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

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFFS
(SETTLEMENT APPROVAL)
(Motion Returnable October 31, 2018)

October 5, 2018

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PART I – OVERVIEW

1. Following the settlement of this class action (the "**Action**") and a parallel class action in Québec ("**Québec Action**" and together with this Action, the "**Actions**"), the Plaintiffs have brought this motion seeking orders approving:

   (a) the settlement between the Plaintiffs and the Defendants ("**Settlement Agreement**");[1]

   (b) the proposed plan for allocating and distributing the proceeds of the Settlement Agreement ("**Distribution Protocol**");[2] and

   (c) the payment of an honorarium to each of the Plaintiffs.

2. This Action has been vigorously litigated for over 6 years through preliminary motions, including motions for leave under the Ontario *Securities Act* ("***OSA***") and certification that were initially contested but ultimately unopposed, various motions and an appeal relating to the pleadings, delivery of extensive summary judgment motion material by the Plaintiffs and the Defendants, and a motion to determine whether the motions for summary judgment should be heard. The Plaintiffs have reviewed and analysed over 34,000 defence productions and conducted nearly 40 days of examinations for discovery.[3]

3. The Plaintiffs were preparing for trial and had served their trial record when the parties reached an agreement in principle to resolve the Actions.[4]

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1 Settlement Agreement dated August 13, 2018 ("**Settlement Agreement**"), Exhibit "A" to the Affidavit of Anthony O'Brien affirmed October 1, 2018 ("**O'Brien Affidavit**").
2 Schedule "J" to the Settlement Agreement, Exhibit "A" to the O'Brien Affidavit.
3 O'Brien Affidavit at para 5.
4 O'Brien Affidavit at para 6.

4. The Settlement Agreement provides that SNC-Lavalin Group Inc. ("**SNC**") and its insurers will pay a total of $110 million to resolve the claims asserted in the Actions.[5] For the reasons described below, Class Counsel strongly endorses this substantial settlement as being fair and reasonable and in the best interest of the Class.

5. This settlement came in May 2018 after two rounds of mediation with former Chief Justice Winkler.[6]

6. The case was highly complex and the outcome was uncertain. The certified claims of the Class Members are predicated solely on Part XXIII.1 of the *OSA*. Thus far, no case has ever proceeded to trial or even summary judgment under this part of the *OSA* and there are a number of aspects of the regime that have not been the subject of judicial guidance. This added to the overall uncertainty of the case and amplified the risk.[7]

7. The critical risks specific to this litigation are as follows:

   (a) that the Court would find that there had been no misrepresentation made by the Defendants either because the alleged misstatements were not untrue or because they were not material;

   (b) that no damages flowed from the misrepresentations, which argument was the basis for the Defendants' summary judgment motion, or that the Court would find that no public correction of the alleged misrepresentations had occurred;

   (c) that the Defendants would establish a "reasonable investigation" or due diligence defence pursuant to section 138.4(6) and (7) of the *OSA*; and

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5 O'Brien Affidavit at para 7.
6 O'Brien Affidavit at para 8.
7 O'Brien Affidavit at para 11.

(d) even if the Plaintiffs were to prevail on these issues, the risk that the proportionate liability provisions of Part XXIII.1 would result in a finding that significant proportionate liability (50% or greater) would be assigned to individuals who did not personally have the capacity, nor adequate insurance, to satisfy a substantial judgment. This could lead to a scenario where the Plaintiffs are left with a judgment against SNC for only a fraction of any damages proven.[8]

8. The Distribution Protocol employs a damage calculation formula analogous to the formulae set out in section 138.5(1) of the *OSA* and apportions damages according to a framework that is detailed and equitable.

PART II – FACTS

A. The Parties

9. SNC is a Montreal-based engineering, construction and infrastructure company with global operations. SNC is a reporting issuer within the meaning of Canadian securities legislation. Its shares trade on the TSX and on alternative trading platforms in Canada.[9]

10. The Defendants other than SNC ("**Individual Defendants**") are current or former directors and officers of SNC.

11. The Plaintiffs in the Action, the Trustees ("**DALI Trustees**") of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund ("**DALI Fund**") and 0793094 B.C. Ltd. ("**0793094**"), purchased SNC shares during the period from November 6, 2009 to February 27, 2012 ("**Class Period**").[10] The DALI Fund is a multi-employer pension

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8 O'Brien Affidavit at para 12.
9 O'Brien Affidavit at para 15.
10 Affidavit of Brent Gray sworn September 27, 2018 ("**Gray Affidavit**") at para 5; Affidavit of Lisa Watt sworn October 4, 2018 ("**Watt Affidavit**") at para 9.

plan.[11] 0793094 is a family holding company of Brent Gray, who resides in British Columbia.[12]

B. Background of the Actions

12. The market capitalization ("market cap") of SNC on November 6, 2009 — the first day of the certified class period — was approximately $6.68 billion.[13]

13. On February 28, 2012, SNC issued a press release in which it announced the following:[14]

> SNC-Lavalin Group Inc. (TSX: SNC) announced today that its 2011 net income is expected to be approximately 18% (or approximately $80 million) below its previously announced 2011 outlook. Of this amount, the following items are expected to be recorded in the fourth quarter of 2011:
>
> - A loss of approximately $23 million from a revised position of the Company's net financial exposure on its Libyan projects;
> - Unfavourable cost reforecasts on certain projects in its Infrastructure and Environment and Chemicals and Petroleum segments; and
> - Period expenses of approximately $35 million relating to certain payments made in the fourth quarter of 2011 that were documented to construction projects to which they did not relate and, consequently, had to be recorded as expenses in the quarter.
>
> The Company's Board of Directors initiated an independent investigation, led by its Audit Committee, of the facts and circumstances surrounding the $35 million of payments referred to above and certain other contracts. Independent legal counsel were retained in this connection. The investigation's current findings support the Company's accounting treatment of these payments. The Board of Directors is taking steps to implement changes and further appropriate actions arising from the investigation.
>
> The Company is working with its external auditors and legal advisors to resolve all issues relating to the investigation to permit the auditors to deliver their audit report on a timely basis. The Company is working towards announcing and filing its 2011 fourth quarter and year-end financial results as soon as reasonably possible and in any event prior to March 30, 2012.

14. Following this announcement, the price of SNC's shares declined from $48.37 on February 27, 2012, to $38.43 on February 28, 2012 and $37.40 on February 29, 2012, causing a drop in its market capitalization of hundreds of millions of dollars.[15]

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11 Watt Affidavit at para 5.
12 Gray Affidavit at para 1.
13 O'Brien Affidavit at para 16.
14 O'Brien Affidavit at para 17.
15 O'Brien Affidavit at para 18.

15. Following the February 28, 2012 announcement, financial analysts understood and conveyed that this disclosure suggested that evidence of improper or illegal payments or corruption had been uncovered.[16] The Plaintiffs alleged that this was one of the key corrective disclosures.

16. Thereafter, on March 26, 2012, SNC released further details purporting to announce the results of the independent investigation initially announced on February 28, 2012. SNC's MD&A for the financial year ended December 31, 2011 released on March 26, 2012 disclosed the following regarding an aggregate $56 million paid under three agency agreements:[17]

> During December 2011 and January 2012, information was received as part of an accounting review and numerous internal meetings, held amongst certain members of senior management, with respect to two agency agreements documented to construction projects to which they did not appear to relate. The Chairman of the Board of Directors was briefed on January 19, 2012, requested additional information, and was further briefed on February 3, 2012, at which time Stikeman Elliott LLP was mandated as independent counsel. The investigation commenced of payments aggregating US$33.5 million made by the Company in the fourth quarter of 2011 under presumed agency agreements (the "**A Agreements**") documented in respect of Project [Intentionally omitted] ("**Project 1**") and Project [Intentionally omitted] ("**Project 2**"), but believed in fact to relate to Project [Intentionally omitted] ("**Project A**"). Independent counsel retained investigative advisors to provide business intelligence and related services.
>
> In February 2012, documents were received by the Company's Chief Financial Officer (the "**CFO**"), and related information was detected as part of year-end accounting processes, with respect to two other contracts. On February 16, 2012, the Chairman of the Board of Directors and the Chairman of the Audit Committee were briefed and the scope of the investigation was widened to include: (a) payments aggregating approximately US$22.5 million made by the Company in 2010 and 2011 under a presumed agency agreement (the "**B Agreement**" and together with the A Agreements, the "**Agreements**") documented in respect of Project [Intentionally omitted] ("**Project 3**"), but believed in fact to relate to Project [Intentionally omitted] ("**Project B**"); and (b) a presumed collection agreement (the "**Collection Agreement**") and related 2009 invoice (the "**Invoice**") purporting to relate to the settlement of a dispute relating to Project [Intentionally omitted] ("**Project 4**"), as to which there was no information at the time.
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> […]

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16 O'Brien Affidavit at para 19; Canaccord Genuity, "Taking Q4/11 Charges; Reiterating Buy; Lowering Target to C$58.00 from C$64.00" dated February 28, 2012 at p 2, Exhibit "B" to the O'Brien Affidavit; Scotiabank, "Déjà vu – A Buying Opportunity?" dated March 2, 2012 at pp 1–2, Exhibit "B" to the O'Brien Affidavit; National Bank Financial, "Uncertainty Trumps Scope, Scale, Valuation" dated March 6, 2012 at p 2, Exhibit "B" to the O'Brien Affidavit.

17 O'Brien Affidavit at para 20; MD&A dated March 25, 2012 at pp 6 and 8–9, Exhibit "C" to the O'Brien Affidavit.

RESULTS OF THE INDEPENDENT REVIEW

PRELIMINARY MATTERS

The Agreements are based upon the form of representative agreement contemplated in the Company's Policy on Commercial Agents/Representatives (the "**Agents Policy**"). The Agents Policy sets out the rules governing the hiring and remuneration of commercial agents or representatives by the Company in various markets around the world. One key feature of the Agents Policy is that all of the hiring and remuneration of agents is the responsibility of SNC-Lavalin International Inc. ("**SLII**"), a subsidiary of the Company. There are different authorized signatories depending on whether the contract with the agent respects certain limits, but no provision in the Agents Policy allows any person to override the Agents Policy.

FINDINGS DERIVED FROM INFORMATION OBTAINED

Based upon the information obtained as part of the Independent Review, and although there is no documentary evidence linking the Agreements to Project A or Project B: (a) a presumed agent, representative or consultant appears to have been retained for each of Project A and Project B; (b) the Agreements were respectively documented in respect of Projects 1 and 2 (instead of Project A) and Project 3 (instead of Project B); (c) all or part of the US$33.5 million paid in 2011 under the A Agreements is more likely than not to relate to Project A; and (d) all or part of the approximately US$22.5 million paid in 2010 and 2011 under the B Agreement is more likely than not to relate to Project B. No agency agreement other than the Agreements came to light in the context of the Independent Review as being improperly documented in respect of a project to which it did not effectively relate.

The following table summarizes these findings:

	A Agreements	**B Agreement**
Presumed agents hired	In 2011, the Former EVP Construction said that he had hired an agent to help secure work in respect of Project A. The Independent Review has found no direct and conclusive evidence establishing the nature of the services or actions undertaken by, or the true identity of, any presumed agent. The counterparties named in the A Agreements appear to be without substance, and any individual named on the public registers in relation to the corporate counterparties does not appear to be a true principal.	In 2009, the Former EVP Construction said that he had hired an agent to help secure work in respect of Project B. The Independent Review has found no direct and conclusive evidence establishing the nature of the services or actions undertaken by, or the true identity of, any presumed agent. The counterparty named in the B Agreement appears to be without substance, and any individual named on the public registers in relation to the corporate counterparties does not appear to be a true principal.
Decisions to attribute to other projects	At the same time, a decision was made not to charge the presumed agents' fees to Project A, and not to otherwise associate the presumed agents with Project A.	At the same time, a decision was made not to charge the presumed agent's fees to Project B, and not to otherwise associate the presumed agent with Project B.
Execution of improper documents	The Former EVP Construction co-signed and instructed a senior officer of SLII to co-sign the A Agreements on behalf of SLII. The A Agreements were improperly documented in respect	The Former EVP Construction instructed a senior officer of SLII to sign the B Agreement on behalf of SLII. The B Agreement was improperly documented in respect of

	A Agreements	B Agreement
	of Projects 1 and 2.	Project 3.
Agents Policy	The Agents Policy was not complied with in various respects in connection with the A Agreements, including the authorized signatories and the aggregate corporate limits on fees attributable to the attributed projects.	The Agents Policy was not complied with in various respects in connection with the B Agreement, including the authorized signatories and the aggregate corporate limits on fees attributable to the attributed project.
Payments	The A Agreements contemplated fees of US$33.5 million in the aggregate. In December 2011, payments of US$33.5 million under the A Agreements were requested of SLII by the Former EVP Construction. The required signatories (the Chairman of SLII and the CFO) refused to approve the payments. The requests were brought to the Company's Chief Executive Officer (the "CEO"), who authorized or permitted the Former EVP Construction to make the payments through his division.	The B Agreement contemplated fees of $30 million. Payments aggregating approximately US$22.5 million were made in 2010 and 2011 through SLII (Tunisia), but were improperly approved on its behalf by the Former EVP Construction and someone within his division.
Use of payments, etc.	The Independent Review has found no direct and conclusive evidence establishing the exact use, purpose or beneficiaries of payments made under the A Agreements. However, as noted above, the decision to hire presumed agents was based on the understanding at the time that it would help secure work in respect of Project A.	The Independent Review has found no direct and conclusive evidence establishing the exact use, purpose or beneficiaries of payments made under the B Agreement. However, as noted above, the decision to hire a presumed agent was based on the understanding at the time it would help secure work in respect of Project B.
Accounting	Payments were to be accounted for in respect of Projects 1 and 2 in accordance with the improper documentation. Accounting entries were not made or were made and reversed in short order in relation to Projects 1 and 2.	Payments were accounted for in respect of Project 3 in accordance with the improper documentation. Accounting entries were made in relation to Project 3 in 2010 and 2011. The entries were subsequently detected in February 2012 as an anomaly and reported to the Senior Vice-President and Controller of the Company.
Disclosure	The agencies on Project A were neither properly disclosed within the Company, nor were they disclosed to its internal or external auditors until shortly before the Independent Review began. In late 2011, the CFO was told at a meeting with the CEO and the Former EVP Construction that agents had been hired on Project A. The CFO objected	The agency on Project B was neither properly disclosed within the Company, nor to its internal or external auditors until shortly before the Independent Review began. In 2010, the CFO was told at a meeting with the CEO and the Former EVP Construction that an agent had been hired on Project B and that its fees would be charged to other projects.

	A Agreements	B Agreement
	to any involvement.	The CFO objected to this at the meeting.

17. Further revelations followed. On April 13, 2012, it was disclosed that the RCMP had conducted a search of SNC's headquarters in Montreal.[18]

18. Then on June 25, 2012, it was disclosed that two former employees of SNC had been charged under the *Corruption of Foreign Public Officials Act* relating to SNC's attempt to secure a contract for the construction of the Padma Bridge project in Bangladesh ("**Padma Bridge Project**").[19]

19. On November 26, 2012, it was disclosed that Swiss authorities were investigating possible illegal or improper payments by SNC in the approximate amount of $139 million, in addition to the $56 million that had been disclosed on February 28, 2012 and March 26, 2012.[20]

20. On November 28, 2012, it was disclosed that SNC's former Chief Executive Officer, Pierre Duhaime, had been arrested and charged with fraud and other criminal offences related to the contract awarded to SNC with respect to the construction and operation of the McGill University Health Centre hospital project in Montreal (which was "Project B" referred to in SNC's disclosure on March 26, 2012) ("**MUHC Project**").[21]

21. On July 3, 2013, it was disclosed that SNC had paid a secret $13.5 million commission linked to a froth treatment plant in Alberta, the construction of which had been awarded

18 O'Brien Affidavit at para 21.
19 O'Brien Affidavit at para 22.
20 O'Brien Affidavit at para 23.
21 O'Brien Affidavit at para 24.

to SNC in 2011 (which was "Project A" referred to in SNC's disclosure on March 26, 2012) ("**CNRL Project**").[22]

22. The Plaintiffs allege that SNC misrepresented or failed to disclose material information relating to the making of improper payments in respect of contracts SNC pursued for the MUHC Project, the CNRL Project and elsewhere in its securities filings during the Class Period. The Actions allege that those payments were not properly accounted for, and SNC's financial statements and management's discussion and analysis released during the Class Period contained statements that were materially false or misleading. It is alleged that SNC's securities therefore traded at artificially inflated prices during the Class Period, resulting in damage to Class Members when information relating to those alleged misrepresentations was eventually publicly disclosed.

C. Procedural History of the Litigation

Commencement of the Québec Action

23. On March 1, 2012, the Québec Action was commenced in the Superior Court of Québec, styled *Winder v SNC-Lavalin Group Inc., et al*., Court File No. 200-06-000141-120. The Québec Action was subsequently re-styled as *Delaire v SNC-Lavalin Group Inc., et al*., Court File No. 500-06-000650-131.[23]

Commencement of the Ontario Action

24. On May 9, 2012, an action styled *Gray v SNC-Lavalin Group Inc., et al.* (Court File No. CV-12-453236-00CP) was commenced in the Ontario Superior Court of Justice in

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22 O'Brien Affidavit at para 25.
23 O'Brien Affidavit at para 26.

Toronto by the issuance of a Statement of Claim. Rochon Genova was counsel to the Plaintiff in that action.[24]

25. Also on May 9, 2012, an action styled *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc., et al*. (Court File No. CV-12-2014-00) was commenced in the Ontario Superior Court of Justice in Brampton by the issuance of a Statement of Claim. Siskinds was counsel to the Plaintiffs in that action.[25]

26. There were no other cases filed in Canada, other than the cases filed by Rochon Genova and Siskinds, and the Québec Action. Rochon Genova and Siskinds agreed to join forces and prosecute the litigation together, which avoided delay (associated with carriage motions) and allowed for a stronger litigation team to emerge.[26]

27. On June 29, 2012, this Court approved the consolidation of the two actions commenced on May 9, 2012 to proceed in the Ontario Superior Court of Justice in Toronto under Court File No. CV-12-453236-00CP, as well as the discontinuance of the actions against certain Individual Defendants.[27]

Certification of the Actions and the Granting of Leave

28. The Plaintiffs' motions for certification and leave were scheduled to occur quickly (September 18–20 and 24–25, 2012) to ensure that the leave motion was decided prior to November 6, 2012, being three years after the release of the first SNC disclosure document that was alleged to contain a misrepresentation. At that time, there was

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24 O'Brien Affidavit at para 27.
25 O'Brien Affidavit at para 28.
26 O'Brien Affidavit at para 29.
27 O'Brien Affidavit at para 30.

significant uncertainty about the operation of the limitation period under Part XXIII.1 as it then required leave to be granted within three years of the alleged misrepresentations.[28]

29. On June 29, 2012, the Plaintiffs served their motion record for the certification and leave motions. The Plaintiffs' motion record included an affidavit of a Siskinds lawyer attaching, among other things, various public documents; a report from a forensic accounting expert; a report from a financial economist; and affidavits of representatives of the two proposed representative plaintiffs.[29]

30. On July 6, 2012, the Plaintiffs served a supplementary motion record containing a second affidavit of the Siskinds lawyer and a supplementary affidavit of the financial economist whose affidavits were included in the Plaintiffs' first motion record.[30]

31. On August 3, 2012, SNC and the outside director Defendants served a responding motion record, containing an affidavit of Eric Kirzner, a Professor of Finance at the Rotman School of Management, who provided an opinion on whether it could be determined on a class-wide basis that Class Members relied on the alleged misrepresentations.[31]

32. Following negotiations between the parties in the period shortly before the scheduled hearing of the leave and certification motions, the parties reached agreement with respect to the disposition of the motions, and the motions ultimately proceeded unopposed by the Defendants (except Mr. Ben Aissa and Mr. Roy, who had not filed a notice of intent to defend and did not appear on the motions having been served).[32]

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28 O'Brien Affidavit at para 31.
29 O'Brien Affidavit at para 32.
30 O'Brien Affidavit at para 33.
31 O'Brien Affidavit at para 34.
32 O'Brien Affidavit at para 35.

33. On September 19, 2012, this Court certified this Action as a class proceeding and appointed the DALI Trustees and 0793094 as representative plaintiffs, and granted leave to the Plaintiffs to commence an action under Part XXIII.1 of the *OSA*. The Court also approved the discontinuance of the Plaintiffs' common law and statutory claims other than the claims under Part XXIII.1 of the *OSA*.[33]

34. By order dated January 24, 2013, the Québec Court authorized the Québec Action as a class proceeding, appointed Jean-Paul Delaire as representative plaintiff and granted leave to the plaintiff to commence an action under the secondary market liability provisions of the Québec *Securities Act*. Stéphane Roy contested the motion for authorization at the hearing before the Québec Court on January 10, 2013.[34]

Opt-Out Process

35. By way of notice, Class Members were given an opportunity to opt-out of the Actions. The deadline to opt-out passed on May 8, 2013. There were 153 opt-outs.[35]

The Progress of the Action

36. Following the certification of this Action, documentary discovery commenced. According to evidence filed in this proceeding, SNC reviewed more than 800,000 documents in the course of its document collection efforts. Approximately 34,000 documents were produced by the Defendants. The Defendants' production came after many months of negotiations between the parties about the scope of production and e-

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33 O'Brien Affidavit at para 36; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2012 ONSC 5288; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc* (September 19, 2012), Toronto CV-12-453236-00CP (Certification Order); *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc* (September 19, 2012), Toronto CV-12-453236-00CP (Leave Order).

34 O'Brien Affidavit at para 37.

35 O'Brien Affidavit at para 38; Opt-Out Report, NPT RicePoint Class Action Services dated May 24, 2013 (with redactions), Exhibit "D" to the O'Brien Affidavit.

discovery protocols, in respect of which Class Counsel retained a forensic technology expert to assist. There was ultimately a motion before the Court to resolve a dispute between the parties about aspects of the discovery plan.[36]

37. In addition to the documents produced by the Defendants, the Plaintiffs also accessed material generated by way of the criminal investigations into SNC and certain of the other Defendants. After extensive negotiation, the Plaintiffs obtained *Wagg* Orders providing them with access to certain evidence obtained in the criminal proceedings, subject to terms concerning the use and filing of those documents. The Orders were as follows:[37]

(a) on July 15, 2013, following negotiations with the Crown, an Order was made by this Court for production of documents from a criminal proceeding in Ontario relating to the Padma Bridge Project;[38]

(b) on March 21, 2016, following negotiations with the Crown, an Order was made by this Court for production of documents from the Crown disclosure briefs in criminal proceedings in Québec against SNC, Pierre Duhaime and Stéphane Roy;[39] and

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36 O'Brien Affidavit at para 40; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2013 ONSC 6297; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2013 ONSC 7122.

37 O'Brien Affidavit at para 41.

38 *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc* (July 15, 2013), Toronto CV-12-453236-00CP (Order).

39 *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc* (March 21, 2016), Toronto CV-12-453236-00CP (Amended Order).

(c) on May 11, 2017, an Order was made by this Court for production of additional documents from the criminal proceedings in Québec.[40]

38. The process undertaken by Class Counsel to review the documents produced by the Defendants and obtained under the *Wagg* Orders was time-consuming and expensive. The Plaintiffs' document review process was overseen by Dawn Sullivan Willoughby, e-discovery counsel at Siskinds. Class Counsel employed advanced discovery management platforms to facilitate the document review process and assembled a team of document reviewers to perform the first-level review of the documents. The first-level review team spent over 2,000 hours on that review. The review team included individuals who were capable of reviewing Arabic and French language documents included among the documents produced to the Plaintiffs. After the first-level review process, documents were reviewed, analyzed and collated by members of the Class Counsel team in preparation for examinations for discovery.[41]

39. During the course of the litigation, there were a number of interlocutory disputes that resulted in motions and appeals.[42]

40. During 2013 through 2015, a number of motions were argued regarding documentary production, the Plaintiffs' pleadings and the proposed discovery plan. One of the pleadings motions resulted in a motion for leave to appeal, another pleadings motion in an appeal to the Court of Appeal.[43] Class Counsel believed that those motions and the

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40 *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc* (May 11, 2017), Toronto CV-12-453236-00CP (Order).

41 O'Brien Affidavit at para 42.

42 O'Brien Affidavit at para 43.

43 *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2013 ONSC 6297; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2013 ONSC 7122; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2014 ONSC 660; *Drywall Acoustic Lathing and Insulation Local*

appeals were important and necessary to advance the interests of the Class Members, and to provide clarity about the scope of the case before concluding documentary discovery and proceeding to examinations for discovery.[44]

41. Subsequently, in January 2016, SNC and the outside director Defendants delivered a motion for summary judgment that sought the dismissal of the Action. The motion focused on the question of whether a "public correction" is a necessary element of the right of action under Part XXIII.1, and whether the Plaintiffs could satisfy that requirement (assuming it existed). The motion was supported by an affidavit sworn by a lawyer from the firm representing SNC and the outside director Defendants, which attached certain SNC disclosure documents and other public documents as exhibits.[45]

42. On June 30, 2016, the Plaintiffs delivered a responding motion record on the summary judgment motion of SNC and the outside director Defendants, and brought their own motion for summary judgment seeking a determination in favour of the Plaintiffs on certain certified common issues directed at whether the impugned SNC disclosure documents contained misrepresentations within the meaning of the *OSA* and, if so, when and by what means those misrepresentations were publicly corrected.[46]

43. The Plaintiffs' summary judgment motion record contained:

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675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc, 2014 ONSC 1764; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2014 ONSC 1982; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2014 ONSC 3438; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2015 ONSC 256; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2015 ONCA 718.

44 O'Brien Affidavit at para 44.

45 O'Brien Affidavit at para 45; Notice of Motion of SNC and the Outside Directors dated January 14, 2016, Exhibit "E" to the O'Brien Affidavit.

46 O'Brien Affidavit at para 46.

(a) an affidavit of Professor S.P. Kothari (the "**Kothari Report**"), a financial economist from MIT's Sloan School of Management, who opined on whether the alleged corrective disclosures pleaded by the Plaintiffs caused statistically significant changes in the price of SNC securities, whether the information contained in those alleged corrective disclosures that caused the statistically significant price changes corrected the misrepresentations alleged by the Plaintiffs, and whether the Defendants' alleged "preemptive" corrective disclosures were corrective of the alleged misrepresentations;

(b) an affidavit of Professor Gordon Richardson, the KPMG Professor of Accounting at the Rotman School of Management, University of Toronto, who opined on whether SNC's financial reporting during the Class Period complied with GAAP or IFRS, whether SNC's representations during the Class Period with respect to internal control over financial reporting ("**ICFR**") and disclosure controls and procedures ("**DC&P**") were materially untrue, and whether the press release issued by SNC on February 28, 2012 disclosed actual or potential deficiencies in SNC's ICFR and DC&P and whether that disclosure was material from an accounting perspective; and

(c) various discovery documents, documents obtained through the *Wagg* process and a request to admit.[47]

44. Class Counsel devoted significant resources and incurred substantial expenses in preparing the evidence for these watershed and potentially dispositive summary judgment

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47 O'Brien Affidavit at para 47.

motions, including over $1 million alone on the expert reports of Professors Kothari and Richardson.[48]

45. In August of 2016, the Court heard a motion for directions to determine whether either or both of the motions for summary judgment should be heard and determined. The Court decided that both summary judgment motions should be stayed and ordered that the Action proceed to examinations for discovery and trial.[49]

46. In January of 2017, the Defendant Riadh Ben Aïssa, who had previously been noted in default, delivered a Statement of Defence and had his noting in default set aside. The Plaintiffs also delivered amended Replies. SNC and certain of the other Defendants moved to strike out portions of Mr. Ben Aïssa's Statement of Defence and the Plaintiffs' Replies. Certain of the Defendants were also seeking relief with respect to the forthcoming examinations for discovery, including a stay or postponement of the examinations. The Defendants were largely successful in striking the pleadings they sought to have struck. They were not successful in their attempt to stay or postpone the examinations for discovery, which meant that the litigation could proceed without further delay through that next phase.[50]

47. Between April and September of 2017, the parties conducted nearly 40 days of examinations for discovery in Toronto and Montreal.[51]

48. In April of 2018, the Plaintiffs delivered their trial record.[52]

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48 O'Brien Affidavit at para 49.

49 O'Brien Affidavit at para 50; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2016 ONSC 5784.

50 O'Brien Affidavit at paras 51–53; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2017 ONSC 2188; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2017 ONSC 3369.

51 O'Brien Affidavit at para 54.

Progress of the Québec Action

49. Following the granting of authorization by the Québec Court, the Québec Action was not actively pursued separately from this Action. It was agreed by the parties that documentary and oral discovery conducted in this Action would also be used in the Québec Action. The Québec Court was provided with updates on the progress of this Action from time to time.[53]

Related Proceedings

50. On February 20, 2017, SNC filed an application in the Québec Superior Court for declaratory judgment against the Defendants' directors and officers liability insurers arising out of a dispute about whether the payment of defence costs served to reduce (waste) the insurers' coverage limits. On March 21, 2017, certain of the insurers filed a competing application for declaratory judgment in the Québec Superior Court concerning the insurers' obligations under a pre-determined allocation provision for the payment of any indemnity under the policies. In March of 2018, both applications were adjourned *sine die* by Justice Gagnon. The Plaintiffs in this Action and the plaintiff in the Québec Action were *mises-en-cause* in these proceedings in the Québec Superior Court.[54]

51. There were numerous criminal proceedings, civil proceedings and regulatory proceedings/investigations that concern facts that overlap with or relate to the Actions:[55]

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52 O'Brien Affidavit at para 55.
53 O'Brien Affidavit at para 56.
54 O'Brien Affidavit at para 58; Application for Declaratory Judgment dated February 20, 2017, Exhibit "F" to the O'Brien Affidavit; Application for Declaratory Judgment dated March 21, 2017, Exhibit "F" to the O'Brien Affidavit; and Amended Application for Declaratory Judgment dated April 4, 2017, Exhibit "F" to the O'Brien Affidavit.
55 O'Brien Affidavit at para 59.

(a) *Criminal charges relating to Libya*:

(i) On February 19, 2015, fraud and corruption charges were laid against SNC, SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. with respect to payments made to Libyan government officials between 2001 and 2011. The criminal proceedings are ongoing.

(ii) On October 1, 2014, Riadh Ben Aïssa pled guilty to criminal charges related to his activities in Libya in the Federal Criminal Court of Switzerland. Mr. Ben Aïssa was ordered to pay approximately C$17.2 million to SNC as part of the settlement.

(iii) In March 2014, Stéphane Roy was charged with certain offences related to SNC's activities in Libya.

(iv) Former SNC executive, Sami Bebawi, was charged with crimes related to his activity in Libya and for obstructing justice.

(b) *Criminal charges related to the MUHC Project*:

(i) On November 27, 2012 and February 14, 2013, Pierre Duhaime was charged with criminal offences related to his involvement in procuring the MUHC Project for SNC. A stay of the November 27, 2012 charges was granted on March 1, 2017. The criminal proceedings are continuing in relation to the other charges.

(ii) On November 27, 2012 and February 14, 2013, Mr. Ben Aïssa was charged with criminal offences related to the procurement of the MUHC Project for SNC. A stay of the November 27, 2012 charges was granted

on March 1, 2017. On July 10, 2018, Mr. Ben Aïssa pleaded guilty to one of the remaining charges in exchange for the other charges being dropped.

(iii) On September 14, 2014, Mr. Roy was charged with certain offences with respect to the MUHC Project. On July 10, 2018, Mr. Roy was acquitted after the Crown decided not to present evidence against him.

(iv) Criminal proceedings in relation to the MUHC Project also continue against former MUHC manager Yanaï Elbaz and his brother Yohann Elbaz.

(v) Arthur Porter, the former Chief Executive Officer of MUHC, was also facing charges prior to his death.

(c) *Criminal charges with respect to the Padma Bridge Project*: the RCMP conducted a formal investigation into improper payments made in relation to the Padma Bridge Project. The investigation led to charges against former SNC employees and others under the *Corruption of Foreign Public Officials Act*. The charges were eventually dropped after an Ontario court found that evidence against the former SNC employees had been improperly obtained.

(d) *Settlements with international organizations*:

(i) On April 17, 2013, SNC reached a settlement with the World Bank in relation to investigations undertaken by the World Bank into the Padma Bridge Project and a project in Cambodia. SNC-Lavalin Inc. accepted a suspension on its right to bid on World Bank projects for 10 years.

(ii) On October 1, 2015, SNC reached a settlement with the African Development Bank related to allegations of former employees of SNC-

Lavalin International Inc. ordering illicit payments to public officials in two African countries.

(e) *Civil litigation*: In 2015, SNC filed a civil action in Québec Superior Court against Mr. Ben Aïssa and Mr. Bebawi seeking to recoup losses from money allegedly embezzled by the two former SNC officers between 2001 and 2011. To the best of Class Counsel's knowledge, the proceeding is currently ongoing.

(f) *Other*: The Autorité des marches financiers ("**AMF**") is currently investigating SNC in relation to compliance with securities laws and regulations. AMF certification is required for SNC to contract with public bodies in Québec. It is not clear whether the investigation relates to the Actions.

D. Settlement Discussions and the Settlement

52. Mr. Winkler presided as mediator at two-day mediation sessions in each of December 2016 and May 2018. After the mediation session in December 2016 failed to yield a resolution, the Plaintiffs continued with the prosecution of the Action. Close to 18 months later, settlement discussions resumed at the second mediation in May 2018, and an agreement in principle was reached between the parties to resolve the Actions at that mediation.[56] The settlement amount was considerably higher than that offered by the Defendants and rejected by the Plaintiffs at the mediation session in December 2016.[57]

53. In preparation for the first mediation session in December 2016, Class Counsel had lengthy internal discussions during which they reviewed and debated the risks and obstacles the Actions faced in proceeding through a trial of the common issues, the

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56 O'Brien Affidavit at para 60.
57 Gray Affidavit at para 23; Watt Affidavit at para 27.

likelihood of those risks materializing, and how those risks would impact on the recovery that would be achieved for the Class. Class Counsel also considered how those risks might be mitigated in order to optimize results at trial. These discussions were conducted with the benefit of: (i) the detailed expert evidence relating to liability that had been prepared and filed for the summary judgment motion before the court in early 2016; (ii) an expert preliminary assessment of damages and statutory liability limits prepared for the mediation; and (iii) a detailed consideration of extensive documentary productions and the Crown disclosure received by way of a *Wagg* order. Comprehensive mediation briefs were prepared considering all of this. In addition, Class Counsel considered the mediation briefs prepared by defence counsel. Having carefully considered all of the foregoing, Class Counsel advised the Plaintiffs and took instructions before entering the mediation.[58]

54. In preparation for the second mediation session in May 2018, Class Counsel had the benefit of all of the foregoing, plus an extensive discovery record in which gaps in the evidence had been filled. In addition, Class Counsel had the benefit of observing how the Individual Defendants responded to close questioning, including making several key admissions when pressed to do so. The mediation briefs were updated to reflect the discovery evidence. Class Counsel also had the benefit of an extensive liability work-up that had been undertaken by them for the purposes of moving the case towards trial, including the preparation of a lengthy trial memorandum that formed the basis for the Plaintiffs' decision to set the matter down for trial in April 2018. Having considered all

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58 O'Brien Affidavit at para 9.

of this, Class Counsel advised the Plaintiffs and took instructions both before and during the mediation.[59]

55. All of the negotiations leading to the agreement in principle to settle the Actions and the execution of the Settlement Agreement were conducted on an adversarial, arms-length basis.[60]

56. The key terms of the Settlement Agreement are as follows:[61]

(a) the Settlement is conditional on the approval of the Courts;

(b) the Settlement does not constitute an admission of liability by the Defendants;

(c) SNC will pay C$88,000,000 and shall cause the Defendants' insurers to pay C$22,000,000, for a total of C$110,000,000 for the benefit of the Class Members in full and final settlement;

(d) the amount of C$1,500,000 shall be paid, within thirty (30) days of execution of the Settlement Agreement, to Siskinds (in trust), to be deposited into an interest bearing trust account ("**Escrow Account**") from which funds shall be paid toward Administration Expenses incurred prior to the issuance of the Approval Orders. This payment was received by Siskinds on September 11, 2018;

(e) the amount of C$108,500,000 shall be paid, within ten (10) days of the issuance of the last Approval Order, to the Administrator (in trust), to be held in the Escrow Account for the benefit of the Class Members and disbursed in accordance with the Settlement Agreement and the Approval Orders;

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59 O'Brien Affidavit at para 10.
60 O'Brien Affidavit at para 60.
61 O'Brien Affidavit at para 61.

(f) on the Effective Date, all Defendants will receive a full and final release from all Class Members of all claims made against them in the Actions;

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

(h) the Net Settlement Amount will be distributed to Class Members who file claims in accordance with the Distribution Protocol; and

(i) the approval of the Distribution Protocol and the request for Class Counsel Fees are not conditions of the approval of the Settlement itself.

E. Notice and Objection Process

57. Pursuant to this Court's Order dated August 17, 2018 and the Order of the Québec Court dated September 19, 2018, the First Notice (short-form and long-form versions) has been disseminated in accordance with the Plan of Notice.[62]

58. Among other things, the First Notice advised Class Members of their right to object to the approval of the Settlement Agreement or the Distribution Protocol. The deadline for doing so is October 17, 2018. As the First Notice has only just been disseminated, no objections have been received.[63] However, any timely objections received in the future will be brought to the attention of the Court at the hearing of the motion to approve the Settlement Agreement and the Distribution Protocol on October 31, 2018.

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62 O'Brien Affidavit at paras 62–63.
63 O'Brien Affidavit at para 64.

F. Information Supporting the Settlement

59. This Action is at a more advanced stage than most securities and other class actions when they settle. The Plaintiffs were able to make a very well informed decision to settle the Actions based on a consideration of information not typically available when an action is resolved at an earlier stage, including:[64]

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

(b) approximately 34,000 documents produced by the Defendants pursuant to their discovery obligations;

(c) documents produced in the context of various criminal proceedings pursuant to *Wagg* Orders issued by the Courts;

(d) evidence generated by Class Counsel's own investigation into the matters underlying the Action;

(e) trading data for shares of SNC;

(f) input from experts retained by Class Counsel as described below:

(i) an assessment of the materiality of the alleged misrepresentations, as well as the question of whether the alleged public corrections were corrective of the alleged misrepresentations and constituted new information provided to the market, contained in the affidavit of Professor Kothari sworn in support of the Plaintiffs' summary judgment motion in 2016;

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64 O'Brien Affidavit at para 65.

(ii) the opinion of Professor Gordon Richardson in relation to certain weaknesses associated with SNC's ICFR and DC&P during the Class Period as set out in his affidavit sworn in support of the Plaintiffs' summary judgment motion in 2016;

(iii) an estimate of potential class-wide damages prepared by Professor Joseph Weber from the MIT Sloan School of Management; and

(iv) the preliminary analysis of a corporate governance expert retained by Class Counsel who had begun work on an opinion on the issues raised by the Actions;

(g) the discovery evidence, taken over nearly 40 days, of all of the parties to the Actions;

(h) information regarding insurance policies potentially responsive to the claims asserted;

(i) information disclosed in the course of related criminal proceedings which were monitored by Class Counsel (described above);

(j) the contributions and assessments of positions taken during the negotiation process with Mr. Winkler in his capacity as mediator;

(k) the views, guidance and observations of the Courts expressed in the various preliminary decisions rendered in this case; and

(l) information regarding positions taken by the Defendants and their insurers during the course of the mediations.

60. The evidentiary record attests to the dedication and comprehensive investment, financial and otherwise, the Plaintiffs and Class Counsel made in connection with the Actions.

G. Risks

61. The Plaintiffs and Class Counsel are confident that the claims are meritorious and that the settlement achieved is not only substantial, but one that is in the best interests of the Class. That said, they were always aware of the real risks they faced, including the legal and tactical risks that could have hampered recovery from the Defendants. As discussed, Class Counsel had more than enough information to gauge the strength of the Plaintiffs' case. Class Counsel's assessment and recommendation of the settlement rests primarily on the factors detailed below.

62. The risks fall into two categories: generic litigation risks and case-specific risks.

63. The generic risks inherent in litigation are the risks arising from the passage of time, and the procedural risks that inhere in litigation of this complexity, such as the risk that witnesses will not appear or will not give the evidence expected of them, and the risk of adverse procedural or evidentiary determinations by the Court.[65]

64. With the passage of time, documentary evidence may no longer be available, and witnesses may die or their memories of the material events may fade, all of which would impact the Plaintiffs' ability to prove their case.[66]

65. That also applies to the Class Members. By the time the trial process, including appeals from the trial judgment, would have concluded, 10 years or more would have passed from the Class Period when the Class Members' purchase transactions took place. With

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65 O'Brien Affidavit at para 70.
66 O'Brien Affidavit at para 71.

the passage of that amount of time, some Class Members may no longer be alive, corporate Class Members may no longer exist, some Class Members may not have retained the required transaction records to support their claim, and some Class Members may not be inclined to file a claim. It was inevitable that a claims process that occurred 10 years or more after the Class Period ended would not have 100% participation from Class Members, a factor that would impact the amount ultimately recovered.[67]

66. The case-specific risks are as follows:[68]

(a) the risk that the Court would find that there had been no misrepresentation made by the Defendants either because the alleged misstatements were not untrue or because they were not material;

(b) the risk that the Court would find that no public correction of the alleged misrepresentations had occurred, and relatedly that no damages flowed from the misrepresentations;

(c) the risk that the Defendants would establish a "reasonable investigation" or due diligence defence pursuant to section 138.4(6) and (7); and

(d) even if the Plaintiffs were to prevail on these issues, there remained a risk of a finding that significant proportionate liability (50% or greater) would be assigned to individuals who did not personally have the financial capacity, or who were without adequate or fully responsive D&O insurance, to satisfy a substantial

67 O'Brien Affidavit at para 72.
68 O'Brien Affidavit at para 73.

judgment. This could lead to a scenario where the Plaintiffs are left with a judgment against SNC for only a fraction of any damages proven.[69]

67. In this particular case, the evidence is voluminous, the facts complex, and the law uncertain. No action brought under Part XXIII.1 has been determined on its merits beyond the leave stage. The uncertainty and unpredictability arising from that legal novelty of the claim amplified the risk for all parties.[70]

No Misrepresentations / No Materiality

68. The core of the misrepresentation claims asserted by the Plaintiffs pertained to $56 million in payments which were accounted for in respect of projects to which they did not relate. As the evidence disclosed, payments were made in respect of the MUHC Project in 2010 and 2011 and the CNRL Project in 2011 but were accounted for as agent payments in respect of other unrelated projects, in other continents. The Plaintiffs alleged that these payments and their misallocation meant that SNC's Class Period disclosures contained misrepresentations by omitting to disclose the payments and their misallocation, or by falsely representing that:[71]

(a) SNC was a "socially responsible company" and a "responsible global citizen";

(b) SNC had in place controls, policies and practices that were designed to ensure compliance with anti-bribery laws to which SNC is subject;

(c) SNC had ICFR and DC&P that were properly designed and operating effectively; and

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69 O'Brien Affidavit at paras 12 and 73.
70 O'Brien Affidavit at para 74.
71 O'Brien Affidavit at para 76.

(d) SNC's business was conducted in compliance with its Code of Ethics and Business Conduct.

69. The Plaintiffs had sought to broaden the scope of the alleged wrongdoing underlying the pleaded misrepresentations in a number of respects: to allegations of misconduct in Libya and other countries, to misconduct other than bribes and to misconduct that occurred prior to the Class Period. However, by virtue of the decisions rendered by this Court and the Court of Appeal in 2014 and 2015,[72] the Plaintiffs were prevented from adding the particulars of the broader misconduct, at least for the purposes of determining whether misrepresentations were made in SNC's Class Period disclosure documents.[73]

70. This case did not have the hallmark signs of a classic securities fraud case. Rather, the misrepresentations focused on more general statements in SNC's disclosure documents that were subsequently alleged to have been rendered false by the alleged wrongful conduct of SNC and the former employees. There was a significant dispute between the parties about the facts relating to the alleged wrongful conduct underpinning the misrepresentation claims. The available information about those facts developed over time as, for example, criminal charges were laid and the criminal proceedings progressed.[74]

71. In relation to the core of the misrepresentation claims that were permitted to proceed — the allegations relating to payments of $56 million in respect of the MUHC Project and the CNRL Project in Canada and the intentional misallocation and concealment of these

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72 *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2014 ONSC 660; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2014 ONSC 3438; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2015 ONSC 256; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2015 ONCA 718.

73 O'Brien Affidavit at para 77.

74 O'Brien Affidavit at para 78.

expenses to three unrelated SNC projects — the Defendants contested that there was any misrepresentation made, at all. They contended that the statements made in SNC's disclosure documents, which the Plaintiffs alleged were misrepresentations, were not untrue, for example because statements about compliance with anti-bribery laws and the Code of Ethics did not amount to a guarantee that improper payments would not occur or breaches of the Code of Ethics would not occur. Further, they denied that there was any improper purpose to the payments relating to the MUHC Project and the CNRL Project. The Plaintiffs were, therefore, faced with the task of proving that the admitted $56 million accounting misallocations were in fact material departures from GAAP, that SNC's ICFR and DC&P were not designed or functioning effectively, and that the payments constituted bribes in circumstances where there had been no admission by SNC of bribery.[75]

72. The timing of the payments relating to the CNRL Project also presented a significant issue for the Plaintiffs. The payments appear to have been made in December 2011, after the release of the last document alleged to contain a misrepresentation on November 4, 2011. Because the improper payments were made after the release of the last pleaded disclosure document, the Defendants argued there was no misrepresentation in the pleaded disclosure documents arising from those payments. The Defendants took the position that the CNRL Project payments were disclosed when they ought to have been disclosed: in February 2012 in the course of financial reporting for the fourth quarter of 2011.[76] The Plaintiffs would have argued that the underlying transactions and authorizations to engage in the illicit payments and misallocations occurred prior to the

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75 O'Brien Affidavit at para 79.
76 O'Brien Affidavit at para 80.

last pleaded disclosure document, which thus gave rise to a misrepresentation in the pleaded disclosures.

73. If the Defendants were successful on their argument with respect to the CNRL Project, the success of the Plaintiffs' case may have turned on the more limited failure to disclose the $22.5 million of payments made by SNC in 2010 and 2011 in respect of the MUHC Project, but allocated to a project in Algeria in 2009. The quantum of that payment, without more, would have presented a challenge in proving its materiality given the overall size of SNC's business at the time (over $1 billion in revenue annually) and the fact that this was below the amount of SNC's accounting materiality reporting threshold.[77]

74. Even for the full $56 million, the Defendants took the position that payments of that amount, from a purely quantitative perspective, were not material because they were not of sufficient value, given the value of SNC's overall assets and revenues, to reasonably be expected to have a significant effect on the market price or value of SNC's securities (the test of materiality under the *OSA*).[78]

75. The materiality issue would have been the subject of competing expert evidence at trial. On the summary judgment motion, the Plaintiffs had filed the extensive Kothari Report in support of, among other things, the Plaintiffs' position that the pleaded misrepresentations were material.[79] The Kothari Report concluded that information relating to these payments was material, but it was understood that the Defendants had

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77 O'Brien Affidavit at para 81.
78 O'Brien Affidavit at para 82.
79 O'Brien Affidavit at para 83.

critiques of Professor Kothari's opinion and that this issue would have been challenged.[80] Professor Richardson's opinion also supported the materiality of the pleaded misrepresentations.

No Public Correction or Damages

76. The Plaintiffs had pled that the alleged misrepresentations were publicly corrected in the news release issued by SNC on February 28, 2012 and through a number of subsequent corrective disclosures that did not emanate from SNC.[81]

77. The Defendants' position was that none of the Plaintiffs' pleaded corrective disclosures constituted "public corrections" of the pleaded misrepresentations as contemplated by *OSA* section 138.3. In particular, the Defendants pleaded that the February 28, 2012 disclosures were not related to, or corrective of, the pleaded misrepresentations. Their position was that when SNC did make a public disclosure of irregularities relating to the MUHC Project and CNRL Project payments on March 26, 2012, that disclosure did not result in any material share price correction.[82]

78. Indeed, in January 2016, SNC and the outside director Defendants brought a summary judgment motion focused on that specific issue.[83] They asserted that a public correction is a necessary element of a claim under Part XXIII.1, and the statements alleged to form the public corrections in this case were not corrective of the alleged misrepresentations. The premises of the Defendants' argument were that the information in the alleged corrective disclosures did not logically connect with the alleged falsity of SNC's Class

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80 O'Brien Affidavit at para 84.
81 O'Brien Affidavit at para 85.
82 O'Brien Affidavit at para 86.
83 Notice of Motion of SNC and the Outside Directors dated January 14, 2016, Exhibit "E" to the O'Brien Affidavit.

Period disclosure documents, and that the alleged falsity of the disclosure documents had already been publicly disclosed prior to the corrective disclosures alleged by the Plaintiffs.[84]

79. Professor Kothari opined that all but one of the Plaintiffs' alleged corrective disclosures were corrective of the alleged misrepresentations. Professor Kothari also concluded that the information conveyed in the Defendants' alleged "pre-emptive" corrective disclosures was not sufficiently comprehensive to fully pre-empt the information conveyed in the Plaintiffs' alleged corrective disclosures. The conclusions of the Kothari Report gave the Plaintiffs confidence that they would succeed in proving that one or more of their alleged corrective disclosures constituted a "public correction" for the purposes of Part XXIII.1. However, the Plaintiffs also understood that the Defendants intended to file competing expert evidence to challenge Professor Kothari's opinion. This issue was expected to have been vigorously challenged by the Defendants.[85]

80. Separately, the Defendants contended that Part XXIII.1 does not provide for multiple corrective disclosures. The issue of whether it is possible to assert multiple public corrections in an action under Part XXIII.1 is untested. If the Defendants had been successful in arguing that it is not possible to assert multiple corrective disclosures, the Plaintiffs would have been confined to arguing that the sole public correction was the SNC disclosure released on February 28, 2012. As discussed above, the Defendants would have argued that the February 28, 2012 disclosure was not a valid corrective disclosure.[86]

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84 O'Brien Affidavit at para 87.
85 O'Brien Affidavit at para 88.
86 O'Brien Affidavit at para 89.

81. The Defendants' position was that the "public correction" issue was relevant to whether the Plaintiffs had satisfied a constituent element of a claim under Part XXIII.1, as well as to the assessment of damages. Under section 138.5(1) of the *OSA*, the assessment of damages turns, in some circumstances, on the trading price of the securities in the period after the public correction of the misrepresentation. If the Defendants were successful in arguing that the Plaintiffs' alleged corrective disclosures did not constitute public corrections of the misrepresentations, the Defendants would have argued that damages should be assessed at zero under the legislative scheme.[87]

82. Further, section 138.5(3) of the *OSA* provided the Defendants with a mechanism to argue for a reduction in the amount of damages by establishing that news unrelated to the correction of the alleged misrepresentations negatively influenced share prices. In particular, it was anticipated that the Defendants would argue that the decline in the price of SNC shares in the period immediately after the February 28, 2012 disclosure was wholly or partly attributable to information that was unrelated to the alleged misrepresentations. The Kothari Report accepted that a small portion of the price decline on the February 28 and February 29 trading days was attributable to unrelated earnings news. There would have been considerable debate about the extent to which the price decline on those trading days was attributable to the correction of the alleged misrepresentations. That would have been the subject of competing expert evidence.[88]

83. The quantum of damages would also have been impacted by the determination of when the first misrepresentation was made. If the Court determined that a misrepresentation was not made in the disclosure document issued on the first day of the Class Period, but

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87 O'Brien Affidavit at para 90.
88 O'Brien Affidavit at para 91.

rather in a later document, that would contract the Class Period and reduce the quantum of damages.[89]

84. For the purposes of mediation, the Plaintiffs obtained a preliminary estimate of potential class-wide damages from Professor Weber (which assumed 100% participation by Class Members, including individuals who had opted out of the Actions). Based on certain assumptions, Professor Weber calculated damages under section 138.5(3) to be approximately C$439.9 million if he used a single trader proportional trading model and approximately C$294.4 million if he used a multi trader trading model.[90]

85. Professor Weber developed the trading models to estimate the number of "damaged shares" that were acquired by Class Members during the Class Period and retained throughout the Class Period. To estimate damages under the formulae in section 138.5(1), Professor Weber applied his trading model to estimate when the "damaged shares" were sold in the period after the Class Period and their respective selling prices. Professor Weber also incorporated into his damages estimate adjustments to reflect the following two arguments which likely would have been made by the Defendants under section 138.5(3):

(a) that any drop in the share price prior to the first alleged corrective disclosure on February 28, 2012 was unrelated to the alleged corrective disclosure and the alleged misrepresentations. That would establish a maximum purchase price of $48.37, being the closing price of SNC shares on February 27, 2012 prior to the first alleged corrective disclosure on February 28, 2012; and

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89 O'Brien Affidavit at para 92.
90 O'Brien Affidavit at para 93.

(b) that the alleged corrective disclosure on February 28, 2012 included earnings news that was unrelated to the alleged misrepresentations and, therefore, some of the decline in the price of SNC shares following the February 28, 2012 disclosure was attributable to that earnings news and not attributable to the correction of the alleged misrepresentations. Professor Weber used a post-correction floor price of $41.69, computed as the ten trading day volume-weighted average share price after the corrective disclosure on February 28, 2012 of $38.49, with an uplift of $3.20 to reflect the percentage of the two-day (February 28 and February 29) abnormal return that Professor Kothari determined was attributable to the unrelated earnings news.[91]

86. Professor Weber's estimate of the potential class-wide damages also took into account the fact that over time, in the period following the end of the Class Period, the trading price of SNC's shares climbed to levels above the trading prices of the shares during portions of the Class Period. By operation of subsection 138.5(1), when a Class Member disposed of shares at a price higher than their acquisition price, they do not appear to have been entitled to damages under section 138.5, which is also reflected in the Distribution Protocol.[92]

87. The Plaintiffs estimated that SNC's liability limit under Part XXIII.1 was as low as $334 million and as high as $424 million, depending on the point in time during the Class Period used for the purposes of calculating SNC's market capitalization, upon which SNC's liability limit is calculated. If the Court used the liability limit based on SNC's

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91 O'Brien Affidavit at para 94.
92 O'Brien Affidavit at para 96.

market capitalization on November 6, 2009 — the first day of the Class Period — the calculated liability limit would have been approximately $334 million.[93]

88. Accordingly, even if Professor Weber's section 138.5(3) damages approach was accepted, his higher estimate of damaged shares was accurate, all Class Members participated, and SNC's proportionate liability was assessed at 100%, all of which was subject to risk, the Plaintiffs would not have been in a position to recover the full amount of the class-wide damages from SNC because of the limits on damages provided by *OSA* section 138.7.[94]

Reasonable Investigation Defence

89. All of the Defendants relied on a reasonable investigation defence under sections 138.4(6) and (7) asserting that they had been duly diligent in spite of the misrepresentations having been made (which was denied).[95]

90. One additional source of risk for the Plaintiffs as to whether they could overcome the Defendants' reasonable investigation defence arose from the Defendants' position that some pre-Class Period evidence which would assist the Plaintiffs in answering the defence should not be admissible at trial because it did not pertain directly to the transactions alleged to have been the subject matter of the misrepresentations. In particular, there was evidence in the record that, prior to the Class Period, the Board of Directors of SNC was aware of illicit activities on behalf of certain Individual Defendants. This evidence would partially answer SNC's position that it was duly diligent because they had reliable systems in place designed to prevent the pleaded illicit

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93 O'Brien Affidavit at para 95.
94 O'Brien Affidavit at para 96.
95 O'Brien Affidavit at para 97.

conduct which underlay the pleaded misrepresentations. SNC had taken the position that awareness by SNC and the outside director Defendants of conduct that occurred prior to the Class Period and that concerned payments beyond the MUHC Project, CNRL Project and the Padma Bridge Project was not relevant and, at trial, they would object to its introduction into evidence. In Class Counsel's view, such evidence would make the answer to the due diligence defence stronger, and its potential exclusion at trial posed some risk.[96]

91. The reasonable investigation defence raised complex legal and factual issues and posed some risk to the Plaintiffs. In general, the Defendants asserted that they maintained a sophisticated system of controls and certifications (ICFR and DC&P), designed to avoid the making of the kinds of misrepresentations pleaded in this case, and that they had no knowledge of the particular facts which gave rise to the claims asserted. The Plaintiffs and Class Counsel believed that they had good answers to this affirmative defence, most notably that the CEO and CFO Defendants who were responsible for certifying the efficacy of SNC's ICFR and DC&P themselves knew of and authorized the misallocation of the $56 million in project payments which are the subject of this Action. This "management override" of the ICFR and DC&P, in Class Counsel's view, was a complete answer to any due diligence defence as asserted by those members of management directly involved. It was less clear that those facts would be sufficient to answer the defence as asserted by SNC, although Class Counsel believed that they could successfully answer SNC's defence in part through the evidence, noted above, that, prior to the Class Period, the Board of Directors of SNC was aware of illicit activities on

96 O'Brien Affidavit at para 100.

behalf of certain Individual Defendants. In any event, the defence posed a risk that would have to be answered with expert evidence.[97]

Proportionate Liability and Recovery Risk

92. The discovery and documentary evidence pointed to certain Individual Defendants who were part of SNC's senior executive management as having the most direct involvement in the pleaded misrepresentations and the alleged misconduct underlying those misrepresentations: the CEO, the CFO and an Executive VP in charge of the relevant projects ("**Senior Executive Management Defendants**"). A critical issue in the case was whether SNC could successfully rely on the proportionate liability provision in section 138.6(1) such that, if there was any liability on the part of SNC, it would be proportionately small relative to the greater liability of the Senior Executive Management Defendants. SNC argued that this statutory provision enabled it to lay most of any civil liability at the feet of these Senior Executive Management Defendants who may not, on their own, have the financial means (nor available insurance) to satisfy a substantial damages award.[98]

93. Section 138.6(1) is untested. There would have been significant dispute about the interpretation of that provision. Specifically with respect to SNC, the issue of how a corporate issuer's "responsibility" is determined separately from the "responsibility" of the individuals who manage and direct the issuer would have been an important issue. While there is generic precedent in the form of the corporate identification doctrine that could be applied to inform that question, the application of that doctrine in the specific context of the Part XXIII.1 liability regime is untested and uncertain. The ability of the

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97 O'Brien Affidavit at para 101.
98 O'Brien Affidavit at para 102.

Plaintiffs to hold SNC responsible for the actions of the Senior Executive Management Defendants was, in Class Counsel view, strongly arguable, but nevertheless uncertain. Given the novelty of the issue, regardless of the trial result, an appeal would have been inevitable, which would have delayed any recovery to the Class.[99]

94. One unique aspect of this case was the fact that a number of senior executives, including the CEO and an Executive Vice-President (both Defendants in this action and both members of SNC's "Office of the President"), were alleged by SNC to have been responsible for the pleaded misrepresentations. These same individuals have been charged criminally for conduct relevant to the liability issues in this Action. If SNC was successful in proving that these Individual Defendants were acting outside their authority, and that they were principally responsible for the pleaded misrepresentations, there was a risk that not only might SNC's responsibility for the damages be diminished to something less than 50%, but also that there was little prospect of recovery from those individuals deemed principally responsible, as any insurance coverage may be denied because of criminal findings against them.[100]

95. Class Counsel understood that SNC's directors' and officers' liability insurance coverage during the relevant policy period was not "entity coverage". Therefore, if SNC was determined to have been responsible for a significant portion of damages, it did not have responsive insurance coverage. SNC's ability to satisfy a substantial damages award was not assured because the resolution of the ongoing criminal proceedings against SNC created some risk as to SNC's future viability.[101]

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99 O'Brien Affidavit at para 103.
100 O'Brien Affidavit at para 104.
101 O'Brien Affidavit at para 105.

96. If the Senior Executive Management Defendants were determined to be responsible for a significant portion of damages, the prospects of recovery against these individuals would have been greatly diminished as it is unlikely that those individuals would have the capacity to satisfy a substantial judgment. Further, unless the Plaintiffs were successful in arguing that the liability limits of the Senior Executive Management Defendants should be lifted pursuant to section 138.7(2), there would be no opportunity for meaningful recovery from those individuals. Indeed, the liability limits applicable to those individuals would permit only modest recoveries, absent findings of fraud against such individuals.[102]

97. Although there was a "tower" of directors' and officers' liability insurance policies with total liability limits of C$70 million, the insurers had reserved their rights to deny coverage for some of the key Senior Executive Management Defendants. Added to this uncertainty, there was an unresolved dispute before the courts in Québec regarding whether the polices were "wasting" (meaning that the limits of liability were diminishing to cover the very considerable defence costs). As such, it was not clear that the Class could meaningfully recover on a damages award against any or all of the Senior Executive Management Defendants. This was a significant consideration given that SNC was arguing that these individuals bore the largest proportionate share of liability for the pleaded misrepresentations.[103]

98. Further, there are criminal proceedings against SNC and certain of the Senior Executive Management Defendants in respect of conduct which was related to the misrepresentations pleaded in this case. Criminal findings and convictions against certain

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102 O'Brien Affidavit at para 106.
103 O'Brien Affidavit at para 107.

of the Senior Executive Management Defendants could further imperil the availability of insurance coverage otherwise available to satisfy a judgment.[104]

Summary of Case-Specific Risks

99. In summary, there was a risk that the Plaintiffs could have lost any or all of the misrepresentation, public correction and reasonable investigation elements of the claim and recovered nothing. Furthermore, if successful on liability, there remained a risk that damages could have been reduced or uncollectable if the trial judge disagreed with the Plaintiffs' damages theory or if a large degree of proportionate responsibility was assigned to the Senior Executive Management Defendants.[105]

100. The Settlement eliminates these identified risks to recovery and instead provides an immediate and substantial benefit to Class Members in exchange for the release of their claims.[106]

H. Distribution Protocol

101. The Distribution Protocol[107] creates a claims process for Class Members to seek compensation that employs a damage calculation formula analogous to the formulae set out in section 138.5(1)[108] and incorporates expert evidence introduced in the Action.

102. The steps in calculating a Class Member's compensation are set out in paragraphs 5 to 13 of the Distribution Protocol. These steps are explained in plain language in the Guide to the Distribution Protocol.[109]

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104 O'Brien Affidavit at para 108.
105 O'Brien Affidavit at para 109.
106 O'Brien Affidavit at para 110.
107 Schedule "J" to the Settlement Agreement, Exhibit "A" to the O'Brien Affidavit.
108 O'Brien Affidavit at para 121.
109 Guide to the Distribution Protocol, Exhibit "G" to the O'Brien Affidavit.

103. The approach taken in the Distribution Protocol mirrors the Plaintiffs' damages theory that the value of SNC common shares was artificially inflated during the Class Period and that the artificial inflation was removed, to a significant degree, in the ten trading days after the February 28, 2012 corrective disclosure.[110]

104. The Distribution Protocol also seeks to reflect anticipated arguments that might have been made by the Defendants under section 138.5(3). As discussed above, arguments under section 138.5(3) are reflected in the Distribution Protocol in two respects and are supported by the preliminary damages assessment prepared for the Plaintiffs by Professor Weber and the materiality opinion of Professor Kothari:

(a) it was anticipated that the Defendants would argue that any drop in the share price prior to the first alleged corrective disclosure on February 28, 2012 was unrelated to the alleged corrective disclosure. As such, the Distribution Protocol uses a maximum purchase price of $48.37. That maximum purchase price is reflected in the definition of "Acquisition Expense" in the Distribution Protocol; and

(b) it was anticipated that the Defendants would argue that the alleged corrective disclosure on February 28, 2012 included negative information unrelated to the alleged misrepresentations and, therefore, some of the decline in the price of SNC shares on February 28, 2012 and February 29, 2012 was attributable to news unrelated to the pleaded misrepresentations. The Distribution Protocol utilizes a post-correction floor price of $41.69.[111]

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110 O'Brien Affidavit at para 122.
111 O'Brien Affidavit at para 123.

105. The key elements of the Distribution Protocol are as follows (definitions in the Distribution Protocol are applied here):

(a) the objective of the Distribution Protocol is to equitably distribute the Net Settlement Amount among Authorized Claimants having regard to the issues in the Action;

(b) the Administrator will administer all claims pursuant to the terms of the Distribution Protocol;

(c) the Administrator, in the absence of reasonable grounds to the contrary, will assume Claimants to be acting honestly and in good faith;

(d) Claimants will have 120 days from the date of the publication of notice of approval of the Settlement within which to submit a claim to the Administrator;

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

(f) in the event of a denial of a claim by the Administrator, there is a process whereby a Claimant can request that there be a reconsideration of the claim. Any decision of the Administrator after a reconsideration of the claim is final and binding and not subject to further review or appeal; and

(g) this is a non-reversionary settlement and, as such, the Net Settlement Amount will be distributed to Authorized Claimants on *pro rata* basis pursuant to the terms of the Distribution Protocol.[112]

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112 O'Brien Affidavit at para 124.

106. Class Counsel believes that the Distribution Protocol will achieve its stated objective of equitably distributing the Net Settlement Amount among Authorized Claimants.[113]

107. If the settlement is approved, there is no possibility that unclaimed amounts would revert to Class Counsel or the Defendants.[114]

PART III – LAW AND ANALYSIS

108. After over six years of litigation, numerous interlocutory motions (including the filing of competing summary judgment motions), extensive documentary discovery, nearly 40 days of examinations for discovery, two mediations, and this Action being set down for trial, the Actions have settled for $110 million.

109. The issues before this Court are whether:

(a) the Settlement Agreement should be approved;

(b) the Distribution Protocol should be approved; and

(c) honoraria to the Plaintiffs should be approved.

110. This settlement was reached after years of hard-fought litigation and two rounds of mediation, and bears no structural symptoms evidencing collusion or conflicts of interest. The quantum of the settlement was driven by the facts and Class Counsel's assessment of the risks flowing from those facts. It would be difficult for any Court to evaluate a settlement on the same basis as Class Counsel who have spent years litigating the case.[115]

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113 O'Brien Affidavit at para 125.

114 Reversions are an indicator of unfairness to class members: Howard M Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859 at 892; *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662.

115 *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8; *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at para 4.

111. Nonetheless, this Court is well-positioned to examine the structure of the settlement and determine whether it falls within a zone of reasonableness. In addition to the record filed on the approval motion, it must be borne in mind that this Court has also performed an invaluable case management function over the past six years during which time it has decided numerous interlocutory motions, including a critical motion addressing whether competing summary judgment motions should proceed.

112. The zone of reasonableness determination is informed by the background of the Actions—the extensive documentary productions analysed by Class Counsel, extensive discovery of key witnesses, consultation with numerous experts, and Class Counsel's comprehensive research and understanding of the factual and legal issues converge to allow Class Counsel to understand clearly whether a settlement is in a zone of reasonableness. As the Court has noted, the likelihood that a settlement is fair and reasonable and in the best interests of the class escalates as an action approaches trial.[116] All of these factors favour this Court's approval of the settlement.

A. Settlement Structure

113. It is appropriate and necessary for a court to scrutinize the Settlement Agreement and supporting materials in search of "structural" indicators of collusion or conflicts of interest.[117] The Court should ask whether Class Counsel negotiated in the best interests of the Class. The Court should guard against: efforts to make a settlement seem larger than it is; undue expansion of the class size; inappropriate protection of defendants from

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116 *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 35; *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670 at paras 5 and 10.

117 *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8.

liability; and any measures that discourage objection to the settlement or fee request.[118] The Court is well-placed to identify structural features of settlements indicative of collusion or conflicts of interest in the negotiations and the agreement.[119]

114. Broadly speaking, agreements that place a high value on non-monetary or conditional compensation,[120] contemplate a possible reversion of settlement funds to defendants without a concomitant reduction in class counsel's compensation,[121] make settlement approval contingent on fee approval,[122] and have optics that suggest the settlement is more favourable to class counsel than class members,[123] are examples of the types of features of which courts should be cautious.

115. Canadian courts have scrutinized these types of issues before. For example:

(a) in *Smith Estate v National Money Mart Co*, the proposed settlement was ostensibly valued at $120 million. Pursuant to that settlement, some class members were to receive debt forgiveness, while other class members were to receive "transaction credits." A cash payment of $30.5 million was to be made, but applied almost entirely to class counsel's fee first. In rejecting the settlement as proposed, this Court noted: "[c]lass counsel's fee takes up all the cash portion of this settlement, [and] Class Members who have repaid their loans to Money Mart will get no repayment of the allegedly illegal fees, which … was the rallying

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118 Howard M Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859 at 873.

119 *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8.

120 *Smith Estate v National Money Mart Co*, 2010 ONSC 1334 at para 95, varied in part *Smith Estate v National Money Mart Co*, 2011 ONCA 233; *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at footnote 10.

121 *Bilodeau v Maple Leaf Foods Inc*, 2009 CarswellOnt 1301; *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at footnote 10.

122 *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 85–86.

123 *Smith Estate v National Money Mart Co*, 2010 ONSC 1334 at para 33, varied in part *Smith Estate v National Money Mart Co*, 2011 ONCA 233.

point for the class action … in the first place."[124] The agreement had structural hallmarks of unfairness: non-monetary compensation was highly valued for the purpose of a fee application and the interaction of the fee request with the settlement agreement suggested a possible preference for the interests of counsel over those of class members;

(b) in *Bilodeau v Maple Leaf Foods Inc*, the proposed settlement included so-called "Enhanced Payments." In the event that there remained a residue following payment of all eligible claims, Enhanced Payments on a *pro rata* basis were to be made to claimants who experienced high levels of physical harm. If Enhanced Payments were made and there remained a residue, class counsel was permitted to apply for approval of further fees to be paid from that residue. If a balance remained thereafter, then *cy-près* payments would be made as agreed upon and approved by the court. Although the settlement was ultimately approved, it warranted particular scrutiny because of the risk that it arguably created incentives for class counsel not to maximize the distribution of notice and the settlement proceeds to the greatest number of claimants;[125]

(c) in *Garland v Enbridge Gas Distribution Inc*, a settlement term made the approval of the settlement conditional on payment of class counsel's fee. Justice Cullity declined to approve the settlement, stating that such an arrangement created an

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124 *Smith Estate v National Money Mart Co*, 2010 ONSC 1334 at para 94, varied in part *Smith Estate v National Money Mart Co*, 2011 ONCA 233.

125 *Bilodeau v Maple Leaf Foods Inc*, 2009 CarswellOnt 1301.

inherent conflict of interest between class counsel's interests and those of the class they sought to represent;[126] and

(d) similarly, in *Brown v Canada (Attorney General)*, the approval of the settlement was conditional on the approval of class counsel's fee. Justice Belobaba refused to approve the fee request and accordingly was not able to approve the settlement. Linking legal fees to the settlement approval undermined class counsel's ability to give independent legal advice on the merits of the settlement.[127]

116. These types of structural features indicative of conflicts of interests are not present here:

(a) there are no non-monetary benefits. This is a cash settlement. Class Members will receive cash compensation distributed in accordance with the Distribution Protocol;

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

(c) Class Counsel and the Plaintiffs have entered into contingency fee retainers that account for the stage of the litigation at which recovery is made and incentivizes Class Counsel to maximize overall recovery.[128] Both the Class and Class Counsel's interests were aligned through the course of the litigation;

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126 *Garland v Enbridge Gas Distribution Inc*, 2006 CarswellOnt 6585.
127 *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 81 and 85.
128 Contingency Fee Retainer Agreement dated August 14, 2012, Exhibit "A" to the Gray Affidavit; Contingency Fee Retainer Agreement dated May 3, 2012, Exhibit "A" to the Watt Affidavit.

(d) optics are not a problem here. The significant monetary benefit secured for the Class is far greater than any Class Counsel fee that may be approved by the Court; and

(e) there is no reversion to the Defendants. If any remainder exists after the Net Settlement Amount is distributed *pro rata* in accordance with the Settlement Agreement and the Distribution Protocol, it will be distributed *cy-près* to one or more recipients to be approved by the Court.

117. Where there is an all-cash settlement, contingency fees align the interests of counsel and class members to the greatest degree possible so that counsel is incented to pursue the maximum recovery for the class. As noted above, the settlement structure is fair and admits of none of the defects identified in the case law. Class Counsel was incentivized to maximize recovery, and did so.

B. Zone of Reasonableness

118. A court's scrutiny of a settlement is tempered by its recognition that the resolution need not be perfect. Rather, it must only fall within a range or "zone" of reasonableness.[129]

119. The zone of reasonableness assessment allows for variation between settlements depending upon the subject matter of the litigation and the nature of the damages for which settlement provides compensation.[130] A less than perfect settlement may be in the best interests of those affected by it when considered in light of the risks and obligations associated with continued litigation.[131] The settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory

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129 *Dabbs v Sun Life Assurance Co of Canada*, 1998 CarswellOnt 2758 at para 30.
130 *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 70.
131 *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at paras 25 and 33.

settlement.[132] The Court should also take into account practical considerations such as future expense and likely duration of the litigation in assessing the reasonableness of the settlement.[133]

120. In settlements, as here, reached in the later stages of an action, this Court has been "prepared to accept that class counsel was well informed about the risks and rewards of further litigation when the settlement was reached and that the settlement was indeed in the best interests of the class."[134]

121. In *McIntyre (Litigation guardian of) v Ontario* and *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, the Court catalogued features typical of settlements reached in the later stages of an action, which signalled that a settlement was fair, reasonable and in the best interests of the class.[135]

122. These features are present in this case:

(a) *comprehensive research and understanding of legal issues:* in preparing for the pending trial, two mediations, numerous interlocutory motions, including the summary judgment motions, the Plaintiffs gained significant insight into the legal and factual issues that would form the subject matter of the trial;

(b) *far reaching documentary discovery:* the Plaintiffs reviewed approximately 34,000 documents produced by the Defendants and additional documents

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132 *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 80.
133 *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622 at para 22.
134 *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at para 14. See also *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 35; *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670 at para 5 and 10.
135 *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 33; *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at para 13.

obtained through the *Wagg* process, and devoted thousands of hours to the documentary review process;

(c) *discovery of key witnesses:* there were nearly 40 days of examinations for discovery during which the Plaintiffs were able to examine most of the key witnesses in the case, including the Senior Executive Management Defendants; and

(d) *expert reports*: the Plaintiffs had the benefit of the detailed evidence of their experts relating to liability that had been prepared and filed for the summary judgment motions before the court in 2016, as well as an expert assessment of damages prepared for the mediation.

123. In this case, Class Counsel's understanding of the factual and legal issues is mature. As in *McIntyre*, resolution was informed by "layers and layers of actual, and not just imagined, information about the risks and rewards of further litigation."[136] Class Counsel knew the risks and rewards of going to trial.[137] The settlement was negotiated not in a vacuum, but from a deep knowledge gained through the significant time and effort spent prosecuting the Action leading to a fair and reasonable settlement in the best interests of the Class.

124. As stated by the 7th Circuit in *Reynolds* and reiterated by the Court in *Agnico-Eagle*, "a high degree of precision cannot be expected in valuing litigation, especially regarding the estimate of the probability of particular outcomes."[138] The challenge of valuing litigation

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136 *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 34.
137 *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 34.
138 *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 12, citing *Reynolds v Beneficial National Bank*, 288 F 3d 277 (7th Cir 2002) at para 20.

is compounded in Canadian secondary market securities cases, where a paucity of trial and settlement outcomes makes it difficult to build a usable statistical model.[139]

125. Those challenges aside, in this Action, it is clear that the action falls within a range of reasonableness and is in the best interest of the Class, taking into account, in addition to the hallmarks of fairness detailed above, the following key case-specific risks:

(a) the risk that the Court would find that there had been no misrepresentation made by the Defendants either because the alleged misstatements were not untrue or because they were not material;

(b) the risk that the Court would find that no public correction of the alleged misrepresentations had occurred, and relatedly that no damages flowed from the misrepresentations, which argument was the basis for the Defendants' summary judgment motion that was stayed without consideration of the merits;

(c) the risk that the Defendants would establish a "reasonable investigation" or due diligence defence pursuant to section 138.4(6) and (7) of the *OSA*; and

(d) even if the Plaintiffs were to prevail on these issues, the risk that the proportionate liability provisions of Part XXIII.1 would result in a finding that significant proportionate liability (50% or greater) would be assigned to individuals who did not personally have the capacity, nor adequate insurance, to satisfy a substantial judgment. This could lead to a scenario where the Plaintiffs are left with a judgment against SNC for only a fraction of any damages proven.[140]

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139 Moreover, in a number of Canadian securities settlements, the issuers were insolvent at the time the negotiations were concluded, further complicating the assessment of possible trial outcomes.

140 O'Brien Affidavit at para 12.

126. The Settlement provides for a total payment of $110 million to resolve all claims against the Defendants in relation to the Actions. Class Counsel was well apprised of the risks and rewards of continued litigation. The Settlement eliminates the downside risk of non-recovery and provides an immediate and substantial benefit to Class Members in exchange for the release of their claims. Class Counsel respectfully recommends approval of the Settlement. Where, as here, an action is in its later stages, hallmarks of fairness exist, and there are no indicia of collusion or conflicts, the Court ought to have confidence in, and accept, Class Counsel's good faith settlement approval recommendation.

C. Other Factors Supporting Settlement Approval

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

(a) the settlement of complex litigation is encouraged by courts and favoured by public policy;[141]

(b) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval;[142]

(c) the Court's role is to inquire whether the settlement secures an adequate advantage for the class in its surrender of its litigation rights;[143]

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141 *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at para 31, aff'd 2010 ONCA 841, leave to appeal to SCC denied 2011 CarswellOnt 6019.

142 *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at para 31, aff'd 2010 ONCA 841, leave to appeal to SCC denied 2011 CarswellOnt 6019.

143 *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at paras 31, aff'd 2010 ONCA 841, leave to appeal to SCC denied 2011 CarswellOnt 6019.

(d) it is within the power of the court to indicate areas of concern and afford parties the opportunity to answer and address those concerns through, if necessary, changes to the agreement. However, a court's power to approve or reject a settlement agreement does not permit the Court to modify its terms;[144] and

(e) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the actions or simply rubber-stamp a proposed settlement.[145]

128. In sum, the settlement is fair and reasonable under all of the circumstances. The Settlement Agreement provides for a total payment of $110 million to resolve all claims against the Defendants in relation to the Actions. The settlement is consistent with both the purpose and spirit of the *CPA*, which encourages settlement after a reasonable investigation and careful consideration of the merits, costs and risks of continuing litigation.

D. Distribution Protocol

129. The Distribution Protocol should be approved as it provides for a plan of distribution of the Net Settlement Amount that is fair, reasonable and in the best interests of the Class.[146]

130. The claims of the Class Members are based on Part XXIII.1. The Distribution Protocol takes the sensible approach of employing a damage calculation formula analogous to the formulae set out in section 138.5(1), while reflecting anticipated arguments that might have been made by the Defendants under section 138.5(3).

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144 *Vitapharm Canada Ltd v F Hoffman-La Roche Ltd*, 2005 CarswellOnt 1095 at para 127.
145 *Nunes v Air Transat AT Inc*, 2005 CarswellOnt 2503 at para 7.
146 *Zaniewicz v Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59.

E. Honoraria

131. Honoraria of $10,000 per plaintiff are requested for each of the Plaintiffs in recognition of the commitment, time and energy they gave in advancing this matter on behalf of the Class. For the benefit of the Class, they subjected their particular circumstances and business practices to significant scrutiny by way of documentary production and discovery. They were involved through pleadings, certification, examinations for discovery, preparation for trial and mediation.

132. Their evidence makes clear that they have each been active participants throughout the lengthy history of this litigation and have participated in delivering a very good result for the Class.

133. This Court will approve the payment of honoraria to plaintiffs where a plaintiff has "participated in every step of the…litigation" and where they have made a significant contribution to bringing the litigation to a conclusion in the best interests of the Class, as these Plaintiffs have.[147] Their willingness to step forward and represent the Class through many years and their active participation have earned them the recognition that an honorarium entails.

PART IV – ORDER SOUGHT

134. The Plaintiffs request orders approving the Settlement Agreement, the Distribution Protocol and the payment of honoraria to the Plaintiffs, and granting the ancillary relief necessary for the provision of notice, the administration of the Settlement and the dismissal of the Action with prejudice and without costs.

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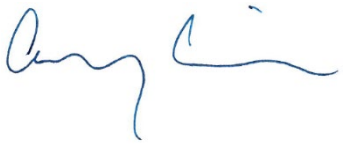
147 *Allen v The Manufacturers Life Insurance Company*, 2016 ONSC 5895 at para 36; *McSherry v Zimmer GmbH*, 2016 ONSC 4606 at para 54.

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



Siskinds LLP and Rochon Genova LLP
Lawyers for the Plaintiffs

SCHEDULE "A"
LIST OF AUTHORITIES

CASES

1. *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532
2. *Allen v The Manufacturers Life Insurance Company*, 2016 ONSC 5895
3. *Bilodeau v Maple Leaf Foods Inc*, 2009 CarswellOnt 1301
4. *Brown v Canada (Attorney General)*, 2018 ONSC 3429
5. *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670
6. *Dabbs v Sun Life Assurance Co of Canada*, 1998 CarswellOnt 2758
7. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2012 ONSC 5288
8. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc* (September 19, 2012), Toronto CV-12-453236-00CP (Certification Order)
9. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc* (September 19, 2012), Toronto CV-12-453236-00CP (Leave Order)
10. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2013 ONSC 6297
11. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc* (July 15, 2013), Toronto CV-12-453236-00CP (Order)
12. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2013 ONSC 7122
13. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2014 ONSC 660
14. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2014 ONSC 1764
15. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2014 ONSC 1982
16. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2014 ONSC 3438
17. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2015 ONSC 256
18. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2015 ONCA 718
19. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc* (March 21, 2016), Toronto CV-12-453236-00CP (Amended Order)
20. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2016 ONSC 5784

21. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2017 ONSC 2188
22. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc* (May 11, 2017), Toronto CV-12-453236-00CP (Order)
23. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc*, 2017 ONSC 3369
24. *Garland v Enbridge Gas Distribution Inc*, 2006 CarswellOnt 6585
25. *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669
26. *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662
27. *McSherry v Zimmer GmbH*, 2016 ONSC 4606
28. *Nunes v Air Transat AT Inc*, 2005 CarswellOnt 2503
29. *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643
30. *Osmun v Cadbury Adams Canada Inc*, 2010 ONCA 841
31. *Osmun v Cadbury Adams Canada Inc*, 2011 CarswellOnt 6019
32. *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932
33. *Reynolds v Beneficial National Bank*, 288 F 3d 277 (7th Cir 2002)
34. *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647
35. *Smith Estate v National Money Mart Co*, 2010 ONSC 1334
36. *Smith Estate v National Money Mart Co*, 2011 ONCA 233
37. *Vitapharm Canada Ltd v F Hoffman-La Roche Ltd*, 2005 CarswellOnt 1095
38. *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622
39. *Zaniewicz v Zungui Haixi Corporation*, 2013 ONSC 5490

SECONDARY SOURCES

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

SCHEDULE "B"
RELEVANT STATUTES

Securities Act, RSO 1990, c S.5, Part XXIII.1

PART XXIII.1
CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE
Interpretation and Application
Definitions

138.1 In this Part,

"compensation" means compensation received during the 12-month period immediately preceding the day on which the misrepresentation was made or on which the failure to make timely disclosure first occurred, together with the fair market value of all deferred compensation including, without limitation, options, pension benefits and stock appreciation rights, granted during the same period, valued as of the date that such compensation is awarded; ("rémunération")

"core document" means,

(a) a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements and an interim financial report of the responsible issuer, where used in relation to,

(i) a director of a responsible issuer who is not also an officer of the responsible issuer,

(ii) an influential person, other than an officer of the responsible issuer or an investment fund manager where the responsible issuer is an investment fund, or

(iii) a director or officer of an influential person who is not also an officer of the responsible issuer, other than an officer of an investment fund manager,

(b) a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements, an interim financial report and a material change report required by subsection 75 (2) or the regulations of the responsible issuer, where used in relation to,

(i) a responsible issuer or an officer of the responsible issuer,

(ii) an investment fund manager, where the responsible issuer is an investment fund, or

(iii) an officer of an investment fund manager, where the responsible issuer is an investment fund, or

(c) such other documents as may be prescribed by regulation for the purposes of this definition; ("document essentiel")

"document" means any written communication, including a communication prepared and transmitted only in electronic form,

(a) that is required to be filed with the Commission, or

(b) that is not required to be filed with the Commission and,

(i) that is filed with the Commission,

(ii) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with any exchange or quotation and trade reporting system under its by-laws, rules or regulations, or

(iii) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer; ("document")

"expert" means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company, including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer, but not including a designated credit rating organization; ("expert")

"failure to make timely disclosure" means a failure to disclose a material change in the manner and at the time required under this Act or the regulations; ("non-respect des obligations d'information occasionnelle")

"influential person" means, in respect of a responsible issuer,

(a) a control person,

(b) a promoter,

(c) an insider who is not a director or officer of the responsible issuer, or

(d) an investment fund manager, if the responsible issuer is an investment fund; ("personne influente")

"issuer's security" means a security of a responsible issuer and includes a security,

(a) the market price or value of which, or payment obligations under which, are derived from or based on a security of the responsible issuer, and

(b) which is created by a person or company on behalf of the responsible issuer or is guaranteed by the responsible issuer; ("valeur mobilière d'un émetteur")

"liability limit" means,

(a) in the case of a responsible issuer, the greater of,

(i) 5 per cent of its market capitalization (as such term is defined in the regulations), and

(ii) $1 million,

(b) in the case of a director or officer of a responsible issuer, the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the director's or officer's compensation from the responsible issuer and its affiliates,

(c) in the case of an influential person who is not an individual, the greater of,

(i) 5 per cent of its market capitalization (as defined in the regulations), and

(ii) $1 million,

(d) in the case of an influential person who is an individual, the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the influential person's compensation from the responsible issuer and its affiliates,

(e) in the case of a director or officer of an influential person, the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the director's or officer's compensation from the influential person and its affiliates,

(f) in the case of an expert, the greater of,

(i) $1 million, and

(ii) the revenue that the expert and the affiliates of the expert have earned from the responsible issuer and its affiliates during the 12 months preceding the misrepresentation, and

(g) in the case of each person who made a public oral statement, other than an individual referred to in clause (d), (e) or (f), the greater of,

(i) $25,000, and

(ii) 50 per cent of the aggregate of the person's compensation from the responsible issuer and its affiliates; ("limite de responsabilité")

"management's discussion and analysis" means the section of an annual information form, annual report or other document that contains management's discussion and analysis of the financial condition and financial performance of a responsible issuer as required under Ontario securities law; ("rapport de gestion")

"public oral statement" means an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed; ("déclaration orale publique")

"release" means, with respect to information or a document, to file with the Commission or any other securities regulatory authority in Canada or an exchange or to otherwise make available to the public; ("publication", "publier")

"responsible issuer" means,

(a) a reporting issuer, or

(b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded; ("émetteur responsable")

"trading day" means a day during which the principal market (as defined in the regulations) for the security is open for trading. ("jour de Bourse")

Application

138.2 This Part does not apply to,

(a) the purchase of a security offered by a prospectus during the period of distribution;

(b) the acquisition of an issuer's security pursuant to a distribution that is exempt from section 53 or 62, except as may be prescribed by regulation;

(c) the acquisition or disposition of an issuer's security in connection with or pursuant to a take-over bid or issuer bid, except as may be prescribed by regulation; or

(d) such other transactions or class of transactions as may be prescribed by regulation.

Liability
Liability for secondary market disclosure
Documents released by responsible issuer

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) each director of the responsible issuer at the time the document was released;

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

(d) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

Public oral statements by responsible issuer

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between

the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;

(d) each influential person, and each director and officer of the influential person, who knowingly influenced,

(i) the person who made the public oral statement to make the public oral statement, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

Influential persons

(3) Where an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(d) the influential person;

(e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and

(f) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

Failure to make timely disclosure

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

(a) the responsible issuer;

(b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and

(c) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

Multiple roles

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

Multiple misrepresentations

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and

(b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

No implied or actual authority

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.

Burden of proof and defences
Non-core documents and public oral statements

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

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

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

(c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation.

Same

(2) A plaintiff is not required to prove any of the matters set out in subsection (1) in an action under section 138.3 in relation to an expert.

Failure to make timely disclosure

(3) In an action under section 138.3 in relation to a failure to make timely disclosure, a person or company is not liable, subject to subsection (4), unless the plaintiff proves that the person or company,

(a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change;

(b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring knowledge of the change or that the change was a material change; or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure.

Same

(4) A plaintiff is not required to prove any of the matters set out in subsection (3) in an action under section 138.3 in relation to,

(a) a responsible issuer;

(b) an officer of a responsible issuer;

(c) an investment fund manager; or

(d) an officer of an investment fund manager.

Knowledge of the misrepresentation or material change

(5) A person or company is not liable in an action under section 138.3 in relation to a misrepresentation or a failure to make timely disclosure if that person or company proves that the plaintiff acquired or disposed of the issuer's security,

(a) with knowledge that the document or public oral statement contained a misrepresentation; or

(b) with knowledge of the material change.

Reasonable investigation

(6) A person or company is not liable in an action under section 138.3 in relation to,

(a) a misrepresentation if that person or company proves that,

(i) before the release of the document or the making of the public oral statement containing the misrepresentation, the person or company conducted or caused to be conducted a reasonable investigation, and

(ii) at the time of the release of the document or the making of the public oral statement, the person or company had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation; or

(b) a failure to make timely disclosure if that person or company proves that,

(i) before the failure to make timely disclosure first occurred, the person or company conducted or caused to be conducted a reasonable investigation, and

(ii) the person or company had no reasonable grounds to believe that the failure to make timely disclosure would occur.

Factors to be considered by court

(7) In determining whether an investigation was reasonable under subsection (6), or whether any person or company is guilty of gross misconduct under subsection (1) or (3), the court shall consider all relevant circumstances, including,

(a) the nature of the responsible issuer;

(b) the knowledge, experience and function of the person or company;

(c) the office held, if the person was an officer;

(d) the presence or absence of another relationship with the responsible issuer, if the person was a director;

(e) I the existence, if any, and the nature of any system designed to ensure that the responsible issuer meets its continuous disclosure obligations;

(f) the reasonableness of reliance by the person or company on the responsible issuer's disclosure compliance system and on the responsible issuer's officers, employees and others whose duties would in the ordinary course have given them knowledge of the relevant facts;

(g) the period within which disclosure was required to be made under the applicable law;

(h) in respect of a report, statement or opinion of an expert, any professional standards applicable to the expert;

(i) the extent to which the person or company knew, or should reasonably have known, the content and medium of dissemination of the document or public oral statement;

(j) in the case of a misrepresentation, the role and responsibility of the person or company in the preparation and release of the document or the making of the public oral statement containing the misrepresentation or the ascertaining of the facts contained in that document or public oral statement; and

(k) in the case of a failure to make timely disclosure, the role and responsibility of the person or company involved in a decision not to disclose the material change.

Damages
Assessment of damages

138.5 (1) Damages shall be assessed in favour of a person or company that acquired an issuer's securities after the release of a document or the making of a public oral statement containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions.

2. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the lesser of,

i. an amount equal to the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions, and

ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,

A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

B. if there is no published market, the amount that the court considers just.

3. In respect of any of the securities of the responsible issuer that the person or company has not disposed of, assessed damages shall equal the number of securities acquired, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,

i. if the issuer's securities trade on a published market, the trading price of the issuer' securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

ii. if there is no published market, the amount that the court considers just.

Same

(2) Damages shall be assessed in favour of a person or company that disposed of securities after a document was released or a public oral statement made containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions.

2. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the lesser of,

i. an amount equal to the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions, and

ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,

A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

B. if there is no published market, the amount that the court considers just.

3. In respect of any of the securities of the responsible issuer that the person or company has not acquired, assessed damages shall equal the number of securities that the person or company disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,

i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as such terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

ii. if there is no published market, then the amount that the court considers just.

Same

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

Proportionate liability

138.6 (1) In an action under section 138.3, the court shall determine, in respect of each defendant found liable in the action, the defendant's responsibility for the damages assessed in favour of all plaintiffs in the action, and each such defendant shall be liable, subject to the limits set out in subsection 138.7 (1), to the plaintiffs for only that portion of the aggregate amount of damages assessed in favour of the plaintiffs that corresponds to that defendant's responsibility for the damages.

Same

(2) Despite subsection (1), where, in an action under section 138.3 in respect of a misrepresentation or a failure to make timely disclosure, a court determines that a particular defendant, other than the responsible issuer, authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing it to be a misrepresentation or a failure to make timely disclosure, the whole amount of the damages assessed in the action may be recovered from that defendant.

Same

(3) Each defendant in respect of whom the court has made a determination under subsection (2) is jointly and severally liable with each other defendant in respect of whom the court has made a determination under subsection (2).

Same

(4) Any defendant against whom recovery is obtained under subsection (2) is entitled to claim contribution from any other defendant who is found liable in the action.

Limits on damages

138.7 (1) Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,

(a) the aggregate damages assessed against the person or company in the action; and

(b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.

Same

(2) Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure.

Procedural Matters
Leave to proceed

138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

(a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

Same

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

Same

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

Copies to be sent to the Commission

(4) A copy of the application for leave to proceed and any affidavits and factums filed with the court shall be sent to the Commission when filed.

Requirement to provide notice

(5) The plaintiff shall provide the Commission with notice in writing of the date on which the application for leave is scheduled to proceed, at the same time such notice is given to each defendant.

Same, appeal of leave decision

(6) If any party appeals the decision of the court with respect to whether leave to commence an action under section 138.3 is granted,

(a) each party to the appeal shall provide a copy of its factum to the Commission when it is filed; and

(b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent.

Notice

138.9 (1) A person or company that has been granted leave to commence an action under section 138.3 shall,

(a) promptly issue a news release disclosing that leave has been granted to commence an action under section 138.3;

(b) send a written notice to the Commission within seven days, together with a copy of the news release;

(c) send a copy of the statement of claim or other originating document to the Commission when filed; and

(d) provide the Commission with notice in writing of the date on which the trial of the action is scheduled to proceed, at the same time such notice is given to each defendant.

Appeal

(2) If any party to an action under section 138.3 appeals the decision of the court,

(a) each party shall provide a copy of its factum to the Commission when it is filed; and

(b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent.

Restriction on discontinuation, etc., of action

138.10 An action under section 138.3 shall not be discontinued, abandoned or settled without the approval of the court given on such terms as the court thinks fit including, without limitation, terms as to costs, and in determining whether to approve the settlement of the action, the court shall consider, among other things, whether there are any other actions outstanding under section 138.3 or under comparable legislation in other provinces or territories in Canada in respect of the same misrepresentation or failure to make timely disclosure.

Costs

138.11 Despite the Courts of Justice Act and the Class Proceedings Act, 1992, the prevailing party in an action under section 138.3 is entitled to costs determined by a court in accordance with applicable rules of civil procedure.

Power of the Commission

138.12 The Commission may intervene in an action under section 138.3, in an application for leave to commence the action under section 138.8 and in any appeal from the decision of the court in the action or with respect to whether leave is granted to commence the action.

No derogation from other rights

138.13 The right of action for damages and the defences to an action under section 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.

Limitation period

138.14 (1) No action shall be commenced under section 138.3,

(a) in the case of misrepresentation in a document, later than the earlier of,

(i) three years after the date on which the document containing the misrepresentation was first released, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

(b) in the case of a misrepresentation in a public oral statement, later than the earlier of,

(i) three years after the date on which the public oral statement containing the misrepresentation was made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and

(c) in the case of a failure to make timely disclosure, later than the earlier of,

(i) three years after the date on which the requisite disclosure was required to be made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure.

Suspension of limitation period

(2) A limitation period established by subsection (1) in respect of an action is suspended on the date a notice of motion for leave under section 138.8 is filed with the court and resumes running on the date,

(a) the court grants leave or dismisses the motion and,

(i) all appeals have been exhausted, or

(ii) the time for an appeal has expired without an appeal being filed; or

(b) the motion is abandoned or discontinued.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFFS (SETTLEMENT APPROVAL) (Motion Returnable October 31, 2018)

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