Court File No. CV-12-44865100CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

E. EDDY BAYENS, JOHN SINCLAIR, LUC FORTIN, PIERRE RACICOT and STANLEY SHORTT, in their capacity as TRUSTEES OF THE MUSICIANS' PENSION FUND OF CANADA

Plaintiffs

- and -

KINROSS GOLD CORPORATION, TYE W. BURT, PAUL H. BARRY, GLEN J. MASTERMAN and KENNETH G. THOMAS

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE MOVING PLAINTIFFS
(Fee and Settlement Approval)

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PART I - OVERVIEW OF THE MOTION

1. This is a motion to approve the settlement of a proposed class proceeding concerning allegations of material misrepresentations. The parties come to this court for judicial approval of a $12.5 million all inclusive settlement following unsuccessful motions for leave pursuant to the *Securities Act*[1] (the "OSA") and certification pursuant to the *Class Proceedings Act, 1992*[2] (the "CPA").

2. The Plaintiffs submit that the settlement is fair, reasonable and in the best interests of the class. A payment of $12.5 million represents a substantial recovery for class members that is more certain and sooner than continued pursuit of a Leave to Appeal application to the Supreme Court of Canada or any potential judgment on the common issues or subsequent individual assessments. Most importantly, the mandatory threshold motions for certification pursuant to the

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[1] *Securities Act,* RSO 1990, c S.5.

[2] *Class Proceedings Act, 1992,* SO 1992, c. 6.

CPA and leave to proceed with claims pursuant to section 138 of the OSA were dismissed by this court, sustained on appeal. At present, this action has yet to even be certified as a class proceeding.

3. While an application for leave to appeal to the Supreme Court of Canada is pending, the reality is that only a handful of such application are typically granted, particularly when they engage the interpretation of provincial civil procedural matters.

4. Continuing litigation includes the very probable risks that: (a) leave to appeal would be denied by the Supreme Court of Canada, (b) leaving the class with an uncertified action and (c) leaving only the representative Plaintiffs with a common law claim for negligent misrepresentation. Even if leave to appeal were granted, and the Plaintiffs were successful in the end on the merits of the motions, that eventuality would take approximately two years from now to obtain. A common issues trial would still remain in order to finally resolve the matter.

5. Even if the action were permitted to proceed to the common issues trial stage, the proven damages could be similar to or less than the settlement amount (particularly if one factors in the litigation costs of a common issues trial and, if required, individual assessments), not to mention the additional years it would have taken to get to trial, plus all of its attendant appeals.

6. The Plaintiffs respectfully request that: (a) the settlement agreement be approved by this Honourable Court in its entirety and without modification; (b) class counsel fees of $3,437,500.00 million be approved reflecting a multiplier of 2.4; and (c) the action be dismissed without costs.

PART II - HISTORY OF THE ACTION

A. Nature Of The Action – Commenced March 2012

7. Koskie Minsky LLP ("Class Counsel") was retained by the Board of Trustees of the Musicians' Pension Fund of Canada (the "Plaintiffs") to initiate and prosecute this securities class action in the spring of 2012.[3]

8. The claims advanced pertain to alleged misrepresentations and an alleged failure to make timely disclosure of material changes or facts relating to the Tasiast and Chirano mines by Kinross Gold Corporation, Tye W. Burt, Paul H. Barry, Glen J. Masterman and Kenneth G. Thomas (the "Defendants"). The Notice of Action was served on the Defendants on March 12, 2012. The Statement of Claim was served on the Defendants on April 10, 2012.[4] The action was initially brought on behalf of persons who purchased the shares of Kinross Gold Corporation between February 16, 2011 and January 16, 2012.[5] The class definition has been subsequently amended, pursuant to the terms of the parties' settlement agreement.[6]

B. Funding Of The Action – April 2012 to July 2013

9. On April 5, 2012, the Plaintiffs made an application for funding to the Ontario Class Proceedings Fund. The funding application was set down for a hearing on May 22, 2012. Following the hearing, the Class Proceedings Committee made several inquiries of Class Counsel concerning the merits of this action, answers to which were provided by the Plaintiffs. Further inquiries were made by the Class Proceedings Committee on July 4, 2012 concerning the merits of this action, answers to which were again provided by the Plaintiffs. It was not until September 2012 that the Class Proceedings Fund definitively indicated that it was denying the

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[3] Exhibit "B" to the Affidavit of Michael Mazzuca, sworn June 3, 2015 at para. 3 ("Mazzuca Affidavit"), Motion Record of the Plaintiffs, Tab 2B, p. 112.

[4] Mazzuca Affidavit, at para. 5, Motion Record of the Plaintiffs, Tab 2, p. 11.

[5] Mazzuca Affidavit, at para. 6, Motion Record of the Plaintiffs, Tab 2, p. 11.

[6] Exhibit "G" to the Mazzuca Affidavit, Motion Record of the Plaintiffs, Tab 2G, p. 255.

Plaintiffs' funding application.[7]

10. Following its application for funding to the Class Proceedings Fund, Class Counsel approached Harbour Fund II, L.P. ("Harbour") regarding funding for this action. Harbour considered the request for funding over several months and ultimately agreed to fund this action. Class Counsel negotiated the terms of Harbour's indemnity over the course of several more months. Ultimately, an agreement that was more favourable than the terms offered by the Class Proceedings Fund was agreed upon between Class Counsel, the Plaintiffs and Harbour.[8]

11. On May 30, 2013, the Plaintiffs entered into a formal litigation funding agreement with Harbour.[9] The funding agreement provided that Harbour will provide an indemnity for adverse cost awards in an amount up to $1 million for the motions for certification and leave, and $5 million afterwards, in respect of any common issues trial. In return, if the action succeeds, Harbour would be repaid any adverse costs it paid and receive a percentage of net recovery to the class (net of class counsel fees, taxes, and disbursements and administration and notice costs). Harbour would receive 7.5% of any net recovery if the action was resolved before the certification hearing or 10% of net recovery if resolved after certification was finally resolved.

12. In July 2013, the Plaintiffs moved before the court to have the Harbour funding agreement approved by the case management judge. Pursuant to the Order of Justice Perell dated July 22, 2013, the funding agreement was approved.[10] In accordance with the terms of that funding agreement, on August 12, 2013, Harbour paid $300,000.00 into Court as security for costs.[11]

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[7] Mazzuca Affidavit, at para. 14, Motion Record of the Plaintiffs, Tab 2, p. 13.

[8] Mazzuca Affidavit, at para. 15, Motion Record of the Plaintiffs, Tab 2, p. 13.

[9] Exhibit "J" to the Mazzuca Affidavit, at para. 18, Motion Record of the Plaintiffs, Tab 2J, p. 300.

[10] Exhibits "K" and "L" to the Mazzuca Affidavit, at para. 17, Motion Record of the Plaintiffs, Tabs 2K and 2L, p. 343 and 347.

[11] Exhibit "M" to the Mazzuca Affidavit, at para. 18, Motion Record of the Plaintiffs, Tab 2M, p. 356.

C. Leave & Certification Motions – Heard October 2013

13. The Plaintiffs filed their motions for certification and leave pursuant to Part XXIII.1 of the Ontario OSA on October 2, 2012. In support of the motions, the Plaintiffs filed a voluminous record containing expert affidavits from:

(a) Alan Mak, a Chartered Accountant, who provided an opinion on the accounting and reporting of goodwill for Kinross's purchase of Red Back Mining Inc.;

(b) Michael Wilson, a senior consultant with CSO Consulting Services Inc., who provided an opinion on technical mining issues;

(c) Frank Torchio, President of Forensic Economics Inc., who provided an opinion regarding the efficiency of the markers for the common stock of Kinross Gold Corporation, and a preliminary estimate of potential aggregate damages under the OSA; and

(d) David Weir, the President of NPT RicePoint Class Action Services Inc., who provided an opinion on the manner in which notice of certification should be distributed if the claim was certified.[12]

14. In response to the Plaintiffs' motion record, the Defendants filed a lengthy responding record on April 15, 2013. The Defendants' responding motion record contained fact affidavits from Dr. Glen Masterman, Kinross's Senior Vice-President, Exploration and Juliana Lam, Kinross's former Senior Vice-President, Finance. The Defendants' responding record also contained a fact affidavit from Edward G. Lee, a Managing Director of Duff & Phelps, LLC, and expert reports from Dr. Gordon Richardson, a Chartered Accountant, and Robert G. Connochie, a mineral development and management expert.[13]

15. On May 7, 2013, the Plaintiffs filed a reply motion record containing further affidavits from Messrs. Mak and Wilson, followed by two Requests to Admit on the Defendants.[14] In August 2013, the Defendants filed a sur-reply motion record containing further affidavits from Mr. Lee, Dr. Richardson, Dr. Masterman and Mr. Connochie. Finally, on September 26, 2013,

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[12] Mazzuca Affidavit, at para. 20, Motion Record of the Plaintiffs, Tab 2, p. 15.

[13] Mazzuca Affidavit, at para. 22, Motion Record of the Plaintiffs, Tab 2, p. 15.

[14] Mazzuca Affidavit, at paras. 23, Motion Record of the Plaintiffs, Tab 2, p. 16.

the Plaintiffs filed a sur-reply motion record containing the answers to its Request to Admit.[15]

16. With voluminous records tendered by both sides, the Plaintiffs' motions for certification and leave were heard before Justice Perell on October 22, 23, and 24, 2013. Virtually every component of the statutory leave and certification tests was in contention between the parties. The motions also raised the following novel point of first impression: what is the appropriate interplay between the statutory leave and certification tests? If leave pursuant to the OSA is denied, how does that impact the certification determination?

17. Ultimately, both of the Plaintiffs' motions were dismissed in their entirety.[16] Amongst other things, the court found that:

> "… there is **no possibility** – let alone a reasonable possibility – that Musicians' action for the Goodwill Misrepresentation could succeed at trial. … **Musicians is not even close to getting over the bar.** The case it advanced for a triggering event for a goodwill impairment based on what Kinross knew or ought to have known, which case will not get better by examinations for discovery, has no possibility of success. … To this day, the thesis that Kinross' hopes were falsified hopes remains an open question."[17] [emphasis added]

18. By orders dated November 5, 2013 and December 17, 2013, the action was dismissed and the Plaintiffs ordered to pay costs in the amount of $500,000, inclusive of all fees, disbursements and HST, for the unsuccessful certification and leave motions.[18]

D. Appeal To The Court of Appeal – June 2014

19. A Notice of Appeal to the Court of Appeal for Ontario was served on the Defendants on November 28, 2013 from the denial of leave to proceed with claims pursuant to Part XXIII.1 of the OSA. In addition, on November 28, 2013 the Plaintiffs appealed to the Divisional Court from

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[15] Mazzuca Affidavit, at paras. 23, 24, 25, 26, Motion Record of the Plaintiffs, Tab 2, p. 16.

[16] Exhibit "P" to the Mazzuca Affidavit, at para. 27, Motion Record of the Plaintiffs, Tab 2P, p. 402.

[17] Reasons of Justice Perell, paras. 178, 182, 188, Exhibit "O" to the Mazzuca Affidavit, Motion Record of the Plaintiffs, Tab 2O, pp. 390 and 391.

[18] Exhibits "P" and "Q" to the Mazzuca Affidavit, Motion Record of the Plaintiffs, Tabs 2P and 2Q, pp. 402 and 405.

the denial of certification.[19] On December 5, 2013, the Plaintiffs brought a motion on consent of the Defendants requesting that the Divisional Court appeal be transferred to the Court of Appeal so that all appeals could be heard together.[20]

20. The appeals to the Court of Appeal for Ontario were heard on June 11, 2014. By Reasons dated December 17, 2014, the Plaintiffs' appeals were dismissed in their entirety.[21] The Court of Appeal determined that:

> "…I am not persuaded that, in the end, the motion judge misapprehended the leave test in any material way. Read as a whole, his reasons confirm that he appreciated the essential nature of the leave test under section 138.1 of the *Securities Act*, including the reasonable possibility requirement, as outlined by this court in *Green*. …. **Resolution of these questions does not lend itself to a class action**. **Rather, the need for a host of individual inquiries regarding reliance, causation and damages renders the common law claims unsuitable for certification**. …. To permit a class action to proceed in the circumstances of this case, in my view, would render access to justice more illusory than real and would significantly undercut the goal of judicial economy. The goal of behaviour modification does not alter this conclusion."[22] [emphasis added]

21. Costs arising from the Plaintiffs' appeals were set at $85,000.00 inclusive of all fees, disbursements and HST.[23] Following the dismissal of the motions and the appeals, the Plaintiffs owed a total of $585,000.00 to the Defendants in costs.

22. Therefore, by the end of 2014, both the Ontario Superior Court and the Court of Appeal for Ontario had determined that the Plaintiffs' motions had no possibility of success on their merits.[24] As the civil standard of proof at trial is considerably higher than on a motion for leave pursuant to the OSA, the Plaintiffs would have faced even more substantial obstacles at a trial

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[19] Mazzuca Affidavit, at para. 29, Motion Record of the Plaintiffs, Tab 2, p. 16.

[20] Mazzuca Affidavit, at para. 30, Motion Record of the Plaintiffs, Tab 2, p. 17.

[21] Exhibit "S" to the Mazzuca Affidavit, at para. 32, Motion Record of the Plaintiffs, Tab 2S, p. 411.

[22] Reasons of Hoy A.C.J.O., Cronk and Peppal JJ.A., paras. 51, 129, 139, Exhibit "S" to Mazzuca Affidavit, Motion Record of the Plaintiffs, Tab 2S, pp. 433, 463 and 467.

[23] Exhibit "T" to the Mazzuca Affidavit, at paras. 32, 33 Motion Record of the Plaintiffs, Tab 2T, p. 475.

[24] Mazzuca Affidavit, at para. 40, Motion Record of the Plaintiffs, Tab 2, p. 19.

(had they ever had the chance to prosecute one).[25]

E. Defendants' Offer to Settle The Action Without Costs – January 2015

23. On January 13, 2015, before the Plaintiffs filed their application for Leave to Appeal to the Supreme Court of Canada, the Defendants made an offer to the Plaintiffs to settle this action on the following terms:

(a) the costs awards of $500,000 for the leave and certification motions and $85,000 for the appeal would be waived by the Defendants, including accrued interest;

(b) the Plaintiffs would undertake to not commence an application for leave to appeal to the Supreme Court of Canada;

(c) the Plaintiffs would deliver a full and final release, in a form satisfactory to the Defendants, releasing the Defendants from any and all claims, asserted or unasserted, known or unknown, up to the date of the release;

(d) the parties would both consent to an order dismissing this action without costs, which order would have presented in draft to Justice Perell for signature, in a joint submission by counsel for the parties confirming the parties' agreement that the dismissal order does not require court approval in light of the dismissal of the Plaintiffs' leave and certification motions, upheld on appeal;

(e) in the event that Justice Perell declined to sign the dismissal order, the parties would take all steps necessary to obtain an issued and entered dismissal order, including but not limited to, the Plaintiffs bringing a motion for court approval of the settlement, with the consent of the Defendants; and

(f) Class Counsel would undertake and agree not to provide representation, advice, information, documentation, encouragement or assistance to any person in relation to any other proceedings arising out of or relating in any way to the subject matter of the claims pleaded or that could have been pleaded in this action.[26]

24. While the Plaintiffs seriously considered the offer, on the instructions of the representative Plaintiffs, Class Counsel ultimately rejected the terms of the offer on their behalves. Instead, the Plaintiffs submitted their application for Leave to Appeal to the Supreme

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[25] Mazzuca Affidavit, at para. 46, Motion Record of the Plaintiffs, Tab 2, p. 20.

[26] Exhibit "V" to the Mazzuca Affidavit, at paras. 56, 57, Motion Record of the Plaintiffs, Tab 2V, p. 520.

Court of Canada.[27] Given the Supreme Court of Canada's published statistics on Leave to Appeal applications - that only approximately 12% succeed - the Plaintiffs nevertheless appreciated that their application could very well be denied.[28] As a result, the Plaintiffs and Class Counsel took a serious risk in rejecting the terms of the Defendants' January 2015 offer to settle the litigation.

F. Leave to Appeal to The Supreme Court of Canada – February 2015

25. On February 11, 2015, the Plaintiffs perfected their application record for Leave to Appeal to the Supreme Court of Canada, including their Memorandum of Argument. On March 12, 2015, the Defendants filed their Response on the Application for Leave to Appeal to the Supreme Court of Canada. On March 23, 2015, the Plaintiffs filed their Reply to Response to the Application for Leave to Appeal.[29] The Supreme Court of Canada has not yet rendered a decision on the Plaintiffs' application.[30]

G. Settlement Negotiations & Agreement Ultimately Reached – April 2015

26. In February and March 2015, the parties engaged in settlement negotiations, resulting in the Settlement Agreement.[31] Had the Plaintiffs accepted the January 2015 offer to dismiss without costs and not sought leave to appeal, there would have been no extant litigation for the Plaintiffs to settle or negotiate in March 2015.

27. The Settlement Agreement was reached through hard-fought arm's length good faith negotiations and represents a compromise between the parties. The key terms of the Settlement Agreement include:

(a) Class Counsel shall advise the Supreme Court of Canada that the parties are asking the Supreme Court of Canada not to take any steps to decide the leave

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[27] Mazzuca Affidavit, para. 58, Motion Record of the Plaintiffs, Tab 2, p. 24.

[28] Mazzuca Affidavit, paras. 42, 43, Motion Record of the Plaintiffs, Tab 2, p. 19.

[29] Mazzuca Affidavit, paras. 34, 35, 36, Motion Record of the Plaintiffs, Tab 2, pp. 17 and 18.

[30] Mazzuca Affidavit, para. 37, Motion Record of the Plaintiffs, Tab 2, p. 18.

[31] Exhibit "A" to the Mazzuca Affidavit, at paras., 60, 61, Motion Record of the Plaintiffs, Tab 2A, p. 38.

application unless the settlement agreement is terminated (which has been done);

(b) the Defendants continue to vigorously dispute, deny and contest the allegations in the action and any wrongdoing or liability in connection with the Tasiast and/or Chirano mines;

(c) all claims that were or could have been asserted arising from this action shall be released;

(d) the Defendants, through their insurers, reinsurers and/or co-insurers, shall pay the all-inclusive sum of $12.5 million;

(e) unless the agreement is terminated in accordance with its terms, the Defendants are not entitled to a reversion of any portion of the settlement amount;

(f) Class Counsel fees, repayment of disbursements, administrative costs and notice costs are to be paid from the settlement fund; and

(g) if the opt out threshold is exceeded, the Defendants may terminate the settlement agreement.[32]

28. Following the execution of the Settlement Agreement, on April 27, 2015, on consent of all parties, Class Counsel sent a letter to Roger Bilodeau, Q.C., Registrar of the Supreme Court of Canada, advising Mr. Bilodeau of the proposed Settlement Agreement and asking the Supreme Court of Canada not to take any steps to decide the leave to appeal application pending the outcome of the motion to approve the Settlement Agreement.[33] The letter further provides that if the settlement is not approved or otherwise fails pursuant to its terms, the parties will advise the Supreme Court of Canada and will request that it make a determination on the leave application.[34]

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[32] Mazzuca Affidavit, at para. 61, Motion Record of the Plaintiffs, Tab 2, p. 24.

[33] Mazzuca Affidavit, at para. 38, Motion Record of the Plaintiffs, Tab 2, p. 18.

[34] Exhibit "X" to the Mazzuca Affidavit, at para. 38, Motion Record of the Plaintiffs, Tab 2X, p. 555.

H. Work Of Class Counsel In Advancing This Action

29. Class counsel, Koskie Minsky LLP, has prosecuted this action on behalf of the class and without compensation through key motions, appeals, a Supreme Court of Canada application and settlement negotiations. Koskie Minsky has acted in this matter for close to four (4) years and undertaken the following steps in advancing the litigation to this point:

(a) investigated this action and prepared pleadings;

(b) retained accounting, mining and damages experts;

(c) prepared OSA leave to proceed and certification materials;

(d) sought third party funding which spanned over one year;

(e) attended and defended cross-examinations of affiants by the Defendants;

(f) argued and prepared for a three day leave and certification motion;

(g) negotiated an appeal process which obviated the need to attend before the Divisional Court with respect to the certification decision and packaged all issues to go directly to the Court of Appeal;

(h) argued and prepared for an appeal before the Court of Appeal;

(i) prepared and filed a leave to appeal application to the Supreme Court of Canada;

(j) attended various cases conferences;

(k) communicated with class members, the instructing Plaintiffs and reported to Harbour.

30. Koskie Minsky has incurred 2,812.60 hours in time in prosecuting this action as of June 1, 2015. The total fees docketed as of June 1, 2015 are $1,430,107.70 (exclusive of tax). Koskie Minsky seeks a multiplier of 2.4 of its docketed time, reflecting 27.5% of the amount recovered in settlement, consistent with the terms of the Retainer Agreement.

31. This action was large and complex. Class Counsel devoted a significant amount of lawyers, students and clerk time to prosecuting this action efficiently and effectively. Class Counsel undertook full responsibility for prosecuting this action. No other law firms assisted

Class Counsel with the prosecution of this action.[35] A detailed chart of the hours and the value of the time docketed to this matter by Class Counsel up to June 1, 2015 is attached as Schedule "C" to this factum.[36] In total, Class Counsel devoted approximately 2,812.60 hours of lawyer, student and clerk time to the prosecution of this action.

32. The Plaintiffs respectfully request that the proposed settlement and fee request be approved as both satisfy the judicial and statutory criteria for approval: both the terms of the agreement and the fees sought are fair, reasonable and in the best interests of the class.

PART III - ISSUES AND THE LAW

33. There are two discrete issues on this motion:

(a) is the settlement fair, reasonable and in the best interests of the class?

(b) are the requested fees for class counsel fair and reasonable in light of the risks undertaken in prosecuting this litigation, the degree of success achieved and the terms of the Retainer Agreement?

A. The Settlement Is Fair, Reasonable and In the Best Interests Of The Class

(i) The Test For Settlement Approval Pursuant to Section 29 of the CPA

34. The test on a motion for settlement approval is "whether the settlement is fair, reasonable and in the best interests of the class as a whole" and "not whether it meets the demands of a particular member". The settlement must fall within the range of reasonableness in order to obtain court approval: it need not be 'perfect'.[37]

35. The "range of reasonableness" test permits that a number of settlement possibilities may be in the best interests of a class when compared to the unpredictable alternative of costly protracted litigation. Compromises are to be expected and indeed, encouraged by the courts and

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[35] Mazzuca Affidavit, at para. 72, Motion Record of the Plaintiffs, Tab 2, p. 28.

[36] Exhibit "CC" to the Mazzuca Affidavit, at para. 66, Motion Record of the Plaintiffs, Tab 2CC, pp. 607-611.

[37] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.) at para. 69, Book of Authorities of the Plaintiffs at Tab 1.

supported by public policy.[38]

36. In determining whether to approve a settlement, courts may consider, among other factors:

(a) the likelihood of recovery or success;

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

(c) the terms of the settlement;

(d) the recommendation and experience of class counsel;

(e) future expenses and likely duration of litigation and its attendant risks;

(f) the recommendations of neutral parties;

(g) the number of objections or objectors, if any;

(h) the presence of good faith, arms-length bargaining and the absence of collusion;

(i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and

(j) information conveying to the court the dynamics of and positions taken by parties during the negotiations.[39]

37. There is a "strong initial presumption of fairness" when the settlement is negotiated at arm's-length and recommended by experienced class counsel:

> "Where the parties are represented – as they are in this case – by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable

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[38] *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.) at para. 30, Book of Authorities of the Plaintiffs at Tab 2; *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.) at para. 21, Book of Authorities of the Plaintiffs at Tab 3.

[39] *Sayers v. Shaw CablesystemsLimited*, 2011 ONSC 962 at para. 28 [*Sayers*], Book of Authorities of the Plaintiffs at Tab 4.

> settlement and that class counsel is staking his or her reputation and experience on the recommendation."[40]

38. Moreover, where certification is sought for the purposes of settlement, all of the criteria for certification must still be satisfied but compliance with that "criteria is not as strictly required because of the difference circumstances associated with settlements. … [and] the fact that certification has previously been denied does not preclude certification being granted in the context of a settlement".[41]

39. *A fortiori* in this case where the "real certification battleground between the parties in relation to the common law claims concerns the issue whether a class is the preferred procedure."[42] There can be no doubt now that a substantial monetary settlement of dismissed claims, sustained on appeal, is preferable to continued litigation of an uncertified class proceeding. All other certification criteria in this case have already been found to exist by the Court of Appeal for Ontario:

> "The appellants' pleading is susceptible to appropriate amendments to assert the required elements of the common law tort. … The class definition proposed by the appellants clearly identifies the persons who have a potential claim against the respondents and adequately defines the class period. Accordingly, the class definition and the representative plaintiff criteria pose no impediment to certification of the common law claims. …the resolution of the questions posed as common issues is necessary to the resolution of the claims of each class members. Moreover, the resolution of these questions would appear to advance the claims of the entire class and, if commonly determined, will avoid duplication of legal and factual analysis."[43]

40. As such, there is 'some basis in fact' upon which to certify this action as a class proceeding for settlement purposes.

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[40] *Serhan v. Johnson & Johnson*, 2011 ONSC 128 at paras. 55 and 56 [*Serhan*], Book of Authorities of the Plaintiffs at Tab 5.

[41] *Fischer v. IG Investment Management Ltd*., 2010 ONSC 5132 at paras. 10 and 17, Book of Authorities of the Plaintiffs at Tab 6.

[42] Reasons of Hoy A.C.J.O., Cronk and Peppal JJ.A., paras. 121, Exhibit "S" to the Mazzuca Affidavit, Motion Record of the Plaintiffs, Tab 2S, p. 459.

[43] Reasons of Hoy A.C.J.O., Cronk and Peppal JJ.A., paras. 112, 114, 116, Exhibit "S" to the Mazzuca Affidavit, Motion Record of the Plaintiffs, Tab 2S, pp. 456 and 457.

(ii) Factors Weighing in Favour of Approval of Settlement

41. *Substantial Settlement Fund*. The $12.5 million settlement provides certain, timely and substantial compensation to class members who have already been unsuccessful before two courts in Ontario in obtaining leave to proceed with the OSA statutory claims or having the action certified as a class proceeding. The all-inclusive $12.5 million settlement is a significant fund when considered in the context of the fact that the only means by which certification or leave could be granted now is if the Supreme Court of Canada first granted leave to appeal and then the Plaintiffs were ultimately successful on the merits of that appeal.

42. *Litigation Risks*. Not only did the Plaintiffs face serious challenges in ultimately making out their case at trial, they have already been unsuccessful in having their action even certified as a class proceeding and failed in obtaining leave to proceed with their OSA statutory claims. The significance of the denial of leave pursuant to the OSA cannot be understated. At present, the only cause of action that remains available for pursuit is these particular Plaintiffs' common law claims, leaving thousands of class members with no remedy whatsoever and therefore, no prospect of monetary relief.

43. Even if the common law claims had been certified without the statutory claims, the Court of Appeal confirmed that it would not have been appropriate to certify reliance as a common issue or the ability to make an aggregate damages award.[44] As a result, certification would have nevertheless meant that the "resulting proceeding would involve a vast number of individual trials on the critical issues of reliance, causation and damages".[45]

44. Not only would these individual trials have added extraordinary costs and delay, assuming the Plaintiffs had been successful on proving liability on the common issues, those trials would have proceeded "against the backdrop of an existing judicial determination that the appellants' core claims of misrepresentation, in particular, the Goodwill Impairment Claim, hold

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[44] Reasons of Hoy A.C.J.O., Cronk and Peppal JJ.A., para. 120, Exhibit "S" to the Mazzuca Affidavit, Motion Record of the Plaintiffs, Tab 2S, p. 459.

[45] Reasons of Hoy A.C.J.O., Cronk and Peppal JJ.A., para. 121, Exhibit "S" to the Mazzuca Affidavit, Motion Record of the Plaintiffs, Tab 2S, pp. 459-460.

no reasonable prospect for success at trial".[46]

45. These continuing litigation risks are not dissimilar to those identified by the court in *Fischer v. IG Investment Management Ltd.* where the risks at the time of settlement approval were deemed "considerable" including:

> (a) whether the plaintiffs would be successful in overturning the denial of certification;
>
> (b) if there were a common issues trial, whether the defendants would be found to have acted in accordance with the prevailing standard of care;
>
> (c) if there was a finding of liability against the defendants, whether the class members would be able to prove their individual losses; and
>
> (d) if the settlement were not approved and the plaintiffs successful in having the order denying certification overturned, the discovery process would remain very time consuming, uncertain and expensive.[47]

46. The reality is that the Plaintiffs' Leave to Appeal Application to the Supreme Court of Canada "holds a small prospect of success, without which [they] would be left with an uncertified action and no leave to proceed with the statutory claims".[48] Weighed against this impending reality, the proposed settlement is an excellent result for the class.

47. *Net Damages Risk*. There is also the risk, even if the Plaintiffs had been ultimately successful in having their claims certified by the Supreme Court of Canada, that any damages award following a common issues trial could be similar to – or even much less than – the compensation provided through the proposed settlement. This risk is particularly acute if one takes into account that any such damages award would, as a practical matter, be reduced to pay for the litigation costs of a common issues trial plus lengthy individual assessments. Since reliance, a requisite element of the tort of negligent misrepresentation, cannot be certified as a common issue in Ontario, individual assessments would have been required, assuming the

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[46] Reasons of Hoy A.C.J.O., Cronk and Peppal JJ.A., paras. 138, Exhibit "S" to the Mazzuca Affidavit, Motion Record of the Plaintiffs, Tab 2S, p. 467.

[47] *Fischer v. IG Investment Management Ltd*., 2010 ONSC 7147 at para. 12, Plaintiffs Authorities, Tab 7.

[48] Affidavit of Stanley Shortt, sworn May 28, 2015, at para. 13 ("Shortt Affidavit"), Motion Record of the Plaintiffs, Tab 3, p. 635.

Plaintiffs were successful at trial.

48. In addition to the reliance/causation individual issues, the notion of an aggregate damages award also poses risk and difficulty for the Plaintiffs at any common issues trial (had it even been certified as a common issue). The potential range of aggregate damages in this action is highly contested between the parties. There is yet to be a secondary market securities common issues trial, meaning the ability of a trial judge to make an aggregate award is both novel and unpredictable.

49. While Class Counsel stands by the methodology and findings of Mr. Torchio, there does remain a serious risk that the trial judge might accept some or all of the Defendants' criticisms of the aggregate assessment methodology. In fact, the common issues trial judge could determine that a global award of aggregate damages pursuant to section 24 of the CPA is not possible at all.

50. In that eventuality, further individual issues trials or references may be necessary in order for class members to establish their right to damages, as well as the amount of damages owing. Such a process would inevitably increase the length of time class members will be required to wait prior to receiving compensation, if any, while at the same time further increasing the overall costs of achieving recovery for class members and depleting any judgment. The Court of Appeal was alive to this possibility and specifically acknowledged the eventuality in this case that "the option of individual actions to pursue securities misrepresentation claims is unappealing, costly and cumbersome".[49]

51. *Claims Process & Distribution Protocol*. The Claims and Distribution Protocol reflects a fair and balanced method for allocating the settlement proceeds among persons who purchased Kinross shares during the class period.

52. The Claims and Distribution Protocol creates a claims-based process for eligible purchasers of Kinross securities to seek compensation from the settlement fund. Once each eligible claimant's compensable damages are calculated, the net settlement fund will be

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[49] Reasons of Hoy A.C.J.O., Cronk and Peppal JJ.A., para. 139, Exhibit "S" to the Mazzuca Affidavit, Motion Record of the Plaintiffs, Tab 2S, p. 467.

distributed among claimants on a *pro rata* basis.[50]

53. The methods to be employed under the Claims and Distribution Protocol to calculate compensable damages and to distribute settlement funds are fair, well-recognized methods.[51] Each of the claimant's actual compensation shall be the portion of the net settlement fund equivalent to the ratio of one's Nominal Entitlement to the total Nominal Entitlements of all claimants, multiplied by the net settlement fund, as calculated by the administrator.[52]

54. If, after six months from the date upon the administrator distributes the last contemplated payment from the net settlement fund, the settlement fund maintains a positive balance, those funds shall not revert back to the Defendants but shall be donated to Pro Bono Canada.[53]

55. This proposed distribution protocol therefore satisfies the prevailing judicial test for approval of a claims process in a class proceeding: the plan must be fair and reasonable, and in the best interests of the class.[54] By employing well-recognized valuation methods and distributing monies on a *pro rata* basis, with no reversion to the Defendants, all class members shall be treated fairly.

B. Class Counsel Fees Are Fair and Reasonable in All the Circumstances

56. Class Counsel seeks total fees, inclusive of taxes, of $3,437,500 based on 3.5 years of litigation and a base fee of more than $1,430,000.[55] The requested counsel fees represent 27.5% of the gross settlement proceeds, or a multiplier of approximately 2.4. The requested fees are well within the range approved in other actions and compensate for the significant risks in this litigation and the ultimate success achieved.

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[50] Shortt Affidavit, at paras. 16, Motion Record of the Plaintiffs, Tab 3, pp. 635-636.

[51] Shortt Affidavit, at para. 17, Motion Record of the Plaintiffs, Tab 3, p. 636; Mazzuca Affidavit, at para. 97, Motion Record of the Plaintiffs, Tab 2, p. 35.

[52] Mazzuca Affidavit, at para. 97, Motion Record of the Plaintiffs, Tab 2, p. 35.

[53] Mazzuca Affidavit, at para. 99, Motion Record of the Plaintiffs, Tab 2, p. 35.

[54] *Zaniewicz v. Zunghui Haixi Corporation*, 2013 ONSC 5490, para. 59, Book of Authorities of the Plaintiffs, Tab 19.

[55] Exhibit "CC" to the Mazzuca Affidavit at para. 66, Motion Record of the Plaintiffs, Tab 2CC, p. 607-611.

57. The fairness and reasonableness of fees are to be determined in light of the risk that class counsel undertook in conducting the litigation and the degree of success or result achieved: "fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and do it well."[56]

58. Factors relevant to determining the reasonableness of the fee request will also include examination of the following:

(a) the factual and legal complexities of the matters engaged by the action;

(b) risk undertaken, including the risk of not obtaining leave under the OSA or not being certified pursuant to the CPA;

(c) degree of responsibility assumed by class counsel;

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

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

(f) degree of skill and competence demonstrated by counsel'

(g) results achieved;

(h) expectations of the class as to the fee amount; and

(k) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[57]

59. Risk for class counsel ought to be measured from the commencement of the action and as it continued: "[i]t would be wrong to use hindsight to give different weight to that risk than the lawyers and clients gave to it at the outset."[58] Risk is not limited to the prospect that the defendants might escape liability altogether.

60. Class counsel assumes the risk that (a) the court may refuse to certify the action as a class proceeding; (b) leave to proceed with the statutory claims might be denied; (c) a resolution could

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[56] *Sayers* at paras. 35 and 37, Book of Authorities of the Plaintiffs at Tab 4; *Gagne v. Silcorp. Ltd.*, [1998] O.J. No. 4182 (C.A.) at para. 14 [*Gagne*], Book of Authorities of the Plaintiffs at Tab 8.

[57] *Eidoo v. Infineon Technologies AG*, 2014 ONSC 6082 at para. 84, Book of Authorities of the Plaintiffs at Tab 9.

[58] *Gagne* at para. 16, Book of Authorities of the Plaintiffs at Tab 8; *Endean v. The Canadian Red Cross Society*, 2000 BCSC 971 at para. 28 [*Endean*], Book of Authorities of the Plaintiffs at Tab 10.

take many years (3.5 years in this case), during which counsel receives no compensation; (d) even if there is a settlement, the court may not approve it or suggest modifications to which both parties will not agree, unravelling the settlement; and (e) where the plaintiff seeks to have damages assessed on a class-wide basis, there is a risk the court will refuse to do so.[59] There is no doubt that once the motions for leave and certification were dismissed (upheld on appeal) this became a "very-very risky class action".[60]

61. The requested fee, representing 27.5% of recovery and a 2.4 multiplier, is consistent with the success achieved and risks undertaken. It is also consistent with the "yardsticks" set out by the Court of Appeal in *Gagne v. Silcorp Ltd.*:[61]

> (a) the percentage of gross recovery is 27.5%, which is not excessive and is consistent with percentage fees awarded in other class actions;
>
> (b) the multiplier sought is 2.4, which is within the range of "slightly greater than one to three or four in the most deserving cases";
>
> (c) the percentage sought is precisely that which is contemplated and reflected in the retainer agreement;
>
> (d) the percentage fee sought is less than the 33% 'presumptively valid' fee established in 2013 by the *Canon* decision; and
>
> (e) this fee request creates a reasonable economic incentive to take on this sort of case in the future - a multiplier of 2.4 for fees incurred over a 3.5 year period is well within the acceptable range, particularly in light of the fact that continued litigation here became an incredibly risky proposition once the Court of Appeal upheld the denial of certification and leave in December 2014.

62. The percentage and multiplier sought are also at the lower end of the percentage range of fees approved in other Ontario decisions:

> (a) in *Robertson v. Thomson*, Justice Cullity approved a fee representing 36% of the recovery in a copyright infringement case, reflecting a 2.4 multiplier;[62]

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[59] *Gagne* at para. 14, Plaintiffs Authorities at Tab 8; *Endean* at para. 52, 60 and 62, Book of Authorities of the Plaintiffs at Tab 10; *Hislop v. Canada (Attorney General)*, [2004] O.J. No. 1867 (S.C.) at para. 12, Book of Authorities of the Plaintiffs at Tab 11.

[60] *Horgan v. Lakeridge Health Corp.*, 2014 ONSC 5209 at para. 53, Book of Authorities of the Plaintiffs at Tab 11.

[61] *Gagne* at para. 26, Book of Authorities of the Plaintiffs at Tab 8.

(b) in *Ormrod v. Toronto Hydro,* Justice Winkler (as he then was) approved a class counsel fee representing 35% of the class' recovery in a pension surplus matter, based on a multiplier of 2;[63]

(c) in *Martin v. Barrett*, Justice Cullity approved a fee representing 29% of the gross recovery "a percentage that I consider is not out of line with those awarded in previous cases involving, and not involving, the application of a multiplier".[64]

(d) in *Osmun v. Cadbury Adams Canada Inc.*, Justice Strathy approved a class counsel fee of $1.33 million based on gross recovery of $5.34 million;[65]

(e) in *Walker v. Union Gas*, Justice Cumming approved a fee of $2.75 million out of a $9.2 million settlement (or 30% of the gross proceeds);[66]

(f) in *Serhan (Trustee of) v. Johnson & Johnson*, Justice Horkins approved a class counsel fee of $1.5 million out of a settlement valued at $4 million (or 38% of the gross proceeds).[67]

63. Finally, the representative Plaintiffs, who were actively involved in this litigation, support class counsel's fee request:

> "Without successful recovery, the trustees have no obligation to pay Class Counsel, we have no obligation to pay for litigation expenses and we have an indemnity in respect of adverse costs. The trustees are committed to the prosecution of this action, but we recognize that **Class Counsel has accepted almost all of the financial risk that comes with the advancement of this litigation on our behalf and on behalf of other harmed Kinross investors.** …
>
> Our counsel committed to expending millions of dollars in time, money and other resources to prosecute this action with the significant risk of failing to be certified, failing to obtain leave, or failing to achieve judgement against the Defendants. I am satisfied that our counsel has pursued this action vigorously and has worked to maximize recovery."[68] [emphasis added]

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[62] *Robertson v. Thomson Canada Ltd.,* [2009] O.J. No. 2650 (S.C.) at para. 39 [*Robertson*], Book of Authorities of the Plaintiffs at Tab 13.

[63] *Ormrod v. Toronto Hydro-Electric Systems Ltd.,* [2002] O.J. No. 4925 (S.C.) at para. 2, Book of Authorities of the Plaintiffs at Tab 14.

[64] *Martin v. Barrett*, [2008] O.J. No. 2105 (S.C.) at para. 55, Book of Authorities of the Plaintiffs at Tab 15.

[65] *Osmun v. Cadbury Adams Canada Inc.,* 2010 ONSC 2752 at paras. 4 and 11, Book of Authorities of the Plaintiffs at Tab 16.

[66] *Walker v. Union Gas Ltd.*, [2009] O.J. No. 536 (S.C.) at para. 28, Book of Authorities of the Plaintiffs at Tab 17.

[67] *Serhan* at para. 101, Book of Authorities of the Plaintiffs at Tab 5.

[68] Shortt Affidavit, at paras. 21, 22, Motion Record of the Plaintiffs, Tab 3, pp. 636-637.

64. In this context, courts have considered this to be a significant factor in favour of approving requested fees.[69]

65. Lastly, and perhaps most importantly, the requested fees conform entirely to the express terms of the retainer agreement and reflect a lower percentage than the '*prima face*' valid 33% established by recent case law:[70] "a one-third contingency fee agreement, if fully understood and accepted, should be accorded presumptive validity … the presumption of validity should only be rebutted in clear cases based on principled reasons".[71]

66. In particular, the retainer agreement provides for a sliding scale of counsel fees depending on the monetary level of success and the stage of the litigation, as follows:

	For the first $20 million of any Recovery	For the portion of the Recovery between $20 million and $40 million	For the portion of the Recovery between $40 million and $60 million	For the portion of the Recovery in excess of $60 million
If the Action is settled or there is judgment before the Court renders a decision on a certification motion	twenty-five percent (25%)	twenty percent (20%)	fifteen percent (15%)	ten percent (10%)
If the Action is settled or there is judgment after the Court renders a decision on a certification motion and before the commencement of the Common Issues trial;	twenty-seven and a half percent (27.5%)	twenty-two and a half percent (22.5%)	seventeen and a half percent (17.5%)	twelve and a half percent (12.5%)
If the Action is settled after the commencement of the Common Issues trial or is determined by judgment after the trial.	thirty percent (30.0%)	twenty-five percent (25.0%)	twenty percent (20.0%)	fifteen percent (15.0%)

[69] *Robertson* at paras. 29 and 38 (S.C.J.), Book of Authorities of the Plaintiffs at Tab 13.

[70] Shortt Affidavit, at para. 23, Motion Record of the Plaintiffs, Tab 3, p. 637.

[71] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 at paras. 3, 8 and 11, Book of Authorities of the Plaintiffs at Tab 18.

67. This grid ties class counsel compensation directly to the degree of success achieved, while at the same time ensuring that the overall fees are not excessive. These percentages cut both ways for class counsel.[72] If recovery in the action were small, then no matter how much class counsel had spent in time, money and other resources, they would be held to a percentage of that small amount. On the other hand, if class counsel achieved large recovery in the action, they would be compensated accordingly, though their fees would be subject to declining percentages as the recovery got larger.[73]

68. In this case, the fees sought reflect 27.5% of the settlement. This is because the action settled after the court rendered a decision on the certification motion, and the settlement is under $20 million. This is in accordance with the express terms of the retainer agreement.[74]

C. No Objections To This Motion Received

69. Class counsel has provided notice of this motion in accordance with the Order of this Court dated April 27, 2015.[75] To date, not one single objection to the settlement or class counsel's fee request has been received.[76]

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[72] Shortt Affidavit, at para. 24, Motion Record of the Plaintiffs, Tab 3, pp. 637-638.

[73] Shortt Affidavit, at paras. 24, Motion Record of the Plaintiffs, Tab 3, pp. 637-638.

[74] Shortt Affidavit, at para. 25, Motion Record of the Plaintiffs, Tab 3, p. 638

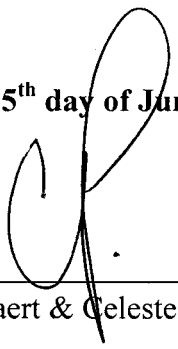
[75] Mazzuca Affidavit, at para. 64, Motion Record of the Plaintiffs, Tab 2, at p. 25.

[76] Affidavit of Emily Corner sworn May 7, 2015, Motion Record of the Plaintiffs, Tab 4, p. 721.

PART IV - ORDER REQUESTED

70. The Plaintiffs respectfully request an order: (a) approving the settlement agreement in its entirety; (b) approving the legal fees requested by class counsel; and (c) dismissing the action against the Defendants on a without costs basis

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June 2015.



Kirk M. Baert & Celeste Poltak
Koskie Minsky LLP
Lawyer for the Plaintiffs

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.)
2. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.)
3. *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.)
4. *Sayers v. Shaw CablesystemsLimited.*, 2011 ONSC 962
5. *Serhan v. Johnson & Johnson*, 2011 ONSC 128
6. *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 5132
7. *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 7147
8. *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 (C.A.)
9. *Eidoo v. Infineon Technologies AG*, 2014 ONSC 6082
10. *Endean v. The Canadian Red Cross Society*, 2000 BCSC 971
11. *Hislop v. Canada (Attorney General)*, [2004] O.J. No. 1867 (S.C.)
12. *Horgan v. Lakeridge Health Corporation*, 2014 ONSC 5209
13. *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (S.C.)
14. *Ormrod v. Toronto Hydro-Electric Systems Ltd.*, [2002] O.J. No. 4925 (S.C.)
15. *Martin v. Barrett*, [2008] O.J. No. 2105 (S.C.)
16. *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752
17. *Walker v. Union Gas Ltd.*, [2009] O.J. No. 536 (S.C.)
18. *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686
19. *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490

SCHEDULE "B" - RELEVANT STATUTES

Class Proceedings Act, 1992, S.O. 1992, CHAPTER 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).

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Fees and disbursements

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

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

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

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

Court to approve agreements

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

Priority of amounts owed under approved agreement

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

Determination of fees where agreement not approved

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

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

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

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

SCHEDULE "C" - SUMMARY OF COUNSEL TIME (to June 1, 2015)

A. SUMMARY OF TIME BY COUNSEL

Lawyer	Year of Call	Hours	Time Value	Avg. Hourly Rate
Kirk M. Baert	1990	474.1	$431,252.50	$909.62
Michael Mazzuca	1992	108.5	$84,400.00	$777.88
Celeste Poltak	2000	592.9	$366,595.00	$618.31
Rob Gain (Jan. 2015 to date)	2006	97.4	$50,505	$518.53
Jonathan Bida (2012 to May 2014)	2007	527.6	$218,940	$414.97
Sean O'Donnell (2012 to Aug. 2013)	2010	292.5	$99,905	$341.56
Garth Myers	2012	250.7	$94,391.50	$376.51
Other		468.90	$84,118.70	$179.40
Total:		**2,812.60**	**$1,430,107.70**	

B. SUMMARY OF TIME BY STAGE IN ACTION

1. COMMENCEMENT OF CLAIM, DRAFTING PLEADINGS

Lawyer	Hours	Time Value	Avg. Hourly Rate
Kirk M. Baert	12.5	$ 10,625.00	$ 850.00
Celeste Poltak	7.5	$ 4,125.00	$ 550.00
Jonathan Bida	44.7	$ 16,765.00	$ 375.06
Garth Myers	42	$ 7,770.00	$ 185.00
Other	14.8	$ 9,470.00	$ 639.86
TOTAL	**121.5**	**$ 48,755.00**	

2. FUNDING

Lawyer	Hours	Time Value	Avg. Hourly Rate
Michael Mazzuca	20.8	$ 15,530.00	$ 746.63
Kirk M. Baert	30.7	$ 26,477.50	$ 862.46
Celeste Poltak	48.10	$ 27,747.50	$ 576.87
Jonathan Bida	84.7	$ 33,072.50	$ 390.47
Sean O'Donnell	88.9	$ 30,670.00	$ 344.99
Roberto Tomassini	22.1	$ 12,155.00	$ 550.00
Other	8.5	$ 1,999.50	$ 235.24
TOTAL	**303.8**	**$ 147,652.00**	

3. CARRIAGE

Lawyer	**Hours**	**Time Value**	**Avg. Hourly Rate**
Kirk M. Baert	4	$ 3,400.00	$ 850.00
Celeste Poltak	12	$ 6,610.00	$ 550.83
Jonathan Bida	16.1	$ 6,077.50	$ 377.48
Garth Myers	32.5	$ 5,994.00	$ 184.43
Other	4.8	$ 1,850.00	$ 385.42
TOTAL	**69.4**	**$ 23,931.50**	

4. CERTIFICATION AND LEAVE

Lawyers	**Hours**	**Time Value**	**Avg. Hourly Rate**
Michael Mazzuca	22.7	$ 16,727.50	$ 736.89
Kirk M. Baert	195.8	$ 169,952.50	$ 867.99
Celeste Poltak	237.1	$ 134,982.50	$ 569.31
Jonathan Bida	231.2	$ 91,760.00	$ 396.89
Sean O'Donnell	188.1	$ 64,070.00	$ 340.62
Garth Myers	33	$ 6,884.50	$ 208.62
Other	168.5	$ 34,610.50	$ 205.40
TOTAL	**1076.4**	**$ 518,987.50**	

5. APPEAL TO COURT OF APPEAL

Lawyers	Hours	Time Value	Avg. Hourly Rate
Michael Mazzuca	6.7	$ 5,405.00	$ 806.72
Kirk M. Baert	165.4	$ 156,125.00	$ 943.92
Celeste Poltak	125.2	$ 79,917.50	$ 638.32
Jonathan Bida	116	$ 54,485.00	$ 469.70
Garth Myers	79	$ 23,422.50	$ 296.49
Other	92.2	$ 27,327.00	$ 296.39
TOTAL	**584.5**	**$ 346,682.00**	

6. APPLICATION FOR LEAVE TO APPEAL TO SUPREME COURT OF CANADA

Lawyers	Hours	Time Value	Avg. Hourly Rate
Kirk M. Baert	28.9	$ 28,565.00	$ 988.41
Celeste Poltak	100.7	$ 70,345.00	$ 698.56
Rob Gain	97.4	$ 50,505.00	$ 518.53
Other	87.9	$ 25,169.00	$ 286.34
TOTAL	**314.9**	**$ 174,584.00**	

7. COMMUNICATION WITH CLASS MEMBERS

Lawyers	Hours	Time Value	Avg. Hourly Rate
Other (Junior lawyers, clerks)	76.7	$ 15,197.20	$ 198.14
TOTAL	**76.7**	**$ 15,197.20**	

8. COMMUNICATION WITH REPRESENTATIVE PLAINTIFF

Lawyers	Hours	Time Value	Avg. Hourly Rate
Michael Mazzuca	26.5	$ 20,150.00	$ 760.38
Other	33.9	$ 13,037.50	$ 384.59
TOTAL	**60.4**	**$ 33,187.50**	

9. SETTLEMENT

Lawyers	Hours	Time Value	Avg. Hourly Rate
Kirk M. Baert	36	$35,307.50	$ 980.76
Celeste Poltak	54.3	$37,747.50	$ 695.17
Garth Myers	47.9	$15,567.50	$ 325.00
Other	47.9	$21,415.50	$ 447.09
TOTAL	**175.2**	**$105,208.50**	

E. EDDY BAYENS, et al Plaintiffs	and	**KINROSS GOLD CORPORATION, et al.** Defendant	Court File No. CV-12-44865100CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at TORONTO

FACTUM OF THE PLAINTIFFS
(Fee and Settlement Approval)

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