to the court - and any further appeals - have been disposed of? Is it possible, for example, that all distributions would be withheld for a period of years while a single appeal was making its way up the judicial hierarchy?
2. What are the estimated costs of administration and what, if any, provision for their review is contemplated?
3. Will the claims administrator's fees be subject to review, or approval, by anyone? In his affidavit, the claims administrator refers to a supervisory role of class counsel. Where is this role defined and will counsel be entitled to charge further fees for their services?
4. Is it contemplated that there will be a report to class counsel, or the court, after administration has been completed?
5. Given that the object of the settlement is to terminate the litigation, why is it thought appropriate to give rights of appeal (or review?) to the court from all disallowed claims? Can this imposition of jurisdiction on the court be justified? Who are to be the parties to the hearings by the court and what standard of appeal (or review?) is to be applied? Is it intended that class counsel are to participate and, if so, is this to be done without further compensation? Is it intended that the claims administrator should be entitled to be represented? How is section 25 of the CPA considered to be relevant?
6. Is there to be a possibility of appeals from designations by the publication classification committee, or from a disallowance of late-filed claims?
7. Is it possible to justify the existence of a right to a hearing if all claims of a class member are disallowed but not if just one of several claims is accepted?
8. The draft judgment refers to Crawford Class Actions' services. Where is its role spelled out and why is it necessary?
9. How are para 16 of the settlement agreement and para 15 of the draft judgment reconcilable?

42 My attempts to find answers to the above and other questions have not been assisted by the

numbering of the paragraphs of Schedule B and the references to other paragraph numbers in paragraphs 50 and 51 of the schedule.

43 Although the points system that is an integral part of the claims process is, at least in my experience, original as well as creative, the settlement will not be effective unless the claims distribution process will work efficiently. Unless there is a reasonable likelihood that this will occur, neither the settlement, nor counsel's fee will merit final approval. At present I am not satisfied that sufficient attention has been given to this consideration and to the details of the process.

44 Counsel are to arrange a case conference to discuss the concerns I have mentioned and, if they are resolved, to settle the terms of the appropriate orders and the notice to class members.

M.C. CULLITY J.

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 understanding 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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	FRIDAY, THE
	)	
REGIONAL SENIOR JUSTICE MORAWETZ	)	27TH DAY OF DECEMBER, 2013

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 AND 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*

ORDER

THIS MOTION, made by the plaintiffs for an order approving the fees, disbursements and taxes of Koskie Minsky LLP, Siskinds LLP and Paliare Roland Rothstein Rosenberg LLP in relation to and payable from the settlement with Ernst & Young LLP, was heard on December 13, 2013 at the Court House, 330 University Avenue, Toronto, Ontario.

WHEREAS this Court issued an order on March 30, 2013 approving the Ernst & Young Settlement and such order (a) established a settlement trust for the Ernst & Young settlement proceeds (the "Settlement Trust"); (b) appointed Koskie Minsky LLP and Siskinds LLP (together "Canadian Class Counsel"), along with insolvency counsel Paliare Roland Rosenberg Rothstein LLP, as counsel for persons that purchased Sino-Forest securities for the purposes of the settlement with Ernst & Young; and (d) established that the fees and disbursements of Canadian Class Counsel and Paliare Roland Rothstein Rosenberg LLP are to be paid from the Settlement Trust, subject to court approval of such fees and disbursements in accordance with the laws of Ontario governing the payment of counsel's fees and disbursements in class proceedings;

AND WHEREAS on December 13, 2012 the Honourable Justice Then assigned the Honourable Justice Morawetz to hear the motion to approve the Ernst & Young settlement and ancillary matters related to the Ernst & Young settlement under the *Class Proceedings Act, 1992* and the *Companies' Creditors Arrangement Act*;

AND WHEREAS this Court issued an order on October 23, 2013 approving the form of notice of the hearing to approve class counsel fees;

AND ON READING the plaintiffs' motion record, and all supplemental motion records, all objections filed, and on reading such other material filed, and on hearing the submissions of counsel for the plaintiffs, and those other persons present,

1. **THIS COURT ORDERS** that the time for service and manner of service of the notice of motion and the plaintiffs' motion materials on any person are, respectively, hereby abridged and validated, and any further service thereof is hereby dispensed with so that this motion was

properly returnable December 13, 2013 in both proceedings set out in the title of proceedings herein.

2. **THIS COURT ORDERS** that the contingency fee retainer agreement entered into between the plaintiffs and Canadian Class Counsel is approved, and the amount payable to Canadian Class Counsel and Paliare Roland Rothstein Rosenberg LLP from the Settlement Trust in respect of the settlement with Ernst & Young is hereby set at $17,846,250.00 in respect of legal fees, $2,320,495.54 for HST and QST on fees and $1,811,928.43 for disbursements (inclusive of all applicable taxes on the disbursements), such amounts to be paid by NPT RicePoint Class Action Services Inc. (the "Claims Administrator") from the Settlement Trust within 10 days of the Ernst & Young settlement proceeds being paid into the Settlement Trust.

3. **THIS COURT ORDERS** that $1,046,573.08 of the amount payable in paragraph 2 of this order shall be paid by Canadian Class Counsel to Kessler, Topaz Meltzer & Check LLP as an agency fee within 10 days of receipt by Canadian Class Counsel of such amounts from the Settlement Trust.

4. **THIS COURT ORDERS** that Canadian Class Counsel shall be paid by the Claims Administrator from the Settlement Trust within 10 days of the Ernst & Young settlement proceeds being paid into the Settlement Trust for any disbursements paid by Canadian Class Counsel after December 13, 2013 for expenses and taxes relating to administration of the settlement with Ernst & Young and the notice of the settlement approval hearing, notice of the hearing to approve the Claims and Distribution Protocol and any notice of the Claims and Distribution Protocol.

JAN 1 [illegible]

Morawetz, J.

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 AND ARRANGEMENT OF SINO-FOREST CORPORATION

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

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA. et al.

Plaintiffs

SINO-FOREST CORPORATION, et al.

Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

ORDER

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Lawyers for the plaintiffs and CCAA Representative Counsel

REPORT

ON

CLASS ACTIONS

ONTARIO LAW REFORM COMMISSION

VOLUME III

Ministry of the
Attorney
General

1982

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions. The Commissioners are:

DEREK MENDES DA COSTA, Q.C., LL.B., LL.M., S.J.D., LL.D., *Chairman*

H. ALLAN LEAL, Q.C., LL.M., LL.D., *Vice Chairman*

HONOURABLE RICHARD A. BELL, P.C., Q.C.

WILLIAM R. POOLE, Q.C.

BARRY A. PERCIVAL, Q.C.

M. Patricia Richardson, M.A., LL.B., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada M5C 1C5.

During the course of the Class Actions Project, the Honourable G. A. Gale, C.C., Q.C., LL.D., retired as Vice Chairman of the Commission because of ill health. While the Commission benefited greatly from Mr. Gale's knowledge and experience and acknowledges its indebtedness to him, we wish to state that he did not agree with all the recommendations contained in this Report, particularly those relating to costs.

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review and set aside the agreements where they would require the payment of unreasonable fees.[112]

In the usual case – where a class lawyer does not have an agreement with any class member, except perhaps the representative plaintiff – the basis for a claim for remuneration will be either a statutory fee provision or the common fund or substantial benefit doctrine. If the class action terminates by a settlement that creates a fund for the class or culminates in a judgment that the class is entitled to monetary relief, the class lawyer, under the common fund doctrine, will apply to the court for fees to compensate him for his services that benefited class members with whom he has no contractual relations. If the class action obtains an injunction or a declaration, application to the court will be made under any applicable statutory fee provision or the substantial benefit doctrine.

Consequently, in such cases, a class lawyer's right to remuneration for his efforts on behalf of the class, although not based on a contingent fee agreement, nevertheless is contingent, because it depends on a favourable resolution of the action, either by an adjudication or by a settlement. If the action fails, no compensation for such efforts will be forthcoming, notwithstanding the lawyer's expenditure of time and effort.

(ii) Fee Assessment

a. Calculation of Attorneys' Fees

Once the entitlement of the class lawyer to remuneration is established, it becomes the task of the trial judge to assess the appropriate attorney's fee. The fact that the court has a discretion to determine fees does not distinguish class actions from individual actions. Where the exceptions to the American rule apply in individual actions, courts calculate the fee to be awarded. Cases in which attorneys' fees have been determined in individual actions constitute the background for fee assessment in class actions.

When assessing fees, courts are obliged to follow a standard of "reasonableness with reference to the particular facts of the case".[113] Although undoubtedly a sensible exhortation, this directive affords little guidance as to how fees should be calculated in particular cases. Consequently, there have been attempts by the courts[114] and by the American Bar Association[115] to give content to the concept of reasonableness by devising lists of factors that should be considered. Many of these efforts, however, have been directed to

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[112] *Dunn v. H.K. Porter Co.*, 602 F.2d 1105 (3d Cir. 1979). For commentary, see Note, "*Dunn v. Porter*: Guidelines for Federal Courts in Exercising Their Authority to Review and Set Aside Contingent Fee Agreements", [1979] Det. Coll. L. Rev. 765.

[113] *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959), at 188.

[114] See, for example, *In re Osofsky*, 50 F.2d 925 (S.D.N.Y. 1931), at 927, and *Angoff v. Goldfine*, *supra*, note 113, at 189.

[115] See American Bar Association, *Code of Professional Responsibility*, Disciplinary Rule DR 2-106(B).

judicial fee assessment generally, and have not specifically addressed the issue in the context of class action litigation.[116] The guidelines respecting the exercise of judicial discretion have been criticized as lacking the requisite clarity and precision because they fail to explain what weight should be given to the various factors.[117] They are considered little more than hortatory enjoinders to assess a reasonable fee. The inadequacy of these guidelines has been demonstrated by the practice of some courts of stating simply that due consideration had been given to them, without explaining how the factors affected the amount of the fee that was ultimately awarded. Courts have often appeared to review the criteria as a *pro forma* exercise, unrelated to the factual circumstances of the particular case.[118]

Turning to a consideration of how courts have calculated the amount of attorneys' fees in class actions, it may be observed that the courts have altered their general approach over the years. Formerly, courts sought to assess the value of lawyers' services by examining a number of factors, but emphasizing the amount of the monetary recovery or the value of the benefit conferred on the class; the usual result was the application of a percentage formula to the class recovery.[119] The new trend, which is becoming the dominant approach, has been to calculate fees by reference to various factors designed to measure the value of the services performed, with particular attention being given to the time expended by the lawyer.[120] It has been suggested that the transition from an emphasis on the amount of the recovery to an emphasis on the time expended may have been precipitated by criticism of the size of fee awards by certain courts and commentators.[121]

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[116] See, however, Federal Judicial Center, Board of Editors, *Manual for Complex Litigation* (1978) (Clark Boardman), §1.47, at 96-96.1, *n.* 127 (hereinafter referred to as "Manual"), where the editors suggest that, in class actions, the following factors, among others, should be considered: "(1) that in seeking and accepting employment as counsel for a judicially determined class an element of public service is involved; (2) the representation of the class by counsel is not a result of private enterprise but results from provisions of an opportunity to represent the class by a judicial determination; and (3) the policy of the law in class actions, including antitrust actions, is to provide a motive to private counsel to represent consumers and to enforce the laws".

[117] In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), at 470, the Court of Appeals for the Second Circuit stated that "more is needed than a mere listing of factors. Such a list, standing alone, can never provide meaningful guidance." One commentator has referred to the lists of factors as "essentially meaningless litanies": see Dawson II, *supra*, note 87, at 927.

[118] See Mowrey, *supra*, note 93, at 304-06; Note, "Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines" (1975), 16 B.C. Ind. & Com. L. Rev. 630, at 632-33 (hereinafter referred to as "Recent Judicial Guidelines"); Smith, "Standards for Judicial Approval of Attorneys' Fees in Class Action and Complex Litigation" (1977), 20 How. L.J. 20, at 28-29; and Note, "Attorneys' Fees - Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action" (1978), 51 Temple L.Q. 799, at 807-08.

[119] The earlier approach is described in Mowrey, *supra*, note 93, at 334-38.

[120] See Miller, *Attorneys' Fees in Class Actions* (1980), at 60-62.

[121] In *City of Detroit v. Grinnell Corp.*, *supra*, note 117, at 469, the Court stated that, "[f]or the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so".

Crucial to this development were two decisions of the Court of Appeals for the Third Circuit in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*[122] These decisions and others[123] sought to bring a coherent method to the judicial assessment of attorneys' fees in class action litigation. In view of the impact of the so-called "*Lindy* approach", it is necessary to describe it in some detail.

The *Lindy* case was an antitrust class action that terminated with the creation of a settlement fund from which the class lawyers, relying on the common fund doctrine, sought fees for efforts on behalf of class members with whom they had no contingent fee agreements. In an express effort to rationalize fee determination, the Third Circuit Court of Appeals devised a method intended to achieve the fundamental objective of fee determination in class actions – "to compensate the attorney for the reasonable value of services benefiting the unrepresented claimant".[124] Briefly, the prescribed method of fee assessment first requires the court to calculate the number of compensable hours spent by the lawyer in activities on behalf of the class. The amount of time is then multiplied by its value, that is, the lawyer's "normal billing rate",[125] which conceivably may vary for different activities. After the resulting product, which the Court termed the "lodestar", is calculated, it is adjusted to take account of two factors: the quality of work demonstrated by the lawyer in the conduct of the case, and the fact that payment of the lawyer is contingent on success.[126] After the reasonable value of the lawyer's services

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[122] 341 F. Supp. 1077 (E.D. Pa. 1972), vacated and remanded 487 F.2d 161 (3d Cir. 1973) (the latter hereinafter referred to as "*Lindy I*"), on remand 382 F. Supp. 999 (E.D. Pa. 1974), and 540 F.2d 102 (3d Cir. 1976) (*en banc*) (the latter hereinafter referred to as "*Lindy II*"). The evolution of the *Lindy* standards is described in *Barrett v. Kalinowski*, 458 F. Supp. 689 (M.D. Pa. 1978), at 701-03. For a description of the newer approach, see Manual, *supra*, note 116, §1.47, at 97-106; Mowrey, *supra*, note 93, at 338-40; and Harvard Developments, *supra*, note 111, at 1611-13.

[123] See *City of Detroit v. Grinnell Corp.*, *supra*, note 117, which presented a similar analysis. Another influential appellate court decision was *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which established twelve factors that should be examined by a court in assessing lawyers' fees but, unlike *Lindy*, did not set out a step-by-step method of computation.

[124] *Lindy I*, *supra*, note 122, at 167.

[125] See Mowrey, *supra*, note 93, at 323-25; Recent Judicial Guidelines, *supra*, note 118, at 647; and Harvard Developments, *supra*, note 111, at 1613, *n.* 150.

> There has been some controversy whether hourly rates can be assigned to the work performed by class lawyers. Hourly rates are given in respect of services that are not performed on a contingent basis and, therefore, lend themselves to the establishment of standard fees. Class litigation in the United States, however, is almost invariably undertaken by lawyers on a contingent basis. For example, Wright and Miller, *supra*, note 77, Vol. 7A (Curr. Supp. 1981), §1803, observed as follows (at 228):
>
> > [T]he notion that there are fixed hourly rates that can be attributed to all lawyers and used as objective markers of the worth of their services is somewhat of an illusion. These rates have never existed for contingent fee lawyers, since time and hourly rates are irrelevant for their type of practice.
>
> See, also, Mowrey, *supra*, note 93, at 324, and Newberg, *supra*, note 83, Vol. 3, §6924d, at 1148.

[126] *Lindy I*, *supra*, note 122, at 166-69.

on behalf of the entire class is determined, the unrepresented class members pay a percentage of that amount equal to their percentage recovery from the fund.[127] In *Lindy II*, the Third Circuit Court of Appeals refined the analytical process by providing a fuller explanation of the contingency and quality of work factors.[128]

As indicated above, the intention of the *Lindy* decisions was to rationalize the method of fee assessment by putting it on a more objective basis than was hitherto evident in the use of a percentage formula. While, by comparison to the earlier method of fee assessment, the *Lindy* approach does systematize the method of fee assessment, it remains a subjective exercise in which the court, at each stage of the analysis, must make judgments about matters incapable of precise quantification.

Even the starting point, the determination of the time spent by the lawyer, obliges the court to render subjective judgments. The court must ascertain whether the lawyer's activities in respect of which time is claimed did, in fact, enure to the benefit of the class.[129] In determining the amount of compensable time, courts seek to ensure that lawyers do not engage in unnecessary preparation and duplication of effort in order to inflate their fees.[130] The nature of the inquiry demanded by the emphasis on time spent on behalf of the class requires lawyers to submit, and therefore to maintain, comprehensive information about their activities. A further incentive to keep precise records has been created by the practice of some courts of disregarding unrecorded time, unless it can be substantiated by other means.[131]

As we have indicated, the *Lindy* decisions require courts to multiply the hours spent on behalf of the class by the "normal billing rate". In fulfilling this directive, courts appear to have adopted different approaches. While some decisions appear to take a subjective approach, relying on the lawyer's statement of his hourly rate, others prefer to assign a rate based on a consideration of more objective standards.[132]

As we have explained, the "lodestar" – which is the product of the time spent on behalf of the class multiplied by the "normal billing rate" – may be increased to reflect the influence of two factors, namely, the quality of the

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[127] See text accompanying note 124, *supra*.

[128] *Lindy II*, *supra*, note 122, at 116-18.

[129] See Newberg, *supra*, note 83, Vol. 3, §6925, at 1153-56, and Mowrey, *supra*, note 93, at 319-20.

[130] See Note, "Computing Attorney's Fees in Individual and Class Action Antitrust Litigation" (1972), 60 Calif. L. Rev. 1656, at 1667; Dawson II, *supra*, note 87, at 927-28; Mowrey, *supra*, note 93, at 322-23; Smith, *supra*, note 118, at 64-66; Recent Judicial Guidelines, *supra*, note 118, at 644; Harvard Developments, *supra*, note 111, at 1617; and Wright and Miller, *supra*, note 77, Vol. 7A (Curr. Supp. 1981), §1803, at 228-29.

[131] See Manual, *supra*, note 116, §1.47, at 105; Smith, *supra*, note 118, at 39-41; and Newberg, *supra*, note 83, Vol. 3, §6125, at 1153-54.

[132] For example, in *City of Detroit v. Grinnell Corp.*, *supra*, note 117, at 471, the Court referred to "the hourly amount to which attorneys of like skill in the area would typically be entitled for a given type of work".

lawyer's work and the contingent nature of success. In assessing the former, a court is interested in the quality of work demonstrated in the course of the particular litigation, rather than in an evaluation of the lawyer's ability in a general sense.[133] This inquiry will include an examination of the lawyer's performance in court, conduct of negotiations, and administration of the class action. If the quality shown is unusually high or unusually low, the compensation is adjusted accordingly.

In evaluating the quality of services rendered, a factor inevitably cited is the nature of the issues involved in the class action. Not surprisingly, novel or complex issues are thought to demand greater ingenuity and industry in order to bring the suit to a successful conclusion.[134] Whether the litigation will be judged to have this character may depend on whether the position of the class has been assisted by the existence of legal precedent or antecedent government proceedings, either of which likely will ease the task of the class lawyer.[135] The quality of work also will be assessed having regard to the result achieved.[136] For example, a larger recovery realized in a relatively short period of time normally demonstrates the exercise of superior skill by the class lawyer.

The contingent nature of success is a factor that is to be considered independently of the quality of work factor. Increasing the "lodestar" amount and, hence, the fee award, to reflect this factor is intended to take account of the economic realities of class litigation – or, more specifically, the financial risk undertaken by a class lawyer.[137]

In class litigation, compensation will be forthcoming only after the investment of a substantial amount of time and effort by the lawyer. While not receiving any remuneration for his or her work, the usual expenses of running an office are being incurred. Moreover, substantial advances may be made on behalf of the client to pay for the enormous expenses incurred in the action, which would augment significantly the financial risk assumed by the class lawyer.

In conducting litigation on this basis, the position of a class lawyer

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[133] In *Lindy II*, *supra*, note 122, at 117, Aldisert J., who gave the opinion of the Court (Gibbons and Seitz JJ. concurring in part and dissenting in part), stated that "counsel who possess or who are reputed to possess more experience, knowledge and legal talent generally command hourly rates superior to those who are less endowed. Thus, the quality of an attorney's work *in general* is a component of the reasonable hourly rate; this aspect of 'quality' is reflected in the 'lodestar' and should not be utilized to augment or diminish the basic award under the rubric of 'the quality of an attorney's work' " (emphasis in original). See, also, Mowrey, *supra*, note 93, at 307-11, and Newberg, *supra*, note 83, Vol. 3, §6931, at 1198-99.

[134] See Newberg, *supra*, note 83, §6933, at 1200-02; Smith, *supra*, note 118; and Wright and Miller, *supra*, note 77, Vol. 7A (Curr. Supp. 1981), §1803, at 231-32, *n.* 62.12.

[135] See Newberg, *supra*, note 83, Vol. 3, §6933, at 1200.

[136] See Mowrey, *supra*, note 93, at 311-18.

[137] For a discussion of the economics of class litigation, see Note, "Developments – Attorney Fee Awards in Antitrust and Securities Class Actions" (1980), 6 C.A.R. 84, at 132-33, and Newberg, *supra*, note 83, Vol. 3, §6926a, at 1166-67.

compares unfavourably with that of a lawyer who performs non-contingent work compensable on a certain or hourly basis. If a class lawyer were not compensated in a manner that reflected the risk of failure, in addition to being reimbursed for his investment of time and resources, it is argued that lawyers would prefer to undertake other kinds of work for which payment was certain.

A court's examination of the contingency factor at the termination of a class action is an *ex post facto* assessment of the probability of success. The court engages in a retrospective inquiry in which the risk of failure is evaluated from the perspective of the time the action was initiated. In considering the contingency factor, courts have identified certain elements that, in their view, bear upon the probability of success. These elements have been summarized as follows:[138]

> At the outset it is helpful to outline the various elements of the contingency factor. Analysis of these elements will focus on their positive or negative effects on certainty of success. The risk of success or failure requires consideration, for example, of the presence or absence of prior governmental proceedings or prior legal precedent. These two elements are often cited as affecting the contingency factor, but their importance can only be assessed in light of the specific facts of each controversy.[139] For this reason, the likelihood of obtaining a favorable liability judgment, and the risks involved in proving damages even after liability is shown, are particularly important. The risk that the damages proved will be disproportionate to the litigation efforts expended, thus resulting in inadequate compensation is also present. The contingencies in obtaining class certification present another large hurdle. The decision to commit a lawyer's time, money and personnel to resolution of the class action issues represents a unique risk borne by the attorney, though the class representative remains personally responsible for costs should the case be dismissed. Additionally, the vigor and capabilities of the defense may increase the difficulties, and the risk of litigating the counsel fee petition remains.

Although the *Lindy* approach was developed in the context of an application for fees from a settlement fund, its impact has extended beyond that context. Courts have held that this approach is to be followed where the defendant has agreed to pay reasonable attorney's fees in addition to a settlement fund.[140] Where fees are assessed pursuant to statutory fee provisions, the *Lindy* approach also has influenced the method of fee calculation.[141]

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[138] Newberg, *supra*, note 83, Vol. 3, §6926, at 1165.

[139] The effect of prior government proceedings appears to be uncertain. It has been suggested that, from the perspective of the class lawyer, the risk of failure will be reduced where there has been a criminal conviction or where "substantial investigations undertaken by the government indicate that a private party can prove guilt in a separate trial". Short of a guilty plea or a guilty verdict after trial, there will not be a substantial reduction in the contingency factor. However, in the course of a particular proceeding, evidence supporting the class may be generated, which would attenuate the risk. The absence of any governmental proceeding accentuates the complexity and novelty of the action, thereby increasing the risk of failure assumed by counsel: see Newberg, *supra*, note 83, Vol. 3, §6926b, at 1179, and §6926i, at 1180.

[140] *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974), and *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975).

[141] *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert.* denied 100 S. Ct. 2999 (1980); and *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980).

While there has been some criticism of the *Lindy* approach,[142] a recent study of attorneys' fees in class actions, commissioned by the Federal Judicial Center,[143] reveals its importance. The study confirms that there is a growing trend to emphasize the time and labour expended by the lawyer. But it also demonstrates that the method of fee assessment is not yet sufficiently consistent to warrant a conclusion that there is a firmly established practice. Variations exist among the eleven federal court circuits and among the courts within each circuit. However, while the *Lindy* approach has not been rigidly followed by all courts, it has been generally accepted in preference to the earlier approach that emphasized the amount of the recovery.

b. Procedure

In the United States, attorneys' fees in class actions are determined by the court at a hearing, upon the application of the class lawyer. Where a suit terminates by settlement, usually the hearing is scheduled simultaneously with the hearing for the approval of the settlement.[144] As indicated, the fees that are the subject of the lawyer's application are intended to compensate him for services on behalf of class members with whom he has no contractual relations.[145]

With his application to the court for fees, a class lawyer must submit supporting affidavits and memoranda outlining the basis of his claim. The lawyer must provide a detailed description of the nature and progress of the class action, his efforts on behalf of the class, and their results.

An application for fees may be opposed by class members, either individually or in a group, by the defendant, or by other lawyers who have participated in the action.[146] To a great extent, the source of payment will

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[142] See Newberg, *supra*, note 83, Vol. 3, §6924d, at 1148-50, and §6935, at 1205-06. See, also, Leubsdorf, "The Contingency Factor in Attorney Fee Awards" (1981), 90 Yale L.J. 473, and Herzel and Hagan, "Plaintiffs' Attorneys' Fees in Derivative and Class Actions" (1981), 2 Litigation 25.

[143] See Miller, *supra*, note 120.

[144] See *infra*, ch. 20.

[145] Some class lawyers have applied for attorneys' fees from the shares of class members who have retained their own lawyers. These attempts have met with mixed results. Certain courts, concerned with the assessment of "double fees", have refused to award fees in respect of represented class members, while others, adhering strictly to the common fund doctrine, have ordered that fees be paid: see Newberg, *supra*, note 83, Vol. 3, §§6980-6980g, at 1277-90.

[146] Lawyers, other than the lawyer retained by the representative plaintiff, may be participating in the class action as counsel for other representative plaintiffs or intervenors. Where the class action has produced a fund, either as a result of a settlement or an adjudication, these lawyers may apply for fees, challenging the fee application of the class lawyer, on the basis that their efforts have contributed to the creation of the fund, and that their services should be compensated accordingly.

Competition for fees obliges the court to deal with certain allocational and distributional questions. Where the lawyers and the defendant settle by agreement both the amount of the fee and to whom it is to be distributed, the approval of the court still is necessary. In the absence of agreement, the court will have to determine how a global

determine who will challenge it. For example, in a settlement agreement, if the defendant has arranged to pay a fee over and above the settlement fund, or if the defendant is liable to pay attorneys' fees under a statutory provision, he will have an interest in attempting to persuade the court to assess a lower fee than that requested by the lawyer. If the fee is to be deducted from a settlement fund otherwise payable to the class, class members will have an economic interest in arguing that it is excessive because it will reduce their shares. In view of this interest, notice of an impending fee hearing is sent to them.

A controversial procedural issue has concerned whether the fee assessment should be a hearing involving *viva voce* testimony, the presentation of documentary evidence, cross-examination, and pre-hearing discovery.[147] The alternative to such a formal proceeding is a court determination relying exclusively on documentary material. It seems that the former type of hearing is mandatory where it appears from the fee application that facts are in dispute, even where there has been no formal challenge to the lawyer's claims, or where one or more objecting class members wish to present evidence.[148]

After the court has determined the fee, it must consider how the burden is to be borne by members of the class. The general rule is that class members bear the burden on a *pro rata* basis. Until resolved by a recent decision of the United States Supreme Court, there was an issue whether class members who have not claimed their shares should be required to contribute to attorneys' fees on a *pro rata* basis. In *The Boeing Company v. Van Gemert*,[149] Mr. Justice Powell, who delivered the opinion of the Court, stated that, since "[t]he right to share the harvest of the lawsuit, upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel",[150] class members who do not claim their shares should nonetheless be obliged to contribute on a *pro rata* basis to the award of attorneys' fees.

Once the amount of the fee is settled, it is a simple matter to secure payment. Before individual shares of the recovery are distributed to class members, the fees are deducted from the fund and the amount of the individual shares is reduced accordingly.[151]

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amount is to be divided among lawyers claiming fees. If there is no agreement as to the total amount of the fees, the court will determine the individual fee applications of the various lawyers, rather than assess a global sum. In cases where the theoretical basis of the award of the attorney's fee is to reward services that have benefited the class members with whom the lawyers have no contractual relationship, the inquiry necessarily will focus first on the question of whether the activities of the particular lawyer benefited the class.

[147] See Mowrey, *supra*, note 93, at 292-94.

[148] *Lindy I*, *supra*, note 122, at 169; *City of Detroit v. Grinnell Corp.*, *supra*, note 117, at 468; and *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980), at 1328.

[149] *Supra*, note 81. For a discussion of this case, see *supra*, ch. 14, sec. 3(b)(i).

[150] *The Boeing Company v. Van Gemert*, *supra*, note 81, at 750.

[151] See Newberg, *supra*, note 83, Vol. 3, §6970a, at 1256-57.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

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

The Trustees of the Labourer's Pension Fund of Central and Eastern Canada, et al.	and	Sino-Forest Corporation, et al.	Superior Court File No: CV-10-414302
Plaintiffs		Defendants	

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceeding under the *Class Proceedings Act, 1992*
Proceeding commenced at Toronto

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