Court File No. CV-12-453236-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE TRUSTEES OF THE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675 PENSION FUND and 0793094 B.C. LTD.

Plaintiffs

- and -

SNC-LAVALIN GROUP INC., IAN A. BOURNE, DAVID GOLDMAN, PATRICIA A. HAMMICK, PIERRE H. LESSARD, EDYTHE A. MARCOUX, LORNA R. MARSDEN, CLAUDE MONGEAU, GWYN MORGAN, MICHAEL D. PARKER, HUGH D. SEGAL, LAWRENCE N. STEVENSON, GILLES LARAMÉE, MICHAEL NOVAK, PIERRE DUHAIME, RIADH BEN AÏSSA and STÉPHANE ROY

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF CLASS COUNSEL
(FEE APPROVAL)
(Motion Returnable October 31, 2018)

October 5, 2018

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PART I – OVERVIEW

1. Class Counsel seeks approval of its fees and disbursements in accordance with retainer agreements executed at the outset of this complex, prolonged and contentious proceeding which resulted in substantial benefit to the class, namely $110 million. The requested fee is fair and reasonable in the context of this case.

2. This action has now settled after more than 6 years of intense litigation, including numerous interlocutory proceedings, the preparation of summary judgment motions by both the Plaintiffs and the Defendants, extensive documentary discoveries, nearly 40 days of oral discovery, significant expert analysis, two rounds of mediation, and only after this Action was set down for trial.

3. The global fee requested, including the fee to be sought in the Quebec Action, is $25.25 million, which equates to 22.95% of the settlement. The fee requested in this Action, which was more actively pursued, is $23.25 million plus disbursements and applicable taxes. This reflects a multiplier of approximately 2.54 on the time spent by Class Counsel advancing this Action. The fee requested in the Quebec Action, which was largely deferred in favour of the Ontario Action, will be $2 million plus disbursements and applicable taxes. This division reflects both the division of work done as between the Quebec and Ontario members of the Class Counsel team and the approximate relative size of the classes in the two cases, based on Class Counsel's experience.

4. The fees requested are fair and reasonable. They:

   (a) reflect the substantial recovery achieved for the Class as well as the risks undertaken, including Class Counsel's assumption of the risk of adverse costs awards and

substantial carrying costs (*i.e.* disbursements and docketed time) over 6 years of hotly contested litigation;

(b) accord with retainer agreements executed at the outset of the litigation which guided the expectations of both the Plaintiffs and Class Counsel;

(c) result in a multiplier which is well in line with those approved by Courts in other cases; and

(d) are within the range of fees that have been approved in similar cases.

5. Accordingly, it is respectfully submitted that Class Counsel's fee request ought to be approved.

6. Unsurprisingly, given the complexity of the issues and the length at which they were litigated, Class Counsel has incurred substantial disbursements. These disbursements reflect Class Counsel's commitment and substantial investment in the case on behalf of the Class in, among other things:

(a) the investigation of the facts underlying the claims;

(b) retaining top notch experts on the crucial financial, economic, accounting and corporate governance aspects of the case; and

(c) the review, analysis and translation of the voluminous documentary record.

PART II – SUMMARY OF THE FACTS

7. The key facts relating to the conduct of the litigation and its resolution are set out at paragraphs 9-56 of the Plaintiffs' Factum for Approval of the Settlement.

A. Retainer Agreements

8. At the outset of the litigation, the Plaintiffs entered into Retainer Agreements with Class Counsel which provided, among other things, as follows:

(a) Class Counsel would undertake the litigation on a contingent fee basis, and would only be paid in the event of success as defined in those retainer agreements;

(b) Class Counsel would fund the disbursements incurred in advancing litigation, which would be recovered in the event of success from a settlement or judgment; and

(c) Class Counsel would indemnify the Plaintiffs against any award of adverse costs made against them at any stage of the Action.[1]

9. The retainer agreements provided that Class Counsel would be paid on a percentage basis from any settlement or judgment obtained on behalf of the Class, with the applicable percentages varying depending on the circumstances when the case is resolved. For the purposes of this motion, the circumstances relevant to determining the percentages applicable under the retainer agreements are as follows:

(a) The Settlement of the action was achieved after the resolution of what was initially a fully contested leave and certification motion (which was ultimately unopposed) and prior to the commencement of trial. The leave and certification of this Action was not agreed to solely for the purposes of implementing a Settlement, as is often the case; rather, the Action continued on a contested basis for nearly six years after the Court granted leave and certification of the Action. Accordingly, pursuant to section 7 of the Retainer Agreements, the operative base percentage is 27.5%;

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1 Retainer Agreement, Exhibit "A" to the Affidavit of Lisa Watt sworn October 4, 2018 ("**Watt Affidavit**"); Retainer Agreement, Exhibit "A" to the Affidavit of Brent Gray sworn September 27, 2018 ("**Gray Affidavit**").

(b) Pursuant to paragraph 11 of the Retainer Agreement, Class Counsel agreed to indemnify the Plaintiffs against any award of adverse costs made against them. Paragraph 12 specifies that in exchange for providing such indemnity, the Plaintiffs agree that the base percentage in the Retainer Agreements shall be increased by 5.0%, to 32.5%;

(c) Pursuant to paragraph 8 of the Retainer Agreements,

(i) the base percentage of 32.5% is applied to the first $20 million recovered;

(ii) the applicable percentage is reduced by 5% to 27.5% for amounts between $20 million and $40 million;

(iii) the applicable percentage is reduced by an additional 5% to 22.5% for amounts between $40 and $60 million; and

(iv) the applicable percentage for amounts above $60 million is 17.5%.

10. Accordingly, the Retainer Agreements provide for a fee calculated as follows:

32.5% on first $20 million	= 6.5 million
27.5% on next $20 million	= 5.5 million
22.5% on next $20 million	= 4.5 million
17.5% on amount above $60 million	= 8.75 million
Total requested fees	**$25.25 million**

11. The structure of this retainer agreement ensures that counsel is compensated for the increase in risk and work that arises as matters proceed towards trial, while at the same time providing for a fair fee in the context of a larger settlement.

B. Coordination of Fee Requests with Quebec Counsel

12. By agreement between Class Counsel in the Ontario and Quebec Actions, the fee applications in the two Actions are being coordinated such that the total fee requested in both Actions is in the amount contemplated by the Retainer Agreements. The application before this Court seeks $23.25 million to be awarded in this Action, and a request of $2 million plus applicable taxes is being made in the Quebec Action. The Quebec fee request, along with the motion to approve the Settlement, is scheduled to be heard by the Quebec Court on November 23, 2018.

C. The Representative Plaintiffs Support the Fee Request

13. Each of the Plaintiffs has described their understanding of the proposed fee request and the issues leading to the Settlement. They have expressed their support for the payment of the fee in accordance with their retainer agreements.[2]

D. Factors Supporting the Request for Class Counsel Fees

i. This Part XXIII.1 securities class action was complex, hard fought, expensive and protracted

14. At the commencement of this Action, it was anticipated that:

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

(b) there would be resistance to the leave and certification motions;

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2 Watt Affidavit at paras 38-48; Gray Affidavit at paras 34-44.

(c) if successful on the leave and certification motion, there would be multiple interlocutory motions, possibly summary judgment motions and the production of tens of thousands of documents and weeks of examinations for discovery;

(d) barring resolution, there would be a very lengthy trial with an uncertain outcome; and

(e) the prospect of substantial exposure to potential adverse costs awards, including the fees and disbursements of multiple defence firms and their various experts, would be present throughout the proceeding.

15. Part XXIII.1 is a complex regime, demonstrated by the fact that very few plaintiff firms have undertaken the risk of investigating, analyzing and prosecuting such cases. By the end of 2017, there had been 81 statutory secondary market cases filed, or approximately 7 per year. Of the 81 cases, 32 (40%) remained unresolved at the end of 2017; 10 have been denied leave and/or certification; and 4 have been discontinued.[3]

16. While the Action ultimately proceeded unopposed through leave and certification, that outcome was not anticipated when the Action was commenced, nor when the leave and certification record was delivered. In fact, the leave and certification motions were contested by the Defendants until the parties reached agreement on a consensual resolution of those motions.[4]

17. The requirement that leave of the court be obtained prior to the commencement of an action under Part XXIII.1 is a significant feature of the regime. The leave requirement distinguishes secondary market securities class actions from other class actions where,

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3 "Trends in Canadian Securities Class Actions: 2017 Update", Exhibit "H" to the Affidavit of Anthony O'Brien affirmed October 1, 2018 ("**O'Brien Affidavit**").

4 O'Brien Affidavit at paras 31–36.

generally, a plaintiff may move directly for certification, a step that is not a test of the merits (section 5(5) of the *CPA*).

18. In contrast, a leave motion requires a preliminary assessment of the merits. To obtain leave, the plaintiff must establish that there is "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff." There has been considerable case law devoted to clarifying this standard, including two decisions of the Supreme Court of Canada.[5]

19. Typically:

(a) the leave motion requires considerable front-end loaded work requiring the plaintiff to conduct a thorough investigation and analysis into the available public record, and to engage expert witnesses to provide opinions in order to establish that it has a reasonable possibility of establishing the key elements of her case;

(b) defendants challenge the leave motion, often filing responding expert opinions and at times affidavits of fact witnesses;

(c) cross-examinations, motions arising out of cross-examinations and lengthy hearings are conducted in the course of the leave motion;

(d) success or failure on the leave motion will result in appeals; and

(e) the costs consequences of an unsuccessful motion for leave are significant.[6]

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5 *Theratechnologies Inc v 121851 Canada Inc*, 2015 SCC 18; *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60.

6 See, for example, *Mask v Silvercorp Metals Inc*, 2015 ONSC 7780; *Yip v HSBC Holdings plc*, 2018 ONCA 626.

20. The leave motion is also typically accompanied by a certification motion where, in a securities case, the contest is typically joined over all of the certification criteria, other than perhaps section 5(1)(e) of the *CPA*. The decision on the certification motion is also often the subject of appeal.

21. Securities class actions in Ontario are generally complex, hard fought, expensive and protracted, even more so when claims are advanced under Part XXIII.1. Since few cases have been advanced in this space, Canadian courts have determined relatively few Part XXIII.1 cases, which has led to uncertainty. As such, these cases often raise questions of first impression, resulting in multiple interlocutory steps and appeals.

22. Issuers make voluminous disclosure in broad terms, the significance of which can be open to debate. Markets react in complex ways to news. The materiality and economic impact of particular impugned disclosures can be difficult to discern and disentangle from industry wide bad news, for instance, and those matters can be the subject of disagreement by highly qualified experts.

23. We are in the early days of this legislative regime. There has been no contested determination of a Part XXIII.1 action beyond a motion for leave under section 138.8. No plaintiff has been granted judgment in a Part XXIII.1 case following a summary judgment motion or a trial.

24. Although leave motions, appeals and interlocutory proceedings have addressed aspects of the Part XXIII.1 regime, there are significant parts of the regime which have yet to receive judicial scrutiny, and which were significant issues in this case:

(a) no case has yet determined how the allocation of proportionate liability under section 138.6 of the *OSA* should be conducted, and whether and to what extent it alters corporate identification theory;

(b) no case has expressly determined the nature of the knowledge required to lift the liability limits applicable to defendants other than the issuer pursuant to section 138.7(2);

(c) although aspects of the section 138.4(6) reasonable investigation defence have been considered at the leave stage,[7] there remains uncertainty about the scope of the inquiry to be undertaken in assessing the reasonableness of a defendant's conduct and the nature of the knowledge or information which might vitiate the defence.

ii. The risk that the financial state of the issuer defendant deteriorates as the case moves forward

25. Even when meritorious cases are actively litigated, the financial state of an issuer defendant can deteriorate quickly and without warning, precluding the likelihood of any meaningful recovery for the class and, by extension, precluding recovery of counsel's fees and disbursements.[8]

26. Insolvency of defendants is a risk. At the commencement of this Action, while SNC was in a solid financial position owing to its business success in the past, it had become embroiled in a number of controversies that could have had a material impact on SNC's future business prospects. The risk of insolvency was extant in this case.

iii. Fees and disbursements financed to date

27. As described in more detail below, Siskinds and Rochon Genova have collectively docketed time which, applying standard hourly rates, equates to work in process of

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7 See, for example, *Rahimi v SouthGobi Resources Ltd*, 2017 ONCA 719.
8 See, for example, *Keyton v Canada Lithium Corp*, 2016 ONSC 7354.

C$9,114,909.50, exclusive of HST. They have financed disbursements of C$2,393,423.69 and HST on those disbursements of C$256,006.24.

(a) Siskinds time and disbursements

28. Up to and including October 1, 2018, Siskinds has docketed 15,655 hours equating to fees of C$6,099,030.50 at standard hourly rates. HST on those fees would amount to C$$792,873.97. Up to and including September 19, 2018, Siskinds has financed disbursements of C$1,752,641.58 and HST on those disbursements of C$213,883.57.

29. The hourly rates and hours expended by the key members of the Siskinds team since the commencement of the Action up to and including October 1, 2018 in this file are as follows:

LAWYER	HOURLY RATE	HOURS
Michael Robb (2002 ON Call)	$500.00	5.7
	$525.00	14.3
	$550.00	0.1
	$575.00	1.8
	$660.00	317.3
	$700.00	454.4
	$750.00	278.7
Anthony O'Brien (2008 ON; 2006 AU Calls)	$375.00	595
	$395.00	801.50
	$415.00	597
	$445.00	314.1

LAWYER	HOURLY RATE	HOURS
	$450.00	145.4
	$500.00	191
Douglas Worndl (1989 ON Call)	$500.00	436.2
	$590.00	2,178.8
Ronald Podolny (2009 ON; 2010 NY Calls)	$325.00	1,205.4
	$425.00	1,164.7
	$450.00	44.2
Charles Wright (1995 ON Call)	$650.00	58
	$675.00	4.7
	$700.00	1
	$800.00	28.2
	$850.00	2.9
	$900.00	32.3
Dimitri Lascaris (2004 ON; 1992 NY Calls)	$600.00	193.4
	$650.00	216.4
	$675.00	134.9
	$775.00	109.3
Dawn Sullivan (1999 ON Call)	$325.00	597.6
	$350.00	307
	$450.00	98.3
	$475.00	140.1
	$500.00	3

30. The following chart sets out the disbursements that have been financed by Siskinds in pursuing the Action, up to September 19, 2018:

TYPE	TOTAL
Courier	$7,997.30
Parking	$161.10
Copies	$86,934.22
Long Distance Telephone Charge	$4,044.84
Postage	$114.71
Research/Resource Material	$26,554.98
Binding Supplies	$882.65
Media (USB Keys/Hard Drives)	$811.80
Agents Fees	$46,214.69
Corporate Profile Search	$55.57
Adverse Cost Awards	$105,916.01
Expert Reports	$922,058.20
Mileage/Travel/Meals	$55,423.35
Mediation	$65,853.79
Non-Expert Reports	$169,746.83
PR/Media	$2,971.50
Service of Documents	$12,083.18
Stationary Supplies	$48.97
Transcripts and Court Reporting	$83,048.78
Translation Services	$27,338.19
eDiscovery Services	$132,728.92

Court Fees	$1,652.00
TOTAL BEFORE TAX:	$1,752,641.58
TAX:	$213,883.57
TOTAL INCLUDING TAX:	**$1,966,525.15**

(b) Rochon Genova time and disbursements

31. Since the commencement of the Action up to September 24, 2018, Rochon Genova has docketed fees of C$3,015,879.00 and HST on those fees of C$392,064.27, and Rochon Genova has financed disbursements of C$640,782.11 and HST on those disbursements of C$42,122.67.

32. The hourly rates and hours expended since the commencement of the Action up to and including September 24, 2018 by the primary Rochon Genova lawyers involved in this file are as follows:

LAWYER	HOURLY RATE	HOURS
Joel Rochon (1988 ON Call)	$925.00	1,244.43
Peter Jervis (1983 ON Call)	$925.00	1,168.25
Douglas Worndl (1989 ON Call)	$925.00	213.2
Ronald Podolny (2009 ON; 2010 NY Calls)	$500.00	41.4
John Archibald (2003 ON; 2014 BC Calls)	$500.00	511.6
Remissa Hirji (2012 ON Call)	$350.00	282.5

33. The following chart sets out the disbursements that have been financed by Rochon Genova in pursuing the Action, up to September 24, 2018:

TYPE	TOTAL
Courier	$507.20
Facsimiles	$356.63
Copies	$39,216.10
Long Distance Telephone Charge	$1,071.95
Postage	$83.48
Research/Resource Material	$17,458.58
Binding Supplies	$817.04
Expert Reports	$471,186.99
Mileage/Travel/Meals	$12,486.37
Navigant Consulting	$45,304.92
Corporate search	$28.50
Translation	$1,160.56
ASAP Reporting Services Inc.	$1,133.34
Cross-examinations (Neesons)	$34,287.45
Mediation	$15,000.00
Service of Documents	$234.00
Court Fees	$449.00
TOTAL BEFORE TAX:	$640,782.11
TAX:	$42,122.67
TOTAL INCLUDING TAX:	**$682,904.78**

iv. Class Counsel's indemnification against adverse costs exposed Class Counsel to significant risk

34. At the commencement of the Action, Class Counsel agreed to indemnify the Plaintiffs against adverse costs, reserving their right to obtain, on the Plaintiffs' behalf, indemnification against adverse costs from the Class Proceedings Fund or a third party litigation funder, with the understanding that doing so provided value to the Class.

35. Litigation of this nature is inherently expensive and risky from an adverse costs perspective. The indemnification against adverse costs exposed Class Counsel to significant risk. A number of recent costs decisions, including *Das v George Weston Limited* (approximately $2.3 million in total awarded to two sets of defendants),[9] *Yip v HSBC Holdings plc* (approximately $1 million awarded to defendants)[10] and *Hughes v Liquor Control Board of Ontario* (approximately $2.3 million in total awarded to multiple sets of defendants),[11] by way of example, demonstrate the significant risk inherent in indemnifying against adverse costs. These costs awards were made on preliminary motions. In the present case, that risk was carried through extensive contested interlocutory proceedings. The costs exposure at trial, had a settlement not been reached, could well have been many multiples of those amounts.

36. If the case had proceeded to trial, funding may have been sought as an adverse costs award in favour of the Defendants with six sets of defence counsel would have been very difficult for the firms to bear. However, it is far from clear whether funding would have been available or at what rate, given the large adverse costs associated with bringing a

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9 *Das v George Weston Limited*, 2017 ONSC 5583.
10 *Yip v HSBC Holdings plc*, 2017 ONSC 6848.
11 *Hughes v Liquor Control Board of Ontario*, 2018 ONSC 4862.

substantial securities case forward without any acceptable offers being made even after several years of hard fought litigation.

37. Accordingly, the indemnification given by Siskinds and Rochon Genova had significant value to the Class. Under the retainer agreements with the Plaintiffs, the indemnification given by Class Counsel is valued at 5% of the gross Settlement Amount. That rate is competitive with the expense that would have been incurred if indemnification was obtained from the Class Proceedings Fund (10% of the net settlement amount) or a third party litigation funder (which, in some cases, has been 7% of the net settlement amount, subject to a cap of $5 million or $10 million depending on whether resolution is reached before or after the filing of a pre-trial conference brief, and in others, where legal fees are advanced, as high as 20%[12]).

E. Summary of Siskinds and Rochon Genova's fees and disbursements request

38. Siskinds and Rochon Genova's legal fees and disbursements request may be summarized as follows:

ITEM	TOTAL
Fee Request:	$23,250,000.00
HST on Fee Request:	$3,022,500.00
Disbursements:	$2,393,423.69
Taxes on Disbursements:	$256,006.24
Total Fee/Disbursement Request (including applicable taxes):	**$28,921,929.93**

12 *Houle v St Jude Medical Inc*, 2017 ONSC 5129 at para 32.

F. Anticipated fees and disbursements to be incurred

39. Considerable work remains to be done by Siskinds and Rochon Genova. Their continued involvement will include:

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

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

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

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

40. Class Counsel estimates that it will accrue approximately $150,000 in additional time before the work on this matter is completed.

PART III – LAW AND ANALYSIS

41. Class Counsel's fee request is made pursuant to the terms of Class Counsel's retainers with the Representative Plaintiffs, which have been carefully designed to appropriately incentivize Class Counsel while providing for a fair fee in the event of a larger settlement. The fee appropriately reflects the significant recovery secured for the Class, the serious risks inherent in hotly contested litigation of this nature involving significant sums of money and the substantial investment of time and money made by Class Counsel. The fee requested is consistent with past precedent. It is fair and reasonable.

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

42. The *CPA* gives proposed representative plaintiffs the right to enter into contingent fee arrangements with putative class counsel.[13] Such agreements are not enforceable until they have received Court approval.[14] 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.[15]

43. The retainer agreements entered into between Class Counsel and the Representative Plaintiffs comply with these requirements and ought to be approved by the Court.[16]

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

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

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13 *Class Proceedings Act, 1992*, SO 1992, c 6, s 32(1).
14 *Class Proceedings Act, 1992*, SO 1992, c 6, s 32(2).
15 *Class Proceedings Act, 1992*, SO 1992, c 6, s 33.
16 Exhibit "A" to each of the Watt Affidavit and the Gray Affidavit.

the size of the fund to which a one-third contingency fee may presumptively be applied.[17] This approach works especially well for all-cash settlements, as is the case here.[18]

45. Compensating counsel through a percentage of recovery is "generally considered to reflect a fair allocation of risk and reward as between lawyer and client".[19] Contingency fees induce the lawyer to maximize recovery for the client and are fair to the client because there is no pay without success.[20] They help to promote access to justice in that they allow counsel, not the client, to finance the litigation.[21]

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

47. As described at paragraph 9 above, the applicable percentages vary based on:

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

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17 *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 11; *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at para 47.
18 *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 11.
19 *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 710 at para 64.
20 *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 710 at para 64.
21 *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 21.

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

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

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

49. The progressively higher discount on the base contingency as the quantum of recovery increases serves a dual purpose. First, it provides for a graduated fee which lowers Class Counsel's fee as a percentage of the recovery as the settlement amount increases. Second, by providing the prospect of a greater reward for larger recoveries it, nevertheless, ensures that Class Counsel remain incentivized to maximize recovery.

50. Some courts have expressed the view that contingent fee agreements based on a percentage of recovery are presumptively valid.[22] In this case, the retainer agreements align the interests of Counsel and the Class and ensures compensation is within an appropriate range. There is no reason to question the validity of Class Counsel's retainers and the fee sought pursuant to their terms should be approved.

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

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

> A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending on the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this court the settlement averted a seven to ten day trial. Fee arrangements that reward efficiency and results should not be discouraged.[23]

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

> Using a percentage-based calculation in determining class counsel fees "properly places the emphasis on the quality of representation, and the benefit conferred to the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours."[24]

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

> The proposed fee represents a significant premium over what the fee would be based on time multiplied by standard hourly rates. Is that a reason to disallow it? If the settlement had only been achieved four years later, on the eve of trial, when over a million dollars in time had been expended, would the fee be any more or

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

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

> less appropriate? Should counsel not be rewarded for bringing this litigation to a timely and meritorious conclusion?[25]

54. Other commentators have noted that "the trend in Canada has certainly been away from the multiplier approach and towards percentage-based fees." Percentage-based fees are superior because they promote certainty and encourage class counsel to take on cases. Ontario recognized the importance of class actions, especially with regard to achieving behaviour modification, through the *CPA*. Percentage-based fees promote that goal.[26]

C. A Multiplier Cross-Check Confirms the Fairness and Reasonableness of the Request

55. Some recent decisions of this Court have indicated that in cases involving large settlements it may be appropriate to consider a multiplier on docketed time as a cross-check on the reasonableness of counsel's fee request.[27] While the multiplier approach has been repeatedly criticized[28] and Class Counsel's variable contingency fee retainers alleviate concerns with utilizing a contingency fee in large cases (see paragraph 9 above), assessing the fee request on a multiplier approach only confirms its appropriateness.

56. Having regard to the fee sought in this action alone ($23.25 million), the multiplier calculates to approximately 2.54 ($23.25 million in fees divided by $9.15 million in time). If the estimated time to complete the matter is taken into consideration, the multiplier is reduced to 2.5 ($23.25 million in fees divided by $9.3 million in time).

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

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

27 *Mancinelli v Royal Bank of Canada*, 2018 ONSC 4206 at paras 35-36; *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 59-62.

28 See *e.g. Cassano v Toronto Dominion Bank*, 2009 CarswellOnt 4052 at para 60; *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at paras 20-21; *Fulawka v Bank of Nova Scotia*, 2014 ONSC 4743 at para 22.

57. If the global fee amount is considered, having regard to the time spent in both actions, the multiplier remains reasonable. The time being advanced in the Quebec Action is currently approximately $647,000.[29] Thus the overall multiplier sought amounts to approximately 2.58 ($25.25 million in fees divided by $9.77 million in time).

58. 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.[30] 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.[31]

59. However calculated, the multiplier in this case confirms the reasonableness of the fee requested. The Court of Appeal has noted that a multiplier of 2 is on the lower-end of court approved multipliers.[32] This Court has approved of multipliers of 2.5 and over in a number of cases, for example:

Decision	**Multiplier**	**Recovery**
Fantl v Transamerica Life Canada[33]	2.5	$40,500,000
Mancinelli v Royal Bank of Canada[34]	2.5	$107,000,000
Brown v Canada (Attorney General)[35]	*Brown*: 4 *Riddle:* 1.5	$550,000,000

29 O'Brien Affidavit at para 164.
30 *Gagne v Silcorp Ltd*, 1998 CarswellOnt 4045 at paras 16, 19 and 22.
31 *Gagne v Silcorp Ltd*, 1998 CarswellOnt 4045 at para 26.
32 *Lavier v MyTravel Canada Holidays Inc*, 2013 ONCA 92 at para 37.
33 *Fantl v Transamerica Life Canada*, 2009 CarswellOnt 6264.
34 *Mancinelli v Royal Bank of Canada*, 2018 ONSC 4206.
35 *Brown v Canada (Attorney General)*, 2018 ONSC 3429.

Fulawka v Bank of Nova Scotia[36]	2.75	Est. $95,000,000
Fanshawe College v Hitachi, Ltd et al.[37]	3.68	$14,348,690
Marcantonio v TVI Pacific Inc.[38]	2.5	$2,100,000
Smith v Krones Machinery Co.[39]	2.9	$1,400,000
Martin v Barrett[40]	2.5	$13,926,196
Hislop v Canada (Attorney General)[41]	4.8	Est. $81,000,000
Parsons v Canadian Red Cross Society[42]	3.8	$1,207,000,000

60. Applying the multiplier approach to the fee requested confirms its reasonableness.

D. The Ontario/Quebec Allocation

61. The coordination of the fee requests between the Ontario and Quebec Actions is intended to:

(a) approximately reflect the allocation of class members between the classes certified by the Ontario and Quebec Courts;

(b) approximately reflect the relative division of labour between the two actions; and

(c) remain consistent with the economic terms of the retainer agreements executed by all of the Plaintiffs.

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36 *Fulawka v Bank of Nova Scotia*, 2014 ONSC 4743.
37 *Fanshawe College v Hitachi, Ltd et al.*, 2016 ONSC 8212.
38 *Marcantonio v TVI Pacific Inc*, 2009 CarswellOnt 4850.
39 *Smith v Krones Machinery Co*, 2000 CarswellOnt 68.
40 *Martin v Barrett*, 2008 CarswellOnt 3151.
41 *Hislop v Canada (Attorney General)*, 2004 CarswellOnt 1785.
42 *Parsons v Canadian Red Cross Society*, 2000 CarswellOnt 2174, aff'd 2001 CarswellOnt 182.

62. This agreement will have no impact on the treatment of Class Members for the purposes of the administration of the Settlement.

63. As set out above, the global sum being sought for fees is consistent with the retainer agreements executed by the Plaintiffs in this Action. The retainer agreement executed by the Plaintiff in the Quebec Action provides for a fee of 25% of any settlement or judgment.[43] As such, the total fee request, which amounts to just under 23% of the Settlement Amount, complies with both sets of retainers.

64. This agreement allocates approximately 7.9% of the fee to Quebec counsel. Viewed alternatively, it constitutes a 25% fee on approximately 7.2% of the Settlement Amount. By operation of Quebec law in force when the Quebec Action was authorized, the Quebec Class does not include any entity with more than 50 employees, meaning that some large Quebec institutional investors will be included in the Ontario Class.

65. Similar allocations have been approved in previous actions. Perhaps most analogously, a similar arrangement allocating 8% of the class, and thus of class counsel fees, to a parallel Quebec securities class action was approved in *Dugal v Manulife*.[44] In *Simmonds v Armtec Infrastructure Inc*, another securities class action, Justice Patterson allocated 94% of counsel fees to the Ontario class action and 6% to the Québec class action.[45] In *Osmun v Cadbury Adams Canada Inc*, Justice Strathy (as he was then) accepted an

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43 O'Brien Affidavit at para 135.
44 *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at paras 23-25.
45 *Simmonds v Armtec Infrastructure Inc*, 2014 ONSC 3587 (unreported).

agreement to notionally allocate 7.2% of a settlement to the Québec settlement class.[46] In the circumstances of this case, a similar allocation is likewise fair and reasonable.

66. For clarity, this allocation is only applicable for the purposes of the coordinated fee applications. It will not affect the distribution of the settlement among Class Members, which is to be determined by the proposed Distribution Protocol.

E. The Fee Request is Fair and Reasonable

67. In class proceedings, the Court has "supervisory jurisdiction over the fees charged by class counsel."[47] The Court is tasked to determine whether the fee requested is fair and reasonable.[48]

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

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

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

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

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

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

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

(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.[49]

69. The weight to be afforded to a particular factor varies from case to case but the results achieved and the risks undertaken by Class Counsel will typically be amongst the most important factors.[50]

i. Factual and Legal Complexity

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

(a) the secretive nature of the matters in issue: the Actions related to a series of allegedly improper payments which were allegedly allocated in a manner intended to obscure their purpose;

(b) the corporate structure and residency of the entities through which these alleged transactions were conducted – it was alleged that payments were made by offshore

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

entities, to offshore entities, and then accounted for in SNC's foreign subsidiaries, all of which made tracking these transactions more complex;

(c) the general complexity that arises from assessing questions about materiality and the impact of particular information on the stock price of a particular company, given the many types of information that can influence securities prices on any given day; and

(d) the complexity arising from the "reasonable investigation" defence asserted by the Defendants, given the alleged sophistication of the system of internal controls relied upon by the Defendants for this purpose.

71. Part XXIII.1 is still relatively new. It provides a complex scheme for the assertion of claims by secondary market investors relating to misrepresentations by or on behalf of issuers. The interpretation of many aspects of Part XXIII.1 remains uncertain. In this particular case, legal complexity arose from questions such as:

(a) how the requirement to allocate proportionate liability pursuant to *OSA* section 138.6 will interact with more traditional legal doctrines such as the corporate identification theory;

(b) whether liability arising from the conduct of senior officers of an issuer undertaken for the benefit of a corporation but outside of its policies and procedures should be visited on the corporation in the absence of specific knowledge of that conduct by the company's board of directors and in the face of reasonable efforts by the board to ensure compliance; and

(c) the degree to which individuals who have no role in preparing, reviewing or certifying continuous disclosure documents may be allocated liability for misrepresentations contained in those documents.

72. The factual and legal complexity in this case was extraordinary.

ii. The Risk Assumed by Class Counsel

73. Courts assessing the fairness and reasonableness of fees have often focused on the risk that class counsel undertook in conducting the litigation and the degree of success or result achieved.[51] Risk in this context is measured from the commencement of the action and not with the benefit of hindsight.[52] These risks "are – quite simply – the exposure to substantial personal liability for costs and the risk of receiving no compensation for the time and disbursements invested in the case."[53] The risks arise as a result of uncertainty of outcome with respect to leave under Part XXIII.1, certification, liability, and recovery.[54]

74. These risks are particularly pronounced in actions, such as this one, litigated under Part XXIII.1, which has not yet been tested on the merits of an action and, accordingly, where a great deal of uncertainty about the outcome of any given case exists.

75. In *Green v Canadian Imperial Bank of Commerce* (a costs decision), Chief Justice Strathy emphasized the need to appropriately compensate class counsel in secondary market misrepresentation claims that are certified and granted leave.[55] Appropriate incentives for class counsel are an access to justice issue given the inherent risks that exist and the nature of the litigation:

> These claims [secondary market misrepresentation claims] are suitable for class action treatment because no individual class member would take on the risks involved in pursuing individual litigation. The ability of the class to pursue these claims depends

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

> on the willingness of class counsel to accept the very substantial risks in exchange for the potential rewards.[56]

In fact, "[t]he efficacy of the statutory remedy depends on incentivizing class counsel to take these formidable risks."[57]

76. Ontario Courts, including the Court of Appeal, have also repeatedly emphasized the need to provide a sufficient incentive to class counsel in light of risks undertaken when considering fee requests.[58] Defendants tend to be well resourced, engage large law firms, and employ a strategy of wearing down the opposition.[59] This is particularly true in litigation involving large sums of money where the large potential loss spurs greater litigation spending by the defendants. Compensation in class proceedings must be sufficiently appealing to justify counsel's lost opportunity to take on paying clients and the years-long carrying costs of a case, especially when faced with well-funded defendants in high-stakes litigation.

77. The incentive must also be large enough when assessed in the context of counsel's class action practice as a whole. Class counsel's assessment of incentive does not hinge on any one case, but the sum of successes and losses. As this 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

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56 *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 13 [emphasis added].
57 *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 14.
58 See *e.g. Gagne v Silcorp Ltd*, 1998 CarswellOnt 4045 at paras 14 and 19; *Ainslie v Afexa Life Sciences Inc*, 2010 ONSC 4294 at para 44.
59 *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at paras 65-66.

measured across a great many files. A 'large' contingency recovery in one case will offset the loss or losses in other cases."[60]

78. This case was an enormous undertaking, as is evidenced by the length of time it took, the number of hours spent, the number of people involved, the volume of documentary production, the examinations for discovery conducted, the amounts spent on disbursements, and the number of appearances before this Court.

79. The risks assumed were both procedural and substantive. This case contained the typical procedural risk arising from the need for various interlocutory proceedings, including a motion for certification, as well as an additional one given the requirement to obtain leave under OSA s. 138.8.

80. The leave requirement incorporates the substantive legal and factual risks inherent in a Part XXIII.1 action. As described above, the relative novelty of Part XXIII.1, the lack of certainty about how important aspects of it will be applied and the factual complexity of these actions (and this one in particular) exacerbate these risks.

81. Apart from the risk of time spent and disbursements funded, Class Counsel assumed the risk of adverse costs on behalf the Plaintiff. There was a significant risk of an onerous costs award if this litigation were to fail.

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60 *Ramdath v George Brown College of Applied Arts and Technology*, 2016 ONSC 3536 at footnote 14.

iii. Result Achieved

82. The Settlement Agreement provides an immediate monetary benefit to Class Members in the amount of $110 million—this was a very good result for the Class having regard to the particular risks of the case.

83. There were many ways the Plaintiffs could lose in this case: they could fail to establish a misrepresentation, a public correction or any damages, all of which were complex factual issues to be determined having regard to sophisticated expert evidence. They could fail to rebut the reasonable investigation defence, which is both factually and legally complex and would require additional expert evidence. They could lose even by winning, if the Court were to find that most or all of the proportionate liability rested with Defendants without the capacity to pay a substantial judgment.

iv. Skill and Competence of Class Counsel

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

v. Importance of the Matters to the Class

85. As Chief Justice Strathy recognized in *Green v Canadian Imperial Bank of Commerce*, the feasibility of the legislative scheme established in Part XXIII.1 of the *OSA* depends on the viability of class proceedings.[61] Absent a class proceeding, investors would be left without a remedy and the deterrence objectives of Part XXIII.1 would be left

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61 *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 13.

unfulfilled.[62] The action was, thus, of significant importance to Class Members and the securities regulatory regime as a whole.

vi. Class Members' Expectations

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

vii. The Ability of the Class to Pay

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

F. The Fee Request is Consistent with Past Precedent

88. Class Counsel requests a global fee of $25.25 million on a global recovery of $110 million. The global contingency fee sought pursuant to the terms of the retainer agreements described above equates to approximately 22.95% of the total Settlement Amount. This fee is well within the range of fees that this Court has approved in the past.

89. This Court has frequently approved contingency fee retainer agreements between 25% to 33%,[63] as "it is only through a robust contingency fee system that class counsel will be

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62 *Rahimi v SouthGobi Resources Ltd*, 2017 ONCA 719 at para 39.

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

appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice."[64] The fee requested in this case is well *below* that range.

90. The fee request in this case compares favourably with that made in *Eidoo v Infineon Technologies AG*, where this Court approved $24 million in counsel fees on an $80 million recovery (a contingency of 30%) plus an additional $1 million in disbursements.[65]

91. The requested fee also fits squarely within the range of fees that have been approved in other large settlement cases:

(a) In *Canadian Imperial Bank of Commerce v Deloitte & Touche*, an aggregate of legal fees and disbursements representing 22.2% of a $121.896 million settlement was approved;[66]

(b) In *Ironworkers Ontario Pension Fund v Manulife Financial*, the Court approved a contingency fee of 22.5% plus disbursements and taxes on a settlement of $69 million where a third party indemnification agreement was in place. The indemnification agreement resulted in an additional 7% being paid from the Ontario settlement, after the deduction of fees, disbursements and administrative expenses. There is no similar levy in this case;[67]

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64 *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537 at para 19.
65 *Eidoo v Infineon Technologies AG*, 2016 ONSC 3628 at para 2. Note: the BC Supreme Court (*Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2016 BCSC 964 at para 8) and the Superior Court of Québec (*Option Consommateurs v Infineon Technologies AG*, 2016 QCCS 2454) also approved the fee request.
66 *Canadian Imperial Bank of Commerce v Deloitte & Touche*, 2017 ONSC 5000 at paras 24 and 34.
67 *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at paras 26-27 and 29.

(c) In *Cassano v Toronto Dominion Bank*, counsel's requested contingency fee of 20% plus disbursements on a $55 million settlement was approved;[68]

(d) In *Quenneville v Volkswagen*, fees of $26 million plus disbursements of approximately $1 million and taxes of $3.5 million were approved with respect to a large settlement reached in the early stages of the litigation;[69] and

(e) In *Slark (Litigation Guardian of) v Ontario*, the Court approved a contingency fee of 20.68% plus disbursements of $1.6 million and taxes of $1.78 million on a $67.7 million settlement where disbursement funding and indemnification for adverse costs was received from the Law Foundation of Ontario. The Law Foundation funding resulted in an additional 10% levy being paid out of the settlement funds after the deduction of legal fees, disbursements and administrative expenses. There is no similar levy in this case.[70]

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

G. Class Counsel Fees Requested

93. Class Counsel's legal fee and disbursement in this Action may be summarized as follows:

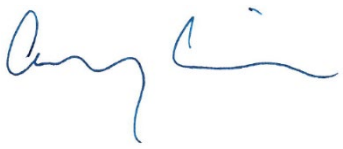
ITEM	TOTAL
Fee Request:	$23,250,000.00
HST on Fee Request:	$3,022,500.00
Disbursements:	$2,393,423.69
Taxes on Disbursements:	$256,006.24
Total Fee/Disbursement Request (including applicable taxes):	**$28,921,929.93**

68 *Cassano v Toronto Dominion Bank*, 2009 CarswellOnt 4052 at paras 50 and 63.
69 *Quenneville v Volkswagen*, 2017 ONSC 3594 at paras 3 and 6.
70 *Slark (Litigation guardian of) v Ontario*, 2014 ONSC 1283 at paras 4 and 15-17.

PART IV – ORDER SOUGHT

94. Class Counsel requests this Honourable Court's approval of the retainer agreements and of legal fees in the amount of C$23.25 million plus taxes, and reimbursement of disbursements of $2,393,423.69 plus taxes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 5th DAY OF OCTOBER, 2018



Siskinds LLP and Rochon Genova LLP
Lawyers for the Plaintiffs

SCHEDULE "A"
LIST OF AUTHORITIES

CASES

1. *Abdulrahim v Air France*, 2011 ONSC 512
2. *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532
3. *Ainslie v Afexa Life Sciences Inc*, 2010 ONSC 4294
4. *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105
5. *Brown v Canada (Attorney General)*, 2018 ONSC 3429
6. *Canadian Imperial Bank of Commerce v Deloitte & Touche*, 2017 ONSC 5000
7. *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60
8. *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686
9. *Cassano v Toronto Dominion Bank*, 2009 CarswellOnt 4052
10. *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada*, 1998 CarswellOnt 1896
11. *Das v George Weston Limited*, 2017 ONSC 5583
12. *Eidoo v Infineon Technologies AG*, 2016 ONSC 3628
13. *Fanshawe College v Hitachi, Ltd et al*, 2016 ONSC 8212
14. *Fantl v Transamerica Life Canada*, 2009 CarswellOnt 6264
15. *Ford v F Hoffman-La Roche Ltd*, 2005 CarswellOnt 1094
16. *Fulawka v Bank of Nova Scotia*, 2014 ONSC 4743
17. *Gagne v Silcorp Ltd*, 1998 CarswellOnt 4045
18. *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829
19. *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602
20. *Hislop v Canada (Attorney General)*, 2004 CarswellOnt 1785
21. *Houle v St Jude Medical*, *2017* ONSC 5129
22. *Hughes v Liquor Control Board of Ontario*, 2018 ONSC 4862
23. *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669
24. *Keyton v Canada Lithium*, 2016 ONSC 7354

25. *Lavier v MyTravel Canada Holiday*, 2013 ONCA 92
26. *Mancinelli v Royal Bank of Canada*, 2018 ONSC 4206
27. *Marcantonio v TVI Pacific Inc*, 2009 CarswellOnt 4850
28. *Martin v Barrett*, 2008 CarswellOnt 3151
29. *Mask v Silvercorp Metals Inc*, 2015 ONSC 7780
30. *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537
31. *Option Consommateurs v Infineon Technologies AG*, 2016 QCCS 2454
32. *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752
33. A *Parsons v Canadian Red Cross Society*, 2000 CarswellOnt 2174

    B *Parsons v Canadian Red Cross Society*, 2001 CarswellOnt 182
34. *Pichette v Toronto Hydro*, 2010 ONSC 4060
35. *Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2016 BCSC 964
36. *Quenneville v Volkswagen*, 2017 ONSC 3594
37. *Rahimi v SouthGobi Resources Ltd*, 2017 ONCA 719
38. *Ramdath v George Brown College of Applied Arts and Technology*, 2016 ONSC 3536
39. *Robertson v ProQuest LLC*, 2011 ONSC 2629
40. *Robertson v Thomson Canada Ltd*, 2009 CarswellOnt 3660
41. *Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752
42. *Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962
43. *Simmonds v Armtec Infrastructure Inc*, 2014 ONSC 3587 (unreported)
44. *Slark (Litigation guardian of) v Ontario*, 2014 ONSC 1283
45. *Smith Estate v National Money Mart Co*, 2011 ONCA 233
46. *Smith v Krones Machinery Co*, 2000 CarswellOnt 68
47. *Theratechnologies Inc v 121851 Canada Inc,* 2015 SCC 18
48. *Urlin Rent a Car Ltd v Furukawa Electric Co,* 2016 ONSC 7965
49. A *Yip v HSBC Holdings plc,* 2017 ONSC 6848

    B *Yip v HSBC Holdings plc*, 2018 ONCA 626

SECONDARY SOURCES

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

SCHEDULE "B"
RELEVANT STATUTES

Class Proceedings Act, 1992, SO 1992, c 6, ss 32 and 33

Fees and disbursements

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

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

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

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

Court to approve agreements

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

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

Agreements for payment only in the event of success

33 (1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

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Agreements for payment only in the event of success

33 (1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

Interpretation: success in a proceeding

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

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

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

Definitions

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

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

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

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

Motion to increase fee by a multiplier

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

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

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

Idem

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

Idem

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

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

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

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

Idem

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

Idem

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF CLASS COUNSEL (FEE APPROVAL) (Motion Returnable October 31, 2018)

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