Court File No. CV-08-00359335-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

HOWARD GREEN and ANNE BELL

Plaintiffs

- and -

CANADIAN IMPERIAL BANK OF COMMERCE, GERALD McCAUGHEY, TOM WOODS, BRIAN G. SHAW and KEN KILGOUR

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFFS

(Approval of Settlement Agreement, Distribution Plan and Fee Request
Returnable January 12, 2022)

January 8, 2022

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I. OVERVIEW

1. Following the Settlement of this class action (the "Action"), the Plaintiffs have brought a motion seeking orders approving:

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

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

(c) Class Counsel's fee request; and

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

2. In this Overview, the reasons for the relief requested are summarized.

Settlement should be approved

3. In the words of Mr. Justice Strathy, "[t]his is an extraordinary case by any standard."[3]

4. This complex Action has been vigorously litigated for over 13 years through many important challenges including a seminal motion for leave to proceed under Part XXIII.1 of the *OSA* and certification under the *CPA* which was vigorously contested and ultimately appealed (in the Plaintiffs' favour) to the Ontario Court of Appeal and to the Supreme Court of Canada in 2015.[4]

5. The Action was defended by formidable and well-resourced counsel teams, and the outcome was, at all times, uncertain.[5]

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1 Exhibit "A" to the Affidavit of Vincent Genova sworn December 31, 2021 in support of this motion for approval of the settlement; ("Genova Settlement Approval Affidavit").
2 Exhibit "H", to the Genova Settlement Approval Affidavit.
3 *Green v. Canadian Imperial Bank of Commerce,* 2016 ONSC 3829, at para 11.
4 Genova Settlement Approval Affidavit, para. 6.
5 Genova Settlement Approval Affidavit, para. 13.

6. The predicted risks at the outset of this litigation not only came to pass, they were far more significant than originally imagined. Not only was leave and certification hotly contested; the decision was ultimately appealed to the Supreme Court of Canada.

7. The leave and certification motion involved 13 expert reports, 27 days of cross examinations of both fact and expert witnesses, thousands of pages of evidence, and 8 hearing days. This preliminary motion determined whether the case would be allowed to proceed. As discussed below, this motion was originally dismissed by Justice Strathy as a result of the implications of the *Timminco* decision of the Court of Appeal. It was only after an appeal to the Court of Appeal that leave and certification were granted. This decision was, in turn, appealed to the Supreme Court of Canada, with all attendant litigation risks.

8. In terms of the steps leading to trial, the documentary production included more than 150,000 documents, and parties engaged in a further 20 days of discovery over a six month period and exchanged over 450 pages of written interrogatories. Trial preparation also involved the preparation of comprehensive expert reports, including reply reports, dealing with the very complex securities, derivative products, valuation, and economic damages analysis issues and numerous corporate governance issues. Millions of dollars were invested in these reports, not only for the merits-based leave motion, but also for the 9-week trial which was scheduled to commence on October 4, 2021.

9. In every respect, this was very much “bet the firm” litigation for Class Counsel.

10. In addition, substantial resources and counsel time were invested in the preparation of factual evidence for the trial. Numerous third party fact witnesses were contacted and placed under summons to appear at trial, and letters of request had been issued by this Honourable Court to

compel the attendance of witnesses in the United States and England, and the process was underway with US counsel to summon witnesses for trial.[6]

11. An agreement in principle to settle this action for $125 million was achieved on September 22, 2021, less than 2 weeks before the scheduled start of trial, and after two extensive mediations, most recently before former Associate Chief Justice of Ontario Dennis O'Connor as mediator, followed by an extended Pre-Trial conference process before Mr. Justice Frederick Myers as Pre-Trial Judge.[7]

12. For the reasons described below, Class Counsel and the Representative Plaintiffs Anne Bell and Howard Green strongly endorse this substantial settlement as being fair and reasonable and in the best interest of the Class.

13. In preparation for the mediation session before Mr. O'Connor and later the Pre-Trial Conference before Justice Myers, Class Counsel had lengthy internal discussions during which they considered the risks and obstacles the Action faced in proceeding through a trial of the common issues and how those risks would impact on the potential recovery for the Class.[8]

14. No case has proceeded to trial under Part XXIII.1, although defendants have been successful on leave[9] and summary judgment[10] motions. There are a number of aspects of this unique civil liability regime that have not been the subject of judicial guidance. That uncertainty further heightened the risk in this case.[11]

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6 Genova Settlement Approval Affidavit, para 8.
7 Genova Settlement Approval Affidavit, para 11.
8 Genova Settlement Approval Affidavit, para 12.
9 See, e.g., *Bradley v Eastern Platinum Ltd.*, 2016 ONSC 1903; *Paniccia v. MDC Partners Inc.*, 2018 ONSC 3470; *Goldsmith v. National Bank of Canada*, 2016 ONCA 22.
10 *Wong v. Pretium Resources*, 2021 ONSC 54.
11 Genova Settlement Approval Affidavit, para 14.

15. In addition to the general risks that are inherent in all major litigation, the Class Counsel team identified the following critical risks which are specific to this litigation and relevant to the proposed settlement:[12]

(a) the risk that the Court would find that there had been no misrepresentation made by the Defendants, at all during the Class Period from May 31, 2007 through to December 2007, or only later in the Class Period, either because it found that the alleged misstatements were not untrue throughout that period, or because they were not material prior to December 2007 to require disclosure;

(b) the risk that if the trial judge determined that the undisclosed facts about the Bank's subprime exposure only became "material" and thus required disclosure much later in the Class Period would substantially reduce the number of Class Members entitled to damages and would severely reduce the damages claim for those Class Members;

(c) the risk that the Court would find that no public corrections of the alleged misrepresentations had occurred as alleged by the Plaintiffs in 6 separate "partial corrective disclosures" between mid November 2007 and December 6, 2007, or alternatively only on December 6, 2007, which would either eliminate or substantially reduce the damages claim (the jurisprudence on "partial corrective disclosures" is still in development in the absence of any trial decisions under Part XXIII.1);

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12 Genova Settlement Approval Affidavit, para 15.

(d) 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*, based on the substantial evidence filed by the defendants about how they had followed what they strongly argued were entirely appropriate corporate governance practises throughout the Class Period in considering the necessary disclosures, and had consulted with, and followed the advice of, their external auditors about how to value their subprime securities in 2007;

(e) the risk that the Defendants' argument, that they had closely consulted with their external accounting advisers about their valuations of subprime securities during the Class Period, and thus had acted both prudently and accurately with respect to both (i) the valuations of the unhedged securities and (ii) the Credit Valuation Adjustments against the credit exposure to the Bank's hedge counterparties ("CVA"), would be accepted by the trial judge which would reduce or eliminate a finding of liability;

(f) the risk that the Defendants' theory of damages, which assessed damages at only 5% of the Plaintiffs' assessment, would be accepted by the court over the Plaintiffs' theory of damages which would dramatically reduce the recovery;

(g) the risk that, even if the Plaintiffs succeeded in establishing liability and achieving an award of damages, that the defendants would appeal to the Court of Appeal and the Supreme Court of Canada which could delay recovery for another three years at least; and

(h) the risk that, even if successful on liability, the Court would not award aggregate damages pursuant to section 24 of the *CPA*, and instead refer the determination of

damages to a lengthy individualized claim assessment process which itself might take years after liability was determined and appeals exhausted.

16. In advance of and during the various mediations and ultimately the Pre-Trial Conference, Class Counsel carefully analyzed each of these risks and how they impacted the prospects of recovery for the Class Members. Class Counsel weighed each of these risks in concluding that the proposed settlement is fair, reasonable and in the best interests of the Class.[13]

17. The Settlement eliminates these identified risks to recovery and instead provides an immediate and substantial benefit to the Class in addition to providing for an important element of accountability and behaviour modification within the banking and financial industry in exchange for the release of their claims. At $125 million, this is among the largest *OSA* Part XXIII.1 settlements since that statutory civil liability regime was introduced in December 2005.[14]

18. The Representative Plaintiffs have agreed with Class Counsels' assessment and recommendation to settle on the terms proposed.[15] Representative Plaintiff Anne Bell stated in her affidavit that it was her "sincere hope" that the settlement will lead to "enhanced accountability by all banks and financial institutions to everyday people who invest as shareholders" and that "shareholders' trust in the integrity of information disclosed by banks and financial institutions will be restored."[16]

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13 Genova Settlement Approval Affidavit, para 16.
14 Genova Settlement Approval Affidavit, paras 138-139.
15 Genova Settlement Approval Affidavit, para 17.
16 Bell Affidavit, at para 7.

The Distribution Protocol should be approved

19. The Distribution Protocol was designed with the assistance of economist Frank Torchio, the Plaintiffs' damages expert, with the following objectives:

(a) To result in a fair distribution of any settlement fund among Eligible Claimants;

(b) To be consistent with the unique damages formulae provided by section 138.5 of Part XXIII.1 of the *OSA*; and

(c) To be capable of being administered in an efficient and effective manner.[17]

20. As described below, the Distribution Protocol achieves these objectives.[18]

21. In the opinion of Class Counsel and economist Frank Torchio, the Distribution Protocol will equitably distribute the Net Settlement Amount among Eligible Claimants.[19]

Class Counsel's fee request should be approved

22. Following the release of the decision of the Supreme Court of Canada which allowed this case to finally proceed, Mr. Justice Strathy summarized the risks facing Class Counsel in his 2016 decision regarding the costs of the leave and certification motion:[20]

> [11] This is an extraordinary case by any standard […]
>
> [13] This is an access to justice issue. These claims are suitable for class action treatment because no individual class member would take on the risks involved in pursuing individual litigation. The ability of the class to pursue these claims depends on the willingness of class counsel to accept the very substantial risks in exchange for the potential rewards.

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17 Genova Settlement Approval Affidavit, paras 150-151; Affidavit of Frank Torchio sworn December 28, 2021 ("Torchio Affidavit"), paras 16-17, 26.

18 Genova Settlement Approval Affidavit, para 152, Torchio Affidavit paras 16-17, 26.

19 Genova Settlement Approval Affidavit, para 156; Torchio Affidavit paras 16-17, 25.

20 *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at paras 11-17.

> [14] The risks are – quite simply – the exposure to substantial personal liability for costs and the risk of receiving no compensation for the time and disbursements invested in the case. There is no funding agreement in this case, but the latter risk exists even where there is a funding agreement to indemnify class counsel for an adverse costs award or for some portion of their disbursements. The efficacy of the statutory remedy depends on incentivizing class counsel to take these formidable risks.
>
> [15] Defence counsel do not face these risks. […]
>
> [17] Although this claim has passed through the initial screening, the plaintiffs and their lawyers have a long road ahead of them. A failure to award fair costs to the plaintiffs will encourage and reward a defence strategy of wearing down the plaintiffs by wearing down their lawyers. I am not suggesting that this was, or will be, the defendants' strategy in this case, but defendants have everything to gain and little to lose by sparing no expense in this kind of case.

23. Although securities class actions are generally complex, very few, if any, have been as protracted, costly and high-risk as this Action. The context of this hard-fought litigation, which lasted more than 13 years, included appeals to the Court of Appeal and to the Supreme Court of Canada and numerous interlocutory motions, lengthy cross-examinations and discoveries and voluminous documentary productions and expert reports.

24. Soon after it was commenced, this Action, represented existential risk to the Rochon Genova firm which continued to face sustained and substantial risks throughout the litigation. From its commencement, Rochon Genova continued to expend tremendous human and financial resources in the prosecution of this Action on behalf of the Class Members.

25. Class Counsel seek the approval of Class Counsel Fees to be paid in accordance with the Retainer Agreements entered into by the Representative Plaintiffs in 2008 authorizing a 30% fee which comes to $37,500,000.00 plus taxes and disbursements. This represents a multiplier of

approximately 2.5 times the value of Class Counsel's docketed time over the 13-year life of this case.

26. Class Counsel's fee request as will be fully discussed below is fair and reasonable because it:

(a) reflects the substantial recovery achieved for the Class and acknowledges the very substantial "bet the firm" type risks undertaken by Class Counsel;[21]

(b) accords with the retainer agreements Class Counsel entered with the Representative Plaintiffs at the outset of this litigation;

(c) results in a multiplier of approximately 2.5 times the value of docketed time invested by Class Counsel which is consistent with the multipliers approved by Ontario Courts in other cases;

(d) is within the range of fees on a percentage basis that have been approved in other cases, including larger value cases;

(e) properly compensates Class Counsel for the substantial time invested by a highly experienced counsel team that has prosecuted this case for over a decade; and

(f) are fully supported by the Representative Plaintiffs.

Representative Plaintiffs' Honoraria should be approved

27. On behalf of the Class, the two Representative Plaintiffs, Anne Bell and Howard Green, persevered through over 13 years of litigation.

[21] Genova Fee Affidavit.

28. The requested honoraria of $25,000 for each of Mrs. Bell and Mr. Green recognizes their unwavering commitment, time and energy they gave in participating in and advancing this matter on behalf of the Class.

29. In fulfilling their duties as Representative Plaintiffs, they willingly subjected their particular circumstances and investment practices to significant scrutiny by way of documentary production and written discovery. They were involved from the initial stages of the litigation through the leave and certification motion, examinations for discovery, attending at all of the major court hearings, including all of the appeals, preparation for trial and mediation.

30. In sum, the Representative Plaintiffs made a significant contribution to the very substantial result achieved for the Class and the requested honoraria appropriately recognizes this.

II. FACTS

A: WHAT THIS CASE IS ABOUT

31. The Class brings this Action for damages arising out of CIBC's alleged misrepresentations to the market about the nature and extent of its USD$11.5 billion exposure to subprime U.S. residential mortgage-backed securities ("US RMBS") from May 31, 2007 through February 2008. The following paragraphs describe the Plaintiffs' allegations which are contested by the Defendants.

32. It is the Plaintiffs' position that CIBC not only failed to disclose material facts about the extent of its subprime US RMBS exposure; but it also denied that it had any "major risk" to such

exposure on May 31, 2007 when specifically asked by financial analysts during its Q2/2007[22] earnings conference call.

33. By the spring of 2007, the subprime US RMBS market had collapsed, trading had "frozen" and index prices indicated the potential for substantial losses. Market analysts were increasingly concerned about the Bank's potential exposure to this collapsing sub-prime RMBS market, which exposure the CIBC denied.

34. The Bank failed to disclose the nature and extent of its sub-prime US RMBS exposure until it was far too late; and Class Members purchased their CIBC shares at prices which were artificially inflated because the market was told by CIBC that it had no material risk exposure to subprime US RMBS.

35. When the material facts about the nature and extent of CIBC's subprime US RMBS exposure were leaked into the market in November and December, 2007, CIBC's share price lost almost 20% of its value causing damage to the Class Members.

36. The Class Members – CIBC's own shareholders – were entitled to disclosure of all material facts about the business and affairs of CIBC during the Class Period. As a result of not receiving appropriate disclosure, Class Members purchased shares at artificially inflated prices and suffered substantial damages when the true state of the Bank's subprime US RMBS exposure was revealed.

37. The Plaintiffs received two reports from economist Frank Torchio of Forensic Economics Inc. in Rochester New York, wherein total aggregate damages were estimated to be between

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[22] CIBC's fiscal year end is October 31. Therefore, its Q1 ends on January 31, its Q2 ends on April 30, its Q3 ends on July 31 and its Q4/FY ends on October 31. Throughout this document there will be reference to Q2/2007, Q3/2007 and Q4/2007 which refer to CIBC's 2007 quarterly interim reporting periods.

$715.8 million and $728.0 million, exclusive of pre-judgment interest. These reports were served on the Defendants in anticipation of trial.

38. The market capitalization of CIBC prior to the start of the Class Period was approximately CA$35 billion.

39. CIBC World Markets ("World Markets") was the wholesale and corporate banking arm of CIBC providing, among other things, a range of integrated credit and capital markets products and investment banking services to clients in key financial markets, including in the U.S. and the U.K. The Bank's involvement in structured finance transactions was carried out largely through the World Markets division and the World Markets' offices in London and New York. The assets at issue this Action – Collateralized Debt Obligations ("CDOs"), CDOs of CDOs ("CDO^2"), credit default swaps ("CDS") and in particular US RMBS – were structured, underwritten, traded and held as investments within the World Markets division.

40. Through a number of undisclosed transactions, CIBC amassed an exposure of approximately $11.7 billion to the U.S. subprime (and nonprime) residential mortgages market. The Bank's expert in this case broke down the notional value of this US sub-prime RMBS exposure as at the end of Q2/2007 (April 30, 2007) as $1.732 billion of unhedged exposure, and $9.957 billion of "hedged" exposure. It is the Plaintiffs' position that the amount and nature of this exposure were material facts that were not disclosed to the market. Further, this disclosure should

have taken place no later than May 31, 2007, with the release of CIBC's Q2/2007 interim financial report and accompanying MD&A.

41. It is the Plaintiffs' position that these statements and similar statements by the Bank during the Class Period which denied or minimized the Bank's exposure to subprime U.S. RMBS were actionable misrepresentations pursuant to *OSA* section 138.3.

42. The Bank and the individual Defendants took the position that given the known market conditions throughout the Class Period, its risk exposure to subprime US RMBS was not material, and when such exposure became material, it made public disclosure in compliance with its legal obligations under the *OSA* and otherwise. The Defendants' experts also criticize the Plaintiffs' experts for engaging in a hindsight analysis.

B: PROCEDURAL HISTORY OF THE ACTION

Commencement of this Action

43. This Action was commenced in the name of Howard Green by the issuance of a statement of claim on July 22, 2008. There were several substantial amendments to the Statement of Claim, the most recent being on June 8, 2016. Anne Bell was added as a plaintiff on January 11, 2010.

Certification of the Actions and the Granting of Leave to Proceed

44. The Plaintiffs' motion for certification under the *CPA* and leave to proceed under the Part XXIII.1 of the *OSA* were heard over 8 days before Mr. Justice Strathy, as he then was, on February 9, 10, 13, 14, 15, 16, 17 and April 5, 2012.

45. On the leave and certification motion, there were 13 expert reports filed and cross examinations of both fact and expert witnesses over 27 days in 2011.

46. On February 16, 2012, the penultimate day of the hearing of the leave and certification motion, the Ontario Court of Appeal released its decision in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, which ruled, for the first time, that section 28 of the *CPA*, did not suspend the limitation period in section 138.14 of the *OSA*. The implication of this was that the Part XXIII.1 leave motion had to be finally determined (not just commenced) prior to the *OSA* 3-year limitation period. As the pleaded misrepresentations in this Action were made in 2007, by the time the leave motion was before Justice Strathy in 2012, the *Timminco* decision would mean that this case would have been time barred.

47. On July 3, 2012 Justice Strathy ruled that he would have certified this case but for the just released *Timminco* decision. Following that Court of Appeal authority, leave and certification were denied, and the case was effectively dismissed.

48. The Plaintiffs appealed Justice Strathy's decision to a panel of 5 Judges of the Ontario Court of Appeal, because the Plaintiffs were asking the Court to overrule its 2012 *Timminco* decision and allow this case to proceed. This appeal was brought along with appeals of two other leave and certification decisions (*Silver v. Imax*, and *Millwright Regional Counsel of Ontario Pension Trust Fund (Trustee of) v. Celestica*) which met a similar fate because of the *Timminco* decision.

49. After a 4-day hearing in May of 2013, the Court of Appeal for Ontario overturned the decision of Justice Strathy and certified this case under the *CPA* and granted the Plaintiffs leave to proceed pursuant to Part XXIII.1 of the *OSA*.

50. On August 7, 2014, the Defendants were granted leave to appeal to the Supreme Court of Canada.

51. On December 4, 2015, a narrowly divided Supreme Court of Canada dismissed the Defendants' appeal, as it applied to this case, and the Plaintiffs were allowed to proceed pursuant to the earlier decision of the Court of Appeal.[23]

Certification and Opt-Out Process

52. By way of court approved notice dated October 5, 2016, Class Members were given an opportunity to opt-out of this certified class action. The deadline to opt-out passed on January 3, 2017. Seventy-five individuals exercised their right to opt-out of this Action. To the best of Class Counsel's knowledge, none of the individuals who opted out of this class action commenced their own individual actions.

The Amount and Nature of Discovery, Evidence and Investigation

53. Following the decision of the Supreme Court of Canada, the Action was allowed to proceed, and the process of production and discovery was commenced.

54. The Defendants produced 150,000 documents amounting to approximately 1.5 million pages of productions. This documentary record was reviewed by a team of lawyers, experts, students and clerks in preparation for examinations for discovery which took place over 20 days in 2017 and 2018.

55. In addition to oral examinations for discovery, there were approximately 450 pages of written interrogatories which also formed part of the discovery record.

56. Various motions were also brought in respect of production and discovery issues before the record for trial was set.

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23 *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60.

Preparation for Trial

57. In anticipation of trial, the parties served and filed 22 expert reports and reply reports of more than 4,000 pages in length (1,437 pages excluding exhibits) in the fields of market economics, finance, corporate governance, credit risk management and accounting.

58. The Plaintiffs filed trial expert reports of:

(a) Professor Gregg Jarrell the past Chief Economist at the SEC and Professor of Economics at the University of Rochester whose reports assessed 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;

(b) Professor Gordon Richardson, the KPMG Accounting Scholar at the University of Toronto, whose accounting reports addressed whether CIBC's financial reporting complied with relevant accounting standards during the Class Period, and in particular whether CIBC's financial reporting adequately reported its concentration of credit risk to shareholders;

(c) Professor Bernard Black, the Nicholas D. Chabraja Professor at Northwestern University, with positions in the Pritzker School of Law, the Kellogg School of Management, Department of Finance, and the Institute for Policy Research. Professor Black's research areas include, among others, empirical methods for causal inference, law and finance, and international corporate governance. He had earlier provided expert testimony in the *Enron* litigation. Professor Black prepared extensive reports (168 and 158 pages in length, respectively) dealing with CIBC's

exposure to subprime US RMBS and CIBC's public reporting of these issues throughout the Class Period;

(d) H. Garfield Emerson, Q.C., the past chair of Rogers Communications, CEO of Rothchild's Bank and acknowledged leading expert in the area of corporate governance. Mr. Emerson's expert report (304 pages in length) and reply report (114 pages in length) filed for trial addressed issues of corporate governance and whether CIBC was duly diligent in assessing the materiality of information about its business and affairs for the purposes of fulfilling CIBC's disclosure obligations;

(e) Dr. Sanjay Sharma, the Founder and Chairman of GreenPoint Global – a risk advisory, education, and technology services firm headquartered in New York, whose expert report and reply report addressed investment banking industry risk management practices and CIBC's risk management practices during the Class Period. From 2007 to 2016, Dr. Sharma was the Chief Risk Officer of Global Arbitrage and Trading Group and Managing Director in Fixed Income and Currencies Risk Management at RBC Capital Markets in New York. His career in the financial services industry spans over two decades during which he has held investment banking and risk management positions at Goldman Sachs, Merrill Lynch, Citigroup, Moody's and Natixis. Dr. Sharma is the author of "Risk Transparency" (Risk Books, 2013), Data Privacy and GDPR Handbook (Wiley, 2019) and co-author of "The Fundamental Review of Trading Book (or FRTB) – Impact and Implementation" (Risk Books, 2018);

(f) Mr. Larry Bates whose reply expert report filed for trial addressed investment banking industry practice during the Class Period, including the role and

significance of credit rating agencies. Mr. Bates enjoyed a thirty-five year banking career with several major financial institutions in both Canada and the U.K., including most recently as Global Head of Debt Capital Markets for the Royal Bank of Canada; and

(g) Economist Frank Torchio whose expert report and reply expert report addressed the issue of aggregate and per share damages suffered by Class Members, which reports were served but not filed in advance of trial. Mr. Torchio is a leading expert in damages determination, particularly in securities class actions and he has provided expert reports, affidavits, depositions and testified in numerous securities class actions in Canada, the U.K., the United States, and Australia.

59. The Defendants filed the following reports prepared by very experienced and well qualified experts that directly countered the opinions of the Plaintiffs' experts:

(a) Dr. Daniel Thornton's report addressed accounting standards and CIBC's compliance with relevant accounting standards (responding to the report of Professor Richardson);

(b) David A. Brown Q.C.'s report regarding corporate governance issues and whether CIBC was duly diligent in its assessment and reporting of material facts about its business and affairs during the Class Period (responding to the Report of Mr. Emerson);

(c) Professor Glenn Hubbard of Columbia University prepared a report regarding corporate finance and economic issues (responding to the reports of Professor Black and Dr. Sharma);

(d) Professor John J. McConnell of Perdue University prepared a report regarding corporate finance and economic issues and CIBC's assessment of its exposure to Subprime US RMBS (responding to the reports of Professor Black, Dr. Sharma, and Professor Richardson);

(e) Paul Noring, CPA, prepared a report regarding accounting standards and CIBC's compliance with relevant accounting standards (responding to the report of Professor Richardson);

(f) Dr. Lesley Daniels Webster's report regarding finance and economic issues (responding to the reports of Professor Black and Dr. Sharma);

(g) Dr. Mukesh Bajaj's report regarding finance, economics and damages issues (responding to the reports of Professor Jarrell, Mr. Torchio, Professor Black and Professor Richardson); and

(h) Mr. James K. Finkel's report regarding investment banking industry practice during the Class Period on the issues of credit risk evaluation and the reliance of credit rating agencies (responding to the report of Mr. Larry Bates).

60. During the course of the litigation there was a real risk that the court would reject the opinions of the Plaintiffs' experts and reach a conclusion that was consistent with the expert opinions presented by the Defendants' experts.

61. In addition, numerous domestic witnesses were under summons to appear at trial, and letters of request had been issued by this Honourable Court, and the process was underway with US counsel to summon foreign witnesses.

62. *Evidence Act* notices and a Trial Record were also served by the Plaintiffs in advance of the trial of this Action which was scheduled to commence on Monday October 4, 2021 for 9 weeks before the Honourable Sean Dunphy of the Ontario Superior Court of Justice.

C: THE SETTLEMENT

The Negotiation Process: The Presence of Arm's-Length Bargaining and the Absence of Collusion

63. All negotiations leading to the Settlement Agreement were conducted on an adversarial, arms-length basis. In all there were two formal mediations attempted, each presided over by objective and highly skilled former judges and an extended Pre-Trial conducted by a sitting judge:

(a) In 2014, while the appeal of Justice Strathy's decision to the Court of Appeal was pending, the parties engaged in a mediation before the Honourable George Adams, one of the most experienced mediators of complex commercial disputes in Canada. That mediation proceeded over two days, with a full canvassing of the many complex issues in this case;

(b) After the trial of this Action was set for the fall of 2021, Dennis O'Connor, the retired Associate Chief Justice of Ontario, presided over a multi-day mediation in early June 2021;

(c) In August and September, 2021, Mr. Justice Frederick Myers of the Ontario Superior Court of Justice, in his capacity as the Pre-Trial Judge, conducted an extended pre-trial process.

64. The Settlement Agreement was the product of the latter mediation and pre-trial processes in the months leading up to the trial.

The O'Connor Mediation

65. Mr. O'Connor received detailed mediation memoranda from all parties, and briefs of many of the key documents relied on. He also held separate preparation sessions with counsel for each of the parties to review and discuss, in advance of the mediation, the key issues in dispute relating to both liability and damages.

66. During that two-day mediation, there were intense negotiations and a detailed review with Mr. O'Connor of both the strengths and weaknesses of the Plaintiffs' case as well as the case of the Defendants.

67. After two days of negotiations, it was apparent that there was no possibility of reaching a settlement.

The Pre-Trial before Justice Myers: Further Negotiation and the Role of a Neutral Party

68. Towards the end of June 2021, a Pre-Trial Conference took place with the case management judge, Justice Fred Myers, who is a highly experienced commercial judge. The Pre-Trial addressed settlement issues and Justice Myers, like Mr. O'Connor was provided with detailed memoranda and briefs of many of the key documents to review in advance of the Pre-Trial.

69. After two days of discussing these issues with the parties, Justice Myers concluded that a settlement was not possible at that time based on the significant differences in the parties' perceptions of the strength of the Plaintiffs' case both on liability and damages. The Pre-Trial was adjourned on the basis that there might be further negotiation between the parties directly or with the assistance of Justice Myers.

70. Trial preparation continued throughout the summer of 2021.

71. In September 2021, the Plaintiffs contacted Justice Myers and asked him to assist the parties by communicating a further settlement offer to the Defendants. This Pre-Trial session resulted in resolution of the case.

72. The final offer of $125 million was accepted by Class Counsel on the instructions of the Representative Plaintiffs. This was considered to be a reasonable compromise given the broad range of risks and issues discussed over this very prolonged negotiation process with extremely experienced mediators and a highly experienced and respected commercial judge.

The Proposed Settlement Terms and Conditions

73. The key terms of the Settlement Agreement are as follows:

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

(b) the Settlement does not constitute an admission of liability by the Defendants who, in fact, deny the allegations against them;

(c) CIBC will pay $125 million ("Settlement Amount") for the benefit of the Class Members in full and final settlement of this Action;

(d) when the Approved Settlement Order becomes a Final Order (the "Effective Date"), all Defendants will receive a full and final release from all Class Members;

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

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

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

D: NOTICE OF SETTLEMENT APPROVAL HEARING

74. On December 6, 2021, this Honourable Court issued an order ("Notice of Settlement Approval Hearing Order"):

(a) setting the date for the Settlement and Fee Approval Hearing for January 12, 2022;

(b) approving the form, content and method of dissemination of the Notice of Settlement Approval Hearing in accordance with the Plan of Notice which is Schedule H to the Settlement Agreement (the "Plan of Notice"); and

(c) appointing Epiq Class Action Services Canada Inc. ("Epiq") as the administrator of this Settlement (the "Administrator").

75. In accordance with the Plan of Notice, Class Counsel and Epiq have taken various steps to notify Class Members of the Settlement Approval Hearing, including the publication of the Notice of Settlement Approval Hearing, which publication has been by way of:

(a) National news papers in both the English and French;

(b) Press Releases;

(c) Class Counsels' website; and

(d) A dedicated website - www.cibcsecuritiessettlement.ca – administered by Epiq.

76. In addition, the Notice of Settlement Approval Hearing (Long form) provides a toll-free number and email address that enable Class Members to contact Class Counsel in order that they may, among other things, obtain more information about the Settlement or how to object to it,

and/or request that a copy of the Settlement Agreement be electronically or physically mailed to them.

77. In accordance with the Notice Plan, Class Counsel has posted on their website well in advance of the Settlement Approval Hearing: the Settlement Agreement, the Notice of Settlement Approval Hearing (Long Form); a summary of the rationale for the Settlement; a sample calculation of notional entitlement pursuant to the Distribution Protocol along with an explanation; and the evidence and written submissions in support of the motion for approval of the Settlement and requested Counsel Fees.

78. The Notice of Settlement Approval Hearing, both long form and short form, advised Class Members of their right to object to the Settlement as well as to the request to be made by Class Counsel for the payment of Class Counsel Fees.

79. As of the date of this factum, no objections have been received; however, in response to the published notices, both Rochon Genova and Epiq have been contacted by a number of individuals seeking information about the claims process.

E: FACTORS SUPPORTING THE FAIRNESS AND REASONABLENESS OF THE SETTLEMENT

Recommendations and Experience of Class Counsel

80. In assessing the reasonableness of the Settlement, Class Counsel had access to and considered the following sources of information:

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

(b) a database of more than 150,000 documents constituting in excess of 1.5 million pages produced by the Defendants;

(c) additional documents arising from the *OSA* leave and *CPA* certification process;

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

(e) trading data for the shares of CIBC during the material period of time;

(f) published financial analyst reports regarding CIBC during the material period of time;

(g) the Plaintiffs' trial expert reports and importantly the defence expert reports prepared by highly experienced and qualified experts;

(h) the discovery evidence, which, by Order of Mr. Justice Belobaba, included cross-examinations on the leave and certification motions which, taken together amounted to approximately 47 days of examinations; and

(i) the information and perspectives exchanged during the mediation conducted by Mr. O'Connor and Mr. Justice Myers, in his capacity as Pre-Trial Judge.

81. Class Counsel possessed more than adequate information from which to make an informed recommendation concerning resolution of the Action as against the Defendants.

82. It is the opinion of the entire Class Counsel team, which has many decades of combined experience in litigating secondary markets securities claims, that the terms of the Settlement Agreement are fair, reasonable and in the best interests of the Class. The Settlement Agreement delivers a substantial, immediate benefit to Class Members in exchange for the release of their claims, which Class Counsel believed to be meritorious, but which faced significant challenges. The Settlement Agreement is also consistent with the statutory purposes of the *OSA*, as it promotes compliance with Ontario's securities regulatory regime.

The Future Expense and Likely Duration of Litigation

83. If the Settlement were not to be approved, the future expense and duration of litigation would be very substantial.

84. The trial of this action was scheduled for 9 weeks. Appeals will inevitably follow, adding further expense and delay before the claims of class members would be finally determined.

85. As described elsewhere, if the Trial Judge determined that an aggregate damages award pursuant to section 24 of the *CPA* was not available in light of the relevant provisions of the *OSA*; then there would be a further very lengthy individualized claims process which could take years after the final determination of liability following appeals.

The Degree and Nature of Communications by Counsel and the Representative Plaintiffs with Class Members during the Litigation

86. During the course of this Action, Class Counsel communicated with Class Members through court-approved notices, answering their inquiries by email and telephone and periodic website updates.

87. Joel Rochon explained the terms of the settlement to the Representative Plaintiffs, and Class Counsels' rationale for recommending acceptance of the proposed Settlement; and both Mr. Green and Mrs. Bell agreed with his advice and instructed him to enter the Settlement Agreement on their behalf, which he did.

88. Class Counsel's rationale for recommending the Settlement to the Plaintiffs, the Class and to the Court is described below.

Litigation Risk: The likelihood of recovery or success

89. Discussed below are both the generic risks inherent in all litigation that influenced the range of outcomes, as well as the risks specific to this case.

90. Generic litigation risk refers to the risks arising from the passage of time, and the procedural risks that are inherent 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.

91. 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.

92. Class Counsel have also identified significant risks which are specific to this case where the evidence is voluminous, the facts complex, and the law uncertain. The uncertainty and unpredictability arising from that legal novelty certainly enhanced the risk for the Plaintiffs.

93. Each of these issues is described in greater detail below.

(a) The risk that the Court would find that there was no actionable misrepresentation

94. To succeed at trial, the Plaintiffs would have to prove that CIBC failed to disclose to shareholders material information it was required to disclose about any material risk of loss it faced as a result of its exposure to subprime US RMBS throughout the Class Period, beginning on May 31, 2007.

95. While the claim alleges that CIBC made misrepresentations by failing to disclose the full extent of its subprime exposure and risks from May 31, 2007 through February 2008, the Bank argued that its disclosures relating to its US subprime securities were accurate, reflected facts that were known at the time, and complied with all applicable securities laws. The Bank also argued that the period of 2007 was tumultuous for all financial institutions as it was the period when the global credit crisis affected the entire financial sector. In short, there was a risk that a Court could conclude, based on the comprehensive reports prepared by the defence experts, that CIBC made no material misrepresentations that caused harm to shareholders. This risk is expanded upon below.

96. The Bank's experts argued that the Plaintiffs' experts were basing their criticism of the Bank's Class Period disclosure decisions with the benefit of 20/20 hindsight without sufficient

regard to the information that was reasonably available to the Bank when those decisions were made.[24] [25]

97. In order to establish liability against the Defendants in this case pursuant to Part XXIII.1 of the *OSA*, it was necessary to establish that there was a misrepresentation in CIBC's public disclosure about its business and affairs during the Class Period.

98. A statutory misrepresentation under the Part XXIII.1 regime is an untrue statement of material fact or a failure to state a material fact that is required to be stated or that is necessary to make a statement not misleading, in light of the circumstances it was made.

99. A material fact is a fact that would reasonably be expected to have a significant effect on the market price or value of the securities in question, which in this case, were CIBC's common shares.

100. The core of the misrepresentation claims asserted by the Plaintiffs on behalf of the Class relate to CIBC's public disclosure (or lack of disclosure) regarding the nature and extent of its US$11.5 billion exposure to subprime US RMBS throughout the Class Period.

101. To determine what CIBC was and was not required to disclose in respect of its $11.5 billion exposure to subprime US RMBS, it was necessary to deconstruct how and when that risk existed, and when losses (if any) crystalized within the context of what was known or should have been

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[24] For example, Defendants' expert Professor Hubbard criticized Plaintiffs' experts Professor Black and Dr. Sharma of "Hindsight Bias", a criticism which they rejected with equal force.

[25] This "hindsight" criticism was an echo of the comments of U.S. District Judge William H. Pauley III (SDNY) when, in March 2010, he dismissed a parallel U.S. case against CIBC. This is discussed below.

known by the Defendants. This was an exercise of some complexity which gave rise to various points of controversy among experts. How those controversies would be resolved at trial represented, in some instances, the difference between establishing liability and not.

102. The section below explains CIBC's exposure to subprime US RMBS as reflected by the record of this case.

103. It is the Plaintiffs' position that CIBC's $11.5 billion exposure to the subprime US RMBS market consisted of a number of securitized structures including:

(a) subprime mortgage collateralized bonds (generally, "RMBS");

(b) high-risk "mezzanine" Collateralized Debt Obligations ("CDOs") which were collateralized by the lower, riskier generally BBB/BBB- tranches of subprime RMBS;

(c) CDOs collateralized by the lower, riskier mezzanine tranches of "mezzanine" CDOs known as CDO squared ("CDO^2"); and

(d) its intermediation business, simultaneously taking a long and short position on subprime assets; was usually effected using Credit Default Swaps ("CDS") written on subprime reference assets comprised largely of subprime mezzanine RMBS, CDOs and CDO^2.

104. As explained by Plaintiffs' expert Professor Black, each RMBS, CDO and CDO^2 consisted of layers, or "tranches", all receiving cash flow from the underlying pools of subprime or nonprime mortgages, RMBS, CDOs and/or CDO^2s. The tranches would usually be rated by an external credit rating agency. The most senior tranches would generally receive a AAA rating and would typically be sold to investors. Within the AAA category, some tranches were more senior, and

were called "super-senior AAA" or simply "super-senior." The remaining lower layers would then be subdivided into various lower tranches with ratings ranging from AA to C.

105. Each RMBS, CDO and CDO^2 offering included a detailed cash flow "waterfall" specifying how loan and coupon payments would be allocated among the tranches. The waterfall typically provided that losses would be applied first to the lowest tranches. If lower tranches were wiped out, losses would be applied progressively to higher tranches.

106. It is relevant that all of the Bank's CDOs and CDO^2s were "mezzanine" securities collateralized by mostly the lower, typically, BBB/BBB- tranches of RMBS (that could not be sold to investors). According to the Plaintiffs' experts, this meant that if losses in the subprime mortgage pools reached relatively low levels, the entire CDO or CDO^2 would be "wiped out" including the Super Senior AAA CDO and CDO^2 tranches held by the Bank.

107. RMBS and CDO tranches have "attachment" and "detachment" points. The "attachment point" of a particular tranche (e.g., BBB) signifies the level of the percentage of losses in the underlying mortgage pools which will restrict cash flow and begin to cause losses to that tranche. The "detachment point" signifies the percentage of such losses in the mortgage pools which will cause a complete wipeout of that tranche, and subsequently a complete loss for further securities collateralized by that tranche. According to the Plaintiffs' expert Professor Black, BBB- rated nonprime securities typically attached when losses in the underlying collateral reached 10% and detached at 11% losses.

108. According to Professor Black, if the attachment point and detachment point for a particular underlying BBB- RMBS tranche, which collateralizes a mezzanine CDO, are 10 to 11%, and if the mortgage losses in the underlying subprime collateral pools exceed 11%, the entire CDO

structure including the Super Senior AAA tranche will suffer a complete loss of 100% of the "notional value."

109. The implication of this finding by Professor Black, is that CIBC's subprime securities, even though they may have been rated AAA, were only collateralized by thin layers of BBB or BBB- mezzanine tranches of subprime RMBS . The term "mezzanine" reflected the non-investment grade quality of the BBB/BBB- RMBS tranches that supported the securities. According to Professor Black, even though the senior tranches of the mezzanine CDO might have received a rating of AAA, these securities were highly vulnerable to loss if the subprime mortgage pool losses reached a level of only 10 to 15%.

110. A key area of disagreement among the Plaintiffs' and Defendants' experts was the attachment and detachment points of the various tranches of the RMBS within the CDO structure.

111. The lower the detachment point, the more likely it was for there to be a failure of the particular CDO structure; exposing CIBC to loss on the full notional value of its particular CDO investment.

112. The Plaintiffs' experts (in particular, Professor Black and Dr. Sharma) opined that, based on what they determined to be appropriate attachment and detachment points for each of the securities and the prevailing conditions in the US residential real estate market, the entire CDO portfolio was at significant risk of being wiped out, exposing CIBC to losses of the full notional value of $11.5 billion through most, if not all, of the Class Period.

113. The Defendants' experts held contrary opinions of the relevant attachment and detachment points and the prevailing state of the US residential real estate market throughout the Class Period.

Based on their analyses, CIBC's experts opined that CIBC's risk of loss was not nearly so dire as that opined by Professor Black and Dr. Sharma.

114. Another issue where there was considerable disagreement among the experts was the strength or value of CIBC's hedges against loss.

115. It was the Plaintiffs' position that a substantial element of CIBC's subprime risk exposure arose through its approximately $9.8 billion "hedged" (intermediated) positions. CIBC had written CDS protection on mezzanine subprime reference assets to large institutions such as Goldman Sachs; essentially insuring Goldman against any losses on these same reference assets. This was exposure to risk of loss on mezzanine subprime securities.

116. CIBC entered offsetting CDS trades by purchasing CDS protection on the same reference assets from less credit worthy insurers. It was the Plaintiffs' position that approximately $7.8 billion of this protection was written with financially weak monoline insurers. These intermediation trades were referred to as "negative basis trades" because CIBC could charge more when selling its CDS to a counterparty like Goldman than it had to pay its less creditworthy monoline insurer and could book profit for the entire lifetime of the structure immediately upon closing the deal. These agreements with monoline insurers, including ACA Financial Guaranty Corporation ("ACA") were described by Plaintiffs' industry expert Dr. Sharma as "illogical" because the creditworthiness and ratings of the hedge counterparties (like ACA) were worse than the underlying "insured" securities. ACA was a single "A" rated entity, and it insured CIBC's risk on was purportedly a "AAA" portfolio. Stated more simply, insurance against risk of loss on the "AAA" portfolio was placed with monoline insurers which had a much higher risk of loss.

117. In addition, the Plaintiffs' experts (in particular, Professor Black and Dr. Sharma) pointed to the fact that these monoline insurers had also written many billions of dollars of insurance to not only CIBC but to other financial institutions also seeking CDS insurance protection on the US subprime mortgage market. Therefore, these experts opined, ACA and the other monoline insurers lacked the capital to pay on claims if called upon by CIBC. The Plaintiffs' position was that ACA never had the claims paying ability at any time during the Class Period and was therefore never an effective hedge.

118. The Defendants and their experts pointed to the fact that ACA was rated investment grade by Standard & Poor's, and that the rating agency was in the best position to assess ACA's creditworthiness. They also point out that when S&P downgraded ACA in December 2007 because of ACA's bankruptcy, CIBC promptly disclosed this and its implications to the regulators and the market as they were required to do by relevant securities laws.

119. The Plaintiffs' experts (in particular, Professor Black, Dr. Sharma and Mr. Bates) opined that the rating agencies' assessment of ACA was unreliable and known to be so by market participants at the material time. The Defendants' experts strongly argued the contrary view, opining that the rating agencies were the best source of information regarding the creditworthiness of ACA and the other monoline insurers.

120. While there were many points of disagreement between the Plaintiffs' and the Defendants' experts, this factum focuses on two (i.e., the appropriate attachment and detachment points of the various CDO positions held by CIBC; and the creditworthiness of the monoline insurers providing CIBC with hedges against risk of loss) as illustrative of how the Court had a basis for deciding the

key liability issue of material non-disclosure in favour of or against the Plaintiffs. If the latter, the case would be lost, and the Class would receive nothing.

121. It is noteworthy that a proposed securities class action very similar to this one was brought by leading U.S. securities class actions firms on behalf of U.S. resident CIBC shareholders before the U.S. Federal Court in the Southern District of New York. That case alleged substantially the same misrepresentations regarding CIBC's exposure to U.S. subprime RMBS in 2007. However, on March 19, 2010, U.S. District Judge William H. Pauley III (SDNY) dismissed that case on a motion for summary judgment. In his reasons for decision, Judge Pauley ruled that many major financial institutions failed to anticipate a meltdown in the mortgage market during the period in 2007 covered by the Class Period, and that the U.S. plaintiffs failed to demonstrate that CIBC had information in its possession that was contrary to CIBC's public statements about its subprime risk exposure.[26]

122. The criticism by the Defendants' experts – in particular, economist Professor Hubbard and governance expert Mr. Brown – that the Plaintiffs' case was based in part on 20/20 hindsight, echoed the comments of District Judge Pauley in the U.S. case against CIBC in the SDNY when he noted: "CIBC, like so many other institutions, could not have been expected to anticipate the crisis with the accuracy the Plaintiff enjoys in hindsight."[27]

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[26] Genova Fee Approval Affidavit, Exhibit "D", *Plumbers & Steamfitters Local 773 Pension Fund v. CIBC et al*., 08 Civ. 8143.

[27] Genova Fee Approval Affidavit, Exhibit "D", *Plumbers & Steamfitters Local 773 Pension Fund v. CIBC et al*., 08 Civ. 8143, at page 22.

123. Even though the parallel U.S. case failed in 2010, Class Counsel remained undeterred and confident in their ability to obtain compensation for Class Members and carried on with the prosecution of the Canadian case.

(b) The risk that the Court would find that there was no public correction of the pleaded misrepresentations (i.e., that the misrepresentation did not give rise to damages)

124. The Defendants also argued that the economic analysis of their experts established that there were no damages suffered by shareholders as a result of any alleged failure to disclose the Bank's subprime risk exposure prior to Q3/2007 and Q4/2007. According to the Defendants' experts, fluctuations in CIBC's share price were attributable to the evolution of the financial crisis through 2007 and not because of the Bank's failure to make appropriate and timely disclosure of material facts about its subprime risk exposure. There was therefore a risk that a Court could accept the Defendants' expert evidence that there was no public correction of the pleaded misrepresentations. This factum elaborates on this risk, below.

125. Assuming that a misrepresentation was established, on a balance of probabilities, another element of Part XXIII.1 liability is the requirement that the Plaintiffs establish that the pleaded misrepresentation were publicly corrected – that is there was some public disclosure which informed the market of that previous disclosures by the Defendants, were in fact material misstatements.

126. In general, a public correction which corrects materially positive information about the issuer, will cause the price of the issuer's securities to decline. That is, artificial inflation in the share price before the correction, leaves the share price once the market is aware of the material misstatement which caused the inflation.

127. In order to prove a public correction, what is generally needed is an observed statistically significant share price movement caused by the new, correct information, and a proven correlation between that share price movement and the previously misrepresented material information. This is established through the expertise of a financial economist using both statistical analysis and event study methodology.

128. Proof of a public correction is relevant to both issues of liability and damages. Where there is a statistically significant observed share price movement which is caused by a correction of the pleaded misrepresentation, this supports the conclusion that the misstatements were material – that is, the misstatement was reasonably expected to significantly affect the market price or value of the securities. The amount of the statistically significant share price movement which is attributable to the correction is a measure of per share damages, at least for those shares purchased immediately prior to the correction.

129. The Plaintiffs' expert, Professor Gregg Jarrell, found 6 statistically significant share price movements in November and December 2007, which he opined were public corrections of the pleaded misrepresentations regarding CIBC's failure to disclose its exposure to subprime U.S. RMBS.

130. Further, Professor Jarrell opined that the cumulative artificial inflation imparted into CIBC's share price was $16.89 per share immediately before the first public correction which occurred on November 12, 2007. This represents a measure of per-share damages for those Class Members who acquired their shares immediately prior to the first public correction.

131. The Defendants' expert, Dr. Mukesh Bajaj, using different parameters, opined in his 218-page report that, among other things, of the 6 corrective events identified by Professor Jarrell, only two (on December 6 and 7) were statistically significant, and only $0.90 of the observed excess

share price movement on these dates could be attributed to the pleaded misrepresentations. This meant that, according to Dr. Bajaj, that there were virtually no material misrepresentations that caused harm to shareholders, and virtually no damages to Class Members were attributable to the pleaded misrepresentations.

132. In his Reply Expert Report, Professor Jarrell was highly critical of Dr. Bajaj's methodology as being results driven and contrary to accepted economic analytical techniques.

133. While Class Counsel were confident that Professor Jarrell's reports were far stronger than the report of Dr. Bajaj, nevertheless, the fact that there was such diametrically opposite expert opinion on the foundational issue of whether there was a public correction of the pleaded misrepresentations, represented considerable litigation risk in this case.

(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*

134. The Defendants advanced affirmative defenses that they exercised proper judgment in evaluating the value and risk associated with CIBC's CDO portfolio which was exposed to subprime U.S. RMBS and that they relied appropriately on their internal disclosure and risk measurement systems, and external accounting advisers who agreed with the Bank's disclosure of risks and valuations of its subprime assets. The Defendants also maintained that it was only in late 2007 that the severity of the subprime crisis required detailed disclosure, which it made in its Q4/2007 report in December 2007. The Bank also argued that the Bank's Board and management committees were constantly analyzing the risk inherent in its subprime portfolio and made the necessary disclosure as required by law. There was therefore a risk that the Court could find that the Defendants were duly diligent and therefore not liable pursuant to *OSA* sections 138.4(6) and (7). This factum elaborates on this risk, below.

135. All of the Defendants relied on the "reasonable investigation" defence under sections 138.4(6) and (7) of the *OSA* that they had been duly diligent even if the misrepresentations were made (which they denied).

136. The Plaintiffs relied on the expert opinions of Mr. Gar Emerson, Q.C., one of Canada's leading experts on corporate governance and securities law; while the defendants relied on the expert opinions of Mr. David Brown, Q.C., the former Chair of the Ontario Securities Commission, who also enjoys a considerable reputation as a leading expert on corporate governance and securities law.

137. In short, two leading experts came to opposite conclusions regarding this critical issue of whether the Defendants had been duly diligent in assessing and publicly reporting on CIBC's exposure to subprime U.S. RMBS during the Class Period.

138. Class Counsel were confident that Mr. Emerson's opinion was superior and should be accepted and the Defendants' "reasonable investigation" defense would be rejected by the Court; however, there was real litigation risk that in the circumstances of this case, the Court would find that the Defendants did all that they reasonably could have done to assess the Bank's exposure to subprime U.S. RMBS at a time of great market volatility in the immediate lead up to the financial crisis of late 2007 and 2008

(d) Would aggregate damages be awarded?

139. The Plaintiffs' position was that that this was an appropriate case for aggregate damages to be assessed at trial after the conclusion of the liability phase pursuant to section 24 of the *CPA*. In this regard, the Plaintiffs served the aggregate damages report and reply report of economist Frank Torchio.

140. The Defendants brought a pre-trial motion to strike the reports of Mr. Torchio on the basis that, in their view, aggregate damages are not permitted by Part XXIII.1 of the *OSA.*

141. On June 3, 2021, Mr. Justice Dunphy ruled that the motion to strike the reports of Mr. Torchio was premature, and the appropriate time to deal with whether aggregate damages should be awarded pursuant to section 24 of the *CPA* is at the conclusion of the liability phase of trial. Mr. Justice Dunphy held:[28]

> The most efficient way of proceeding – and the one I am directing – is to reserve the aggregate damages issue to be considered if necessary after a decision on liability is rendered. There is no need for evidence relating to an eventual application under s. 24 of the *CPA* to be called before any decision on liability is given. If (i) a finding of liability is made; and (ii) an application is made in consequence of such decision under s. 24 of the *CPA*, then and only then a hearing may be held to consider that issue and to hear additional evidence, including *viva voce* evidence, relating to that narrow issue. If there are further expert reports to be exchanged on this subject, I invite the parties to do so now and to continue to comply with all directions of the case management or pre-trial judge in that regard.

142. While Justice Dunphy did not strike the reports of Mr. Torchio, Justice Dunphy also ruled that they could not be tendered into evidence until the issue of aggregate damages was considered and determined after the liability phase of trial.

143. Whether or not aggregate damages can be awarded in a securities class action brought pursuant to Part XXIII.1 of the *OSA* has not been the subject of determination at trial.

144. While Class Counsel were confident that the Court had a basis to award aggregate damages in this case, the fact that there has not been a trial determination of this issue represents litigation risk. If aggregate damages were not awarded in this case, and instead a lengthy process

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[28] Genova Fee Approval Affidavit, Exhibit "E".

of individualized claims determination was undertaken post-trial and any appeals of the trial decision on liability, then, in Class Counsel's judgment the amount of participation in the claims process would be further diminished, particularly among Class Members who are retail investors.

145. The certainty of settlement and the claims process contemplated by the Notice Program and the Distribution Protocol will, in Class Counsel's judgment, improve the class member take-up rate and recovery of some of their losses.

Immediate Benefit

146. 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.

147. At $125 million, this Settlement is among the largest settlements of a Canadian secondary market securities class action to date. While each case is different, there can be no doubt that this is a substantial result for the Class after years of very difficult and hard-fought litigation.

F: DISSEMINATION OF APPROVED SETTLEMENT NOTICE

148. The Settlement Agreement requires that the distribution of the Approved Settlement Notice (both short form and long form notices) be conducted in accordance with the Plan of Notice which is Schedule "H" to the Settlement Agreement.

149. Part two of the Plan of Notice provides for indirect notice through:

(a) The publication of the Approved Settlement Notice (Short Form) in the English language national editions of *The Globe and Mail*, the *Montreal Gazette*, and in the French language of *La Presse* on two occasions;

(b) The publication of the English and French language versions of the Approved Settlement Notice (Short Form), with necessary formatting modifications, across

North America wide *CNW/Cision*, a major business newswire in Canada and sent to Institutional Shareholder Services Inc. (ISS);

(c) The posting of the Approved Settlement Notice (Long Form) in both the English and French languages on the dedicated CIBC class action website www.cibcsecuritiessettlement.ca which is administered by Epiq;

(d) Class Counsel posting to its website dedicated to the action the short form and long form Approved Settlement Notice;

(e) Epiq setting up a toll-free number and email address available to the public that will enable Class Members to obtain more information about the settlement, the claims process, and to request that a copy of the Settlement Agreement, Approved Settlement Notice (Long Form) and the Claim Form be sent electronically or physically to them directly.

150. The Plan of Notice also provides for direct notice through:

(a) Epiq mailing the Approved Settlement Notice (Long Form) and the Claim Form to individuals and entities identified as a result of CIBC's counsel delivering to the Epiq an electronic list in the possession of CIBC's transfer agent containing the names and addresses of persons that obtained CIBC common shares immediately prior to the six corrective events identified by Professor Jarrell in his expert reports; and

(b) Epiq mailing the Approved Settlement Notice (Long Form) and the Claim Form to the brokerage firms in Epiq's proprietary databases requesting that the brokerage firms either send a copy of the Approved Settlement Notice and the Claim Form to

> all individuals and entities identified by the brokerage firms as being Class Members, or to send the names and addresses of all known Class Members to Epiq who shall mail the Approved Settlement Notice and the Claim Form to the individuals and entities so identified.

151. In Class Counsel's experience, providing notice directly to Class Members and indirectly through publication in the manner described above will cause it to come to the attention of a substantial portion of the Class.

152. The content and manner of dissemination of the Notice of Approved Settlement (both short form and long form) are consistent with the programs approved and implemented in a number of other similar cases in which Rochon Genova has acted as class counsel.

153. Epiq estimated the total cost of administering the Plan of Notice and the Settlement to be between $466,557 and $670,189, exclusive of any applicable taxes, depending on the number of claims submitted in response to the Notice Plan. Class Counsel believes that the estimated cost is proportionate to the size of the settlement and consistent with the cost of notice and settlement administration in other securities class action settlements of similar size or complexity.

G: PROPOSED DISTRIBUTION PROTOCOL

154. The proposed Distribution Protocol for distributing the Net Settlement Amount is attached as Schedule "D" to the Settlement Agreement.

155. Both the Distribution Protocol and the Sample Calculation have been posted to the Class Counsel website in accordance with the Plan of Notice.

156. The Distribution Protocol was prepared with the assistance of economist Frank Torchio, the Plaintiffs' damages expert.

157. The objective of the Distribution Protocol was three-fold:

(a) it would result in a fair distribution of any settlement fund among Eligible Claimants;

(b) it would be consistent with the unique damages formulae provided by section 138.5 of Part XXIII.1 of the *OSA*; and

(c) it could be administered in an efficient and effective manner.

158. For the reasons stated in Mr. Torchio's affidavit on this motion, Class Counsel believe that the Distribution Protocol achieves these objectives.

159. The Distribution Protocol does not provide for any damages to attach to Class Members' shares purchased after December 7, 2007, even though the Class Period runs to February 28, 2008. The reason for this is based on the evidence of the Plaintiffs' expert Professor Jarrell who opined that by December 7, 2007, after the six identified corrective disclosures, there was no longer any artificial inflation still present in the CIBC share price which could be attributed to the pleaded misrepresentations. In other words, the Class Period as certified was too long, and includes Class Members who did not suffer any damages tied to the misrepresentations pleaded against CIBC.

160. If this matter were to proceed to trial, based on the expert evidence filed in this case, damages could not be proven for shares acquired after December 7, 2007, therefore the Distribution Protocol assigns such shares a Notional Entitlement of "zero".

161. Apart from the calculation of the Notional Entitlement which is explained in the affidavit of Mr. Torchio, the key elements of the Distribution Protocol are as follows (definitions in the Distribution Protocol are applied here):

(a) the Administrator (*i.e.*, Epiq) will administer all claims pursuant to the terms of the Distribution Protocol;

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

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

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

(e) 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;

(f) 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;

(g) to the extent that funds remain in the Escrow Account after distribution pursuant to the Distribution Protocol, then those funds will be distributed *cy-près* to a recipient as directed by the Court**.**

162. Based on Class Counsels' knowledge of the facts of this case and Class Counsels' experience in other securities class action settlements, Class Counsel believe that the Distribution

Protocol will achieve its stated objective of equitably distributing the Net Settlement Amount among Eligible Claimants.

H: REQUESTED FEE APPROVAL

Class Counsel Fees Requested

163. Class Counsel seek the approval of Class Counsel Fees to be paid in accordance with the Retainer Agreements entered into by the Representative Plaintiffs in 2008 authorizing a 30% fee which comes to $37,500,000.00 plus taxes and disbursements. This represents a multiplier of approximately 2.5 times the value of Class Counsel's docketed time over the 13-year life of this case.

Retainer Agreements

164. The terms of Mr. Green's Retainer Agreement, and Mrs. Bell's Retainer Agreement are essentially the same. In broad terms, they provide for:

(a) the payment of a contingent fee to Rochon Genova on the basis of 30% of the total value of the amount recovered, or on the basis of a 4 times multiplier of the value of time spent prosecuting this claim, whatever is higher;

(b) Rochon Genova is entitled to recover from any settlement or judgment all reasonable disbursements incurred along with accrued interest on those disbursements and taxes.

(c) Rochon Genova agrees to indemnify the Representative Plaintiffs against any adverse cost order in this Action,

165. In addition, the terms of the Representative Plaintiffs' Retainer Agreements specify that Class Counsel's fee is calculated on the value of any settlement or judgment received by the Class, "over and above any award of court costs or claim for reasonable disbursements."

166. The fee requested by Rochon Genova represents 30% of the $125,000,000.00 settlement amount.

167. The requested fee is in accordance with the 30% contingent fee designated by the retainer agreement and less than the 4 times multiplier—as contemplated by the retainer agreement—of the value of time spent by Class Counsel prosecuting this Action.

Factors Supporting the Request for Class Counsel Fees

168. In Class Counsel's experience, the complications and resulting cost of prosecuting a complex securities class action like this can be very significant. This was certainly borne out in this case not only from the standpoint of the sheer complexity of the case, but also the length of time—over 13 years since issuing the claim— required to achieve this important recovery for Class Members.

169. To provide context, in Rochon Genova's +20 year history of class actions practice, the firm assumed more risk and devoted more resources to the prosecution of this single case over the past 13 years than with any other case. Beyond the inherent complexity of securities class actions, this extraordinary risk was considerably heightened by the release of the 2012 decision of the Court of Appeal for Ontario in *Timminco*, which not only threatened the continued viability of this Action, but also at the time, the Rochon Genova firm itself.

170. As discussed below, prior to the commencement of the Action, Rochon Genova assessed and assumed the following risks of prosecuting this massive securities class action with an

uncertain outcome, including exposure to not only Class Counsel's own fees and disbursements, but also those of opposing counsel.

(a) Securities class actions, particularly Part XXIII.1 class actions, are high-risk, complex, hard fought, expensive and protracted

171. That the Part XXIII.1 secondary market civil liability regime is a complex regime is perhaps best evidenced by the fact that very few plaintiff firms in Canada have taken on the risk of investigating, analyzing and prosecuting such cases and even fewer cases of this nature have ever succeeded in terms of providing substantial recovery for class members.

172. According to a recent study by NERA Economic Consulting, since its introduction into law on December 31, 2005 until the end of 2020, there have been 112 statutory secondary market cases, or approximately 7.5 cases per year. The high-water mark was 2019 when 14 such cases were filed. Of the 112 cases, 34 (30%) remained unresolved at the end of 2020; 14 have been denied leave and/or certification; and 10 have been discontinued.

173. The requirement that leave be obtained prior to the commencement of an action under Part XXIII.1 is a significant feature of the regime that distinguishes securities class actions from other class actions where, generally, a plaintiff may move directly for certification, a step that is not a test of the merits (section 5(5) of the *CPA*).

174. Under section 138.8 of the *OSA*, a leave motion requires a preliminary assessment of the merits of the proposed securities class action. To obtain leave, the plaintiff must establish that there is "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff." There has been considerable case law devoted to this standard, including two decisions of the Supreme Court of Canada (one of which was this one, *Canadian Imperial Bank of Commerce v. Green,* [2015] 3 S.C.R. 801).

175. In Class Counsels' experience:

(a) the leave motion typically requires considerable front-end loading wherein a plaintiff must conduct a thorough investigation and analysis into the available public record, and commission expert opinion or opinions in order to establish that it has a reasonable possibility of establishing the key elements of her case;

(b) defendants typically challenge the leave motion, often filing responding expert opinion and sometimes fact witnesses;

(c) cross-examinations, motions arising out of cross-examinations and lengthy hearings are typical for this kind of case; and

(d) success or failure on the leave motion will invariably result in appeals.

176. At the commencement of this Action, Rochon Genova was faced with the above risks and other risks inherent to the prosecution of a securities class action in Ontario. At the time of commencing this action, it was anticipated by Plaintiffs' counsel that:

(a) this case would be hard fought by leading defense counsel who are themselves experts in the defense of securities cases at two of the most prominent corporate law firms in Canada;

(b) the defense was extremely well funded and would spare no expense;

(c) there would be great resistance to the leave and certification motions, and indeed at every step of this proceeding;

(d) the leave and certification motion would itself involve many days of cross examinations of both fact and expert witnesses;

(e) if successful on the leave and certification motion, there would be production of potentially hundreds of thousands of documents and weeks of examinations for discovery;

(f) if the case did not settle, there would be a very lengthy trial with an uncertain outcome; and

(g) the exposure to potential adverse costs awards, including the fees and disbursements of multiple defence firms and their various experts, would be considerable, in the several millions of dollars.

177. The predicted risks at the outset of this litigation not only came to pass, they were acutely more significant than Class Counsel originally imagined, principally because of the release of the 2012 Court of Appeal decision in *Timminco* and the profound subsequent uncertainty flowing from that decision as this case made its way through various stages of appeal.

(b) The Existential Risk posed by the *Timminco* decision

178. From early on, this Action faced the existential risk that the leave motion was not timely and therefore the action would be dismissed on the basis of the limitation issue.

179. Specifically, on February 16, 2012, the penultimate day of the original hearing of the leave and certification motion before Mr. Justice Strathy, the Court of Appeal released its decision in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, which ruled, for the first time, that section 28 of the *CPA*, *did not* suspend the *limitation* period in section 138.14 of the *OSA*. The implication of this was that the Part XXIII.1 leave motion had to be finally determined (not just commenced) prior to the *OSA* 3-year limitation period.

180. As the pleaded misrepresentations in this Action were made in 2007, by the time the leave motion came before Justice Strathy in 2012, the effect of the *Timminco* decision would mean that this case would have been time barred.

181. On July 3, 2012, Justice Strathy ruled that he would have certified this case but for the just released *Timminco* decision. Following that appellate authority, leave and certification were denied.

182. Three and a half years later, the Supreme Court permitted the matter to proceed, in a decision reported at: *Canadian Imperial Bank of Commerce v. Green*, [2015] 3 S.C.R. 801. However, for several years prior to the release of the SCC decision, this Action was prosecuted under the spectre of a very real risk of being dismissed on the limitation issue alone.

183. Quite apart from the limitation issue, the leave and certification motion was hotly contested. That motion involved 13 expert reports, 27 days of cross examinations of both fact and expert witnesses, thousands of pages of evidence, and 8 hearing days.

(c) Class Counsel's indemnification against adverse costs exposed Class Counsel to significant risk

184. At the commencement of the Action, Rochon Genova agreed to indemnify their clients, the Representative Plaintiffs, against adverse costs.

185. Rochon Genova's indemnification against adverse costs exposed the firm to significant risk; a risk that grew over the course of the Action which was without any safety net at all, until after Class Counsel received a decision from the Supreme Court of Canada on December 4, 2015. As mentioned, had the Plaintiffs not been successful in the SCC, Rochon Genova would have been

responsible for the costs of the entire action incurred by two formidable defence firms over the course of 7 years.

186. In an effort to mitigate this risk and gain protection against adverse costs, Rochon Genova initially applied to the CPF for funding in 2011 *prior* to the leave and certification motion before Mr. Justice Strathy, heard February 9, 10, 13-17 and April 5, 2012. However, that funding request was denied and the firm was placed in a precarious situation not only in respect of funding the go-forward expert fees and other associated case costs estimated to be in the millions of dollars, but also the risk of a major adverse costs award, should the Plaintiffs fail at any stage of the appeals which ultimately ended at the SCC.

187. Put another way, the CPF's denial of Class Counsel's funding application was a major blow to Rochon Genova, especially in light of the considerable resources in salaries and expert fees and other case costs the firm had already invested in this file and was required to invest in the future. Nevertheless, the Plaintiffs successfully appealed the decision of Justice Strathy to a five-member panel of the Court of Appeal, which released its decision on February 3, 2014. To convene a five-judge panel of the Court of Appeal for the purpose of overturning a previous decision of that Court was naturally an inherently risky procedural step; however, this was the only path available to the Plaintiffs at that time.

188. Funding from the CPF was not in place until December 1, 2016, a year after the release of the SCC decision. All told, for first the eight years of this Action, commenced July 2008, Rochon Genova was fully exposed to paying an adverse costs award of opposing counsel for the entire Action including the motion and appeals to the Court of Appeal for Ontario and the Supreme Court of Canada, as well as the cost of all disbursements, the bulk of which were for the fees of

expert witnesses. Obtaining funding in this context provided an important safeguard for Rochon Genova to avert the potential for a catastrophic outcome to the firm.

189. After the 2015 Supreme Court of Canada Decision, the determination of costs of the preliminary 2012 leave and certification motion was referred back to Mr. Justice Strathy. Sitting *ex officio*, Justice Strathy awarded the Plaintiffs' costs on a *partial indemnity* basis comprised of fees of $1,505,418.72 and disbursements of $932,123.14.

190. The June 2016 partial indemnity costs award related only to the 2012 leave and certification motion. The substantial indemnity value of Class Counsel's time for that motion was, of course, considerably in excess of the amount awarded.

191. Had the Supreme Court of Canada not found in favour of the Plaintiffs, not only would Rochon Genova have lost all of its fees and disbursements incurred up to the December 2015 judgment of the Supreme Court; it would also have had to pay the Defendants for their costs. In Class Counsel's judgment, that indemnification obligation would have been in the many millions of dollars given that the adverse costs being sought would have been for the entire action for as incurred by the Defendants who were represented by leading counsel at two of Canada's top firms – Torys LLP and Goodmans LLP.

192. Therefore, until the decision of the Supreme Court of Canada in December 2015 and Justice Strathy's costs award in June 2016, Rochon Genova faced a financial exposure of many millions of dollars. Had the Supreme Court of Canada not found in favour of the Plaintiffs, the Rochon Genova firm would have faced significant financial challenges to the point of having a liquidity crisis of its own.

193. After the CPF agreed to provide case specific support to Rochon Genova in December 2016, only some of the financial risk to the firm were mitigated in that the CPF only agreed to indemnify the Plaintiffs against future adverse cost awards, and to pay for a portion of the go-forward case costs incurred by Rochon Genova.

194. While this support from the CPF certainly assisted in terms of partially de-risking the case and enabled Class Counsel to proceed with its prosecution, there was and has never been any contribution towards the millions of dollars of time the firm continued to invest for its lawyers and other professionals to cover the unfunded portion of disbursements and experts' fees for the next 5 years.

Fees and disbursements incurred and financed to date

195. The time investment of Rochon Genova in terms of the value of WIP of all timekeepers to date over the 13-year life of this file is $14,808,597, representing 22,001 billable hours.

196. Rochon Genova's co-counsel, Himelfarb Prozsanski, has docketed fees of $68,812.50 and incurred HST on those fees of $6,138.63.

197. Rochon Genova also invested in very considerable disbursements which it paid over the life of this file in the amount of $6,964,160 plus HST on those disbursements of $362,221. In addition, Rochon Genova has incurred disbursements that still remain to be paid, in the amount of $921,859, and HST of 119,841.67 for a total amount of disbursements incurred, including HST, of $8,368,081.

198. The Defendants reimbursed Rochon Genova in the amount of $1,099,559 (inclusive of HST) further to a cost award following the Plaintiffs' successful leave and certification motion, as described above. CPF has reimbursed Rochon Genova in the amount of $4,643,990 (inclusive of

HST) since it extended certain financial support to this action on December 1, 2016 for a total reimbursed, to date, to Rochon Genova of $5,743,549.[29]

199. Accordingly, the disbursements (inclusive of HST) incurred by Rochon Genova and not covered by CPF or the earlier leave and certification costs award amount to: $2,624,535.[30]

200. Pursuant to *Regulation 771/02*, the CPF levy will be imposed on the class' recovery, in the amount of the sum of: (a) the amount of any financial support paid by the CPF (in this case, disbursements funded) and (b) 10 percent of the amount of the settlement funds remaining. In other words, once the Class Counsel fee and the Administrator's fee is deducted from the settlement amount, the CPF will receive a reimbursement of the approximately $4.6 million in disbursements it has funded, and a levy in the amount of 10% of the settlement amount remaining after the CPF's disbursements are refunded to it. Class Counsel estimates CPF's total entitlement (disbursements repayment and levy) to amount to approximately $12 million.[31]

201. Rochon Genova has been assisted in this litigation by its co-counsel, Himelfarb Proszanski LLP. One of the firm's founding partners, Mr. Peter Proszanski, worked closely with Rochon Genova in the investigation and formulation of this case prior to pleading in 2008. His contribution was particularly valuable in informing the counsel team regarding the developments in the CIBC litigation in the U.S., and its implications for the Canadian case. Mr. Proszanski continued to provide strategic advice throughout the course of this action. He also participated, along with Rochon Genova team, in the mediation sessions referred to above. Along with Rochon Genova,

[29] Genova Fee Approval Affidavit, at para 49; Supplemental Affidavit of Vincent Genova, sworn January 6, 2022 ("Genova Supplemental Affidavit") at para 3.
[30] Genova Supplemental Affidavit at para. 3.
[31] Genova Fee Approval affidavit at para. 53 and Genova Supplemental Affidavit at para 3.

Himelfarb Proszanski lawyers have acted to liaise with the Representative Plaintiffs during the course of this litigation.

Anticipated fees and disbursements to be incurred

202. Considerable work remains to be done by Class Counsel. Next steps will include:

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

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

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

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

203. Based on their experience in other cases, Class Counsel estimate that they will accrue approximately an additional $150,000 in time addressing these matters.

204. In summary, in Class Counsel's opinion, in light of the numerous and substantial risks faced by Rochon Genova in the prosecution of this action over the past 13 years, the protracted and complex nature of this proceeding, the result achieved for the class, and the terms of the retainer agreements, the requested fee in the amount of 30% of the class members' recovery is fair and reasonable.

III. ISSUES ON THE MOTION

205. The issues for this Court are whether:

(a) The Settlement Agreement should be approved;

(b) The Distribution Protocol should be approved;

(c) Class Counsel's fee request should be approved; and

(d) Honoraria to the Plaintiffs should be approved.

IV. LAW AND ARGUMENT

A. SETTLEMENT APPROVAL

206. This settlement was reached after 13 years of hard-fought litigation and two rounds of mediation and a formal Pre-Trial. The quantum of the settlement was driven by the facts and Class Counsel's assessment of the risks flowing from those facts. This Court is well-positioned to examine the structure and quantum 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 not be forgotten that this Court has also performed an invaluable case management function since approximately May 2020 during which time it has decided interlocutory motions, presided over case conferences, and importantly presided over the Pre-Trial Conference during which time, the parties attempted to settle and eventually did resolve this Action.

207. The zone of reasonableness determination is informed by the background of the Actions—the extensive documentary productions analysed by Class Counsel, the discovery of the parties, consultation with numerous experts, and Class Counsel's comprehensive research and understanding of how the factual and legal issues converge to allow Class Counsel to determine whether this 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. The proposed Settlement was arrived at just 2 weeks before the trial of this Action was scheduled to commence. All of these factors favour this Court's approval of the settlement.

(a) Settlement Structure

208. As part of the approval process, 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.[32] The Court should ask whether Class Counsel negotiated in the best interests of the Class. The Court should also guard against efforts to make a settlement seem larger than it is; undue expansion of the class size; inappropriate protection of defendants from liability; and any measures that discourage objection to the settlement or fee request.[33] The Court is well-placed to identify structural features of settlements indicative of collusion or conflicts of interest in the negotiations and the agreement.[34]

209. Broadly speaking, agreements that place a high value on non-monetary or conditional compensation,[35] contemplate a possible reversion of settlement funds to defendants without a concomitant reduction in class counsel's compensation,[36] make settlement approval contingent on fee approval,[37] and have optics that suggest the settlement is more favourable to class counsel than

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

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

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

35 *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.

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

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

class members,[38] are examples of the types of structural features of which courts should be cautious.

210. 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 point for the class action … in the first place."[39] 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

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38 *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.

39 *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.

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. The Court ordered that there be no further application for approval of fees until the Administrator provided a report establishing that Enhanced Payments had been paid in full;[40]

(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 inherent conflict of interest between class counsel's interests and those of the class they sought to represent;[41] 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.[42]

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40 *Bilodeau v Maple Leaf Foods Inc*, 2009 CarswellOnt 1301.
41 *Garland v Enbridge Gas Distribution Inc*, 2006 CarswellOnt 6585.
42 *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 81 and 85.

211. These types of structural features indicative of conflicts of interests are not present here. In particular:

(a) this is an all-cash settlement. There are no non-monetary benefits. Class Members will receive cash compensation distributed in accordance with the Distribution Protocol. This feature alone, ensures that this settlement is in no way compromised by problems that sometimes exist with non-cash settlements or hybrid settlement arrangements;

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

(c) Class Counsel and the Plaintiffs have entered into percentage based contingency fee retainers that align the interest of Class Counsel and the Class;

(d) 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.

212. 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 here admits of none of the defects

identified in the case law. Class Counsel was incentivized to maximize recovery to the Class and it did so.

(b) Zone of Reasonableness

213. On a settlement approval motion, the Court's task is to determine whether the settlement falls within a range, or "zone", of reasonableness.[43] The resolution need not be measured against a standard of perfection.

214. In assessing whether the settlement falls within the zone of reasonableness, courts have reviewed the following factors, first enumerated by Justice Sharpe (as he then was) in *Dabbs*, and most recently summarized by Glustein J. in *PayPal*. As Justice Glustein noted, these factors "are not to be applied mechanically and […] in any given case, some factors will have greater significance than others":[44]

(a) the presence of arm's-length bargaining and the absence of collusion,

(b) the proposed settlement terms and conditions,

(c) the number of objectors and nature of objections,

(d) the amount and nature of discovery, evidence or investigation,

(e) the likelihood of recovery or likelihood of success,

(f) the recommendations and experience of counsel,

(g) the future expense and likely duration of litigation,

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43 *Dabbs v Sun Life Assurance Co of Canada*, 1998 CarswellOnt 2758 at para 30.

44 *Kaplan v. PayPal CA Limited*, 2021 ONSC 1981 at para 52; *Dabbs*, at para 30; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at paras 32-33; *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622 at para 22. See also: *Robinson v. Medtronic, Inc.*, 2020 ONSC 1688 (CanLII) at paras. 63-68

(h) information conveying to the court the dynamics of and the positions taken by the parties during the negotiations;

(i) the recommendation of neutral parties, if any, and,

(j) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

215. The zone of reasonableness assessment has been considered in several cases. That analysis allows for variation between settlements depending upon the subject matter of the litigation and the nature of the damages for which settlement provides compensation.[45] 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.[46] The settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.[47] 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.[48]

216. Where settlements, as here, are 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."[49]

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45 *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 70.

46 *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at paras 25 and 33.

47 *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 80.

48 *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622 at para 22.

49 *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.

217. Each of the *Dabbs* factors is satisfied in this case, further confirming the settlement falls within the zone of reasonableness as discussed briefly below.

218. **The presence of arm's-length bargaining and the absence of collusion**: the parties conducted two mediations and participated in a formal pre-trial process at all times at arm's length and in the absence of any collusion, and under the supervision of current or retired members of the judiciary.

219. **The amount and nature of discovery, evidence and investigation**: the Plaintiffs reviewed 150,000 documents comprised of approximately 1.5 million pages produced by the Defendants. In preparing for the pending trial, numerous interlocutory motions, including the merits-based leave and certification motion, the Plaintiffs gained significant insight into the legal and factual issues that would form the subject matter of the trial. In particular, counsel gained significant insight from discovery of key witnesses and exchange of expert reports:

(a) *discovery of key witnesses:* there were 47 days of cross-examinations on affidavits on the leave motion and examinations for discovery during which the Plaintiffs' Counsel examined most of the key witnesses in the case, including CIBC's senior executives during the Class Period and key experts CIBC would be relying on at trial;

(b) *expert reports*: the Plaintiffs had the benefit of the detailed evidence of their own experts relating to liability and damages prepared by many leading experts, as well as the expert evidence of the Defendants. In anticipation of trial, the parties served and filed 22 expert reports and reply reports of more than 4,000 pages in length in

the fields of market economics, finance, corporate governance, credit risk management and accounting.

220. **The likelihood of recovery or likelihood of success:** in addition to the general risks that are inherent in all major litigation, the critical risks that the counsel team identified as specific to this litigation were as follows:

(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 corrections 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) of the *OSA*;

(d) the risk that the Defendants' theory of damages would be accepted by the court and the Plaintiffs' theory of damages would be rejected with the result being that recovery for the Class would be negligible even if liability were established; and

(e) the risk that, even if successful on liability, the Court would not award aggregate damages pursuant to section 24 of the *CPA*, and instead refer the determination of damages to a lengthy individualized claim assessment process which itself might take years after liability was determined and appeals exhausted.

221. **The recommendations and experience of counsel:** Class Counsel in this case

collectively have decades of experience prosecuting securities class actions. They strongly recommend this settlement as in the best interest of the Class.

222. **The future expense and likely duration of litigation:** The parties went to great effort to prepare this matter for trial scheduled to commence on Monday October 4, 2021 for 9 weeks. In the event that this settlement is not approved, inevitably the trial would proceed followed in all likelihood by a lengthy appeal process. This expensive, time consuming course of action would be avoided by the proposed settlement.

223. **The role of neutral parties, if any**: the proposed settlement is the product of both the mediation presided over by Mr. O'Connor and more immediately, the Pre-Trial process and negotiations supervised by Mr. Justice Myers, both of whom, as neutral third parties, assisted the parties to arrive at a resolution of this complex Action through tough, arms-length negotiation and ultimately, reasonable compromise.

224. **The degree and nature of communications by counsel and the representative plaintiff with class members during the litigation**: Class members were apprised of the major steps in this litigation. In particular, after being briefed on the settlement by Joel Rochon, the Representative Plaintiffs agreed with Class Counsel's assessment and their recommendation to settle on the terms proposed.

225. Because this case settled just two weeks before the scheduled 9-week trial, Class Counsel's understanding of the factual and legal issues was comprehensive and mature. The settlement was informed by "layers and layers of actual, and not just imagined, information about the risks and rewards of further litigation."[50] Class Counsel knew the risks and rewards of going to trial.[51] The

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50 *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 34.

51 *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 at para 34.

settlement was not negotiated 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.

226. As stated by the U.S. 7th Circuit Court in *Reynolds* and reiterated by this 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."[52] The challenge of valuing litigation 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.

227. These challenges aside, in the present case, 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 key case-specific risks discussed at paragraph 176 above.

228. The Settlement provides for a total payment of $125 million to resolve all claims against the Defendants in relation to the Action. 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.

(c) Other Factors Supporting Settlement Approval

229. In addition to the *Dabbs* factors discussed above, 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

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52 *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.

public policy;[53]

(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;[54]

(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;[55]

(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;[56]

(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.[57]

230. In summary, the settlement is fair and reasonable under all of the circumstances. The Settlement Agreement provides for a total payment of $125 million to resolve all claims against the Defendants in relation to the Action. The settlement is consistent with both the purpose and

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53 *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.

54 *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.

55 *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.

56 *Ford v. F. Hoffmann-La Roche Ltd*. 2005 CarswellOnt 1095 at para 127.

57 *Nunes v Air Transat AT Inc*, 2005 CarswellOnt 2503 at para 7.

spirit of the *CPA*, which encourages settlement after a reasonable investigation and careful consideration of the merits, costs and risks of continuing litigation.

B: DISTRIBUTION PROTOCOL

231. 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.[58]

232. The claims of the Class Members are based on Part XXIII.1 of the *OSA*. The Distribution Protocol, designed with the assistance of expert economist Frank Torchio, takes the sensible approach of employing a damage calculation formula analogous to the formulae set out in section 138.5 of Part XXIII.1 the *OSA*.

233. The Distribution Protocol is informed by the expert evidence of Professor Gregg Jarrell and Mr. Torchio both of whom analyzed per share and aggregate damages having regard to sections 138.5(1) and (3) of the *OSA* and the *contra* opinions of CIBC's damages experts. The Distribution Protocol reflects how individual claims of Class Members would be proved at trial with the benefit of expert reports filed for that purpose.

234. The Distribution Protocol was designed with the following objectives:

(a) To result in a fair distribution of any settlement fund among Eligible Claimants;

(b) To be consistent with the unique damages formulae provided by section 138.5 of Part XXIII.1 of the *OSA*; and

(c) To be capable of being administered in an efficient and effective manner.[59]

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58 *Zaniewicz v Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59.

59 Genova Settlement Approval Affidavit, paras 150-151; Affidavit of Frank Torchio sworn December 28, 2021 ("Torchio Affidavit"), paras 16-17, 26

235. In the opinion of Class Counsel and economist Frank Torchio, the Distribution Protocol achieves these objectives and will equitably distribute the Net Settlement Amount among Eligible Claimants.[60]

C: FEE APPROVAL

236. The test for approval of counsel fees in this context is whether they are fair and reasonable in all the circumstances.[61] In *SNC*, the Court listed the following factors that are relevant in assessing the reasonableness of class counsel fee request: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[62]

237. Each of these criteria supports Class Counsel's fee request in this case.

238. **The factual and legal complexities of the matters dealt with**: the facts underlying this class action are extraordinarily complex. This litigation involved highly complex and technical matters arising from the valuation of US subprime real estate exposed securities, "hedges" against such exposure, and questions regarding materiality and impact of such information upon the share

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60 Genova Settlement Approval Affidavit, para 156; Torchio Affidavit paras 16-17, 25

61 *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*, 2021 ONSC 6956, para. 26.

62 *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2018 ONSC 6447 at para 75.

price of a large Canadian financial institution. The matters were hotly contested and formed the subject of testimony of a number of experts in finance, accounting, economics, corporate governance and risk management, many of whom are leading authorities in their fields on both sides of the case.

239. **The risk undertaken, including the risk that the matter might not be certified, or if leave had not been granted:** had the matter not been certified, or had leave not been granted, Class Counsel would have faced very substantial financial exposure, which threatened the firm's long-term viability. At the time of the leave and certification motion (which was ultimately appealed all the way to the Supreme Court), Class Counsel had no support or indemnity from the CPF or any other funder. Writing in respect of this very action, Strathy, C.J.O. (as he then was), stated:

> The risks are – quite simply – the exposure to substantial personal liability for costs and the risk of receiving no compensation for the time and disbursements invested in the case. There is no funding agreement in this case, but the latter risk exists even where there is a funding agreement to indemnify class counsel for an adverse costs award or for some portion of their disbursements. The efficacy of the statutory remedy depends on incentivizing class counsel to take these formidable risks.[63]

240. In addition, and as described below, a parallel U.S. action making many of the same allegations against CIBC was dismissed in March 2010 on summary judgment by the U.S. Federal Court for the Southern District of New York. Class counsel had to make a choice of whether to press on in light of the adverse findings in another court; or to abandon this case. Faced with this

[63] *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 14.

added important risk factor, Class Counsel chose the former, having confidence in their own investigation and their ability to deliver a good result for the Class.

241. **The degree of responsibility assumed by class counsel**: class counsel assumed all of the responsibility and risk involved in the prosecution of this Action until after the successful Supreme Court appeal. Even after CPF provided an indemnity and disbursement support in late 2016, Class Counsel continued investing substantial funds in the prosecution of this action, including $2,624,535 in unfunded disbursements and what turned out to be $14.8 million in time incurred by the lawyers and other clerks and professionals at the firm.

242. **The monetary value of the matters in issue:** the monetary value of the matters in issue was very substantial, as evidenced by the amount of the settlement which represents one of the largest securities class action settlements in Canadian history.

243. **The importance of the matter to the class:** given the high monetary value of the matters in issue, the matter was very important to the class, which includes a large number of retail shareholders as well as institutional shareholders including pension funds.

244. **The degree of skill and competence demonstrated by class counsel:** Class Counsel demonstrated a high degree of competence in guiding this action from inception, through a labyrinth of procedural and substantive challenges including the leave and certification motion, a successful appeal strategy conducting exhaustive documentary and oral discovery and a number

of interlocutory motions. As further noted by Mr. Justice Strathy (as he then was) in considering costs on the leave and certification motion:[64]

> [11] **This is an extraordinary case by any standard.** In considering a fair and reasonable award, I have regard to all the circumstances, but particularly the following:
>
> a) the plaintiffs put the claim at between $2 billion and $4 billion, amounts that I cannot say are unrealistic;
> b) the class is very substantial and includes over 100,000 Canadian shareholders;
> c) this was one of the first cases to advance a claim under Part XXIII.1 of the *Securities Act* dealing with secondary market misrepresentation and it is an important landmark case;
> d) the facts were extraordinarily complex and required sophisticated expert evidence;
> e) the law was both complex and novel;
> f) the record was massive: there were a total of 25 affidavits filed by the parties, cross-examinations were conducted over 29 days, and the evidentiary record comprised 45 volumes of material;
> g) the hearing before me, which was based entirely on the record, took seven days;
> h) the proceeding was vigorously contested by the defendants, who were well-resourced and represented by teams of highly experienced counsel;
> i) although the plaintiffs did not achieve everything they sought on the certification motion, they achieved very substantial success; and
> j) the motions were skillfully and thoroughly prepared, prosecuted and argued by experienced class counsel

245. **The results achieved:** the result represents very substantial recovery and one of the largest securities class action settlements since the introduction of the *OSA* Part XXIII.1 regime.

246. **The ability of the class to pay**: as in other securities class actions, the vast majority of class members had no ability to pay their own counsel and would not have brought this complex litigation on their own, on a fee-for-service basis. As noted by Mr. Justice Strathy in his leave and certification costs decision in this case: "These claims are suitable for class action treatment

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64 *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 11.

because no individual class member would take on the risks involved in pursuing individual litigation. The ability of the class to pursue these claims depends on the willingness of class counsel to accept the very substantial risks in exchange for the potential rewards."[65]

247. **The expectations of the class as to the amount of the fees**: fees in the amount of 30% would be expected by class members, as confirmed by the representative plaintiffs' affidavits, which attach the retainer agreements. Such fees are largely consistent with class counsel fee awards in other Canadian securities settlements, as further discussed below.

248. The retainer agreements in this case provided for a fee on the basis of 30% "…of the total value of the amount recovered, or on the basis of a 4 times multiplier of the time spent prosecuting the claim, whichever is higher…".[66] In this case, the requested 30% contingency fee represents a multiplier of approximately 2.5 times the value of Class Counsel's docketed time.[67]

249. **The opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement:** Vincent Genova, the co-founder of Rochon Genova, testified in support of this motion that the firm invested more resources and undertook more risk in prosecuting this case than on any other case. Accordingly, the opportunity cost to Class Counsel was very substantial.

250. Further, Ontario Courts have accepted that the percentage set out in the retainer agreement is presumptively valid and enforceable. Justice Belobaba stated that this is "the most principled approach to Class Counsel compensation" and "best assures the future viability of the class action

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

66 Green Retainer Agreement, at para 3, Exhibit A to the Genova Fee Approval Affidavit; Bell Retainer Agreement, at para 3, Exhibit B to the Genova Fee Approval Affidavit.

67 Genova Fee Approval Affidavit, para 48

as a significant vehicle for access to justice".[68] In approving a one-third (33.3%) fee request in a settlement of up to $50 million, Justice Belobaba held that:

> (a) contingency fee arrangements that are fully understood and accepted by the representative plaintiffs (such as the retainer agreement in this case) should be presumptively valid and enforceable;
>
> (b) the presumption of a valid contingency fee should only be rebutted as follows:
>
> (a) when there is a lack of full understanding or true acceptance on the part of the representative plaintiff;
>
> (b) when the agreed-to contingency amount is excessive; and
>
> (c) when applying the presumptively valid one-third contingency fee leads to a legal fee award that is so large as to be unseemly or otherwise unreasonable.[69]

251. In settlements which exceed $100 million, Belobaba J. urged a "case-by-case approach" focused on the fairness and reasonableness of the fee avoidance of "undeserved and unseemly windfalls". When considering fees in these large settlements, "the case law makes clear that the most important factors in determining whether the requested legal fee is fair and reasonable are the risks incurred and the results achieved and also 'whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.'"[70] As among these factors, "it is the risk incurred that 'most justifies' a premium in class proceedings. The nature of the risk incurred is primarily the risk of non-payment."[71] In other words, "[t]he greater the risk of failure and non-

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68 *O'Brien v Bard*, 2016 ONSC 3076, para. 16.
69 *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, paras. 8-10.
70 *MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726 at paras 25-26.
71 *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 at para. 41.

payment – that is, the greater the resulting financial impact on class counsel and their firm – the larger the premium."[72]

252. There is no question the criteria described by Justice Belobaba are satisfied in the present case. In particular, as further elaborated below, given the high degree of risk and the complex and protracted nature of this proceeding and the novel issues being litigated, there is no suggestion that the legal fee requested in this 13-year, hard-fought proceeding represents an "undeserved" or "unseemly windfall".

253. The parallel U.S. CIBC shareholders class action presents a vivid illustration of the substantive risk of dismissal faced by Class Counsel in this Action. A proposed securities class action very similar to this one was brought by leading U.S. securities class actions firms on behalf of U.S. resident CIBC shareholders before the U.S. Federal Court in the Southern District of New York. That case alleged substantially the same misrepresentations against CIBC and three of the same individual defendants regarding CIBC's exposure to U.S. subprime RMBS in 2007. On March 19, 2010, U.S. District Judge William H. Pauley III (SDNY) dismissed that case on a motion for summary judgement. In his reasons for decision, Judge Pauley ruled that many major financial institutions failed to anticipate a meltdown in the mortgage market during the period in 2007 covered by the Class Period, and that the U.S. plaintiffs failed to demonstrate that CIBC had information in its possession that was contrary to CIBC's public statements about its subprime risk exposure.[73]

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72 *Brown*, *supra* at para 43.

73 *Plumbers & Steamfitters Local 773 Pension Fund v. CIBC et al.*, 08 Civ. 8143, Exhibit D to the Genova Fee Approval Affidavit.

254. In spite of the obvious risk presented by this relevant, but negative ruling of the SDNY, Class Counsel had faith in its investigation and its ability to prosecute this Action to a successful conclusion.[74]

255. Several decisions note that awarding fees based on a percentage of gross recovery may be more appropriate than the multiplier methodology which "has been criticized for, among other things, encouraging inefficiency and duplication and discouraging early settlement."[75] In contrast, contingency fees "encourage efficiency. They reward success. They fairly reflect the considerable risks and costs undertaken by class counsel."[76] Percentage of gross recovery fee awards also recognize that the overall risk for class counsel may be measured not in any one case but over an entire practice.[77] As this Court has stated, "[o]ver a period of years, plaintiff-side class action firms will win cases and lose cases... [t]he 'risk' that contingency lawyers face cannot be assessed case-by-case or one-off, but must be measured across a great many files. A 'large' contingency recovery in one case will offset the loss or losses in other cases."[78]

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74 Genova Fee Approval Affidavit, para. 29.

75 *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324, para. 52.

76 *Osmun v. Cadbury Adams Canada Inc*., 2010 ONSC 2752, paras. 21.

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

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

256. Fees in the range of 30% are "very common" in class proceedings and are routinely approved by Ontario courts.[79, 80] The table below summarizes several notable class action settlements and fee requests approved by Ontario courts in recent years, including several cases in the $100+ million settlement range:

Citation	**Fee percentage**	**Settlement Amount Approved**
Cannon v. Funds for Canada Foundation, 2013 ONSC 7686	33%	$28.2 million
Middlemiss v. Penn West Petroleum, 2016 ONSC 3537	33%	$26.5 million
Canadian Imperial Bank of Commerce v. Deloitte, 2017 ONSC 5000	18%	$122 million
The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc., 2018 ONSC 6447	22.95%	$110 million
Catucci v Valeant [2020, unreported][81]	31%	$124 million
Good v. Toronto Police Services Board, 2020 ONSC 6332	28%	$16.5 million
Baroch v. Canada Cartage, 2021 ONSC 7376	30%	$22.25 million
C.S. v. Ontario, 2021 ONSC 6851	27%	$15 million
MacDonald et al v. BMO Trust Company et al, 2021 ONSC 3726	20%	$100 million

79 *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 63.

80 *Baroch v. Canada Cartage*, 2021 ONSC 7376, para. 1; *C.S. v. Ontario*, 2021 ONSC 6851, paras. 57, 71; *Good v. Toronto Police Services Board*, 2020 ONSC 6332, para. 40; *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537, para. 19.

81 Relevant materials attached to Genova Fee Approval Affidavit.

257. A number of the cases above are distinguishable from the present case. In particular, in *SNC-Lavalin*, in which Rochon Genova acted as co-counsel, the fee was governed by a retainer which provided for a "sliding scale" of fees based on the litigation stage at which the settlement was achieved. Similarly, in *Deloitte*, the combined individual receiver action and class action provided for counsel fee based on a 2.0 multiplier.[82] Finally, in *MacDonald*, a class action which was devoid of the prolonged, expensive and risky series of appeals and trial risk present here, Belobaba J. noted that class counsel "presented no hard evidence"[83] regarding litigation risks or the financial impact of this litigation upon class counsel's firms.

258. Two large secondary market securities settlements referenced above, *SNC* and *Valeant*, both of which Rochon Genova served as co-counsel, are notable for the following similarities and contrasts in terms of risk assumed by plaintiffs' counsel:

	Settlement	**Fee**	**Percentage**	**Comments re: risk**
The Trustees v. SNC-Lavalin Group Inc., 2018 ONSC 6447	$110 million	$25.25	22.95%	**Leave and certification were on consent.** Case settled after discovery but without any trial date. Risk shared by two firms as co-counsel. Settlement and fees approved 6 years after action commenced
Catucci v Valeant [Court File No. 500-06-000783-163, District of Montreal, The Honourable Peter Kalichman, S.C.J., November 12, 2019; unreported]	$124 million	$38.1 million	30.1%	Leave and certification were contested and appealed. Case settled at early stages of discovery. Risk shared by a co-counsel consortium of seven firms. Settlement and fees approved 3 years after action commenced

82 *Deloitte*, *supra* at para 12.

83 *MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726 at para 42.

259. The *Valeant* settlement, for which all relevant documents are attached to the Genova Fee Approval Affidavit, is particularly relevant for the present motion. That case, started in 2016, settled in two parts:

(a) an initial partial settlement with Valeant's auditor PWC of $30 million and counsel fees of $9 million, both of which were approved by the Quebec Superior Court on November 12, 2019;

(b) a final settlement with Valeant and the other defendants for $94 million and counsel fees of $29.1 million both of which were approved by the Quebec Superior Court n November 16, 2020.

260. The total settlement in the *Valeant* case was $124 million, with combined counsel fees (exclusive of disbursements and taxes) of $38.1 million (or approximately 31%). The case settled at the early stages of discovery, approximately 4 years after the case started. In *Valeant*, the risks of litigation, and the fees earned, were shared by a class-counsel consortium of seven law firms.

261. Class Counsel are alive to Justice Belobaba's concern, discussed above, in relation to larger settlements ($100 million or higher), that "the approval of legal fees in these so-called mega-settlements remains as principled as possible and not result in undeserved and unseemly windfalls".[84]

262. As noted above, there is no suggestion in the present case of an "undeserved and unseemly windfall." In fact, the evidence is to the contrary. In this hard-fought litigation, which lasted 13 years and included appeals all the way to the Supreme Court of Canada, plaintiffs' counsel

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84 *MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726, at para 25.

expended very significant financial and human resources in advancing Class Members' interests. At several stages in this litigation, there was considerable "risk of non-payment," which would have had serious financial consequences for Class Counsel. In *Brown*, a case that was "as close a case of class counsel 'betting the firm' as I have seen," Belobaba J. stated that it was "beyond dispute that class counsel … deserve a significant premium in the calculation of their legal fees."[85]

263. As in *Brown*, here, Class Counsel assumed a tremendous financial risk in pursuing this litigation over the course of 13 years of litigation including 8 years absent the benefit of any funding. To say that Class Counsel "bet the firm" was certainly, at the time, no exaggeration. Indeed, it was through counsel's perseverance in the face of significant adversity that has led to the creation of this settlement. Significant risk undertaken by class counsel ought to be recognized in the form of approval of class counsel fees pursuant to the percentage described in the Retainer Agreements.

264. Regardless of whether a multiplier or a percentage of gross recovery method is selected, absent wrongdoing and abuse, retainer agreements must be given effect. The Plaintiffs gave evidence that they fully understood the retainers when they entered them and support the fee request now.[86]

265. Giving effect to reasonable retainer agreements is also good public policy. It supports the statutory goals of the *CPA* and the *OSA*, and the viability of the Canadian class action regime. Justice Strathy, as he then was, stated: "If first-class lawyers cannot be assured that the Courts will support their reasonable fee requests, how can the Courts and the public expect them to take on

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85 *Brown*, *supra*, at paras. 69 and 71.

86 Affidavit of Mr. Green, at paras 41-42; affidavit of Ms. Bell, at paras 43-46.

risky and expensive litigation that can go for years before there is a resolution?"[87] To a similar effect, Goudge J.A. stated in *Gagne*: "The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope."[88]

266. Writing in another case, Strathy J. expanded on this policy rationale:[89]

> Plaintiff's counsel are serious, responsible, committed and effective class action counsel. They are entrepreneurial. They will likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here.

267. Most recently, Glustein J., in approving the fee request in *PayPal*, similarly held: "Contingency fee arrangements are an 'important means' to provide 'enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient'. […] The policy of the *CPA* is to provide an incentive to class counsel to pursue class actions in order to increase access to justice. Class counsel fees have been awarded and are intended to compensate law firms for the risk that they may never be paid for their time or reimbursed for their disbursements."[90] In *PayPal*, class counsel's fee request of 25% was deemed fair and reasonable in the context of a settlement achieved *prior* to the hearing of the contested certification motion. In contrast, in the present case, Class Counsel are seeking a fee of 30% in the context where they were successful on a contested

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87 *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105, paras. 67. *Helm v. Toronto Hydro- Electric System Limited*, 2012 ONSC 2602, paras. 25-26.

88 *Gagne v. Silcorp Ltd*. 1998 CarswellOnt 4045 at para 14.

89 *Helm v. Toronto Hydro-Electric System Limited*, 2012 ONSC 2602

90 *PayPal*, *supra* at para. 87.

leave and certification motion (following the Supreme Court appeal), completed discovery and prepared the case to the eve of trial.

268. Regardless of whether a multiplier or percentage of recovery method is selected, the fee request in the present case is within the realm of reasonableness.

269. Here, the requested fees are 30% of the settlement amount, a range that is routinely approved in Canadian class action settlements.

270. Furthermore, in this case, the multiplier is approximately 2.5 times the value of Class Counsel's docketed time of $14,808,597 which is not unexpected, given that this action was started in 2008. Courts have held that a multiplier even up to 4 times docketed time is presumptively fair. This Court recently held in a fee approval motion in *Pace Securities* that "a multiplier of 2.5 times is well within the range accepted in the caselaw and may well be considered "low" in some circumstances."[91]

271. For these reasons, it is respectfully submitted that the fee request of 30% of the $125 million settlement, or $37.5 million plus disbursements and taxes, is fair and reasonable and should be approved.

272. In short, Class Counsel are seeking the approval the following payments:[92]

ITEM	TOTAL
Fee Request:	$37,500,000.00

[91] *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*, 2021 ONSC 6956, para. 28. *Fantl v. Transamerica Life Canada*, 2009 CanLII 55704 (Ont. S.C.J.), para. 92. Further, in *Brown*, this Court approved a four-times multiplier. *Brown, supra* at para 71.

[92] Genova Supplemental Affidavit at para. 4.

ITEM	TOTAL
HST on Fee Request:	$4,875,000.00
Unfunded / outstanding disbursements incurred by Rochon Genova (inclusive of HST):	$2,624,535
Total Fee/Disbursement Request (including applicable taxes):	**$44,999,533**

273. In addition, as described above, Class Counsel seek the approval of the payment of CPF's statutory levy (10%) and the repayment of disbursements covered by CPF ($4.6 million), in the total amount of approximately $12 million.[93]

D: APPROVAL OF HONORARIA

274. Honoraria of $25,000 per plaintiff are requested for each of the Representative Plaintiffs in recognition of the commitment, time and energy they gave in advancing this matter on behalf of the Class.

275. For the benefit of the Class, they actively initiated this class action and subjected their individual circumstances and investment practices to significant scrutiny by way of documentary production and discovery. They were involved through pleadings, the leave and certification motion, the appeal process, examinations for discovery, preparation for trial and mediation.

276. Their evidence makes clear that they have each been active participants throughout the lengthy history of this litigation and have made a significant contribution to the excellent result achieved for the Class.

[93] Genova Fee Approval Affidavit at para 53 and Genova Supplemental Affidavit at para. 3.

277. 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.[94] Their willingness to step forward and persevere in representing the Class through many years and their continued active participation have earned them the recognition that the requested honoraria entails.

V. ORDER REQUESTED

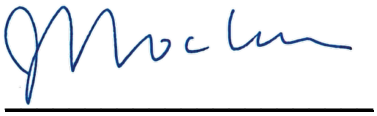
278. The Plaintiffs request an order:

(a) approving the Settlement Agreement, the Distribution Protocol, the payment of honoraria to the Representative Plaintiffs; and

(b) approving the retainer agreements and the legal fees in the amount of $37,500,000.00 plus applicable taxes, and reimbursement of disbursements of $2,624,535.12 inclusive of taxes.

(c) approving the distribution to the CPF of its statutory levy and funded disbursements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 8th day of January, 2022



Joel P. Rochon / Peter R. Jervis / Douglas M. Worndl / Ronald Podolny

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

SCHEDULE "A"

Tab	Description
1.	*AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 (CanLII)
2.	*Allen v. The Manufacturers Life Insurance Company*, 2016 ONSC 5895 (CanLII)
3.	*Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 (CanLII)
4.	*Baroch v. Canada Cartage*, 2021 ONSC 7376 (CanLII)
5.	*Bilodeau v Maple Leaf Foods Inc*, 2009 CarswellOnt 1301
6.	*Bradley v. Eastern Platinum Ltd.*, 2016 ONSC 1903 (CanLII)
7.	*Brown v. Canada (Attorney General)* 2018 ONSC 3429 (CanLII)
8.	*Canadian Imperial Bank of Commerce v. Deloitte*, 2017 ONSC 5000
9.	*Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 (CanLII)
10.	*Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670 (CanLII)
11.	*C.S. v. Ontario* , 2021 CarswellOnt 14417
12.	*Dabbs v Sun Life Assurance Co of Canada*, 1998 CarswellOnt 2758
13.	*Fantl v. Transamerica Life Canada*, 2009 ONSC 55704 (CanLII)
14.	*Ford v. F. Hoffmann-La Roche Ltd. 2005* CarswellOnt 1095
15.	*Gagne v. Silcorp Ltd*. 1998 CarswellOnt 4045
16.	*Garland v Enbridge Gas Distribution Inc*, 2006 CarswellOnt 6585
17.	*Goldsmith v. National Bank of Canada*, 2016 ONCA 22 (CanLII)
18.	*Good v. Toronto Police Services Board*, 2020 ONSC 6332 (CanLII)
19.	*Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 (CanLII)
20.	*Helm v. Toronto Hydro- Electric System Limited*, 2012 ONSC 2602 (CanLII)
21.	*Ironworkers Ontario Pension Fund v Manulife Financial*, 2017 ONSC 2669 (CanLII)
22.	*Kaplan v. PayPal CA Limited*, 2021 ONSC 1981 (CanLII)
23.	*MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726 (CanLII)
24.	*Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324 (CanLII)
25.	*McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662 (CanLII)
26.	*McSherry v Zimmer GmbH*, 2016 ONSC 4606 (CanLII)

Tab	Description
50.	Howard M Erichson, “Aggregation as Disempowerment: Red Flags in Class Action Settlements” (2016) 92 Notre Dame L Rev 859 at 873

SCHEDULE "B'

Class Proceedings Act, 1992, S.O. 1992, c. 6

Discontinuance, abandonment and settlement

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

Settlement without court approval not binding

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

Effect of settlement

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

Notice: dismissal, discontinuance, abandonment or settlement

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

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

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

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

Securities Act

R.S.O. 1990, CHAPTER S.5

Purposes of Act

1.1 The purposes of this Act are,

(a) to provide protection to investors from unfair, improper or fraudulent practices;

(b) to foster fair, efficient and competitive capital markets and confidence in capital markets;

(b.1) to foster capital formation; and

(c) to contribute to the stability of the financial system and the reduction of systemic risk. 1994, c. 33, s. 2; 2017, c. 34, Sched. 37, s. 2; 2021, c. 8, Sched. 9, s. 40 (7).

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") 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 10; 2006, c. 33, Sched. Z.5, s. 14; 2007, c. 7, Sched. 38, s. 11; 2010, c. 1, Sched. 26, s. 6; 2010, c. 26, Sched. 18, s. 38.

Section Amendments with date in force (d/m/y)

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 11.

Section Amendments with date in force (d/m/y)

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (1, 2).

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (3).

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (4).

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (5); 2006, c. 33, Sched. Z.5, s. 15.

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (6).

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (7).

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. 2004, c. 31, Sched. 34, s. 12 (8).

Section Amendments with date in force (d/m/y)

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

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

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

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

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

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (2).

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (3).

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (4).

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (5).

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (6).

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) 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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (7, 8).

Confidential disclosure

(8) A person or company is not liable in an action under section 138.3 in respect of a failure to make timely disclosure if,

(a) the person or company proves that the material change was disclosed by the responsible issuer in a report filed on a confidential basis with the Commission under subsection 75 (3) or the regulations;

(b) the responsible issuer had a reasonable basis for making the disclosure on a confidential basis;

(c) where the information contained in the report filed on a confidential basis remains material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist;

(d) the person or company or responsible issuer did not release a document or make a public oral statement that, due to the undisclosed material change, contained a misrepresentation; and

(e) where the material change became publicly known in a manner other than the manner required under this Act or the regulations, the responsible issuer promptly disclosed the material change in the manner required under this Act or the regulations. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (9); 2006, c. 33, Sched. Z.5, s. 16 (1, 2).

Forward-looking information

(9) A person or company is not liable in an action under section 138.3 for a misrepresentation in forward-looking information if the person or company proves all of the following things:

1. The document or public oral statement containing the forward-looking information contained, proximate to that information,

i. reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and

ii. a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.

2. The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information. 2004, c. 31, Sched. 34, s. 13 (10).

Same

(9.1) The person or company shall be deemed to have satisfied the requirements of paragraph 1 of subsection (9) with respect to a public oral statement containing forward-looking information if the person who made the public oral statement,

(a) made a cautionary statement that the oral statement contains forward-looking information;

(b) stated that,

(i) the actual results could differ materially from a conclusion, forecast or projection in the forward-looking information, and

(ii) certain material factors or assumptions were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information; and

(c) stated that additional information about,

(i) the material factors that could cause actual results to differ materially from the conclusion, forecast or projection in the forward-looking information, and

(ii) the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information,

is contained in a readily-available document or in a portion of such a document and has identified that document or that portion of the document. 2004, c. 31, Sched. 34, s. 13 (10).

Same

(9.2) For the purposes of clause (9.1) (c), a document filed with the Commission or otherwise generally disclosed shall be deemed to be readily available. 2004, c. 31, Sched. 34, s. 13 (10).

Exception

(10) Subsection (9) does not relieve a person or company of liability respecting forward-looking information in a financial statement required to be filed under this Act or the regulations or forward-looking information in a document released in connection with an initial public offering. 2004, c. 31, Sched. 34, s. 13 (10); 2006, c. 33, Sched. Z.5, s. 16 (3).

Expert report, statement or opinion

(11) A person or company, other than an expert, is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert in respect of which the responsible issuer obtained the written consent of the expert to the use of the report, statement or opinion, if the consent had not been withdrawn in writing before the document was released or the public oral statement was made, if the person or company proves that,

(a) the person or company did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert; and

(b) the part of the document or oral public statement fairly represented the report, statement or opinion made by the expert. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (11).

Same

(12) An expert is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert, if the expert proves that the written consent previously provided was withdrawn in writing before the document was released or the public oral statement was made. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (12).

Release of documents

(13) A person or company is not liable in an action under section 138.3 in respect of a misrepresentation in a document, other than a document required to be filed with the Commission, if the person or company proves that, at the time of release of the document, the person or company did not know and had no reasonable grounds to believe that the document would be released. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (13).

Derivative information

(14) A person or company is not liable in an action under section 138.3 for a misrepresentation in a document or a public oral statement, if the person or company proves that,

(a) the misrepresentation was also contained in a document filed by or on behalf of another person or company, other than the responsible issuer, with the Commission or any other securities regulatory authority in Canada or an exchange and was not corrected in another document filed by or on behalf of that other person or company with the Commission or that other securities regulatory authority in Canada or exchange before the release of the document or the public oral statement made by or on behalf of the responsible issuer;

(b) the document or public oral statement contained a reference identifying the document that was the source of the misrepresentation; and

(c) when the document was released or the public oral statement was made, the person or company did not know and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (14); 2010, c. 26, Sched. 18, s. 39.

Where corrective action taken

(15) A person or company, other than the responsible issuer, is not liable in an action under section 138.3 if the misrepresentation or failure to make timely disclosure was made without the knowledge or consent of the person or company and, if, after the person or company became aware of the misrepresentation before it was corrected, or the failure to make timely disclosure before it was disclosed in the manner required under this Act or the regulations,

(a) the person or company promptly notified the board of directors of the responsible issuer or other persons acting in a similar capacity of the misrepresentation or the failure to make timely disclosure; and

(b) if no correction of the misrepresentation or no subsequent disclosure of the material change in the manner required under this Act or the regulations was made by the responsible issuer within two business days after the notification under clause (a), the person or company, unless prohibited by law or by professional confidentiality rules, promptly and in writing notified the Commission

of the misrepresentation or failure to make timely disclosure. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (15); 2006, c. 33, Sched. Z.5, s. 16 (4).

Section Amendments with date in force (d/m/y)

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. 2002, c. 22, s. 185; 2006, c. 33, Sched. Z.5, s. 17; 2007, c. 7, Sched. 38, s. 12 (1-4).

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 14; 2006, c. 33, Sched. Z.5, s. 17; 2007, c. 7, Sched. 38, s. 12 (5-8).

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. 2002, c. 22, s. 185.

Section Amendments with date in force (d/m/y)

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 15 (1).

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 15 (2).

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). 2002, c. 22, s. 185.

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. 2002, c. 22, s. 185.

Section Amendments with date in force (d/m/y)

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 16.

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. 2002, c. 22, s. 185.

Section Amendments with date in force (d/m/y)

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 17.

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. 2002, c. 22, s. 185.

Same

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court. 2002, c. 22, s. 185.

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. 2009, c. 34, Sched. S, s. 6 (1).

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. 2009, c. 34, Sched. S, s. 6 (2).

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. 2009, c. 34, Sched. S, s. 6 (2); 2010, c. 1, Sched. 26, s. 7.

Section Amendments with date in force (d/m/y)

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 18; 2009, c. 34, Sched. S, s. 7 (1).

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. 2009, c. 34, Sched. S, s. 7 (2).

Section Amendments with date in force (d/m/y)

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. 2004, c. 31, Sched. 34, s. 19.

Section Amendments with date in force (d/m/y)

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 20.

Section Amendments with date in force (d/m/y)

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. 2009, c. 34, Sched. S, s. 8.

Section Amendments with date in force (d/m/y)

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. 2004, c. 31, Sched. 34, s. 22.

Section Amendments with date in force (d/m/y)

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. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 23.

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. 2014, c. 7, Sched. 28, s. 15.

Section Amendments with date in force (d/m/y)

HOWARD GREEN et al
Plaintiffs

- and -

CANADIAN IMPERIAL BANK OF COMMERCE et al
Defendants

Court File No: CV-08-359335

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE PLAINTIFFS
(Approval of Settlement Agreement, Distribution Plan and Fee Request
Returnable January 12, 2022)

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