Court File No. 3957-11CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

PETER ROONEY and ARCHIE LEACH

Plaintiffs

- and -

ARCELORMITTAL S.A., LAKSHMI N. MITTAL, ADITYA MITTAL, 1843208 ONTARIO INC., PHILIPPUS F. DU TOIT, NUNAVUT IRON ORE ACQUISITION INC., IRON ORE HOLDINGS, LP, NGP MIDSTREAM & RESOURCES, L.P., NGP M&R OFFSHORE HOLDINGS, L.P., JOWDAT WAHEED, BRUCE WALTER, JOHN T. RAYMOND, JOHN CALVERT, BAFFINLAND IRON MINES CORPORATION, RICHARD D. MCCLOSKEY, JOHN LYDALL and DANIELLA DIMITROV

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFFS (SETTLEMENT, CLASS COUNSEL FEES, FUNDING COMMISSION AND HONORARIA)

(Motion Returnable September 6, 2019)

August 7, 2019

Siskinds LLP
Barristers & Solicitors
680 Waterloo Street, P.O. Box 2520
London, ON N6A 3V8

Michael G. Robb (LSO#: 45787G)
Nicholas Baker (LSO#: 59642T)
Tel: 519-660-7872
Fax: 519-660-7873

302-100 Lombard Street
Toronto, ON M5C 1M3

Anthony O'Brien (LSO#: 56129U)
Tel: 416-594-4394
Fax: 519-672-6065

Lawyers for the Plaintiffs

TO: **Aird & Berlis LLP**
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Steve Tenai
Tel: 416-863-1500
Fax: 416-863-1515

Lawyers for the Defendants, ArcelorMittal S.A., Lakshmi N. Mittal, Aditya Mittal, 1843208 Ontario Inc., Phillipus F. du Toit and Baffinland Iron Mines Corporation

AND TO: **Davies Ward Phillips & Vineberg LLP**
155 Wellington Street West
Toronto, On M5V 3J7

Andrea Burke
Tel: 416-367-6908
Fax: 416-863-0871

Lawyers for the Defendants, Nunavut Iron Ore Acquisition Inc., Iron Ore Holdings, LP, NGP Midstream & Resources, LP, NGP M&R Offshore Holdings, LP, Jowdat Waheed, Bruce Walter, John T. Raymond and John Calvert

AND TO: **Stikeman Elliott LLP**
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Alexander Rose
Tel: 416-869-5204
Fax: 416-947-0866

Lawyers for the Defendants, Richard D. McCloskey, John Lydall and Daniella Dimitrov

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PART I – OVERVIEW

1. Following the settlement of this class action ("**Action**"),[1] the Plaintiffs and Siskinds LLP ("**Siskinds**") have brought these motions seeking orders approving:

   (a) the settlement between the Plaintiffs and the Defendants pursuant to section 29 of the *Class Proceedings Act, 1992* ("***CPA***")[2] and related matters;

   (b) the proposed plan for allocating and distributing the proceeds of the settlement ("**Distribution Protocol**");

   (c) Class Counsel Fees to be paid in accordance with the retainer agreements entered into with the Plaintiffs pursuant to section 32 of the *CPA*;

   (d) an interim payment of the Funding Commission to the litigation funder, Claims Funding Australia Pty Ltd; and

   (e) the payment of an honorarium to each of the Plaintiffs.

2. This Action has been vigorously litigated for over eight years through numerous contested motions, motions for leave to appeal and an appeal, including a comprehensive motion to strike that ended with an appeal to the Ontario Court of Appeal. This Action has been certified as a class proceeding. Although the formal discovery process has not yet begun, the Plaintiffs have a firm grasp on the strengths and weaknesses of their case.[3]

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1 Capitalized terms herein not otherwise defined have the same meaning as in the Settlement Agreement dated June 7, 2019 ("**Settlement Agreement**"), Exhibit "A" to the Affidavit of Garett Hunter sworn August 7, 2019 ("**Hunter Affidavit**").

2 *Class Proceedings Act, 1992*, SO 1992, c 6.

3 Hunter Affidavit at para 6.

3. On January 31, 2019, the parties conducted a mediation with the assistance of the former Chief Justice of Ontario, the Honourable Warren K. Winkler (ret.) as mediator.[4]

4. In the lead-up to that mediation, the Plaintiffs obtained documentary disclosure from the Defendants for the purposes of the mediation on matters relevant to liability and damages. That disclosure supplemented the documents that the Plaintiffs were able to access from the related regulatory proceeding brought by Staff of the Ontario Securities Commission ("**OSC**") against the Defendants, Mr. Waheed and Mr. Walter, which was decided by the OSC Panel on August 26, 2014 ("**OSC Decision**").[5] The Plaintiffs also had the benefit of a valuation of Baffinland shares prepared for Baffinland in the related dissent and appraisal proceeding ("**Valuation Application**") and a responding report from their own expert prepared for purposes of the mediation.[6]

5. The mediation on January 31, 2019 did not result in a resolution of the Action. However, negotiations between the parties, with the assistance of Mr. Winker, continued in the months that followed. Certain of the parties' counsel attended a second meeting with Mr. Winker on March 4, 2019, which again did not result in a settlement. The discussions continued in the months that followed, eventually leading to a settlement in principle in May 2019. The Settlement Agreement was executed on June 7, 2019.[7]

6. The Settlement Agreement provides that the Defendants will pay or cause their insurers to pay $6,500,000.00 to resolve the claims asserted in the Action.[8]

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4 Hunter Affidavit at para 7.
5 *Jowdat Waheed et al.*, 2014 ONSEC 23.
6 Hunter Affidavit at para 8.
7 Hunter Affidavit at para 9.
8 Hunter Affidavit at para 10.

7. In preparation for the mediations, Siskinds had lengthy internal discussions to review and debate the risks and obstacles the Action faced proceeding through a trial of the common issues, the likelihood of those risks materializing and how those risks would impact on the possibility of recovery for the Class. These discussions were conducted with the benefit of the materials referred to above, the parties' submissions and evidence on the various interlocutory motions, and the decisions of this Court and other courts on those motions.[9]

8. The certified claims of the Class Members are predicated on a statutory cause of action under section 131 of the Ontario *Securities Act* ("***OSA***") for misrepresentations in take-over bid and directors' circulars, insider trading and tipping contrary to section 134 of the *OSA*, unjust enrichment, and relief from oppression pursuant to section 248 of the Ontario *Business Corporations Act* ("***OBCA***"). The resolution of these claims is complex and the outcome of the action highly uncertain.[10]

9. In addition to the general risks present in all high stakes securities litigation, the critical risks specific to this Action are those laid out in paragraphs 63 to 87 below, being broadly:

   (a) the risk that the Court would find that there had been no misrepresentations;

   (b) the risk that the Court would dismiss the Plaintiffs' *OBCA* oppression claims, whether based on allegations of misrepresentation or other misconduct in the context of the take-over bid process; and

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9 Hunter Affidavit at para 11.
10 Hunter Affidavit at para 12.

(c) the risk that the Court would find that the Class did not suffer any loss or damage as a result of the alleged misconduct of the Defendants.[11]

10. After considering all the foregoing, Siskinds advised the Plaintiffs and took instructions before entering the January 31, 2019 and March 4, 2019 mediations. These same considerations were at play in the negotiations outside the formal mediation sessions, including in the advice provided to the Plaintiffs with respect to the sum of $6,500,000.00 that was finally agreed upon by the parties.[12]

11. The Settlement is the product of arm's length negotiations between the parties. Siskinds endorses the Settlement as being fair, reasonable and in the best interests of the Class.

12. The Plaintiffs' proposed Distribution Protocol for distribution of the Settlement funds is designed to provide a fair, streamlined and efficient claims process, and to provide compensation based on the relative strength and estimated damages associated with Class Members' claims against the Defendants.

13. Siskinds seeks approval of its fees and disbursements in accordance with the retainer agreements executed at the outset of this complex, prolonged and contentious proceeding which resulted in a fair and reasonable settlement for the benefit of the Class. Siskinds seeks approval of fees in the amount of $1,787,500.00 plus applicable HST of $232,375.00, and reimbursement of $266,798.55 in disbursements plus applicable taxes of $34,524.44, for an all-inclusive request of $2,321,197.99. The Class Counsel Fee request is fair and reasonable in the context of this case.

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11 Hunter Affidavit at para 13.
12 Hunter Affidavit at para 14.

14. The Plaintiffs also propose that an interim payment of the Funding Commission be made to the Funder at this stage, with the final quantum of the Funding Commission to be determined at the conclusion of the administration of the Settlement.

15. Finally, an honorarium of $10,000.00 is proposed for each of the Plaintiffs in recognition of the service they have provided to the Class in the prosecution of the Action.

PART II – FACTS

A. Background to the Action

16. Baffinland is a mining company incorporated under the *OBCA*. Prior to the take-over of Baffinland that is the subject of this Action, Baffinland was a reporting issuer in all provinces and territories of Canada. Its Common Shares were listed for trading on the Toronto Stock Exchange ("**TSX**") under the ticker symbol "BIM", and warrants issued by Baffinland in 2007 ("**2007 Warrants**") were listed for trading on the TSX under the ticker symbol "BIM.WT".[13]

17. Baffinland's sole asset was the 100%-owned Mary River iron ore project on Baffin Island in Nunavut ("**Mary River Project**" or "**Project**"). The property consisted of nine high-grade iron ore deposits. At the relevant time, mineral reserves or resources had been classified for only three of the nine deposits and feasibility studies were based on mineral reserves from only deposit 1. Baffin Island is very remote and there was no pre-existing infrastructure. To get iron ore extracted at the Mary River Project to market, the ore would have to be shipped overland to a port where it would then have to be transported by sea.[14]

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13 Hunter Affidavit at para 16.
14 Hunter Affidavit at para 17.

18. On March 5, 2008, Baffinland disclosed a feasibility study based on transporting 18 million tonnes of iron ore annually from the Mary River Project via rail to port ("**2008 Feasibility Study**"). In 2008, Baffinland reported the existence of an expansion study for production of 30 million tonnes of iron ore annually but did not publicly disclose the study itself ("**2008 Expansion Study**").[15]

19. In June and July 2010, Baffinland announced that it was considering a road haulage option for development of the Mary River Project. It announced the completion of a road haulage conceptual study ("**2010 Conceptual Study**") but did not disclose the study itself.[16]

20. On January 13, 2011, Baffinland issued a press release reporting on the results of a technical study on the road haulage option ("**2011 Road Feasibility Study**"). Baffinland did not release the full study until February 28, 2011 after the close of the Joint Bid.[17]

21. Development of the Mary River Project required a massive amount of capital that Baffinland was incapable of raising on its own and expertise Baffinland did not have. As a result, Baffinland had long been searching for an investor to assist in the development of the Mary River Project. ArcelorMittal S.A. ("**ArcelorMittal**") and Baffinland had discussed a joint venture as early as 2008. There was a pause in negotiations with the onset of the 2008 financial crisis.[18]

22. In the course of its search for an investor, Baffinland retained the services of Jowdat Waheed as a consultant in early 2010. Mr. Waheed was given extensive access to

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15 Hunter Affidavit at para 18.
16 Hunter Affidavit at para 19.
17 Hunter Affidavit at para 20.
18 Hunter Affidavit at para 21.

Baffinland's business and asked to assess options for the development of the Mary River Project.[19]

23. Negotiations between Baffinland and ArcelorMittal recommenced in 2009 and by August 2010 ArcelorMittal and Baffinland agreed to a term sheet ("**August 2010 Term Sheet**") for a joint venture for the development of the Mary River Project ("**Joint Venture**"). Negotiations over the definitive terms of the Joint Venture continued into September 2010.[20]

24. However, the negotiations between ArcelorMittal and Baffinland over the Joint Venture ceased following the hostile take-over bid led by Nunavut Iron Ore Acquisition Inc. ("**Nunavut**") for all of Baffinland's Common Shares for $0.80 per Common Share on September 22, 2010. In a Baffinland directors' circular dated October 7, 2010, Baffinland's directors recommended that Baffinland shareholders reject the offer. Mr. Waheed was directly involved in the launch of the Nunavut bid as the President and Chief Executive Officer of Nunavut.[21]

25. On November 12, 2010, ArcelorMittal made a competing take-over bid for all of Baffinland's outstanding Common Shares and 2007 Warrants for $1.10 per Common Share and for $0.10 per 2007 Warrant. ArcelorMittal's take-over bid was a friendly offer made with the support of Baffinland's board of directors pursuant to a support agreement dated November 8, 2010 ("**Support Agreement**"). A Baffinland directors' circular dated

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19 Hunter Affidavit at para 22.
20 Hunter Affidavit at para 23.
21 Hunter Affidavit at para 24.

November 12, 2010 recommended that holders of BIM Securities accept the offer and tender to the bid.[22]

26. Following the friendly ArcelorMittal bid, there were several competing rounds of bids made by ArcelorMittal and Nunavut. However, on January 14, 2011, the previously competing bidders, Nunavut and ArcelorMittal, joined forces to make a joint bid, thereby ending the auction that had seen the bid price rise over the previous months. ArcelorMittal and Nunavut offered to purchase all of Baffinland's outstanding Common Shares and 2007 Warrants for $1.50 per Common Share and for $0.10 per 2007 Warrant ("**Joint Bid**"). In a Notice of Change to the November 12, 2010 directors' circular dated January 17, 2011, Baffinland's directors recommended that holders of BIM Securities accept the offer and tender to the Joint Bid.[23]

27. On February 17, 2011, after being extended twice, the Joint Bid expired with 325,192,869 Common Shares and 4,530,824 2007 Warrants being tendered to the bid, representing (with securities already held by the Offerors) 93% of the outstanding Common Shares and 76% of the outstanding 2007 Warrants.[24]

28. The remainder of Baffinland's Common Shares and 2007 Warrants were taken up via a follow-on Plan of Arrangement. The individuals who had their shares taken up via the follow-on Plan of Arrangement are not Class Members.[25]

29. The Plaintiffs allege that certain material facts about Baffinland and the Mary River Project, including in relation to the 2008 Expansion Study, the 2010 Conceptual Study and the 2011 Road Feasibility Study, were misrepresented or not adequately disclosed in

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22 Hunter Affidavit at para 25.
23 Hunter Affidavit at para 26.
24 Hunter Affidavit at para 27.
25 Hunter Affidavit at para 28.

the various circulars issued in connection with the take-over of Baffinland, and that Baffinland and certain of its directors and officers acted oppressively in the take-over bid process.[26]

30. The Plaintiffs also make insider trading allegations. They allege that the Offerors had knowledge of undisclosed material facts regarding Baffinland in their possession at the time they took up the BIM Securities in the Joint Bid.[27]

31. A summary of the causes of action advanced against each particular defendant can be found at paragraph 32 of the Hunter Affidavit.

B. History of the Action

32. On April 19, 2011, the Plaintiffs commenced the Action against the Defendants through the issuance of a Notice of Action. A Statement of Claim was filed on May 18, 2011 and further amended on May 31, 2013, June 4, 2013, October 31, 2013 and for a final time on July 9, 2018.[28]

1. Venue transfer and stay motions

33. The Defendants brought a motion to transfer the venue of the Action from London to Toronto. The Plaintiffs brought a motion to stay the Valuation Application until the certification motion in the Action was determined. The Valuation Application is an application pursuant to section 185 of the *OBCA* in which the Defendant, 1843208

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26 Hunter Affidavit at para 29.
27 Hunter Affidavit at para 30.
28 Hunter Affidavit at para 33; Second Fresh as Amended Statement of Claim, Exhibit "B" to the Hunter Affidavit.

Ontario Inc., is asking the Court to fix the fair value of Baffinland Common Shares previously held by a group of dissenting shareholders.[29]

34. The venue and stay motions were heard together on April 14, 2012 and re-heard on October 24, 2012 in London. On March 6, 2013, Justice Leitch dismissed the Defendants' venue transfer motion and granted the Plaintiffs' stay motion. The Defendants sought leave to appeal the decision of Justice Leitch on the stay motion. On July 8, 2013, Justice Bryant dismissed the motion for leave to appeal.[30]

2. Motion to approve a litigation funding arrangement

35. In 2013, the Plaintiffs brought a motion for the approval of a litigation funding agreement ("**Funding Agreement**") with the litigation funder, Claims Funding Australia Pty Ltd ("**Funder**"). Pursuant to the Funding Agreement, the Funder agreed to pay an amount for disbursements and to pay any adverse costs order in the proceeding, in return for 7% of the net recovery for the Class (i.e. after deducting Siskinds' fees and disbursements and any administration expenses), capped at C$5,000,000.00 if a settlement occurred prior to delivery of the pre-trial conference brief.[31]

36. On November 21, 2013, this Honourable Court issued an Order approving the funding arrangement, subject to the payment into court of specified amounts as security for the Defendants' costs of the proceeding. The Funder paid C$500,000.00 and then C$1,500,000 into court in compliance with the Order.[32]

3. Defendants' motions to strike

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29 Hunter Affidavit at paras 34-35.
30 Hunter Affidavit at paras 36-38.
31 Hunter Affidavit at para 39; Litigation Funding Agreement, Exhibit "C" to the Hunter Affidavit.
32 Hunter Affidavit at para 40.

37. Over four days in December 2014 and January 2015, the then-current Statement of Claim was the subject of three concurrent motions to strike by the three Defendant groups pursuant to rules 21, 25.06(1), 25.06(8) and 25.11.[33]

38. The Defendants' motions to strike were a comprehensive and wide-ranging attack on the Plaintiffs' pleaded case, by which the Defendants sought to strike out all or substantially all of the Statement of Claim.[34]

39. This Honourable Court issued an Order on July 30, 2015 striking a few paragraphs from the Statement of Claim but leaving the bulk of the Claim intact. Among other things, the Order required the Plaintiffs to make an election as to whom to sue under section 131(1) of the *OSA* and struck the elements of the Statement of Claim asserting a cause of action under section 131 of the *OSA* on behalf of persons who disposed of their BIM Securities on the secondary market. By order dated August 17, 2016 and accompanying reasons, the Court of Appeal partly granted and partly denied the Plaintiffs' appeal of the Order dated July 30, 2015. Specifically, the Court of Appeal allowed the Plaintiffs' appeal on the election issue and denied the appeal with respect to the ability to assert a cause of action under section 131 of the *OSA* on behalf of secondary market sellers.[35]

4. Certification motion

40. A motion for certification of the Action as a class proceeding was heard over two days in January 2018. On May 18, 2018, the Action was certified as a class proceeding and

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33 Hunter Affidavit at para 41.
34 Hunter Affidavit at para 42.
35 Hunter Affidavit at para 43.

Archie Leach and Peter Rooney were appointed as the representative plaintiffs for the Class.[36]

41. Baffinland, Richard McCloskey, John Lydall and Daniella Dimitrov sought leave to appeal the certification of oppression remedy common issues. On September 11, 2018, leave to appeal was denied.[37]

5. Defendants' motions regarding the Funder's letter of credit

42. The Defendants brought concurrent motions to stay the Action on the basis that the letter of credit posted by the Funder as security under paragraph 1(c) of the Court's Order dated November 21, 2013 did not comply with the requirements of the Order or, in the alternative, advice and direction from the Court as to the form of the letter of credit.[38]

43. On May 18, 2018, the Court made an Order setting out a process to be followed if a letter of credit posted by the Funder is not renewed and requirements for the terms of any letter of credit posted by the Funder.[39]

6. Related Litigation: The OSC Decision

44. Over 43 days between January 12, 2013 and September 5, 2013, an OSC Panel heard an insider trading and tipping case against the Defendants Mr. Waheed and Mr. Walter. OSC Staff alleged that Mr. Waheed had knowledge of undisclosed material facts related to Baffinland at the time of Nunavut's toehold purchases made in the lead-up to its September 22, 2010 hostile bid. OSC Staff alleged that Mr. Waheed acquired this knowledge during his time as a consultant for Baffinland and after his time as a

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36 Hunter Affidavit at para 44.
37 Hunter Affidavit at para 45.
38 Hunter Affidavit at para 46.
39 Hunter Affidavit at para 47.

consultant via communications with Baffinland management. OSC Staff further alleged that Mr. Waheed provided the information he obtained to Mr. Walter.[40]

45. In the OSC Decision, the OSC Panel dismissed the insider trading and tipping allegations against Mr. Waheed and Mr. Walter. The OSC Decision considered, among other things, Baffinland's search for a strategic partner, joint venture partner negotiations with ArcelorMittal (including findings with respect to the August 2010 Term Sheet), internal and independent valuations of the Joint Venture prepared for Baffinland, and internal documents relevant to Nunavut's hostile take-over bid.[41]

C. The Settlement

46. All of the negotiations leading to the Settlement Agreement were conducted on an adversarial, arms-length basis. The Honourable Warren Winkler, former Chief of Justice of Ontario, presided as mediator at mediation sessions on January 31, 2019 and March 4, 2019, and assisted in the negotiations outside the formal mediation sessions, which resulted in the Settlement Agreement.[42]

47. The key terms of the Settlement Agreement are as follows:

(a) the Settlement is conditional upon the approval of this Honourable Court;

(b) the Settlement does not constitute an admission of liability by the Defendants;

(c) the Defendants and their insurers will pay C$6,500,000.00 all-inclusive for the benefit of the Class Members in full and final settlement;

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40 Hunter Affidavit at para 48.
41 Hunter Affidavit at para 49; *Jowdat Waheed et al.,* 2014 ONSEC 23.
42 Hunter Affidavit at para 50.

(d) the Settlement Amount shall be paid to Siskinds within 30 days of execution of the Settlement Agreement, to be deposited into trust and from which funds shall be paid toward Administration Expenses incurred prior to the issuance of the Second Order and the Third Order, up to a maximum of $250,000;

(e) if the Settlement Agreement is approved by the Court, the claims of all Class Members asserted, or which could have been asserted in, the Action will be fully and finally released, and the Action will be dismissed;

(f) there is no provision for any reversion of the Settlement Amount to the Defendants or their insurers unless the Settlement is not approved and does not, therefore, become effective;

(g) the Net Settlement Amount will be distributed to Class Members who file claims in accordance with the Distribution Protocol; and

(h) the approval of the request for Class Counsel Fees and the Distribution Protocol are not a condition of the approval of the Settlement Agreement.[43]

48. The Plaintiffs have received from the Defendants favourable costs awards of C$208,000.00 on the venue transfer motion, the motion to stay the Valuation Application, the motion for leave to appeal arising from that stay motion, the certification motion and the motion for leave to appeal arising from the certification motion. That amount will be added to the Settlement Amount for distribution to the Class Members. That amount is not included for the purposes of calculating Class Counsel Fees or the Funding Commission.[44]

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43 Hunter Affidavit at para 51.
44 Hunter Affidavit at para 52.

D. First Notice

49. Pursuant to this Court's Order dated June 13, 2019, the following steps were taken to disseminate the First Notice, comprising a short-form version ("**Short-Form First Notice**") and a long-form version ("**Long-Form First Notice**"), in accordance with the Plan of Notice:

(a) on June 29, 2019, the Short-Form First Notice was published in English in the business section of the national weekend edition of *The Globe & Mail* and in French in the business section of *La Presse*;

(b) on June 28, 2019, English and French versions of the Short-Form First Notice were issued (with necessary formatting modifications) across Canada Newswire and sent to Institutional Shareholder Services Inc. (ISS);

(c) on June 28, 2019, the Long-Form First Notice was mailed, electronically or physically, to those persons and entities who had previously contacted Siskinds for purposes of receiving notice of developments in the Action;

(d) by July 8, 2019, Epiq Class Action Services Canada Inc. ("**Epiq**"), the Administrator, sent the Long-Form First Notice and the Claim Form to the Canadian brokerage firms in its proprietary databases requesting that the brokerage firms either send a copy of the Long-Form First Notice and the Claim Form to all individuals and entities identified by the brokerage firms as being Class Members, or to send the names and addresses of all known Class Members to the Administrator (who subsequently mailed the Long-Form First Notice and the Claim Form to the individuals and entities so identified);

(e) by July 8, 2019, Epiq sent the Long-Form First Notice and Claim Form to individuals and entities identified in the electronic list of potential Class Members sent by Baffinland's transfer agent to Epiq as required by the Settlement Agreement;

(f) on June 28, 2018, the Long-Form First Notice (English and French), the Settlement Agreement, the Collateral Agreement (redacted), a "Summary Rationale for Settlement" and a "Guide to the Distribution Protocol" were published on Siskinds' website;

(g) Siskinds made a toll-free number and email address available to the public that will enable Class Members to contact Siskinds in order that they may, amongst other things, obtain more information about the Settlement, how to object to the Settlement, the claims process and the opt out process, and/or request that a copy of the Settlement Agreement, the long-form First Notice and the Claim Form be electronically or physically mailed to them; and

(h) on or before August 7, 2019, Siskinds will publish on its website the Hunter Affidavit, the Rooney Affidavit, the Leach Affidavit and this factum.[45]

E. Second Notice

50. The Settlement Agreement requires that the distribution of the Second Notice, comprising a short-form version ("**Short-Form Second Notice**") and a long-form version ("**Long-Form Second Notice**"), occur in accordance with the Plan of Notice. Copies of the proposed Short-Form Second Notice and the proposed Long-Form Second Notice are

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45 Hunter Affidavit at para 53.

attached as Schedules "F" and "G" to the Settlement Agreement, respectively. The Plan of Notice is attached as Schedule "H" to the Settlement Agreement.[46]

51. The Plan of Notice provides that:

(a) the English and French language versions of the Short-Form Second Notice will be issued (with necessary formatting modifications) across Canada Newswire and also sent to Institutional Shareholder Services Inc. (ISS);

(b) the English and French language versions of the Long-Form Second Notice will be published on Siskinds' website; and

(c) Siskinds will mail or email the Long-Form Second Notice to those persons that have contacted Siskinds as of the publication date regarding this litigation and that have provided Siskinds with their contact information.[47]

52. Siskinds will also make a toll free number and email address available to the public that will enable Class Members to obtain more information about the Settlement and to request that a copy of the Long-Form Second Notice be sent electronically or physically to them directly.[48]

53. In light of the extensive program undertaken to distribute the First Notice, which included providing notice directly to Class Members, and the fact that all material information from the Class Members' perspective was included in the First Notice, it is appropriate that a less extensive program be utilized for the Second Notice. The content and manner

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46 Hunter Affidavit at para 54. The Settlement Agreement is attached as Exhibit "A" to the Hunter Affidavit.
47 Hunter Affidavit at para 55.
48 Hunter Affidavit at para 56.

of dissemination of the Second Notice are consistent with the programs approved and implemented in other similar cases in which Siskinds is counsel.[49]

F. Experience of Siskinds

54. Siskinds has extensive experience litigating and resolving complex class action litigation similar to this case. Siskinds has acted as lead or co-lead counsel to plaintiffs in excess of 100 class proceedings and has successfully resolved over 60 class proceedings in areas such as securities, competition (price-fixing), product liability (particularly with respect to pharmaceuticals and medical products), the environment, and consumer protection.[50]

G. Information available to Siskinds supporting the Settlement

55. In assessing the reasonableness of the Settlement, Class Counsel had access to and considered the following sources of information:

(a) all of Baffinland's relevant disclosure documents and other publicly available information concerning the Defendants;

(b) trading data;

(c) the submissions of the Defendants on the motions to strike heard in 2014/2015, the reasons of this Honourable Court on that motion and those of the Court of Appeal on the subsequent appeal;

(d) the submissions of the Defendants on the certification motion heard in 2018 and the reasons of this Honourable Court on that motion;

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49 Hunter Affidavit at para 57.
50 Hunter Affidavit at para 3.

(e) the views of the Court expressed in the various other interlocutory decisions rendered in this Action;

(f) the OSC Decision, transcripts of the hearing before the OSC Panel and documentary exhibits tendered in the OSC proceeding. The documentary exhibits included, among other things, documents related to Baffinland's search for a strategic partner to develop the Mary River Project, documents relevant to the Joint Venture negotiations with ArcelorMittal (including the August 2010 Term Sheet and various other proposed Joint Venture terms), an assessment of the value of the Joint Venture prepared for Baffinland by CIBC World Markets Inc. ("**CIBC**"), documents relevant to Nunavut's hostile take-over bid and ArcelorMittal's friendly take-over bid (including assessments of the value of the bids prepared by CIBC, Baffinland board minutes and Baffinland special committee meeting minutes), non-public studies of the Mary River Project such as the 2010 Conceptual Study and various versions of Waheed's financial model of the Mary River Project prepared in advance of and during the take-over bid process;

(g) documents requested from the Defendants in advance of the January 2019 mediation which included, among other things, presentations/reports to the Baffinland board and special committee assessing the value of the various take-over bids;

(h) an expert report prepared by Duff & Phelps for the Defendant 1843208 Ontario Inc. in the Valuation Application ("**Duff & Phelps Report**");

(i) an expert report prepared by James Canessa for the Plaintiffs for mediation purposes that responded to the Duff & Phelps Report ("**Canessa Report**");

(j) the input of Mr. Winkler in his capacity as mediator; and

(k) the positions taken by the Defendants and their insurers during the course of the mediations.[51]

56. Class Counsel possessed more than adequate information to make an informed recommendation concerning resolution of the Action as against the Defendants on the basis upon which it was resolved.[52]

H. Litigation Risks

57. The Plaintiffs and Siskinds are confident that the claims are meritorious and that the settlement achieved is not only substantial, but one that is in the best interests of the Class. That said, they were always aware of the real risks they faced, including the legal and tactical risks that could have hampered recovery from the Defendants. As discussed, Siskinds had more than enough information to gauge the strength of the Plaintiffs' case. Siskinds' assessment and recommendation of the settlement rests primarily on the factors detailed below.

58. The risks fall into two categories: generic litigation risks and case-specific risks.

59. This Action faced generic risks inherent in all litigation that influence the range of outcomes, as well as case specific risks. Generic risks inherent in all litigation, include the risks arising from the passage of time, and the procedural risks that inhere in litigation

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51 Hunter Affidavit at para 58.
52 Hunter Affidavit at para 59.

of this complexity, such as the risk that witnesses will not appear or will not give the evidence expected of them, and the risk of adverse procedural or evidentiary rulings.[53]

60. With the passage of time, documentary evidence may no longer be available, and witnesses may die or their memories of the material events may fade, all of which would impact the Plaintiffs' ability to prove their case.[54]

61. The passage of time also applies to Class Members. By the time the discovery and trial process, including appeals from the trial judgment, would have concluded, more than 10 years would have passed from when the Class Members' shares were tendered and/or sold. With the passage of that amount of time, some Class Members may no longer be alive, corporate Class Members may no longer exist, some Class Members may not have retained the required transaction records to support their claims and some Class Members may not be inclined to file a claim.[55]

62. The more specific risks are those related to the issues arising in this particular case. The critical risks are explained in detail below. The Settlement eliminates these identified risks to recovery and instead provides an immediate and substantial benefit to Class Members in exchange for the release of their claims.

1. No misrepresentation; disclosure prohibited; no materiality

63. The core of the Plaintiffs' claims against the Defendants is that, during the bid process, there were misstated or undisclosed "material facts" that prevented the Class Members from assessing the true value of Baffinland and the Mary River Project. The Plaintiffs advanced misrepresentation claims under section 131 of the *OSA* in respect of the various

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53 Hunter Affidavit at para 63.
54 Hunter Affidavit at para 64.
55 Hunter Affidavit at para 65.

take-over bid and directors' circulars, which requires proof of a "misrepresentation". A "misrepresentation" is defined in the *OSA* as "(a) an untrue statement of material fact, or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made". A "material fact" is "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities". Similarly, the Plaintiffs' claims against the Offerors for insider trading and tipping under section 134 of the *OSA* requires proof of a "material fact … with respect to the issuer that has not been generally disclosed". Further, the Plaintiffs' oppression and unjust enrichment claims were premised, in part, on an allegation that there were misrepresentations in the disclosure documents.[56]

64. The misrepresentation claims included the following allegations:

(a) a failure to disclose the terms of the proposed Joint Venture with ArcelorMittal, including the August 10, 2010 Term Sheet;

(b) a failure to disclose the 2008 Expansion Study, the 2010 Conceptual Study and the 2011 Road Feasibility Study, and/or that disclosures related thereto were misleading and incomplete;

(c) a failure to disclose budgets and financial forecasts, financial models, exploration plans, negotiations with the Nunavut Impact Review Board, Board materials, details on the search for a strategic partner, royalty negotiations and other matters, and/or that disclosures related thereto were misleading and incomplete; and

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56 Hunter Affidavit at para 67.

(d) Baffinland's January 13, 2011 press release disclosing the results of the 2011 Road Feasibility Study contained misrepresentations.[57]

65. The Defendants took the position that there was no liability because there were no misstatements, that adequate disclosure of the alleged undisclosed material facts had been made in other disclosure documents, that the alleged undisclosed material facts could not be disclosed under securities law and/or that those facts were not material in any event. These arguments would have presented significant obstacles for the Plaintiffs at trial.[58]

66. Class Counsel viewed the alleged misrepresentations relating to the proposed Joint Venture negotiations between Baffinland and ArcelorMittal as the strongest misrepresentation claims. However, there were a number of significant challenges with these allegations:

(a) certain of the circulars did disclose details with respect to the progress of the negotiations between ArcelorMittal and Baffinland. While the circulars did not disclose the precise financial or other terms of the proposed Joint Venture, such as the content of the August 2010 Term Sheet, there is a risk that a Court would find that these disclosures were sufficient to discharge the Defendants' disclosure obligations;

(b) although ArcelorMittal and Baffinland had agreed on the August 2010 Term Sheet, it was non-binding, and definitive agreements setting out the terms of the Joint Venture were still being negotiated at the time of the launch of the Nunavut

57 Hunter Affidavit at para 68.
58 Hunter Affidavit at para 69.

take-over bid. There was a risk that a Court would find that the details set out in the August 2010 Term Sheet were not material; and

(c) the negotiations between Baffinland and ArcelorMittal regarding the Joint Venture were abandoned after Nunavut commenced its hostile take-over bid on September 22, 2010. Because the Joint Venture was no longer an option available to Baffinland at the time of the release of most of the circulars and the completion of the Joint Bid, there is a risk that a Court would find that the terms that had been under discussion in respect of the abandoned Joint Venture were not material facts.[59]

67. There was also significant risk attached to the misrepresentation claims advanced with respect to the non-disclosure of the 2008 Expansion Study, the 2010 Conceptual Study and the 2011 Road Feasibility Study, including the following risks:

(a) that a Court would find that adequate disclosure of the substance of the studies had been made, even if the studies themselves had not been released: details of the 2008 Expansion Study, such as the projected production rate and deposits involved, were disclosed in a June 19, 2008 press release and in other documents; there was some disclosure of the relevant facts related to the 2010 Conceptual Study in Baffinland news releases and in the impugned circulars, including that such a study had taken place and some high-level details of the study's conclusions; and the results of the 2011 Road Feasibility Study were disclosed in a January 13, 2011 Baffinland press release immediately prior to the Joint Bid;

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59 Hunter Affidavit at para 70.

(b) that a Court would find that disclosure was prohibited by National Instrument 43-101 — *Standards of Disclosure for Mineral Projects* ("**NI 43-101**"), such that non-disclosure of those studies could not form the basis for a liability finding against the Defendants. NI 43-101 prohibited issuers from disclosing the results of an economic analysis that included inferred mineral resources. The 2008 Expansion Study was based predominantly on inferred resources. NI 43-101 arguably also prohibited disclosure of the 2010 Conceptual Study because the information contained in it was not sufficiently reliable; and

(c) that a Court would find that the 2010 Conceptual Study was superseded by the 2011 Road Feasibility Study, the economic results of which were disclosed by Baffinland in its January 13, 2011 press release.[60]

68. The Plaintiffs allege that the January 13, 2011 press release describing the 2011 Road Feasibility Study (described in, and incorporated by reference into, the Baffinland directors' circular dated January 17, 2011) was misleading because it suggested the more profitable rail option was being abandoned in favour of the road option and that the higher reserve estimate from the 2008 Feasibility Study was no longer valid and had been superseded by the 2011 Road Feasibility Study. However, the Defendants argued that the press release and previous Baffinland disclosures made it clear that Baffinland still intended to pursue the rail option at some point in time, and that the reference to the reserve estimate from the 2008 Feasibility Study being superseded and no longer valid was in compliance with the relevant disclosure rules under NI 43-101. There was a real

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60 Hunter Affidavit at para 71.

risk that a Court would find that there had been no misrepresentation in that press release.[61]

69. Finally, with respect to the items listed at paragraph 64(c), there are similar risks to the Plaintiffs' claim, such as the previous disclosure of some of the facts related to those items or a prohibition on their disclosure. There is also a risk that a Court would find that these were not material facts that required disclosure. There is Supreme Court precedent holding that the disclosure of every detail about an issuer is not required since doing so would overwhelm investors with details. There was a substantial risk that a court would find that budgets, financial forecasts, models, exploration plans and the like fall into the category of immaterial matters not requiring disclosure.[62]

2. Oppression: no oppressive conduct in violation of the reasonable expectation

70. The Plaintiffs sought relief from oppression under section 248 of the *OBCA* against Baffinland, Ms. Dimitrov, Mr. McCloskey and Mr. Lydall. Relief from oppression was sought on several grounds, including most importantly on the basis of the following:

(a) failing to ensure that the terms of the Support Agreement between Baffinland and ArcelorMittal contained terms that prevented ArcelorMittal from joining forces with a hostile take-over bidder, which it ultimately did, when such terms were in common use in similar circumstances, which failure meant that the auction between Nunavut and ArcelorMittal was brought to an end and the Joint Bid could be commenced;

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61 Hunter Affidavit at para 72.
62 Hunter Affidavit at para 73.

(b) failing to take steps to prevent Mr. Waheed from violating the terms of his confidentiality agreement with Baffinland when those steps could have put a stop to the Nunavut bid and thus preserved the more valuable Joint Venture, or provided time for other bidders to commence competing bids for Baffinland's securities; and

(c) Ms. Dimitrov, as an officer and director of Baffinland, engaging in unlawful "tipping" by providing undisclosed material information to Mr. Waheed in the period leading up to the launch of the Nunavut take-over bid.[63]

71. The Plaintiffs would have argued that this conduct violated the Class Members' reasonable expectations of shareholder value maximization and a fair process. While the Plaintiffs were confident that they could establish the existence of those reasonable expectations on a class-wide basis, they faced more significant challenges in establishing that the expectations were violated in an oppressive manner by the alleged misconduct of the Defendants.[64]

72. With respect to the allegation concerning the Support Agreement and the failure to preserve the auction between ArcelorMittal and Nunavut, the Plaintiffs faced a number of risks with respect to these allegations:

(a) that the Court would find that restrictions on joint bids were not a common feature of support agreements in other transactions;

(b) that the Court would find that any failure to include a specific term in the Support Agreement was not oppressive of the Class Members' reasonable expectations

63 Hunter Affidavit at para 74.
64 Hunter Affidavit at para 75.

because there was in fact a competitive bid process that resulted in increased consideration to Class Members. The bid process was open for close to four months prior to the commencement of the Joint Bid. Baffinland retained CIBC to search for a "white knight" and many potential bidders had been canvassed. The only prospective "white knight" willing to make a bid was ArcelorMittal. There was also a substantial increase in the offering price for Baffinland's Common Shares over the course of the bid process (an 87% increase from the initial bid of $0.80 to the Joint Bid price of $1.50 per Common Share). Moreover, the price of the Joint Bid, $1.50 per Common Share, was close to the maximum value of the proposed Joint Venture with ArcelorMittal, which, according to work done by CIBC at the time, had a value of $0.82 to $1.58 per Common Share. Further, there is some basis for believing that the auction between ArcelorMittal and Nunavut was at or near its conclusion at the time the Joint Bid was commenced; and

(c) the Support Agreement was a public document that was filed on SEDAR on November 8, 2010. There is a risk that the Plaintiffs could not sustain this allegation because some of the Class Members acquired BIM Securities after the Support Agreement was made public and, therefore, "bought into the oppression".[65]

73. With respect to the alleged failure to take steps to prevent Mr. Waheed from violating the terms of his confidentiality agreement, which could have prevented the Nunavut take-

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65 Hunter Affidavit at para 76.

over bid and preserved the Joint Venture with ArcelorMittal, there were a number of risks:

(a) there is evidence that Baffinland did in fact take a number of steps in response to the Nunavut bid, including the Baffinland board of directors recommending to Baffinland shareholders that they not tender to the Nunavut bid, complaining to the OSC about Mr. Waheed's conduct, putting in place a second shareholder rights plan ("poison pill") to provide more time to explore alternatives to the Nunavut bid, and canvassing potential alternative bidders;

(b) the Court could find that the Class Members who acquired their BIM Securities on or after the Nunavut bid was commenced on September 22, 2010 ("**Post-Bid Class Members**") "bought into the oppression" and thus are not entitled to a remedy; and

(c) the Joint Venture negotiations had been ongoing for some time and there was no guarantee that they would be successfully concluded even if Nunavut's hostile bid had been restrained.[66]

74. Finally, the OSC Decision cast significant uncertainty over the Plaintiffs' ability to establish the oppression claims based on the allegation that Ms. Dimitrov engaged in unlawful tipping. In the OSC Decision, the OSC Panel held that Mr. Waheed and Mr. Walter had not engaged in insider trading or tipping. The Plaintiffs' tipping allegations against Ms. Dimitrov were based on the same facts as those that were the subject of the insider trading allegations against Mr. Waheed in the OSC enforcement proceeding.

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66 Hunter Affidavit at para 77.

Accordingly, there was a significant risk that a Court would conclude that Ms. Dimitrov had not engaged in tipping.[67]

3. No or minimal damages

75. If the Plaintiffs were successful in establishing the liability of the Defendants, the Plaintiffs faced significant difficulty in establishing that the Class Members are entitled to damages.[68]

76. The premise underpinning this Action is that Class Members who tendered their BIM Securities to the take-over bid or otherwise disposed of their BIM Securities on the secondary market on or after January 14, 2011 received too low a price for those securities. It would have to be proven that the BIM Securities were worth more than was received by Class Members as a consequence of the Defendants' misconduct. Based on the documents and other information in Siskinds' possession, there was a significant risk that a Court would not find that the value of the BIM Securities was more than the amount received by Baffinland securityholders under the Joint Bid, resulting in no or minimal recovery for the Class.[69]

77. The challenge for the Plaintiffs from a damages perspective was in showing that there were scenarios that could have materialized, if the Defendants had not engaged in the alleged misconduct, that would have resulted in an economically more advantageous outcome for Class Members than what they received. For example, that the proposed Joint Venture between ArcelorMittal and Baffinland would have proceeded and it would have been more valuable to Class Members than the consideration received under the

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67 Hunter Affidavit at para 78.
68 Hunter Affidavit at para 79.
69 Hunter Affidavit at para 80.

Joint Bid; or that the competing bids from Nunavut and ArcelorMittal would have continued and provided more value to Class Members than the consideration received under the Joint Bid; or that some other party might have come along and agreed to bid for Baffinland or to develop the Mary River Project as a strategic partner with Baffinland, which would have provided more value to Class Members than the consideration received under the Joint Bid.[70]

78. The Plaintiffs faced real difficulty in establishing any of those counterfactual scenarios. A significant complicating factor in the damages analysis in this case is that Baffinland appeared to have very few options available to it for the development of the Mary River Project that would allow Baffinland's shareholders to unlock the value of their Baffinland shares. Baffinland had spent considerable time, both prior to and during the take-over bid process, seeking out other strategic partners or bidders, but the only available options were the proposed Joint Venture with ArcelorMittal (negotiations over which ceased following the Nunavut bid) and the take-over bids of ArcelorMittal and Nunavut (which eventually became the Joint Bid). The lack of options can be explained in part by the fact that the development of the Mary River Project is a complex, expensive and time-consuming venture and few companies appeared willing to take on such a venture. These issues would have created challenges for the Plaintiffs in establishing that they and the Class Members were deprived of some more valuable alternative to the Joint Bid as a result of the alleged misconduct of the Defendants.[71]

79. Further, the claims of the Post-Bid Class Members were more complex from a damages perspective. The Post-Bid Class Members acquired their BIM Securities when

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70 Hunter Affidavit at para 81.
71 Hunter Affidavit at para 82.

Baffinland was "in play" and it could be argued that they did so to profit from the take-over bid process, and not because of any interest in the long-term profitability of Baffinland and the value of the Mary River Project. Many of the Post-Bid Class Members would have realized a significant profit on their purchases of BIM Securities. The offer for Baffinland's Common Shares increased by 87% from Nunavut's initial hostile bid ($0.80 per Common Share) to the Joint Bid ($1.50 per Common Share). In those circumstances, it would have been more challenging to argue that the Post-Bid Class Members were damaged by the conduct of the Defendants.[72]

80. As noted above, one approach that could be taken to determine the damages of the Class Members is to look at the value of the proposed Baffinland/ArcelorMittal Joint Venture for the development of the Mary River Project that was interrupted by the Nunavut bid. However, a valuation prepared by CIBC during the bid process valued the Joint Venture at between $0.82 and $1.58 per Common Share. The upper-end of the CIBC valuation of the Joint Venture was only $0.08 above the price of $1.50 per Common Share offered under the Joint Bid. There are a number of factors supporting CIBC's valuation of the Joint Venture as an indicator of maximum damages per share:

(a) the value of the Joint Venture is an appropriate measure of Baffinland's value. Baffinland, as a junior mining company, did not have the capital or expertise to develop the Mary River Project. It needed a partner, such as ArcelorMittal, to successfully develop the Mary River Project;

(b) there is no reason to believe that Baffinland would have received more favourable terms from a different joint venture partner or that one could even be found.

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72 Hunter Affidavit at para 83.

Baffinland started the search for a strategic partner in 2008. Despite Baffinland's significant efforts to find a strategic partner (which included hiring CIBC to aid in the search), the only entity that showed significant interest was ArcelorMittal. Due to the lack of other options and Baffinland's weak financial position, it was also unlikely that Baffinland would have been able to negotiate more favourable terms than the terms it was in the process of negotiating with ArcelorMittal. Indeed, it had been engaged in negotiations with ArcelorMittal for an extended period of time; and

(c) the OSC Panel was persuaded by this valuation. It held that Baffinland shareholders "were not financially disadvantaged in any material way" by the Joint Bid since $1.50 per Common Share "was close to the top of the range of values which CIBC estimated that the ArcelorMittal joint venture proposal represented (which itself was highly contingent on a number of uncertain events)".[73]

81. For the purposes of mediation, the Plaintiffs had the benefit of the Duff & Phelps Report prepared by Baffinland for the Valuation Application and the responding Canessa Report prepared for the Plaintiffs. The Duff & Phelps Report concluded that Baffinland's Common Shares had a fair value of between $1.00 and $1.50 per Common Share. The low-end of that fair value range was determined through a discounted cash flow analysis based on the development of the Mary River Project under the 2008 Feasibility Study, with some adjustments to the assumptions used in the 2008 Feasibility Study to make them current to the valuation date. The upper-end of the fair value range was based on

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73 Hunter Affidavit at para 84.

the "market process" that resulted in the price of $1.50 per Common Share under the Joint Bid. If a Court accepted the Duff & Phelps Report, then there would be no damages since Class Members would have received fair value for their BIM Securities.[74]

82. The Canessa Report responded to the Duff & Phelps Report. It provided an estimate of the fair value of Baffinland's Common Shares by adjusting some of the assumptions used in the Duff & Phelps Report; specifically, assumptions related to the discount rate, iron ore prices, the premium on high grade iron ore from the Mary River Project and capital expenditures required for the development of the Mary River Project. By altering these assumptions, Mr. Canessa arrived at a valuation of $2.10 to $3.98 as of September 22, 2010 and $1.27 to $3.13 as of February 17, 2011.[75]

83. The significant limitation of the Canessa Report is that the determination of "fair value" does not necessarily reflect the damages to which the Class Members are entitled as a result of the conduct of the Defendants. It is a separate measure to be applied in the context of the Valuation Application.[76]

84. In recognition of the relative weakness of the claims of the Post-Bid Class Members (as discussed above), settlement negotiations were approached with a focus on the Common Shares that fall within the class definition (*i.e.* they were either tendered to the take-over bid or sold on the secondary market on or after January 14, 2011) and that were held as of the commencement of the Nunavut take-over bid on September 22, 2010 ("**Pre-Bid Class Members**"). Siskinds estimates that Pre-Bid Class Members accounted for approximately 80 million Common Shares, whereas Post-Bid Class Members accounted

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74 Hunter Affidavit at para 85.
75 Hunter Affidavit at para 86.
76 Hunter Affidavit at para 87.

for approximately 261 million Common Shares, out of a total of approximately 341 million Common Shares falling within the class definition (comprising approximately 227 million Common Shares taken up under the Joint Bid and 114 million Common Shares sold on the secondary market on or after January 14, 2011, after excluding the Common Shares of the "Excluded Persons" who were carved out of the class).[77]

85. The difference between the amount received by Pre-Bid Class Members for their Common Shares ($1.50) and CIBC's high-water mark for the value of Baffinland Common Shares ($1.58) is $0.08. The maximum total damages for the approximately 80 million Common Shares of Pre-Bid Class Members is approximately C$6.4 million, which approximates the Settlement Amount.[78]

86. For the total number of Common Shares of the Class Members (approximately 341 million Common Shares), applying the same damages per share ($0.08), maximum total damages was approximately C$27.3 million.[79]

87. Notably, these damages estimates do not account for the risks associated with establishing liability at trial discussed above.[80]

I. Proposed Distribution Protocol

88. The key elements of the Distribution Protocol are as follows (definitions in the Distribution Protocol apply in this section):[81]

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77 Hunter Affidavit at para 88.
78 Hunter Affidavit at para 89.
79 Hunter Affidavit at para 90.
80 Hunter Affidavit at para 91.
81 Hunter Affidavit at para 95. The Distribution Protocol is attached as Schedule "I" to the Settlement Agreement which is Exhibit "A" to the Hunter Affidavit. The Guide to the Distribution Protocol is attached as Exhibit "D" to the Hunter Affidavit.

(a) the objective of the Distribution Protocol is to equitably distribute the Net Settlement Amount among Authorized Claimants having regard to the issues in the Action;

(b) the Administrator will administer all claims pursuant to the terms of the Distribution Protocol;

(c) the Administrator, in the absence of reasonable grounds to the contrary, will assume Claimants to be acting honestly and in good faith;

(d) Claimants have 180 days from the publication of First Notice to submit a claim to the Administrator;

(e) the Administrator will have discretion to correct minor omissions or errors in a Claim Form;

(f) in the event of a denial of a claim by the Administrator, there is a process whereby a Claimant can request that there be a reconsideration of the claim. Any decision of the Administrator after a reconsideration of the claim is final and binding and not subject to further review or appeal; and

(g) this is a non-reversionary settlement and, as such, the Net Settlement Amount will be distributed to Authorized Claimants on a *pro rata* basis. Each Authorized Claimant's *pro rata* interest in the Net Settlement Amount will depend on their "Net Settlement Amount Interests" ("**NSAI**"). Each Authorized Claimant's NSAI will be calculated on the following basis:

Eligibility Criteria	**Net Settlement Amount Interests**
Common shares held at close of trading on September 21, 2010 and tendered for sale or otherwise disposed of on or after January 14,	Three (3) NSAI for each such common share

Eligibility Criteria	Net Settlement Amount Interests
2011	
2007 warrants held at the close of trading on September 21, 2010 and tendered for sale or otherwise disposed of on or after January 14, 2011	One-fifth (0.2) NSAI for each such 2007 warrant
Common shares purchased between September 22, 2010 and January 13, 2011 (inclusive) and tendered for sale or otherwise disposed of on or after January 14, 2011	Three-quarters (0.75) NSAI for each such common share
2007 warrants purchased between September 22, 2010 and January 13, 2011 (inclusive) and tendered for sale or otherwise disposed of on or after January 14, 2011	One-twentieth (0.05) NSAI for each such 2007 warrant
Common shares purchased on or after January 14, 2011 and tendered for sale or otherwise disposed of on or after January 14, 2011	0 NSAI for each such common share
2007 warrants purchased on or after January 14, 2011 and tendered for sale or otherwise disposed of on or after January 14, 2011	0 NSAI for each such 2007 warrant

89. The attribution of NSAI in the Distribution Protocol is designed to account for the following:

(a) 2007 Warrants receive one-fifteenth of the NSAIs attributed to Common Shares purchased during the same period because the consideration paid for 2007 Warrants under the Joint Bid ($0.10 per 2007 Warrant) was one-fifteenth of the consideration paid for Common Shares under the Joint Bid ($1.50 per Common Share), reflecting the relative value of the 2007 Warrants and the Common Shares;

(b) the higher NSAI for BIM Securities acquired prior to the launch of the Nunavut take-over bid on September 22, 2010 is designed to assign greater value to the Pre-Bid Class Members with a long-interest in Baffinland, who were viewed as having lower litigation risk than the Post-Bid Class Members (for the reasons discussed above); and

(c) Class Members who acquired their BIM Securities on or after January 14, 2011 receive zero NSAI for those BIM Securities to reflect two key factors:

(i) because the Plaintiffs' case theory is premised on the Class Members having disposed of their BIM Securities at too low a price, those Class Members who acquired their BIM Securities on or after January 14, 2011 would also have acquired those BIM Securities at too low a price and thus cannot claim to have suffered any damage; and

(ii) it will avoid double-compensation in respect of the same BIM Securities in that a Class Member who acquired their BIM Securities prior to January 14, 2011 and then sold those BIM Securities on the secondary market on or after January 14, 2011 would be entitled to NSAI, whereas a second Class Member who acquired the BIM Securities from the first Class Member on or after January 14, 2011 would not be entitled to NSAI for those BIM Securities when subsequently tendered or otherwise disposed of.[82]

90. The Distribution Protocol will achieve its stated objective of equitably distributing the Net Settlement Amount among Authorized Claimants.

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82 Hunter Affidavit at para 96.

J. The Funding Commission

91. Under the terms of the Funding Agreement, the "Commission" payable to the Funder is 7% of the "Net Resolution Sum", which is defined as the "Resolution Sum less (i) Lawyers' fees and disbursements, including HST; and (i) Administration Expenses". The Net Resolution Fund does not include costs recovered on behalf of the Class on successful interlocutory motions. The "Administration Expenses" cannot be quantified with certainty until the conclusion of the administration of the Settlement, and as such the final amount of the "Commission" payable to the Funder cannot be determined until the conclusion of the administration.[83]

92. A request is being made for an interim payment to the Funder based on estimate of the "Administration Expenses". The amount of the interim payment is expected to be less than the amount of the final "Commission", such that a further payment to the Funder is expected at the conclusion of the administration. The interim payment requested is $248,636.88.[84]

93. It can take more than a year after settlement is approved for funds to be distributed to settlement claimants. An interim payment to the Funder will encourage the participation of third-party financing in future cases, which in turn will facilitate access to justice.[85]

K. Class Counsel Fees

1. Class Counsel Fees Requested

94. Siskinds seeks the approval of Class Counsel Fees in the amount of C$1,787,500.00 plus taxes and reimbursement for disbursements.

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83 Hunter Affidavit at para 98.
84 Hunter Affidavit at para 99.
85 Hunter Affidavit at para 100.

95. The legal fee and disbursement request may be summarized as follows:[86]

ITEM	TOTAL
Fee Request:	$1,787,500.00
Taxes on Fee Request:	$232,375.00
Disbursements:	$266,798.55
Taxes on Disbursements:	$34,524.44
Total Fee/Disbursement Request (including applicable taxes):	**$2,321,197.99**

2. Retainer Agreements

96. Siskinds' fee request is consistent with the retainer agreements entered into with the Plaintiffs in January 2012, which are attached to the Plaintiffs' respective affidavits.[87]

97. The operative terms of the retainers for Peter Rooney and Archie Leach are identical. Those retainers provided that Siskinds will be entitled to 27.5% of the "Net Amount Recovered" if a recovery occurs after a decision is rendered by the Court on a contested certification motion but before the commencement of the common issues trial.[88]

98. This Action has been certified as a class proceeding following a contested certification motion. The fee request of C$1,787,500.00 is 27.5% of C$6,500,000.00, which is the "Net Amount Recovered".[89]

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86 Hunter Affidavit at para 102.
87 Hunter Affidavit at para 103.
88 Hunter Affidavit at para 104. Contingency Fee Retainer Agreement between Archie Leach and Siskinds LLP dated January 2012, para 8, Exhibit "A" to the Affidavit of Archie Leach sworn August 6, 2019 ("**Leach Affidavit**"); unsigned version of Contingency Fee Retainer Agreement between Archie Leach and Siskinds LLP dated January 2012, para 8, Exhibit "B" to the Leach Affidavit; Contingency Fee Retainer Agreement between Peter Rooney and Siskinds LLP dated January 2012, para 8, Exhibit "A" to the Affidavit of Peter Rooney sworn August 2, 2019 ("**Rooney Affidavit**").
89 Hunter Affidavit at para 105.

99. As a consequence of the Plaintiffs' success on several interlocutory motions during the course of the litigation, the Plaintiffs received favourable costs awards of C$208,000.00. The costs awards will be added to the Settlement Amount to be distributed to the Class in accordance with the Distribution Protocol. The amount of the favourable costs awards has not been included in the "Net Amount Recovered" for the purposes of calculating the 27.5% contingency fee. The amount has also not been included in the calculation of the Funding Commission.[90]

3. Risks assumed by Siskinds supporting the fee request

100. Prior to the commencement of the Action, Siskinds assessed and assumed the following risks of prosecuting this complex securities class action with an uncertain outcome, including exposure to its own fees and disbursements.[91]

101. The complications and resulting cost of prosecuting a complex securities class action like this one can be very significant.[92] Securities class actions in Ontario are generally complex, hard fought, expensive and can be protracted. It has been Siskinds' experience to date that, because securities class actions are relatively new to Canada, often interlocutory motions and certification motions will raise issues of first impression and result in appeals.[93]

102. This Action is a case in point. It was commenced more than eight years ago and has been the subject of several interlocutory motions and an appeal. The comprehensive motions to strike brought by the Defendants raised novel issues with respect to the interpretation of section 131 of the *OSA* that were ultimately resolved by the Ontario Court of Appeal.

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90 Hunter Affidavit at para 106.
91 Hunter Affidavit at para 107.
92 Hunter Affidavit at para 108.
93 Hunter Affidavit at para 109.

These motions considerably delayed the prosecution of the case. The Defendants' motions to strike were argued over five days in December 2014 and January 2015, with the decision released on July 30, 2015. The appeal of the decision was heard on May 4, 2016, with the decision of the Court of Appeal for Ontario released on August 17, 2016. That decision is now a leading decision on the interpretation of section 131 of the *OSA*.[94]

103. There were several other interlocutory motions and a contested certification motion that further delayed the prosecution of the Action.

104. At the commencement of this Action, Siskinds was faced with the risks inherent to the prosecution of a securities class action in Ontario. It was anticipated that:

(a) this case would be hard fought by multiple defence firms all of whom are expert in the defence of securities cases;

(b) there would be resistance to the certification motion;

(c) there was likely to be multiple other hard-fought interlocutory motions;

(d) if successful on the certification motion, following appeals, there would be production of tens of thousands of documents and weeks of examinations for discovery;

(e) if the case did not settle, there would be a very lengthy trial with an uncertain outcome; and

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94 Hunter Affidavit at para 110.

(f) if litigation funding was not secured, the exposure to potential adverse costs awards, including the fees and disbursements of multiple defence firms and their various experts, would be considerable, most certainly in the millions of dollars.[95]

4. Fees and disbursements financed to date

105. From the commencement of the Action up to and including July 31, 2019, Siskinds has docketed fees of C$3,158,780.00 with HST on those fees of C$410,641.40. Since the commencement of the Action up to and including July 31, 2019, Siskinds has financed disbursements of C$266,798.55 with HST on those disbursements of C$34,524.44.[96]

106. The hourly rates and hours expended by the key members of the Siskinds team since the commencement of the Action up to and including July 31, 2019 in this file are as follows:[97]

LAWYER	HOURLY RATE	HOURS
Michael G. Robb (2002 ON Call)	$475.00	279.10
	$500.00	158.40
	$525.00	235.60
	$550.00	158.90
	$575.00	88.20
	$660.00	54.40
	$700.00	66.30
	$750.00	176.20
	$800.00	148.60
Anthony O'Brien (2008 ON Call; 2006 AU	$350.00	286.10
	$375.00	182.80

95 Hunter Affidavit at para 112.
96 Hunter Affidavit at paras 113-114.
97 Hunter Affidavit at para 115.

Call)	$395.00	256.20
	$415.00	220.90
	$445.00	23.30
	$450.00	147.40
	$500.00	290.90
	$600.00	204.50
Dimitri Lascaris (2004 ON Call; 1992 NY Call)	$585.00	62.30
	$600.00	52.80
	$650.00	9.30
	$675.00	2.20
	$775.00	0.30
Douglas M. Worndl (1989 ON Call)	$500.00	529.80
	$590.00	1,247.00
Garett M. Hunter (2017 ON Call)	$165.00	73.70
	$200.00	256.40
	$275.00	146.20
Nicholas C. Baker (2011 ON Call; 2009 AU Call)	$200.00	0.90
	$210.00	30.80
	$350.00	16.10
	$375.00	58.90
	$400.00	134.60
	$500.00	76.40
Charles M. Wright (1995 ON Call)	$625.00	2.00
	$650.00	2.00
	$675.00	7.10
	$700.00	3.90
	$850.00	0.40
	$900.00	0.20
	$950.00	21.20

107. The following chart sets out the disbursements that have been financed by Siskinds in pursuing the Action, up to July 31, 2019:[98]

ITEM	TOTAL
Courier	$3,017.68
Copies	$30,152.24
Long Distance Calls	$1,341.92
Postage	$292.61
Research/Resource Material	$20,654.79
Binding Supplies	$469.35
Expert Fees	$112,350.95
Court Fees	$1,516.55
Agent Fees and Disbursements	$31,428.73
Mediation Expenses	$24,000.00
Mileage/Travel/Meals	$13,513.52
Media/Notice	$2,242.90
Investigation Expenses	$649.00
Service of Documents	$9,157.69
Obtaining Copies of Documents from the OSC litigation	$15,255.16
Document Storage	$755.46
TOTAL BEFORE TAX	$266,798.55
TAX	$34,524.44
TOTAL INCLUDING TAX	**$301,322.99**

5. Anticipated fees and disbursements to be incurred

108. Siskinds estimates that it will spend time valued at approximately an additional C$75,000.00 to complete the administration of the Settlement, if the Settlement Agreement is approved by this Honourable Court. This additional time will be spent to:

98 Hunter Affidavit at para 116.

(a) prepare for and attend the Settlement approval hearing on September 6, 2019;

(b) assist in implementation of Part 2 of the Plan of Notice, related to the notice of the approval of the Settlement;

(c) liaise with the Administrator to ensure the fair and efficient administration of the Settlement Agreement and Distribution Protocol; and

(d) respond to inquiries from Class Members and their lawyers, if applicable, regarding the Settlement Agreement and the Distribution Protocol.[99]

L. The Plaintiffs' Involvement in the Prosecution of the Litigation

109. Both Mr. Rooney and Mr. Leach made extensive efforts to prosecute the action on behalf of Class Members. From the start of the Action until the date their respective affidavits were sworn, Mr. Rooney spent approximately 300 hours and Mr. Leach approximately 100 hours prosecuting the action on behalf of the Class.[100]

110. Among other things, Mr. Rooney and Mr. Leach:

(a) swore affidavits in support of the motion for certification in 2011 and 2017 and were cross-examined on those affidavits;

(b) swore affidavits in opposition to the Defendants' motion to change venues from London to Toronto in 2011 and were cross-examined on those affidavits;

(c) entered into the Litigation Funding Agreement and swore affidavits in support of the motion for approval of the Litigation Funding Agreement;

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99 Hunter Affidavit at para 117.
100 Rooney Affidavit at para 12; Leach Affidavit at para 12.

(d) reviewed materials with respect to the Defendants' motions to strike and provided instructions to counsel; and

(e) provided instructions with respect to the January 31, 2019 mediation and were involved in the process that followed that led to the settlement of the action.[101]

111. Mr. Rooney attended the hearing of the certification motion also attended the January 31, 2019 mediation session.[102]

112. Both Mr. Leach and Mr. Rooney were also in regular contact with Class Counsel to receive updates on the prosecution of the action and to provide their instructions to Class Counsel with respect to all material aspects of the prosecution of the Action.[103]

PART III – ISSUES AND THE LAW

113. After over eight years of litigation, numerous interlocutory motions (including comprehensive motions to strike), two mediation sessions and extensive informal negotiations, the Action has settled for $6.5 million.

114. The key issues before this Court are approval of:

(a) the Settlement Agreement;

(b) the Distribution Protocol;

(c) Class Counsel Fees;

(d) an interim payment of the Funding Commission; and

(e) honoraria for the Plaintiffs.

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101 Rooney Affidavit at para 11; Leach Affidavit at para 11.
102 Rooney Affidavit at para 11.
103 Rooney Affidavit at para 10; Leach Affidavit at para 10.

A. Settlement Approval

115. This settlement was reached after years of hard-fought litigation and multiple rounds of mediation and negotiation, and bears no structural symptoms evidencing collusion or conflicts of interest. The quantum of the settlement was driven by the facts and Class Counsel's assessment of the risks flowing from those facts. It would be difficult for any Court to evaluate a settlement on the same basis as Class Counsel who have spent years litigating the case.[104]

116. Nonetheless, this Court is well-positioned to examine the structure of the settlement and determine whether it falls within a zone of reasonableness. In addition to the record filed on the approval motion, it must be borne in mind that this Court has also performed an invaluable case management function over the past eight years during which time it has decided numerous interlocutory motions, including comprehensive motions to strike that were appealed to the Ontario Court of Appeal.

117. The zone of reasonableness determination is informed by the background of the Action, the extensive documents analysed by Siskinds, consultation with experts, and Siskinds' comprehensive research and understanding of the factual and legal issues. All converge to allow Siskinds to understand clearly whether a settlement is in a zone of reasonableness. All of these factors favour this Court's approval of the settlement.

1. Settlement Structure

118. It is appropriate and necessary for a court to scrutinize the Settlement Agreement and supporting materials in search of "structural" indicators of collusion or conflicts of

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104 *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8; *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at para 4.

interest.[105] The Court should ask whether Class Counsel negotiated in the best interests of the Class. The Court should guard against: efforts to make a settlement seem larger than it is; undue expansion of the class size; inappropriate protection of defendants from liability; and any measures that discourage objection to the settlement or fee request.[106] The Court is well-placed to identify structural features of settlements indicative of collusion or conflicts of interest in the negotiations and the agreement.[107]

119. Broadly speaking, agreements that place a high value on non-monetary or conditional compensation,[108] contemplate a possible reversion of settlement funds to defendants without a concomitant reduction in class counsel's compensation,[109] make settlement approval contingent on fee approval,[110] and have optics that suggest the settlement is more favourable to class counsel than class members,[111] are examples of the types of features of which courts should be cautious.

120. Canadian courts have scrutinized these types of issues before. For example:

(a) in *Smith Estate v National Money Mart Co*, the proposed settlement was ostensibly valued at $120 million. Pursuant to that settlement, some class members were to receive debt forgiveness, while other class members were to receive "transaction credits." A cash payment of $30.5 million was to be made, but applied almost entirely to class counsel's fee first. In rejecting the settlement

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105 *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8.
106 Howard M Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859 at 873.
107 *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8.
108 *Smith Estate v National Money Mart Co*, 2010 ONSC 1334 at para 95, varied in part *Smith Estate v National Money Mart Co*, 2011 ONCA 233; *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at footnote 104.
109 *Bilodeau v Maple Leaf Foods Inc*, 2009 CarswellOnt 1301; *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at footnote 104.
110 *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 85–86.
111 *Smith Estate v National Money Mart Co*, 2010 ONSC 1334 at para 33, varied in part *Smith Estate v National Money Mart Co*, 2011 ONCA 233.

as proposed, the Court noted: "[c]lass counsel's fee takes up all the cash portion of this settlement, [and] Class Members who have repaid their loans to Money Mart will get no repayment of the allegedly illegal fees, which … was the rallying point for the class action … in the first place."[112] The agreement had structural hallmarks of unfairness: non-monetary compensation was highly valued for the purpose of a fee application and the interaction of the fee request with the settlement agreement suggested a possible preference for the interests of counsel over those of class members;

(b) in *Bilodeau v Maple Leaf Foods Inc*, the proposed settlement included so-called "Enhanced Payments." In the event that there remained a residue following payment of all eligible claims, Enhanced Payments on a pro rata basis were to be made to claimants who experienced high levels of physical harm. If Enhanced Payments were made and there remained a residue, class counsel was permitted to apply for approval of further fees to be paid from that residue. If a balance remained thereafter, then *cy-près* payments would be made as agreed upon and approved by the court. Although the settlement was ultimately approved, it warranted particular scrutiny because of the risk that it arguably created incentives for class counsel not to maximize the distribution of notice and the settlement proceeds to the greatest number of claimants;[113]

(c) in *Garland v Enbridge Gas Distribution Inc*, a settlement term made the approval of the settlement conditional on payment of class counsel's fee. Justice Cullity declined to approve the settlement, stating that such an arrangement created an

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112 *Smith Estate v National Money Mart Co*, 2010 ONSC 1334 at para 94, varied in part *Smith Estate v National Money Mart Co*, 2011 ONCA 233.

113 *Bilodeau v Maple Leaf Foods Inc*, 2009 CarswellOnt 1301.

inherent conflict of interest between class counsel's interests and those of the class they sought to represent;[114] and

(d) similarly, in *Brown v Canada (Attorney General)*, the approval of the settlement was conditional on the approval of class counsel's fee. Justice Belobaba refused to approve the fee request and accordingly was not able to approve the settlement. Linking legal fees to the settlement approval undermined class counsel's ability to give independent legal advice on the merits of the settlement.[115]

121. These types of structural features indicative of conflicts of interests are not present here:

(a) there are no non-monetary benefits. This is a cash settlement. Class Members will receive cash compensation distributed in accordance with the Distribution Protocol;

(b) approval of the Settlement Agreement is not conditional on approval of Class Counsel's fee. Class Counsel is able to provide an independent recommendation on the merits of the Settlement Agreement;

(c) Class Counsel and the Plaintiffs have entered into contingency fee retainers that account for the stage of the litigation at which recovery is made and incentivizes Class Counsel to maximize overall recovery.[116] Both the Class and Class Counsel's interests were aligned through the course of the litigation;

(d) there is no reversion to the Defendants. If any remainder exists after the Net Settlement Amount is distributed pro rata in accordance with the Settlement

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114 *Garland v Enbridge Gas Distribution Inc*, 2006 CarswellOnt 6585.
115 *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 81 and 85.
116 January 2012 Retainer Agreement, paras 8-13, Exhibit "A" to the Leach Affidavit; unsigned word version of the Retainer Agreement, paras 8-13, Exhibit "B" to the Leach Affidavit; January 2012 Retainer Agreement, paras 8-13, Exhibit "A" to the Rooney Affidavit.

Agreement and the Distribution Protocol, it will be distributed *cy-près* to one or more recipients to be approved by the Court.

122. Where there is an all-cash settlement, contingency fees align the interests of counsel and class members to the greatest degree possible so that counsel is incented to pursue the maximum recovery for the class. As noted above, the settlement structure is fair and admits of none of the defects identified in the case law. Class Counsel was incentivized to maximize recovery, and did so.

2. Zone of Reasonableness

123. A court's scrutiny of a settlement is tempered by its recognition that the resolution need not be perfect. Rather, it must only fall within a range or "zone" of reasonableness.[117]

124. The zone of reasonableness assessment allows for variation between settlements depending upon the subject matter of the litigation and the nature of the damages for which settlement provides compensation.[118] A less than perfect settlement may be in the best interests of those affected by it when considered in light of the risks and obligations associated with continued litigation.[119] The settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.[120] The Court should also take into account practical considerations such as future expense and likely duration of the litigation in assessing the reasonableness of the settlement.[121]

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117 *Dabbs v Sun Life Assurance Co of Canada*, 1998 CarswellOnt 2758 at para 30.
118 *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 70.
119 *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at paras 25 and 33.
120 *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 80.
121 *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622 at para 22.

125. In settlements, as here, where Class Counsel is in possession of extensive factual information and knowledge of risks from interlocutory motions or other sources (such as the OSC Decision in this case), "the supervising class action judge will be justified in assuming that class counsel had a complete or almost complete understanding of the risks and rewards of further litigation and the court will be more comfortable relying on class counsel's recommendation that the settlement is indeed in the best interests of the class."[122]

126. In *McIntyre (Litigation guardian of) v Ontario* and *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, the Court catalogued features typical of settlements reached in the later stages of an action, which signalled that a settlement was fair, reasonable and in the best interests of the class.[123]

127. These features are present in this case:

(a) *comprehensive research and understanding of legal issues*: in preparing for the mediation, negotiations, and numerous interlocutory motions, the Plaintiffs gained significant insight into the legal and factual issues that would form the subject matter of the trial;

(b) *receipt of highly relevant documents and analysis of the legal issues*: the Plaintiffs reviewed the OSC Decision, transcripts of the hearing before the OSC Panel and documentary exhibits tendered in the OSC proceeding. The documentary exhibits included, among other things, documents related to Baffinland's search for a

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122 *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670 at paras 5-10. See also *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at para 14; *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 35.

123 *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 33; *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at para 13.

strategic partner to develop the Mary River Project, documents relevant to the Joint Venture negotiations with ArcelorMittal (including the August 2010 Term Sheet and various other proposed Joint Venture terms), an assessment of the value of the Joint Venture prepared for Baffinland by CIBC, documents relevant to Nunavut's hostile take-over bid and ArcelorMittal's friendly take-over bid (including assessments of the value of the bids prepared by CIBC, Baffinland board minutes and Baffinland special committee meeting minutes), non-public studies of the Mary River Project such as the 2010 Conceptual Study and various versions of Waheed's financial model of the Mary River Project prepared in advance of and during the take-over bid process. Documents requested from the Defendants in advance of the January 2019 mediation which included, among other things, presentations/reports to the Baffinland board and special committee assessing the value of the various take-over bids. All documents received and reviewed were highly relevant to the liability and damages issues in this litigation; and

(c) *expert analysis*: including the Duff & Phelps Report and the responding Canessa Report.

128. In this case, Siskinds' understanding of the factual and legal issues is mature. As in *McIntyre*, resolution was informed by "layers and layers of actual, and not just imagined, information about the risks and rewards of further litigation."[124] Class Counsel knew the risks and rewards of going to trial.[125] The settlement was negotiated not in a vacuum, but

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124 *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 34.
125 *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 34.

from a deep knowledge gained through the significant time and effort spent prosecuting the Action leading to a fair and reasonable settlement in the best interests of the Class.

129. As stated by the 7th Circuit in *Reynolds* and reiterated by the Court in *Agnico-Eagle*, "a high degree of precision cannot be expected in valuing litigation, especially regarding the estimate of the probability of particular outcomes."[126] The challenge of valuing litigation is compounded in Canadian securities class actions, where a paucity of trial and settlement outcomes makes it difficult to build a usable statistical model.[127]

130. Those challenges aside, in this Action, it is clear that the action falls within a range of reasonableness and is in the best interest of the Class, taking into account, in addition to the hallmarks of fairness detailed above, the following key case-specific risks as described in more detail at paragraphs 63 to 87 above:

(a) the risk that the Court would find that there had been no misrepresentations;

(b) the risk that the Court would dismiss the Plaintiffs' *OBCA* oppression claims, whether based on allegations of misrepresentation or other misconduct in the context of the take-over bid process; and

(c) the risk that the Court would find that the Class did not suffer any loss or damage as a result of the alleged misconduct of the Defendants.

131. The Settlement provides for a total payment of $6.5 million to resolve all claims against the Defendants in relation to the Action. Class Counsel was well apprised of the risks and rewards of continued litigation. The Settlement eliminates the downside risk of non-

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126 *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 12, citing *Reynolds v Beneficial National Bank*, 288 F 3d 277 (7th Cir 2002) at para 20.

127 Moreover, in a number of Canadian securities settlements, the issuers were insolvent at the time the negotiations were concluded, further complicating the assessment of possible trial outcomes.

recovery and provides an immediate benefit to Class Members in exchange for the release of their claims. Class Counsel respectfully recommends approval of the Settlement. Where hallmarks of fairness exist, and there are no indicia of collusion or conflicts, the Court ought to have confidence in, and accept, Class Counsel's good faith settlement approval recommendation.

3. Other Factors Supporting the Settlement

132. The Courts have articulated the following principles to be applied in considering the approval of the settlement of a class proceeding:

(a) the settlement of complex litigation is encouraged by courts and favoured by public policy;[128]

(b) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval;[129]

(c) the Court's role is to inquire whether the settlement secures an adequate advantage for the class in its surrender of its litigation rights;[130]

(d) it is within the power of the court to indicate areas of concern and afford parties the opportunity to answer and address those concerns through, if necessary,

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128 *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at para 31, aff'd 2010 ONCA 841, leave to appeal to SCC denied 2011 CarswellOnt 6019.

129 *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at para 31, aff'd 2010 ONCA 841, leave to appeal to SCC denied 2011 CarswellOnt 6019.

130 *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at paras 31, aff'd 2010 ONCA 841, leave to appeal to SCC denied 2011 CarswellOnt 6019.

changes to the agreement. However, a court's power to approve or reject a settlement agreement does not permit the Court to modify its terms;[131] and

(e) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the actions or simply rubber-stamp a proposed settlement.[132]

133. In sum, the settlement is fair and reasonable under all of the circumstances. The settlement is consistent with both the purpose and spirit of the *CPA*, which encourages settlement after a reasonable investigation and careful consideration of the merits, costs and risks of continuing litigation.

B. Distribution Protocol

134. The Distribution Protocol should be approved as it provides for a plan of distribution of the Net Settlement Amount that is fair, reasonable and in the best interests of the Class.[133]

135. As described at paragraphs 88 and 89 above, the Distribution Protocol provides for a *pro rata* distribution of the Settlement funds by assigning NSAI, which is done based on the relative strengths and weaknesses of each Class Members' claims depending on the timing of their purchases.

C. Fee Approval

136. Class Counsel's fee request is made pursuant to the terms of Class Counsel's retainers with the Representative Plaintiffs, which have been carefully designed to appropriately incentivize Class Counsel while providing for a fair fee. The fee appropriately reflects

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131 *Vitapharm Canada Ltd v F Hoffman-La Roche Ltd*, 2005 CarswellOnt 1095 at para 127.
132 *Nunes v Air Transat AT Inc*, 2005 CarswellOnt 2503 at para 7.
133 *Zaniewicz v Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59.

the recovery secured for the Class, the serious risks inherent in hotly contested litigation of this nature and the substantial investment of time and money made by Class Counsel. The fee requested is consistent with past precedent. It is fair and reasonable.

1. The Retainer Agreements Comply with the Requirements of the CPA

137. The *CPA* gives proposed representative plaintiffs the right to enter into contingent fee arrangements with putative class counsel.[134] Such agreements are not enforceable until they have received Court approval.[135] A retainer agreement is required to be in writing and must:

(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.[136]

138. The retainer agreements entered into between Class Counsel and the Representative Plaintiffs comply with these requirements and ought to be approved by the Court.

2. The Percentage Approach in the Retainer Agreements Results in an Appropriate Fee

139. Contingency fee retainer agreements worth up to one-third of the settlement amount have been held to be presumptively valid, with the caveat that there may be an upper limit to the size of the fund to which a one-third contingency fee may presumptively be

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134 *Class Proceedings Act, 1992*, SO 1992, c 6, s 32(1).
135 *Class Proceedings Act, 1992*, SO 1992, c 6, s 32(2).
136 *Class Proceedings Act, 1992*, SO 1992, c 6, s 33.

applied.[137] This approach works especially well for all-cash settlements, as is the case here.[138]

140. Compensating counsel through a percentage of recovery is "generally considered to reflect a fair allocation of risk and reward as between lawyer and client".[139] Contingency fees induce the lawyer to maximize recovery for the client and are fair to the client because there is no pay without success.[140] They help to promote access to justice in that they allow counsel, not the client, to finance the litigation.[141]

141. The contingency fee agreements in this case provide for less than a 1/3 recovery. The retainers are calibrated to incentivize Class Counsel to achieve the maximum possible recovery for the Class while ensuring that a fair fee is received even in the case of a resolution which may be larger than those to which a one-third fee may be presumptively applied. These retainers do so by incorporating variables into the calculation of the applicable percentage which reflect the degree of risk undertaken, the volume of work done and the result achieved.

142. The applicable percentages vary based on:

(a) the stage at which the action is resolved, with the percentages increasing as the matter progresses towards trial;

(b) the amount recovered, with the percentages decreasing as the Settlement Amount gets larger; and

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137 *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 11; *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at para 47.
138 *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 11.
139 *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at para 64.
140 *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at para 64.
141 *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 21.

(c) whether or not Class Counsel provides an indemnity against adverse costs awards.[142]

143. The larger base contingency at later stages of the action recognizes that Class Counsel incurs greater risks and will inevitably invest more time and money in an action as it progresses. This includes higher carrying costs, including greater time spent prosecuting the action and more disbursements paid. The availability of a larger base contingency at later stages of the action also ensures that Class Counsel is properly incentivized to avoid early settlements that do not appropriately compensate the Class.

144. Some courts have expressed the view that contingent fee agreements based on a percentage of recovery are presumptively valid.[143] In this case, the retainer agreements align the interests of Counsel and the Class and ensures compensation is within an appropriate range. There is no reason to question the validity of Class Counsel's retainers and the fee sought pursuant to their terms should be approved.

145. A percentage fee arrangement promotes the policy objective of judicial economy in that it encourages efficiency in the litigation and discourages unnecessary work that might otherwise be done simply to increase the lawyer's base fee. In *Crown Bay*, Justice Winkler (as he then was) addressed the benefits of a percentage-based fee arrangement:

> A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending on 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

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142 January 2012 Retainer Agreement, paras 8-9 and 12-13, Exhibit "A" to the Leach Affidavit; unsigned word version of the Retainer Agreement, paras 8-9 and 12-13, Exhibit "B" to the Leach Affidavit; January 2012 Retainer Agreement, paras 8-9 and 12-13, Exhibit "A" to the Rooney Affidavit.

143 *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 11.

> settlement. In the case before this court the settlement averted a seven to ten day trial. Fee arrangements that reward efficiency and results should not be discouraged.[144]

146. In *Vitapharm Canada Ltd v F Hoffman-La Roche Ltd*, Justice Cumming observed the benefits of percentage-based fee arrangements:

> Using a percentage-based calculation in determining class counsel fees "properly places the emphasis on the quality of representation, and the benefit conferred to the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours."[145]

147. In *Helm v Toronto Hydro*, Justice Strathy reasoned:

> 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?[146]

148. Other commentators have noted that "the trend in Canada has certainly been away from the multiplier approach and towards percentage-based fees." Percentage-based fees are superior because they promote certainty and encourage class counsel to take on cases. Ontario recognized the importance of class actions, especially with regard to achieving behaviour modification, through the *CPA*. Percentage-based fees promote that goal.[147]

3. The value of Siskinds' Docketed time Confirms the Reasonableness of the Requested Fee

149. The fee sought in this action is *less* than the value of Class Counsel's docketed time. Class Counsel has docketed time with a value of C$3,158,780.00 (excluding taxes). Class

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144 *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada*, 1998 CarswellOnt 1896 at para 11; *Class Proceedings Act, 1992*, SO 1992, c 6, ss 33(3) and (4).

145 *Ford v F Hoffmann-La Roche Ltd*, 2005 CarswellOnt 1094 at para 107.

146 *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602 at para 25.

147 *Class Action Counsel Fees: A Fair and Reasonable Approach* (prepared for the 8th National Symposium on Class Actions in April 2011 by Charles M. Wright, Garry D. Watson, Q.C. and Anthony O'Brien).

Counsel requests fees of C$1,787,500.00 (excluding taxes), approximately 56% of the docketed time. The higher value of the docketed time supports the reasonableness of the fee request in this Action.

4. The Fee Request is Fair and Reasonable

150. In class proceedings, the Court has "supervisory jurisdiction over the fees charged by class counsel."[148] The Court is tasked to determine whether the fee requested is fair and reasonable.[149]

151. In *Smith Estate v National Money Mart Co*, the Ontario Court of Appeal confirmed the following as factors to be considered in assessing the fairness and reasonableness of requested 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

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148 *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 12.
149 *Gagne v Silcorp Ltd*, 1998 CarswellOnt 4045 at para 26.

(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[150]

152. The weight to be afforded to a particular factor varies from case to case but the results achieved and the risks undertaken by Class Counsel will typically be amongst the most important factors.[151]

i. Factual and Legal Complexity

153. Here, the facts and law underlying these actions were extraordinarily complex. Factual complexity arose from, among other things:

(a) novelty of the matters at issues: Securities class actions are relatively new to Canada, and often interlocutory motions and certification motions will raise issues of first impression and result in appeals. This Action is a case in point. The comprehensive motions to strike brought by the Defendants raised novel issues with respect to the interpretation of section 131 of the *OSA* that were ultimately resolved by the Ontario Court of Appeal. These motions considerably delayed the prosecution of the case. The Defendants' motions to strike were argued over five days in December 2014 and January 2015, with the decision released on July 30, 2015. The appeal of the decision was heard on May 4, 2016, with the decision of the Court of Appeal for Ontario released on August 17, 2016. That decision is now a leading decision on the interpretation of section 131 of the *OSA*;

(b) the general complexity that arises from assessing questions about materiality and the impact of particular information on the stock price of a particular company,

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150 *Smith Estate v National Money Mart Co*, 2011 ONCA 233 at paras 80-81.
151 *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at para 71.

given the many types of information that can influence securities prices on any given day; and

(c) damages assessment: the Plaintiffs had to show that there were scenarios that could have materialized, if the Defendants had not engaged in the alleged misconduct, that would have resulted in an economically more advantageous outcome for the Class Members than what they received.

ii. The Risk Assumed by Class Counsel

154. Courts assessing the fairness and reasonableness of fees have often focused on the risk that class counsel undertook in conducting the litigation and the degree of success or result achieved.[152] Risk in this context is measured from the commencement of the action and not with the benefit of hindsight.[153] These risks "are – quite simply – the exposure to substantial personal liability for costs and the risk of receiving no compensation for the time and disbursements invested in the case."[154] The risks arise as a result of uncertainty of outcome with respect to certification, liability, and recovery.[155]

155. In *Green v Canadian Imperial Bank of Commerce* (a costs decision), Chief Justice Strathy emphasized the need to appropriately compensate class counsel in secondary market misrepresentation claims.[156] The complexity of those secondary market cases is analogous to circular misrepresentation and oppression claims advanced in this action. In both types of cases, appropriate incentives for class counsel are an access to justice issue given the inherent risks that exist and the nature of the litigation:

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152 *Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962 at para 35.
153 *Gagne v Silcorp Ltd*, 1998 CarswellOnt 4045 at para 16.
154 *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 14 [emphasis in original].
155 *Ford v F Hoffmann-La Roche Ltd*, 2005 CarswellOnt 1094 at para 72.
156 *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 12.

> These claims [secondary market misrepresentation claims] are suitable for class action treatment because no individual class member would take on the risks involved in pursuing individual litigation. The ability of the class to pursue these claims depends on the willingness of class counsel to accept the very substantial risks in exchange for the potential rewards.[157]

156. Ontario courts, including the Court of Appeal, have also repeatedly emphasized the need to provide a sufficient incentive to class counsel in light of risks undertaken when considering fee requests.[158] Defendants tend to be well resourced, engage large law firms, and employ a strategy of wearing down the opposition.[159] This is particularly true in litigation involving large sums of money where the large potential loss spurs greater litigation spending by the defendants. Compensation in class proceedings must be sufficiently appealing to justify counsel's lost opportunity to take on paying clients and the years-long carrying costs of a case, especially when faced with well-funded defendants in high-stakes litigation.

157. The incentive must also be large enough when assessed in the context of counsel's class action practice as a whole. Class counsel's assessment of incentive does not hinge on any one case, but the sum of successes and losses. As the Court has stated, "[o]ver a period of years, plaintiff-side class action firms will win cases and lose cases… [t]he 'risk' that contingency lawyers face cannot be assessed case-by-case or one-off, but must be measured across a great many files. A 'large' contingency recovery in one case will offset the loss or losses in other cases."[160]

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157 *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 13 [emphasis added].
158 See *e.g. Gagne v Silcorp Ltd*, 1998 CarswellOnt 4045 at paras 14 and 19; *Ainslie v Afexa Life Sciences Inc*, 2010 ONSC 4294 at para 44.
159 *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at paras 65-66.
160 *Ramdath v George Brown College of Applied Arts and Technology*, 2016 ONSC 3536 at para14.

158. This case was a large undertaking, as is evidenced by the length of time it took, the number of hours spent, the number of people involved, the amounts spent on disbursements, and the number of appearances before this Court.

iii. Result Achieved

159. The Settlement Agreement provides an immediate monetary benefit to Class Members in the amount of $6.5 million—this was a good result for the Class having regard to the particular risks of the case.

160. There were many ways the Plaintiffs could lose in this case: they could fail to establish a misrepresentation or that there was any oppressive conduct. Even if the Plaintiffs were successful in establishing liability, there was a very real possibility that there would be no or limited damages.

iv. Skill and Competence of Class Counsel

161. Class Counsel is experienced in litigating and resolving complex class action litigation. Class Counsel diligently pursued this case on behalf of the Class and exercised its skill and judgement to secure a good recovery for the Class.

v. Class Members' Expectations

162. The fee requested is consistent with prior cases and the retainer agreements executed, and thus within the range of what Class Members should reasonably expect in a resolution of this magnitude at this stage in an action of this complexity.

vi. The Ability of the Class to Pay

163. Class Counsel has delivered a cash fund from which their requested fee may be paid. The Class has the resources to pay the proposed fee as a result of the efforts of Class Counsel.

5. The Fee Request is Consistent with Past Precedent

164. Class Counsel requests C$1,787,500 on a recovery of $6.5 million. The contingency fee sought pursuant to the terms of the retainer agreements described above equates to approximately 27.5% of the total Settlement Amount. This fee is well within the range of fees that courts have approved in the past.

165. Ontario courts have frequently approved contingency fee retainer agreements between 25% to 33%,[161] as "it is only through a robust contingency fee system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice."[162] The fee requested in this case is within that range.

166. The fees sought in this case are well within the range of fees typically approved. The contingency fee requested pursuant to terms of the retainer ought to be approved.

6. Ongoing Work

167. Considerable work remains to be done. Siskinds' continued involvement will include:

(a) preparing for and attending the settlement approval motion;

(b) facilitating implementation of Part 2 of the Plan of Notice;

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161 See *e.g. Abdulrahim v Air France*, 2011 ONSC 512; *Robertson v ProQuest Information & Learning Co*, 2011 ONSC 2629; *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752; *Pichette v Toronto Hydro*, 2010 ONSC 4060; *Robertson v Thomson Canada Ltd*, 2009 CarswellOnt 3660; *Martin v Barrett*, 2008 CarswellOnt 3151; *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532; *Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752; *Urlin Rent a Car Ltd v Furukawa Electric Co*, 2016 ONSC 7965; *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537.

162 *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537 at para 19.

(c) liaising with the Administrator to ensure the fair and efficient administration of the Settlement; and

(d) responding to inquiries from Class Members and their lawyers regarding the Settlement.

168. Class Counsel estimates that it will accrue approximately $75,000 in additional time before the work on this matter is completed.

D. Interim Payment of the Funding Commission

169. This Court has previously approved the Funding Agreement, which sets out the Funding Commission payable to the Funder.

170. The Plaintiffs request that part of the Funding Commission be paid now in the amount of $248,636.88.

171. This interim amount is anticipated to be below the Funder's actual entitlement. The remainder of the Funding Commission will be paid when the precise amount of the Funding Commission can be determined.

172. It can take more than a year after settlement is approved for funds to be distributed to settlement claimants. An interim payment to the Funder will encourage the participation of third-party financing in future cases, which in turn will facilitate access to justice.

E. Honoraria

173. Honoraria of $10,000 for each of Mr. Rooney and Mr. Leach are requested in recognition of the commitment, time and energy they gave in advancing this matter on behalf of the Class. They were involved through pleadings, numerous interlocutory motions and an appeal, and certification.

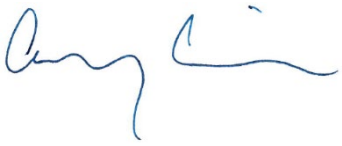
174. Their evidence makes clear that both have been active participants throughout the lengthy history of this litigation and have participated in delivering a good result for the Class.[163]

175. Courts will approve the payment of honoraria to plaintiffs where a plaintiff has "participated in every step of the … litigation" and where they have made a significant contribution to bringing the litigation to a conclusion in the best interests of the Class, as these Plaintiffs have.[164] Their willingness to step forward and represent the Class through many years and their active participation have earned them the recognition that an honorarium entails.

PART IV – ORDER SOUGHT

176. The Plaintiffs and Siskinds request orders approving the Settlement Agreement, the Distribution Protocol, Class Counsel Fees, an interim payment of the Funding Commission and the payment of an honorarium to each of the Plaintiffs, and granting the ancillary relief necessary for the provision of notice, the administration of the Settlement and the dismissal of the Action with prejudice and without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 7th DAY OF AUGUST, 2019



Siskinds LLP
Lawyers for the Plaintiffs

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163 Leach Affidavit at paras 10-12; Rooney Affidavit at paras 10-12.
164 *Allen v The Manufacturers Life Insurance Company*, 2016 ONSC 5895 at para 36; *McSherry v Zimmer GmbH*, 2016 ONSC 4606 at para 54.

SCHEDULE "A"
LIST OF AUTHORITIES

CASES

1. *Abdulrahim v Air France*, 2011 ONSC 512
2. *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532
3. *Ainslie v Afexa Life Sciences Inc*, 2010 ONSC 4294
4. *Allen v The Manufacturers Life Insurance Company*, 2016 ONSC 5895
5. *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105
6. *Bilodeau v Maple Leaf Foods Inc*, 2009 CarswellOnt 1301
7. *Brown v Canada (Attorney General)*, 2018 ONSC 3429
8. *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686
9. *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670
10. *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada*, 1998 CarswellOnt 1896
11. *Dabbs v Sun Life Assurance Co of Canada*, 1998 CarswellOnt 2758
12. *Ford v F Hoffman-La Roche Ltd*, 2005 CarswellOnt 1094
13. *Gagne v Silcorp Ltd*, 1998 CarswellOnt 4045
14. *Garland v Enbridge Gas Distribution Inc*, 2006 CarswellOnt 6585
15. *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829
16. *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602
17. *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669
18. *Martin v Barrett*, 2008 CarswellOnt 3151
19. *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662
20. *McSherry v Zimmer GmbH*, 2016 ONSC 4606
21. *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537
22. *Nunes v Air Transat AT Inc*, 2005 CarswellOnt 2503

23. *Osmun v Cadbury Adams Canada Inc*, 2010 ONCA 841

24. *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643

25. *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752

26. *Osmun v Cadbury Adams Canada Inc*, 2011 CarswellOnt 6019

27. *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932

28. *Pichette v Toronto Hydro*, 2010 ONSC 4060

29. *Ramdath v George Brown College of Applied Arts and Technology*, 2016 ONSC 3536

30. *Reynolds v Beneficial National Bank*, 288 F 3d 277 (7th Cir 2002)

31. *Robertson v ProQuest Information $ Learning Co.,* 2011 ONSC 1647

32. *Robertson v ProQuest Information & Learning Co*, 2011 ONSC 2629

33. *Robertson v Thomson Canada Ltd*, 2009 CarswellOnt 3660

34. *Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752

35. *Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962

36. *Smith Estate v National Money Mart Co*, 2010 ONSC 1334

37. *Smith Estate v National Money Mart Co*, 2011 ONCA 233

38. *Urlin Rent a Car Ltd v Furukawa Electric Co,* 2016 ONSC 7965

39. *Vitapharm Canada Ltd v F Hoffman-La Roche Ltd*, 2005 CarswellOnt 1095

40. *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622

41. *Zaniewicz v Zungui Haixi Corporation*, 2013 ONSC 5490

SECONDARY SOURCES

43. *Class Action Counsel Fees: A Fair and Reasonable Approach* (prepared for the 8th National Symposium on Class Actions in April 2011 by Charles M. Wright, Garry D. Watson, Q.C. and Anthony O'Brien)

44. Howard M. Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859 at 873.

SCHEDULE "B"
RELEVANT STATUTES

***Class Proceedings Act, 1992*, SO 1992, c 6, ss 32-33**

Fees and disbursements

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

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

…

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. 1992, c. 6, s. 33 (1).

Interpretation: success in a proceeding

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

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

Definitions

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

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

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33 (3).

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

Motion to increase fee by a multiplier

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

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

Idem

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

Idem

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

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at London

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFFS (SETTLEMENT, CLASS COUNSEL FEES, FUNDING COMMISSION AND HONORARIA) (Motion Returnable September 6, 2019)

Siskinds LLP
Barristers & Solicitors
680 Waterloo Street, P.O. Box 2520
London, ON N6A 3V8

Michael G. Robb (LSO#: 45787G)
Nicholas Baker (LSO#: 59642T)
Tel: 519-660-7872
Fax: 519-660-7873

Siskinds LLP
Barristers & Solicitors
302-100 Lombard Street
Toronto, ON M5C 1M3

Anthony O'Brien (LSO#: 56129U)
Tel: 416-594-4394
Fax: 519-672-6065

Lawyers for the Plaintiffs