Court File No.: CV-14-509885-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CLAIRE BALDWIN

Plaintiff

- and -

IMPERIAL METALS CORPORATION, J. BRIAN KYNOCH, ANDRE DEEPWELL, LARRY G. MOELLER, LAURIE PARE, N. MURRAY EDWARDS, EDCO FINANCIAL HOLDINGS LTD. and EDCO CAPITAL CORPORATION

Defendants

Proceeding under the *Class Proceedings Act, 1992*

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PART I – OVERVIEW

1. The parties have reached a settlement. On this motion, the Plaintiff seeks an order approving the Settlement Agreement. The Plaintiff also seeks order approving the proposed Second Notice, approving the proposed method for disseminating notice, appointing RicePoint Administration Inc. ("**RicePoint**") as administrator, approving the Plan of Allocation, approving Class Counsel fees, and approving the Plaintiff's honorarium.

2. This Action has been vigorously litigated for over nine years, including a hotly contested motion for leave to assert the cause of action provided by Part XXIII.1 of Ontario's *Securities Act* ("***OSA***") and an appeal of the leave decision to the Ontario Court of Appeal. This Action has been certified as a class proceeding for the purposes of settlement. Although the formal discovery process has not yet begun, the Plaintiff had access to an extensive body of evidence and has a firm grasp on the strength and weaknesses of her case.[1]

3. On August 22, 2022, the Plaintiff and Imperial Metals Corporation ("**Imperial**"), J. Brian Kynoch, Andre Deepwell, Larry G. Moeller and Laurie Pare (the "**Imperial Defendants**") conducted a mediation with the assistance of Joel Wiesenfeld as mediator.[2]

4. At the mediation, the Plaintiff and the Imperial Defendants engaged in arms-length negotiations and ultimately agreed to settle the action. On November 16, 2022, the Plaintiff and the Imperial Defendants executed a term sheet confirming the settlement of the action on specific terms. The Settlement Agreement was executed on January 31, 2023.[3]

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[1] Affidavit of Bethanie Pascutto, affirmed April 27, 2023 ("**Pascutto Affidavit**"), Motion Record ("**MR"**), Tab 2 at para 6.
[2] Pascutto Affidavit, MR, Tab 2 at para 7.
[3] Pascutto Affidavit, MR, Tab 2 at para 8 and Exhibit "A".

5. The Settlement Agreement provides that the Imperial Defendants and their insurers will pay $6,000,000.00 to resolve the claims asserted in the Action.[4]

6. In preparation for the mediation, Class Counsel had lengthy discussions in which they reviewed and debated the risks and obstacles the Action faced proceeding through a second leave motion and a trial of the common issues, the likelihood of those risks materializing and how those risks would impact on the size and likelihood of recovery for the Class. These discussions were conducted with the benefit of the materials filed by the parties for the leave motions and appeal, including expert opinions, and the decisions of this Court and other courts.[5]

7. After considering all the foregoing, Class Counsel advised the Plaintiff and took instructions before entering mediation.[6]

PART II – FACTS

A. Background to the Action

8. This action arises out of a breach of the tailings storage facility (the "**TSF**") at Mount Polley in the early morning hours of August 4, 2014. Imperial issued a press release on August 4, 2014 announcing the breach (the "**August 4 Press Release**") which states:[7]

> Imperial Metals Corporation (III-TSX) reports the tailings storage facility at its Mount Polley mine was breached, releasing an undetermined amount of water and tailings in the early morning of August 4. The cause of the breach is unknown at this time.
>
> Senior company management are at the mine site and are working with mine operating personnel, local agencies, provincial ministry officials and the engineers of record to assess the extent of the breach and the impact of the released water and tailings on the surrounding area.
>
> The Company will provide further information when confirmed and available.

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[4] Pascutto Affidavit, MR, Tab 2 at para 9.
[5] Pascutto Affidavit, MR, Tab 2 at para 10.
[6] Pascutto Affidavit, MR, Tab 2 at para 11.
[7] Pascutto Affidavit, MR, Tab 2 at paras 15-16.

9. On August 7, 2014, this Action was initiated by Notice of Action against the Defendants, including Imperial which is a publicly traded company listed on the TSX. The Second Fresh as Amended Statement of Claim alleges that the Defendants made misrepresentations in Imperial's public disclosures pertaining to the TSF of Imperial's principal operating asset, the Mount Polley open-pit copper and gold mine. Specifically, the Second Fresh as Amended Statement of Claim alleges that that the Defendants failed to disclose specific and identifiable material facts that would have revealed a materially increased likelihood of TSF failure compared to the generic risks the Defendants actually disclosed.[8]

10. It is further alleged that the Plaintiff and the Class suffered significant investment losses when the misrepresentations were publicly corrected when, on August 4, 2014, Imperial issued a news release disclosing that the Mount Polley tailings storage facility had breached, resulting in wastewater and tailings being released into the environment.[9]

11. The Defendants denied and continue to deny these allegations.[10]

12. The proceeding is advanced on behalf of all persons and entities, wherever they may reside or be domiciled, who acquired Imperial's Securities during the Class Period and continued to hold some or all of those Securities as of August 5, 2014, other than the Excluded Persons.[11]

13. On September 17, 2014, the Plaintiff delivered her notice of motion for leave to assert the cause of action for misrepresentation in secondary market disclosure documents under section 138.3 of the *OSA* and, if necessary, under the parallel provisions of the securities legislation of other Canadian provinces.[12]

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[8] Pascutto Affidavit, MR, Tab 2 at para 17 and Exhibit "B".
[9] Pascutto Affidavit, MR, Tab 2 at para 18.
[10] Pascutto Affidavit, MR, Tab 2 at para 19.
[11] Pascutto Affidavit, MR, Tab 2 at para 20.
[12] Pascutto Affidavit, MR, Tab 2 at para 21.

14. The parties filed extensive evidence on the leave motion, including: competing expert opinions from engineers on the cause of the TSF's collapse; affidavits attaching, among other things, Imperial's public disclosures, the results of independent governmental investigations into the cause of TSF's collapse and documents obtained by the Plaintiff through freedom of information requests to the Government of British Columbia; and the Imperial Defendants filed several responding fact affidavits, including from the Imperial Defendants themselves (Brian Kynoch, Andre Deepwell, Laurie Pare and Larry Moeller) and from Imperial's Chief Operating Officer Donald Parson. Several cross-examinations were held in advance of the leave motion, including of the engineering experts.[13]

15. The parties filed lengthy factums in support of their respective positions on the leave motion. In their submission, the Imperial Defendants raised numerous grounds to resist the Plaintiff's leave motion, including that the Imperial Defendants had made no misrepresentations, that the Imperial Defendants would be able to establish a due diligence defence at trial, that the Plaintiff had failed to plead misrepresentations with specificity, that the Plaintiff had failed to identify a public correction, and that the Plaintiff had failed to lead evidence to establish the materiality of any alleged misrepresentations.[14]

16. The leave motion was originally scheduled for early Spring of 2020 but was delayed due to global COVID-19 pandemic. The motion was subsequently rescheduled and heard on September 17, 2020. On September 23, 2020, Justice Belobaba issued his order dismissing the leave motion on the grounds that there was no public correction of the alleged misrepresentations. The Plaintiff appealed and on November 25, 2021 the Court of Appeal allowed the appeal.[15]

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[13] Pascutto Affidavit, MR, Tab 2 at para 22.
[14] Pascutto Affidavit, MR, Tab 2 at para 23.
[15] Pascutto Affidavit, MR, Tab 2 at para 24.

17. The leave motion was set to be re-heard on June 27 and 28, 2022. However, in advance of the re-hearing of the leave motion, the Plaintiff and the Imperial Defendants agreed to hold a mediation. As a consequence, the leave motion was adjourned by Justice Glustein to allow the parties to mediate.[16]

18. The Plaintiff and the Imperial Defendants exchanged lengthy mediation briefs and held a mediation on August 22, 2022. Joel Wiesenfeld was the mediator. Mr. Wiesenfeld practiced as securities regulatory counsel for 31 years, concluding his career as a partner at Torys LLP in 2012. During that time, he was repeatedly recognized as one of the top securities litigation practitioners in Canada, including among others as a leading practitioner in securities litigation by Lexpert/American Lawyer's Guide to the Leading 500 lawyers in Canada 2007, 2009, 2010, 2011 and 2012. Mr. Wiesenfeld was the co-founder and co-chair of The Advocates Society's Securities Litigation Practice Group and is an editorial board member of The Canadian Securities Law Reporter. Since leaving private practice, Mr. Wiesenfeld has successfully provided mediation services on securities related matters, including helping successfully mediate the resolution of securities class actions.[17]

19. At the mediation, the Plaintiff and the Imperial Defendants engaged in arms-length negotiations and ultimately agreed to settle the action. On November 16, 2022, the Plaintiff and the Imperial Defendants executed a term sheet confirming the settlement of the action on specific terms. The Plaintiff and the Imperial Defendants finalized the Settlement Agreement on January 31, 2023.[18]

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[16] Pascutto Affidavit, MR, Tab 2 at para 25.
[17] Pascutto Affidavit, MR, Tab 2 at para 26.
[18] Pascutto Affidavit, MR, Tab 2 at para 27.

B. The Settlement

20. Pursuant to the terms of the Settlement Agreement, the Imperial Defendants and their insurers agree to pay $6,000,000 to resolve the litigation, without admission of liability. A compensation fund will be established and administered by a professional administrator, RicePoint, to pay claims to Class Members pursuant to a formula. The Settlement Amount includes all legal fees, disbursements, taxes and administration expenses.[19]

21. The Settlement Agreement is subject to approval by this Court. If the Settlement Agreement is approved, the claims of all Class Members asserted or that could have been asserted in the action, will be fully and finally released and the action will be dismissed. The settlement is not an admission of liability, wrongdoing or fault on the part of the Defendants.[20]

22. The key terms of the Settlement Agreement are as follows:[21]

(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 Imperial Defendants will pay $6,000,000 all-inclusive for the benefit of the Class Members in full and final settlement;

(d) the Imperial Defendants and their insurers shall pay the Settlement Amount to Siskinds, in trust, within 30 days of the Court order approving the Settlement Agreement;

(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 without costs and with prejudice. This

[19] Pascutto Affidavit, MR, Tab 2 at para 28.
[20] Pascutto Affidavit, MR, Tab 2 at para 29.
[21] Pascutto Affidavit, MR, Tab 2 at para 30.

includes releases for, and the dismissal of the action without costs and with prejudice in relation to, N. Murray Edwards, Edco Financial Holdings and Edco Capital Corporation (the "**Edwards Defendants**") who are defendants but not parties to the Settlement Agreement. The releases granted to the Edwards Defendants are an integral part of the Settlement Agreement without which the Settlement Agreement would not have been reached. Lawrence Thacker, counsel to the Imperial Defendants, confirmed during submissions on the First Motion that the Edward Defendants are aware of the settlement and that the Action will be dismissed in its entirety without costs and with prejudice;

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

(g) the Settlement Amount will be distributed to Class Members who file claims in accordance with the Plan of Allocation; and

(h) the approval of the request for Class Counsel Fees, Plan of Allocation and honorarium for the Plaintiff are not a condition of the approval of the Settlement Agreement.

C. First Notice

23. Pursuant to this Court's Order dated February 10, 2023, the following steps were taken to disseminate the First Notice:[22]

(a) on February 17, 2023, the First Notice was published, in English and French, over *Canada Newswire*;

[22] Pascutto Affidavit, MR, Tab 2 at para 31; Affidavit of Ivan Bobonavic, sworn April 26, 2023 ("**Second Bobonavic Affidavit**"), MR, Tab 5 at paras 11-13.

(b) on February 24, 2023, RicePoint sent the First Notice to the 195 brokerage firms in its proprietary database, requesting that the brokerage firms either send a copy of the First Notice 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 RicePoint (who would subsequently mail or email the First Notice to the individuals and entities so identified);

(c) on February 17, 2023, RicePoint's website related to this Action, including all items relevant to First Notice, went live,

(d) on February 17, 2023, the First Notice, the Settlement Agreement, and Frequently Asked Questions were published on Siskinds' website in English. On February 21, 2023, the Settlement Agreement was posted on Siskinds' French website;

(e) by February 21, 2023, the First Notice was mailed, electronically and/or physically, to those persons and entities who had previously contacted Class Counsel for the purposes of receiving notice of developments in the Action;

(f) RicePoint has made a toll free number and an email address available to the public that will enable Class Members to contact RicePoint 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 First Notice and the Claim Form be electronically or physically mailed to them;

(g) contact information for Class Counsel was included in the First Notice; and

(h) on or before May 1, 2023, Siskinds will publish on its website:

i. an affidavit sworn by a representative of Class Counsel, Bethanie Pascutto;

ii. an affidavit sworn by the representative plaintiff, Claire Baldwin;

iii. an affidavit sworn by Ivan Bobanovic of RicePoint; and

iv. this factum.

D. Opt-Out Elections and Notice of Objection

24. To date, no Class Member has submitted an opt-out election or notice of objection. The deadline to file an opt-out election or notice of objection was April 21, 2023.[23]

E. Second Notice

25. The Settlement Agreement requires that the distribution of the Second Notice occur in accordance with the Plan of Notice. The Plan of Notice provides that: [24]

(a) the Administrator shall issue a press release containing the content of the Second Notice over Canada Newswire;

(b) the Administrator shall provide the Second Notice to the brokerage firms in its proprietary database;

(c) Class Counsel shall post the Second Notice in English and French on their websites;

(d) Class Counsel shall e-mail the Second Notice to Class Members for whom they have current e-mail addresses; and

(e) Class Counsel shall mail the Second Notice to Class Members for whom they have current mailing addresses but no e-mail addresses.

[23] Second Bobonavic Affidavit, MR, Tab 5 at para 20.
[24] Pascutto Affidavit, MR, Tab 2 at paras 32-33 & Exhibit "A", Schedule "C" and "E".

F. Proposed Administrator

26. After soliciting bids from competing experienced Canadian class action administrators and considering their experience and respective bids, Class Counsel believe it is in the best interests of the Class to appoint RicePoint as Administrator to:[25]

(a) receive and review claims from Class Members; and

(b) administer the Settlement Amount in accordance with the Plan of Allocation and Settlement Agreement, subject to the Court's approval of both.

27. Class Counsel is confident in RicePoint's ability to effectively and efficiently undertake the notice program and claims administration in this matter, having regard to RicePoint's expertise and experience in executing notice programs and undertaking complex claims administrations.[26] Class Counsel recommend the appointment of RicePoint as administrator.[27]

G. Factors Supporting the Fairness and Reasonableness of the Settlement

(a) Information Available to Counsel

28. In assessing the reasonableness of the Settlement, Class Counsel had access to and considered the following sources of information and evidence:[28]

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

(b) the Independent Expert Engineering Investigation and Review Panel Report on the Mount Polley Tailings Storage Facility Breach dated January 30, 2015, which reported on the causes of the TSF's failure (the "**Independent Expert Panel Report**"). The Independent Expert Panel Report was prepared at the request of British Columbia's Ministry of

[25] Pascutto Affidavit, MR, Tab 2 at para 36.
[26] Affidavit of Ivan Bobanovic, sworn January 26, 2023 ("**First Bobanovic Affidavit**"), MR, Tab 3 at paras 7-14.
[27] Pascutto Affidavit, MR, Tab 2 at paras 37-38.
[28] Pascutto Affidavit, MR, Tab 2 at para 39.

Energy and Mines and several indigenous bands. In reaching its conclusion, the Panel drew on numerous internal contemporaneous documents, including from, among others, the Mount Polley Mining Corporation (Imperial's subsidiary that operated the Mount Polley Mine) and Knight Piesold Consulting (one of the engineers of record for the Mount Polley Mine). The Panel also retained professionals to assist in their analysis, including Thurber Engineering Limited;

(c) the investigation report of the Chief Inspector of Mines entitled "Mount Polley Mine Tailings Storage Facility Breach" dated November 30, 2015, which also conducted an investigation into the failure of the Mount Polley mine's TSF (the "**Chief Inspector of Mines Report**"). The investigation was conducted by the Chief Inspector of Mines of the Province of British Columbia pursuant to the authority granted by the *Mines Act*. The investigation team reviewed numerous internal documents (including from the Mount Polley Mining Corporation), conducted interviews and engaged an engineering firm to assist it with its analysis;

(d) approximately 1,157 documents about the Mount Polley Mine obtained through freedom of information requests to the Government of British Columbia;

(e) monthly reports from the Mount Polley mine during the Class Period and relevant portions of all Board minutes during the Class Period produced by the Imperial Defendants as answers to undertakings from the cross-examination of Andre Deepwell;

(f) documents made public from freedom of information requests made by other members of the public and posted online by the British Columbian Government;

(g) trading data;

(h) the submissions of the Defendants on the leave motion, the reasons of this Honourable Court on that motion and those of the Court of Appeal on the subsequent appeal;

(i) an expert report and reply report prepared by Dr. Lawrence A. Hansen, a consulting geotechnical engineer, for the Plaintiff on the failure of the Mount Polley mine's TSF;

(j) an expert responding report and sur-reply report prepared by Dr. Ian Hutchinson, a geotechnical engineer, for the Imperial Defendants on the failure of the Mount Polley mine's TSF;

(k) an expert report from Terry Elridge of Golder Associates, a geotechnical engineering firm, for the Imperial Defendants on the technical reasons for the failure of the Mount Polley mine's TSF;

(l) the input of Mr. Wiesenfeld in his capacity as mediator; and

(m) the positions taken by the Defendants and their insurers during the course of the mediations.

29. Class Counsel possessed more than adequate information to make an informed recommendation concerning resolution of the Action on the basis upon which it was resolved.[29]

30. Class Counsel believes the terms of the Settlement Agreement are fair, reasonable and in the best interests of the Class. The Settlement Agreement delivers an immediate benefit to Class Members in exchange for the release of their claims which, while Class Counsel believed them to be meritorious, faced significant risks.[30]

[29] Pascutto Affidavit, MR, Tab 2 at para 40.
[30] Pascutto Affidavit, MR, Tab 2 at para 41.

(b) Litigation Risks

31. This Action faces various generic risks inherent in all litigation that influence the range of outcomes, as well as case specific risks.[31]

32. The generic risks include the risks arising from the passage of time, and the procedural risks that inhere in litigation 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.[32]

33. 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 Plaintiff's ability to prove her case.[33]

34. The passage of time also applies to Class Members. By the time the leave motion was heard and a decision rendered and the discovery and trial process concluded, including appeals, more than 10 years would have passed from the Class Period. 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.[34]

35. The more specific risks are those related to the issues arising in this particular case are described in the following paragraphs.

i. Leave not granted

36. Before a hearing on the merits of the Plaintiff's claim, the Plaintiff was required to get leave from this Honourable Court to commence a statutory action against the Defendants for secondary

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[31] Pascutto Affidavit, MR, Tab 2 at para 43.
[32] Pascutto Affidavit, MR, Tab 2 at para 44.
[33] Pascutto Affidavit, MR, Tab 2 at para 45.
[34] Pascutto Affidavit, MR, Tab 2 at para 46.

market misrepresentation, pursuant to Part XXIII.1 of the *OSA*. At the leave stage, the Plaintiff's burden is to establish a reasonable possibility that her action will succeed at trial. [35]

37. The first leave motion was dismissed in a decision rendered in September 2020 on the basis that the required public correction had not been established. The decision was overturned on appeal and the leave motion sent back to be considered by this Honourable Court for a second time. If the appeal had been unsuccessful, the Plaintiff's Action would have effectively been at an end.[36]

38. There was a significant a risk that the second leave motion would also have been dismissed. The Defendants took the position in their written submissions that the Plaintiff had not proven, identified or credibly alleged any misrepresentation, omission or public correction, that the Defendants had not made any misrepresentations, that the Plaintiff had not demonstrated materiality of any alleged misrepresentations, and that the Defendant's reasonable investigation provides a complete defence. There was a significant risk that the Court would have agreed with the Defendants on one, some or all of those positions.[37]

ii. No misrepresentation; no public correction; no materiality; reasonable investigation defence

39. The core of the Plaintiff's claim is that the Defendants failed to disclose the specific and identifiable material risk of a catastrophic failure of the TSF at Mount Polley. Specifically, that they omitted to disclose the risks posed by (a) the weak conditions of the TSF's foundation's soil; (b) the improperly over-steepened slope of the dam enclosing the TSF; and (c) the lack of a sustainable water management program and the accumulation of unprecedented excess water in the TSF resulting in geotechnically undesirable conditions. In light of these omissions, statements made in

[35] Pascutto Affidavit, MR, Tab 2 at paras 48-49.
[36] Pascutto Affidavit, MR, Tab 2 at para 50.
[37] Pascutto Affidavit, MR, Tab 2 at para 51.

Imperial's disclosure issued between August 2011 and August 2014 (the "**Impugned Documents**") were materially false or misleading, and investors continued to purchase the shares at prices which were inflated due to these misrepresentations.[38]

40. The Plaintiff advanced misrepresentation claims under the *OSA* and *BCSA* in respect of the Impugned Documents, which requires proof of "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". A similar definition applies under the *BCSA*.[39]

41. The Plaintiff argued that Imperial's knowledge of the material risk of a catastrophic failure of the TSF at Mount Polley is evidenced in their internal documents from 2007 to early 2014 which refer to (i) several red flags raised by consultants and others with respect to the design, construction, operation and structural integrity of the TSF at Mount Polley, and which gave rise to a specific identifiable risk of failure, and (ii) Mount Polley's operations suffering from a historic lack of water management and tailings management strategies and a lack of adequate disclosure controls and procedures.[40]

42. Following disclosure of the breach, the market price of Imperial's shares declined by as much as 40% and Imperial lost $500 million of its market capitalization.[41]

43. The Defendants took the position that Imperial had no knowledge, and could not reasonably have had any knowledge, about the weak soil conditions that they claimed were the cause of the

[38] Pascutto Affidavit, MR, Tab 2 at para 52.
[39] Pascutto Affidavit, MR, Tab 2 at para 53.
[40] Pascutto Affidavit, MR, Tab 2 at para 54.
[41] Pascutto Affidavit, MR, Tab 2 at para 55.

breach. The Defendants asked for the leave motion to be dismissed on the basis that (i) the Plaintiff had failed to plead with specificity or offer credible evidence of the misrepresentations she alleges, (ii) the Plaintiff had failed to plead a public correction with specificity and that the August 4 Press Release is not a public correction, (iii) the Plaintiff had failed to lead evidence to establish the materiality of any alleged misrepresentations; and (iv) the Defendants will be able to establish a due diligence defence at trial. These arguments would have presented significant obstacles for the Plaintiff if the action had proceeded to trial.[42]

44. While Class Counsel believed that the Plaintiff had a strong argument that the Impugned Documents included misrepresentations by omission, there were a number of significant challenges with these allegations:[43]

(a) the Impugned Documents included disclosure about the general risk of the TSF's failure. While the Impugned Documents did not disclose that there were conditions present at the TSF (such as the accumulation of excess water, inadequate site investigation and the over-steepened dam slope) that created geotechnically undesirable conditions that negatively impacted its safety, there is a risk that a Court would find that these disclosures were sufficient to discharge the Defendants' disclosure obligations;

(b) although the breach of the TSF and Imperial's disclosure about the breach demonstrated that there were conditions present at the TSF that created specific risks of failure, there is a risk that a Court would find that the alleged public correction was not reasonably capable of being understood in the secondary market as correcting what was misleading in the Impugned Documents;

[42] Pascutto Affidavit, MR, Tab 2 at para 56.
[43] Pascutto Affidavit, MR, Tab 2 at para 57.

(c) the Plaintiff asserted that there were a number of conditions that contributed to the TSF failure, which ought to have been disclosed. There is a risk that a Court would find that the primary cause of the failure was the unusual and unexpected geological formation in the form of the weakened UGLU layer (upper glaciolacustrine layer) under the perimeter embankment of the TSF that could not have been reasonably discovered and disclosed, as the Imperial Defendants argued. On the leave motion, the Imperial Defendants argued that there was substantial evidence supporting their position, including their expert opinions, the Independent Expert Panel Report and Chief Inspector of Mines Report. For instance, the Imperial Defendants emphasized that the Independent Expert Panel Report pointed to the incorrect interpretation of the strength of the UGLU layer as the "overarching problem". As a result, there was a serious risk that a Court could find that there was no misrepresentation or that the Defendants were entitled to a reasonable investigation defence on the core misrepresentation advanced by the Plaintiff—the omission of the specific and identifiable material risk of the TSF's failure from Imperial's disclosure documents during the Class Period; and

(d) the Imperial Defendants relied on assurances from its engineers of record and the British Columbia Ministry of Energy and Mines on the integrity of the Mount Polley mine's TSF. There is a risk that a Court would find that the Imperial Defendants were entitled to a reasonable investigation defence as a result.

iii. Damages limitations and risks

45. The Plaintiff had a preliminary damages estimate of losses in the range of $80 million based on the statutory formula for damages under Part XXIII.1 of the *OSA*. However, there was a risk that actual damages recoverable from the Defendants damages would be less.[44]

46. *First*, under Part XXIII.1 of the *OSA,* damages calculated pursuant to the damages formula are limited by statutory caps on damages (called "liability limits") that apply unless the plaintiff can prove that the particular defendant authorized, permitted, or acquiesced in making a misrepresentation while knowing that it was a misrepresentation. The liability limit cannot be lifted as against the issuer (*i.e.* Imperial) even where the issuer has knowledge of the misrepresentation.[45]

47. For Imperial, the liability limit is 5% of its pre-misrepresentation market capitalization, which is calculated according to a formula provided in the regulations to the *OSA*. That liability limit could vary depending on findings at leave or trial regarding when the misrepresentations were first made. If the Court determined that the misrepresentations started on August 15, 2011 (the start of the Class Period certified on consent for Settlement approval purposes), the liability limit would be approximately $19.9 million.[46]

48. For the individual defendants, the limit is the greater of 50% of the aggregate of their compensation or $25,000. Class Counsel's calculation of the likely maximum liability limits are: (1) Brian Kynoch - $611,135; (2) Andre Deepwell – $418,428; (3) Larry Moeller - $71,289; and (4) Laurie Pare - $25,000. There is insufficient publicly available information to calculate the liability caps for the Edwards Defendants.[47]

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[44] Pascutto Affidavit, MR, Tab 2 at para 58.
[45] Pascutto Affidavit, MR, Tab 2 at para 59.
[46] Pascutto Affidavit, MR, Tab 2 at para 60.
[47] Pascutto Affidavit, MR, Tab 2 at paras 61-62..

49. *Second*, under Part XXIII.1 of the *OSA* defendants can rebut the damages calculated pursuant to the statutory damages formula by proving that the change in the market price of the securities is "unrelated" to the misrepresentations. There was a risk that the Defendants would be able to establish that all or part of the decline following the alleged public correction was unrelated to the misrepresentations. Based on the arguments advanced by the Defendants on leave, the Plaintiff anticipated that at trial the Defendants would argue that a substantial portion of the decline in share price following the public correction was unrelated to the misrepresentation because the post-public correction share price decline concerned the breach of the TSF itself, not any misrepresentations related to an undisclosed risk. Put another way, the argument would be made that the decline in Imperial's share price reflected the crystallization of a disclosed risk, rather than the revelation of an undisclosed risk.[48]

iv. Additional risks facing claims on behalf of Note holders

50. In addition to the risks identified above, there were additional risks for the claims advanced on behalf of Class Member's who acquired Imperial Metal's 7% unsecured Notes due March 2019 during the Class Period.[49]

51. *First*, there was a risk that any documents provided to Class Members in the initial offering of the Notes in March of 2014 would not be considered a prescribed document for the purposes of the statutory cause of action for misrepresentations in an offering memorandum provided by section 132.1(1) of the *BCSA* and, as a result, there would be no statutory cause of action available for the initial offering of the Notes. Common law causes of action premised on a misrepresentation can pose difficulties in pursuing on a class wide basis.[50]

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[48] Pascutto Affidavit, MR, Tab 2 at para 63.
[49] Pascutto Affidavit, MR, Tab 2 at para 64.
[50] Pascutto Affidavit, MR, Tab 2 at para 65.

52. *Second*, there was limited trading data available that could be used to determine the value of the Notes that traded during the Class Period or to calculate the losses of Note holders.[51]

53. It is also noteworthy that that Plaintiff's counsel has not been contacted by any Note holder who claims to have suffered a loss recoverable in this Action.[52]

v. Immediate benefit

54. 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.[53]

H. The Claims Procedure and Administration Costs

55. RicePoint has prepared a Claim Form, in electronic and paper format, for Class Members to make claims to participate in settlement benefits. The Claim Form will be available on https://www.imperialmetalsclassaction.com/. Class Members will also be able to make a claim through an online portal available on the same website. The online portal replicates the content and information requests in the paper Claim Form.[54]

56. The claims procedure will begin after approval of the Settlement Agreement. If the Settlement Agreement is approved, Class Members will have until 120 days after Second Notice is last disseminated to submit a claim for compensation.[55]

57. The cost to administer the Settlement is estimated to be approximately $155,403, excluding taxes and the cost of notice.[56]

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[51] Pascutto Affidavit, MR, Tab 2 at para 66.
[52] Pascutto Affidavit, MR, Tab 2 at para 67.
[53] Pascutto Affidavit, MR, Tab 2 at para 68.
[54] Second Bobonavic Affidavit, MR, Tab 5 at para 21 and Exhibit "A".
[55] Second Bobonavic Affidavit, MR, Tab 5 at para 22.
[56] Second Bobonavic Affidavit, MR, Tab 5 at para 23.

I. Proposed Plan of Allocation

58. Class Counsel believes that the proposed Plan of Allocation is fair, reasonable, and in the best interests of the Class. In coming to this assessment of the Plan of Allocation, Class Counsel considered the contents of the Settlement Agreement, the Plan of Allocation itself, the economics of distributing a Settlement of this quantum, how similar securities class action settlements have been distributed in the past, and input from RicePoint, which has substantial experience calculating class member entitlement to benefits in the securities class action context.[57]

59. The key elements of the Plan of Allocation are as follows (definitions in the Plan of Allocation apply in this section):[58]

(a) the objective of the Plan of Allocation is to equitably distribute the Compensation Fund among Authorized Claimants having regard to the issues in the Action;

(b) the Administrator will administer all claims pursuant to the terms of the Plan of Allocation;

(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 until October 13, 2023 to submit a claim to the Administrator;

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

(f) in the event of a denial of a claim by the Administrator, there is a process whereby a Claimant can request 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;

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[57] Pascutto Affidavit, MR, Tab 2 at para 70.
[58] Pascutto Affidavit, MR, Tab 2 at para 71.

(g) this is a non-reversionary settlement and, as such, the Compensation Fund will be distributed on a *pro rata* basis. Each Authorized Claimant's *pro rata* interest in the Compensation Fund will depend on their Notional Entitlement. Each Authorized Claimant's Notional Entitlement will be calculated in a manner that mirrors the damages formula under section 138.5 of the *OSA* as closely as possible. To reflect this the Plan of Allocation provides:

Eligibility Criteria	**Notional Entitlement**
Imperial common shares and 7% Unsecured Notes due March 2019 disposed of before the close of trading on the Toronto Stock Exchange on August 1, 2014	None
Each Imperial common share disposed of on or before August 18, 2014	the Acquisition Expense less the Disposition Proceeds
Each Imperial common share disposed of after August 18, 2014	the lesser of: i. the difference between the Acquisition Expense and the Disposition Proceeds; and ii. the difference between the Acquisition Expense and $9.971[59]
Each Imperial common share not yet disposed of	the difference between the Acquisition Expense and $9.971[60]
Each 7% Unsecured Notes due March 2019 disposed of after August 4, 2014 and prior to March 15, 2019	the Acquisition Expense less the Disposition Proceeds and any interest payments received on the Note
Each 7% Unsecured Notes due March 2019 redeemed, paid in full or extended on or before March 15, 2019	None

[59] An estimate of the volume weighted average trading price in the 10 days following the public correction.
[60] An estimate of the volume weighted average trading price in the 10 days following the public correction.

(h) the amount paid from the compensation Fund on account of the Notes shall not exceed 10% of the Compensation Fund, reflecting our assessment of the relative strength of the claims made on behalf of Class Members who acquired common shares during the Class Period versus the Notes and their relative contribution to the value of the Settlement Agreement; and

(i) Claimants must provide documentary support for their claims, with the requirement to be interpreted equitably by the Administrator in keeping with the purpose of the Plan of Allocation.

60. Based on Class Counsel's knowledge of the facts of this Action and our experience in other securities class action settlements, they believe that the Plan of Allocation will achieve its stated objective of equitably distributing the Compensation Fund among Authorized Claimants.[61]

61. The Plan of Allocation, if implemented, will distribute the Settlement Amount to Class Members in a manner that is similar to other securities class actions that RicePoint has administered. Based on RicePoint's experience, the Plan of Allocation will provide an efficient and effective methodology for distributing the Compensation Fund to Authorized Claimants (eligible Class Members' who submit a properly completed claim form prior to the claims bar deadline). The Claim Form will gather all necessary information for RicePoint to do the calculations prescribed by the Plan of Allocation. RicePoint has significant experience and expertise doing these types of calculations. The Plan of Allocation has flexible proof of transaction requirements that will allow legitimate claims to be successfully made while providing reasonable assurance that illegitimate claims will be rejected.[62]

[61] Pascutto Affidavit, MR, Tab 2 at para 72.
[62] Second Bobonavic Affidavit, MR, Tab 5 at para 25.

62. RicePoint anticipates, subject to the occurrence of unforeseen events, that the first distribution of settlement funds to Class Members will occur by May 11, 2024 and a residual distribution (if any) will be made sometime thereafter.[63]

J. Approval of Class Counsel Fees

(a) Class Counsel Fees Requested

63. Class Counsel seeks the approval of Class Counsel Fees in the amount of $1,500,000 plus taxes and reimbursement for disbursements.

64. The legal fee and disbursement request may be summarized as follows:

ITEM	TOTAL
Fee Request	$1,500,000
Taxes on Fee Request	$195,000
Disbursements	$62,758.76
Taxes on Disbursements	$8,158.64
Total Fee and Disbursement Request (including taxes)	$1,765,917.40

(b) Retainer Agreement

65. Class Counsels' fee request is consistent with the retainer agreement entered into with the Plaintiff.[64]

66. The retainer provides that Class Counsel will be entitled to a contingency fee of 25% of the "Amount Recovered" plus applicable taxes. The fee request of $1,500,000 plus applicable taxes is

[63] Second Bobonavic Affidavit, MR, Tab 5 at para 26.
[64] Affidavit of Claire Baldwin, sworn April 27, 2023 ("**Baldwin Affidavit**"), MR, Tab 3 at Exhibit "A".

25% of $6,000,000, which is the "Net Amount Recovered". The amount requested is less than the actual fees incurred by Class Counsel prosecuting this Action on behalf of the Plaintiff and Class.[65]

(c) Risks Assumed by Class Counsel

67. As elaborated below, prior to the commencement of the Action, Class Counsel assessed and assumed the following risks of prosecuting this complex securities class action with an uncertain outcome, including exposure to our own fees and disbursements. In Class Counsel's experience, the complications and resulting cost of prosecuting a complex securities class action like this one can be very significant.[66]

68. Securities class actions in Ontario are generally complex, hard fought, expensive and can be protracted. It has been Class Counsel's 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.[67]

69. This Action is case in point. It was commenced more than nine years ago and has been the subject of an appeal. On September 23, 2020, the leave motion was dismissed on the basis that there was no public correction. The Plaintiff appealed and, on November 25, 2021, the Court of Appeal overturned the decision. After the parties had served and filed their written submissions but before the appeal was heard, the Court of Appeal released a decision dealing directly with the issue on appeal in this Action. The Plaintiff brought a motion for leave to make supplementary submissions. Leave was granted and the parties served and filed supplementary submissions on the novel issue newly considered by the Court of Appeal.[68]

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[65] Pascutto Affidavit, MR, Tab 2 at para 76.
[66] Pascutto Affidavit, MR, Tab 2 at paras 77-78.
[67] Pascutto Affidavit, MR, Tab 2 at para 79.
[68] Pascutto Affidavit, MR, Tab 2 at para 80.

70. The Court of Appeal returned the leave motion to the Superior Court for a re-hearing of the leave motion. That leave motion was pending when the Imperial Defendants and Plaintiff agreed to a mediation. [69]

71. At the commencement of the Action, Class Counsel was faced with the risks inherent to the prosecution of securities class actions in Ontario. It was anticipated that:[70]

(a) this case would be hard fought by a defence firm that is an expert in the defence of securities cases;

(b) there would be significant resistance to the motion for leave to assert the cause of action under Part XXIII.1 of the *OSA*;

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

(d) if successful on the leave and 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

(f) the exposure to adverse costs awards, including the fees and disbursements of defence counsel and their various experts, would be considerable, most certainly in the millions of dollars. This cost exposure existed at trial and also on the leave and certification motions where substantial adverse cost awards are common.

(d) Efforts of Class Counsel to Date

72. Class Counsel has performed significant work on behalf of Class Members. Class Counsel[71]:

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[69] Pascutto Affidavit, MR, Tab 2 at para 81.
[70] Pascutto Affidavit, MR, Tab 2 at para 82.
[71] Pascutto Affidavit, MR, Tab 2 at para 83.

(a) undertook an investigation of the allegations against the Defendants;

(b) prepared a Notice of Action, Statement of Claim and made amendments to the Statement of Claim;

(c) undertook further investigations and prepared voluminous evidentiary materials for the application for leave under Part XXIII.1 of the *OSA*, including an expert report, Imperial's public documents, the results of public inquiries into the collapse of the TSF and documents obtained through freedom of information requests;

(d) prepared lengthy written submissions and argued the Part XXIII.1 leave motion;

(e) successfully appealed the Part XXIII.1 leave decision of this Honourable Court to the Ontario Court of Appeal;

(f) prepared supplementary written submissions and prepared to re-argue the Part XXIII.1 leave motion;

(g) undertook extensive negotiations, including a mediation, that resulted in the Settlement Agreement; and

(h) responded to Class Member inquiries.

(e) Fees and Disbursements

73. Since the commencement of the Action up to and including April 20, 2023, Class Counsel has docketed fees of $1,852,704 (Siskinds LLP: $1,029,987; Groia and Co.: $760,737; KND Complex Litigation: $61,980) plus applicable taxes.[72]

74. Since the commencement of the Action up to and including April 20, 2023, Class Counsel has financed disbursements of $129,319.81 (Siskinds: $81,656.03; Groia and Co.: $47,663.78) plus applicable taxes. However, Class Counsel will only be requesting $70,917.40 inclusive of taxes in

[72] Pascutto Affidavit, MR, Tab 2 at paras 84 & 86.

disbursements as $75,000 in costs awarded by the Court of Appeal was previously used to pay for disbursements incurred by Class Counsel in the prosecution of the litigation.[73]

75. Class Counsel estimates that it will spend time an additional 60 hours to complete the administration of the Settlement, if the Settlement Agreement is approved by this Honourable Court. This additional time will be spent to:[74]

(a) prepare for and attend the Settlement approval hearing on May 11, 2023;

(b) assist in implementation of Part 2 in 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 Plan of Allocation; and

(d) respond to inquiries from Class Members and their lawyers, if applicable, regarding the Settlement Agreement and the Plan of Allocation.

K. Request for Honorarium

76. From the beginning of this litigation, Ms. Baldwin has had had responsibility for instructing Class Counsel. She was briefed on various issues on an ongoing basis as the litigation progressed and expended significant efforts bringing this Action to a successful resolution, including spending more than 80 hours reviewing the pleadings and key material filed by the parties, discussing the mediation and providing Class Counsel with instructions, swearing multiple affidavits, and reviewing the Settlement Agreement and Plan of Allocation.[75]

77. Absent Ms. Baldwin—a retail investor who acquired a relatively small number of shares during the Class Period (3,068 shares)—stepping up and acting as the proposed representative

[73] Pascutto Affidavit, MR, Tab 2 at paras 85 & 87.
[74] Pascutto Affidavit, MR, Tab 2 at para 88.
[75] Pascutto Affidavit, MR, Tab 2 at para 89.

plaintiff on behalf of the Class there may have been no Action and, therefore, no recovery for Class Members.[76]

78. In light of these steps and her overall contribution, Class Counsel requests an honorarium of $2,500 for Ms. Baldwin to be paid from the Settlement Amount, if approved.[77]

PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

79. After over nine years of litigation, an appeal, and a mediation session, the Action has settled for $6 million.

80. The issues to be considered by this Honourable Court are:

(a) approval of the Settlement Agreement;

(b) approval of the Second Notice;

(c) approval of the Plan of Notice;

(d) appointment of RicePoint Administration Inc. as administrator;

(e) approval of the Plan of Allocation;

(f) approval of Class Counsel fees; and

(g) approval of an honorarium for the Plaintiff.

A. Settlement Approval

81. This settlement was reached after almost a decade of litigation that was ultimately resolved through mediation. There are no indicia of collusion or conflicts of interest. The Settlement Amount is based on the facts and Class Counsel's assessment of risks flowing from those facts. Class Counsel is uniquely positioned to evaluate the settlement, having spent more than nine years immersed in the litigation.[78]

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[76] Pascutto Affidavit, MR, Tab 2 at para 90.
[77] Pascutto Affidavit, MR, Tab 2 at para 91; Baldwin Affidavit, MR, Tab 3 at paras 5-7.
[78] *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8.

82. The function of this Court is to examine the structure of the Settlement and determine whether it falls within a zone of reasonableness. The zone of reasonableness determination is informed by the background of the Action, the documents analysed by Class Counsel, consultation with experts, and Class Counsel's comprehensive research and understanding of the factual and legal issues. In this case, all of these factors favour this Court's approval of the Settlement.

(a) Settlement Structure

83. 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 interest.[79] 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.[80] The Court is well-placed to identify structural features of settlements indicative of collusion or conflicts of interest in the negotiations and the agreement.

84. Broadly speaking, agreements that place a high value on non-monetary or conditional compensation,[81] contemplate a possible reversion of settlement funds to defendants without a concomitant reduction in class counsel's compensation,[82] make settlement approval contingent on fee approval,[83] and have optics that suggest the settlement is more favourable to class counsel than class members,[84] are examples of the types of features of which courts should be cautious.

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[79] *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8; *Robinson v. Medtronic, Inc*., 2020 ONSC 1688 at para 65(i)-(ii).
[80] Howard M Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859 at 873, Book of Authorities ("**BoA**"), Tab 1.
[81] *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; *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at footnote 10.
[82] *Bilodeau v Maple Leaf Foods Inc.*, 2009 CanLII 10392 (ON SC).
[83] *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 85-86.
[84] *Smith Estate v National Money Mart Co.*, 2010 ONSC 1334 at para 33, varied in part *Smith Estate National Money Mart Co.*, 2011 ONCA 233.

85. 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 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."[85]

(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;[86]

(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

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[85] *Smith Estate v National Money Mart Co.*, 2010 ONSC 1334 at para 94, varied in part *Smith Estate National Money Mart Co.*, 2011 ONCA 233.
[86] *Bilodeau v Maple Leaf Foods Inc.*, 2009 CanLII 10392 (ON SC).

approve the settlement, stating that such an arrangement created an inherent conflict of interest between class counsel's interests and those of the class they sought to represent;[87] 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.[88]

86. The type of structural features that indicate conflicts of interest 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 Plan of Allocation;

(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 Plaintiff have entered into a contingency fee retainer that incentivizes Class Counsel to maximize overall recovery.[89] 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 Compensation Fund is distributed *pro rata* in accordance with the Settlement Agreement and the Plan of Allocation, it will be distributed *cy-près* to one or more recipients to be approved by the Court.

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[87] *Garland v Enbridge Gas Distribution Inc.*, 2006 CanLII 36243 (ON SC).
[88] *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 81 and 85.
[89] Baldwin Affidavit, MR, Tab 3 at Exhibit "A".

87. 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.

(b) Zone of Reasonableness

88. 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.[90]

89. 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.[91] 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.[92] The settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.[93] 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.[94]

90. In settlements where Class Counsel is in possession of significant factual information and knowledge of risks from interlocutory motions or other sources, "the supervising class action judge will be justified in assuming that class counsel had a complete or almost complete understanding of

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[90] *Dabbs v Sun Life Assurance Co of Canada*, 1998 CanLII 14855 (ON SC); *Robinson v. Medtronic, Inc.*, 2020 ONSC 1688 at para 64(iv), 66.
[91] *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 70, BoA, Tab 2.
[92] *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at paras 25 and 33.
[93] *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 80, BoA, Tab 2.
[94] *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622 at para 22.

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."[95]

91. In *Clegg v HMQ 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.[96]

92. These features are present in this case:

(a) *comprehensive research and understanding of legal issues*: in preparing for the mediation, negotiations, and the hotly contested leave motion, the Plaintiff 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 Plaintiff reviewed the report from the Independent Panel Expert established by the British Columbia Minister of Energy and Mines and the report from the Chief Inspector of Mines in the Province of British Columbia on the causes of the TSF failure. The Plaintiff also made a freedom of information request to the Government of British Columbia and reviewed the 1,157 documents obtained. The Plaintiff reviewed documents put into evidence by the Defendants, conducted cross-examinations of the individuals named as Defendants in this Action and reviewed documents produced by the Defendants in response to requests for undertakings. The documents reviewed were highly relevant to the liability and damages issue in this litigation and the cross-examinations assisted the Plaintiff in understanding the strength of her case; and

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[95] *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670 at paras 5-10.
[96] *Clegg v HMQ Ontario*, 2016 ONSC 2662 at para 33; *Ironworkers v Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at para 13.

(c) *expert analysis*: including the report from Dr. Lawrence Hansen and the expert reports from the Defendants' experts Dr. Ian Hutchinson and Terry Elridge of Golder Associates.

93. In this case, Class Counsel's understanding of the factual and legal issues is mature. Resolution was informed by actual information about the risks and rewards of further litigation, including a second contested leave motion, possible appeals and trial.[97] The settlement was negotiated 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.

94. Litigation cannot be valued with a high degree of precision. 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.[98]

95. While a high degree of precision is not available, 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 36 to 52 above:

(a) the risk that the Court would not certify the Action as a class proceeding;

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

(c) the risk that the Court would find that there had been no public correction;

(d) the risk that the Court would find that the Defendants could rely on the reasonable investigation defence;

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[97] *Clegg v HMQ Ontario*, 2016 ONSC 2662 at para 34.
[98] *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 12.

(e) the risk that the Court would find that the decline in Imperial's share price following the public correction was unrelated in whole or part to the asserted misrepresentations, limiting recoverable damages; and

(f) the risk that the Court would find that the non-issuer Defendants damages were limited to the liability caps under Part XXIII.1 of the *OSA*.

96. In addition to the liability limits potentially applicable to the non-issuer Defendants, the maximum recovery for the Plaintiff and Class was also limited by the liability limit applicable to Imperial, which Class Counsel calculated as approximately $19.9 million. The liability limit for issuers such as Imperial cannot be lifted. The settlement amount is a strong result considering the maximum damages recoverable from Imperial.

97. The Settlement provides for a total payment of $6 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-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.

(c) Other Factors Supporting Settlement

98. The Court 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;

(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;

(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;[99]

(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, 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; 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.[100]

99. 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. Plan of Allocation

100. The Plan of Allocation should be approved as it provides for a plan of distribution of the Distribution Fund that is fair, reasonable and in the best interests of the Class.[101]

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[99] *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at para 31, aff'd 2010 ONCA 841, leave to appeal to SCC denied 2011 CanLII 40927.
[100] *Ford v F Hoffman-La Roche Ltd*, 2005 CanLII 8751 at paras 116 and 127; *Robinson v. Medtronic, Inc*., 2020 ONSC 1688 at para 64.
[101] *Zaniewicz v Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59.

101. As described paragraphs 58 to 62 above, the Plan of Allocation provides for a *pro rata* distribution of the Compensation Fund by assigning a Notional Entitlement, which is done based on the statutory formula for damages under Part XXIII.1 of the *OSA*. This is consistent with the methodology that has been used to distribute settlement funds in other securities class actions.[102]

102. The Compensation Fund will be distributed to Class Members who acquired Imperial common shares on the secondary market and Class Members that acquired Notes on the primary or secondary market. The Plan of Allocation limits the total amount of compensation available to Class Members for their Notes to a maximum of 10% of the Compensation Fund. This reflects Class Counsel's assessment of the relative strength of the claims of those Class Members.[103] The application of a discount on the total amount recoverable to such Class Members is reasonable given the increased litigation risks related to the Notes and uncertainty surrounding the quantum of the loss attributable to the Notes.[104]

103. The Plan of Allocation is also practical and economic. According to RicePoint, who has significant experience administering securities class action settlements, the Claim Form will gather all necessary information for RicePoint to do the calculations prescribed by the Plan of Allocation. The flexible proof of transaction requirements will allow legitimate claims to be successfully made while providing reasonable assurance that illegitimate claims will be rejected.[105]

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[102] See *e.g. Pinizzotto v TILT Holdings, Inc.,* 2021 ONSC 8001 at para 31; *DALI v SNC-Lavalin Group Inc*., 2018 ONSC 6447 at paras 53-57, 73
[103] Pascutto Affidavit, MR, Tab 2 at para 70(h).
[104] *Pinizzotto v TILT Holdings, Inc*., 2021 ONSC 8001 at para 62; *Haase v Reliq Health Technologies Inc.,* 2022 BCSC 1754 at paras 34, 36.
[105] Second Bobanovic Affidavit, MR, Tab 5 at para 25.

C. Proposed Notice Plan (Second Notice)

104. A court must consider whether notice of settlement should be given pursuant to section 27.1(12) of the *CPA*. The factors in considering the form and scope of the notice are set out in section 17 of the *CPA*. Relevant factors include the cost of giving notice, the nature of the relief sought, the size of the individual claims of the class members, the number of class members, and the places of residence of class members. The notice may be given by posting, advertising, or publishing.[106]

105. The Plan of Notice provides for notice to be provided in two-stages. Approval of Second Notice is being sought on this application. The parties have agreed on the form and content of the Second Notice.

106. The Second Notice provides notice of the approval of the Settlement Agreement and the deadline for a claim for compensation. It also provides a link to the Settlement Agreement, the Plan of Allocation and a description of the claims process.[107]

107. The Second Notice will be disseminated as follows:[108]

(a) the Administrator shall issue a press release containing the content of the First Notice over *Canada Newswire*;

(b) the Administrator shall provide the First Notice to the brokerage firms in its proprietary database;

(c) Class Counsel shall post the First Notice in English and French on their websites;

(d) Class Counsel shall e-mail the First Notice to Class Members for whom they have current e-mail addresses; and

(e) Class Counsel shall mail the First Notice to Class Members for whom they have current mailing addresses but no e-mail addresses.

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[106] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 17 & 27.1(12).
[107] Pascutto Affidavit, MR, Tab 2 at Exhibit "A", Schedule "E".
[108] Pascutto Affidavit, MR, Tab 2 at para 33; Second Bobanovic Affidavit, MR, Tab 5 at para 18.

108. The contemplated manner of disseminating the Second Notice is consistent with the notice programs approved and implemented in many other similar cases in which Class Counsel have been counsel. In Class Counsel's experience, the combination of direct and indirect methods of providing notice should cause the Second Notice to come to the attention of a significant portion of the Class.[109]

109. The notice proposed here is intelligible, informative and tailored to the circumstances of this case. The plan proposed is based on notice plans previously approved and employed in similar securities cases in Ontario. The plan for posting and publication of notice is national and should ensure sufficient exposure to class members. Where possible, direct notice is more likely to be effective than other forms of notice, and that is what is contemplated here. Indirect notice is used as back-up. Both kinds of notice are proposed here.[110]

D. Proposed Administrator

110. RicePoint has agreed to perform the notice tasks assigned to the Administrator in the Plan of Notice and to administer the claims procedure. RicePoint provides notice and administrative services for class action settlements in Canada. Over approximately the last 21 years, RicePoint has administered over 100 settlements of varying size and complexity and distributed more than $5 billion in settlement funds. Those settlements related to securities, price fixing, medical, consumer and employment matters.[111]

111. Class Counsel is confident in RicePoint's ability to effectively and efficiently undertake the notice program and claims administration in this matter, having regard to RicePoint's expertise and

[109] Pascutto Affidavit, MR, Tab 2 at para 35.
[110] First Bobanovic Affidavit, MR, Tab 4 at paras 18-26.
[111] First Bobanovic Affidavit, MR, Tab 4 at paras 9-13.

experience in executing notice programs and undertaking complex claims administrations. Class counsel recommend the appointment of RicePoint as administrator.[112]

112. RicePoint estimates that the cost to administer the settlement is $155,405, excluding taxes and the cost of notice.[113] This estimate is consistent with estimated costs to administer similar securities class action settlements that have been approved as reasonable by this Court.[114]

E. Fee Approval

113. Class Counsel's fee request is made pursuant to the terms of Siskinds' retainer with the Plaintiff, which was carefully designed to appropriately incentivize Class Counsel while providing for a fair fee. The fee appropriately reflects 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.

(a) The Retainer Agreement Complies with the Requirements of the CPA

114. The *CPA* gives proposed representative plaintiffs the right to enter into contingent fee arrangements with putative class counsel.[115] Such agreements are not enforceable until they have received Court approval.[116] 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

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[112] Pascutto Affidavit, MR, Tab 2 at paras 37-38.
[113] Second Bobanovic Affidavit, MR, Tab 5 at para 23.
[114] *Pinizzotto v. TILT Holdings, Inc.*, 2021 ONSC 8001 at para 65.
[115] *Class Proceedings Act*, 1992, SO 1992, c 6, s. 32(1).
[116] *Class Proceedings Act*, 1992, SO 1992, c 6, s. 32(2).

(c) state the method by which payment is to be made, whether by lump sum, salary, or otherwise.[117]

115. The retainer agreements entered into between Siskinds and the Plaintiff complies with these requirements and ought to be approved by the Court.

(b) The Percentage Approach in the Retainer Agreements Results in an Appropriate Fee

116. The contingency fee retainer in this case provides for a 25% recovery. Contingency fee retainer agreements in the range of 20% and 33% are very common in class proceedings and have been held to be presumptively valid.[118] The profession and the public have for years recognized that the system works and that it is fair. This approach works especially well for all-cash settlements, as is the case here. Compensating counsel through a percentage of recovery is "generally considered to reflect a fair allocation of risk and reward as between lawyer and client". [119]

117. 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.[120]

118. In this case, the retainer agreement aligns the interests of Class Counsel and the Class and ensures compensation is within an appropriate range. Ms. Baldwin has a full understanding of the fees sought and supports the request.[121] There is no reason to question the validity of the retainer, and the fee sought pursuant to their terms should be approved.

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[117] *Class Proceedings Act*, 1992, SO 1992, c 6, s. 33.
[118] *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 11; *Pinizzotto v. TILT Holdings, Inc*., 2021 ONSC 8001 at para 71(i).
[119] *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 11; *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at paras 63-64.
[120] *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada*, 1998 CanLII 14842 (ON SC); *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602 at para 25.
[121] Baldwin Affidavit, MR, Tab 3 at para 15.

(c) Class Counsel's Docketed Time

119. 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 $1,852,704 (excluding taxes). Class Counsel requests fees of $1,500,000 (excluding taxes). Class Counsel's docketed time in this case is higher than the fee requested, which supports the reasonableness of the requested fee.

(d) The Fee Request is Fair and Reasonable

120. In class proceedings, the Court has "supervisory jurisdiction over the fees charged by class counsel."[122] The Court is tasked to determine whether the fee requested is fair and reasonable.[123]

121. 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:[124]

(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;

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[122] *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 12.
[123] *Gagne v Silcorp Ltd*, 1998 CanLII 1584 (ON CA).
[124] *Smith Estate v National Money Mart Co*, 2011 ONCA 233 at paras 80-81.

(i) the expectations of the class as to the amount of fees; and

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

122. 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.[125]

i. Factual and Legal Complexity

123. The facts and law underlying this Action was particularly complex. Factual and legal complexity arose from, among other things:

(a) *novelty of the matters at issue:* Securities class actions are relatively new to Canada, and often interlocutory motions and leave motions will raise issues of first impression and result in appeals. This Action is a case in point. On September 23, 2020, the leave motion was dismissed on the basis that there was no public correction. The Plaintiff appealed and, on November 25, 2021, the Court of Appeal overturned the decision. After the parties had served and filed their written submissions but before the appeal was heard, the Court of Appeal released a decision dealing directly with the issue on appeal in this Action. The Plaintiff brought a motion for leave to make supplementary submissions. Leave was granted and the parties served and filed supplementary submissions on the novel issue newly considered by the Court of Appeal; and

(b) *determining the underlying cause of the TSF failure:* prosecuting this case required Class Counsel to have a thorough understanding of the report from the Independent Panel

[125] *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at para 71.

Expert Report established by the British Columbia Minister of Energy and Mines and the report from the Chief Inspector of Mines Report in the Province of British Columbia on the causes of the TSF failure, as well as the expert reports from both parties.

ii. Risks Assumed by Class Counsel

124. In assessing the fairness and reasonableness of fees, Courts consider the risk that class counsel undertook in conducting the litigation, and the degree of success or result achieved.[126] Risk in this context is measured from the commencement of the action and not with the benefit of hindsight.[127] These risks are "the exposure to substantial personal liability for costs and the risk of receiving no compensation for the time and disbursements invested in the case."[128]

125. In *Green v Canadian Imperial Bank of Commerce*, Chief Justice Strathy emphasized the need to appropriately compensate class counsel in secondary market misrepresentation claims, like this Action.[129]

126. 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.[130] Defendants tend to be well resourced, engage large law firms, and employ a strategy of wearing down the opposition.[131] 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

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[126] *Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962 at para 35; *Pinizzotto v. TILT Holdings, Inc*., 2021 ONSC 8001 at para 71(x)-(xi)
[127] *Gagne v Silcorp Ltd*, 1998 CanLII 1584 (ON CA)
[128] *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 14.
[129] *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at paras 12-13.
[130] *Ainslie v Afexa Life Sciences Inc*, 2010 ONSC 4294 at para 44.
[131] *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at paras 65-66.

paying clients and the years-long carrying costs of a case, especially when faced with well-funded defendants in high-stakes litigation.

127. 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."[132]

128. 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. Class Counsel's fee request is well-justified.

iii. Result Achieved

129. The Settlement Agreement provides an immediate monetary benefit to Class Members in the amount of $6 million – this was a good result for the Class having regard to the particular risks of the case.

130. There were many ways the Plaintiff could lose in this case: they could fail to establish a misrepresentation or public correction, the Defendants could have successfully relied on the reasonable investigation defence, or damages could have been substantially limited by the damages caps under Part XXIII.1 of the *OSA*.

iv. Skill and Competence of Class Counsel

[132] *Ramdath v George Brown College of Applied Arts and Technology*, 2016 ONSC 3536 at para 14.

131. 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

132. 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

133. 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.

(e) The Fee Request is Consistent with Past Precedent

134. Class Counsel requests $1,500,000 (excluding taxes) on a recovery of $6 million. The contingency fee sought pursuant to the terms of the retainer agreement described above equates to 25% of the total Settlement Amount. This fee is well within the range of fees that courts have approved in the past.

135. Ontario courts have frequently approved contingency fee retainer agreements between 25% to 33%, 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."[133]

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[133] *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537 at para 19; 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 CanLII 32703 (ON SC); *Martin v Barrett*, 2008 CanLII 25062 (ON SC); *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532; *Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752; *Urlin Rent a Car v Furukawa Electric Co*, 2016 ONSC 7965.

136. 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.

(f) Ongoing Work

137. Significant work remains to be done. Class Counsel's continued involvement will include:

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

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

(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.

138. Class Counsel estimates that it will accrue approximately 60 hours in additional time before the work on this Action is completed.

F. Honorarium

139. In *Doucet v The Royal Winnipeg Ballet*, the Divisional Court confirmed that honorarium can be awarded to representative plaintiffs. However, the Divisional Court cautioned that honorarium should only be awarded in rare, not routine, circumstances and they "should foster the goals of class proceedings while addressing significant concerns about an apparent conflict of interest between recipients of these payments and other class members."[134]

140. This is an appropriate case for the award of an honorarium. *First*, there is no conflict of interest between Ms. Baldwin and the Class by the payment of the honorarium requested. The honorarium requested—$2,500—is modest compared to the value of the settlement. Moreover, the honorarium requested does not provide Ms. Baldwin with compensation for her losses above that received by other Class Members, but rather compensates her for the significant time and energy

[134] *Doucet v The Royal Winnipeg Ballet*, 2023 ONSC 2323 at para 92.

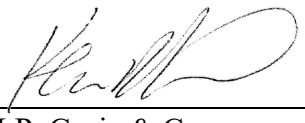
she gave in advancing this matter on behalf of the Class. She was involved through the pleadings, leave motion, appeal, and the certification for the purposes of settlement. She has been an active participant throughout the lengthy history of this litigation and has participated in delivering a good result for the Class.[135] Approval of the Settlement Agreement is not contingent on the award of the honorarium to the representative plaintiff. Accordingly, Ms. Baldwin faced no conflict of interest in providing her instructions to Class Counsel precisely because a successful resolution did not entitle her to anything more than other Class Members.

141. *Second,* awarding an honorarium to Ms. Baldwin in these circumstances promotes the goals of class proceedings. Absent Ms. Baldwin stepping up and acting as representative plaintiff, there may have been no action at all, which would undermine the access to justice and behaviour modification goals of class proceedings. Ms. Baldwin's efforts were necessary for the successful resolution of this Action, which, if the Settlement Agreement is approved by the Court, will enable Class Members to make a claim for compensation from the Settlement Agreement and thereby obtain access to justice.

PART IV – ORDER REQUESTED

142. The Plaintiff seeks an order for relief set out in the Notice of Motion dated April 27, 2023.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of April, 2023.



Siskinds LLP, Groia & Company, *Lawyers for the Plaintiff*

[135] Baldwin Affidavit, MR, Tab 3 at paras 5-7.

SCHEDULE "A" – CASES CITED

Jurisprudence

1. *Abdulrahim v Air France*, 2011 ONSC 512
2. *Ainslie v Afexa Life Sciences Inc*, 2010 ONSC 4294
3. *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105
4. *Bilodeau v Maple Leaf Foods Inc.*, 2009 CanLII 10392 (ON SC)
5. *Brown v Canada (Attorney General)*, 2018 ONSC 3429
6. *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686
7. *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670
8. *Clegg v HMQ Ontario*, 2016 ONSC 2662
9. *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada*, 1998 CanLII 14842 (ON SC)
10. *Dabbs v Sun Life Assurance Co of Canada*, 1998 CanLII 14855 (ON SC)
11. *DALI v SNC-Lavalin Group Inc.*, 2018 ONSC 6447
12. *Doucet v The Royal Winnipeg Ballet*, 2023 ONSC 2323
13. *Ford v F Hoffman-La Roche Ltd*, 2005 CanLII 8751
14. *Gagne v Silcorp Ltd*, 1998 CanLII 1584 (ON CA)
15. *Garland v Enbridge Gas Distribution Inc.*, 2006 CanLII 36243 (ON SC)
16. *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829
17. *Haase v Reliq Health Technologies Inc.,* 2022 BCSC 1754
18. *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602
19. *Ironworkers v Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669
20. *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532
21. *Martin v Barrett*, 2008 CanLII 25062 (ON SC)
22. *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537
23. *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643
24. *Osmun v Cadbury Adams Canada Inc*, 2010 ONCA 841
25. *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932
26. *Pichette v Toronto Hydro*, 2010 ONSC 4060
27. *Pinizzotto v TILT Holdings, Inc.,* 2021 ONSC 8001
28. *Ramdath v George Brown College of Applied Arts and Technology*, 2016 ONSC 3536
29. *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647
30. *Robertson v ProQuest Information & Learning Co*, 2011 ONSC 2629
31. *Robertson v Thomson Canada Ltd*, 2009 CanLII 32703 (ON SC)
32. *Robinson v. Medtronic, Inc.*, 2020 ONSC 1688
33. *Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752
34. *Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962
35. *Smith Estate v National Money Mart Co*, 2010 ONSC 1334
36. *Smith Estate v National Money Mart Co*, 2011 ONCA 233
37. *Urlin Rent a Car v Furukawa Electric Co*, 2016 ONSC 7965
38. *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622

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

Secondary Sources

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

SCHEDULE "B" – LEGISLATION

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

Notice of certification

17 (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section. 1992, c. 6, s. 17 (1); 2020, c. 11, Sched. 4, s. 18 (1).

Court may dispense with notice

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so. 1992, c. 6, s. 17 (2); 2020, c. 11, Sched. 4, s. 18 (2).

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the places of residence of class members; and

(f) any other relevant matter. 1992, c. 6, s. 17 (3); 2020, c. 11, Sched. 4, s. 18 (2).

Means of giving notice

(4) The court may, for the purposes of subsection (3), order that notice be given by any of the following means or combination of the following means, and may order that notice be given to different class members by different means:

1. Personally or by mail.
2. By posting, advertising, publishing or leafleting.
3. By individual notice to a sample group within the class.
4. By any electronic means the court considers appropriate.
5. By any means that may be prescribed.
6. By any other means the court considers appropriate. 2020, c. 11, Sched. 4, s. 18 (3).

Contents of notice

(5) Unless the court orders otherwise, notice under this section shall,

(a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;

(b) state the manner by which and time within which class members may opt out of the proceeding;

(c) describe the possible financial consequences of the proceeding to class members;

(d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;

(e) indicate whether there is a third-party funding agreement as defined in section 33.1 between the representative plaintiff and a funder and, if so, provide a description of the payment to which the funder is entitled under the agreement;

(f) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;

(g) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;

(h) describe the right of any class member to participate in the proceeding;

(i) provide contact information for a person or entity to whom class members may direct inquiries about the proceeding;

(j) include the prescribed information; and

(k) include any other information the court considers appropriate. 2020, c. 11, Sched. 4, s. 18 (3).

Court to consider circumstances

(6) The court shall make such orders under subsections (3), (4) and (5) as are necessary to ensure that the notice given is the best notice that is practicable in the circumstances. 2020, c. 11, Sched. 4, s. 18 (3).

Solicitations of contributions

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements. 1992, c. 6, s. 17 (7).

Public Guardian and Trustee

(8) Notice ordered to be given under this section shall be served on the Public Guardian and Trustee if there is a reasonable possibility that the Public Guardian and Trustee is authorized to act on behalf of one or more class members. 2020, c. 11, Sched. 4, s. 18 (4).

Notice of settlement approval

(12) In approving a settlement, the court shall consider whether notice of the settlement should be given under section 19, and whether such notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding;

(c) a description of any plan for distributing settlement funds;

(d) any other prescribed information; and

(e) any other information the court considers appropriate. 2020, c. 11, Sched. 4, s. 25.

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).

Fees must be fair and reasonable

(2.1) The court shall not approve an agreement unless it determines that the fees and disbursements required to be paid under the agreement are fair and reasonable, taking into account,

(a) the results achieved for the class members, including the number of class or subclass members expected to make a claim for monetary relief or settlement funds and, of them, the number of class or subclass members who are and who are not expected to receive monetary relief or settlement funds;

(b) the degree of risk assumed by the solicitor in providing representation;

(c) the proportionality of the fees and disbursements in relation to the amount of any monetary award or settlement funds;

(d) any prescribed matter; and

(e) any other matter the court considers relevant. 2020, c. 11, Sched. 4, s. 29 (1).

Same

(2.2) In considering the degree of risk assumed by the solicitor, the court shall consider,

(a) the likelihood that the court would refuse to certify the proceeding as a class proceeding;

(b) the likelihood that the class proceeding would not be successful;

(c) the existence of any other factor, including any report, investigation, litigation, initiative or funding arrangement, that affected the degree of risk assumed by the solicitor in providing representation; and

(d) any other prescribed matter. 2020, c. 11, Sched. 4, s. 29 (1).

Same

(2.3) In determining whether the fees and disbursements are fair and reasonable, the court may, by way of comparison, consider different methods by which the fees and disbursements could have been structured or determined. 2020, c. 11, Sched. 4, s. 29 (1).

Agreements for payment only in the event of success

33 (1) 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); 2020, c. 11, Sched. 4, s. 30 (1).

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE MOVING PARTY,
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