Court File No. CV-18-00606411-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

ABRAM B. DYCK

Plaintiff

- and -

0799714 B.C. LTD. and RONALD WAYNE CLAYTON

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFF
(APPROVAL OF SETTLEMENT, CLASS COUNSEL FEES, AND INTERIM FUNDING COMMISSION)

September 15, 2023

Siskinds LLP
Barristers & Solicitors
65 Queen Street West
Suite 1155
Toronto, ON M5H 2M5

Anthony O'Brien (LSO#: 56129U)
Email: anthony.obrien@siskinds.com
Tel: 416.594.4394
Fax: 519.672.6065

275 Dundas Street, Unit 1
P.O. Box 2520
London, ON N6B 3L1

Garett Hunter (LSO#: 71800D)
Email: garett.hunter@siskinds.com
Tel: 519.660.2121
Fax: 519.672.6065

Lawyers for the Plaintiff

TO: **Cassels Brock & Blackwell LLP**
40 King Street West
Suite 2100 Scotia Plaza
Toronto, ON M5H 3C2

Lara Jackson
Email: ljackson@cassels.com

Derek Ronde
Email: dronde@cassels.com

Jessica Lewis
Email: jlewis@cassels.com

Tel: 416-860-2907
Fax: 416-860-3108

Lawyers for the Defendants

TABLE OF CONTENTS

PART I – OVERVIEW

1. The parties have reached a settlement. On this motion, the Canadian Plaintiff[1] seeks orders approving:

(a) the Settlement Agreement and dismissing the Canadian Action with costs and with prejudice on the Effective Date of the Settlement Agreement;

(b) the form, content and method for disseminating Canadian Second Notice;

(c) the Canadian Plan of Allocation;

(d) Canadian Plaintiff's Counsel's fees, disbursements and applicable taxes on those fees and disbursements; and

(e) an interim payment of the approved Canadian Funding Commission to the Canadian Funder.

2. The Canadian Action has been vigorously litigated for over five 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***")[2], which was granted. The Canadian Action has also been certified as a class proceeding.[3] Although the formal discovery process was just starting, the Canadian Plaintiff and his counsel had access to key pieces of evidence and have a firm grasp on the strength and weaknesses of his case.[4]

---

[1] Capitalized terms not otherwise defined herein are defined in the Joint Stipulation and Agreement of Global Settlement of Two Related Securities Class Actions Pending in Different Jurisdictions dated May 25, 2023 ("**Settlement Agreement**"), Notice of Motion ("**NOM**") Schedule A, Ex 1.

[2] *Securities Act*, RSO 1990, c S.5.

[3] Note – the *Class Proceedings Act, 1992*, SO 1992, c 6 in force between June 22, 2006 and September 30, 2020 applies to the Canadian Action. It is referred to herein as the "***Class Proceedings Act***". The new version of the legislation is referred to as the "***New Class Proceedings Act***".

[4] Affidavit of Michael G. Robb affirmed September 14, 2023 ("**Robb Affidavit**") at para 5, Motion Record ("**MR**") Tab 2.

3. Following a complex and hard-fought arms-length mediation process overseen by an experienced mediator, Robert Meyer, the Canadian Plaintiff agreed to settle the Canadian Action for USD$13,500,000.[5] This is an excellent result for the Canadian Settlement Class. It reflects a fair and reasonable compromise made by the Canadian Plaintiff on the recommendation of experienced counsel who was well apprised of the facts of the case. The Settlement Agreement ought to be approved.

4. The Canadian Plan of Allocation for distributing compensation to Canadian Settlement Class Members is designed to mirror the damages formula under Part XXIII.1 of the *OSA*. It will allow the Canadian Net Settlement Fund to be distributed to Canadian Settlement Class Members in a fair, equitable and efficient manner. It ought to be approved.

5. Canadian Plaintiff's Counsel requests fees of USD$3,780,000 plus applicable taxes and the reimbursement of disbursements of CAD$1,206,617.95 plus applicable taxes. The fee and disbursement request ought to be approved. The fee request appropriately reflects the risks undertaken by Canadian Plaintiff's Counsel at the outset of the Canadian Action, the substantial investment of time and money made and the excellent result achieved for the Canadian Settlement Class. The request for reimbursement of disbursements should also be approved. The disbursements incurred were necessary for the Canadian Action to be litigated to a successful resolution and are consistent with those approved in other actions litigated under Part XXIII.1 of the *OSA*.

6. The Canadian Plaintiff also seeks an interim payment of USD$600,000 to the Canadian Funder on account of the Canadian Funding Commission that was approved by previous order of this Court. Paying an interim commission now, instead of waiting for the distribution process to be

[5] Robb Affidavit at paras 98-99, MR Tab 2.

completed, will encourage the participation of third-party financing in future cases, which in turn will facilitate access to justice.

PART II – FACTS

A. Background to the Canadian Action

7. The Canadian Action arises out of *amparo* litigation that was brought before the Guatemalan courts in May 2017 by CALAS, a Guatemalan non-profit organization, concerning Tahoe's flagship Escobal mine in Guatemala ("**CALAS Litigation**"). CALAS, among other things, sought the suspension of the Escobal mine's exploitation license on a provisional and definitive basis because of the failure of the Guatemalan Ministry of Energy and Mines ("**MEM**") to consult with the Xinka indigenous people in accordance with the International Labour Organization's Indigenous and Tribal Peoples Convention No. 169 ("**ILO 169**") prior to granting the exploitation license to Tahoe.[6]

8. The Canadian Plaintiff, on his behalf and on behalf of the class, commenced the Canadian Action on October 4, 2018 asserting that a news release issued by Tahoe on May 24, 2017 contained misrepresentations, including by omitting the material risk that the CALAS Litigation would lead to the provisional and/or definitive suspension of the Escobal mine's exploitation license.[7]

9. It is further alleged that the misrepresentations in the May 24, 2017 news release were publicly corrected after the close of trading on July 5, 2017 when Tahoe issued a news release that disclosed the provisional suspension of the Escobal mine's exploitation license, the risk that it would not be able to successfully have the provisional license suspension lifted, the risk of the definitive suspension of the exploitation license while consultations were undertaken and the likely length of the suspensions. The Canadian Action seeks to recover investment losses suffered by the Canadian

[6] Robb Affidavit at para 9, MR Tab 2.
[7] Robb Affidavit at para 10, MR Tab 2.

Plaintiff and the Canadian Settlement Class because of the decline in Tahoe's share price that occurred following the correction.[8]

10. The Defendants denied and continue to deny these allegations.[9]

11. Following the submission of voluminous evidence, extensive cross-examinations and lengthy written submissions, the Canadian Plaintiff's motion for leave under Part XXIII.1 of the *OSA*, certification and for leave to file a Fresh as Amended Statement of Claim substituting 0799714 B.C. Ltd as a Defendant for Tahoe was heard on July 21st and 22nd, 2023. By Order dated August 26, 2021, the Canadian Court granted the leave motion, certified the action as a class proceeding and granted leave to file a Fresh as Amended Statement of Claim.[10]

12. Shortly before the hearing of the leave and certification motion, the Canadian Plaintiff filed an uncontested motion for approval of the Canadian Funding Agreement. The Court approved the Canadian Funding Agreement by Order dated July 20, 2021. Pursuant to the terms of the Canadian Funding Agreement, the Canadian Funder posted security with the Accountant of the Canadian Court in the amount of C$100,000 in July 2021 and an additional C$400,000 in September 2021.[11]

13. In the fall of 2021 (following the exchange of written submissions), the Canadian Plaintiff and Defendants reached an agreement by which the Defendants paid CAD$975,000.00 in costs of the leave and certification motions. A substantial portion of the costs claimed related to the expert fees of Dr. Claudia Escobar and Dr. Michael Hartzmark and translation fees.[12]

[8] Robb Affidavit at para 10, MR Tab 2.
[9] Robb Affidavit at para 11, MR Tab 2.
[10] Robb Affidavit at paras 12-19, MR Tab 2; *Dyck v. Tahoe Resources Inc.*, 2021 ONSC 5712.
[11] Robb Affidavit at para 20, MR Tab 2.
[12] Robb Affidavit at para 22, MR Tab 2.

14. At around the same time as the parties were resolving the costs award, they started negotiations on a Discovery Plan, and on the terms of a court order addressing notice of leave and certification and the opt-out process.[13]

B. The U.S. Action

15. An overlapping securities class action against Tahoe, Ronald Clayton, Kevin McArthur, Mark Sadler and Edie Hofmeister was commenced in the United States by the U.S. Plaintiff. The U.S. Action is being prosecuted in Nevada.[14]

16. The U.S. Action survived a motion to dismiss but has not yet been certified. There has been voluminous documentary discovery and several depositions taken in the U.S. Action.[15]

17. Although there is overlap between the Canadian Action and U.S. Action, there are important structural differences. *First*, the two actions have different class periods. The Canadian Action's class period is May 24, 2017 to July 5, 2017 (inclusive). The U.S. Action's class period is from April 3, 2013 to August 24, 2017 (inclusive).[16]

18. *Second*, the scope of the individuals and entities included in the overlapping part of the class periods (*i.e.* May 24, 2017 to July 5, 2017) are different. The U.S. Action's class definition is confined to individuals and entities who acquired shares over the NYSE or in the United States. The Canadian Action's class definition was originally global and, therefore, overlapped with the U.S. Action. By Order of the Ontario Superior Court dated June 13, 2023, the Canadian Action's class definition was amended to remove the overlap. The Canadian Action's class definition is now confined to any person who acquired Tahoe securities on any Canadian exchange or alternative trading system, or any

[13] Robb Affidavit at para 23, MR Tab 2.
[14] Robb Affidavit at para 24, MR Tab 2.
[15] Robb Affidavit at paras 25-26, MR Tab 2.
[16] Robb Affidavit at para 27, MR Tab 2.

exchange or trading platform outside Canada and the United States, during the class period of May 24, 2017 to July 5, 2017 (inclusive).[17]

C. Events leading to the Settlement Agreement

19. In early 2022, the Canadian Plaintiff, the U.S. Plaintiff and Defendants agreed to hold a mediation to explore the global resolution of the litigation. Robert Meyer, a highly experienced JAMS mediator, was engaged.[18]

20. The mediation was originally scheduled for July 28, 2022. In advance of the scheduled mediation, the parties exchanged detailed mediation briefs, and the Canadian Plaintiff obtained a confidential damages opinion from Dr. Michael Hartzmark. In the lead-up to the scheduled mediation, it became apparent that a global resolution with the Defendants would not be possible at that time because certain threshold issues with the U.S. Plaintiff and his counsel could not be resolved. The scheduled mediation was cancelled as a result.[19]

21. After the mediation scheduled for July 28, 2022 was cancelled, the parties continued to communicate informally about a possible global resolution and a solution to the impasse between the Canadian Plaintiff and U.S. Plaintiff on the threshold issues. As a result of these communications, the U.S. Plaintiff and Canadian Plaintiff were able to reach an agreement on the threshold issues in the fall of 2022 so that a formal mediation with Mr. Meyer was re-scheduled for January 31, 2023.[20]

22. On January 31, 2023, the parties met for a full-day mediation session with Mr. Meyer. Following hard-fought, arm's-length negotiations between the Canadian Plaintiff and the Defendants,

[17] Robb Affidavit at para 28, MR Tab 2.
[18] Robb Affidavit at para 29, MR Tab 2.
[19] Robb Affidavit at para 31, MR Tab 2.
[20] Robb Affidavit at para 32, MR Tab 2.

and between the Canadian Plaintiff and the U.S. Plaintiff, the parties were able to reach an agreement in principle for a global settlement of the claims against Defendants in both actions.[21]

23. A term sheet was subsequently signed on February 21, 2023. The terms of the agreement were then memorialized in the Settlement Agreement dated May 25, 2023, as discussed further below.[22]

D. The Settlement Agreement and its Implementation

24. The Defendants agreed to resolve all claims in the Canadian Action and U.S. Action for two separate lump sum payments: USD$19,500,000 to resolve the claims in the U.S. Action and USD$13,500,000 to resolve the claims in the Canadian Action. Each settlement is to be administered separately in the jurisdiction in which each Action is pending. The Canadian Settlement Amount includes all legal fees, disbursements, taxes, the Canadian Funding Commission and administration expenses.[23]

25. A fundamental component of the Settlement Agreement is the global resolution of all claims against the Defendants. Consequently, the Settlement Agreement requires approval by both the Canadian Court and the U.S. Court to become effective.[24]

26. The U.S. Plaintiff filed her materials for preliminary approval of the Settlement Agreement, approval of notice, approval of the U.S. Plan of Allocation and the start of the claims process. A motion hearing has been scheduled by the U.S. Court for October 6, 2023.[25]

27. If the Settlement Agreement is approved by both Courts, the claims of all Canadian Settlement Class Members will be fully and finally released, and the Canadian Action will be dismissed. The

[21] Robb Affidavit at para 33, MR Tab 2.
[22] Robb Affidavit at para 34, MR Tab 2.
[23] Robb Affidavit at para 35, MR Tab 2; Settlement Agreement sections 1(z), 1(ttt), 6, NOM Schedule A, Ex 1.
[24] Robb Affidavit at para 36, MR Tab 2; Settlement Agreement section 47, NOM Schedule A, Ex 1.
[25] Robb Affidavit at para 37, MR Tab 2.

Settlement Agreement is not an admission of liability, wrongdoing or fault on the part of the Defendants.[26]

28. Other key terms of the Settlement Agreement include the following:

(a) the Defendants have the right to terminate the Settlement Agreement if the requests for exclusion from the Canadian Settlement Class and U.S. Settlement Class exceed the Opt-Out Threshold. The criteria for the Opt-Out Threshold are established in a confidential Supplemental Agreement;[27]

(b) if the Settlement Agreement becomes effective, the Released Defendant Parties are released from Released Canadian Claims, meaning any and all pending claims arising from the same operative facts as the Canadian Action, and any and all causes of action of every nature and description that the Canadian Plaintiff or any other member of the Canadian Settlement Class: (i) asserted in the Canadian Action or (ii) could have asserted in the Canadian Action or any forum, domestic or foreign that arise out of, are based upon, or relate to, directly or indirectly, in whole or in part: (a) the allegations, transactions, facts, events, matters or occurrences, representations involved, set forth, alleged or referred to in the Canadian Action; and (b) the purchase or sale or other acquisition or disposition, or holding of Tahoe securities on any Canadian exchange or any Canadian alternative trading system, or on any exchange or trading platform outside Canada and the United States, during the class period in the Canadian Action. The Released Defendant Parties are granted a similar release with respect to the U.S. Action and Released U.S. Claims;[28]

[26] Robb Affidavit at para 38, MR Tab 2; Settlement Agreement sections 1(vv), 3, 58, NOM Schedule A, Ex 1.
[27] Robb Affidavit at para 39(a), MR Tab 2; Settlement Agreement section 49, NOM Schedule A, Ex 1.
[28] Robb Affidavit at para 39(b), MR Tab 2.

(c) there is no provision for any reversion of the Canadian Settlement Amount to the Defendants or their insurers unless the Settlement Agreement is not approved or does not become effective;[29]

(d) the Settlement Agreement will become effective upon the following conditions being satisfied: (i) the U.S. Preliminary Approval Order is entered (a copy of which is attached to the Settlement Agreement as Exhibit "A"); (ii) the Canadian First Order is entered; (iii) the U.S. Settlement Amount is paid into the U.S. Escrow Account and the Canadian Settlement Amount is paid into the Canadian Escrow Account; (iv) the U.S. Court approves the Settlement and the U.S. Judgment is entered (a copy of the form of order is attached to the Settlement Agreement as Exhibit "C") and becomes Final[30]; and (v) the Canadian Court approves the Settlement, the Canadian Second Order is entered and becomes Final. The Canadian First Order was entered on June 15, 2023. The other conditions for the Settlement Agreement becoming effective have yet to be completed;[31] and

(e) the approval of the request for Canadian Plaintiff's Counsel's fees and the Canadian Plan of Allocation is not a condition of approval for the Settlement Agreement.[32]

E. Dissemination of Canadian First Notice

29. Canadian First Notice was disseminated in accordance with Part 1 of the Canadian Plan of Notice with one exception. Part 1 of the Canadian Plan of Notice provides that the long-form Canadian First Notice be posted on the *Registre des actions collectives*. That step could not be

[29] Robb Affidavit at para 39(g), MR Tab 2; Settlement Agreement section 6, NOM Schedule A, Ex 1.
[30] *i.e.* after the appeal period expires.
[31] Robb Affidavit at para 39(h), MR Tab 2; Settlement Agreement section 47, NOM Schedule A, Ex 1.
[32] Robb Affidavit at para 39(j), MR Tab 2; Settlement Agreement section 23, NOM Schedule A, Ex 1.

completed because that system requires a Quebec court file number to do so. Canadian Plaintiff's Counsel does not believe this materially impacted the effectiveness of Canadian First Notice.[33]

F. Canadian Second Notice

30. The parties have agreed on the form, content and method of disseminating Canadian Second Notice.

31. Part 2 of the Canadian Plan of Notice provides that Canadian Second Notice will be disseminated as follows:

(a) Long-form Canadian Second Notice:

i. posted, in English and French, by Canadian Plaintiff's Counsel on https://www.siskinds.com/class-action/tahoe/ and by the Canadian Claims Administrator on its webpage dedicated to the Canadian Action; and

ii. provided by Canadian Plaintiff's Counsel to any potential Canadian Settlement Class Member who has contacted Canadian Plaintiff's Counsel for the purposes of receiving notice of developments in the Canadian Action (by email or mail as the case may be);

(b) Short-form Canadian Second Notice:

i. disseminated as a news release across Canada NewsWire (in English and French); and

ii. sent to Institutional Shareholder Services Inc. (ISS).[34]

32. Canadian Second Notice provides, among other things: notice that the Canadian Court approved the settlement and the fees and disbursements of Canadian Plaintiff's Counsel (if they are approved), and a reminder of the ongoing claims process and procedure for making a claim.

[33] Robb Affidavit at paras 43-45, MR Tab 2; Affidavit of Cameron Azari sworn September 13, 2023 ("**Second Azari Affidavit**") at para 6, MR Tab 5.
[34] Robb Affidavit at para 48, MR Tab 2; Canadian Plan of Notice, NOM Schedule A, Ex 3.

33. In combination with Canadian First Notice, Part 2 of the Canadian Plan of Notice will be effective in notifying Canadian Settlement Class Members of the ongoing claims process and procedure for making a claim.[35]

G. The Ongoing Claims Procedure

34. The procedure to make a claim for compensation from the Canadian Net Settlement Fund started concurrently with the dissemination of Canadian First Notice on July 7, 2023. The Canadian Claims Administrator has received 27 claims as of September 13, 2023.[36]

35. The Claims Bar Deadline is January 3, 2024. It is typical in the claims administration process for most claims to be received closer to the Claims Bar Deadline. The number of claims filed with the Canadian Claims Administrator will likely increase significantly as the deadline gets closer.[37]

H. Objections and Opt-Outs

36. No objections to the Settlement Agreement, the Canadian Plan of Allocation or Canadian Plaintiff's Counsel's fee request were received.[38]

37. Three invalid Opt Out Elections were received ("**Opt-Out Request 1**", "**Opt-Out Request 2**" and "**Opt-Out Request 3**", respectively).

38. Opt-Out Request 1 is invalid because it failed to provide the transaction details and supporting documentation for those transactions required in the Opt Out Election approved by order of this Court dated June 13, 2023. The Canadian Claims Administrator requested the missing transaction details but did not receive those details from the person ("**OPR-1**") making the request.[39]

---

[35] Affidavit of Cameron Azari sworn June 1, 2023 ("**First Azari Affidavit**") at para 37, MR Tab 4.
[36] Second Azari Affidavit at paras 10-11, MR Tab 5.
[37] Robb Affidavit at para 42, MR Tab 2; Second Azari Affidavit at para 11, MR Tab 5.
[38] Robb Affidavit at para 51, MR Tab 2.
[39] Azari Affidavit at paras 14-15, MR Tab 2.

39. Canadian Plaintiff's Counsel contacted the person making the opt out request ("**OPR-1**"). OPR-1 indicated that they did not have the information and did not plan on providing it. OPR-1 further indicated that she had no plan to commence an action or otherwise take steps to recover her Tahoe trading losses. OPR-1 made the opt out request because she did not want any further involvement with the Canadian Action, or the claims process, for personal family reasons.[40]

40. Opt-Out Request 2 is also invalid. The person making the request ("**OPR-2**") failed to provide the transaction details and supporting documentation for those transactions as is required. OPR-2 indicated that they no longer had this information. Opt-Out Request 2 was also post-marked September 6, 2023, a day after the Court imposed deadline of September 5, 2023 for opt outs. The Canadian Claims Administrator informed OPR-2 that Opt-Out Request 2 was invalid and the reasons for it being invalid.[41]

41. Opt-Out Request 3 is invalid too. The person making the request ("**OPR-3**") did not provide the transaction details and supporting documentation required. The person making the request indicated that this was because they did not acquire any Tahoe shares during the class period in the Canadian Action. It, therefore, appears that OPR-3 is not a member of the Canadian Settlement Class. Opt-Out Request 3 is also invalid because it was sent after the opt out deadline. The Canadian Claims Administrator informed OPR-3 that Opt-Out Request 3 was invalid and the reasons for it being invalid via email.[42]

42. Based on the Opt Out Elections received to date, the Opt Out Threshold will not be triggered. That could change depending on the number of Opt Out Elections received in the U.S. Action.

[40] Azari Affidavit at para 16, MR Tab 2.
[41] Second Azari Affidavit at paras 17-18, MR Tab 5.
[42] Second Azari Affidavit at paras 18-19, MR Tab 5.

I. Factors Supporting the Fairness and Reasonableness of the Settlement

a) Information Available to Canadian Plaintiff's Counsel

43. Canadian Plaintiff's Counsel possessed more than adequate information to make an informed recommendation concerning resolution of the Canadian Action on the basis upon which it was resolved.[43] Although the discovery process was just beginning in the Canadian Action, the Canadian Plaintiff and Canadian Plaintiff's Counsel had access to documentary evidence, expert evidence and other sources of information that is typical of a later stage of an action. In particular, they had:

(a) documents, obtained with the assistance of local Guatemalan counsel, from the Guatemalan Supreme Court's and Constitutional Court's files for the CALAS Litigation, many of which were translated;

(b) documents, obtained with the assistance of local Guatemalan counsel, from Guatemalan governmental agencies concerning the Escobal mine and its licenses, which were translated;

(c) the decisions of the Guatemalan Supreme Court and Constitutional Court in the CALAS Litigation;

(d) prior to the Canadian Action being commenced, a preliminary privileged and confidential opinion from Guatemalan counsel on the likely outcomes of the CALAS Litigation;

(e) the motion records for the leave and certification motions, including: the reports of Dr. Claudia Escobar and Francisco Chavez Bosque on the likely outcomes of the CALAS Litigation, the reports of Dr. Michael Hartzmark and Paul Gompers on the economic materiality of the asserted misrepresentations and the transcripts of these experts' cross-examinations;

[43] Robb Affidavit at para 55, MR Tab 2.

(f) the Defendants' written and oral submissions for the leave and certification hearing;

(g) the expert damages opinion of Dr. Hartzmark for the mediation;

(h) the Defendants' mediation brief, the positions taken by the Defendants at the mediation and the insights of experienced mediator, Robert Meyer;

(i) the U.S. Plaintiff's mediation brief, which contained excerpts from documents obtained in the U.S. Action's discovery process and transcripts from depositions in the U.S. Action;

(j) internal Tahoe and third-party documents from the discovery process in the U.S. Action that were posted on PACER in support of the U.S. Plaintiff's motions for the issuance of letters rogatory; and

(k) all Tahoe's relevant disclosure documents and other publicly available information concerning the Defendants.[44]

b) Litigation Risks

44. The Canadian Action faces various generic risks inherent in all litigation that influence the range of outcomes, as well as case specific risks.[45]

45. 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 (which was serious in this case given that some witnesses reside in Guatemala and other foreign countries) or will not give the evidence expected of them, and the risk of adverse procedural or evidentiary rulings.[46]

46. 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 Canadian Plaintiff's ability to prove his case.[47]

[44] Robb Affidavit at para 55, MR Tab 2.
[45] Robb Affidavit at para 59, MR Tab 2.
[46] Robb Affidavit at para 60, MR Tab 2.
[47] Robb Affidavit at para 61, MR Tab 2.

47. The passage of time impacts the likelihood that Canadian Settlement Class Members would come forward to prove their individual claim for compensation if the Canadian Plaintiff was successful on the common issues but there was no aggregate damages award. By the time the discovery and trial process concluded, including appeals, likely more than 10 years would have passed from the end of the class period. With the passage of that amount of time, some Canadian Settlement Class Members may no longer be alive, corporate Canadian Settlement Class Members may no longer exist, some Canadian Settlement Class Members may not have retained the required transaction records to support their claims and some Canadian Settlement Class Members may not be inclined to file a claim.[48]

48. The case specific risks are those related to issues and challenges arising on the particular facts of the Canadian Action. These are explained below.

i. Proof of a misrepresentation (undisclosed material fact)

49. The core of the Canadian Plaintiff's claim is that Tahoe and Mr. Clayton failed to disclose in the May 24, 2017 news release the materially increased risk of a provisional and/or definitive suspension of the Escobal mine's exploitation license posed by the CALAS Litigation.

50. The Canadian Plaintiff advanced claims under Part XXIII.1 of the *OSA*, which requires proof of a "misrepresentation". A "misrepresentation" is defined in the *OSA* as "(a) an untrue statement of material fact, or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made". A "material fact" is "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities".[49]

[48] Robb Affidavit at para 62, MR Tab 2.
[49] *OSA*, section 1(1).

51. While Canadian Plaintiff's Counsel believed, and continues to believe, that the Canadian Plaintiff and Canadian Settlement Class have a strong argument that the May 24, 2017 news release contained misrepresentations, there was a risk that the Canadian Plaintiff would be unable to establish this at trial.

52. The factual predicates for the Canadian Plaintiff's allegation that there was a materially increased risk of an Escobal license suspension were that: (a) there were Xinka with a right to be consulted under ILO 169 by the MEM in relation to the granting of the Escobal exploitation license; (b) the Xinka peoples had not been consulted in accordance with ILO 169; and (c) the likely remedy for the failure to consult in accordance ILO 169 was a provisional suspension of the Escobal exploitation license (while the amparo litigation ran its course) and then a definitive suspension of the Escobal exploitation license (while the required consultations were conducted). It was expected that elements (a) and (c) would be hotly contested at trial. In particular, it was anticipated that the Defendants would point to their reliance on the MEM in granting the Escobal exploitation license and the purported uncertainty of Guatemalan law to argue that there was no misrepresentation in the May 24, 2017 news release.[50]

53. At trial the Canadian Plaintiff would have also faced the argument that there was no misrepresentation because the risk of a license suspension was publicly known and had been previously disclosed in Tahoe's pre-May 24, 2017 disclosures. For example, Tahoe's Annual Information Form dated March 9, 2016 stated that:[51]

> The validity of the licenses related to the Escobal, La Arena and Shahuindo Mines can be uncertain and may be contested. There is no assurance that applicable governmental bodies will not revoke or significantly alter the conditions of applicable licenses that are required by the Escobal, La Arena and Shahuindo Mines. Changes to Guatemalan or Peruvian laws, including new mining legislation or adverse court rulings, could materially and adversely impact our rights to exploration and exploitation licenses necessary for the Escobal, La Arena and Shahuindo Mines.

[50] Robb Affidavit at para 67, MR Tab 2.
[51] Robb Affidavit at para 68, MR Tab 2.

54. On the leave motion and at the mediation, the Defendants also argued that some market analysts understood that there was a risk to the Escobal license, including from previous litigation involving CALAS that failed. The Defendants argued that the risk posed by the CALAS Litigation was no different and, therefore, the risk had already been disclosed to investors.[52]

55. There was also the risk that the Canadian Plaintiff would be unable to establish the materiality of the asserted misrepresentations. On the leave motion, the Defendants' economic expert Dr. Gompers opined that, given the information already available to investors, the allegedly misrepresented information would not have had a significant effect on the market price of Tahoe's shares. Dr. Gompers' opinion was also that Dr. Hartzmark's reports did not adequately establish the materiality of the asserted misrepresentations. It was expected that the Defendants would submit similar evidence at trial to argue that the misrepresentations were not material.[53]

56. These arguments were litigated in the context of the *OSA* leave motion, but only on the "reasonable possibility of success" standard of proof. At trial, the Canadian Plaintiff would have been required to prove the existence of a misrepresentation in the May 24, 2017 news release on a balance of probabilities.

ii. Meeting the heightened non-core document burden

57. Part XXIII.1 of the *OSA* puts an elevated burden of proof on plaintiffs for misrepresentations in non-core documents, of which Tahoe's May 24, 2017 news release is an example. Even if the Canadian Plaintiff successfully established a misrepresentation in the news release, he would still have to meet the elevated non-core document burden at trial to be successful.

[52] Robb Affidavit at para 69, MR Tab 2.
[53] Robb Affidavit at para 70, MR Tab 2.

58. That elevated non-core document burden required the Canadian Plaintiff to prove one of the following with respect to the May 24, 2017 news release: (a) that the Defendants knew, at the time the news release was released, that it contained the misrepresentation(s); (b) at or before the time the news release was released, the Defendants deliberately avoided acquiring knowledge it contained the misrepresentation(s); and (c) through action or failure to act, the Defendants were guilty of gross misconduct in connection with the release of the news release that contained the misrepresentation(s).[54]

59. Based on the Defendants' arguments on the leave motion and in the context of the mediation, it was expected that they would argue that the non-core document burden had not been met because:

(a) they reasonably relied on: the MEM's determination that there were no Xinka to consult under ILO 169 when the MEM issued the Escobal license; and the Guatemalan government's 2002 official census showing only a few Xinka in the area of the mine;

(b) Tahoe was unaware of the presence of any Xinka in the Escobal mine's area of influence;

(c) based on Guatemalan jurisprudence, even if a consultation obligation did exist, the suspension of the Escobal license was a "black swan" event that could not be foreseen; and

(d) there was a history of previous unsuccessful challenges to the Escobal mine's license on a variety of theories, and the Defendants reasonably believed this was another unmeritorious claim.[55]

60. Although the Canadian Plaintiff and his counsel strongly believed that there was evidence that undermined these arguments, including in the documents and other information referenced above, there was a risk that the trial court would agree with the Defendants.

---

[54] *OSA*, section 138.4(1).
[55] Robb Affidavit at para 74, MR Tab 2.

61. The Canadian Plaintiff also faced risk because of the relative novelty of his stand-alone non-core document misrepresentation claim. This is the only secondary market securities class action under Part XXIII.1 that has been prosecuted solely on misrepresentations in a non-core document.[56] Moreover, at the commencement of the Canadian Action, there was no appellate jurisprudence and limited lower court jurisprudence on the standard that plaintiffs must meet to satisfy the elevated non-core document burden under Part XXIII.1 of the *OSA*. Indeed, the Canadian Plaintiff drew on American authorities to help support his interpretation of the non-core document burden on the leave motion. There was a risk that the judicial interpretation of the non-core document standard would be more onerous than anticipated by Canadian Plaintiff's Counsel.[57]

iii. Proof of Damages

62. For mediation purposes, Dr. Hartzmark prepared an estimate of the damages suffered by the Canadian Settlement Class Members. Dr. Hartzmark's calculation of maximum damages at trial for the Canadian Settlement Class based on the statutory formula under section 138.5(1) of the *OSA* was USD$70.5 million. The Canadian Settlement Amount is approximately 19.2% of that damages estimate.[58]

63. The percentage is higher when the beneficial costs award of CAD$975,000 is taken into account. That costs award is exclusively for the benefit of the Canadian Settlement Class Members. Converting the costs award to U.S. dollars as of September 11, 2023, based on the Bank of Canada daily exchange rate (USD$1.00 equals CAD$1.3581), the amount available to Canadian Settlement Class Members is approximately 20.2% of the estimated damages.[59]

---

[56] Note: there have been several other cases where a non-core document misrepresentation claim was brought alongside a core document misrepresentation claim. See *e.g. Kauf v Colt Resources, Inc*, 2019 ONSC 2179.
[57] Robb Affidavit at para 76, MR Tab 2.
[58] Robb Affidavit at para 77, MR Tab 2.
[59] Robb Affidavit at para 78, MR Tab 2.

64. There was a risk that actual damages recoverable from the Defendants at trial under Part XXIII.1 of the *OSA* would be significantly less.

65. Under section 138.5(3) of the *OSA*, defendants can rebut the damages calculated pursuant to the statutory formula under section 138.5(1) by proving that the change in the market price of the securities is "unrelated" to the misrepresentations.[60]

66. There was a risk that the Defendants would be able to establish that all or part of the share price decline following the asserted public correction in Tahoe's July 5, 2017 news release was unrelated to the misrepresentations. Based on the arguments advanced by the Defendants on the leave motion and at the mediation, the Canadian Plaintiff anticipated that at trial the Defendants would argue that the decline in share price following the July 5 news release was attributable to the disclosure of the *actual* outcome of the suspension of the Escobal mine's license rather than the correction of the alleged misrepresentation that there was an increased *risk* of a license suspension. Indeed, on the leave motion, the Defendants' expert Dr. Gompers' opinion on the materiality of the misrepresentations argued that there was a disconnect between the alleged misrepresentation and the alleged corrective disclosure. If this argument was accepted, it had the potential to eliminate or substantially reduce the damages payable by the Defendants.[61]

c) Immediate Benefit

67. The Settlement eliminates the above identified risks to recovery and provides an immediate and substantial benefit to Canadian Settlement Class Members in exchange for the release of their claims.

[60] *OSA*, section 138.5(3).
[61] Robb Affidavit at para 81, MR Tab 2.

d) Access to Insurance Proceeds

68. In the course of the litigation, the Canadian Plaintiff obtained disclosure of Tahoe's directors and officers liability insurance policies that are responsive to the claims in the Canadian Action. Under the terms of those policies, the policy limits were eroded by ongoing defence costs in the Canadian Action and the US Action. By the time of the mediation, a significant amount of the available insurance had been eroded by defence costs in the two actions. If the litigation was not settled, it is highly likely that there would have been a further significant reduction in the available insurance as the litigation continued on two fronts in Canada and the U.S., thereby eliminating or reducing this important source of recovery for the Canadian Settlement Class Members.[62]

J. Canadian Plan of Allocation

69. The Canadian Plaintiff seeks approval of the Canadian Plan of Allocation for the purpose of allocating the Canadian Net Settlement Fund and distributing it to Canadian Settlement Class Members who file valid and timely claims.

70. The key elements of the Canadian Plan of Allocation are as follows (definitions in the Canadian Plan of Allocation apply to this section):

(a) the objective of the Canadian Plan of Allocation is to equitably distribute the Canadian Net Settlement Fund[63] among Authorized Canadian Claimants (i.e. those who submit a valid claim), while avoiding double compensation; [64]

(b) Canadian Claimants have until January 3, 2024 to submit a claim to the Canadian Claims Administrator;[65]

---

[62] Robb Affidavit at para 82, MR Tab 2.
[63] "Canadian Net Settlement Fund" means the Canadian Settlement Fund less: (i) court-awarded attorneys' fees and disbursements of Canadian Plaintiff's Counsel; (ii) Canadian Notice and Administration Expenses; (iii) the Canadian Funding Commission; (iv) Taxes; and (v) any other fees or expenses approved by the Canadian Court.
[64] Robb Affidavit at para 88(a), MR Tab 2; Plan of Allocation para 2, NOM Schedule A, Ex 2.
[65] Robb Affidavit at para 88(d), MR Tab 2.

(c) if a U.S. Settlement Class Member inadvertently submits a claim to the Canadian Claims Administrator, they will forward the claim to the U.S. Claims Administrator;[66]

(d) in the event of a denial of a claim by the Canadian Claims Administrator, there is a process whereby a Canadian Claimant can request reconsideration of their claim. A decision of the Canadian Claims Administrator on reconsideration can be appealed, in prescribed circumstances, to an arbitrator appointed by the Court. The arbitrator's decision will be final and not subject to appeal;[67] and

(e) this is a non-reversionary settlement and, as such, the Canadian Net Settlement Fund will be distributed on a *pro rata* basis to Authorized Canadian Claimants. Each Authorized Canadian Claimant's *pro rata* interest in the Canadian Net Settlement Fund will depend on their Recognized Loss. The Recognized Loss formula mirrors the statutory formula in section 138.5 of the *OSA* for Tahoe shares acquired during the class period (referred to as "**Tahoe Eligible Canadian Shares**") as follows:[68]

***OSA* pinpoint**	**Eligibility Criteria**	**Calculation of Recognized Loss**
Section 138.5(1)	Tahoe Eligible Canadian Shares disposed of on or before July 5, 2017	0
Section 138.5(1)1	Tahoe Eligible Canadian Shares disposed of between July 6, 2017 and July 19, 2017 (inclusive)	The Recognized Loss shall be the difference between the Acquisition Expense (the price paid by a Canadian Claimant (including brokerage commissions) to acquire a Tahoe Eligible Canadian Share) and Disposition Proceeds (the price per Tahoe Eligible Canadian Share received by a

[66] Robb Affidavit at para 88(f), MR Tab 2; Plan of Allocation para 21, NOM Schedule A, Ex 2.
[67] Robb Affidavit at para 88(g), MR Tab 2; Plan of Allocation paras 22-37, NOM Schedule A, Ex 2.
[68] Robb Affidavit at para 88(h), MR Tab 2; Plan of Allocation para 9, NOM Schedule A, Ex 2.

		Canadian Claimant on the disposition of a Tahoe Eligible Canadian Share)
Section 138.5(1)2	Tahoe Eligible Canadian Shares disposed of on or after July 20, 2017	the Recognized Loss shall be the lesser of (i) and (ii): (i) The difference between the Acquisition Expense and Disposition Proceeds; and (ii) The difference between the Acquisition Expense and $6.84
Section 138.5(1)2,3	Tahoe Eligible Canadian Shares that were exchanged for cash or shares of Pan American Silver Corp. in the Plan of Arrangement	The difference between the Acquisition Expense and $6.84

71. In the above chart, $6.84 is the volume weighted average price of Tahoe's common shares on the Toronto Stock Exchange in the 10 days following the alleged public correction on July 5, 2017, calculated in accordance with the General Regulation, RRO 1990, Reg 1015 sections 250-251 under the *OSA*.

K. Canadian Plaintiff's Counsel's Fees and Disbursements

(a) Overview of the Request

72. Canadian Plaintiff's Counsel seeks the approval of fees and disbursements, plus applicable taxes on both, as follows:

ITEM	AMOUNT
Fee Request	USD$3,780,000.00
Taxes on Fee Request	USD$491,400.00
Disbursements	CAD$1,206,617.95
Taxes on Disbursements	CAD$156,701.99

Total Fee and Disbursement Request (including taxes)	**USD$4,271,400.00 plus CAD$1,363,319.94**

73. Canadian Plaintiff's Counsel's request is consistent with the contingency fee retainer agreement entered into with the Canadian Plaintiff ("**Retainer Agreement**").[69] The Retainer Agreement provides that Canadian Plaintiff's Counsel will be entitled to a contingency fee of 28% of the "Amount Recovered" plus applicable taxes. The fee request of USD$3,780,000 plus applicable taxes is 28% of USD$13,500,000, which is the "Amount Recovered".[70]

74. Consistent with the terms of the Retainer Agreement, costs awarded to the Canadian Plaintiff of CAD$975,000 for the leave and certification motion are not included in the calculation of Canadian Plaintiff's Counsel's fee request. The entirety of that costs award accrues to the benefit of the Canadian Settlement Class.[71]

75. The Retainer Agreement also allows Canadian Plaintiff's Counsel to charge interest on disbursements incurred. The interest is CAD$36,417.77. Canadian Plaintiff's Counsel is forgoing that interest request.[72]

(b) Risks Assumed by Canadian Plaintiff's Counsel Supporting the Fee Request

76. Prior to the commencement of the Canadian Action, Canadian Plaintiff's Counsel assumed the risk of being paid their fees and reimbursed for disbursements incurred only if the Canadian Action was successful. This risk was significant. The Canadian Action is a complex securities class action that had an uncertain outcome. In Canadian Plaintiff's Counsel's experience, the cost in legal

[69] Robb Affidavit at para 92, MR Tab 2; Contingency Fee Retainer Agreement dated March 1, 2018 ("**Retainer Agreement**") at paras 10-18, Ex A to the Affidavit of Brian Dyck sworn May 29, 2023 ("**Dyck Affidavit**"), MR Tab 3.
[70] Robb Affidavit at para 94, MR Tab 2.
[71] Robb Affidavit at para 96, MR Tab 2.
[72] Robb Affidavit at para 95, MR Tab 2.

fees incurred and disbursements expended in prosecuting a complex securities class action like this one can be very large.[73]

77. Securities class actions in Ontario are generally hard fought and can be protracted. The Canadian Action is no exception. It was commenced more than five years ago. Leave and certification were granted following a hotly contested motion. The parties were only able to reach a Settlement after a complex and protracted mediation, involving not only the Canadian litigants but the U.S. litigants as well.[74]

78. At the commencement of the Canadian Action, Canadian Plaintiff's Counsel was faced with the risks inherent to the prosecution of securities class actions in Ontario. It was anticipated that:

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

(b) there would be significant resistance to the motion for leave to assert the right of action under Part XXIII.1 of the *OSA.* A leave motion requires a preliminary assessment of the merits. The plaintiff must show that there is a "reasonable possibility that the action will be resolved at trial in favour of the plaintiff". In Canadian Plaintiff's Counsel's experience, as was substantially borne out in this case, a leave motion typically requires:

i. considerable front-end loading wherein a plaintiff must conduct a thorough investigation and analysis into the public record and obtain expensive expert reports in order to establish a reasonable possibility of establishing the key elements of his case;

ii. lengthy written submissions, cross-examinations and hearings; and

iii. appeals;

[73] Robb Affidavit at paras 97-98, MR Tab 2.
[74] Robb Affidavit at para 99, MR Tab 2.

(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 lengthy trial with an uncertain outcome; and

(f) if third party funding was not secured there would be exposure to adverse costs awards, including the fees and disbursements of defence counsel and their various experts, which would be considerable, most certainly in the millions of dollars.[75]

79. It has been Canadian Plaintiff's Counsel's experience that, despite meritorious cases being actively litigated and making their way to trial, the financial state of the issuer defendant can deteriorate rapidly and unexpectedly, precluding the likelihood of any meaningful recovery for the class and, by extension, recovery of Canadian Plaintiff's Counsel's fees and self-financed disbursements.

80. *Canada Lithium* was a case involving Canadian Plaintiff's Counsel where, after leave under Part XXIII.1 of the *OSA* and certification and before examinations for discovery, the issuer defendant became insolvent. Meanwhile, the limits of responsive insurance had been substantially eroded by defence costs. As a result, the *Canada Lithium* action was resolved for a modest sum. The class was precluded from meaningful recovery and Siskinds, as class counsel, did not recover its docketed time.[76]

81. The risk of Tahoe, the issuer in this case, being unable to pay was serious at the outset of the litigation. Tahoe's exploitation license for its crown-jewel Escobal mine in Guatemala had been suspended and the timeline for the resumption of operations at Escobal was unclear. As a result, there was significant uncertainty about Tahoe's ability to operate profitably in the future. Moreover, the

[75] Robb Affidavit at para 100, MR Tab 2.
[76] Robb Affidavit at para 102, MR Tab 2. See *Keyton v Canada Lithium Corp*., 2016 ONSC 7354 at paras 34-36, 49.

value of any responsive insurance coverage was unknown to Canadian Plaintiff's Counsel. As a result, the Defendants' ability to satisfy a judgment at the commencement of the litigation was unclear.[77]

(c) Efforts of Canadian Plaintiff's Counsel to Date

82. Canadian Plaintiff's Counsel has performed significant work on behalf of Class Members. Canadian Plaintiff's Counsel:

(a) undertook an investigation of the allegations against the Defendants, including obtaining documents from the Guatemalan Supreme Court and Constitutional Court, and obtaining a preliminary opinion on the litigation from Guatemalan counsel prior to commencing the Canadian Action;

(b) prepared the Statement of Claim and made amendments to the Statement of Claim;

(c) undertook further investigations, obtained further documents from Guatemala, had those documents translated (through Relativity or by official translators) and reviewed them;

(d) prepared voluminous evidentiary materials for the application for leave under Part XXIII.1 of the *OSA*, including expert reports, Tahoe's public documents, and formal translations of key documents obtained from Guatemala;

(e) prepared lengthy written submissions and successfully argued the Part XXIII.1 leave and certification motions;

(f) obtained and reviewed key documents from the U.S. discovery process that were posted on PACER;

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

[77] Robb Affidavit at para 103, MR Tab 2.

(h) obtained a damages opinion from Dr. Michael Hartzmark for the mediation; and

(i) responded to Class Member inquiries.[78]

(d) Fees Financed to date

83. Since the commencement of the Canadian Action up to and including September 7, 2023, Canadian Plaintiff's Counsel has docketed fees of CAD$1,870,082 plus applicable taxes.

84. The hourly rates and hours expended since the commencement of the Canadian Action up to and including September 7, 2023, before applicable taxes, by the primary lawyers, students-at-law and law clerks on the file are as follows (all currency in Canadian dollars):[79]

LAWYER/CLERK	**HOURS**	**HOURLY RATE**	**TOTAL**
Charles Wright	32.70	$1,000.00	$32,700.00
Michael Robb	3	$700.00	$2,100.00
	12.80	$750.00	$9,600.00
	3.10	$800.00	$2,480.00
	26.00	$850.00	$22,100.00
	228.90	$900.00	$206,010.00
	58	$925.00	$53,650.00
Anthony O'Brien	8.60	$450.00	$3,870.00
	61.90	$500.00	$30,950.00
	75.70	$600.00	$45,420.00
	114.60	$650.00	$74,490.00
	572.40	$700.00	$400,680.00
	105.5	$725.00	$76,487.50
Garett Hunter	50.40	$165.00	$8,316.00
	99.40	$200.00	$19,880.00
	129.20	$275.00	$35,530.00
	140.20	$325.00	$45,565.00
	405.70	$375.00	$152,137.50
	90.70	$425.00	$38,547.50
	251.20	$450.00	$113,040.00
Nicholas Baker	26.60	$375.00	$9,975.00
	111.10	$400.00	$44,440.00
	59.40	$500.00	$29,700.00

[78] Robb Affidavit at para 105, MR Tab 2.
[79] Robb Affidavit at para 108, MR Tab 2.

	54.70	$650.00	$35,555.00
Sana Ebrahimi	21.10	$400.00	$8,440.00
	378.80	$450.00	$170,460.00
	98.50	$500.00	$49,250.00
Dawn Sullivan	0.10	$500.00	$50.00
	18.30	$600.00	$10,980.00
	28.70	$650.00	$18,655.00
James Boyd	11.70	$165.00	$1,930.50
Aylin Manduric	72.50	$175.00	$12,687.50
Enje Daniels	16.30	$150.00	$2,445.00
	8.50	$165.00	$1,402.50
Maurice Benzaquen	125.60	$175.00	$21,980.00
Avi Freedland	25.40	$175.00	$4,445.00
Georgia Hamilton	6.40	$220.00	$1,408.00
Mariana Toledo	11.10	$165.00	$1,831.50
	19.80	$175.00	$3,465.00
Katherine Shapiro	25.50	$180.00	$4,590.00
Diana Stepner	14.00	$115.00	$1,610.00
Jordyn Liebman	11.50	$115.00	$1,322.50
Michael McAlpine	7.10	$170.00	$1,207.00
Nicole Young	24.70	$225.00	$5,557.50
Donna McEvoy	29.50	$200.00	$5,900.00
	22.90	$210.00	$4,809.00
	11.50	$220.00	$2,530.00
	45.40	$245.00	$11,123.00
Britanny Basra	18.90	$135.00	$2,551.50
	33.80	$150.00	$5,070.00
	11.40	$160.00	$1,824.00
Stacey O'Neill	89.40	$210.00	$18,774.00
Jill Liu	5.60	$100.00	$560.00

(e) Disbursements incurred to date

85. Since the commencement of the Canadian Action up to and including September 7, 2023, Canadian Plaintiff's Counsel has incurred disbursements of CAD$1,206,617.95 plus applicable taxes. The following chart provides a breakdown of those disbursements by category:[80]

Disbursement	Amount
Taxable Disbursements	
Courier	$764.25

[80] Robb Affidavit at para 110, MR Tab 2.

Law Society Surcharge		$100.00
Copies		$9,151.10
Long Distance Telephone Charges		$308.55
Postage		$29.29
Research/Resource Material		$10,916.16
Binding Supplies		$15.40
Agent's Fees and Disbursements		$35,408.96
Pacer	$875.67	
Translation fees	$32,536.29	
Waddell Phillips PC re Independent Legal Advice	$1,710.00	
Donaldson Law Clerk Services	$287.00	
Corporate Profile Search/Cyberbahn/OnCorp Direct		$78.40
Expert Reports and Analysis		$1,113,890.20
Guatemalan Counsel	$22,121.45	
Dr. Claudia Escobar	$633,074.01	
Dr. Michael Hartzmark	$458,694.74	
Mileage/Travel/Meals		$16,979.37
Mediation/Arbitration Costs		$5,940.15
News Releases		$2,189.49
Transcripts		$3,798.83
Transfer/Retrieve/Inspect Documents		$318.53
E-Discovery Services and Data Hosting in Relativity		$5,511.27
HST		**$156,701.99**
TOTAL TAXABLE DISBURSEMENTS		**$1,205,399.95**

Non Taxable Disbursements	
Statement of Claim Fee	$220.00
Notice of Motion Fee	$998.00
TOTAL NON TAXABLE DISBURSEMENTS	**$1,218.00**

TOTAL DISBURSEMENTS (TAXES INCLUDED)	**$1,363,319.94**

86. Most of the disbursements incurred were for the expert fees of Dr. Claudia Escobar and Dr. Michael Hartzmark.

87. Dr. Escobar is a respected former member of the Guatemalan judiciary. Dr. Escobar prepared independent expert reports for the leave motion on the likely outcomes of the CALAS Litigation. On the leave motion, this Court found that Dr. Escobar's report provided credible evidence in support of the Canadian Plaintiff's claim. Dr. Escobar's reports were also relied on by the Canadian Plaintiff at

the mediation to support his position on liability. The disbursements incurred on the expert reports of Dr. Escobar were necessary for the successful result achieved in this litigation for the Canadian Settlement Class.[81]

88. Dr. Hartzmark provided independent expert reports on the leave motion and provided a damages opinion for the mediation. On the leave motion, this Court found Dr. Hartzmark's reports provided credible evidence of the materiality of the asserted misrepresentation. At the mediation, Dr. Hartzmark's damages opinion informed the Canadian Plaintiff's negotiating position and Canadian Plaintiff's Counsel's assessment of what constituted a fair and reasonable result for the Canadian Settlement Class Members. The disbursements incurred on Dr. Hartzmark's expert work was necessary for the result achieved on behalf of the Canadian Settlement Class.[82]

89. The remaining disbursements were incurred primarily on a preliminary expert opinion on the likely outcome of the CALAS Litigation, on procuring documents from Guatemala and obtaining formal translations of some of those documents. These expenses were necessary for Canadian Plaintiff's Counsel to bring the Canadian Action to a successful resolution.[83]

(f) Anticipated Fees and Disbursements to be Incurred

90. Canadian Plaintiff's Counsel estimates that they will spend time an additional 100 hours, if the Settlement Agreement is approved by this Honourable Court. This additional time will be spent to:

(a) prepare for and attend the settlement approval hearing on September 26, 2023;

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

[81] Robb Affidavit at para 113, MR Tab 2; *Dyck v Tahoe Resources Inc*., 2021 ONSC 5712 at paras 24(i), (v), (vii) and (viii).
[82] Robb Affidavit at para 114, MR Tab 2; *Dyck v Tahoe Resources Inc*., 2021 ONSC 5712 at para 24(ix).
[83] Robb Affidavit at para 115, MR Tab 2.

(c) liaise with the Canadian Claims Administrator to ensure the fair and efficient administration of the Settlement Agreement and Canadian Plan of Allocation;

(d) co-ordinate with U.S. Plaintiff's Counsel; and

(e) respond to inquiries from Canadian Settlement Class Members and their lawyers, if applicable, regarding the Settlement Agreement and the Canadian Plan of Allocation.[84]

PART III – ISSUES AND LAW

91. The issues to be considered by this Honourable Court are approval of:

(a) the Settlement Agreement and the dismissal of the Canadian Action with costs and with prejudice on the Effective Date of the Settlement Agreement;

(b) the form, content and method of disseminating Canadian Second Notice;

(c) the Canadian Plan of Allocation;

(d) Canadian Plaintiff's Counsel's fees and disbursements; and

(e) an interim payment of the approved Canadian Funding Commission to the Canadian Funder.

A. Settlement Approval

92. The Defendants have agreed to pay USD$13,500,000 (approximately CAD$18,334,350.00[85]) to resolve the claims in the Canadian Action. This is an excellent result for the Canadian Settlement Class. It reflects a fair and reasonable compromise made by the Canadian Plaintiff on the recommendation of experienced and well-informed counsel uniquely positioned to evaluate the fairness and reasonableness of the Settlement.

[84] Robb Affidavit at para 116, MR Tab 2.
[85] Using the Bank of Canada's exchange rate of 1.3581 as of September 11, 2023.

93. The function of this Court is to examine the structure of the Settlement Agreement for indicia of collusion or a conflict of interest and determine whether it falls within a zone of reasonableness.[86] There are no indicia of collusion or a conflict of interest here and the settlement is well-within the zone of reasonableness. The Settlement Agreement ought to be approved.

(a) Settlement Structure

94. 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.[87] 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 class size; inappropriate protection of defendants from liability; and any measures that discourage objection to the settlement or fee request.[88] The Court is well-placed to identify structural features of settlements indicative of collusion or conflicts of interest in the negotiations and the agreement.

95. Broadly speaking, agreements that place a high value on non-monetary or conditional compensation,[89] contemplate a possible reversion of settlement funds to defendants without a concomitant reduction in class counsel's compensation,[90] make settlement approval contingent on fee approval,[91] and have optics that suggest the settlement is more favourable to class counsel than class members,[92] are examples of the types of features of which courts should be cautious.

---

[86] *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8; *Green v CIBC*, 2022 ONSC 373 at para 17. *Class Proceeding Act*, s. 29(2) requires the Court to approve a settlement for it to be binding.
[87] *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8; *Robinson v. Medtronic, Inc*., 2020 ONSC 1688 at para 65(i)-(ii).
[88] Howard M Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859 at 873, Condensed Book of Authorities ("**BoA**"), Tab 9.
[89] *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.
[90] Howard M Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859 at 892, BOA Tab 1.
[91] *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 85-86.
[92] *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.

96. 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."[93]

(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;[94]

(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

[93] *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.
[94] *Bilodeau v Maple Leaf Foods Inc.*, 2009 CanLII 10392.

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;[95] 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.[96]

97. The type of structural features that indicate conflicts of interest are not present here:

(a) there are no non-monetary benefits. This is an all-cash settlement. Canadian Settlement Class Members will receive cash compensation distributed in accordance with the Canadian Plan of Allocation;

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

(c) Canadian Plaintiff's Counsel and the Canadian Plaintiff have entered into the Retainer Agreement that incentivizes Canadian Plaintiff's Counsel to maximize overall recovery. Both the Canadian Settlement Class and Canadian Plaintiff's Counsel's interests were aligned through the course of the litigation; and

(d) there is no reversion. If any remainder exists after the Canadian Net Settlement Fund is distributed *pro rata* in accordance with the Settlement Agreement and the Canadian Plan of Allocation, then (a) a second distribution will occur if it is economical to do so and (b)

[95] *Garland v Enbridge Gas Distribution Inc.*, 2006 CanLII 36243.
[96] *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 81 and 85.

if it is uneconomical to do so, it will be distributed *cy-près* to one or more recipients to be approved by the Court.

98. The settlement structure is fair and admits of none of the defects identified in the case law. Canadian Plaintiff's Counsel was incentivized to maximize recovery for the Canadian Settlement Class and did so.

(b) Zone of Reasonableness

99. 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.[97]

100. The zone of reasonableness assessment allows for variation between settlements depending upon the subject matter of the litigation and nature of the damages for which settlement provides compensation.[98] 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.[99] The settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.[100] 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.[101]

101. In settlements where 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 the risks

---

[97] *Dabbs v Sun Life Assurance Co of Canada*, 1998 CanLII 14855; *Robinson v. Medtronic, Inc.*, 2020 ONSC 1688 at para 64(iii)-(iv), 66; *Pinizzotto v. TILT Holdings, Inc*., 2021 ONSC 8001 at para 54.
[98] *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 70, BOA Tab 6.
[99] *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at paras 25 and 33; *Robinson v. Medtronic, Inc*., 2020 ONSC 1688 at para 64(iv).
[100] *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 80, BOA Tab 6.
[101] *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622 at para 22.

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."[102]

102. 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.[103]

103. Although the discovery process was just commencing in this case, many of those features are present:

(a) *comprehensive research and understanding of legal issues*: In preparing for the mediation and hotly contested leave and certification motion, the Canadian Plaintiff gained significant insight into the legal and factual issues that would form the subject matter of the trial;[104]

(b) *receipt of highly relevant documents*: The Canadian Plaintiff obtained a variety of documents from Guatemalan court files concerning the CALAS Litigation and from Guatemalan governmental agencies about the Escobal mine and the permitting process.[105] The Canadian Plaintiff also had the benefit of numerous documents obtained by the U.S. Plaintiff through the extensive discovery process conducted in the U.S. to date. This included documents on issues at the core of the Canadian Plaintiff's liability theory such as the Defendants' understanding as to the existence of Xinka in the area around the mine and the Defendants' awareness of similar litigation CALAS had commenced in Guatemala and the outcome of that litigation.[106] The documents reviewed were highly relevant to liability and assisted the Canadian Plaintiff in understanding the strength of his case; and

---

[102] *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670 at paras 5-10.
[103] *Clegg v HMQ Ontario*, 2016 ONSC 2662 at para 33. See also: *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at para 13.
[104] Robb Affidavit at paras 13-19, 30-33, MR Tab 2.
[105] Robb Affidavit at para 55(a)-(c), MR Tab 2.
[106] Robb Affidavit at para 55(n)-(o), MR Tab 2.

(c) *expert analysis*: including (i) the reports of the Canadian Plaintiff's expert Dr. Claudia Escobar on the likely outcomes of the CALAS Litigation; (ii) the reports from the Defendants' expert Francisco Chavez Bosque on the likely outcomes of the CALAS Litigation; (iii) the materiality opinions of Dr. Michael Hartzmark (the Canadian Plaintiff's expert) and Dr. Paul Gompers (the Defendants' expert); and (iv) the damages opinion of Dr. Hartzmark prepared for the mediation.[107]

104. Canadian Plaintiff's Counsel's understanding of the factual and legal issues is mature. The resolution was informed by actual information about the risks and rewards of further litigation. The settlement was negotiated from a deep knowledge gained through the significant time and effort spent prosecuting the Canadian Action leading to a fair and reasonable settlement in the best interests of the Canadian Settlement Class.

105. Litigation cannot be valued with a high degree of precision.[108] While a high degree of precision is not available, it is clear that the Settlement falls within a range of reasonableness and is in the best interest of the Canadian Settlement Class, taking into account, in addition to the hallmarks of fairness detailed above, the following key case-specific risks as described in detail at paragraphs 48 to 66 above:

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

(b) the risk that the Canadian Plaintiff would be unable to meet the heightened non-core document standard under Part XXIII.1 of the *OSA*; and

(c) the risk that the Defendants would be able to establish that all or part of the share price decline following the asserted public correction in Tahoe's July 5, 2017 news release was

[107] Robb Affidavit at para 55(e)-(i), MR Tab 2.
[108] *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 12.

unrelated to the misrepresentations and, therefore, losses resulting from the decline were not recoverable by the Canadian Settlement Class.

106. The Settlement provides for a total payment of USD$13,500,000 million to resolve all claims against the Defendants in relation to the Canadian Action. Canadian Plaintiff's Counsel was well apprised of the risks and rewards of continued litigation. The Settlement Agreement eliminates the downside risk of non-recovery or limited recovery and provides an immediate benefit to Canadian Settlement Class Members in exchange for the release of their claims. Canadian Plaintiff's Counsel respectfully recommends approval of the Settlement.

(c) Other Factors Support Approval of the Settlement Agreement

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

(a) the settlement of complex litigation is encouraged by courts and favoured by public policy;[109]

(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;[110]

(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;[111]

(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

[109] *Robinson v Medtronic, Inc*, 2020 ONSC 1688 at para 64(i), (iv).
[110] *Robinson v Medtronic, Inc*, 2020 ONSC 1688 at para 64(ii).
[111] *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at para 31(e), aff'd 2010 ONCA 841, leave to appeal to SCC denied 2011 CanLII 40927.

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.[112]

108. In sum, the Settlement Agreement is fair and reasonable under all of the circumstances. It is consistent with both the purpose and spirit of the *Class Proceedings Act*, which encourages settlement after a reasonable investigation and careful consideration of the merits, costs and risks of continuing litigation.

B. Canadian Plan of Allocation

109. The Canadian Plan of Allocation should be approved as it provides for a plan of distribution of the Canadian Net Settlement Fund that is fair, reasonable and in the best interests of the Canadian Settlement Class.[113]

110. As described above, the Canadian Plan of Allocation provides for a *pro rata* distribution of the Canadian Net Settlement Fund by assigning each Authorized Canadian Claimant a Recognized Loss, which is done based on a formula that closely resembles 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 secondary market securities class actions.[114]

---

[112] *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(v).
[113] *Zaniewicz v Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59.
[114] 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; *Baldwin v Imperial Metals Corporation*, transcribed reasons for decision dated May 15, 2023, at paras 17-19, BOA Tab 13.

C. Proposed Canadian Second Notice

111. A court must consider whether notice of settlement should be given pursuant to section 29(4) of the *Class Proceedings Act*.[115] The factors in considering the form and scope of the notice are set out in section 17 of the *Class Proceedings Act*. 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.[116]

112. The Canadian Plan of Notice provides for notice to be provided in two-stages. Approval of Canadian Second Notice is being sought on this motion. The parties have agreed on the form, content and method of disseminating Canadian Second Notice.

113. Canadian Second Notice provides notice of the approval of the Settlement Agreement and the deadline to make a claim for compensation.[117]

114. Part 2 of the Canadian Plan of Notice will be disseminated as described above.

115. The notice proposed here is intelligible, informative and tailored to the circumstances of this case. The Canadian Claims Administrator is of the opinion that Canadian Second Notice, in combination with the more expansive Canadian First Notice, will be effective in bringing the Settlement and claims process to the attention of Canadian Settlement Class Members.[118]

---

[115] *Class Proceedings Act*, s. 29(4).
[116] *Class Proceedings Act*, s. 17(3)-(5).
[117] Long-Form Canadian Second Notice, NOM Schedule A, Ex 5; Short-Form Canadian Second Notice, NOM Schedule A, Ex 4.
[118] First Azari Affidavit at para 37, MR Tab 4.

D. Approval of Canadian Plaintiff's Counsel's Fees and Disbursements

116. Canadian Plaintiff's Counsel's request for fees of USD$3,780,000 (plus taxes) and disbursements of CAD$1,206,617.95 (plus taxes) is made pursuant to the terms of the Retainer Agreement with the Canadian Plaintiff, which was carefully designed to appropriately incentivize Canadian Plaintiff's Counsel while providing for a fair fee.

117. The fee appropriately reflects the recovery secured for the Canadian Settlement Class, the serious risks inherent in hotly contested litigation of this nature, and the substantial investment of time and money made by Canadian Plaintiff's Counsel. The fee requested is consistent with past precedent. It is fair and reasonable and ought to be approved.

118. A recent decision of the Superior Court in *Adams v Apple Inc.* ("***Adams***")[119] departed from the decades long approach of considering fee approval requests solely under the *Class Proceedings Act*. The Court determined that provisions concerning the treatment of costs and disbursements in the calculation of the contingency fee in the old version of the *Solicitors Act* and the Regulation thereunder (*i.e.* the versions that were in force at the time the agreement was entered into)[120] applied to contingency fee retainers under the *Class Proceedings Act*. For the reasons explained further below, the *Solicitors Act* does not apply. In any event, the Retainer Agreement and Canadian Plaintiff's Counsel's fee request complies with the applicable *Solicitors Act* provisions in question.

[119] *Adams v Apple Inc.*, 2023 ONSC 2957.
[120] Specifically, the version of the *Solicitors Act* and its regulations that were in force from December 12, 2013 to June 30, 2021 apply on the Court's reasoning in *Adams v Apple Inc.*, 2023 ONSC 2957 at para 61. That version is referred to as the "***Solicitors Act***". The new version of the *Solicitors Act* is referred to as the "***New Solicitors Act***".

(a) The Retainer Agreement Complies with the Requirements of the Class Proceedings Act

119. The *Class Proceedings Act* gives proposed representative plaintiffs the right to enter into contingent fee arrangements with putative class counsel.[121] Such agreements are not enforceable until they have received Court approval.[122] A retainer agreement is required to be in writing and must:

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

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

(c) state the method by which payment is to be made, whether by lump sum, salary, or otherwise.[123]

120. The Retainer Agreement between Canadian Plaintiff's Counsel and the Canadian Plaintiff complies with these requirements and ought to be approved by the Court.[124]

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

121. The Retainer Agreement in this case provides for a 28% fee on the Amount Recovered, plus the recovery of disbursements and applicable taxes. 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.[125] 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

---

[121] *Class Proceedings Act*, s. 32(1).
[122] *Class Proceedings Act*, s. 32(2).
[123] *Class Proceedings Act*, s. 33.
[124] Retainer Agreement at paras 10-18, Ex A to the Dyck Affidavit, MR Tab 2A.
[125] *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 11; *Pinizzotto v TILT Holdings, Inc*, 2021 ONSC 8001 at para 71(ii).

counsel through a percentage of recovery is "generally considered to reflect a fair allocation of risk and reward as between lawyer and client".[126]

122. 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.[127]

123. In this case, the Retainer Agreement aligns the interests of Canadian Plaintiff's Counsel with the Canadian Plaintiff and Canadian Settlement Class. It ensures compensation is within an appropriate range. Mr. Dyck has a full understanding of the fees sought and supports the request.[128] There is no reason to question the validity of the Retainer Agreement, and the fee sought pursuant to its terms should be approved.

(c) The Fee Request is Fair and Reasonable

124. In class proceedings, the Court has "supervisory jurisdiction over the fees charged by class counsel."[129] The Court is tasked to determine whether the fee requested is fair and reasonable.[130]

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

(a) the factual and legal complexities of the matters dealt with;

(b) the risk undertaken, including the risk that the matter might not be certified;

(c) the degree of responsibility assumed by class counsel;

---

[126] *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 9, FN 2; *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at paras 63-64.
[127] *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada*, 1998 CanLII 14842; *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602 at para 25.
[128] Dyck Affidavit at paras 20-22, MR Tab 3.
[129] *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 12.
[130] *Gagne v Silcorp Ltd*, 1998 CanLII 1584.

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the class;

(f) the degree of skill and competence demonstrated by class counsel;

(g) the results achieved;

(h) the ability of the class to pay;

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

(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[131]

126. A recent decision of the Superior Court also considered the integrity of the profession as a factor to be considered.[132]

127. 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 important factors.[133]

i. Factual and Legal Complexity

128. The facts and law underlying the Canadian Action were 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 novel issues. This is true of the Canadian Action. This is the only secondary market securities class action under Part

[131] *Smith Estate v National Money Mart Co*, 2011 ONCA 233 at paras 80-81; *Suzic v VIB Event Staffing et al*, 2022 ONSC 3837 at para 63.
[132] *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335 at paras 127-133.
[133] *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at para 71; *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335 at para 82.

XXIII.1 of the *OSA* that has been prosecuted solely on misrepresentations in a non-core document.[134] At the commencement of the Canadian Action, there was no appellate jurisprudence and limited lower court jurisprudence on the standard plaintiffs must meet to satisfy the elevated non-core document burden under Part XXIII.1 of the *OSA*. Indeed, the Canadian Plaintiff drew on American authorities to help support his interpretation of the non-core document burden on the leave motion;[135] and

(b) *Determining the likelihood of a license suspension as of May 24, 2017*: prosecuting this case required Canadian Plaintiff's Counsel to assess the likelihood of an Escobal license suspension on May 24, 2017 and the likely length of that suspension. To do so, Canadian Plaintiff's Counsel had to assess and understand (a) Guatemalan jurisprudence on amparos and ILO 169, which they initially did with the assistance of local Guatemalan counsel and later Dr. Claudia Escobar; and (b) an understanding of the history of the Xinka people and their historical and current presence in the area around the Escobal mine. This task was complicated by the fact that relevant documents were in Guatemala and could only be obtained with the assistance of local counsel.[136]

ii. Risks Assumed by Canadian Plaintiff's Counsel

129. In assessing the fairness and reasonableness of fees, courts consider the risk that counsel undertook in conducting the litigation, and the degree of success or result achieved.[137] Risk in this context is measured from the commencement of the action and not with the benefit of hindsight.[138]

---

[134] Note: there have been several other cases where a non-core document misrepresentation claim was brought alongside a core document misrepresentation claim. See *e.g.* *Kauf v Colt Resources, Inc*, 2019 ONSC 2179.
[135] Robb Affidavit at para 76, MR Tab 2.
[136] Robb Affidavit at para 67, MR Tab 2.
[137] *Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962 at para 35; *Pinizzotto v. TILT Holdings, Inc*., 2021 ONSC 8001 at para 71(x)-(xi).
[138] *Gagne v Silcorp Ltd*, 1998 CanLII 1584.

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."[139]

130. 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 the Canadian Action.[140] Ontario courts, including the Court of Appeal, have emphasized the need to provide a sufficient incentive to class counsel in light of risks undertaken when considering fee requests.[141] Defendants tend to be well resourced, engage large law firms, and employ a strategy of wearing down the opposition.[142] This is particularly true in litigation involving large sums of money where the large potential loss spurs greater litigation spending by the defendants.

131. Compensation in class proceedings must be sufficiently appealing to justify counsel's lost opportunity to take on paying clients and the years-long carrying costs of a case, especially when faced with well-funded defendants in high-stakes litigation. This is particularly true in cases litigated under Part XXIII.1 of the *OSA* where significant disbursements, including on expert fees, are common at an early stage of the litigation.[143]

132. In the Canadian Action, the Canadian Plaintiff's Counsel carried the cost of its significant investment of time of CAD$1,870,082.00 and disbursements totaling CAD$1,206,617.95. Canadian Plaintiff's Counsel pursued the Canadian Action knowing that doing so would be very expensive and resource intensive, all with the real possibility of little or no recovery after trial. The fee awarded must justify the significant risk that Canadian Plaintiff's Counsel took on.

---

[139] *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 14.
[140] *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at paras 12-13.
[141] *Ainslie v Afexa Life Sciences Inc*, 2010 ONSC 4294 at para 44.
[142] *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at paras 65-66.
[143] Robb Affidavit at para 100(b)(i), MR Tab 2.

133. Although the Canadian Plaintiff eventually received adverse costs protection from the Canadian Funder, that agreement was not approved by this Court until July 21, 2021. Prior to that time, Canadian Plaintiff's Counsel indemnified the Canadian Plaintiff for adverse costs awards from the outset of the Canadian Action on October 4, 2018.[144] The Retainer Agreement provides for a specified reduction in Canadian Plaintiff's Counsel's percentage contingency fee to reflect the fact that third-party litigation funding was obtained.[145]

134. The incentive to class counsel must also be large enough when assessed in the context of counsel's class action practice as a whole. Class counsel's assessment of risk-reward 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."[146]

135. 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, and the considerable amounts spent on disbursements. Canadian Plaintiff's Counsel's fee request is well-justified.

iii. Result Achieved

136. The Settlement Agreement provides an immediate monetary benefit to Canadian Settlement Class Members in the amount of USD$13.5 million. This is an excellent result. As described further above, there were many ways the Canadian Plaintiff could lose in this case: they could fail to establish a misrepresentation or to meet the non-core document burden, the Defendants could have successfully

[144] Retainer Agreement at para 15, Ex A to the Dyck Affidavit, MR Tab 3.
[145] Retainer Agreement at para 16, Ex A to the Dyck Affidavit, MR Tab 2A.
[146] *Ramdath v George Brown College of Applied Arts and Technology*, 2016 ONSC 3536 at FN 14.

relied on the reasonable investigation defence, or damages could have been substantially limited under Part XXIII.1 of the *OSA*.

iv. Skill and Competence of Canadian Plaintiff's Counsel

137. Canadian Plaintiff's Counsel is experienced in litigating and resolving complex class action litigation. Canadian Plaintiff's Counsel diligently pursued the Canadian Action and exercised its skill and judgment to secure a good recovery.

v. Canadian Settlement Class Members' Expectations

138. The fee requested is consistent with prior cases and the Retainer Agreement, and thus within the range of what Canadian Settlement Class Members should reasonably expect in a resolution of this magnitude at this stage in an action of this complexity.

139. After notice of Canadian Plaintiff's Counsel fee request and the right to object to it being provided, no objection to the fee request has been received.[147] This indicates that the fee request is consistent with Canadian Settlement Class Members' expectations.

vi. The Ability of the Class to Pay

140. Canadian Plaintiff's Counsel has delivered a cash fund from which their requested fee may be paid. The Canadian Settlement Class has the resources to pay the proposed fee.

vii. Integrity of the Profession

141. In *Fresco v Canadian Imperial Bank of Commerce*, this Court found that the analysis of whether a fee undermined the integrity of the profession ought to focus on whether the fee is champertous. In *McIntyre Estate v Ontario (Attorney General)*, the Ontario Court of Appeal said that

[147] Robb Affidavit at para 51, MR Tab 2.

a fee is champertous where it "compensates a lawyer such that it is unreasonable or unfair to the client" to the extent it takes advantage of the client.[148] In *McIntyre Estate*, the Court of Appeal agreed with comments from another case that "Counsel should be well rewarded if the litigation is successful, for assuming the risk and costs of the litigation. The compensation however should not be a windfall resembling a lottery win."[149]

142. Champerty concerns do not exist here. The fee request, as explained in more detail above, appropriately compensates Canadian Plaintiff's Counsel for the risks undertaken and the results achieved after years of hard-fought litigation. If Canadian Plaintiff's Counsel had not undertaken those risks, there would have been no recovery for the Canadian Settlement Class. The Canadian Plaintiff is fully aware of the fee request and supports it. The fee is consistent with the range of contingency fees frequently approved by this Court for settlements of this size.

(d) A Multiplier Cross-Check Confirms the Fairness and Reasonableness of the Fee Request

143. Although a percentage approach is the preferred methodology for assessing a fee request, some courts find it useful to cross-check the reasonableness of the fee request based on a multiplier of counsel's docketed time. The multiplier approach, like a percentage fee, is designed to reward class counsel for bearing the risks of the litigation and as a reward for the success attained.[150] The Court of Appeal has stated that multipliers will tend to range from slightly greater than one at the low end to three to four depending on the risks associated with the case and the difficulty.[151] The Court of Appeal has noted that a multiplier of 2 is on the lower-end of court approved multipliers.[152]

---

[148] *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335 at para 130.
[149] *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335 at para 130 citing *McIntyre Estate v. Ontario (Attorney General)* (2002), 2002 CanLII 45046, 61 O.R. (3d) 257 paras 76-77.
[150] *Gagne v Silcorp Ltd*, 41 OR (3d) 417 at paras 16, 19 and 22, BOA Tab 2.
[151] *Gagne v Silcorp Ltd*, 41 OR (3d) 417 at para 26, BOA Tab 2; See also *McBain v. Hyundai Auto Canada Corp*., 2021 ONSC 7126 at para 15(i).
[152] *Lavier v MyTravel Canada Holidays Inc*, 2013 ONCA 92 at para 37.

144. Here counsel has docketed time of CAD$1,870,082.00, plus applicable taxes, or USD$1,376,941.38, plus applicable taxes, as of September 7, 2023.[153] This results in a multiplier of 2.75.[154]

145. The multiplier in this case confirms the reasonableness of the fee requested. It is consistent with past fee awards. This Court has approved multipliers in the range of 2.75 in a number of cases, for example:

Decision	Multiplier	Recovery
Fantl v Transamerica Life Canada[155]	2.75	$40,500,000
Mancinelli v Royal Bank of Canada[156]	2.5	$107,000,000
Brown v Canada (Attorney General)[157]	*Brown*: 4 *Riddle:* 1.5	$550,000,000
Fulawka v Bank of Nova Scotia[158]	2.75	Est. $95,000,000
Fanshawe College v Hitachi, Ltd et al.[159]	3.68	$14,348,690
Marcantonio v TVI Pacific Inc.[160]	2.5	$2,100,000
Smith v Krones Machinery Co.[161]	2.9	$1,400,000
Martin v Barrett[162]	2.5	$13,926,196
Hislop v Canada (Attorney General)[163]	4.8	Est. $81,000,000

[153] See Robb Affidavit at para 107, MR Tab 2.
[154] USD$3,780,000 divided by USD$1,376,941.38 (or CAD$1,870,082) = 2.745214912.
[155] *Fantl v Transamerica Life Canada*, 2009 CarswellOnt 6264 at para 90, BOA Tab 1.
[156] *Mancinelli v Royal Bank of Canada*, 2018 ONSC 4206 at para 35.
[157] *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 71 and 77.
[158] *Fulawka v Bank of Nova Scotia*, 2014 ONSC 4743 at paras 20-23.
[159] *Fanshawe College v Hitachi, Ltd et al.*, 2016 ONSC 8212 at paras 26 and 31.
[160] *Marcantonio v TVI Pacific Inc*, 2009 CarswellOnt 4850, at para 37, BOA Tab 4.
[161] *Smith v Krones Machinery Co*, 2000 CarswellOnt 68, at para 13, BOA Tab 8.
[162] *Martin v Barrett*, 2008 CarswellOnt 3151 at para 55, BOA Tab 5.
[163] *Hislop v Canada (Attorney General)*, 2004 CarswellOnt 1785 at para 26, BOA Tab 3.

Parsons v Canadian Red Cross Society[164]	3.8	$1,207,000,000
Pinizzotto v. Tilt Holdings, Inc.[165]	2.4	USD$3,650,000
Kaplan v. PayPal CA Limited[166]	2.5	$10,000,000
Brazeau v. Attorney General (Canada)[167]	3.3	$20,000,000

(e) The Disbursement Reimbursement Request is Fair and Reasonable

146. The disbursements incurred by Canadian Plaintiff's Counsel were necessary for the successful litigation of the Canadian Action.[168] Under Part XXIII.1 of the *OSA*, expensive expert reports and other large disbursements are the norm. The disbursement reimbursement request made in this case is well within the range of the requests the Court has approved in other actions prosecuted under Part XXIII.1 of the *OSA*.[169] The contingency fee and disbursements requested pursuant to terms of the Retainer Agreement are fair and reasonable and ought to be approved.

147. Under the Retainer Agreement, Canadian Plaintiff's Counsel are also entitled to claim interest on disbursements incurred. Consistent with the *Class Proceedings Act*, the interest is to be calculated based on the total at the end of each six-month period and shall accrue at the post-judgment interest rate set by the Ministry of the Attorney General under the *Courts of Justice Act* and *Publication of Postjudgment and Prejudgment Interest Rates* regulation.[170] Canadian Plaintiff's Counsel is forgoing the interest payment request for the benefit of the Canadian Settlement Class.

---

[164] *Parsons v Canadian Red Cross Society*, 2000 CarswellOnt 2174 at para 66, aff'd 2001 CarswellOnt 182, BOA Tab 7.
[165] *Pinizzotto v. TILT Holdings, Inc.*, 2021 ONSC 8001 at paras 71(vii).
[166] *Kaplan v. PayPal CA Limited*, 2021 ONSC 1981 at para 91(iv).
[167] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 4721 para 24.
[168] Robb Affidavit at para 115, MR Tab 2.
[169] *Ironworkers Ontario Pension Fund v Manulife Financial*, 2017 ONSC 2669 at para 25 and FN 18 (disbursements in the amount of $2.3 million, largely for the work of experts, were approved); *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc*., 2018 ONSC 6447 at paras 60, 74-77 (disbursements in the amount of $2,393,423.69 were approved).
[170] Robb Affidavit at para 95, MR Tab 2; *Class Proceedings Act*, section 33(7)(c).

(f) Ongoing Work

148. Significant work remains to be done. Canadian Plaintiff's Counsel's will remain actively involved in the implementation of the Settlement. Canadian Plaintiff's Counsel estimates that it will accrue approximately 100 hours in additional time before the work on the Canadian Action is completed.[171]

(g) The Solicitors Act does not Apply to Contingency Fee Agreements Governed by the Class Proceedings Act

149. In *Adams*, the Court found that provisions in the *Solicitors Act* concerning the treatment of costs and disbursements when counsel fees are calculated on a percentage of recovery basis apply to contingency fee agreements governed by the *Class Proceedings Act.* The Court found that, as a result, when there is no negotiated allocation to disbursements and costs in a settlement agreement, the Court ought to deduct disbursements incurred and a notional allocation for costs from the settlement amount before calculating counsel's percentage fee.[172]

150. With respect, this Court erred in *Adams*. The *Class Proceedings Act* provides a complete code governing the application of contingency fee retainers that precludes the application of the *Solicitors Act*, as is evident from the statutes' legislative history, the provisions of the *Class Proceedings Act* contrasted to those of the *Solicitors Act* and instructive commentary from the Law Society of Ontario ("**LSO**").

i. The legislative history of the *Class Proceedings Act* and *Solicitors Act* shows that they establish mutually exclusive regimes

151. The *Class Proceedings Act* was enacted in 1992 and took force on January 1, 1993. The enactment was made "[d]espite the *Solicitors Act* and *An Act Respecting Champerty*."[173] As this Court

[171] Robb Affidavit at para 116, MR Tab 2.
[172] *Adams v Apple Inc*., 2023 ONSC 2957 at para 84.
[173] *Class Proceedings Act* section 33(1).

noted in *Adams*, the *Solicitors Act* and *An Act Respecting Champerty* effectively prohibited contingency fees.[174] At the time of its enactment, the *Class Proceedings Act* stood alone in the contingency fee space as a "legal unicorn."[175] It created a distinct legislative system applicable to contingency fee retainers in the class proceedings space, which directly contradicted the general legislative directive that otherwise prohibited contingent fees. This must mean that the *Class Proceedings Act* functioned as a complete legislative system for contingency fees in class proceedings. Therefore, the *Class Proceedings Act* ought to be interpreted as a distinct branch of statutory law that applies specifically and only to actions commenced under that act.

152. The *Solicitors Act* was only amended to permit contingency fees in 2002. As the *Class Proceedings Act* legislative regime existed and was fully functional, the purpose of the *Solicitors Act* amendments facilitated the use of contingent fee agreements outside of the *Class Proceedings Act* context. Indeed, there is no reference in the *Solicitors Act* or its regulations[176] to the *Class Proceedings Act*, engagements with representative parties, or any other contextual aspect of class action litigation. Nothing in the *Solicitors Act* has ever been necessary for the functioning of the fee regime under the *Class Proceedings Act*. It functions on a stand-alone basis.

ii. The provisions governing retainers in the *Class Proceedings Act* establish a complete code

153. The *Class Proceedings Act* covers all aspects of fee and disbursement recoveries, in a way consistent with the unique aspects and goals of class actions. The application of the *Solicitors Act*, a general scheme governing traditional client/solicitor relationships, is inconsistent with this comprehensive regime tailored to the unique context of class actions. It is a well-established maxim

[174] *Adams v Apple Inc*., 2023 ONSC 2957 at para 53.
[175] *Adams v Apple Inc.*, 2023 ONSC 2957 at para 56.
[176] Current version of the *Solicitors Act* regulations: *Contingency Fee Agreements*, O Reg 563/20. Version in force from October 1, 2004 to June 30, 2021 applicable to the Canadian Action: *Contingency Fee Agreements*, O Reg 195/04.

of statutory interpretation that the provisions of a general statute must yield to those of a special one.[177] In this context, the *Solicitors Act* must yield to the *Class Proceedings Act*.

154. The *Class Proceedings Act* covers all aspects of fee and disbursement recoveries in a manner that is duplicated by, or inconsistent with, the scheme established by the *Solicitors Act*:

Class Proceedings Act	***Solicitors Act***
A retainer must be in writing and the *Class Proceedings Act* prescribes specific items that must be included in a retainer.[178]	Requires agreements to be in writing and the new regulations prescribe a specific form for contingency fee agreements.[179]
Fees and disbursements must be approved by the Court to be enforceable.[180]	Does not require Court approval except in the case of minors or persons under disability.[181]
The *New Class Proceedings Act*, in force since October 1, 2020, adopted the long-established common law test for fee and disbursement approval. Namely, that they must be fair and reasonable taking into account, among other things, the risks assumed.[182] The Court has the ability to increase or decrease fees if the request is not fair and reasonable.	No requirement for approval (except for minors or persons under disability) and no discretion to increase or decrease fees owing to risks assumed.
The *Class Proceedings Act* permits a "representative party" and a solicitor to enter an agreement for fees and disbursements in the event of "success in a class proceeding". A "representative party" is one who undertakes the statutory representative role on behalf of a class or subclass. The official appointment to that role requires Court approval.[183]	The *Solicitors Act*, by contrast, refers to agreements between a solicitor and a "client." The *Solicitors Act* defines "client" to include "a person who, as a principal or on behalf of another person, retains or employs or is about to retain or employ a solicitor, and a person who is or may be liable to pay the bill of a solicitor for any services".[184] That definition, which includes the singular "person," is built for individual litigation where the client or the client's representative or litigation guardian will pay the bill of the solicitor. That definition is not

[177] *Schnarr v Blue Mountain Resorts Limited*, 2018 ONCA 313 at para 52.
[178] *New Class Proceedings Act*, section 32(1).
[179] *Solicitors Act*, section 28.1(4); *Contingency Fee Agreements*, O Reg 563/20 section 7(1).
[180] *New Class Proceedings Act*, section 32(2).
[181] *Contingency Fee Agreements*, O Reg 563/20 section 6; *Contingency Fee Agreements*, O Reg 195/04 section 5.
[182] *New Class Proceedings Act*, section 32(2.1).
[183] *Class Proceedings Act*, section 33(1).
[184] *Solicitors Act*, section 15.

	consistent with the role of a representative plaintiff in a class proceeding.
The *New Class Proceedings Act* defines "success in a class proceeding" for purposes of contingency fee retainer agreements to mean "a judgment on common issues in favour of some or all class members" and "a settlement that benefits one or more class members".[185]	There is no statutory definition of success under the *Solicitors Act*.

155. Moreover, the *Solicitors Act*'s regulations create mandatory requirements that cannot apply to class proceedings. For instance:

(a) section 7 of the applicable regulations to the *Solicitors Act* states that "a solicitor for a plaintiff shall not recover more in fees under the agreement than the plaintiff recovers as damages or receives by way of settlement."[186] In a class proceeding, where claims are distributed amongst many class members, the contingent fee will always exceed the amount recovered by the representative party;

(b) similarly, section 10 of the applicable regulations to the *Solicitors Act* refers to an assessment process after a solicitor has delivered a bill to a client in respect of a contingency fee agreement.[187] In a class proceeding, there is no scenario by which class counsel can deliver a bill to the representative plaintiff for their contingent fee. Further, under the *Class Proceedings Act*, if the court declines approval of a fee request by class counsel, then the Court is given the authority to set the fees and disbursements to be paid; and

(c) section 3 of the applicable regulations to the *Solicitors Act* states that "A client who is a party to a contingency fee agreement shall direct that the amount of funds claimed by the

[185] *New Class Proceedings Act*, section 1(4).
[186] *Contingency Fee Agreements*, O Reg 195/04 section 7.
[187] *Contingency Fee Agreements*, O Reg 195/04 section 10.

solicitor for legal fees, cost, taxes and disbursements be paid to the solicitor in trust from any judgment or settlement money."[188] This cannot apply in a class proceeding, where the representative plaintiff has no authority to direct a payment of any funds claimed by the solicitor out of the settlement amount, "to the solicitor in trust" or otherwise, without Court approval.

156. The differences in the schemes reflect the fundamentally different contexts the *Class Proceedings Act* and *Solicitors Act* are designed to operate in. The *Solicitors Act* permits contingent fee agreements generally, but it does so under a traditional solicitor and client model. The *Class Proceedings Act* is specifically designed for the representative context in which it operates. The *Solicitors Act* does not apply to retainers governed by the *Class Proceedings Act*.

iii. The LSO says that the *Solicitors Act* does not apply to retainers governed by the *Class Proceedings Act*

157. The interpretation of administrators who carry out the administration or enforcement of legislation are given weight and can be an "important factor" where there is doubt about the meaning of legislation.[189] The *Solicitors Act*'s regulations provide the LSO with the authority to make rules concerning contingent fee arrangements, which it does.[190] The LSO's *Rules of Professional Conduct* and guidance are, therefore, important interpretative tools in respect of the legislation, such as the *Solicitors Act* and *Class Proceedings Act*, that they reference.

158. The LSO interprets the *Class Proceedings Act* as distinct and separate from the more general requirements of the *Solicitors Act*. In a public facing Q&A on its website, the LSO provides answers to commonly asked questions about new contingency fee requirements under the *Solicitors Act*.

---

[188] *Contingency Fee Agreements*, O Reg 195/04 section 3.
[189] Ruth Sullivan, *The Construction of Statutes*, Seventh Edition June 2022, Chapter "23.04. Administrative Interpretation – [3] Admissibility and use of administrative interpretation", BOA Tab 10.
[190] See e.g.: *Contingency Fee Agreements*, O Reg 195/04 section 4; *Contingency Fee Agreements*, O Reg 563/20 section 7(1), 8.

Crucially, in response to the question "How do the new contingency fee rules apply to class proceedings?" the LSO answers: "The *Class Proceedings Act* governs the use of contingency fees in Ontario class actions." Further, in response to the question "Where can I find the current contingency fee requirements" the LSO lists a number of statutes and regulations that "work together to establish current requirements for contingency fee arrangements", but notably excludes the *Class Proceedings Act*. The exclusion of the *Class Proceedings Act* indicates that there is a specific and separate regime for contingency fees in class actions.[191]

(h) In any event, Canadian Plaintiff's Counsel's Fee Request Complies with the Solicitors Act

159. If this Court is not inclined to disagree with the view expressed in *Adams* as to the applicability of the *Solicitors Act* regime to contingency fee retainer agreements under the *Class Proceedings Act*, it is readily open to the Court to find that the Retainer Agreement and Canadian Plaintiff's Counsel's fee request pursuant to that agreement comply with the parts of the *Solicitors Act* and its regulations at issue in *Adams*.

160. *First*, section 28.1(8) of the *Solicitors Act* provided that:[192]

> A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless,
>
> (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and

---

[191] Law Society of Ontario, "Frequently Asked Questions About Contingency Fees" accessed September 6, 2023 <https://lso.ca/lawyers/practice-supports-and-resources/topics/managing-money/fees-and-disbursements/contingency-fees/frequently-asked-questions-about-contingency-fees#:~:text=How%20do%20the%20new%20contingency,requires%20approval%20of%20the%20court>.

[192] Notably, this provision has been removed from the new version of the *Solicitors Act* following a recommendation from the Advocates Society. The Advocates Society viewed this provision as creating a conflict of interest between counsel and their client that ought to be removed. See: Advocates' Society, *Advertising & Fee Arrangements Issues Working Group* <https://www.advocates.ca/Upload/Files/PDF/Advocacy/Submissions/LawSocietyofUpperCanada/Report_of_the_LSUC_Advertising_and_Fee_Arrangements_Issues_Working_Group_nov2.pdf> at paras 198, 201-214, BOA Tab 11.

> (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them.

161. Consistent with the terms of Retainer Agreement in this case,[193] Canadian Plaintiff's Counsel is not requesting the CAD$975,000 in costs awarded on the leave and certification motion. The costs award will be added to the settlement pool for distribution to the Canadian Settlement Class. There were no "costs obtained as part of a settlement" in this case.

162. *Second*, the applicable regulations to the *Solicitors Act* provided that:

> A contingency fee agreement that provides that the fee is determined as a percentage of the amount recovered shall exclude any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.[194]

163. Again, Canadian Plaintiff's Counsel does not seek to apply the 28% contingency fee to the CAD$975,000 in costs awarded for the certification and leave motion, a significant portion of which was referable to disbursements incurred in respect of that motion. There was no "amount … agreed to that is separately specified as being in respect of costs and disbursements" in this case.

164. In sum, even if the *Solicitors Act* applies, Canadian Plaintiff's Counsel's fee request is consistent with the plain language of the relevant provisions and ought to be approved.

165. In *Adams*, the Court read into the *Solicitors Act* the principle that where there is no allocation to costs and disbursements in an all-inclusive settlement, the amount recovered for purposes of calculating counsel's percentage fee ought to be reduced by a notional amount allocated to costs and actual disbursements incurred.[195] Notably, this holding was based on the above provisions in the *Solicitors Act* and its regulations, which do not have any language mandating that such an allocation be made. Rather, those provisions speak to circumstances where there is an agreed allocation to costs

[193] Retainer Agreement at para 13, Ex A to the Dyck Affidavit, MR Tab 3.
[194] *Contingency Fee Agreements*, O Reg 195/04, section 6.
[195] *Adams v Apple Inc*, 2023 ONSC 2957 at para 84.

and disbursements in the settlement (not applicable in the case at bar) or costs and disbursements have been awarded by the court (applicable in the case at bar).

166. Even accepting that the Court has the power to deduct notional costs and disbursements from an all-inclusive settlement amount where costs and disbursements have not been awarded or agreed, it is not appropriate to do so on the facts of this case. Unlike *Adams*, a substantial portion of Canadian Plaintiff's Counsel's time and disbursements were incurred on the leave and certification motions for which a large costs award was already made.[196] A notional costs allocation is unnecessary when there is an actual, substantial cost award for legal fees and disbursements on the key litigation step that was taken prior to the resolution of the Canadian Action.

167. The CAD$975,000 costs award constitutes, in essence, an appropriate allocation to costs and disbursements in the context of this settlement, such that the agreed percentage fee should be applied to the USD$13.5 million settlement amount without deduction.

168. "Double-dipping" was an animating concern for the Court in *Adams*.[197] That is not a concern in this case. In fact, given that the leave and certification costs award is being attributed exclusively to the Canadian Settlement Class, to then deduct costs and disbursements from the USD$13.5 million would overshoot the attempt to guard against double-dipping.

E. Interim Funding Commission

169. This Court has previously approved the Canadian Funding Agreement, which sets out the commission payable to the Canadian Funder. Under the terms of the Canadian Funding Agreement, the "Commission" payable to the Canadian Funder is 8% of the "Net Resolution Sum", which is

[196] Robb Affidavit at para 22, MR Tab 4.
[197] *Adams v Apple Inc*, 2023 ONSC 2957 at para 66.

defined as the "Resolution Sum" less "(i) Lawyers' fees and disbursements, including HST; and (ii) Administration Expenses".[198]

170. The "Administration Expenses" cannot be quantified with certainty until the conclusion of the administration of the Settlement Agreement, and as such the final amount of the "Commission" payable to the Canadian Funder cannot be determined until the conclusion of the administration.[199]

171. The Canadian Plaintiff requests that part of the Commission be paid now in the amount of USD$600,000. This interim amount is approximately 86% of the Canadian Funder's estimated full entitlement. The remainder of the Commission will be paid at the conclusion of the administration, when the final Administration Expenses are known.[200]

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

173. An interim payment of a funding commission was approved by Justice Rady in *Rooney v ArcelorMittal S.A.*[201] and Justice Belobaba in *Manulife*.[202]

---

[198] Robb Affidavit at para 117, MR Tab 2.
[199] Robb Affidavit at para 118, MR Tab 2.
[200] Robb Affidavit at paras 119-120, MR Tab 2.
[201] Order dated September 19, 2019, BOA Tab 4.
[202] *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at paras 26-28.

PART IV – ORDER REQUESTED

174. The Canadian Plaintiff seeks an order for the relief set out in the Notice of Motion dated September 15, 2023.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
this 15th day of September, 2023.

Siskinds LLP, *Lawyers for the Plaintiff*

SCHEDULE "A" – AUTHORITIES

Jurisprudence

1. *Adams v Apple Inc.*, 2023 ONSC 2957
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. *Brazeau v. Attorney General (Canada)*, 2019 ONSC 4721
6. *Brown v Canada (Attorney General)*, 2018 ONSC 3429
7. *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686
8. *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670
9. *Clegg v HMQ Ontario*, 2016 ONSC 2662
10. *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada*, 1998 CanLII 14842 (ON SC)
11. *Dabbs v Sun Life Assurance Co of Canada*, 1998 CanLII 14855 (ON SC)
12. *DALI v SNC-Lavalin Group Inc.*, 2018 ONSC 6447
13. *Doucet v The Royal Winnipeg Ballet*, 2023 ONSC 2323
14. *Dyck v Tahoe Resources Inc.*, 2021 ONSC 5712
15. *Fantl v Transamerica Life Canada*, 2009 CarswellOnt 6264
16. *Ford v F Hoffman-La Roche Ltd*, 2005 CanLII 8751
17. *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335
18. *Gagne v Silcorp Ltd*, 1998 CanLII 1584 (ON CA)
19. *Garland v Enbridge Gas Distribution Inc.*, 2006 CanLII 36243 (ON SC)
20. *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829
21. *Green v CIBC*, 2022 ONSC 373
22. *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602
23. *Hislop v Canada (Attorney General)*, 2004 CarswellOnt 1785
24. *Ironworkers v Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669
25. *Kaplan v. PayPal CA Limited*, 2021 ONSC 1981
26. *Kauf v Colt Resources, Inc*, 2019 ONSC 2179
27. *Lavier v MyTravel Canada Holidays Inc*, 2013 ONCA 92
28. *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532
29. *Marcantonio v TVI Pacific Inc*, 2009 CarswellOnt 4850
30. *Martin v Barrett*, 2008 CanLII 25062 (ON SC)
31. *McBain v. Hyundai Auto Canada Corp.*, 2021 ONSC 7126
32. *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643
33. *Osmun v Cadbury Adams Canada Inc*, 2010 ONCA 841
34. *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932
35. *Parsons v Canadian Red Cross Society*, 2000 CarswellOnt 2174
36. *Pinizzotto v TILT Holdings, Inc.,* 2021 ONSC 8001
37. *Ramdath v George Brown College of Applied Arts and Technology*, 2016 ONSC 3536
38. *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647

39. *Robertson v Thomson Canada Ltd*, 2009 CanLII 32703 (ON SC)
40. *Robinson v. Medtronic, Inc*., 2020 ONSC 1688
41. *Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962
42. *Schnarr v Blue Mountain Resorts Limited*, 2018 ONCA 313
43. *Smith v Krones Machinery Co*, 2000 CarswellOnt 68
44. *Smith Estate v National Money Mart Co*, 2010 ONSC 1334
45. *Smith Estate v National Money Mart Co*, 2011 ONCA 233
46. *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622
47. *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
2. Ruth Sullivan, *The Construction of Statutes*, Seventh Edition June 2022, Chapter "23.04. Administrative Interpretation – [3] Admissibility and use of administrative interpretation"
3. Law Society of Upper Canada – Fifth Report of the Advertising & Fee Arrangements Issues Working Group
4. Order of Justice H.A. Rady dated September 19, 2019 in the action styled *Peter Rooney and Archie Leach v ArcelorMittal S.A. et al*
5. *Baldwin v Imperial Metals Corporation*, transcribed decision dated May 15, 2023

SCHEDULE "B" – LEGISLATION

***Securities Act*, RSO 1990, c S.5**

Definitions
1(1) "material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities; ("fait important")

Burden of proof and defences

Non-core documents and public oral statements

138.4 (1) In an action under section 138.3 in relation to a misrepresentation in a document that is not a core document, or a misrepresentation in a public oral statement, a person or company is not liable, subject to subsection (2), unless the plaintiff proves that the person or company,

(a) knew, at the time that the document was released or public oral statement was made, that the document or public oral statement contained the misrepresentation;

(b) at or before the time that the document was released or public oral statement was made, deliberately avoided acquiring knowledge that the document or public oral statement contained the misrepresentation; or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (1).

Assessment of damages

138.5

(3) Despite subsections (1) and (2), assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure. 2002, c. 22, s. 185.

***Class Proceedings Act, 1992*, S.O. 1992, c. 6 (version applicable up to September 30, 2020)**

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).

Discontinuance, abandonment and settlement

29 (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

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

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

(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

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).

***Class Proceedings Act, 1992*, S.O. 1992, c. 6 (version applicable from October 1, 2020)**

Interpretation, success in a class proceeding

(4) For the purposes of this Act, success in a class proceeding includes,

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

(b) a settlement that benefits one or more class members. 2020, c. 11, Sched. 4, s. 1 (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).

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).

***Solicitors Act*, RSO 1990, c S.15 (version applicable from July 1, 2021)**

Impermissible terms

8. A solicitor shall not include in a contingency fee agreement a provision that,

(a) requires the solicitor's consent before a claim may be abandoned, discontinued or settled at the instructions of the client;

(b) prevents the client from terminating the contingency fee agreement with the solicitor or changing solicitors; or

(c) permits the solicitor to split their fee with any other person, except as provided by the Rules of Professional Conduct of the Law Society of Ontario.

Contingency fee agreements

28.1 (1) A solicitor may enter into a contingency fee agreement with a client in accordance with this section. 2002, c. 24, Sched. A, s. 4.

Remuneration dependent on success

(2) A solicitor may enter into a contingency fee agreement that provides that the remuneration paid to the solicitor for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which services are provided. 2002, c. 24, Sched. A, s. 4.

No contingency fees in certain matters

(3) A solicitor shall not enter into a contingency fee agreement if the solicitor is retained in respect of,

(a) a proceeding under the *Criminal Code* (Canada) or any other criminal or quasi-criminal proceeding; or

(b) a family law matter. 2002, c. 24, Sched. A, s. 4.

Written agreement

(4) A contingency fee agreement shall be in writing. 2002, c. 24, Sched. A, s. 4.

Compensation Agreements

Definitions

15 In this section and in sections 16 to 33,

"client" includes a person who, as a principal or on behalf of another person, retains or employs or is about to retain or employ a solicitor, and a person who is or may be liable to pay the bill of a solicitor for any services; ("client")

"contingency fee agreement" means an agreement referred to in section 28.1; ("entente sur des honoraires conditionnels")

"services" includes fees, costs, charges and disbursements. ("service") R.S.O. 1990, c. S.15, s. 15; 2002, c. 24, Sched. A, s. 1.

***Contingency Fee Agreements*, O Reg 563/20**

Matters not to be included in contingency fee agreements

4. (1) A solicitor shall not include in a contingency fee agreement a provision that,

(a) requires the solicitor's consent before a claim may be abandoned, discontinued or settled at the instructions of the client;

(b) prevents the client from terminating the contingency fee agreement with the solicitor or changing solicitors; or

(c) permits the solicitor to split their fee with any other person, except as provided by the Rules of Professional Conduct. O. Reg. 195/04, s. 4 (1).

(2) In this section,

"Rules of Professional Conduct" means the Rules of Professional Conduct of the Law Society of Ontario. O. Reg. 195/04, s. 4 (2).

Person under disability

6. A solicitor for a person under disability, as defined in the Rules of Civil Procedure, who is represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,

(a) apply to a judge for approval of the agreement before the agreement is finalized; or

(b) include the agreement as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure.

Agreement form, terms

7. (1) A contingency fee agreement for legal services to be provided wholly or partly in exchange for a percentage or proportion of the amount or the value of the property recovered under an award or settlement shall be in the form titled "Standard Form Contingency Fee Agreement", dated November 18, 2021, and published by and available on the website of the Law Society of Ontario. O. Reg. 836/21, s. 1.

(2) In the case of a contingency fee agreement to which subsection (1) does not apply, the solicitor shall ensure that the agreement includes the following:

1. A statement that sets out the method by which the fee is to be determined.

2. A statement that a solicitor for a client who is a claimant shall not recover more in fees under a contingency fee agreement than the amount recovered by the client under an award or settlement from the party or parties against whom the claim was made, including any costs but excluding disbursements and taxes.

3. A statement in respect of disbursements and taxes, including the HST payable on the solicitor's fees, that indicates that if the client is responsible for the payment of disbursements or taxes and the solicitor pays the disbursements or taxes during the course of the matter, the solicitor is entitled to be reimbursed for those payments, subject to section 13 of the Legal Aid Services Act, 2020, as a first charge on any amount recovered under an award or settlement of the matter.

4. A statement that explains costs and the awarding of costs and that indicates that a client is responsible for paying any costs contribution or award, on a partial indemnity or substantial indemnity basis, if the client is the party liable to pay costs.

5. A statement that informs the client of the client's right to ask the Superior Court of Justice to assess and approve of the solicitor's bill, and that includes the applicable timelines for asking for the assessment set out under section 5 or clause 28.1 (11) (a) of the Act, as the case may be.

6. If the client is a party under disability, as defined in the Rules of Civil Procedure, who is represented by a litigation guardian, a statement that the contingency fee agreement either must be approved by a judge before the agreement is finalized or must be reviewed as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure.

7. A statement that outlines when and how the client or the solicitor may terminate the contingency fee agreement, the consequences of the termination for each of them and the manner in which the solicitor's fee is to be determined in the event that the agreement is terminated.

8. A statement that informs the client that the client retains the right to make all critical decisions regarding the conduct of the matter. O. Reg. 836/21, s. 1.

(3) Subsections (1) and (2) do not apply if,

(a) either the client or any person or entity responsible for the payment of the client's legal fees in the matter that is the subject of the agreement is an organization that, together with any affiliates, members of the same joint venture or any other related persons or entities,

(i) employs more than 25 individuals,

(ii) employs a lawyer on a full-time basis, or

(iii) has assets or gross annual revenues that exceed $10 million; or

(b) a court has approved the agreement or the contingency fee set out in the agreement. O. Reg. 836/21, s. 1.

Impermissible terms

8. A solicitor shall not include in a contingency fee agreement a provision that,

(a) requires the solicitor's consent before a claim may be abandoned, discontinued or settled at the instructions of the client;

(b) prevents the client from terminating the contingency fee agreement with the solicitor or changing solicitors; or

(c) permits the solicitor to split their fee with any other person, except as provided by the Rules of Professional Conduct of the Law Society of Ontario.

Timing of assessment of contingency fee agreement

10. For the purposes of clause 28.1 (11) (b) of the Act, the client or the solicitor may apply to the Superior Court of Justice for an assessment of the solicitor's bill rendered in respect of a contingency fee agreement to which subsection 28.1 (6) or (8) of the Act applies within six months after its delivery. O. Reg. 195/04, s. 10.

Contents of contingency fee agreements, litigious matters

3. In addition to the requirements set out in section 2, a solicitor who is a party to a contingency fee agreement made in respect of a litigious matter shall ensure that the agreement includes the following:

1. If the client is a plaintiff, a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement.

2. A statement in respect of disbursements and taxes, including the GST payable on the solicitor's fees, that indicates,

i. whether the client is responsible for the payment of disbursements or taxes and, if the client is responsible for the payment of disbursements, a general description of disbursements likely to be incurred, other than relatively minor disbursements, and

ii. that if the client is responsible for the payment of disbursements or taxes and the solicitor pays the disbursements or taxes during the course of the matter, the solicitor is entitled to be reimbursed for those payments, subject to section 47 of the *Legal Aid Services Act, 1998* (legal aid charge against recovery), as a first charge on any funds received as a result of a judgment or settlement of the matter.

3. A statement that explains costs and the awarding of costs and that indicates,

i. that, unless otherwise ordered by a judge, a client is entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party entitled to costs, and

ii. that a client is responsible for paying any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party liable to pay costs.

4. If the client is a plaintiff, a statement that indicates that the client agrees and directs that all funds claimed by the solicitor for legal fees, cost, taxes and disbursements shall be paid to the solicitor in trust from any judgment or settlement money.

5. If the client is a party under disability, for the purposes of the Rules of Civil Procedure, represented by a litigation guardian,

i. a statement that the contingency fee agreement either must be reviewed by a judge before the agreement is finalized or must be reviewed as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure,

ii. a statement that the amount of the legal fees, costs, taxes and disbursements are subject to the approval of a judge when the judge reviews a settlement agreement or consent judgment under rule 7.08 of the Rules of Civil Procedure, and

iii. a statement that any money payable to a person under disability under an order or settlement shall be paid into court unless a judge orders otherwise under rule 7.09 of the Rules of Civil Procedure. O. Reg. 195/04, s. 3.

***Contingency Fee Agreements*, O Reg 195/04**

Contents of contingency fee agreements, litigious matters

3. In addition to the requirements set out in section 2, a solicitor who is a party to a contingency fee agreement made in respect of a litigious matter shall ensure that the agreement includes the following:

1. If the client is a plaintiff, a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement.

2. A statement in respect of disbursements and taxes, including the GST payable on the solicitor's fees, that indicates,

i. whether the client is responsible for the payment of disbursements or taxes and, if the client is responsible for the payment of disbursements, a general description of disbursements likely to be incurred, other than relatively minor disbursements, and

ii. that if the client is responsible for the payment of disbursements or taxes and the solicitor pays the disbursements or taxes during the course of the matter, the solicitor is entitled to be reimbursed for those payments, subject to section 47 of the *Legal Aid Services Act, 1998* (legal aid charge against recovery), as a first charge on any funds received as a result of a judgment or settlement of the matter.

3. A statement that explains costs and the awarding of costs and that indicates,

i. that, unless otherwise ordered by a judge, a client is entitled to receive any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party entitled to costs, and

ii. that a client is responsible for paying any costs contribution or award, on a partial indemnity scale or substantial indemnity scale, if the client is the party liable to pay costs.

4. If the client is a plaintiff, a statement that indicates that the client agrees and directs that all funds claimed by the solicitor for legal fees, cost, taxes and disbursements shall be paid to the solicitor in trust from any judgment or settlement money.

5. If the client is a party under disability, for the purposes of the Rules of Civil Procedure, represented by a litigation guardian,

i. a statement that the contingency fee agreement either must be reviewed by a judge before the agreement is finalized or must be reviewed as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure,

ii. a statement that the amount of the legal fees, costs, taxes and disbursements are subject to the approval of a judge when the judge reviews a settlement agreement or consent judgment under rule 7.08 of the Rules of Civil Procedure, and

iii. a statement that any money payable to a person under disability under an order or settlement shall be paid into court unless a judge orders otherwise under rule 7.09 of the Rules of Civil Procedure. O. Reg. 195/04, s. 3.

Matters not to be included in contingency fee agreements

4. (1) A solicitor shall not include in a contingency fee agreement a provision that,

(a) requires the solicitor's consent before a claim may be abandoned, discontinued or settled at the instructions of the client;

(b) prevents the client from terminating the contingency fee agreement with the solicitor or changing solicitors; or

(c) permits the solicitor to split their fee with any other person, except as provided by the Rules of Professional Conduct. O. Reg. 195/04, s. 4 (1).

(2) In this section,

"Rules of Professional Conduct" means the Rules of Professional Conduct of the Law Society of Ontario. O. Reg. 195/04, s. 4 (2).

Contingency fee agreement, person under disability

5. (1) A solicitor for a person under disability represented by a litigation guardian with whom the solicitor is entering into a contingency fee agreement shall,

(a) apply to a judge for approval of the agreement before the agreement is finalized; or

(b) include the agreement as part of the motion or application for approval of a settlement or a consent judgment under rule 7.08 of the Rules of Civil Procedure. O. Reg. 195/04, s. 5 (1).

(2) In this section,

"person under disability" means a person under disability for the purposes of the Rules of Civil Procedure. O. Reg. 195/04, s. 5 (2).

Contingency fee not to exceed damages

7. Despite any terms in a contingency fee agreement, a solicitor for a plaintiff shall not recover more in fees under the agreement than the plaintiff recovers as damages or receives by way of settlement. O. Reg. 195/04, s. 7.

Timing of assessment of contingency fee agreement

10. For the purposes of clause 28.1 (11) (b) of the Act, the client or the solicitor may apply to the Superior Court of Justice for an assessment of the solicitor's bill rendered in respect of a contingency fee agreement to which subsection 28.1 (6) or (8) of the Act applies within six months after its delivery. O. Reg. 195/04, s. 10.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFF
(APPROVAL OF SETTLEMENT, CLASS COUNSEL FEES, AND INTERIM FUNDING COMMISSION)

Siskinds LLP
Barristers & Solicitors
65 Queen Street West
Suite 1155
Toronto, ON M5H 2M5

Anthony O'Brien (LSO#: 56129U)
Email: anthony.obrien@siskinds.com
Tel: 416.594.4394
Fax: 519.672.6065

275 Dundas Street, Unit 1
P.O. Box 2520
London, ON N6B 3L1

Garett Hunter (LSO#: 71800D)
Email: garett.hunter@siskinds.com
Tel: 519.660.2121
Fax: 519.672.6065

Lawyers for the Plaintiff