Court File No.: CV-18-590105-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

LESLIE AUSTIN

Plaintiff

- and -

BELL CANADA, BELL MEDIA INC.,
EXPERTECH NETWORK INSTALLATION INC., and BELL MOBILITY INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFF

(Approval of Implementation Order, Opt Out Order, and Order re Payment of Fees, Honorarium to Representative Plaintiff and Class Proceedings Fund Levy)

KOSKIE MINSKY LLP
900 - 20 Queen Street West
Toronto, ON M5H 3R3

Mark Zigler (LS# 19757B)
(t) 416-977-8353 / (e) mzigler@kmlaw.ca

Jonathan Ptak (LS# 45773F)
(t) 416-595-2149 / (e) jptak@kmlaw.ca

James Harnum (LS#: 60459F)
(t) 416-542-6285 / (e) jharnum@kmlaw.ca

MCKENZIE LAKE LAWYERS LLP
1800 - 140 Fullarton Street
London, ON N6A 5P2

Matthew Baer (LS: 48227K)
(t) 519-667-2646 / (e) baer@mckenzielake.com

Emily Assini (LS #59137J)
(t) 519-672-5666 / (e) assini@mckenzielake.com

Lawyers for the Plaintiff

TO: **MCCARTHY TÉTRAULT LLP**
5300 - 66 Wellington Street West
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Dana Peebles
(t) 416-601-7839
(e) dpeebles@mccarthy.ca

Atrisha Lewis
(t) 416-601-7859
(e) alewis@mccarthy.ca

Amanda Iarusso
(t) 416-601-7772
(e) aiarusso@mccarthy.ca

Lawyers for the Defendants

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PART I - OVERVIEW

1. This class proceeding (the **"Action"**) was brought on behalf of a class of over 35,000 individual retirees and surviving spouses (the "Class Members") under the Bell Canada Pension Plan (the "**Pension Plan**") for the full cost-of-living increases that had not been properly calculated and paid by the Defendants.

2. The Action was a complete success, with full recovery achieved for all Class Members. The Class Members will be provided retroactive indexation payments to date, plus interest, and will receive increased pension payments going forward. After all is said and done, the Action will provide recovery to the Class Members of an estimated $168 million over the course of their lifetimes, representing a present value of approximately $103 million.

3. The Action was prosecuted swiftly and aggressively by Class Counsel, who adopted the rare strategy of bringing a summary judgment motion on the merits *at the same time* as the certification motion, which saved several years from the course of the litigation. While the action was dismissed on the summary judgment motion at first instance, the plaintiff appealed and achieved summary judgment on the claim in favour of the class.

4. This factum is filed in support of several motions. The first motion seeks an order implementing the Court of Appeal's decision on summary judgment and providing for payment to the Class Members of the amounts owing to them (the "**Implementation Motion**" and **"Implementation Order"**, as the context requires).

5. The second motion concerns approval of Class Counsel's fees, the payment of an honorarium to the Representative Plaintiff, and the requisite levy to the Class Proceedings Fund (the "**Fee Approval Motion**" and **"Fee Approval Order"**).

6. The third motion seeks, in the specific facts of this case, restrictions on the ability of Class Members to opt out of the class, or alternatively that any Class Members that opt out contribute their proportionate share of the costs given that they will automatically receive the benefits of the action (the "**Opt Out Motion**" and **"Opt Out Order"**).

7. In summary, the motions should be granted for the following reasons:

(a) **Implementation Motion**: the proposed Implementation Order provides for retroactive compensation for the period of lost indexation, plus interest, and an order that Bell Canada pay the increased pension payments going forward. The payments will occur automatically, to all Class Members, without the need for Class Members to make a claim. The Order provides for an expeditious implementation plan and should be granted.

(b) **Fee Approval Motion:** Class Counsel diligently and aggressively prosecuted the action to judgment and obtained complete success. The fees sought reflect approximately 9.7% of the present value (being approximately $103m) of the estimated total amount payable to the Class Members over the course of their lifetimes. The requested fee is very fair and reasonable under the circumstances. The honorarium is also well deserved by the Representative Plaintiff who went far beyond the ordinary responsibilities of a representative plaintiff.

(c) **Opt Out Motion:** The judgment provides complete success to all Class Members on the claim. It is declaratory in nature, which benefits all Class Members, and the damages payments (and all future increased pension payments) will *automatically* be paid to *all* Class Members. Under these circumstances, there is no principled need for an opt out process and permitting an opt out right here would be contrary to the spirit and underlying

principles of the class action regime. Alternatively, should opt outs be permitted, such persons must be required to contribute their proportionate share of the legal costs given that they are retaining the benefits. To do otherwise would constitute unjust enrichment, and cause the Class Members who do not opt out to pay a disproportionate share of the costs for the benefits obtained for all.

PART II - THE FACTS GIVING RISE TO THESE MOTIONS

A. Background

8. Class Counsel was retained by a Bell pensioner, Leslie Austin, after the Defendants failed to provide the full cost-of living increases that were required by the terms of the Pension Plan, as of January 1, 2017. The Defendants took the position that the Pension Plan required an increase of 1%. The Representative Plaintiff took the position that the wording of the Pension Plan, which formed part of his employment contract and that of all Class Members, required an increase of 2%.

9. In order to achieve the most expeditious resolution, the Representative Plaintiff and Class Counsel adopted a rare and aggressive strategy to bring a summary judgment motion at the same time as the certification motion. Approximately two years after the litigation was commenced, the Court of Appeal for Ontario granted judgment to the class, such that the retroactive amounts owed will now be paid, with interest, and all future pension payments of over 35,000 Class Members will be increased accordingly to reflect the increased indexation.

B. The Bell Canada Pension Plan and the failure to provide proper cost-of-living increases in 2017

10. The Representative Plaintiff in this action, Leslie Austin, was a longstanding employee of Bell Canada. He retired and began to receive monthly defined pension benefit payments under the

Pension Plan in 2012. As of December 31, 2016, the date of the last actuarial valuation before the 2017 cost-of-living increase, there were 35,045 individuals receiving pensions from the defined benefit component of the Pension Plan.[1]

11. The Defendants are all part of the same corporate family. Bell Canada, Bell Media Inc., Expertech Network Installation Inc., and Bell Mobility Inc. are the participating employers under the Pension Plan. Bell Canada is the Administrator of the Pension Plan under the *Pension Benefits Standards Act*, 1985, RSC 1985, c 32 ("PBSA").

12. The Pension Plan text provides for indexation of pensions (i.e. a cost-of-living adjustment intended to keep pension entitlements from losing value due to inflation). This provision requires Bell to increase members' monthly benefits in accordance with increases in the cost-of-living, all pursuant to a prescribed calculation set out in section s. 8.7 of the Pension Plan.[2]

13. Section 8.7 of the Pension Plan states that retirement benefits shall be augmented by a cost-of-living increase on every first day of January by a percentage determined in accordance with the Pension Plan based on the "Pension Index", which is defined as "the annual percentage increase of the Consumer Price Index, as determined by Statistics Canada, during the period of November 1 to October 31 immediately preceding the date of the pension increase."[3] Under the terms of the Pension Plan, this amount is then rounded to the nearest whole number to determine the amount of the annual inflation increase.

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1 Affidavit of Matthew Baer, sworn June 24, 2021 ("**Baer Affidavit**"), Plaintiffs' Motion Record ("**PMR**"), para. 19, Vol. 2, Tab 7, p. 129.

2 Baer Affidavit, para 22, PMR, Vol. 2, Tab 7, pp. 129-130.

3 Baer Affidavit, para. 23, PMR, Vol. 2, Tab 7, p. 130.

14. The dispute that gave rise to the Action concerned whether it is Bell who is to determine the Pension Index annual percentage increase for the pensioners, and if so using what methodology, or whether Bell is to simply apply the one decimal rounded annual percentage increase as determined by Statistics Canada in the given year.

15. The Defendants took the position that Bell was to make this determination. Under the Defendants' interpretation, the "Pension Index" was equal to 1.49%, and as a result of a rounding provision in the Pension Plan, must be rounded down to 1%. Under the Plaintiff's interpretation, the "Pension Index" was 1.5%, as determined by Statistics Canada, which is to be rounded up to 2% under the terms of the Pension Plan. Ultimately, the Court of Appeal held that the Plaintiff's interpretation was correct, and that the terms of the Pension Plan required Bell to apply the annual percentage increase as determined and published by Statistics Canada.

16. That 1% difference is very significant to the 2017 pension payment calculation for retirees, surviving spouses and other beneficiaries, but it also continues to impact their pensions for the rest of their lifetimes as each year's calculation is premised on an increase from the previous year. As a result of this action, the Class Members' recovery for the period from January 1st, 2017 to October 1, 2021 alone, including pre-judgment and post-judgment interest, is estimated to be $36,400,000.[4] The Class Members' *total* recovery as a result of this action in the form of increased pension payments for the rest of their lives is estimated to be $168 million, with a present value of approximately $103 million.[5]

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[4] Expert Report of Cameron McNeill, Exhibit A to Affidavit of Cameron McNeill, sworn June 23, 2021 ("**McNeill Report**"), PMR, para. 7, Vol. I, Tab 5, p. 45.

[5] McNeill Report, paras. 1 and 4, PMR, Vol. I, Tab 5, pp. 44-45.

C. Procedural history of the Action and the work undertaken by Class Counsel

17. The action was commenced by way of Statement of Claim issued on January 16th, 2018.

18. After the Statement of Claim was issued, a case management conference was convened. Class Counsel sought an expedited timetable to ensure the matter could be determined as quickly as possible.

19. Initially, The Defendants advised that they would bring a stay motion asserting that the indexation issue should be decided by the Office of the Superintendent of Financial Services, rather than through a court proceeding, and that the stay motion should be heard prior to the certification motion. The plaintiff opposed this approach which would have bifurcated the proceeding, and a motion was ultimately heard regarding the sequencing issue. The Plaintiff was successful on this motion such that the certification motion would proceed, and if the Defendants elected to bring the stay motion it would be heard at the same time as the certification motion.

20. To bring about the swiftest resolution on all the issues, Class Counsel also brought a motion for summary judgment to determine the merits of the whole case, returnable at the same time as the certification motion. This is a very rare occurrence in class proceedings. In most cases, if there are motions for certification and summary judgment heard at the same time, the summary judgment motion is brought *by the defendants* to dismiss the action. Where a plaintiff brings a summary judgment motion, it is ordinarily after certification is granted, appeals are concluded, and discoveries are complete. Bringing a certification motion together with the summary judgment motion shortens the timeline to judgment by several years.

21. The Defendants opposed both the certification motion and summary judgment motions. The Defendants asserted that they had interpreted the Pension Plan (and the indexation provision) correctly and that the action should be dismissed outright.

22. Extensive evidence was filed by each party on the certification and summary judgment motions consisting of almost 1,200 pages.

23. The Plaintiff filed expert evidence from the representative plaintiff and 2 different experts relating to the methodology used by Statistics Canada for the determination and publication of the Consumer Price Index, the interpretation of the indexation provision under the Pension Plan and the value of the lost indexation payments.

24. The Defendants filed an extensive responding record, including:

(a) an affidavit from the Director of Pension and Actuarial Services for BCE regarding the history of the Pension Plan, the interpretation of the indexation provision, communications to pensioners and the methodology for calculation and valuation of the indexation;

(b) an expert affidavit from an actuary regarding the interpretation of the indexation provision under the Pension Plan and the valuation of the indexation; and

(c) a solicitor affidavit attaching information and documents relating to numerous other pension plans with cost-of-living increases.

25. In Reply, the Representative Plaintiff and Class Counsel filed affidavits from their existing experts, as well as an additional expert who is a professor of mathematics at the University of Toronto, regarding mathematical conventions for rounding of significant digits in relation to the cost-of-living increase under the Pension Plan.

26. The motions were highly contested and all of the affiants were cross-examined (except for the litigation assistant). The Defendants cross-examined the Representative Plaintiff in London (requiring travel by counsel) regarding his suitability to be a representative plaintiff, amongst other grounds.

27. Prior to the argument of the certification and summary judgment motions, the Representative Plaintiff brought a motion for the admission of additional evidence relating to communications to the Class Members by the Pension Information Committee. The court granted the motion.

28. The certification and summary judgment motions were argued over two days in July 2019. With respect to the motion for certification, Justice Morgan certified the Action as a class proceeding. The Defendants did not seek leave to appeal the certification order.

29. With respect to the motion for summary judgment, however, Justice Morgan granted judgment in favour of the Defendants and dismissed the Action.

30. The Representative Plaintiff appealed the summary judgment order to the Court of Appeal. The Representative Plaintiff was entirely successful on the appeal, with summary judgment being awarded to the Representative Plaintiff.

31. After the decision was released, Class Counsel engaged in lengthy discussions with the Defendants' counsel and developed the plan for the implementation of the decision of the Court of Appeal and all ancillary matters, which are the subject of these motions.

PART III - ISSUES AND THE LAW

32. The **Implementation Motion** requires the consideration of one issue:

(a) Should the implementation plan set out in the Implementation Order be approved to permit the payment of the increased indexation amounts to date (plus interest) and to require the future pension increases to be made, notice to be given, and the agreed upon costs to be paid?

33. The **Fee Approval Motion** requires the consideration of three issues:

(a) Is the fee request of Class Counsel fair and reasonable in all of the circumstances?

(b) Should an honorarium of $15,000 be paid to the Representative Plaintiff, Leslie Austin?

(c) Is the Class Proceedings Fund entitled to the requested levy?

34. The **Opt-Out Motion** requires the consideration of one issue and, if necessary, a second issue that only arises in the alternative:

(a) In the specific facts of this case, is it appropriate to restrict the right of individual Class Members to opt out of the proceeding?

(b) In the alternative, should Class Members who decide to opt out be required to pay their share of the costs of the Action?

35. The Representative Plaintiff and Class Counsel respectfully submit that the answer to each of these questions is **"Yes".**

The Implementation Motion

36. The Representative Plaintiff, Class Counsel and the Defendants have agreed to a complete plan for implementing the judgment of the Court of Appeal. The requested Implementation Order provides for remedial mechanisms that will ensure that the Class Members are made whole in an efficient and streamlined manner.

37. The Implementation Order imposes obligations to do the following:

(a) Make individual payments, calculated as of October 1, 2021, to each Class Member that provide the difference between the 1% inflation increase that was provided as of January 1, 2017 and the 2% inflation increase that should have been provided (the "Retroactive Payments");

(b) Pay pre-judgment and post-judgment interest on the Retroactive Payments to the Class Members; and

(c) Recalculate the pension benefits owed to the Class Members on the basis of the correct 2% indexation figure for 2017 and ensure that this amount is factored into all future monthly pension payments and all future indexation calculations.

38. The payments will be made *automatically* to the Class Members. There is no requirement for them to take any steps to obtain their funds, or to participate in any claims process.

39. In addition,

(a) the Defendants will bear all costs of notice and payment distribution to the Class Members; and

(b) the Defendants are to pay costs of $472,500 ($450,000 for the action, and $22,500 in respect of the appeal) as a contribution to the Representative Plaintiffs' costs for legal fees and disbursements.[6]

40. The amount of recovery arising from the Action is very significant:

(a) The Representative Plaintiff's actuary estimates that the amount of the lump sum retroactive payment (prior to deductions) for the period from January 1st, 2017 to October 1, 2021, including pre-judgment and post-judgment interest, will be $36,400,000.

(b) In their expert reports prepared for the summary judgment motion, the expert actuaries for both parties estimated the total present value of the increased pension amounts due to the additional indexation to be $103,313,000, as at January 1, 2017.

(c) The Representative Plaintiff's actuary estimated that the additional total amount payable to the Class Members over the course of their (and their surviving beneficiaries') lifetimes will be $168 million.

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[6] This court has the jurisdiction to award costs from the pension fund under section 131(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43. *(Kerry (Canada) Inc. v. DCA Employees Pension Committee*, 2007 ONCA 605 (CanLII), at para. 5, Representative Plaintiff's Book of Authorities ("**PBOA**"), Tab 19). Further, the Supreme Court of Canada has held that costs of both successful and unsuccessful litigants can be paid out of a pension trust fund where, as in this case, the matter deals "with issues surrounding the due administration of the pension trust fund and was for the benefit of all the beneficiaries". (*Burke v. Hudson's Bay Co*., 2010 SCC 34, at para. 97, PBOA Tab 7). According to the most recent Pension Information Committee report, the Pension Plan is in a surplus status: Baer Affidavit, Exhibit C, PMR, Vol. 2, Tab 7, pp. 231-233.

41. The judgment of the Court of Appeal and the Implementation Order reflects complete success to the class. The plan set out in the Implementation Order is the most efficient method of making the Class Members whole and best replicates what the Class Members would have received had the indexation calculation required by the Pension Plan text been performed correctly in the first place.

42. Therefore, based on the reasons set out above, the Implementation Order should be approved.

The Fee Approval Motion

A. The Retainer Agreement and Class Counsel's fee request are fair and reasonable and should be approved

43. Pursuant to section 32(1) of the *CPA*, an agreement respecting fees and disbursements between a solicitor and representative plaintiff shall be in writing. Under section 32(2), the retainer agreement must be approved by the court, and should be in this case. Class Counsel has filed the retainer agreement on this motion with the Court.[7]

44. From the outset, Class Counsel agreed to pursue this action on a contingency fee basis, accepting responsibility for all costs, with the support of the Class Proceedings Fund, and seeking court approval for a fee only if successful. The Representative Plaintiff executed a retainer agreement which confirmed that understanding.

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[7] Affidavit of Leslie Austin, sworn June 22, 2021 ("**Austin Affidavit**"), PMR, Exhibit A, Vol. I, Tab 4, p. 26.

45. The retainer agreement provides for a legal fee based on the percentage of the value of the recovery on a sliding scale, depending on the stage of the action, and ranges between 25% and 33.3%, plus disbursements and taxes. The retainer agreement provides as follows:

> "In the event of Success, Class Counsel shall be paid an amount equal to:
>
> (a) any disbursements not already paid to Class Counsel by the Defendant as costs plus applicable taxes and interest thereon; plus
>
> (b) if the Action is settled before the certification of the action, twenty-five percent (25%) of the Recovery less the fee portion of any costs already paid to Class Counsel, plus taxes; or
>
> (c) if the Action is settled after the certification of the action, thirty percent (30%) of the Recovery less the fee portion of any costs already paid to Class Counsel, plus taxes; or
>
> (d) if the Action is settled after the commencement of oral discoveries, thirty-three and one-third percent (33.3%) of the Recovery less the fee portion of any costs already paid to Class Counsel, plus taxes."[8]

46. The agreement is based on the principle that the further along in the action, the higher the percentage of recovery (up to the maximum of 33.3%). In this case, Class Counsel proceeded all the way to the end of the action. Class Counsel had to perform all of the investigations, obtain all of the necessary factual and expert evidence, and perform all of the cross-examinations necessary to achieve a judgment on the merits. It therefore reflects advancement beyond the "oral discoveries" stage. Under these circumstances, the maximum percentage of 33.3% under the agreement should be applicable.

47. The terms of the retainer agreement are consistent with (and in many cases identical to) other retainer agreements which have been approved in class proceedings and should be approved

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[8] Austin Affidavit, PMR, Exhibit A, Vol. I, Tab 4, p. 30-31.

in this case. Retainer agreements in class actions are virtually always on a contingency basis[9] and typically provide for a fee in the range of one-fifth to one-third of recovery, and no payment to class counsel if the action is not successful.

48. As this matter was determined via summary judgement, and the total estimated present value of the recovery is $103,313,000[10], the retainer agreement provides for class counsel fees of over $33 million. Class Counsel seeks a sum which is significantly less than what is provided for under the Retainer Agreement: legal fees of $10 million (including the costs awards), which reflects approximately 9.7 % of the present value of those payments ($103m), and a lower percentage of the value of the payments over the course of the class members' lives ($168m).

49. The exact dollar value of the Court of Appeal's judgment will not be known until all the pensions have been paid out and the Class Members and their beneficiaries are deceased. Assessing the value at the present time necessarily involves the use of actuarial estimates as to the additional pension payments that will be generated for the Class Members. The actuaries for both parties agree that on January 1, 2017, given reasonable assumptions, $103 million of additional funding would have been required in the Bell Pension Fund to finance the future costs of the lost 1% pension increase for the class. Accordingly, $103 million is the estimated "present value" of the Claim made in this case as of January 1, 2017 when the payments were scheduled to commence. Earnings on such an amount at the Pension Fund's assumed rate of return less payments to the class members based on actuarial assumptions about mortality and other factors would likely be sufficient to fund the payments.

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9 Baer Affidavit, para. 58, PMR, Vol. 2, Tab 7, p. 139.

10 McNeill Report, para. 1, PMR, Vol. I, Tab 5, p. 44.

50. The Representative Plaintiff's actuaries, using the same reasonable assumptions, estimate that over the course of time the total cash that would actually have been paid out to the class over the rest of their lives would be approximately $168 million.[11] Like the "present value" calculation above, this amount too is only an estimate.

51. The retroactive payment for past losses as between January 1, 2017 and October 1, 2021, which is only *part* of the total recovery, is estimated to be $36.4 million including pre and post-judgment interest.[12]

52. It has generally been recognized that a fee agreement entered into between the client and counsel ought to be the starting point of the court's 'fair and reasonable' analysis:

> "This is not to fix a fee either by a reconsideration of all the evidence and the application or judgment or arbitrarily, however one characterizes such a process, but rather to decide whether the agreement operates reasonably in the context. … With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession? In other words, I think the amount payable under the contract is the starting point for the application of the court's judgment."[13] [emphasis added]

53. In *Cassano v. Toronto-Dominion Bank*, Justice Cullity approved the terms of the contingency fee retainer on the following basis:

> "They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not

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[11] McNeill Report, para 4, PMR, Vol. I, Tab 5, p. 44.

[12] McNeill Report, para 7, PMR, Vol. I, Tab 5, p. 45.

[13] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 (B.C.C.A.) at para. 47, PBOA Tab 11.

> unreasonable, the risks were considerable, the degree of success was substantial."[14] [emphasis added]

54. Class action litigation has been conducted across Canada for years allowing counsel to work on a contingent basis, and counsel, if successful, have received a fee in the 33.3% range. In such litigation, awarding counsel a percentage of recovery in exchange for a contingent arrangement has generally been considered by the court to reflect a fair allocation of risk and reward as between lawyer and client. As Justice Strathy (as he then was) determined in the case of *Baker Estate*, after referring to a fee range of 20-30%, and citing class action decisions in which class action fees were awarded between 19.4% and 36%:

> "There should be nothing shocking about a fee in this range … It serves as an inducement to the lawyer the maximize the recovery for the client and it is regarded as fair to the client because it is based upon the 'no cure, no pay' principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings."[15]

55. Justice Belobaba has also consistently approved fee awards in the order of 33.3% of the final settlement, coining such a percentage "presumptively valid" on its face:

> "I have also been persuaded that a one-third contingency fee agreement, if fully understood and accepted, should be accorded presumptive validity. … According presumptive validity to a one-third contingency fee, and thus making class counsel's compensation more certain would take the pressure off certification-motion costs awards as a method for forward-financing the class action lawsuit."[16] [emphasis added]

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[14] *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.) at para. 63, PBOA Tab 9.

[15] *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105 (S.C.J.) at para. 64, PBOA Tab 3.

[16] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 at paras. 3 and 10, PBOA Tab 8. In subsequent decisions, Justice Belobaba also stated that the reasonableness of the percentage fee recovery may also depend on the size of the recovery, particularly in larger recovery cases. Recently, Justice Belobaba approved a $20

56. Justice Strathy has also considered the propriety and reasonableness of 'one-third' contingency fee arrangements in many instances and determined such agreements to be "standard", "common place" and "regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation."[17] It has become judicially well-accepted that "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".[18]

57. In this case, while the aggregate value of the case to the whole class was very high at $103 million on a present value basis and an estimated $168 million in payments over the lives of the Class Members, the individual amounts at stake, on average for each of the over 35,000 pensioners, is less than $5,000. These claims would not be viable on an individual basis and it was necessary to incur the risk and expense of a class action in order to obtain recovery for the group.

B. Class Counsel Fees are Fair and Reasonable in the Circumstances

i. The prevailing legal principles

58. In determining whether to approve Class Counsel's request for legal fees, this court must determine whether those fees are fair and reasonable in all of the circumstances. The requisite factors to be considered are well established and include the following:

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million counsel fee in a case where the recovery was $100 million, yielding a 20% percentage fee. See *MacDonald v. BMO Trust Company, 2021 ONSC 3726,* at para 9 and 53, PBOA Tab 22. The Court in *Pro-Sys Consultations Ltd. V. Infineon Technologies AG*, 2016 BCSC 964, PBOA Tab 25, awarded a class counsel fee of $24 million where an $80 million settlement was reached, yielding a 30% counsel fee.

[17] *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 13, PBOA Tab 1.

[18] *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537 at para. 19, PBOA Tab 24.

(a) the legal and factual complexities of the action;

(b) the risks undertaken, on both the merits and prospects of certification;

(c) the degree of responsibility assumed by class counsel;

(d) the importance of the issues to the Class Members;

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

(f) skill and competence demonstrated by class counsel throughout the action;

(g) results achieved;

(h) ability of the class to pay and the class' expectation of legal fees;

(i) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation.[19]

59. The issue of compensation for Class Counsel is a vitally important subject, and the final analysis of whether class proceedings legislation will achieve its objectives (access to justice, behaviour modification and judicial economy) will largely depend on whether or not there are sophisticated and hard-working Class Counsel who are prepared to act for the class and hence bring these actions and do them well.[20]

60. A fee award that not only compensates Class Counsel for the amount of time actually incurred, but also recognizes that the risk assumed on behalf of the class is essential to ensuring that counsel remain to assume the necessary risks to act as Class Counsel. Class Counsel will inevitably take on worthy cases that they will nevertheless lose, visiting upon them significant financial consequences. If Class Counsel are not adequately compensated in cases where they are

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[19] *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, at para. 80, PBOA Tab 29.

[20] Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996), pp. 3-4 cited by Cumming J. in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.), para. 59, PBOA Tab 31.

successful, they will not have an economic incentive to prosecute class actions, members of the public who have been wronged will be denied access to justice, and inappropriate behavior on the part of defendants will go unmodified.[21]

61. This has been acknowledged in legislative studies underpinning the class action statutes, as well as by settlement approval judges, and this is the lens through which risk evaluation at the fee approval stage must be viewed. As a result, it is paramount that the Court carefully consider not only all of the risks incurred by Class Counsel in prosecuting class proceedings, but also the ultimate risk concerning the fulfillment of the objectives of the legislation. Although the risks incurred in undertaking and continuing a class proceeding are varied and complex, the purpose of assessing the risks incurred by Class Counsel is clear: the issue of compensation will ultimately determine whether or not the class proceedings regime in Canada generally will be successful in fulfilling its legislative objectives.

62. The risks and high costs of litigation associated with pursuing complicated yet worthy cases have been eloquently described as follows:

> There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequence of an order for costs would be to destroy such a claim, no order should be made. Injustice would be even more manifest if the impoverishment of plaintiff were caused by the very acts of which plaintiff complains in the action.[22] [emphasis added]

63. This is precisely the mischief that class proceedings legislation was designed to prevent – the injustice of the non-pursuit of meritorious claims. Such claims cannot be prosecuted diligently,

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[21] Baer Affidavit, para. 53, PMR, Vol. 2, Tab 7, p. 138.

[22] *John Wink Ltd. v. Sico Inc.*, [1987] O.J. No. 5 (H.C.), para. 8, PBOA Tab 17.

or at all, without class counsel being willing and able though a contingent fee arrangement to assume all of the attendant financial risks. Class counsel fees are not only to reward counsel for meritorious efforts, but to "also encourage counsel to take on difficult and risky class action litigation".[23]

64. In applying the principles to determine class counsel fees, the use or focus on the "multiplier" of counsel time has been repeatedly criticized by the courts. Justice Cullity commented on this issue at length in *Cassano v. Toronto-Dominion Bank*.[24] In that case, the retainer agreement provided (as it does in this case) for legal fees to be calculated as a percentage of recovery for the class. Class counsel obtained a $55 million settlement and the Court approved class counsel fees of 20%, being $11 million. The "multiplier" on class counsel's time was **5.5** Justice Cullity canvassed the case law and comments from numerous other courts who concluded that percentage-based recovery models better aligned the interests of the client and counsel and properly rewarded "acuity and efficiency" in achieving the client's objectives, rather than the amount of time spent. Justice Cullity stated as follows:

> [59] The second matter is that the fee of $11 million represents the application of a multiplier of approximately 5.5 to counsel's approved time. This might well be considered to be excessive if the retainer agreements had provided for the adoption of the "lodestar approach" reflected in s. 33 of the CPA. They did not do this.
>
> [60] While it has been said that the appropriateness of a fee calculated in the lodestar manner might be tested by comparing it with the percentage of gross recovery it represents, I would be hesitant to use the lodestar method as a firm indicator of the reasonableness of a fee determined by the application of a percentage to the amount recovered. In *Martin v. Barrett*, [2008] O.J. No. 2105, 67 C.C.P.B. 102 (S.C.J.), at paras. 38-39, I referred to criticisms of the lodestar method. One of these that has been

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[23] *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 9, PBOA Tab 1.

[24] *Cassano v. Toronto-Dominion Bank*, 2009 CanLII 35732 (ON SC), PBOA Tab 9.

repeatedly mentioned in other cases in this jurisdiction and elsewhere is that the application of a multiplier to a base fee may not only encourage an inefficient use of time and a padding of dockets, it may also fail to reward efficient time-management and the exercise of superior skill by class counsel.

[61] As Smith J. stated in Endean v. Canadian Red Cross Society, 2000 BCSC 971 (CanLII), [2000] B.C.J. No. 1254, [2000] 8 W.W.R. 294 (S.C.), at para. 74:

> Good counsel should not be penalized for their acuity and efficiency by basing their fees only on the amount of time it took them to accomplish their clients' objectives.

[62] In contrasting the percentage of recovery approach with the application of a multiplier, Cumming J. stated in *VitaPharm Canada Ltd. v. Hoffma-La Roche Ltd*., [2005] O.J. No. 1117, [2005] O.T.C. 208 (S.C.J.), at para. 107:

> Using a percentage calculation in determining class counsel fees properly places the emphasis on quality of representation, and the benefit conferred on the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours". [page559]

[63] Of course, if counsel accept a retainer on the basis that the lodestar method is to apply, the requirements of s. 33 -- including that of a reasonable base-fee -- must be observed. Class counsel did not choose to adopt that method and, having achieved an excellent result, they submit that it would be unreasonable to reduce their fee by reference to the time they expended to do so. They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial and there is nothing in the manner in which the proceeding was conducted that, in my judgment, would justify a refusal to approve a fee determined in accordance with the terms on which the retainers were accepted.[25]

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[25] *Cassano v. Toronto-Dominion Bank*, 2009 CanLII 35732, at paras 55-63, PBOA Tab 9 [emphasis added]

65. Furthermore, the use of multipliers in assessing the reasonableness of a class counsel fee has been described as being "fundamentally flawed, indeed unprincipled" as it fails to address the true risks of a class action contingency practice.[26]

66. In this case, the factors set out in the case law (as described further below) are each met and justify the class counsel fee sought. Class Counsel seeks 9.7% of the present value of the total estimated recovery in this case, which is well below the ordinary range as described above (see paragraph 55-57) of between 20-33%. It is very fair and reasonable under all of the circumstances including the excellent result reached.

67. While the focus should not be placed on the multiplier for the reasons described above (and in particular, in this case, because of the aggressive strategy to bring the summary judgment motion at the outset which shortened the case by years), the multiplier in this case is, like the percentage, also fair and reasonable under all the circumstances. Class counsel incurred approx. $2.075 million in time as at June 22, 2021, and will incur a total of approximately $2.2 million to complete the matter.[27] Therefore, on the basis of a class counsel fee of $10 million, the multiplier is approximately 4.5. While at the higher end of the traditional range, it is justified in this case given the success, expeditious approach and the size of recovery. The multiplier is also considerably less than the 5.5 multiplier of counsel time in *Cassano v. Toronto Dominion*, described above.[28]

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[26] See, for example, *Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670, PBOA Tab 8, at footnote 9; also see *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537 at para 19, PBOA Tab 24; also see *Ramdath v. George Brown College of Applied Arts and Technology*, 2016 ONSC 3536, PBOA Tab 26, at footnote 14: "Over a period of years, plaintiff-side class action firms will win cases and lose cases. The "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. That is why the "multiplier" approach that purports to assess risk by considering only the case that is currently before the court is fundamentally flawed, indeed unprincipled."

[27] Baer Affidavit, paras. 68-69, PMR, Vol. 2, Tab 7, pp. 142-143.

[28] *Cassano v. Toronto-Dominion Bank*, 2009 CanLII 35732, at paras 59, PBOA Tab 9.

68. Furthermore, when (as in this case), class counsel successfully litigates a matter to judgment on the merits (and in particular when it requires an appeal), each of the factors set out in the case law are amplified. There is increased risk, and the responsibility, counsel skill, and results factors take on more importance than is the case with a settlement of an action. Similarly, there is no "settlement discount" associated with a judgment on the common issues as was obtained here. This Court should consider the increased risks and rewards obtained by Class Counsel in this case, in considering the fees sought on this motion.

ii. The legal and factual complexities of the action

69. While this case was litigated swiftly and efficiently, it nevertheless involved significant legal and factual complexities that support Class Counsel's fee request. It was a case that involved the intersection of the law of class actions and contracts and the relatively esoteric area of pension and benefits law.

70. The case asserted numerous causes of action, including breach of contract, breach of fiduciary duty, and breach of trust.

71. The complexity of the matter and the amounts at stake required extensive, competing expert evidence to be filed by both sides. The evidentiary record was almost 1200 pages, including:

(a) Expert evidence regarding the methodology used by Statistics Canada for the determination and publication of the Consumer Price Index;

(b) Expert evidence regarding the interpretation of the indexation provision under the Pension Plan;

(c) Expert evidence regarding mathematical conventions for rounding of significant digits in relation to the cost-of-living increase under the Pension Plan;

(d) Expert evidence regarding the value of the indexation payments; and

(e) Extensive factual evidence regarding the history of the Pension Plan, the interpretation of the indexation provision, communications to pensioners and the methodology for calculation and valuation of the indexation; and

(f) Factual evidence relating to numerous other pension plans with cost-of-living increases.

72. The motions were hotly contested and all of the affiants were cross-examined (except for the litigation assistant). Procedural motions were also necessary throughout the matter including regarding the proposed stay of proceedings (dealt with in the sequencing motion), as well as with respect to the admission of evidence at the summary judgment motion.

73. In addition to the complex expert and factual evidence to be addressed, relatively rare legal principles were litigated, including the last antecedent rule and the series qualifier rule. Furthermore, new law was made by the Court of Appeal on the application of *contra proferentum* in the context of employer-drafted pension plans.

iii. The risks undertaken, on both the merits and prospects of certification

74. Class Counsel assumed considerable risk in litigating this case which was opposed both on certification and on the merits at the summary judgment motions. In particular:

(a) The Defendants sought to bring a stay motion, prior to certification, requiring a sequencing motion to ensure that the issues could be determined together;

(b) The Defendants opposed the certification motion, and in particular challenged the preferability and representative plaintiff criteria, as well as challenges to certain causes of action, defendants and common issues;

(c) The Defendants opposed the summary judgment motion and asserted the action should be dismissed outright. They filed extensive factual and expert evidence as described above.

75. The risks on the merits are amply demonstrated by the decision at first instance, whereby the Court held that Bell correctly interpreted and applied the indexation provisions under the Pension Plan and dismissed the Representative Plaintiff's action.

76. After losing on summary judgment, Class Counsel continued to seek a remedy for the Class Members by filing, arguing and winning the appeal.

77. The case was very challenging from the outset, given the nature of the language used in the Pension Plan, and the factual and expert evidence which would be required. The case was made more challenging by the extensive factual and evidentiary record filed by the Defendants.

iv. The degree of responsibility assumed by class counsel

78. Koskie Minsky LLP and McKenzie Lake LLP undertook complete responsibility for prosecuting this action. They worked in tandem, seeking to avoid duplication. Class Counsel conducted a complex and novel summary judgment case, argued the necessary appeal, and were completely successful in the result.

v. The importance of the issues to the Class Members and the monetary value of the matters at issue

79. Inflation protection for their pension benefits is of great significance to the Bell Pensioners. Without adequate inflation protection, the real value of their pension decreases each year, and many are on fixed and limited incomes.

80. The monetary value of the matters at issue and the recovery in this case is are of immense proportions to the class as a whole. The value of the recovery for the lost indexation (and interest) for the last 4 years alone is in excess of $36 million, with the total recovery having a present value of over $100 million, and over the course of the Class Members' lives is estimated to be approximately $168 million.[29]

81. However, while the monetary value of the case as a whole is very high, the amounts at stake for each class member (on average, less than $5,000) is such that individual litigation would not be viable. The Class Members required a class action to advance their interests in common to achieve access to justice, payment of their full indexation which was owed, and behaviour modification.[30]

vi. Skill and competence demonstrated by class counsel throughout the action

82. The prosecution of this case well illustrates the skill and competence of Class Counsel, who pursued an aggressive, uncommon and highly successful strategy of seeking summary judgment contemporaneously with certification. They were ultimately successful in this strategy

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[29] McNeill Report, paras. 1, 4 and 7, PMR, Vol. I, Tab 5, p. 44-45.

[30] *Romeo v. Ford Motor Co.* [2019] O.J. No. 1416 (S.C.J), per Morgan J., at paras. 28-29, PBOA Tab 28.

and obtained judgment. They were also successful on the various procedural motions described above leading to the result.

vii. Results achieved

83. The result for the Class Members in this case is outstanding. They achieved complete success in the claim, and will receive their payments automatically, without having to apply or complete any claims process. The notice and administration costs will be paid by the Defendants.

84. Furthermore, their pensions will continue to grow in accordance with their entitlements, and future indexation adjustments will be based on their newly calculated base pensions.

viii. Ability of the class to pay and the class' expectation of legal fees

85. All of the Class Members are retired, and many are of limited financial means. There are few (if any) amongst the Class Members who could have afforded a lawyer, or the disbursement costs necessary to mount this type of case and which was done by Class Counsel.[31] Furthermore, given the nature and value of the individual claims, unless they were aggregated it would not have been viable for any lawyer to take them on contingency.[32]

86. The Representative Plaintiff carefully considered the financial arrangement when he signed the retainer on behalf of the class and found it both fair and favourable to the proposed class.[33] He believes that Class Counsel did an excellent job and supports the fee request made.[34]

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[31] Austin Affidavit, para 18, PMR, Vol. I, Tab 4, p. 24.

[32] Baer Affidavit, para. 51, PMR, Vol. 2, Tab 7, p. 137.

[33] Austin Affidavit, paras. 13, 16 and 17, PMR, Vol. I, Tab 4, pp. 23-24.

[34] Austin Affidavit, paras. 16-17, PMR, Vol. I, Tab 4, p. 24.

87. In particular, the Representative Plaintiff notes the following:

(a) The fee request falls well below what was set out in the Retainer Agreement;

(b) Class Counsel negotiated for a significant amount of costs to be paid of $472,500, which reduces the amount of fees payable by the Class;

(c) Class Counsel took the most expedited route possible to achieve judgment by bringing summary judgment motion at the same time as the certification motion; and

(d) Class counsel vigorously advanced the appeal.[35]

88. Furthermore, the Representative Plaintiff posted the Notice to the Class relating to these motions on May 12, 2021to the Bell Buddies Facebook page he manages relating to this Action. The Notice provided extensive detail about the motions to implement the judgment, for approval of Class Counsel fees, the honorarium, and the Cass Proceedings Fund levy, as well as the motion relating to the issue of opting out. Since that time, there were dozens of Class Members who have posted on the Bell Buddies Facebook page in respect to these motions, or reached out to the Representative Plaintiff personally about them. No concerns were raised with him regarding any of these points, and in particular the quantum of the fees sought by Class Counsel. In general, the Class Members the representative plaintiff corresponded with were very supportive of the lawsuit and the result, and very thankful for the efforts made to advance it.[36]

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[35] Austin Affidavit, para. 16, PMR, Vol. I, Tab 4, p. 24.

[36] Austin Affidavit, para. 19, PMR, Vol. I, Tab 4, p. 25.

89. The Notice was sent by mail directly to all of the 35,045 class members. Out of those 35,045 class members, only 7 class members objected to the legal fees.[37] Of those, only one of them objected to the quantum of the legal fees sought. The concern raised by the other 6 was not about the quantum of the legal fee *per se*, but about whether it should be the defendants that should pay these legal fees.[38] The objections are dealt with in further detail below, but it is important to note at the outset that 35,038 of the 35,045 (99.9%) class members did not object to the legal fees.

90. In terms of quantum for *each* class member, given that there are over 35,000 Class Members, [39] the contribution to legal fees will be approximately $285.00 on average.

91. Given the result achieved, the amount recovered for the class, and that the fee request is considerably less than the terms set out in the retainer agreement (which is consistent with class action retainers generally) the amount sought would be within the reasonable contemplation of Class Members.

ix. The opportunity cost to class counsel in the expenditure of time in pursuit of the litigation.

92. Both Koskie Minsky LLP and McKenzie Lake LLP are law firms with both fee-for-service and contingency-based work. Very significant time and money have been expended by Class Counsel in pursuing this litigation through certification, summary judgment, the appeal and judgment implementation. Up to June 22, 2021, Class Counsel collectively docketed 3,061.1

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37 Affidavit of Uma Ratnam, sworn June 25, 2021 ("**Ratnam Affidavit**"), PMR, para. 5, Vol. I, Tab 6, p. 53.

38 Ratnam Affidavit, Exhibits A to H, PMR, Vol. I, Tab 6, pp. 59-79.

39 Baer Affidavit, para. 19, PMR, Vol. 2, Tab 7, p. 129.

hours of lawyer and clerk time, with a total value of $2,075,280 plus applicable taxes of $269,786.4 for a total of $2,345,066.40.[40]

93. In addition, there is considerable work which remains to be done by Class Counsel, including communications with class members, review of actuarial calculations, and other implementation matters. It is estimated that Class Counsel will incur an additional $125,000 of docketed time in respect of the further work and preparation prior to the motions (since June 22) and following the motions in respect of the judgment implementation matters.[41] Therefore, the total time value of the time spent to completion will be approximately $2,200,000, plus taxes, over the course of 4 years. This represents a very significant opportunity cost.

C. Conclusion on Class Counsel fee approval request

94. Class Counsel undertook very significant risks and achieved complete success for the Class Members. Approving the fee request of Class Counsel advances the goals of the class action regime and provides reasonable remuneration to Class Counsel for the outstanding work that was done. The Representative Plaintiff and Class Counsel respectfully submit that the fee request is fair and reasonable and should be approved.

Objections

95. A Notice to the Class was approved by the Court on May 7, 2021, and distributed directly by mail to all 35,045 Class members, as well as being posted on Class Counsel's website. From the whole class, there were only seven Objection Forms which contained a reason for the

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[40] Baer Affidavit, para. 68, PMR, Vol. 2, Tab 7, p. 142-143.

[41] Baer Affidavit, para. 69, PMR, Vol. 2, Tab 7, p. 143.

objection.[42] An additional individual sent an email with reasons for her objection but did not file an Objection Form.[43] Another 12 individuals completed an Objection Form, but did not provide any objecting reasons.[44]

96. Additionally, 40 individuals sent in an Objection Form, but subsequently advised that they were withdrawing their objection. The vast majority of these individuals completed the form by mistake, many believing it was a claim form or a declaration of eligibility, and they were not objecting.[45] All 40 of these individuals confirmed that they wished to withdraw their objection form.

97. The objections that were not withdrawn fall into the following categories:

Basis of Objection	**Number**
Objection Forms with objecting reasons	
Bell should pay class counsel's fees and/or other deductions[46]	6
Legal fees are too high[47]	1
Does not wish to receive any payment or pension increase[48]	1

[42] Ratnam Affidavit, Exhibits A to H, PMR, Vol. I, Tab 6, pp. 59-79.

[43] Ratnam Affidavit, Exhibit I, PMR, Vol. I, Tab 6, pp. 83-85.

[44] Ratnam Affidavit, Exhibits J to U, PMR, Vol. I, Tab 6, pp. 86-120.

[45] Ratnam Affidavit, paras. 9-10, PMR, Vol. I, Tab 6, pp. 54-55

[46] See Exhibits A-C, E, F and I to the Ratnam Affidavit, PMR, Vol. I, Tab 6, pp. 59-67, 70-75 and 83-85. Objectors within this category are: S.S., S.W., J.B., M.G., C.B. and M.T.

[47] See Exhibit D of the Ratnam Affidavit, PMR, Vol. I, Tab 6, pp. 76-79. Objectors within this category are: F.L.

[48] See Exhibit H of the Ratnam Affidavit, PMR, Vol. I, Tab 6, pp. 80-82. Objectors within this category are: D.T.

Objection Forms without objecting reasons	
Unclear – may relate to eligibility[49]	1
Reasons confirm no objection or questions[50]	1
No reasons given, but have not been reached to confirm if they intended to object[51]	10

The majority of the objections contain a misunderstanding with respect to costs and fees

98. The objectors in the first category do not object to the quantum of the fee, but rather object to the fact that the legal fees are payable by the class members instead of the defendants. While it is understandable that a litigant would want a defendant to pay all of its legal fees, the objection misunderstands the distinction between the limited litigation costs awards that can be obtained (payable by the defendants) and legal fees pursuant to a contingency retainer agreement (payable by the client). Generally, even where completely successful, a litigant will not recover from a defendant anywhere close to all of its legal fees incurred or other expenses of the litigation. The principles of costs recovery do not provide full indemnity (even on an hourly fee basis) except in the rarest of cases involving egregious facts and "a clear finding of reprehensible conduct on the part of the party against whom the cost award is being made",[52] which is not applicable here.

99. Furthermore, in cases (such as here) where a *contingency* agreement was required in order to advance the litigation, such that the client would not pay at all if the litigation was not successful

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[49] See Exhibit L of the Ratnam Affidavit, PMR, Vol. I, Tab 6, pp. 92-96. Objectors within this category are: S.S. (#2).

[50] See Exhibit K of the Ratnam Affidavit, PMR, Vol. I, Tab 6, pp. 89-91. Objectors within this category are: A.L.

[51] See Exhibits J, and M to U, of the Ratnam Affidavit, PMR, Vol. I, Tab 6, pp. 86 to 88 and 96 to 123. Objectors within this category are: H.S., C.M., C.G., G.B., A.M. W.H., R.B., Y.A., C.W., Y.R.

[52] *Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722 (CanLII), at para. 40, PBOA Tab 13.

(and if successful, the fee is based on a percentage of recovery), the degree to which the client will have to fund its legal fees from recovery is likely higher. For example, the Court recently awarded class counsel fees of $6.66 million in fees, representing 33% of the recovery to the class of $20 million in *Brazeau v. Attorney General*[53], where the plaintiff was successful on summary judgment. The court also ordered $800,000 in costs on a contested basis, which was deducted from the $6.66 million payable from the class member recovery in accordance with the retainer agreement. Therefore, notwithstanding having been completely successful on summary judgment, the class still had to fund the vast majority of the legal fees from their recovery, in accordance with the contingency fee retainer agreement.

100. The circumstances are the same here. The same retainer agreement which was used in *Brazeau* was used here, which, contingent on success, provides for legal fees as a percentage of recovery, but with a deduction for costs payable by the defendants.

101. In order to reduce the legal fees payable by the class in this case, Class Counsel negotiated a very substantial costs award of $450,000 in the action (in addition to the fee award of $22,500 granted by the Court of Appeal). There are restrictions in terms of the items which could be included in the cost request, such as all of the time spent on the appeal (given that costs were already fixed by the Court of Appeal) and other matters. The costs award was negotiated as part of the global implementation plan, in return for which the defendant agreed not to seek leave to appeal to the Supreme Court of Canada (which it had preserved its right to do throughout the discussions). The total of $472,500 payable in costs here is a deduction from the amount of legal fees which are to be paid from the recovery of Class Members.

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53 *Brazeau v. Attorney General (Canada),* 2019 ONSC 4721, PBOA Tab 6.

Other objection relating to fees

102. Out of the 35,045 class members, there is only one objection which objects to the actual quantum of fees sought. This objector states that the percentage of the legal fees should be 15%, instead of 30%.[54] This objector may not be aware that Class Counsel is seeking 9.7% of the present value of the recovery ($103m), not 15% or 30%.

Other Objections

103. One objector indicated that they did not want to receive any funds, stating: "I do not want the money. The pension I receive is enough. I will send back any money I receive." [55] This does not appear to be an objection to the relief sought, but rather an indication that he intends to return the money he receives, which is his right.

104. Another objector's reasons are not clear, stating "as a retiree and having worked for 21 years for Bell deem to be eligible to the 2% indexation".[56] There is insufficient information to respond and the person has not yet responded to efforts to contact him. This does not appear to be an objection to the relief sought in the motions.

105. The final Objection Form that contains reasons is not an objection at all, but instead a clear statement that he does not object.[57] He states "I have carefully read the contents of all the material sent to me and have no questions or objection to present".

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54 Exhibit D of the Ratnam Affidavit, PMR, Vol. I, Tab 6, pp. 67-69.

55 Exhibit H of the Ratnam Affidavit, PMR, Vol. I, Tab 6, pp. 80-82.

56 Exhibit L of the Ratnam Affidavit, PMR, Vol. I, Tab 6, pp. 92-95.

57 Exhibit K of the Ratnam Affidavit, PMR, Vol. I, Tab 6, pp. 89-91.

Remaining Objection Forms

106. The remaining 12 Objection Forms do not contain any reasons of what is being objected to, or any substantive confirmation that the person did intend to object. As set out above, many other people had mistakenly sent in Objection Forms, many believing it was a claim form or a declaration of eligibility, and they were not objecting. It is possible the same is true for these 12 individuals. We have attempted to contact these 12 individuals to determine their intention but have not yet been able to reach them. In any event there is no way to respond without knowing what in particular a person may be objecting to in relation to the three motions brought.

107. In conclusion, there are clear answers to all of the objections. Furthermore, the fact that so few members objected despite a direct notice campaign to the 35,045 class members is a strong indicator in support of the Motions.

D. The Honorarium for the Representative Plaintiff should be approved

108. On a fee approval motion, this Court has jurisdiction to grant the request for an honorarium payment, paid out of the judgment or settlement proceeds, to the Representative Plaintiff.[58] In this regard, Class Counsel seeks approval of an honorarium in the amount of $15,000.00 for Leslie Austin.

109. In *Brazeau v. Attorney General (Canada),* this Court recently summarized the factors to be considered in approving an honorarium payment to a representative plaintiff:

> Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. In

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[58] *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at paras. 133–136, PBOA Tab 29; *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528 at para. 43, PBOA Tab 16; *Dolmage v. HMQ*, 2013 ONSC 6686, PBOA Tab 14.

> determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other Class Members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.[59]

110. Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case, assistance which resulted in monetary success for the class, it may be appropriate to award compensation to the representative plaintiff in their own right.[60]

111. In this case, the factors set out in the case law are all satisfied. Mr. Austin's assistance in this case far exceeded his own individual interests and he rendered invaluable assistance and went through considerable hardship in doing so. He went above and beyond the normal responsibilities of a representative plaintiff in bringing this action to a successful judgment applicable to all Class Members. In particular,

(a) He identified the issue and corresponded extensively with Bell to obtain a result;

(b) He approached Class Counsel and created a detailed list of facts and background;

(c) He instituted and managed a Facebook page for Bell pensioners relating to the 2017 indexation issue and the class action lawsuit, entitled "Bell Buddies II". There grew to be

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[59] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 4721, at para 32, PBOA, Tab 6.

[60] *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen.Div.) at para. 28, PBOA, Tab 32.

over 750 members of the group and he posted regular updates about the case, and corresponded with many Class Members through the site;

(d) He provided invaluable assistance regarding the underlying facts, legal theories and strategy at all stages;

(e) He was cross-examined on his affidavit sworn in support of the certification/summary judgment motion;

(f) He travelled to and attended the argument of the certification/summary judgment motion and the appeal, which were held in Toronto;

(g) He corresponded with and spoke to many Class Members since the commencement of the litigation both through the Bell Buddies Facebook page he created, as well as separately by email and phone;

(h) He spent approximately 1040 hours completing his duties as Representative Plaintiff.[61]

112. Mr. Austin has multiple sclerosis and is confined to a wheelchair.[62] Despite grappling with significant health and mobility issues, Mr. Austin travelled to Toronto for court attendances (which required a support person to assist him), always made himself available for meetings, correspondence, and communications with Class Counsel, and always responded in a prompt manner.[63]

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61 Austin Affidavit, para 10, PMR, Vol. I, Tab 4, p. 22.

62 Austin Affidavit, para 11, PMR, Vol. I, Tab 4, p. 22.

63 Baer Affidavit, para 72, PMR, Vol. 2, Tab 7, pp. 143-144.

113. As a result of his contribution and personal sacrifices, Mr. Austin should be granted an honorarium of $15,000. The court has held that "the honorarium is not an award but a recognition that the representative plaintiffs meaningfully contributed to the Class Members' pursuit of access to justice". Mr. Austin made an extremely meaningful contribution and the quantum of the requested honorarium is well within the range accorded in the case law, particularly given that this action proceeded all the way to judgment. In *Dolmage v. Ontario*, and the Sixties Scoop class proceedings, the settlement approval judges made honorarium awards of $15,000.00 and $10,000.00 respectively, to the representative plaintiffs.[64] Courts have awarded up to $50,000 as an honorarium in the appropriate circumstances.[65]

114. In the circumstances of this case, the honorarium payment is appropriate, deserving and fair. Such payment would go some distance in recognizing the significant difficulty for the Representative Plaintiff to perform his role, and the extensive time and effort he spent which is exceptional.

E. The Class Proceedings Fund is entitled to the requested levy

115. Pursuant to section 10 of the Class Proceedings regulation under the *Law Society Act*, a levy is payable to the Class Proceedings Fund in proceedings in which a party receives funding from the Fund.[66]

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[64] *Riddle v. Canada*, 2018 FC 641 (Order, para. 29), PBOA Tab 27; *Dolmage v. Ontario*, 2013 ONSC 6686 at para. 51, PBOA Tab 14.

[65] *MacDonald v. BMO Trust Company*, 2021 ONSC 3726, at para 58, PBOA Tab 22; also *see Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670, PBOA Tab 8.

[66] O.Reg 771/92, s. 10.

116. The regulation specifies that the amount of the levy is the sum of (a) the amount of any financial support paid by the Class Proceedings Fund, and (b) 10 per cent of the amount of the settlement funds to which Class Members are entitled, after the deduction of all amounts that the Court orders to be paid to persons other than Class Members. This includes fees, taxes, disbursements, notice and administration costs.[67]

117. The Class Proceedings Fund has reimbursed Class Counsel a total of $88.330.83 for disbursements. The Representative Plaintiff's experts, whose evidence was indispensable on the summary judgment motion, account for the majority of the disbursements.[68]

The Opt Out Motion

i. In the specific facts of this case, Class Members should not be permitted to opt out

118. In these circumstances, allowing Class Members the right to opt out of the Action leads to an absurd result and creates a collective action problem that this Court should provide relief against. The judgment of the Court of Appeal is of a declaratory nature, applicable to the whole class. The Court of Appeal concluded there was a class-wide breach of contract and mandated a recalculation of the indexation increase in the amount of 2% (instead of 1%) and the payment of damages. The Implementation Order provides that the retroactive losses, as well as increased future payments are to be paid to all Class Members. Therefore, all Class Members have achieved success on the claim, and all will be paid the retroactive amounts, as well as all future increased

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67 *Martin v. Barrett*, 2008 CarswellOnt 9521, at para. 42, PBOA Tab 23.

68 Baer Affidavit, para. 70, PMR, Vol. 2, Tab 7, p. 143.

pension payments, regardless of whether or not they have the opportunity to opt out and choose to do so.

119. Given that judgment in the Action was obtained on behalf of all Class Members and provides for complete recovery, there is no principled need for an opt out in the specific facts of this case. Permitting an opt out right here would be contrary to the spirit and underlying principles of the class action regime.

120. The animating principle behind allowing a class member to opt out is to permit Class Members to elect not to participate in the action so that they will not be affected by its results, whether negative or positive, and can otherwise pursue their own individual action. In *The Law of Class Actions in Canada*, the authors note that "if a class member opts out, he or she foregoes any right to share in the success of the lawsuit but avoids being bound by an unfavourable outcome."[69] The circumstances of this case create a situation where this is no longer true. Since certification and summary judgment was brought at the same time, complete success was obtained on their behalf and all will share in the Retroactive Payments and benefit from the future increased pension payments. This result occurs in this case, regardless of whether any individuals opt out, as Bell Canada is required under the PBSA to administer the Pension Plan in accordance with its terms, and the Court of Appeal has issued a binding decision on how the Pension Plan must be interpreted and applied for all pensioners in the context of the 2017 cost-of-living adjustment.

121. Although not permitting opt outs in a proceeding will surely be rare, the specific facts of this case justify it and reflect the reasoning of the 1982 Ontario Law Reform Commission Report

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[69] Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic and Alison Warner, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014) at p. 215, PBOA Tab 37.

on Class Actions, where it was recognized that there will be some cases where the right to opt out would be meaningless, and recommended there be discretion to the court:

> Furthermore, **a right to opt out would be meaningless in a case where, as a practical matter, a class member would be affected by a judgment notwithstanding his withdrawal from the class action**. His interest is not "individual" in the sense that, by leaving the class and by bringing a separate action, he can effect a result different from that which would ensue had he remained a class member. There seems to be little reason in such circumstances to permit Class Members to opt out. In this respect, the failure of Rule 23 to extend a right to opt out to Class Members in actions seeking injunctive or declaratory relief is a sensible policy decision, as the Class Members might be affected by the judgment in any event[70]

122. American courts and the U.S. federal class proceedings statute have recognized this issue and do not permit opt outs in cases that seek injunctive or declaratory relief, given that all class members will necessarily benefit.[71]

123. The exception of restricting opt outs where injunctive or declaratory relief is obtained applies specifically to this case, as the Court of Appeal's decision and the Implementation Order contain both declaratory relief applicable to all, and orders requiring payment to all of both retroactive losses and future pension amounts.

124. In the 1990 Advisory Committee Report, while there is no explicit language incorporating discretion, the Committee does not comment on the analysis in the 1982 Law Reform Commission Report on this issue. The Advisory Committee Report also does not address the circumstances

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[70] Ontario Law Reform Commission, *Report on Class Actions*, vol. II (Toronto: Ontario Law Reform Commission, 1982) at p. 486, PBOA Tab 38.

[71] Fed. R. Civ. P. § 23(b)(2). See generally*: Carter et al., v City of Lost Angeles*, 169 Cal Rptr 3d 131 (Sup Ct 2014) at 13*; Berry v Schulman*, 807 F (3d) 600 (4th Cir 2015) at 16–17; *Thompson v Merck & Co.*, 2004 US Dist. LEXIS 540 (ED Penn 2004) at 6. See PBOA Tabs 34, 33, and 35.

here, whereby injunctive relief has *already* been obtained and payment of all losses will necessarily be made to all Class Members in any event.[72]

125. The unique fact scenario in this case warrants the Court's order that opt outs not be permitted. The Court has jurisdiction to make this order under section 12 of the Class Proceedings Act, which provides:

> The court, on the motion of a party or class member, **may make any order it considers appropriate** respecting the conduct of a class proceeding **to ensure its fair** and expeditious **determination** and, for the purpose, may impose such terms on the parties as it considers appropriate.[73] [emphasis added]

126. While the Superior Court has previously held that opt out rights must be provided, it did so in the context of completely different facts and is distinguishable.[74] In *Berry v. Pulley*, the court certified a rare type of class action involving both a plaintiff class and defendants' class which related to seniority as between airline pilots at different airlines. In that case, it was contemplated that there may be the need for individual damage assessments, and the defendants asserted that there were different "individual position"[s] regarding liability.[75] Furthermore, that decision was rendered at the certification stage, long before the merits had been determined. The circumstances in that case warranted an opt out right so that they could assert their individual rights, and not be affected by the outcome in the class action (whether it was successful or unsuccessful) and would also not share in the proceeds or any adverse result.

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72 Report of the Attorney General's Advisory Committee on Class Action Reform, page 33-34, PBOA Tab 36.

73 *Class Proceedings Act*, 1992, S.O. 1992, c.6, s. 12.

74 See, for example, *Berry v. Pulley*, [2001] O.J. No. 911 at paras. 38-45, PBOA Tab 5.

75 *Berry v. Pulley*, [2001] O.J. No. 911 at paras 26-31, PBOA Tab 5.

127. The circumstances of *Berry v. Pulley* are completely distinguishable from the facts of this case, in which declaratory relief and judgment for damages has now been obtained and will necessarily be paid to all Class Members. In addition, the court in *Berry v. Pulley* relied on the U.S. class proceedings statute and case law in support of its conclusion, and specifically recognized that there are exceptions to the right to opt out in that jurisdiction which relate to cases that seek "final injunctive relief or corresponding declaratory relief for the entire class".[76] Unlike in *Berry v. Pulley*, that exception is present here.

128. Finally, the Class Members in this case have been provided the opportunity to object or advise if they have any interest in opting out of this case, and none have done so. Pursuant to the court's Notice order, Bell provided direct notice of these motions to all Class Members by mail. In the Notice, the Class Members were expressly advised that a motion was being brought for an Order that no Class member may opt out of this Action. Notwithstanding the delivery of notices to over 35,000 notices, none of the Class Members objected to this relief, or expressed an interest to commence their own lawsuit.[77]

ii. In the alternative, should a right to opt out be provided, deductions should still be made in respect of Class Counsel fees, the Representative Plaintiff's honorarium, and Class Proceedings Fund levy

129. If this Court determines that it cannot make the order requested above, the Class Members who opt out should still be required to pay their share of the Class Counsel fees, honorarium and Class Proceedings Fund levy, by way of deduction from the Retroactive Payments, which are damages paid in this proceeding. The basis for such an order being granted lie in this Court's

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[76] *Berry v. Pulley*, [2001] O.J. No. 911 at para 44, PBOA Tab 5.

[77] See Ratnam Affidavit and accompanying Exhibits, PMR, Vol. I, Tab 6, p. 52-122.

equitable jurisdiction to guard against unjust enrichment and award compensation on the basis of the common fund doctrine or restitutionary *quantum meruit*. With respect to the Class Proceedings Fund levy, the basis also lies in the mandatory language of the Class Proceedings regulation under the *Law Society Act*.

130. It is necessary that all Class Members be treated equally and fairly. All Class Members will be benefiting from the successful class action by way of the declaratory relief, damages, and mandatory order that future increased pension payments be made. As a result, all should contribute their proportionate share to the costs of the Action which was necessary to bring out the successful result.

131. The equitable principle of unjust enrichment consists of three elements: enrichment, corresponding deprivation, and absence of juristic reason for enrichment.[78] In this case, the Class Members who choose to opt out will still receive a benefit, which was obtained as a result of the efforts of Class Counsel, the Representative Plaintiff and the Class Proceedings Fund, and it would be unjust to allow any Class Members who may choose to opt out to retain the benefit of the payments without contributing to the cost equally with the other Class Members.

132. Retention of a conferred benefit has been considered unjust in several circumstances, including benefits given under mistakes of fact or law, under compulsion, out of necessity, because of ineffective transactions, or at the defendant's request or acquiescence. Furthermore, where other claims "fall within the principles underlying unjust enrichment, the law is able 'to develop in a flexible way as required to meet changing perceptions of justice'".[79] If this Court determines that

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[78] *Becker v. Pettkus*, [1980] 2 S.C.R. 834, [1980] S.C.J. No. 103 at para. 38, PBOA Tab 4.

[79] *Kerr v. Baranow*, 2011 SCC 10 at paras. 31-32, PBOA Tab 18.

an opt out right must be provided, the retention of a conferred benefit here would be unjust and the Court should order that each Class Member, even those who opted out, must pay their proportionate share of the costs of obtaining the benefit.

133. In *Lima v. Singer*, the Court of Appeal recently addressed a client's claim that he should not have to pay legal fees to counsel, on the basis that the contingency agreement (which was not in accordance with the *Solicitors Act*) was unenforceable. In that case, the lawyer had obtained a settlement for the client in an insurance dispute. Justice Doherty held that the plaintiff was seeking a "windfall" and that it would constitute "the very definition of unjust enrichment". He stated as follows:

> Mr. Lima also seeks a windfall. He would have the court make an order allowing him to avoid reasonable payment for legal services that resulted in significant financial benefit to Mr. Lima. The approach urged by Mr. Lima, which would allow him to reap the benefits of the settlements achieved by SK's efforts without paying a fair and reasonable fee, goes well beyond any legitimate consumer protection goal, and strikes me as the very definition of unjust enrichment.[80]

134. Given that all Class Members necessarily benefit from the judgment, and will receive payment automatically, it would similarly be the "very definition of unjust enrichment" to not require those Class Members to contribute their proportionate share of the costs.

135. To require that all Class Members contribute their share of the costs would also reflect the principles underlying the "common fund doctrine". The doctrine, popular in American jurisprudence, holds that "a party who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that for litigation expenses incurred,

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[80] *Lima v Kwinter*, [2021] OJ No 317 (C.A.) per Doherty J.A., at para 23 [emphasis added], PBOA Tab 21.

including counsel fees", with the underlying justification being that "unless the costs of litigation are spread to the beneficiaries of the fund they will be unjustly enriched by the attorney's efforts."[81]

136. The common fund doctrine has also been accepted by Canadian courts. In *APEIQ c. Corp. Nortel Networks*, the Quebec Superior Court held that, in the right case, a fee agreement can bind all group members even if it is only signed by one member.[82]

137. Further support for granting the requested order comes in the doctrine of restitutionary *quantum meruit.* This doctrine allows for recovery for unjust enrichment in appropriate circumstances and in particular where there has been no explicit agreement to compensate for services rendered but in situations where the services were furnished with "encouragement or acquiescence…in circumstances that render it unjust for the opposing party to retain the benefit conferred by the provision of the services."[83]

138. In this case, Class Counsel have diligently advanced the case and obtained judgment and damages which will be paid to the whole class. Class Counsel have expended over 3000 hours of work to date, incurred out of pocket expenses, achieved complete success on the claim such that all Class Members can be paid quickly and efficiently, without the need for any steps to be taken by the Class Members.

139. The class action has been well publicised and the Class Members have been well informed about the existence of the action, the steps taken by Class Counsel, and the status throughout. When the action was commenced, a dedicated web page was instituted by Class Counsel, on which

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81 *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 at p. 1265, PBOA Tab 30.

82 *APEIQ c. Corp. Nortel Networks*, 2009 QCCS 2407 at para. 138, PBOA Tab 2.

83 *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 324, at para. 99, PBOA Tab 12.

Class Counsel posted the Statement of Claim, the motion records relating to certification and summary judgment, Court Orders and Reasons, notices to the class, as well as regular updates at each juncture. Class Counsel instituted and managed a dedicated toll-free number and email address for Class Members through which Class Counsel has had ongoing contact with Class Members. In addition, the Class Members were made aware through a dedicated Facebook page (with over 700 members) managed by the representative plaintiff, and through regular updates by the Bell Pensioners Group, which has over 10,000 members.

140. No class member indicated that it did not want Class Counsel to act in this matter,[84] nor did any class member commence an individual claim in respect of this matter. The Class Members have acquiesced to the representation and advancement of the claim on their behalf by Class Counsel, and as a result of their efforts, all Class Members will receive payment of damages (and increased pension payments in the future) as a result. It would be unjust, after judgment and recovery has been obtained on their behalf, to allow Class Members to reap the rewards of the Action without having to pay their proportional share of the costs which should be spread amongst the entire class.

141. The factors for determining the appropriate amount for legal fees under a *quantum meruit* basis are the same factors which are applied to determine fairness and reasonableness of class counsel fees under the *Class Proceedings Act*, 1992. The Court in *Singer v. Lima* stated as follows:

> In *Cohen v. Kealey & Blaney*, [1985] O.J. No.160, at para.11, the Ontario Court of Appeal set out the following factors for consideration when assessing a solicitor's account on a *quantum meruit* basis:

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[84] However, one class member, in advance of this motion indicated that she did not wish to be paid and would return any money provided to her. See Exhibit H of the Ratnam Affidavit, PMR, Vol. I, Tab 6, at pp. 80-82.

(a) the monetary value of the matters in issue;

(b) the importance of the matter to the client;

(c) the time expended by the solicitor;

(d) the legal complexity of the matters to be dealt with;

(e) the degree of skill and competence demonstrated by the solicitor;

(f) the degree of responsibility assumed by the solicitor;

(g) the results achieved;

(h) the ability of the client to pay; and

(i) the client's expectation as to the amount of the fee.[85]

142. The Court of Appeal recently upheld the application of these factors, as well as confirming that fees under a *quantum meruit* basis can be based on a percentage of the settlement funds, particularly where the lawyer acted on contingency and therefore assumed financial risk.[86]

143. As set out above, the consideration of these factors strongly supports the legal fee requested here.

144. With respect to the Class Proceedings Fund, an additional basis to require payment by all Class Members (including any who may elect to opt out) is in the mandatory language of the Class Proceedings regulation under the *Law Society Act*. The regulation states that the levy is the sum of:

> (a) the amount of any financial support paid under section 59.3 of the Act, excluding any amount repaid by a plaintiff; and

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[85] *Singer v. Lima*, [2019] O.J. No. 3683 (S.C.J.), per Petersen J., at para 15, PBOA Tab 20, varied on other grounds in *Lima v. Kwinter*, [2021] O.J. No. 317 (C.A.), per Doherty J.A., PBOA Tab 21; also see *Cohen v. Kealey & Blaney*, [1985] O.J. No.160 (C.A.) at para.11, PBOA Tab 10.

[86] *Lima v. Kwinter* (C.A), [2021] O.J. No. 317 (C.A.), per Doherty J.A.; at paras 63-70, PBOA Tab 21.

> (b) 10 per cent of the amount of the award or settlement funds, if any, to which one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act is entitled.[87]

145. All class members (including any who may elect to opt out) will receive their portion of the award made in the Action pursuant to the Implementation Order. The Class Proceedings Fund is entitled, pursuant to statute, to 10 percent of the net payment to which each person is entitled by way of the Retroactive Payments.

146. In conclusion, should the Court conclude that class members must be given an opportunity to opt out, these class members must still contribute, by way of deduction, their proportional share of the costs of the proceeding being the legal fees, honorarium and the Class Proceedings Fund Levy.

PART IV - ORDER REQUESTED

147. For the reasons set out above, the Representative Plaintiff and Class Counsel respectfully submit that the orders sought in the Implementation Motion, Fee Approval Motion and Opt Out Motion be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of June, 2021.

KOSKIE MINSKY LLP
Mark Zigler
Jonathan Ptak
James Harnum

Lawyers for the Plaintiff

MCKENZIE LAKE LAWYERS LLP
Matthew Baer
Emily Assini

Lawyers for the Plaintiff

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87 O. Reg. 771/92, s. 10 (3).

SCHEDULE "A" – LIST OF AUTHORITIES

Caselaw

1. *Abdulrahim v. Air France*, 2011 ONSC 512
2. *APEIQ c. Corp. Nortel Networks*, 2009 QCCS 2407
3. *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105 (S.C.J.)
4. *Becker v. Pettkus*, [1980] 2 S.C.R. 834, [1980] S.C.J. No. 103
5. *Berry v. Pulley*, 2001 CanLII 28228 (ON SC)
6. *Brazeau v. Attorney General (Canada)*, 2019 ONSC 4721
7. *Burke v. Hudson's Bay Co*., 2010 SCC 34
8. *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686
9. *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.)
10. *Cohen v. Kealey & Blaney*, [1985] O.J. No.160 (C.A.)
11. *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 (B.C.C.A.)
12. *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 324
13. *Davies v. Clarington (Municipality) et al*., 2009 ONCA 722 (CanLII)
14. *Dolmage v. HMQ*, 2013 ONSC 6686
15. *Garland v. Enbridge Gas Distribution Inc.*, 2006 CanLII 41291 (ON SC)
16. *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528
17. *John Wink Ltd. v. Sico Inc.*, [1987] O.J. No. 5 (H.C.)
18. *Kerr v. Baranow*, 2011 SCC 10
19. *Kerry (Canada) Inc. v. DCA Employees Pension Committee*, 2007 ONCA 605 (CanLII)

20. *Lima v. Kwinter*, 2019 O.J. No. 3683 (SCJ)

21. *Lima v. Kwinter*, [2021] O.J. No. 317 (C.A.)

22. *MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726 (CanLII)

23. *Martin v. Barrett*, 2008 CarswellOnt 9521

24. *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537

25. *Pro-Sys Consultations Ltd. V. Infineon Technologies AG*, 2016 BCSC 964 (CanLII)

26. *Ramdath v. George Brown College of Applied Arts and Technology*, 2016 ONSC 3536 (CanLII)

27. *Riddle v. Canada*, 2018 FC 641 (CanLII), [2018] 4 FCR 491

28. *Romeo v. Ford Motor Co.* [2019] O.J. No. 1416 (S.C.J)

29. *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233

30. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 at p. 1265

31. *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*., [2005] O.J. No. 1117 (S.C.)

32. *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen.Div.)

33. *Berry v Schulman*, 807 F (3d) 600 (4th Cir 2015)

34. *Carter et al., v City of Lost Angeles*, 169 Cal Rptr 3d 131 (Sup Ct 2014)

35. *Thompson v Merck & Co*., 2004 US Dist. LEXIS 540 (ED Penn 2004)

Secondary Sources

36. ***Report of the Attorney General's Advisory Committee on Class Action Reform***, February 1990

37. Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic and Alison Warner, ***The Law of Class Actions in Canada*** (Toronto: Thomson Reuters, 2014)

38. Ontario Law Reform Commission, ***Report on Class Actions***, vol. II (Toronto: Ontario Law Reform Commission, 1982)

SCHEDULE "B" – RELEVANT STATUTES

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

Opting out

9 Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order. 1992, c. 6, s. 9; 2020, c. 11, Sched. 4, s. 12.

…

Court may determine conduct of proceeding

12 The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 2020, c. 11, Sched. 4, s. 14.

…

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).

Agreements for payment only in the event of success

33 (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

Interpretation: success in a proceeding

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

Definitions

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33 (3).

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

2. *Law Society Act,* R.S.O. 1990, c. L.8 Regulation 771/92

10. (1) This section applies in a proceeding in respect of which a party receives financial support from the Class Proceedings Fund. O. Reg. 771/92, s. 10 (1).

(2) A levy is payable in favour of the Fund,

(a) when a monetary award is made in favour of one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act; or

(b) when the proceeding is settled and one or more persons in such a class is entitled to receive settlement funds. O. Reg. 771/92, s. 10 (2).

(3) The amount of the levy is the sum of,

(a) the amount of any financial support paid under section 59.3 of the Act, excluding any amount repaid by a plaintiff; and

(b) 10 per cent of the amount of the award or settlement funds, if any, to which one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act is entitled. O. Reg. 771/92, s. 10 (3).

(4) REVOKED: O. Reg. 535/95, s. 1.

3. *Courts of Justice Act,* R.S.O. 1990, c. C.43

Costs

131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

Crown costs

(2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund. R.S.O. 1990, c. C.43, s. 131 (2); 1994, c. 12, s. 45.

4. *Federal Rules of Civil Procedure (U.S.)*

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect

the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class;

or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion;

and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval.

The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) New Opportunity to Be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision

(e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and non-taxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

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ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto
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FACTUM OF THE PLAINTIFF

KOSKIE MINSKY LLP
900 - 20 Queen Street West
Toronto, ON M5H 3R3

Mark Zigler (LS# 19757B)
(t) 416-977-8353 / (e) mzigler@kmlaw.ca

Jonathan Ptak (LS# 45773F)
(t) 416-595-2149 / (e) jptak@kmlaw.ca

James Harnum (LS# 60459F)
(t) 416-542-6285 / (e) jharnum@kmlaw.ca

MCKENZIE LAKE LAWYERS LLP
1800 - 140 Fullarton Street
London, ON N6A 5P2

Matthew Baer (LS# 48227K)
(t) 519-667-2646 / (e) baer@mckenzielake.com

Emily Assini (LS# 59137J)
(t) 519-672-5666 / (e) assini@mckenzielake.com

Lawyers for the Plaintiff