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
(Settlement Approval)

January 17, 2023

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Proceeding under the *Class Proceedings Act, 1992*

Factum
(Settlement Approval)

PART I: OVERVIEW

1. This motion is for an Order approving the settlement agreement between the Representative Plaintiff Jeffrey Lipson and the Defendant Cassels Brock and Blackwell LLP (**"Cassels Brock"** or **"Defendant"**) dated November 14, 2022 (the **"Settlement Agreement"** or **"Settlement"**).

2. In this certified class action, the Plaintiff alleged that Cassels Brock breached the standard of care of reasonably competent solicitors when it prepared legal tax opinions (**"Opinions"**)

relating to a charitable tax donation program (**"Program"**) offered by the Athletic Trust of Canada (**"Athletic Trust"**) for the years 2000 to 2003. The Opinions were part of a package available to the Class Members (those who participated in the Program).

3. The Plaintiff's claim advanced two causes of action: (a) negligence *simpliciter,* based on the allegation that Cassels Brock's Opinions were a pre-requisite to the establishment of the Program and that they did not meet the relevant standard of care; and (b) negligent misrepresentation, based on the allegation that the Opinions contained misleading statements as to whether the Program would withstand CRA challenge.

4. After approximately 12 years of litigation, the completion of the discovery process and the exchange of expert reports discussed below, the Parties have reached a proposed Settlement in this proceeding. The Settlement is the product of the active pursuit of this action, arm's length negotiations and a mediation before the Honourable Frank Marrocco, a recently retired judge of the Ontario Superior Court of Justice.

5. This action was formerly scheduled to proceed to a 30-day trial of the common issues commencing in late January 2023. The common issues trial would, if necessary, address whether Cassels Brock owed and breached any of the duties set out in the certified common issues. It is important to note that the certified common issues do not include any questions relating to the quantification of Class Members' damages. While some elements of liability may be established at the common issues trial if the Plaintiff was successful, individual damages hearings or analysis would almost certainly be necessary to resolve the individual damage claims of the Class Members.

6. The Class Members made cash donations, based on the information available and the Plaintiff's expert's assumptions and analysis, in the aggregate of approximately $43.5 million over

the years 2000 to 2003. Based on a settlement with the CRA arising out of a test case for the Program and again the analysis and assumptions of the Plaintiff's expert, the Class Members were able to claim tax credits totaling approximately $21 million (in aggregate for all Class Members) on the approximately $44.3 million total donated funds, resulting in the Class Members being net out of pocket approximately $23.3 million. If approved, this Settlement will see Cassels Brock pay $8.25 million, which is approximately 35% of the $23.5 million out of pocket damages. If one takes into account the CJA interest that may have been awarded (at 1.3%) on that principal amount (for a total with interest of approximately $27.5 million), the $8.25 million represents 30% of that total out-of-pocket loss.

7. In Class Counsel's opinion, the Settlement is fair, reasonable and in the best interests of the approximately 1,000 Class Members. The Class Members have been notified of this Settlement and no Class Members have filed objections to it. Two Class Members have, as set out below, filed submission in support of the Settlement.

8. There were various real and significant risks and challenges in this case including whether Cassels Brock even owed a duty of care to Class Members, as they were not clients of Cassels Brock and, more significantly, whether Cassels Brock would have been found to have breached the standard of care in rendering the Opinions. The Opinions contained various caveats, assumptions, disclaimers, limitations and risks. The Opinions did not guarantee any particular outcome; rather, the Opinions indicated that a challenge of the Program by the CRA was unlikely to succeed, which by definition meant that a challenge by the CRA was possible and that such a challenge could be successful.

9. Against the Plaintiff's tax expert (Vern Krishna) stood two tax experts who submitted reports for Cassels Brock and for the Third-Party Gardiner Roberts LLP (namely, Edward Heakes

and Brian Nichols). Each of those defence experts opined that Cassels Brock's Opinions met the standard of care at the time, based on what was considered to be the leading Federal Court of Appeal jurisprudence at the time. Mr. Heakes and Mr. Nichols opined that Dr. Krishna's views were not a reflection of the existing caselaw at the relevant time (2000 to 2003), but rather an inappropriate reflection of how the caselaw changed or turned after 2003. In addition, there was evidence that supported Mr. Heakes' and Mr. Nichols' opinions from Thorsteinssons LLP (the largest law firm in Canada that practices exclusively in tax law), who acted for the tax payers (i.e., Class Members) in the test case. Thorsteinssons' stated view (in the context of the test case and before this Class Action was commenced) was that investments in the Program should have (or should likely have) qualified for the full tax credits promoted as part of the Program at the time the taxpayers made their donations in 2000 to 2003, and that it was only a subsequent shift in the caselaw that created the real challenge for the taxpayers. Lastly, there was also an opinion from Ronald Farano (another tax expert, who subsequently passed away) who essentially opined in late 2000 or early 2001 that the Cassels Brock Opinion (then for the year 2000) accurately captured the tax principles issues and authorities.

10. The pure negligence claim (negligence *simpliciter*) may have presented real challenges (as discussed further in the body of this factum).

11. As for the negligent misrepresentation cause of action, even if Cassels Brock was found to have made negligent misstatements in its Opinions, the Class Members would then have had to prove on an individual basis that they relied on the Opinions. In that context, they likely would have had to prove that they at least read the Opinions for the years that they donated. That may have presented a problem. It was apparent to Class Counsel that many of the Class Members, including Mr. Lipson, may not have read the Opinions.

Beyond proving that Class Members actually read the Opinions, each individual may have had to explain how they specifically relied on the Cassels Brock Opinions (as opposed to relying on what their accountants or advisers, who presented the Program to them, said), including what their own accountants and advisers advised them, and whether they knew that the Program was risky, knew of the risk that the CRA would challenge the tax credits claimed, knew that such a challenge may be successful and accepted those risks.

12. There were also potentially real limitation period issues for the Class as this Honourable Court noted in its initial certification decision. While the case was re-instated on appeal, those limitation arguments on the merits did not disappear.

13. There were also challenges with the damages claimed. The first challenge was that the Defendant intended to argue that, in order to be entitled to the charitable tax credit as part of the settlement with the CRA, the Class Members (tax payers) essentially confirmed that they intended to donate their full cash donations to a charity, in exchange for a charitable tax credit. In other words, the net out of pocket amount was not "damages" but rather the result of a conscious choice to donate cash in exchange for a tax credit (and without such donative intent, no tax credit would have been available).

14. Given the issues noted above and below relating to liability and damages, and given the delay attendant with prosecuting the case through a trial, individual issues and appeals, a significant reduction (70% or more) of the maximum damages available was appropriate in Class Counsel's view. One could easily argue that liability was 50/50 (at best) and, thereafter, that a 50% (or more) further reduction was appropriate in light of the issues that would have to be

addressed even if the Court found that the standard of care was breached – that would see the highest possible damages being reduced to 25% (or less than $7 million).[1]

15. Class Counsel have no hesitation in recommending this $8.25 million Settlement to the Class Members and to the Court. The Settlement avoids the real risk of losing on the common issues and provides the Class Members with compensation now. The Settlement also avoids the delays and complications that would have been encountered if the case went to trial, appeal, and then (if successful) on to an individual issues phase and any appeals therefrom.

PART II: THE FACTS

The Plaintiff & the Class

16. The Representative Plaintiff is Jeffrey Lipson. Mr. Lipson is a successful retired businessman who made significant cash donations in the context of the Program in each of the 2000-2003 tax years. Mr. Lipson received and donated 276 Timeshare Weeks through his participation in the Program.[2]

17. The certified class of approximately 1,000 individuals is defined as:

> All individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs (the "**Class Members**" or the "**Class**").[3]

18. Notice of certification was provided in 2014 and 2015 and the opt-out period is closed.

The Defendant & Third Parties

[1] Roy Affidavit at para. 99, Plaintiff's Motion Record at Tab 2, pg. 43.
[2] Settlement & Fee Approval Affidavit of Peter L. Roy sworn November 29, 2022 (**"Roy Affidavit"**) at para. 20, Settlement & Fee Approval Motion Record of the Plaintiff dated November 30, 2022 (**"Plaintiff's Motion Record"**) at Tab 2, pg. 14.
[3] Roy Affidavit at para. 21, Plaintiff's Motion Record at Tab 2, pg. 14.

19. Cassels Brock is the single defendant to this class action. The Opinions were prepared by Lorne H. Saltman who, at the time they were prepared, was a partner in the Tax and Trusts Practice Group of Cassels Brock.[4]

20. Cassels Brock issued a Third-Party Claim against a number of individuals and entities, alleging that they provided tax, financial or legal advice to Class Members with respect to the Program and claiming contribution and indemnity for any amounts awarded against Cassels Brock in the main action. The Third Parties who remain in the action are: i) accounting firm Mintz & Partners LLP; ii) accounting firm Prenick Langer LLP (now TCH Partners LLP); and, iii) law firm and lawyer Gardiner Roberts LLP and the Estate of Ronald J. Farano.[5]

21. Any contributions made to the Settlement Fund by any Third Parties is a matter negotiated between Cassels Brock and those Third Parties.[6]

The Athletic Trust Tax Reduction Program

22. The Program was conceived by its promoters Steven Mintz and Stephen Elliott. The Program was marketed by a number or network of accountants and financial advisors (some of whom are or were formally Third Parties to this Action as noted above) apparently recruited by the Promoters to distribute the Program to their clients.[7]

23. The nature of the transaction underlying the Program was relatively complex. The Program is described in this Honourable Court's certification decision in *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724 (CanLII) at paragraph 18. The Program involved the acquisition and gifting of timeshare units from a resort developer by a Bahamian Trust to participants/investors in the Program (i.e., Class Members). The timeshare units were subject to a charge or lien in favour

[4] Roy Affidavit at paras. 22-23, Plaintiff's Motion Record at Tab 2, pgs. 14-15.
[5] Roy Affidavit at para. 24, Plaintiff's Motion Record at Tab 2, pg. 15.
[6] Roy Affidavit at para. 24, Plaintiff's Motion Record at Tab 2, pg. 15.
[7] Roy Affidavit at paras. 25-26, Plaintiff's Motion Record at Tab 2, pg. 16.

of the timeshare developer. Class Members donated their timeshares to a number of Canadian non-profit athletic organizations (known as "RCAAAs") along with a pre-set amount of cash to discharge the lien. Participants would receive a tax receipt for the value of their cash as well as the purported value of the donated timeshare units. It is the value of the Class Members' cash donations that is the focus of this Settlement. The value of the promoted tax credit exceeded the cash value of the donation by greater than 30%, which (if the Program was not successfully challenged by the CRA) would have resulted in an immediate 30% return or profit for the Class Members. The RCAAAs could then exercise a put option and put (resell) the timeshare weeks in bulk back to the timeshare developer at a pre-determined price (namely, $1,000). This is what has been described as the Put Option.[8]

24. Following the certification of this action and shortly into the discovery process, it became apparent that Cassels Brock also had provided advice with respect to the operation, development or design of the Program and with respect to various materials relating to the Program. This information supported an argument that Cassels Brock's Opinions (i.e., its views on whether the tax credits promoted could be successfully challenged) were not entirely independent. There was at least an argument, in essence, that Cassels Brock's Opinions were expressions of its views on its own prior legal advice or work in the context of the development of the Program or the documents relating thereto. The Plaintiff's initial Statement of Claim was amended to refer to Cassels Brock's role in the development of the Program and this potential lack of independence or conflict.[9]

25. Cassels Brock prepared and issued various substantively relatively identical legal opinions in connection with the Program for the years 2000 to 2003. The Opinions set out various principles

[8] Roy Affidavit at para. 27, Plaintiff's Motion Record at Tab 2, pg. 16.
[9] Roy Affidavit at para. 28, Plaintiff's Motion Record at Tab 2, pg. 17.

and issues and, as noted above, various caveats, assumptions and risks. The ultimate conclusion expressed in each of the Opinions was that *"it is unlikely that the CRA could successfully deny the deemed adjusted cost base of Timeshare Weeks to, nor the tax credit claimed by, the Class A Beneficiaries"*. Cassels Brock did not provide an unqualified endorsement of the Program and it was possible that a trial judge would have found that their Opinions (including its conclusion regarding the likely outcome to any CRA challenge of the Program) satisfied any applicable standard of care.[10]

Litigation in the Tax Court of Canada

26. The Program drew the scrutiny of the CRA and, in 2004, the CRA advised the Class Members that it intended to fully disallow their claims for any tax credits. In 2006, two participants in the Timeshare Donation Program launched proceedings in the Tax Court of Canada with the assistance of counsel at Thorsteinssons LLP as test cases to challenge the CRA's denial of the tax credits.[11]

27. Prior to the CRA challenge, the Promoters and developers established, as part of the Program, a fund to pay for legal costs if the Program was subsequently challenged by the CRA. In or around April 2004, Thorsteinssons began to deal with the CRA on behalf of most of the participants/investors in the Program. Thorsteinssons was paid from the litigation fund established by the Promoters and developers. As discussed further below, the damage estimates in this Settlement are based on information collected by Thorsteinssons during that tax court proceeding. Thorsteinssons provided that information to Class Counsel in advance of the mediation discussed

[10] Roy Affidavit at para. 29, Plaintiff's Motion Record at Tab 2, pg. 17.
[11] Roy Affidavit at para. 31, Plaintiff's Motion Record at Tab 2, pg. 18.

below. Thorsteinssons was previously the source of contact information used to notify the Class of the Certification of this proceeding.[12]

28. A summary of that information was used by the Plaintiff's damages expert (Errol Soriano) to produce the damages report and estimates discussed below. Where no information was available for a Class Member's donation, Mr. Soriano's damages report applied what he calculated as the average donation across all participants in that province in the given year of the donation.[13]

29. In January 2008, the CRA agreed to settle the test cases on the basis that participants/investors would be entitled to a tax credit for the cash portion of their donations to the RCAAAs under the Timeshare Program, but would not receive any credit for any value associated with the donation of Timeshare Weeks. This resulted in Class Members being eligible to receive approximately 47.9% (assuming the highest tax bracket for the Class Members) of the value of their cash donation in the form of a tax credit.[14]

30. The vast majority of the participants/investors in the Program accepted the CRA's offer and agreed to the foregoing settlement. The settlement salvaged some of the Class Members' investment but left them out of pocket to the tune of approximately 52.1% of their cash donations.[15]

Launch of this Class Action

31. Following the settlement with the CRA, Mr. Lipson brought this proposed class against Cassels Brock in April 2009. This action was issued by Mr. Lipson's then counsel Davies, Ward, Phillips & Vineberg LLP (**"Davies"**).[16] The Plaintiff's request for the reimbursement to certain

[12] Roy Affidavit at para. 32, Plaintiff's Motion Record at Tab 2, pg. 18.
[13] Roy Affidavit at para. 33, Plaintiff's Motion Record at Tab 2, pgs. 18-19.
[14] Roy Affidavit at para. 34, Plaintiff's Motion Record at Tab 2, pg. 19.
[15] Roy Affidavit at para. 35, Plaintiff's Motion Record at Tab 2, pg. 19.
[16] Roy Affidavit at para. 37, Plaintiff's Motion Record at Tab 2, pg. 19.

class members of their earlier contributions to the Davies' Costs is addressed in the Fee Approval Factum.

Certification Initially Denied

32. The hearing of the Plaintiff's certification motion proceeded over two days in November 2011 before this Honourable Court. In reasons for decision released on November 14, 2011, this Court held that the Plaintiff's claim was statute-barred on limitations grounds and dismissed the Plaintiff's certification motion and action. This Court further declined to certify the Plaintiff's proposed causation common issue.[17]

Appeal of Certification Decision

33. The Plaintiff appealed the foregoing dismissal to the Court of Appeal. In reasons for decision released on March 19, 2013, the Court of Appeal set aside the dismissal and certified the proposed causation issue. As set out below, the Court of Appeal found that Cassels Brock's limitation defenses would, if necessary, be addressed at the individual issues phase of this action.[18] The Court of Appeal certified common issues in negligence *simpliciter* and negligent misrepresentation.

34. It is important to note that the Class Members' damages was not a certified common issue and, as such, the discovery process described below did not generally address the quantification of damages.[19]

Discovery Phase of this Class Action

35. There has been a large volume of documentary production in this proceeding. Affidavits of Documents and productions, as well as various Supplemental Affidavits of Documents and

[17] Roy Affidavit at para. 52, Plaintiff's Motion Record at Tab 2, pg. 23.
[18] Roy Affidavit at para. 54, Plaintiff's Motion Record at Tab 2, pg. 24.
[19] Roy Affidavit at para. 56, Plaintiff's Motion Record at Tab 2, pg. 25.

productions were exchanged by the Parties and Third Parties over a number of years. Lawyers at Roy O'Connor LLP (**"RO"** or **"Class Counsel"**) reviewed the thousands of documents produced by the Plaintiff, Defendant and Third Parties.[20]

36. In 2014, the Parties debated whether the Plaintiff would be required to produce a series of documents and opinions produced by Thorsteinssons. In reasons for decision released on October 21, 2014, this Court found, among other things, that the Thorsteinssons opinions and related documents should be produced by the Plaintiff.[21]

37. Examinations for discovery commenced on August 18, 2015. Lorne Saltman was Cassels Brock's representative for those examinations. As alluded to above, on the first day of Mr. Saltman's examination, it came to the Plaintiff's attention that Cassels Brock was in possession of additional documents regarding its role in the development or design of the Program and the documents relating thereto. Mr. Saltman's examination was adjourned to allow the Parties to consider and further address that issue.[22]

38. Following a case conference, the Plaintiff delivered an Amended Statement of Claim to add allegations regarding the foregoing alleged conflict issue on February 11, 2016. Cassels Brock and the Third Parties delivered amended pleadings and amended affidavits of documents and productions later that year.[23]

39. Mr. Saltman's examination for discovery was resumed following the resolution of the foregoing document and pleading issues. Mr. Saltman would ultimately be examined over the

[20] Roy Affidavit at para. 58, Plaintiff's Motion Record at Tab 2, pgs. 25-26.
[21] Roy Affidavit at para. 59, Plaintiff's Motion Record at Tab 2, pg. 26.
[22] Roy Affidavit at para. 61, Plaintiff's Motion Record at Tab 2, pg. 26.
[23] Roy Affidavit at para. 62, Plaintiff's Motion Record at Tab 2, pgs. 26-27.

course of 6 days between August of 2015 and October 2016. Mr. Saltman delivered answers to the Plaintiff's written follow-up questions on January 8, 2019.[24]

40. The Third Party Prenick Langer was examined for discovery on November 15, 2015. Prenick Langer delivered answers to undertakings in April 2018. The Third Party Mintz and Partners was examined for discovery on December 1, 2015 and delivered answers to undertakings in July of 2017.[25]

41. Given that Mr. Farano is deceased, the examination for discovery of Gardiner Roberts and the Estate of Ronald Farano was conducted in writing. Various answers to the Plaintiff's and Cassels Brock's written interrogations were eventually provided by Gardiner Roberts and the Estate of Ronald Farano between July 2019 and November of 2020.[26]

42. Jeffrey Lipson was examined for discovery on August 17, 2015. Answers to undertakings and supplemental answers to undertakings were delivered on October 3, 2017 and May 16, 2018, respectively.[27]

43. The Parties argued a refusals motion on September 9, 2019. Following the release of that decision, the Plaintiff delivered answers to refusals on November 15, 2019.[28]

44. A follow-up examination for discovery of Lorne Saltman was conducted on September 6, 2019.[29]

45. In March of 2020, the COVID-19 pandemic broke out. Despite the outbreak, the Parties continued to work on this proceeding.[30]

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[24] Roy Affidavit at para. 63, Plaintiff's Motion Record at Tab 2, pg. 27.
[25] Roy Affidavit at para. 64, Plaintiff's Motion Record at Tab 2, pg. 27.
[26] Roy Affidavit at para. 65, Plaintiff's Motion Record at Tab 2, pg. 27.
[27] Roy Affidavit at para. 66, Plaintiff's Motion Record at Tab 2, pg. 27.
[28] Roy Affidavit at para. 67, Plaintiff's Motion Record at Tab 2, pg. 27.
[29] Roy Affidavit at para. 68, Plaintiff's Motion Record at Tab 2, pg. 28.
[30] Roy Affidavit at para. 69, Plaintiff's Motion Record at Tab 2, pg. 28.

46. A follow-up examination of Mr. Lipson was conducted via Zoom on May 6, 2020.[31]

47. Following the completion of the discovery process and the exchange of various (but not all) expert reports (as discussed further below), this action was set down for trial on January 7, 2021.[32]

48. The Parties attended a number of case conferences before this Court and then Justice Wilson to address a number of issues regarding the trial process. Pursuant to the Order of Justice Wilson dated December 3, 2021, the pre-trial in this matter was scheduled for November 2022. Pursuant to that same Order, the Parties were directed to attend a mediation before June 30, 2022.[33]

Exchange of Expert Reports

49. Numerous expert reports were exchanged in this proceeding. The expert reports exchanged to date fall into three categories: i) reports authored by tax law experts regarding whether Cassels Brock met the standard of care of a reasonably competent tax solicitor; ii) reports authored by other experts regarding whether Cassels Brock was independent or in a conflict or quasi-conflict of interest; and, iii) for the purposes of the mediation, reports authored by forensic accountants regarding the quantification of the Class Members' damages. It was possible that additional reports (e.g., regarding the quantum of Mr. Lipson's individual damages) would have been exchanged before the common issues trial in this action. More specifically, the following reports were exchanged in this proceeding:

Taxation Law Expert Reports

a. **Plaintiff – Report of Professor Vern Krishna dated June 7, 2010[34]:** Professor Krishna is a leading tax law expert in Canada. Professor Krishna has provided three

[31] Roy Affidavit at para. 70, Plaintiff's Motion Record at Tab 2, pg. 28.
[32] Roy Affidavit at para. 71, Plaintiff's Motion Record at Tab 2, pg. 28.
[33] Roy Affidavit at para. 72, Plaintiff's Motion Record at Tab 2, pg. 28.
[34] The Plaintiff subsequently served a revised report from Professor Krishna (that added one paragraph to the June 7, 2010 report) on March 18, 2011 and then a further revised report, correcting typographical errors in the report's footnotes, on July 13, 2011.

reports in this proceeding. Throughout the course of this litigation, Professor Krishna opined that Cassels Brock failed to analyze central and essential components of the Timeshare Program and that it failed to fully inform participants of the risk of CRA assessment and potential denial of the tax credits under the Program;

b. **Gardiner Roberts – Expert Report of Brian Nichols dated October 27, 2020**: In 2020, Gardiner Roberts, who defended the main action, served the expert report of tax specialist Brian Nichols. In short, Mr. Nichols opined that both Cassels Brock's Opinions and Mr. Farano's concurring opinion met the standard of care, that the law of charitable gifting changed over the life of the Program, and that until 2007, it was possible for a taxpayer to make a "profitable" gift and still properly claim a tax credit;

c. **Cassels Brock – Expert Report of Edward Heakes dated November 19, 2020:** In 2020, Cassels Brock served the expert report of tax specialist Edward Heakes. In short, Mr. Heakes opined that the Opinions properly set out the risks faced by investors in the Program, that Cassels Brock met the standard of care of a competent tax lawyer at the time, and that Cassels Brock remained appropriately independent in the provision of its Opinions;

d. **Plaintiff – Expert Report of Vern Krishna dated September 30, 2021**: Professor Krishna's second report was in part produced with the benefit of discovery evidence. It responded to the report of Mr. Heakes. In Mr. Krishna's view, Cassels Brock did not give adequate weight to the risk that the Class Members' donations would not amount to voluntary gifts that qualify for a tax credit;

e. **Cassels Brock – Responding Report of Edward Heakes dated December 15, 2021:** In his 2021 response, Mr. Heakes expanded on his 2020 report and took issue with Mr. Krishna's gift analysis. In short, Mr. Heakes opined that numerous contemporaneous tax cases supported the proposition that, at the time the Program was offered to the public, it was possible to make a profitable gift that would qualify for a tax credit. Mr. Heakes' report cited numerous cases where such an outcome was allowed by the tax court. He disagreed with Professor Krishna's interpretation

of the caselaw, and opined that it did not reflect the law at the time the Opinions were provided, but rather was influenced by the benefit of hindsight;

f. **Omnibus Reply Opinion of Vern Krishna dated February 16, 2022:** Professor Krishna's third report is an omnibus response/reply that addresses Mr. Heakes' December 2021 reply, the report of Mr. Nichols and comments made by Cassels Brock's second expert, Peter Jewett, on the propriety of Cassels Brock acting as corporate counsel while providing a legal opinion on the Program.

   According to Professor Krishna's third report, Cassels Brock's and Gardiner Roberts' experts, among other things, failed in his view to read the caselaw in the correct context and/or failed to consider that several key features of the Program (e.g., the expectation of an immediate profit, the presence of a pre-determined series of transactions, its non-arm's length structure, etc.) would likely raise serious concerns about the Program with the CRA.[35]

Reports Regarding Professional Duties

g. **Expert Professional Report of Gavin MacKenzie dated May 1, 2019:** In addition to Professor Krishna's reports regarding tax issues, the Plaintiff has served the expert report of noted expert Gavin MacKenzie on the issue of whether Cassels Brock breached any duties owed to the Class Members. In Mr. MacKenzie's view, Cassels Brock did owe duties to the Class Members and breached those duties by purporting to offer an independent Opinion, while simultaneously offering advice about the structure and operation of the Program;

h. **Responding Expert Report of Peter Jewett dated November 19, 2020**: In response to Mr. MacKenzie's report, Cassels Brock served the report of Peter Jewett. Mr. Jewett opined that Cassels Brock acted appropriately in rendering the Opinions and did not breach any duties of independence. He also opined that Cassels Brock was not in a conflict of interest (as all parties were interested in facilitating the success of the Program) and that it owed no duty of care to the Class Members (who were not clients of Cassels Brock); and,

[35] Roy Affidavit at para. 73, Plaintiff's Motion Record at Tab 2, pgs. 28-31.

i. **Reply Report of Gavin MacKenzie dated October 1, 2021**: In his Reply Report, Mr. MacKenzie reiterated the effect of how the interests of those to whom Cassels Brock was providing advice on the Program and Class Members diverged. In short, Mr. Mackenzie opined that, while those promoting the Program benefited financially from the Program even if it failed, the Class Members faced costly CRA reassessments and years of litigation.[36]

Mediation Damages Reports

50. The Plaintiff and the Defendant each prepared reports on potential class-wide damages for the purposes of mediation. Without waiving settlement privilege over these reports, they are summarized for the purpose of this settlement approval motion as follows:

a. **Mediation Damages Report of Errol Soriano dated February 16, 2022**: For the purposes of the mediation, the Plaintiff obtained an expert report from a leading forensic accountant, Errol Soriano of KSV Advisory. The purpose of that report was to provide an estimate of Class Members' damages in respect of the estimate of their lost capital (the 52.1% of the cash investment that was not returned by way of tax credit).

As set out above, Mr. Soriano's report was based on information on the value of the Class Members' donations/investments as gathered from Class Members years ago by Thorsteinssons. The data provided by Thorsteinssons appeared to be the best evidence available to the Parties as to the cash donations and was a reasonable basis on which to base an out-of-pocket damages estimate. As set out above, where no information was available for a Class Member's donation, Mr. Soriano's damages report applied what he calculated as the average donation across all participants in that province in the given year of the donation.

Mr. Soriano also calculated an investment return on the out-of-pocket damages. Mr. Soriano's damages report in that regard was based on the premise that, had the Class Members not made their donations to the Program expecting a 30%-plus

[36] Roy Affidavit at para. 73, Plaintiff's Motion Record at Tab 2, pgs. 31-32.

immediate profit, they would have otherwise invested those funds in some other relatively profitable investment (which was set at 5%). As set out in his damages report, Mr. Soriano calculated the aggregate amount of the Class Members' capital out of pocket losses plus a 5% return on those cash losses. The Class Members' out of pocket or cash loss was calculated by Mr. Soriano as the difference between the cash donation they made and tax credit that was available on that donation as a result of the settlement with the CRA. Mr. Soriano illustrated an Ontario Class Members' cash losses as follows:

> a. The cash donation (paid by the Class Member) per timeshare week (in 2000) was $4,700.
>
> b. The top marginal tax rate (in Ontario) at the time was 47.9%.
>
> Based on the foregoing, the "tax benefit" for an Ontario resident (assuming the top marginal tax rate according to the Guide) is $2,251 (i.e., $4,700 x 47.9%). The (cash) loss on the donation in this example is therefore $2,449 (i.e., $4,700 - $2,251).

As set out in his report, Mr. Soriano calculated the Class Members' out of pocket or cash losses at approximately $23.3 million. On top of that out-of-pocket loss, Mr. Soriano calculated a 5% compound return on the cash losses, which generated approximately $38 million in additional interest/return (given the length of time since the payments in the early 2000s).

b. **Mediation Damages Reply Report of Robert Low dated April 21, 2022**: In response to Mr. Soriano's damages report, Cassels Brock produced a damages report from the financial expert Robert Low. Mr. Low disagreed with Mr. Soriano's theory of the Class Members' damages. Among other things, Mr. Low opined that as the Program was structured around a charitable gift, Class Members had no expectation of a profit and that their damages totaled $0.00. Mr. Low also opined that there was no basis to apply a 5% compounding interest rate, or to otherwise deviate from the 1.3% prejudgment interest provided for under the *Courts of Justice Act* (**"CJA"**). If that rate was applied to what Mr. Soriano calculated as the cash

losses, Mr. Low noted that the Class Members' total theoretical damages would amount to a maximum of $27,497,302.[37]

51. Class Counsel notes that the CJA rate is the presumptive interest rate and that it would have been most likely that the court would award that rate on any damages (and not a compound notional annual 5% rate of return). Class Counsel also notes that the $23.3 million in cash or out of pocket losses was calculated based on 100% of the Class Members recovering all of their out-of-pocket losses, which as noted earlier and discussed further below is unlikely.[38]

Mediation before the Hon. Frank Marrocco

52. The Parties agreed to attend a mediation before retired Ontario Superior Court Judge, the Honourable Frank Marrocco.[39]

53. The Parties exchanged mediation briefs. The Parties then attended a one-day virtual mediation before Mr. Marrocco on June 21, 2022. That mediation session extended well into the afternoon but did not result in a settlement. The Parties did generally agree to take part in additional discussions with Mr. Marrocco. Those discussions with Mr. Marrocco culminated with a further in-person mediation session with the Defendant on October 4, 2022. That final mediation session resulted in the proposed settlement discussed in detail below.[40]

54. The negotiations in the summer and autumn of 2022 were intense. On a number of occasions throughout the mediation process, discussions seemed to be on the verge of breaking down and appeared to be lost. The Parties seemed to believe in their respective cases and were simply too far apart throughout much of the mediation process. A contested common issues trial seemed more likely than not and Class Counsel took a number of steps to prepare for trial.[41]

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[37] Roy Affidavit at para. 74, Plaintiff's Motion Record at Tab 2, pgs. 32-34.
[38] Roy Affidavit at para. 75, Plaintiff's Motion Record at Tab 2, pg. 34.
[39] Roy Affidavit at para. 76, Plaintiff's Motion Record at Tab 2, pg. 34.
[40] Roy Affidavit at para. 77, Plaintiff's Motion Record at Tab 2, pg. 35.
[41] Roy Affidavit at para. 78, Plaintiff's Motion Record at Tab 2, pg. 35.

55. Over the course of the negotiations, Class Counsel were eventually able to secure the $8.25 million payment discussed herein.[42]

56. Pursuant to this Court's Order dated November 15, 2022, the Class was notified of the proposed settlement by a combination of direct mail, email and website postings.

PART III: ISSUES & THE LAW

57. The issue on this motion is whether the Settlement should be approved.

General Principles

58. Class action settlements are subject to court approval. The settlement must be fair, reasonable, and in the best interests of the settlement class.[43]

59. On a settlement approval motion, "the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement." An objective and rational assessment of the pros and cons of the settlement is required.[44]

60. A settlement must fall within a zone of reasonableness. According to this Honourable Court in *Quenneville v. Volkswagen Group Canada, Inc.*, 2018 ONSC 2516 (CanLII) at paragraph 57:

> "The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of

[42] Roy Affidavit at para. 79, Plaintiff's Motion Record at Tab 2, pg. 35.
[43] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 29, *Fantl v. Transamerica Life Canada*, 2009 CanLII 42306 (ON SC) at para. 57, *Farkas v. Sunnybrook and Women's College Health Sciences Centre*, 2009 CanLII 44271 (ON SC) at para. 43, *Kidd v. The Canada Life Assurance Company*, 2013 ONSC 1868 (CanLII), *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953 at para. 29.
[44] *Mancinelli v. Royal Bank of Canada*, supra at para. 31, *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673 (ON SC) at para. 10, *Al-Harazi v. Quizno's Canada Restaurant Corporation*, 2007 CanLII 27977 (ON SC) at para. 23, *Rothman v. Kaba Ilco Corp*., 2018 ONSC 4761 (CanLII) at para. 31.

> the damages for which the settlement is to provide compensation. A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally."[45]

61. The court is not required to determine whether a better settlement might have been reached. Where the parties are represented by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking their reputation and experience on the recommendation.[46]

62. A number of factors may be relevant in determining whether a settlement falls within the zone of reasonableness and is in the best interests of the class. Those factors may include the following:

a. the likelihood of recovery or likelihood of success;
b. the proposed settlement terms and conditions;
c. the amount and nature of discovery, evidence or investigation;
d. the recommendation and experience of counsel;
e. the future expense and likely duration of the litigation;
f. the number of objectors and nature of objections;
g. the presence of good faith, arm's-length bargaining and the absence of collusion;
h. the dynamics of the settlement negotiations; and
i. the nature of communications by counsel and the representative plaintiff with class members during the litigation.[47]

63. Class Counsel note that a number of those factors overlap or inform one another, and that the factors that are the most relevant depends on the nature of the particular case. The factors are

[45] See also: *Good v. Toronto Police Services Board*, 2020 ONSC 6332 (CanLII) at para. 31, *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (S.C.J.) at para. 70, *Mancinelli v. Royal Bank of Canada*, supra at para. 32, *Rothman v. Kaba Ilco Corp*., 2018 ONSC 4761 (CanLII) at para. 32.
[46] *Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited*, 2012 ONSC 6626 (CanLII) at para. 29, *Dabbs v. Sun Life Assurance Co. of Canada*, supra at p. 440.
[47] *Fantl v. Transamerica Life Canada*, supra at para. 59, *Corless v. KPMG LLP*, 2008 CanLII 39784 (ON SC) at para. 38, *Farkas v. Sunnybrook and Women's Health Sciences Centre,* supra at para. 45.

generally addressed below, with some of the factors being combined at times to avoid unnecessary duplication of submissions.

Range of Possible Recoveries & Methodology for Valuing Settlement – AND – Likelihood of Recovery

64. For the reasons discussed below, Class Counsel believes and submits that the $8.25 million settlement is fair, reasonable and indeed a strong result for the Class.

65. As a preliminary matter, while the Opinions stated that they could be relied upon by the Class Members,[48] there was a real risk that, in answering the common issues, a trial judge could have found that Cassels Brock simply did not owe a duty of care to the Class Members (they were not the Cassels Brock clients) or that any such duty was somewhat limited and that such a limited duty was satisfied in the circumstances.[49]

66. Further, and as noted above, the Opinions did not, as Mr. Lipson assumed, opine that the claimed tax credits would in fact be allowed or upheld. The Opinion concluded that any challenge by the CRA would likely not be successful. The Opinions also contained various caveats, disclaimers, limiting assumptions and disclosure of various risks.[50]

67. The added claim and allegations relating to the lack of independence and conflict, even if proven, would not have guaranteed success. Obligations relating to conflicts and independence are most often only considered relevant to a fiduciary relationship between a lawyer and their direct client. Given that the Class Members were not clients of Cassels Brock and that there are no fiduciary related common issues (fiduciary duty is most often considered on an individual, not

[48] *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165 (CanLII) at paras. 20 & 23.
[49] Roy Affidavit at para. 83, Plaintiff's Motion Record at Tab 2, pgs. 36-37.
[50] Roy Affidavit at para. 84, Plaintiff's Motion Record at Tab 2, pg. 37.

class, basis), the Defendant would certainly argue that only the accuracy of Cassels Brock's advice (not its independence) was relevant and at issue.[51]

68. The claim in simple negligence (negligence *simpliciter*) and the related proposed causation common issue were relatively novel in these circumstances. As noted above, it is not difficult to conceive that a trial judge would choose to consider the case as one in the realm of negligent misrepresentation. In addition, the motions judge had indicated real concerns with the pure or simple negligence causation proposed common issue (i.e., "but for" the Cassels Brock Opinions, the Program would not have been promoted or offered). While the Court of Appeal certified the pure negligence causation common issue, the trial judge could have found that the promoters would have proceeded with the Program regardless of whether Cassels Brock offered its opinions on the Program. As the Court of Appeal itself stated in *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165 (CanLII):

> "[98] …The allegation is that class members suffered damage because they participated in the program, which, but for Cassels Brock's negligent opinion, would not have been marketed by the promoters and thus not available to class members. In our view, this issue is common to the claims of all class members.
>
> [99] It may be that, at the trial of this common issue, evidence will emerge that the Cassels Brock legal opinion was not a necessary precondition for the promoters to market the program. For example, there may be evidence that the promoters were satisfied to go to market without any legal opinion, or because of legal opinions other than those of Cassels Brock. However, that determination is for the trial…"[52]

69. As the certification motions judge stated, Cassels Brock did not have a monopoly on legal opinions for tax programs[53]. Class Counsel recognize that a trial judge could have reached the same conclusion.[54]

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[51] Roy Affidavit at para. 85, Plaintiff's Motion Record at Tab 2, pg. 37.
[52] Roy Affidavit at para. 86, Plaintiff's Motion Record at Tab 2, pgs. 37-38.
[53] See: *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724 (CanLII) at para 101. See also paras. 97-112.
[54] Roy Affidavit at para. 87, Plaintiff's Motion Record at Tab 2, pg. 38.

70. As alluded to above, the case would have involved the testimony of various experts.[55]

71. On the question of whether the advice in the Opinions satisfied the standard of care, the Plaintiff's expert stood against various experts in the tax field. Mr. Saltman of Cassels Brock was steadfast in his view that his Opinions were fair and accurate in terms of the law at the time the Opinions were drafted. His evidence would have been bolstered by the evidence from James Parks. James Parks was a tax partner with Cassels Brock who reviewed the various drafts of the Opinions in detail and provided input and comments to Mr. Saltman. Cassels Brock produced a number of memos and draft Opinions authored or annotated by Mr. Parks. While Mr. Parks had some notable concerns on earlier drafts of the Opinions, he was satisfied with the final product. According to Mr. Parks' memorandum dated September 21, 2000:

> "Having said all of that, I agree that our views have been well researched and thought through and if the arrangement is successfully attacked for any reason, it would not be for any lack of due diligence on our part."

Mr. Parks had provided similar responses in answer to undertakings given at Mr. Saltman's discovery.[56]

72. As noted above, the Defendant and Third Parties also tendered various tax expert reports in response to the Plaintiff's report from Professor Krishna. The Defendant also had the benefit of opinions expressed in real time by Thorsteinssons and Mr. Farano supporting the propriety of the Cassels Brock Opinions.[57]

73. Cassels Brock has indicated on a number of occasions throughout this litigation that it intended to rely upon the analysis and opinions of Thorsteinssons to refute the Plaintiff's allegations that Cassels Brock did not meet the relevant standard of care. Thorsteinssons issued a

[55] Roy Affidavit at para. 88, Plaintiff's Motion Record at Tab 2, pg. 38.
[56] Roy Affidavit at para. 89, Plaintiff's Motion Record at Tab 2, pgs. 38-39.
[57] Roy Affidavit at para. 90, Plaintiff's Motion Record at Tab 2, pg. 39.

series of opinions and updates throughout the course of the test case litigation at the Tax Court of Canada. Thorsteinssons would ultimately advise the Class Members to the effect that the state of the law had changed and that, while the Program was initially lawful, recent developments in the case law put that conclusion in doubt. According to Thorsteinssons letter to Program participants dated November 20, 2007:

> "As a result of the examinations for discovery, we have now have a clearer idea of the CRA's case. Stated simply, its case is that the contribution of cash and the timeshare units to the "registered Canadian amateur athletic association" ("RCAAA") was not a donation at law because it was one step in a preordained scheme and was motivated solely by self-interest and thus not a true gift or donation. On this basis, the DOJ will argue in court that there should be no tax credit – not even for the cash portion. The DOJ's two alternative positions are that the donors did not have legal title to the timeshare units and that the value of the units (as encumbered by the lien) is zero. In either of these alternatives, the tax relief would be based solely on the cash component of the donation.
>
> When you made your donation to the RCAAA, the state of law was such that, the DOJ's primary theory that there should be no relief even for the cash component would have been considered far-fetched. Even at the time the Tax Court appeals were commenced, we view it as very unlikely that such an argument would be successful.
>
> While we remain doubtful that the DOJ's argument would be accepted by a court, the DOJ is clearly emboldened by the hostile stance that the Tax Court has taken towards all "retail" tax programs. Since 2004, not one publicly marked tax-motivated transaction subject to judicial scrutiny has been able to deliver the tax benefits claimed by the participants. The courts have used a variety of approaches to deny the tax benefits but have always found a way to rule against the taxpayers. When you made your decision to participate in the Program, this line of cases did not exist and many tax practitioners are surprised that the courts have strained so vigorously to deny the tax benefits. Nevertheless, the reality is that you are now facing a hostile judicial environment.
>
> A current case-in-point is the recent Tax Court decision in *McPherson v. The Queen*, 2006 TCC 648. In that case, the Crown succeeded with the argument that the entire donation should be disregarded because it lacked

> donative intent. The taxpayers received no tax relief, not even for the cash portion. While the facts of the *McPherson* case were considerably more offensive to the Court than the timeshare Program and the decision of the Court was poorly reasoned, it does demonstrate that the DOJ's primary theory may find a receptive audience before some judges of the Court. On that basis, the DOJ's primary theory cannot be dismissed entirely."

According to Thorsteinssons letter to Program participants dated January 30, 2008:

> "In our earlier correspondence we discussed the growing tendency of the courts in tax shelter cases to depart from the traditional approach to determining fair market value. That traditional approach equates the fair market value to the hypothetical highest price paid in an open and unrestricted market. In contrast, in tax shelter cases the courts have adopted a less rigorous and more results-oriented analysis. Two notable examples that raised in our November 20, 2007 letter are the art donation cases *Klotz v. The Queen* and *Nash v. M.N.R.* In *Klotz* the Court concluded that the fair market value for a group of art prints should be determined on the basis of the bulk purchase price. Similarly, in *Nash*, the Court concluded that the price that the donors had paid for a group of prints was the best evidence of their value."[58]

74. The Defendant (and Third Parties) would also rely on an opinion obtained in December 2000 or January 2001 from tax specialist Ronald Farano. In his opinion, Mr. Farano concluded that:

> "Based upon my understanding of the law as it exists as of this date, the Opinion properly reflects the legal situation in an income tax context.
>
> With respect to the Athletic Trust of Canada, it appears to be properly settled and structured for the purpose intended.
>
> From my review of the ancillary documents in the Due Diligence Book, the documents appear to reflect the substance of the transactions intended by the parties herein."[59]

75. In short, on the question of whether Cassels Brock met the standard of care, there is good reason to believe that the Plaintiff may have had a distinctly uphill battle.[60]

[58] Roy Affidavit at para. 91, Plaintiff's Motion Record at Tab 2, pgs. 39-41.
[59] Roy Affidavit at para. 92, Plaintiff's Motion Record at Tab 2, pg. 41.
[60] Roy Affidavit at para. 93, Plaintiff's Motion Record at Tab 2, pg. 41.

76. Lastly, there was a risk that the Plaintiff's investment-based damages theory would be rejected by the Court. Moreover, given the Court of Appeal's recent decision in *Aylmer Meat Packers Inc. v. Ontario*, 2022 ONCA 629 (CanLII), and given the length of time this action has taken to get to trial, any award of pre-judgment interest could be dramatically reduced.[61]

77. It is important to emphasize that even if the Plaintiff was successful at the trial of the common issues establishing the Cassels Brock Opinions were negligently made (but assuming that pure negligence was not established), Class Members would still likely have to come forward to satisfy the balance of the liability test/elements for negligent misrepresentation. They would also likely have to address the limitation defence, and not all Class Members would necessarily be able to overcome that defence. They would also arguably have to establish the quantum of their own losses. In addition, individual Class Members may not have been indemnified by the CPF for any costs incurred at the individual issues hearings. Class Members may have faced adverse costs awards that could have swamped their possible recovery. Overall, it is unlikely that 100% of Class Members would choose to go through an individual phase/analysis and, even if they did, they could potentially face some offsetting costs (depending on the conduct and offers by the Defendant).[62]

78. Even if the Plaintiff was successful in establishing that statements in the Opinions were negligently made and all Class Members remarkably came forward as part of any individual damages analysis, the number of Class Members who would be able to establish that they read and reasonably relied upon the content of the Cassels Brock Opinions may have been quite limited and thus the damages recoverable could have been dramatically reduced. As referred to above, Mr. Lipson himself (who made a significant investment on his own) did not read the Opinions. It is not

[61] Roy Affidavit at para. 94, Plaintiff's Motion Record at Tab 2, pg. 41.
[62] Roy Affidavit at para. 96, Plaintiff's Motion Record at Tab 2, pgs. 41-42.

unreasonable to assume that a potentially large percentage of the Class Members did not read the Opinions.[63]

79. Assuming that Cassels Brock would be found liable and be held responsible for 100% of the out-of-pocket losses, Mr. Soriano's damage report estimated such total losses at $23.3 million. If pre-judgment interest available under the CJA was added to that amount, the total damages (on a very good day) would top out at $27.5 million. The Defence damages expert opined that the damages may be $0 based on the charitable donation argument referred to above. Assuming that liability could be established, the damages were reasonably somewhere between that $0 and $27.5 million.[64]

80. As stated above, given the other issues noted above relating to liability and damages, and given the delay attendant with prosecuting the case through a trial, individual issues and appeals, a significant reduction (70% or more) of the maximum damages available was appropriate in Class Counsel's view. One could easily argue that liability was 50/50 (at best) and, thereafter, that a 50% (or more) further reduction was appropriate in light of the issues that would have to be addressed even if the Court found that the standard of care was breached – that would see the highest possible damages being reduced to 25% (or less than $7 million).[65]

Proposed Settlement Terms & Conditions

81. As set out in the Settlement Agreement, Cassels Brock and the Plaintiff have agreed to settle this Class Action for a total, all-inclusive payment of $8.25 million (**"Settlement Fund"**).[66]

82. If approved by the Court, the Settlement Fund will reasonably compensate the Class Members for some portion of the out-of-pocket portions of their cash donations. The Settlement

[63] Roy Affidavit at para. 97, Plaintiff's Motion Record at Tab 2, pg. 42.
[64] Roy Affidavit at para. 98, Plaintiff's Motion Record at Tab 2, pgs. 42-43.
[65] Roy Affidavit at para. 99, Plaintiff's Motion Record at Tab 2, pg. 43.
[66] Roy Affidavit at para. 100, Plaintiff's Motion Record at Tab 2, pg. 43.

Fund will also cover all legal fees and related disbursements (including taxes), any Davies Costs, the costs of administration and distribution of the Settlement Fund to the Class Members, and a 10% statutory levy (as discussed further below) payable to the Class Proceedings Fund (**"CPF"**).[67]

83. In exchange for its $8.25 million payment, the Defendant will receive a full release of all claims and potential claims that Class Members may have against it.[68]

84. The compensation paid to Class Members will be paid from the amount of money remaining after deducting the Court-approved legal fees and disbursements (including taxes) as well as the costs of administering and distributing the money to Class Members, from the Settlement Fund (the amount after those deductions is referred to as the "Net Settlement Fund").[69]

Payment of Compensation

85. If approved by the Court, the Settlement will be paid out or distributed to Class Members in two stages. Under the first stage of the distribution, Class Members will receive their *pro rata* share of the Net Settlement Fund based on their relative cash contribution to the Program.[70]

86. If and to the extent that funds remain one year after the first stage (e.g., if certain cheques from the first stage are not cashed by some Class Members), the remaining funds will be used in phase two to make further payments to those Class Members who actually cashed their cheques under the first phase of the distribution. Any funds remaining after that second distribution will be donated to a charity.[71]

[67] Roy Affidavit at para. 101, Plaintiff's Motion Record at Tab 2, pg. 43.
[68] Roy Affidavit at para. 102, Plaintiff's Motion Record at Tab 2, pg. 43.
[69] Roy Affidavit at para. 103, Plaintiff's Motion Record at Tab 2, pg. 43.
[70] Roy Affidavit at para. 104, Plaintiff's Motion Record at Tab 2, pg. 44.
[71] Roy Affidavit at para. 105, Plaintiff's Motion Record at Tab 2, pg. 44.

Administration of the Settlement

87. Class Counsel have attempted to balance simplifying the administration process with taking reasonable steps to ensure that maximum amount of settlement funds get into the hands of Class Members.[72]

88. If this Settlement is approved, most Class Members will not have to provide evidence of their cash donations in order to receive compensation. Calculations of the Class Members' share of the Net Settlement Fund will be based largely on the information already provided to the Parties by Thorsteinssons. The Settlement Agreement also sets out the steps to be taken to attempt to update or improve that information including, among other things, contacting the Program's master marketing agent to ascertain whether that master marketing agent has records of the Class Members' contributions to the Program.[73]

89. Where the Parties do not have information regarding a Class Member's participation in the Program (approximately 290 Class Members), those Class Members will be asked to provide information confirming the value of their donations to the Program.[74]

90. Most Class Members will receive a letter or letters explaining the calculation of their entitlement to compensation for each stage and a corresponding cheque for the total amount of their compensation. Other class action settlements can involve Class Members making individual claims before any funds are forwarded to them – that is not the case here.[75]

91. If this Settlement is approved by the Court, the costs of the administration of this Settlement are to be deducted from the Settlement Fund. The structure of the Settlement is designed in part to minimize administrative expenses and maximize the compensation that can be distributed to the

[72] Roy Affidavit at para. 106, Plaintiff's Motion Record at Tab 2, pg. 44.
[73] Roy Affidavit at para. 107, Plaintiff's Motion Record at Tab 2, pg. 44.
[74] Roy Affidavit at para. 108, Plaintiff's Motion Record at Tab 2, pgs. 44-45.
[75] Roy Affidavit at para. 109, Plaintiff's Motion Record at Tab 2, pg. 45.

Class Members. Administrative tasks include: i) the delivery of notice to the Class; ii) the calculation of Class Member compensation; and iii) the delivery of compensation to the Class.[76]

92. After reviewing a number of proposals, RO retained RicePoint Administration Inc. (**"RicePoint"**) to act as the Administrator of this Settlement. RicePoint is an experienced class action administrator and has been retained in many class action settlements in Ontario. RicePoint estimates that administration expenses should range between $90,000 and $100,000. In Class Counsel's experience, that is a reasonable estimate for such expenses.[77]

The Amount & Nature of Evidence & Investigation

93. The nature and extent of factual investigation varies from case to case depending on the nature of the case, and can vary based on the specific allegations or issues being considered as part of any particular case. In Class Counsel's view, more than enough information was disclosed or otherwise obtained through the certification, discovery, mediation and settlement processes described above to allow us to recommend the Settlement to the Court and the Class Members.[78]

94. The Parties exchanged an extensive factual record leading up to the certification motion. Following certification, the Parties engaged in the lengthy discovery process. Several motions were argued as a result of the discovery process. Following the completion of the discovery process, the Parties and Third Parties exchanged the various expert reports listed above regarding the issues raised in this action.[79]

95. In Class Counsel's view, there was certainly more than enough information exchanged to develop a detailed understanding of this action and to recommend the Settlement descried herein.[80]

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[76] Roy Affidavit at para. 110, Plaintiff's Motion Record at Tab 2, pg. 45.
[77] Roy Affidavit at para. 111, Plaintiff's Motion Record at Tab 2, pg. 45.
[78] Roy Affidavit at para. 112, Plaintiff's Motion Record at Tab 2, pgs. 45-46.
[79] Roy Affidavit at para. 113, Plaintiff's Motion Record at Tab 2, pg. 46.
[80] Roy Affidavit at para. 114, Plaintiff's Motion Record at Tab 2, pg. 46.

Experience & Recommendations of Class Counsel

96. RO lawyers are experienced class counsel and have been actively litigating this case for more than 12 years.

97. Class Counsel are of the view that the benefits of this Settlement outweigh the risks of proceeding to a contested common issues trial. Class Counsel believe that the Settlement is fair and reasonable, and indeed an excellent result, for the following reasons:

a. The Common Issues trial would not result in a monetary award for the Class Members. If unsuccessful at the forthcoming Common Issues trial, the Class Members would be awarded $0.00;
b. Based on an analysis of liability and individual issues, risks and factors, a settlement of $8.25 million is reasonable;
c. All settlements, of course, involve some element of compromise. Litigants should not reasonably expect to recover 100% of their purported damages. This Settlement provides Class Members with a remedy in circumstances where the case may have been totally unsuccessful or unsuccessful for many Class Members. This Settlement avoids the risks associated with proceeding to trial and individual assessments and exposure to negative personal cost awards;
d. Even if the Plaintiff is successful at a trial of the common issues, there was virtually no chance that an aggregate assessment of damages would be awarded by the trial judge and it was a virtual certainty that each individual Class Member would be required to establish his/her purported entitlements (including as well potentially overcoming limitations issues) and damages at an individual damage assessment;
e. Putting cash compensation into the hands of Class Members today outweighs the risks of further years of delays, risks and unknown results, and a potential unfavourable finding, if the case had proceeded to a contested trial of the common issues. Based on Class Counsel's experience, that process could easily take, including appeals, three to five years (or more) to complete. If approved, this Settlement will remove that kind of delay and risk, and provide more timely and

meaningful compensation.[81]

Future Likely Duration of the Litigation

98. If this Settlement is not approved, the trial itself will take 6 weeks of court time. It could easily take, based on Class Counsel's experience, two to three years to set a new pre-trial and trial date, conduct the common issues trial, and allow for any appeals therefrom. Thereafter, if the case was successful on any basis, the following steps would still need to be taken:

a. a procedure would then have been set for the determination of non-common and/or individual issues (potentially including individual reliance, claims, damage assessments and/or limitation arguments);
b. that procedure may lead to appeals or the need for further directions from the Court;
c. the distribution of notices regarding the non-common and/or individual issues process;
d. the resolution of such individual claims and damage assessments; and,
e. possible appeals from the non-common and/or individual issue determinations.[82]

99. It is difficult to predict how long it may have taken to resolve any individual issues arising from a judgment on the common issues. It could certainly take years.[83]

100. The presence of the Third-Party claims further complicates any estimates as to the future length of this Class Action.[84]

101. As to the likely future expense of this litigation, Class Counsel have already incurred fees in excess of $2.35 million. Millions more in fees and disbursements would be required to bring this action to a final resolution for the Class Members.[85]

[81] Roy Affidavit at para. 116, Plaintiff's Motion Record at Tab 2, pgs. 46-47.
[82] Roy Affidavit at para. 117, Plaintiff's Motion Record at Tab 2, pgs. 47-48.
[83] Roy Affidavit at para. 118, Plaintiff's Motion Record at Tab 2, pg. 48.
[84] Roy Affidavit at para. 119, Plaintiff's Motion Record at Tab 2, pg. 48.
[85] Roy Affidavit at para. 120, Plaintiff's Motion Record at Tab 2, pg. 48.

Objectors & Other Class Member Responses

102. Pursuant to this Honourable Court's Notice of Proposed Settlement Order dated November 15, 2022, the Class was notified of this proposed settlement through a combination of email, regular mail and internet postings. No objections were received in response to the foregoing notice.

103. Two Class Members filed brief submissions in support of the Settlement[86]. They read in operative part as follows:

a. According to CM of Ontario:

> "There are a couple of reasons why I support this settlement:
>
> 1. I would like to see some compensation, although a fraction of my original investment, back.
>
> 2. The length of time it has taken to get to this point is very long - in the interest of expediency, it would be beneficial to resolve this, as proposed, and close the matter."

b. According to TW of British Colombia:

> "I support this settlement as it provides monetary compensation and guards against delays and any significant risks and/or unknown results."

The Presence of Arm's-Length Bargaining & Dynamics of the Settlement Negotiations

104. The dynamics of the Settlement negotiations are set out above. The Settlement is the product of an extensive series of arm's-length and hard-fought negotiations. Each side zealously advanced the interests of their clients and the Parties did not collude to reach the Settlement.[87]

105. The negotiations ultimately resulted in the Defendant substantially increasing its initial unacceptable offer to the agreed upon $8.25 million Settlement Fund. The total value of the Settlement Fund is well into the Plaintiff's reasonable range of settlement and represents a

[86] Copies of the Class Members' complete submissions have been served on the Defendant and filed with the Court. For personal privacy reasons the Class Members are referred to by their initials in this factum.
[87] Roy Affidavit at para. 123, Plaintiff's Motion Record at Tab 2, pg. 48.

reasonable percentage of the Class Members' possible damages (and potentially more than may have been secured even if liability was found by a court). Class Counsel is of the view that the maximum settlement amount was extracted from Cassels Brock.[88]

Communications with the Plaintiff

106. Class Counsel consulted Mr. Lipson throughout this litigation and sought out his input and confirmed his instructions on every major decision in this proceeding as required, including on this Settlement. According to Mr. Lipson:

> "Over the course of this action, I received numerous updates on the status of the action, considered RO's advice and provided input or instructions on every major decision as required…
>
> […]
>
> In the circumstances, I believe that the Settlement is an excellent result and is a fair deal for my fellow Class Members. I have weighed the benefits that would be available to Class Members under the Settlement against the costs, risks and delay if we continued the case through a trial and the likely appeal process. The balance was overwhelmingly in favour of the Settlement. I have considered, among other things, that:
>
> a. Class Members will receive a reimbursement for a portion of their Cash Donation (aside from the tax credit already available) and will not have to wait several years for only the possibility of receiving what could be less compensation in the future; and,
>
> b. Class Members have little, if anything, to do to receive their share of the Settlement. While RO and the Administrator will try and update or improve contact and donation information, compensation will be calculated by an independent administrator and be more or less automatically paid to the Class Members.
>
> I agree with the opinion of RO that this Settlement is fair, reasonable and in the best interests of the class. I am proud of the results achieved in this Settlement. I am proud that I was able to assist and be part of this successful claim."[89]

[88] Roy Affidavit at para. 124, Plaintiff's Motion Record at Tab 2, pgs. 48-49.
[89] Settlement & Fee Approval Affidavit of Jeffrey Lipson sworn November 29, 2022 at paras. 13 and 16-17, Plaintiff's Motion Record at Tab 3, pgs. 616-619.

PART IV: ORDER SOUGHT

107. The Plaintiff respectfully requests an Order approving the Settlement Agreement.

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
(Settlement Approval)

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