Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendant

-and-

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

Factum
(Fee Approval)

January 17, 2023

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Plaintiff

- and -

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MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

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Proceeding under the *Class Proceedings Act, 1992*

Factum
(Fee Approval)

PART I: OVERVIEW

1. This is a motion for an order approving the Retainer Agreement with Class Counsel and Class Counsel's fees and disbursements following the successful resolution of this proceeding. The Retainer Agreement provides that Class Counsel will be entitled to a 25% contingency fee (plus disbursements and taxes) if this action results in a court-approved settlement benefitting the Class Members.
2. The $8.25 million settlement (the **"Settlement"**) clearly benefits the Class Members and provides an efficient means to distribute payments to the Class Members. The result

achieved on this Settlement is, for the reasons set out in the Plaintiff's Settlement Approval Factum, an excellent result that is as good, and more likely better, than what the Class could expect to receive following a trial. The compensation is available now without the risk and delay of further litigation.

3. Class Counsel respectfully requests that the 25% contingency fee provision of the Retainer Agreement be approved by the Court (plus disbursements and taxes).

4. As discussed further below, courts in numerous fee approval decisions have found sound and practical reasons[1] for awarding Class Counsel's fees by way of a percentage-based contingency fee. Indeed, our courts have generally perceived and accepted that the percentage retainer approach is presumptively valid and fair.[2] Our courts have approved percentages of 33%. Our courts have approved a 25% fee in many cases. Chief Justice Strathy has noted (in a case when he was then Justice Strathy) that 30% is within the reasonable or common range of class action fee percentages.

5. Class Counsel took on significant risks when they agreed to litigate this case on a contingency fee basis. There were many risks, including the risk that the case would not be certified, the risk that even if certified the case would not succeed on the merits, the risks of appeals, etc. When this case was commenced, Class Counsel knew that they were taking on a relatively smaller action (in terms of potential overall damages) against a large, well-funded defendant with access to formidable counsel, in a highly technical and challenging area of the law.

[1] Such reasons would include rewarding efficiency, rendering defendants' criticism about the quantum of hours and rates of class counsel moot, and avoiding unnecessary court time reviewing dockets.
[2] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 (CanLII).

6. It is respectfully submitted that the caselaw enforcing percentage fees, the real monetary result achieved in this action and the risks accepted by Class Counsel clearly support Class Counsel's 25% fee request.

7. Class Counsel's fee (with tax) request breaks down as follows:

Total Settlement Fund:	$8,250,000.00
Minus Disbursements[3]:	$543,860.34
Subtotal:	$7,706,139.66
Multiplied by 25% Fee:	$1,926,534.92
+ HST on 25% Fee:	$250,449.54
TOTAL FEE & HST:	**$2,176,984.46**

8. Class Counsel also request payment of the disbursements (as noted above) in the amount, as of the date of this factum, of $543,860.34 (which is inclusive of taxes).

PART II: THE FACTS

9. Class Counsel relies on the factual summary set out in the Plaintiff's Settlement Approval Factum dated January 17, 2023. That Settlement Approval Factum should be read in conjunction with this factum. In the context of this fee approval request, Class Counsel also rely on the additional facts discussed in the paragraphs below.

10. The Plaintiff signed a formal retainer agreement with Class Counsel dated September 1st, 2009 (the **"Retainer Agreement"**).[4]

[3] This amount has been updated to reflect additional disbursements incurred since the Plaintiff filed the Settlement and Fee Approval Affidavit of Peter Roy.

[4] Settlement & Fee Approval Affidavit of Peter L. Roy sworn November 29, 2022 (**"Roy Affidavit"**) at para. 38 and Exhibit G, Settlement & Fee Approval Motion Record of the Plaintiff dated November 30, 2022 (**"Plaintiff's Motion Record"**) at Tabs 2 and 2G, pgs. 19-20 and 205-217.

11. The Plaintiff and his then counsel (Davies) read the Retainer Agreement carefully and discussed the agreement with Class Counsel before he signed it. The Plaintiff specifically requested certain terms in the Retainer. The Plaintiff understood and agreed with the terms of the Retainer Agreement when he signed it and confirms his continuing agreement with the terms now. In particular, Mr. Lipson understood and agreed that the 25% fee was reasonable in the circumstances and with the risks involved.[5]
12. The Retainer Agreement provides that Class Counsel would only be paid its fees and disbursements upon the successful resolution of the action. Success is defined as either a final judgment on the common issues in favour of some or all Class Members, or a court-approved settlement that benefits one or more Class Members.[6]
13. The Retainer Agreement further provided that, subject to the approval of the Court, Class Counsel would be entitled to a fee of 25% of any amounts recovered by the Class, and that the Counsel Fee shall be calculated after all disbursements incurred by Class Counsel have been deducted.[7]

Davies Costs

14. As set out in the Plaintiff's main Settlement Approval Factum, this action was issued by Mr. Lipson's former counsel Davies, Ward, Phillips & Vineberg LLP ("Davies"). Davies performed various tasks, including investigating and researching the issues, seeking input from tax experts, attempting to negotiate with the Defendant and ultimately drafting and issuing the Claim against Cassels Brock.[8]

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[5] Settlement & Fee Approval Affidavit of Jeffrey Lipson sworn November 29, 2022 (**"Lipson Affidavit"**) at para. 11, Plaintiff's Motion Record at Tab 3, pgs. 615-616.
[6] Lipson Affidavit at para. 19, Plaintiff's Motion Record at Tab 3, pgs. 619-620.
[7] Lipson Affidavit at para. 19, Plaintiff's Motion Record at Tab 3, pgs. 619-620.
[8] Roy Affidavit at paras. 37-38, Plaintiff's Motion Record at Tab 2, pgs. 19-20.

15. Davies had been retained on a fee-for-service retainer and would not act in this matter on a contingency basis[9]. Mr. Lipson and nine other Class Members, referred to as "Funders" in the Retainer Agreement, paid Davies approximately $320,000 (including fees, disbursements and taxes).[10]

16. By the summer of 2009, Mr. Lipson and other Funders were not prepared to continue to pay out of their pockets for Davies to prosecute the case and Davies was not prepared to act on a contingency basis. Mr. Lipson made the decision to retain experienced class action counsel, who were prepared to act on a contingency basis, to take over as class counsel[11]. Mr. Lipson contacted Class Counsel through Davies in the summer of 2009 and Class Counsel agreed to take carriage of this action from Davies in September 2009 on a contingency basis. The Retainer Agreement was negotiated with Mr. Lipson, who was then taking advice from Davies.

17. As set out in the Retainer Agreement, Class Counsel agreed, subject to certain conditions, to seek recovery of the fees, disbursements and taxes paid to Davies by the Funders out of any settlement "*such that the Funders will not bear a greater percentage of the legal fees and disbursements (or case expenses) than the other class members should this action be successful".*[12] More specifically, the Retainer Agreement provided in part:

> The Client has advised that he and certain of the Other Participants (putative class members) did pay legal fees and disbursements to Davies with respect to this Proceeding (the "Paid Fees and Disbursements"). The Client has requested, on his behalf and on behalf of such Other Participants (collectively, the "Funders"), that REO seek the full reimbursement or indemnification of the Funders in respect of the Paid Fees and Disbursements, such that the Funders will not bear a greater percentage of the legal fees and disbursements (or case expenses) than the other class members should this action be successful. REO has agreed that it will take

[9] Roy Affidavit at para. 38, Plaintiff's Motion Record at Tab 2, pgs. 19-20; Lipson Affidavit at paras. 10-11,
[10] Roy Affidavit at para. 38, Plaintiff's Motion Record at Tab 2, pgs. 19-20.
[11] Lipson Affidavit at paras. 10-11, Plaintiff's Motion Record at Tab 3, pgs. 615-616.
[12] Roy Affidavit at para. 39, Plaintiff's Motion Record at Tab 2, pg. 20.

> the steps set out in sections 12, 13, 14 and 15 below to recover the Paid Fees and Disbursements on behalf of and for the Funders, subject to court approval and subject to any contrary legal or professional obligations. The Funders shall in no circumstance whatsoever be entitled hereunder to claim or receive any funds or amounts on account of the Paid Fees and Disbursements in excess of the actual amounts that they have paid to Davies towards the Paid Fees and Disbursements.[13]

18. If the request for reimbursement of the Davies Costs out of the Settlement Fund is approved by the Court, the Funders will receive either their share, or their proportionate share of the amounts that they paid to Davies, and will thus not effectively be held responsible for a greater percentage of the total legal expenses incurred with respect to this case.[14]

19. Class Counsel recognized that Davies had performed valuable work for the Plaintiff and the putative Class, work that Class Counsel would have been required to complete had they been retained from the outset. Class Counsel accordingly agreed to a 25% contingency fee as opposed to a higher percentage. The agreement to accept a lower contingency fee percentage was a recognition by Class Counsel that the work performed by Davies provided value to the Class.[15] The total Davies fees (excluding taxes) amount to approximately $275,000, which represents approximately 3.3% of the $8.25 million settlement amount (less disbursements). Thus, the total percentage of the $8.25 million (less disbursements) proposed to be paid out as fees would be 28.56%.

Disbursements Incurred to Date

20. Class Counsel incurred disbursements, inclusive of taxes, totaling $543,236.01 in this action. Class Counsel will incur several thousand dollars of additional disbursements throughout the settlement approval process.[16]

[13] Roy Affidavit at para. 40, Plaintiff's Motion Record at Tab 2, pgs. 20-21.
[14] Roy Affidavit at para. 41, Plaintiff's Motion Record at Tab 2, pg. 21.
[15] Roy Affidavit at para. 42, Plaintiff's Motion Record at Tab 2, pg. 21.
[16] Roy Affidavit at para. 148, Plaintiff's Motion Record at Tab 2, pg. 57.

Straight Time Incurred to Date

21. While the Retainer Agreement provides that Class Counsel will be paid a 25% fee, some courts still review the straight hourly time actually incurred as a double-check to confirm or reconfirm that the percentage fee is reasonable when compared to an implicit multiplier.

22. In this case, Class Counsel have, to the date of this factum, worked or incurred in excess of 4,200 hours in time and fees (without taxes) in excess of $2.4 million.[17] The tasks performed by Class Counsel to achieve this Settlement include:

    a. factual and documentary research;
    b. interviewing the Plaintiff and the drafting of his affidavit in support of certification;
    c. reviewing the Defendant's certification record;
    d. arguing the certification motion;
    e. arguing the appeal;
    f. overseeing the certification notice and opt-out process;
    g. interviewing numerous potential witnesses and experts;
    h. reviewing the Defendant's and Third-Parties' extensive productions;
    i. conducting the examinations for discovery of the Defendant and the Third-Parties who defended the main action;
    j. preparing for and attending the mediation and related negotiations;
    k. communicating with putative Class Members;
    l. drafting the Settlement Agreement and preparing material for settlement approval;
    m. drafting the Notice Program for the proposed Settlement;
    n. attending various case management meetings; and,
    o. retaining and instructing the proposed Settlement Administrator.[18]

23. Class Counsel will incur additional time to implement the Settlement. Class Counsel estimate that they will incur an additional $150,000.00 in fees to implement the Settlement.

[17] Roy Affidavit at para. 144, Plaintiff's Motion Record at Tab 2, pg. 56.
[18] Roy Affidavit at para. 145, Plaintiff's Motion Record at Tab 2, pgs. 56-57.

Additional tasks will include arguing the Approval Motion and, if the Settlement is approved, responding to Class Member inquiries, overseeing the administration of the Settlement, liaising with defence counsel and reporting (if and as necessary) to this Court.[19]

24. If this estimated future time of fees of $150,000.00 is added to the actual time incurred to date of (in excess of) $2,400,000.00, the fees incurred will total (in excess of) $2,550,000.00. When $2,550,000.00 is compared to the 25% contingency fee it generates an implicit multiplier of approximately 0.76.[20]

25. For clarity, Class counsel pauses to note that they were more than prepared to take this case to trial and incur significantly more time on this matter pursing the claims of the Class. Indeed, Class counsel truly believed and expected that this case would most likely only be determined at trial and even continued hold that view for most of the time the mediation process was underway (as only lower settlement offers were made by the Defendant). It was only months after the mediation commenced, when the settlement offers first increased to a reasonable settlement range in the eyes of both Mr. Lipson and Class counsel, that it appeared that the case might not need to proceed to trial.

PART III: ISSUES & THE LAW

26. The main issue on this motion is whether the Retainer Agreement and Class Counsel's fee request (plus disbursements and taxes) should be approved? Class Counsel recognize that the legal concepts and principles discussed below are well known to this Court but are set out in part because this factum will be filed and made publicly available to the Class members.

[19] Roy Affidavit at para. 146, Plaintiff's Motion Record at Tab 2, pg. 57.
[20] Roy Affidavit at para. 147, Plaintiff's Motion Record at Tab 2, pg. 57.

Approval of Retainer Agreement & Class Counsel's Fee Request

27. Pursuant to section 32(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the **"*CPA*"**), a retainer agreement between the plaintiff and class counsel is not enforceable unless it is approved by the Court. The Retainer Agreement conforms to the requirements of the *CPA* and provides, in relevant part, for the calculation of Class Counsel's fee at 25% of the recovery for the Class.

General Principles & Benefits of Percentage-Based Contingency Fees

28. Before turning to the specific factors to be addressed on a fee approval motion, Class Counsel will first discuss the generally recognized benefits of a percentage-based fee analysis over those of a base fee and multiplier or lodestar approach. At times (like this case), a percentage fee approach can actually lead to a lower fee paid to Class Counsel (potentially lower than actual time incurred) than a multiplier approach - but such is one of the risks for class counsel when taking on class actions.

29. Numerous courts have recognized that the objectives of the *CPA* – namely, judicial economy, access to justice and behaviour modification – are dependent, in part, upon counsel's willingness to take on class proceedings, and that counsel's willingness to do so in turn depends on the financial incentives for assuming the risks and burdens of prosecuting a class proceeding. A premium on fees is the reward for taking on risky but meritorious class actions.[21]

30. There is general acceptance by Ontario courts that awarding fees on the basis of a percentage of gross recovery is more appropriate than the multiplier methodology. As this

[21] *Marcantonio v. TVI Pacific Inc.*, 2009 CanLII 43191 (ON SC) at para. 29, *Parsons v. Canadian Red Cross Society*, 2000 CanLII 22386 (ON SC) at para. 18, *Ford v. F. Hoffman-La Roche Ltd.*, 2005 CanLII 8689 (ON SC) at paras. 58-62.

Honourable Court wrote in *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324 (CanLII) at paragraph 52:

> I also agree with the sentiment in the case law that contingency fees are an appropriate way to remunerate class counsel for taking on the risk of class proceedings and preferable to the lodestar or multiplier approach, which reward counsel based on a multiplier of their base fee. The multiplier approach has been criticized for, among other things, encouraging inefficiency and duplication and discouraging early settlement: *Cassano v. Toronto-Dominion Bank* (2009), 2009 CanLII 35732 (ON SC), 98 O.R. (3d) 543 (S.C.J.) at paras. 55, 60, 63.

31. Justice Strathy (as he then was) summarized the benefits of percentage-based fee agreements in *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105 (CanLII), where His Honour stated, after listing percentage fee approvals in various class actions ranging from 24 to 36%, that:

> "[64] …Personal injury litigation has been conducted in this province for years based on counsel receiving a contingent fee as high as 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the "no cure, no pay" principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings. The contingent [percentage] fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well paid for a good result.
>
> [65] My second observation reflects the reality of class action litigation. Defendants tend to be well-resourced and represented by larger law firms... The Collectives [defendants] were represented by a 200 lawyer firm. These were some of the best law firms in the country, charging substantial hourly rates, with virtually unlimited resources and no incentive to roll over and play dead.
>
> [66] Due to the nature of the work, Class Counsel are frequently associated with smaller firms and are invariably engaged on a contingent basis. Without wanting to paint all with the same brush, defendants frequently employ a strategy of wearing down the opposition by motioning everything, appealing everything and settling nothing.

> If class proceedings are to realize the goal of access to justice, Class Counsel must be liberally compensated to ensure that they take on challenging but difficult briefs such as this one.
>
> [67] There must be an economic incentive to encourage lawyers to take on litigation of this kind and this is a factor to be considered in assessing the reasonableness of a fee: *[citations omitted]* If first-class lawyers cannot be assured that the Courts will support their reasonable fee requests, how can the Courts and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution?
>
> [68] My third comment, which is not original, is that this is one area where the Court should free itself from the chains of the hourly rate. The result achieved for the class should generally be the most important test of the value of counsel's services."

32. In *Helm v. Toronto Hydro-Electric System Limited,* 2012 ONSC 2602 (CanLII), Justice Strathy approved a percentage fee for a relatively early settlement and stated that:

> "[25] The proposed fee represents a significant premium over what the fee would be based on time multiplied by standard hourly rates. Is that a reason to disallow it? If the settlement had only been achieved four years later, on the eve of trial, when over a million dollars in time had been expended, would the fee be any more or less appropriate? Should counsel not be rewarded for bringing this litigation to a timely and meritorious conclusion? Should counsel not be commended for taking an aggressive and innovative approach to summary judgment, ultimately causing the plaintiff to enter into serious and ultimately productive settlement discussions?
>
> [26] Plaintiff's counsel are serious, responsible, committed and effective class action counsel. They are entrepreneurial. They will likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here."

33. As held by Justice Strathy in the quotes above, a percentage fee approach also appropriately recognizes that the overall risk for Class Counsel may be measured not in any one case but rather over an entire practice. Such an approach effectively takes into account that some cases will be lost early and some will be lost after many years of hard-fought litigation

against well-funded defendants, some cases will be won or settled but the fee award may not cover the actual fees incurred, some cases will settle early and some late, and so on.[22]

34. At the same time, a percentage fee gives clients a tangible means to measure how much they will have to pay in legal fees in relation to their recovery. The application of a percentage also relieves the court from the relatively difficult and somewhat arbitrary task of scrutinizing the hours and rates of class counsel and second-guessing the manner in which class counsel has litigated the case.

35. There is general acceptance amongst judges in Ontario (and elsewhere) that the percentage set out in the retainer should be considered valid or presumptively valid, and enforceable. In the oft-cited decision of *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 (CanLII), plaintiff's counsel requested and received one-third (33.3%) of the $28.2 million settlement amount in a tax shelter class action. In making this award – approximately $9.4 million – Justice Belobaba found that:

    a. Contingency fee arrangements that are fully understood and accepted by the representative plaintiffs (such as the Retainer Agreement in this case) should be presumptively valid and enforceable;

    b. The judicial acceptance of the contingency fee agreement as presumptively valid would further the development of the class action in at least three ways:

        i. Class counsel's legal fees would be more easily understood, more principled and more "reasonable" than under the "multiplier" approach;

[22] See, for example: "*It is only through a robust contingency fee system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice*": per Belobaba J. - *Middlemiss v. Penn West Petroleum,* 2016 ONSC 3537 (CanLII) at para. 19; see also: *Ramdath v. George Brown College*, 2016 ONSC 3536 (CanLII) at footnote 14.

ii. The percentage-based contingency fee approach would inject predictability into class counsel's compensation calculus and thereby encourage greater use of the class action vehicle, enhancing access to justice; and,

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

c. A percentage-based contingency agreement works best in all-cash settlements (such as the within case); and,

d. The presumption of a valid contingency fee could be rebutted as follows:

i. Where there is a lack of full understanding or true acceptance on the part of the representative plaintiff;

ii. Where the agreed-to contingency amount is excessive; and,

iii. Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise unreasonable.[23]

36. The presumptive enforceability of a valid contingency fee agreement has been described by Justice Belobaba as "*the most principled approach to Class Counsel compensation*" and "*best assures the future viability of the class action as a significant vehicle for access to justice*".[24]

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[23] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 (CanLII) at paras. 8-11.
In a second fee approval decision in *Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670 (CanLII), Justice Belobaba approved the same contingency fee in a subsequent settlement with an additional set of defendants. That subsequent approved fee totaled $5.8 million of a $17.5 million total settlement. In both *Cannon* settlements, the Class Proceedings Fund also received its 10% levy of the funds payable to the class.
[24] *O'Brien v. Bard*, 2016 ONSC 3076 (CanLII) at para. 16; *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 (CanLII) at para. 56.

37. As far back as 2011, Justice Strathy (as he then was) expressly confirmed that a one-third percentage contingency fee was "*standard in class action litigation*" and had "*come to be regarded by lawyers, clients and the courts as fair*":

> "[13] A contingency fee of one-third is standard in class action litigation and has been commonplace in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases."[25]

38. Further illustrative but not exhaustive examples of more recently approved class action fees of between 30% and to 33.3% (as set out in the retainer agreements in question in those cases) include the following:

    a. In *Davidson v. Solomon (Estate)*, 2020 ONSC 2898 (CanLII) at paragraph 73, Justice Mew awarded a 33% fee in a comparatively small settlement ($430,000) against the estate of a dentist accused of surreptitiously videotaping his patients. In that case, class counsel's docketed time exceeded their percentage-based contingency fee;

    b. In *Rezmuves v. Hohots*, 2020 ONSC 5595 (CanLII) at paragraphs 10 and 43, where this Court approved a 30% contingency fee in a very small ($500,000) solicitor's negligence class action settlement;

    c. In *Vester v. Boston Scientific Ltd*., 2020 ONSC 3564 (CanLII) at paragraphs 44 and 56, where this Court approved a 30% contingency fee in a $21.5 million medical device class action;

    d. In *Harper v. American Medical Systems Canada Inc*., 2019 ONSC 5723 (CanLII) at paragraphs 14 and 54, this Court approved a 30% contingency fee in a $20 million medical device class action;

[25] *Abdulrahim v. Air France*, 2011 ONSC 512 (CanLII).

e. In *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090 (CanLII) at paragraph 32, this Court approved a 33.3% fee of $7,033,225.40 on a $21,120,797 settlement in a wrongful solitary confinement class action;

f. In *Brazeau v. Attorney General (Canada)*, 2019 ONSC 4721 (CanLII) at paragraph 29, this Court awarded class counsel a 33.3% contingency fee in a wrongful solitary confinement class action;

g. In *Park v. Nongshim Co., Ltd*., 2019 ONSC 1997 (CanLII) at paragraph 81, Justice Glustein adopted the "presumptive approval" of the retainer agreement as set out in *Cannon* and approved a 1/3rd (33.3%) contingency fee in a price fixing class action;

h. In *Cass v. WesternOne Inc*., 2018 ONSC 4794 (CanLII), at paragraphs 125-128 Justice Glustein approved a 30% contingency fee (plus disbursements and taxes) on a $1 million securities settlement. In *Cass,* the plaintiff was approved for Class Proceedings Fund funding and as such, the Fund's 10% levy was deducted from the settlement as well;

i. In *Ronald J. Valliere v. Concordia International Corp.*, 2018 ONSC 5881 Justice Morawetz approved a 33.3% contingency fee as set out in the retainer agreement as applied to the portion of a $18 million securities settlement relating to non-Quebec residents (the fees for the Quebec residents would be sought separately by Quebec class action counsel);

j. In *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537 (CanLII), at paragraphs 19 and 20 Justice Belobaba approved the 33% contingency fee (plus disbursements and taxes) as specified in the retainer agreement on a $26.5 million securities class action; and

k. In *Silver v. Imax Corp*., 2016 ONSC 403 (CanLII), Justice Baltman approved a 33% contingency fee (plus disbursements and taxes) in a securities case (there were two co-counsel firms – the retainer with one was set at 33% and the second was set at a range of 25-33% with the second firm requesting the fee be set at 33%); and,

l. In *Frank v. Caldwell*, 2014 ONSC 1484 (CanLII), at paragraphs 30-32 and 38-39 this Court approved a 30% contingency fee (plus disbursements and taxes) as specified in the retainer agreement on a USD$3.5 million securities settlement.

Relevant Factors in Determining Class Counsel's Fee

39. While the percentage fee set out in a retainer is generally considered enforceable, there are other factors that the courts consider or reference when determining the fees of class counsel. Those factors include:

    a. the factual and legal complexities of the matters dealt with;
    b. the risk undertaken;
    c. the degree of responsibility assumed by class counsel;
    d. the monetary value of the matters in issue;
    e. the importance of the matter to the class;
    f. the degree of skill and competence demonstrated by class counsel;
    g. the results achieved;
    h. the ability of the class to pay;
    i. the expectations of the class as to the amount of the fees; and,
    j. the time expended by class counsel and the consequent opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[26]

40. Which factors were the most relevant depended on the nature of the case, with the results achieved and risks undertaken usually being principally important. The factors that Class Counsel submits may be relevant in this case are addressed below, with the discussion of some of the factors being combined to avoid unnecessary duplication of submissions.

Complexity of This Case

41. This Class Action was factually and legally complex. As set out in the Plaintiff's Settlement Approval Factum, it involved a complex tax transaction and highly technical, competing views on the caselaw and the validity of the transaction by experienced tax professionals. There were nuances and qualifications in each and every expert's view of the Program that

[26] *Park v. Nongshim Co., Ltd*., 2019 ONSC 1997 (CanLII) at para. 79*, Bilodeau* v. *Maple Leaf Foods Inc.*, 2009 CanLII 10392 (ON SC) at para. 71*, Ford v. F. Hoffman-La Roche Ltd.*, 2005 CanLII 8689 (ON SC) at para. 67*, Brown* supra at para. 40.

added an element of complexity not found in more straight-forward proceedings with well-established standards of care. The examination of the Defendant's representative (Mr. Saltman) took additional time in part because his examination canvassed various technical tax issues and caselaw. Class Counsel's approach to this case required Class Counsel to become steeped in various relevant tax cases, principles and concepts.[27]

Degree of Risk

42. Class proceedings are inherently risky. Class Counsel and its predecessor firms have taken on some very difficult cases, both large and small, with an uncertain outcome because the issues were compelling. While Class Counsel have achieved successes in some class proceedings, Class Counsel have been involved in cases resulting in real defeats and, even when successful, fees less than straight time. For example:

    a. Class Counsel was counsel on *Larcade v. The Province of Ontario* – regarding access to "special needs agreements" for thousands of profoundly disabled children whose parents were allegedly practically compelled to surrender custody of their disabled child to the Province. Certification was initially denied by Justice Cullity, then was subsequently certified by the Divisional Court, but that certification order was later overturned by the Court of Appeal[28];
    b. Class Counsel was counsel on *Williams v. AGC et al.* – a proposed class action arising from the second wave of the SARS epidemic that resisted a motion to strike before being struck by the Court of Appeal[29];
    c. Class Counsel was co-counsel on *McCracken v. CNR* – an unpaid overtime class action regarding the alleged misclassification of CNR workers. The action was initially certified by Justice Perell but later overturned by the Court of Appeal. Class Counsel invested millions in unrecovered fees and disbursements[30];

[27] Roy Affidavit, at para. 127, Plaintiff's Motion Record at Tab 2, pg. 50.
[28] *L. (A.) v. Ontario (Minister of Community and Social Services)*, 2006 CanLII 39297 (ON CA).
[29] *Williams v. Canada (Attorney General)*, 2009 ONCA 378 (CanLII).
[30] *McCracken v. Canadian National Railway Company*, 2012 ONCA 797 (CanLII).

d. In *Monckton v. Canadian Business College*, Class Counsel acted for a class of dental hygiene students (many of whom earned less than $30,000/year) in an action where it was alleged that the students were enrolled in a dental hygiene program (at a cost of approximately $16,000-$17,000) without being advised that they would not automatically be entitled to write a dental hygienist certification exam. Although the case was small and was not expected by Class Counsel to generate any significant fee payments, Class Counsel took the case on and prosecuted it vigorously. Class Counsel incurred over $512,500 in time and disbursements before a favourable settlement for the class was reached. In approving the settlement, this Honourable Court noted that Class Counsel "should be commended for taking on this small class action". The fees requested and awarded by the Court in that case were less than $50,000[31]; and,

e. Class Counsel was counsel in *Ginther v. Bell Mobility Inc. et al.* where Class Counsel brought an action to the brink of certification to then only find, despite investing hundreds of thousands of dollars of legal time, that various facts only then just disclosed by the defendant made the case inappropriate for certification. In that case, the court approved a without-costs discontinuance of the proceeding[32].

43. In this case, Class Counsel undertook a relatively high degree of risk against the Defendant (particularly when that risk is viewed against the size of the case). The Defendant is represented by one of Canada's leading litigation firms that counts some of Canada's best counsel among its lawyers. The resistance mounted by the Defendant was detailed, thoughtful and sophisticated.[33]

44. Serious risks taken by Class Counsel in advancing this action include:

a. Certification Risk – Class Counsel was not successful in having the case certified (dismissed initially on limitations grounds) and the causation common issue was

[31] *Monckton v. C.B.S. Interactive Multimedia*, 2012 ONSC 5227 (CanLII).
[32] *Ginther v. Bell Mobility Inc. et al.*, Court File No. CV-19-00631662-00CP. See also, Roy Affidavit at para. 128€, Plaintiff's Motion Record at Tab 2, pg. 51.
[33] Roy Affidavit at para. 129, Plaintiff's Motion Record at Tab 2, pg. 51.

also initially rejected. Class Counsel was only successful in having the case certified on appeal;

b. Risk of Litigation on the Merits – there was a significant risk that the Plaintiff would not be successful in establishing that Cassels Brock was negligent or that it made negligent misrepresentations;

c. Risk relating to Damages and Individual Assessments – the damages that may have been established and recovered may have been quite limited. Many individuals may not have even pursued claims through an individual issues phase. Moreover, it may have been difficult and costly for those individual Class Members who did press forward into the individual issues phase to establish that Cassels Brock's liability to them (in light of various issues, including having to establish reliance and causation, and overcome limitations issues). Class Counsel would, of course, not be able to collect a fee for losses by Class members who did not pursue individual recovery or for losses by Class members who did not succeed in an individual assessment. And for those that were successful, Class Counsel may have had to wait for each one over the course of many years before being able to collect its percentage fee; and,

d. Hours/Work Required to Date – Class Counsel invested more than 12 years of time into this case and carried enormous fees for years. The Settlement in this case was not achieved in one or two hours, but took more than 4,200 hours from professionals to achieve. A summary of the hours invested to date is set out below at paragraph 56.[34]

[34] Roy Affidavit at para. 130, Plaintiff's Motion Record at Tab 2, pg. 52.

The Monetary Value & Importance of the Matter to the Class

45. This action was of importance to the Plaintiff and the Class. Unlike many class proceedings where the monetary value of individual claims can be miniscule (e.g., credit card or gas bill overcharges amounting to pennies or a few dollars, etc.), the individual compensation payable under the Settlement for many of the Class Members will be more significant. Depending on the amount of money donated to the Program, compensation for individual Class Members may total several thousand or even tens of thousands of dollars or more per Class Member.[35]

Competence of Class Counsel

46. Class Counsel has experience in the area of Class Proceedings. Class Counsel's experience were brought to bear in this complex case. Class Counsel hopes that its efforts to drive this case forward and its reputation as determined counsel assisted in achieving this settlement.[36]

47. Lawyers at Class Counsel are not tax counsel and had to engage in a large amount of research and review a large volume of cases, text books and journal articles in order to become conversant in this specialized and highly technical area of law. [37]

Results Achieved

48. In Class Counsel's view, this Settlement is an excellent result for the Class. Most Class Members will receive a material refund of their cash donation without having to make an individual application, without having to prove that they read and relied on the Opinions (which many would likely not be able to do), without having to overcome the limitation

[35] Roy Affidavit at para. 131, Plaintiff's Motion Record at Tab 2, pgs. 52-53.
[36] Roy Affidavit at para. 132, Plaintiff's Motion Record at Tab 2, pg. 53.
[37] Roy Affidavit at para. 133, Plaintiff's Motion Record at Tab 2, pg. 53.

period defence and without having to otherwise provide support for any kind of individual assessment or damages. As set out in detail above, all Class Members are eligible for some compensation. The payments to the Class as part of this Settlement may be as much or more compensation than the Class would have seen at the end of a contested common issues trial and years of individual assessments. [38]

Expectations of the Class as to the Amount of the Fees

49. Mr. Lipson fully expected that, in the event this action was successful, Class Counsel would be well-compensated for its work and taking on the real risks. Mr. Lipson's Retainer Agreement provides for a 25% contingency fee for a successful outcome in this case. The Representative Plaintiff supports Class Counsel's fee request[39].

50. Pursuant to the notification process regarding this Settlement, the Class was advised that RO will be paid only in the event this action is successful and that we would be seeking a 25% contingency fee plus disbursements, taxes, the CPF's levy and the Davies Costs. As set out in the Plaintiff's Settlement Approval Factum, no Class Member objected to this Settlement or Class Counsel's proposed fee.

Opportunity Cost to Class Counsel

51. As noted below, Class Counsel incurred more than 4,200 hours of time amounting to more than $2.4 million in prospective fees to bring this Settlement before the Court. That is a significant investment of time and money for any firm and a particularly serious investment for a small litigation boutique like RO. Time and resources risked on this case represent time and resources that could not be invested in either conventional paying files or other

[38] Roy Affidavit at para. 134, Plaintiff's Motion Record at Tab 2, pg. 53.
[39] Lipson Affidavit at paras. 18-19, Plaintiff's Motion Record at Tab 3, pgs. 619-620.

class proceedings.[40]

Fee Sought

52. As set out in the Retainer Agreement, Class Counsel would only be paid its fees and disbursements upon the successful resolution of the action. Success is defined as either a final judgment on the common issues in favour of some or all Class Members, or a court-approved settlement that benefits one or more Class Members.[41]

53. The Retainer Agreement further provided that, subject to the approval of the Court, Class Counsel would be entitled to a fee of 25% of any amounts recovered by the Class on any judgment, order, report on a reference or settlement, and that the Counsel Fee shall be calculated after all disbursements incurred by Class Counsel have been deducted.[42]

54. Pursuant to paragraph 19 of the Retainer Agreement, Class Counsel could have requested, as the percentage-based contingency fee is less than the value of their straight docketed time, to be paid its straight time out of the Settlement Fund. Class Counsel are not pursuing such greater straight time compensation.[43]

Total Fee Requested

55. The following sets out Class Counsel's fee request:

Total Settlement Fund:	$8,250,000.00
Minus Disbursements:	$543,860.34
Subtotal:	$7,706,139.66
Multiplied by 25% Fee:	$1,926,534.92
+ HST on 25% Fee:	$250,449.54

[40] Roy Affidavit at para. 137, Plaintiff's Motion Record at Tab 2, pg. 54.
[41] Roy Affidavit at para. 138, Plaintiff's Motion Record at Tab 2, pgs. 54-55.
[42] Roy Affidavit at para. 139, Plaintiff's Motion Record at Tab 2, pg. 55.
[43] Roy Affidavit at para. 141, Plaintiff's Motion Record at Tab 2, pg. 55.

TOTAL FEE & HST: $2,176,984.46

Straight Time Incurred to Date

56. As noted above, RO has incurred, as of the date of this affidavit, more than 4,200 hours in time and fees (without taxes) in excess of $2.4 million. As set out below, if Class Counsel's 25% contingency fee request is approved by the Court, RO will not earn a premium or multiplier on its time incurred to date.[44]

57. As noted above, Class Counsel estimates that it will be necessary incur an additional $150,000 in fees to implement the Settlement. Additional tasks include arguing the approval motion and, if the Settlement is approved, responding to Class Member inquiries, and overseeing the administration of the Settlement. If this estimated future time or fees of $150,000 is added to the actual time incurred to date of (in excess of) $2,400,000, the fees incurred will total (in excess of) $2,550,000. When $2,550,000 is compared to the 25% contingency fee calculated above the implicit multiplier is approximately 0.76.

Disbursements Incurred to Date

58. As set out above, Class Counsel incurred disbursements, inclusive of taxes, totaling approximately $543,860.34 in this action. $479,290.06 of those disbursements were funded by the CPF. $64,570.28 were funded by Class Counsel.

Class Proceedings Fund Levy

59. The Plaintiff was approved for funding by the CPF. As this action resulted in settlement in favour of the Class, the CPF is, pursuant to s. 10(1) of O. Reg. 771/92, entitled to the repayment of its funded disbursements of $479,290.06 and 10% of the amount of the award or settlement funds payable to the Class Members.[45]

[44] Roy Affidavit at para. 144, Plaintiff's Motion Record at Tab 2, pg. 56.
[45] Roy Affidavit at para. 149, Plaintiff's Motion Record at Tab 2, pg. 58.

Request to Not Deduct Costs Award from Approved Fee

60. In addition to the foregoing, Class Counsel respectfully request that the $130,500 fee component (excluding tax) of the certification costs award (see paragraph ● of the Plaintiff's Settlement Approval Factum) and the $43,500 fee component (excluding tax) of the $50,000 certification appeal costs award not be deducted from its approved fee.

61. While the current *Solicitors Act* does allow costs to factor into a contingency fee, at the time the retainer was executed in 2009, section 28.1(8) of the then version of the *Solicitors Act* did not allow a lawyer to collect a costs award or costs component of a settlement unless the Court approved same. That subsection provided as follows:

> *Agreement not to include costs except with leave*
>
> (8) 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
> >
> > *(b)* the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them.

62. Section 19(b) of Mr. Lipson's Retainer Agreement complies with section 28.1(8) of the former version of the *Solicitors Act* and section 3.3 of Ontario Regulation 195/04.[46]

63. The costs awards in this circumstance are the costs awarded in 2013 for the appeal to the Court of Appeal in *Lipson v. Cassels Brock & Blackwell LLP,* 2013 ONCA 391 (CanLII) and then the costs for certification subsequently awarded by this Honourable Court in *Lipson v. Cassels Brock & Blackwell*, 2013 ONSC 6450 (CanLII). There is an argument

[46] Exhibit G to Roy Affidavit, Plaintiff's Motion Record at Tab G, pg. 210

that such earlier interim costs awards (not costs awarded at the ultimate merit resolution or costs paid as part of a settlement), may not have been caught by this former provision of the *Solicitors Act*. There is also an argument that the former section of the *Solicitors Act* was not particularly designed for, and did not mesh particularly well with, class actions, and that class action contingency fees are left to be addressed more holistically by the class action judge under the applicable sections of the *Class Proceedings Act*. To the extent the former section does apply in these circumstances, Class Counsel asserts that this case involves the kind of exceptional circumstances that our courts have identified (albeit in the context of individual (non-class) actions).

64. This Honourable Court is familiar with the principles and caselaw relevant to 28.1(8) of the former *Solicitors Act.* In *Hodge v. Neinstein*, 2014 ONSC 4503[47] (CanLII), the Court addressed the concept of exceptional circumstances under that section in part as follows:

> [37] Section 28.1(8) of the *Solicitors Act* precludes a solicitor from recovering both a proportion of the client's award and also costs unless the court approves. A contingency fee agreement cannot provide for both the payment of costs received from the defendant and a percentage based on damages recovered, unless the court is satisfied that there are exceptional circumstances and the court approves the inclusion of the costs: *Williams (Litigation Guardian of) v. Bowler* (2006), 2006 CanLII 19466 (ON SC), 81 O.R. (3d) 209 (S.C.J.); *Séguin v. Van Dyke*, 2013 ONSC 6576.
>
> …
>
> [39] The exceptional circumstances referred to in s. 28.1(8) include assuming an extraordinary risk that would justify the solicitor charging a premium for his or her work; *Williams (Litigation Guardian of) v. Bowler*, *supra*. In the *Williams* case, the contingency fee was approved where counsel's assumption of significant and unusual risk, together with complications arising from feuding plaintiffs, amounted to extraordinary circumstances that justified granting approval. See also: *Re*

47 That certification decision was overturned on different grounds by the Divisional Court in *Hodge v Neinstein*, 2015 ONSC 7345 (CanLII).

Cogan, 2010 ONSC 915; *Oakley & Oakley Professional Corp. v. Aitken*, 2011 ONSC 5613.

[40] In authorizing the court to allow a lawyer to obtain both a contingency fee and to recover the costs awarded to his or her client in "exceptional circumstances," the Legislature recognized that there will be cases where having regard to the nature of the litigation and the associated risks, a contingency fee alone would not fairly compensate the lawyer for taking on the case: *Oakley & Oakley Professional Corp. v. Aitken*, *supra* at para. 17.

[41] In determining whether there are "exceptional circumstances" under s. 28.1(8) of the *Solicitors Act*, the court needs to know how much of a premium is being sought over by the solicitor and the solicitor should provide the court with his or her dockets or time records: *Re Cogan*, 2010 ONSC 915.

See also:

J. Arthur Cogan Q.C., 2010 ONSC 915 (CanLII):

> "[30] As to what constitutes special circumstances, I am of the view that this refers to cases in which the solicitor has taken on an exceptional risk and/or has rendered unusually extensive services such as may happen in a lengthy medical negligence trial involving hard fought liability issues."

Oakley & Oakley Professional Corporation v. Aitken, 2011 ONSC 5613 (CanLII):

> "[16] I have read the debates in the Legislature concerning the formal introduction of contingency fees in Ontario, and it appears that the policy concerns that underlie s. 28.1 (8) of the Act is that lawyers' fees should not be excessive and that there should be no "double-dipping."
>
> [17] It appears that in authorizing the court to allow a lawyer to obtain both a contingency fee and to recover the costs awarded to his or her client in "exceptional circumstances," the Legislature recognized that there will be cases where having regard to the nature of the litigation and the associated risks, a contingency fee alone would not fairly compensate the lawyer for taking on the case."

65. As to sufficient exceptional circumstances, Class Counsel submits that following factors in combination and otherwise satisfy any exceptional circumstances required:

a. The various risks assumed and faced in this case as noted above;

b. The value of compensation secured, particularly when viewed against the risks and evaluation of the merits;
c. The vigorous defence by the Defendant and the considerable time and effort expended;
d. The absence of any premium on straight time. The total fee sought by Class Counsel is still less than the straight time incurred by Class Counsel;
e. The decision by Class Counsel to not request straight-time (in accordance with that provision in the retainer agreement), which would have resulted in a higher fee payable to class counsel; and,
f. The fact that Class Counsel will need to perform additional work going forward if this settlement is approved.

66. It is also noted that, without addressing (or at least without expressly addressing) any so-called exceptional circumstances under former s. 28.1(8), this Honourable Court approved class counsel retaining or being paid costs in addition to its percentage contingency fee in both *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 7285 (CanLII) at paras. 21 and 22 and in *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, 2009 CanLII 44271 (ON SC) at paras. 63-68. In *Farkas*, this Honourable Court specifically noted that the total fees (including the costs award) were still less than the straight time incurred by class counsel.

No Request for Plaintiff's Honourarium

67. The Plaintiff's Retainer Agreement provides that Class Counsel may seek an honourarium on his behalf. Mr. Lipson has advised that he does not seek an honourarium in this case[48].

[48] Lipson Affidavit at para. 27, Plaintiff's Motion Record at Tab 3, pg. 622. Roy Affidavit at para. 150, Plaintiff's Motion Record at Tab 2, pg. 58.

PART IV: ORDER REQUESTED

68. Class Counsel respectfully requests an Order and Directions from this Court that: i) approve the Retainer Agreement; ii) fix Class Counsels' fees at 25% of $7,706,139. (the Settlement Fund less the total disbursements as requested), plus the requested disbursements and taxes to be paid from the Settlement Fund; iii) fix the Class Proceedings Fund's 10% levy in an amount to be paid from the Settlement Fund; and, iv) authorizing Class Counsel to pay Davies Costs (or some percentage thereof) to each of the Funding Class Members according to their individual payments to Davies.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of January, 2023.

David F. O'Connor

J. Adam Dewar

JEFFREY LIPSON	- and -	**CASSELS BROCK & BLACKWELL LLP et al.**	-and-	**MINTZ & PARTNERS LLP et al.**
Plaintiff		Defendant		Third Parties

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at Toronto

Factum
(Fee Approval)

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