Court File No. 07-CV-334113-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DARA FRESCO

Plaintiff

and

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFF'S FACTUM
(Fee Approval)
(returnable March 3, 2023)

February 27, 2023

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ONTARIO
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PART I - OVERVIEW

1. Class Counsel seek court approval of their retainer agreement with the representative plaintiff and request a contingency fee of $44 million, which equates to 30% of the total settlement of $153 million, net of approximately $6.1 million in unrecovered disbursements.[1]

2. Class Counsel have devoted $16.52 million in straight time to this case (with a further $1 million in expected future fees to see the case through the settlement phase), while at various times carrying millions of dollars in disbursements. The time expended to date was required to advance a ground-breaking case against a well-resourced and sophisticated defendant. Over the course of

[1] Affidavit of J. Adam Dewar , sworn February 24, 2023, ("**Dewar Affidavit**") at paras. 8 and 83. The disbursements total approximately $6.3 million, but just less than $200,000 in disbursements was recovered from costs awards to date, leaving approximately $6.1 in unrecovered/outstanding disbursements. Please also note that the fee ultimately awarded to Class Counsel will be reduced by $652,666.18, the portion of costs awarded to the Plaintiff in this proceeding and that were applied against fees exclusive of taxes.

more than 15 years, Class Counsel were determined to pursue this novel systemic case through certification (unsuccessfully for years), appeals, production issues, the merits, certification of aggregate damages as a common issue following the Court of Appeal's refusal to certify it, further appeal on the merits and on aggregate damages certification, and a proposed methodology for calculating aggregate damages with no assurance that the methodology would be accepted as reliable, in whole or in part.

3. The lawyers involved spent substantial parts of their careers on this case, including thousands of hours of senior counsel, vastly exceeding the amount of time that they have risked on any other class action. The fees devoted to this case exceed or rival the total investment and risk of time by any plaintiff side firms in any class action in Canada. As discussed further below, other "mega fund" class actions, with less straight time invested, have generated total fees in excess of $40 million, and fee premiums (above straight time) of $25 million and more.

4. The requested fees equate to a multiplier of approximately 2.66 on the straight time incurred to date. It is respectfully submitted that the risks and result in this case would justify a significantly higher multiplier. However, even a lower multiplier of 2.5 (which respectfully would only be appropriate for a much less risky case) would still generate a fee over $41 million.

5. The overall settlement amount falls within what this Court has characterized as the mega-fund category. In these circumstances, this Court has held that class counsel fees should:

(a) be decided on a case-by-case basis, including on the basis of the risks incurred and results achieved;

(b) not necessarily be awarded on the basis of contingency percentage if the resulting fee would be disproportionate to the risks incurred and returns generated by class counsel, and therefore be akin to a windfall or lottery win;

(c) multipliers of time incurred should be used as a cross-check for the total fee (with the most deserving cases attracting a 4 times multiplier); and

(d) the total dollar amount of the fee or the premium above the straight time incurred cannot be so large as to be unseemly, so as to potentially impact on the integrity of the legal profession – as this Court stated in *Brown*:

> *"[I]f there is evidence before the court that the requested legal fees are excessive, unseemly or otherwise unreasonable – whatever the amount of the judgment or settlement – the class action judge should roll up her sleeves and examine the risk incurred to help her decide whether the amount being requested by class counsel is indeed fair and reasonable*".

6. Class Counsel submit that, pursuant to this case-by-case approach, a fee consistent with the contingency percentage in the retainer agreement is warranted here. The fee requested is not analogous to a lottery win. It is justified by the risks incurred, the efforts, persistence and ingenuity expended, and the results achieved, including the following:

(a) This was the first national overtime class action case in Canada. Class Counsel developed a novel and untested theory of systemic liability. There was no precedent for certification or for trying the case on the merits. There was no US case to pave the way, no admission by CIBC, no steps by a regulator to clear the trail on liability, and no known, agreed or pre-determinable quantum of aggregate damages or accepted method for determining aggregate damages;

(b) The certification stage involved significant factual and expert records by both parties, significant briefing, and a five day hearing before the motion judge. The Plaintiff ultimately succeeded despite failing to meet the certification test at the Superior Court of Justice and the Divisional Court. While Class Counsel stayed the course, sought leave and eventually prevailed at the Court of Appeal, substantial risks remained, particularly as a result of the Court of Appeal's rejection of aggregate

damages as a common issue and finding that limitations defences would be individual in nature, in addition to the overall risk involved in establishing liability;

(c) After reviewing thousands of pages of CIBC's documents, Class Counsel elected to bring a motion for summary judgment that, in turn, led to two contested documentary production motions.

(d) Numerous cross-examinations of factual and expert witnesses preceded the summary judgment motion. The final summary judgment motion record was more than 8,000 pages. The Parties' factums were "mega-sized," totalling 344 pages (including appendices) for CIBC, and 122 pages for the Plaintiff, followed by further rounds of written submissions. CIBC opposed virtually all aspects of summary judgment and brought its own cross-motion to decide all liability issues in CIBC's favour;

(e) Class Counsel pushed to certify aggregate damages as a common issue for the Class in order to avoid the scenario, anticipated by this Court, in which damages obtained through an individual claims process would be "modest at best"[2];

(f) This Court and the Court of Appeal ultimately agreed on the merits of Class Counsel's systemic approach to this case, found CIBC liable, and granted the request to certify aggregate damages based on a methodology that had never been accepted in any Canadian contested merits hearing;

(g) Class Counsel successfully obtained the production of large amounts of time-stamped data generated by various computer applications used by CIBC employees and developed complex expert evidence that proposed a methodology to calculate aggregate damages (even while CIBC's appeal on the merits was pending before the

[2] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 (S.C.) at para. 17.

Court of Appeal). The quantum of the amounts sought were vigorously opposed by CIBC and by CIBC's expert witness retained for the purpose of mediation in 2022, who raised multiple criticisms of the methodology and assumptions pressed by Class Counsel (in part, through their expert);

(h) Despite the holdings of this Court and the Court of Appeal that the limitation period defence would need to be decided on an individual basis, Class Counsel were not deterred and still proposed aggregate damage calculations for the presumptively time-barred periods in their aggregate damages request.

(i) Class Counsel negotiated a settlement for the entire 16-year Class Period despite the fact that it would have been much easier to settle this case at or below the "mega-fund" threshold, by abandoning the presumptively time-barred part of the Class Period, or agreeing with the decisions to date in this case strongly suggesting that such presumptively time-barred claims cannot be commonly adjudicated; and

(j) The $153 million settlement achieved in this case is the highest such settlement in any Canadian employment class action, and provides compensation for the entirety of the Class Period, including the presumptively time-barred period.

7. Against the exceptional risks at stake, the results achieved in this settlement are excellent. The settlement provides compensation for all class members, going back to 1993. In the view of Class Counsel, the quantum of the settlement represents a reasonable evaluation of the risks for the Class and the result is as good as what the Class could likely have expected to recover after a contested aggregate damages hearing and individual issues hearings.

8. The determined, sustained and ultimately successful efforts to break new ground on certification and liability, as well as the proposal of an untested methodology for calculating

aggregate damages, was possible because Class Counsel continued at every turn to commit and risk even more time, eventually committing and risking a total of $16.52 million in time.

9. Viewed in context, a reasonable and informed member of the public or person involved in the administration of justice would not consider the fee requested to be a windfall lottery award:

(a) The fee requested is consistent with the range of fees and fee premiums awarded in other mega-fund cases. Fees greater than $40 million, and fee premiums of tens of millions, in deserving cases have not been found to, and have not in fact, called the integrity of the profession into question;

(b) The effective multiplier on time incurred (2.66) is less than that awarded in cases that were significantly less risky, less contentious, less precedent-setting, less time-consuming, and with results that were less favourable; and

(c) No Class Members have objected to the proposed fee.

10. In order for the goals of the *Class Proceedings Act, 1992* to be achieved, persistent, competent and experienced counsel must be financially incentivised to take on difficult, long and ground-breaking cases that vindicate fundamental rights, rather than chase low-hanging or quick-ripening fruit. Failing to approve the fees requested in cases such as this one could cause counsel to shy away from these cases, to avoid pressing forward on behalf of all class members (particularly in long and novel cases), and/or to try and settle as early and easily as possible. To achieve its goals, Ontario's class action regime requires lawyers and law firms with the skill and tenacity to take on these kinds of high-risk cases, and devote the necessary parts of their careers, time, resources and effort needed to break ground and bring them to a successful conclusion.

PART II - FACTS

11. In June 2007, the Plaintiff and Class Counsel entered into a Retainer Agreement, clause 4 of which provides that, in the event of successful judgment or settlement, Class Counsel may choose one of the following two methods of fee calculation:

> **Contingency Percentage**
>
> (a) The contingency fee shall be 30% plus G.S.T. of the settlement or judgment proceeds on behalf of class members, net of disbursements; or
>
> **Contingency Multiplier**
>
> (b) the contingency fee shall be 4 x the ordinary hourly rates of counsel.

12. A multiplier of 4 was set because Class Counsel recognized from the outset that the challenges and risks of this novel case would be multiple, daunting and prolonged.[3]

13. The history of this case, from its inception in 2007 to the signing of the Settlement Agreement at the end of 2022, is discussed in detail in the factum in support of settlement approval, as is the overall complexity and risks of this litigation. In brief, over the more than 15 years of this action, Class Counsel have faced high risks, incurred $16.52 million in WIP and at times carried millions of dollars of disbursements.

14. The requested 30% contingency percentage option under the Retainer Agreement is significantly lower than a multiplier at the higher end of the scale. The contingency percentage would translate into a multiplier of approximately 2.66 times straight time to date, not accounting for the substantial additional time required to complete and oversee the settlement process.

15. More specific facts relevant to the determination of Class Counsel's reasonable fees are discussed below.

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[3]Dewar Affidavit at para. 11.

PART III - ARGUMENT

A. Relevant Factors to Assess Class Counsel Fees in Large Cases

16. The applicable law is not in dispute. Under ss. 32 and 33 of the *Class Proceedings Act, 1992* **("*CPA*")**,[4] class counsel's fee agreement must be judicially approved. The court will approve the fee agreement if it is "fair and reasonable."[5] If the agreement is not approved, then under s. 32(4)(a), the court may determine the appropriate amount.

17. In *MacDonald et al. v. BMO Trust Company et al.* and *Brown v. Canada (Attorney General),* this Court held that, in assessing Class Counsel fees in large or so-called "mega-fund" cases (where the amounts payable exceed $50 or $100 million), the Court will not give "presumptive validity" to a percentage agreed to in a contingency fee retainer, as it otherwise ordinarily would in a settlement below those thresholds.[6]

18. Rather, the Court will "roll up its sleeves" and carefully scrutinize the risk and results achieved to determine whether the proposed fee is appropriate and not akin to "winning the lottery"[7] (which would thereby bring the legal profession into disrepute). As emphasized in *MacDonald* and in *Brown*, this requires an individualized, case-by-case analysis that has regard to the specific risks and return, while also taking into account comparable fee awards and the similarities and differences with such comparators.[8] As the Court of Appeal stated in *Gagne v. Silcorp*, "it is the risks when the litigation commenced and as it continued that must be assessed."[9]

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[4] Class Proceedings Act, 1992, S.O. 1992, c. 6.
[5] *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, at para. 27.
[6] *MacDonald v. BMO Trust Company*, 2021 ONSC 3726 (S.C.) ("*MacDonald*") at para. 21; *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 (S.C.) at paras. 48-49.
[7] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 (S.C.) ("*Brown*") at para. 51.
[8] *McDonald*. at para. 25.
[9] *Gagne v. Silcorp Ltd*., 1998 CanLII 1584, 41 OR (3d) 417 (Ont. C.A.) at para. 16.

19. The approach of this Court in *MacDonald* and in *Brown* is consistent with that expressed by the Court of Appeal in the 2002 case of *McIntyre Estate v. Ontario (Attorney General)*, which endorsed the following warning of Justice Wilson regarding windfalls resembling a lottery win:

> "The suggested compensation may or may not be fair and reasonable, depending upon the outcome of the litigation in light of the difficulty of the case, as well as the time and expenses incurred. Counsel should be well rewarded if the litigation is successful, for assuming the risk and costs of the litigation. The compensation however should not be a windfall resembling a lottery win."[10]

20. In addition to the particular scrutiny of risks taken and results achieved in "mega-fund" scenarios, additional factors relevant to the determination of fees include: (a) the factual and legal complexities of the case; (b) the degree of skill and competence demonstrated by class counsel; (c) the degree of responsibility assumed by class counsel; (d) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement, (e) the monetary value of the case; (f) the importance of the matter to the class; (g) the ability of the class to pay; and (h) the expectations of the class as to the amount of the fees.[11]

21. As described below, the risk, difficulty, and complexity of this case, and the excellent results achieved, are at the high end of the scale. In these circumstances, the fee requested is not akin to a windfall or a lottery win. The outcome of this case was achieved by Class Counsel breaking new ground respecting: (a) their theory of systemic liability in an unpaid overtime class proceeding (both at certification and on the merits); (b) their persistent drive for certification of aggregate damages as a common issue, and (c) the significant compensation secured for the Class through settlement negotiations (which included an untested methodology for calculating aggregate damages that was subject to detailed criticisms by CIBC's expert).

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[10] *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.). at para. 76.
[11] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4206 (S.C.) at para. 2.

B. The risk and difficulty of this case

22. This case was the first contested class action of its kind: a national class action for unpaid overtime against a defendant operating in all 10 provinces and three territories, with more than 1,000 retail branches. It was very different from many other "mega-fund" cases. It did not "piggyback" on any US or other case, and it did not capitalize on a defendant's admissions, restatements or criminal or regulatory investigation. Nor did it involve a quantum of damages that was set, agreed to or easily calculable. This case was a *sui generis* and trail-blazing action without legal precedent as to its certifiability, legal merits or damages. When launching this action, Class Counsel knew that they were embarking upon a long and risky endeavour on many levels.

23. As set out in more detail below, the systemic theory of liability developed by Class Counsel had never before been advanced in an employment class action, let alone been certified or decided on the merits. Indeed, there was no Canadian case law regarding the certifiability of a contested unpaid overtime class action. Likewise, there was no settled court authority interpreting the overtime compensation and record-keeping provisions of the *Canada Labour Code* (the "***Code***"), foundational to the claim, that set out the statutory entitlement to overtime compensation and employers' obligations to create and maintain an accurate record of hours worked. Nor was there case law to support Class Counsel's theory that CIBC owed a duty to prevent hours of work that it did not want worked. Moreover, there was great uncertainty as to how damages could be assessed in a practical and efficient way, and whether aggregate damages could even be awarded for a claim of this kind. While Class Counsel believed that there was factual and legal merit to this case, and that many Class Members likely worked uncompensated overtime, there was no clear legal path to certify their claims as a class action, nor to establish liability or damages on their behalf.[12]

[12] Dewar Affidavit at paras. 14-15.

(i) Six-year long certification phase

24. Class Counsel recognized at the outset that there was a substantial risk of failing to convince the Court that this case was certifiable.[13] In addition to meeting the s. 5(1)(a) test of the *CPA,* the task at certification was to show "some basis in fact" in support of the Plaintiff's proposed common issues. CIBC opposed virtually every aspect of Class Counsel's certification argument, generating dozens of affidavits (both lay and expert) in response to the numerous affidavits filed by the Plaintiff, dozens of cross-examinations, and thousands of pages of evidence and transcripts. By the time certification was argued in December of 2008, CIBC had incurred nearly $4 million in fees in fighting certification and Class Counsel had incurred more than $3.4 million.[14] The certification motions judge, Justice Lax, acknowledged the necessity of CIBC's fees given the scope of the proposed class action and the nature of the evidence led in support of the motion.[15]

25. CIBC's position, buttressed by its extensive affidavit evidence, was that there was no basis in fact to support the existence of systemic (class-wide) practices or omissions across its retail branch network. CIBC submitted that its more than one thousand retail branches enjoyed necessary autonomy and flexibility as to how to deal with hours of work, the recording of hours, and compensation for any overtime, including lieu time.

26. Class Counsel also faced CIBC's argument that the Plaintiff's theory of systemic liability – even if proven true – would not materially advance Class Members' claims. CIBC argued that there were no common or systemic causes of unpaid hours, that every Class Member's claim was an idiosyncratic complaint that they worked unpaid overtime on certain days, and that each

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[13] Dewar Affidavit at para. 28.
[14] Brown Affidavit at para. 21; Dewar Affidavit at paras. 19 and 32.
[15] *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1036 (S.C.).

complaint would need to be adjudicated individually on evidence unique to the Class Member's work experiences.[16]

27. At certification at first instance, Justice Lax wholly accepted CIBC's arguments, unequivocally rejecting every tenet of the Plaintiff's Case. Justice Lax: (a) agreed with CIBC's submission that branch managers enjoyed autonomy that precluded commonality across branches; (b) adopted CIBC's assertion that Class Members' claims were inherently individual and disconnected from alleged systemic causes of overtime; and (c) categorically rejected the Plaintiff's contention that CIBC's overtime policies contravened the *Code*.[17]

28. The Plaintiff's defeat at certification at first instance was complete and unequivocal, and punctuated by an adverse costs award of $525,000, which was then among the highest awarded on an unsuccessful certification motion. The Plaintiff's appeal to the Divisional Court was similarly unsuccessful, with a majority of that Court affirming Justice Lax's reasons on all counts.[18]

29. While Class Counsel were ultimately successful in obtaining leave and securing certification in the Court of Appeal, it was only in March 2013, when the Supreme Court denied leave, that the certification risk was mitigated. However, other risks were reinforced: the Court of Appeal refused to certify aggregate damages and held that limitations and discoverability issues would need to be decided on an individual basis. Notably, by the time of certification in the Court of Appeal, Class Counsel had already incurred more than $5.56 million in time.[19] In 2013, after the appeals of the certification decision, Class Counsel received $820,000 in costs from CIBC in respect of the certification motion and related appeals.[20] It would take a further seven years and an

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[16] Dewar Affidavit at para. 30.
[17] Dewar Affidavit at para. 33; *Fresco v. Canadian Imperial Bank of Commerce*, 2009 CanLII 31177 (ON SC).
[18] Dewar Affidavit at para. 35; *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 4724 (Div. Ct.).
[19] Dewar Affidavit at para. 49.
[20] Dewar Affidavit at para. 83.

additional almost $6.6 million in fees (for total fees of more than $12.15[21] million by that point) before Class Counsel obtained success on the common issues before this Court in 2020.[22] But even then Class Counsel still faced: CIBC's appeals from the summary judgment decisions and the certification of aggregate damages as a new common issue; and, if successful in resisting those appeals and any leave to the SCC, obtaining the time-stamped data, preparing expert reports on aggregate damages, analyzing opposing reports and any non-expert evidence relating to aggregate damages, related cross-examinations, and a contested aggregate damages hearing (and the inevitable appeal therefrom), which would likely have been followed by an individual issues phase for presumptively time-barred claims.

(ii) Risk of losing on the merits

30. By the time the parties had extensively briefed their summary judgment record, there were numerous risks on the merits, discussed below.

(b) Risk that the Plaintiff's interpretation of the *Code* would be rejected

31. At the time of summary judgment motion, there was no settled law regarding the critical elements of Class Counsel's theory of liability, including the legality of using a pre-authorization requirement to control hours of work and overtime compensation, whether employees could bear the burden of maintaining their records of all hours worked, and whether an employer had an obligation to prevent or stop overtime work that it did not wish to compensate. Moreover, even if the Plaintiff's theory of liability were found to be legally sound, there was a high risk that it could not be proven on the evidence before the court.[23]

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[21] This total excludes the fees incurred by the other regional firms in the national consortium.
[22] Dewar Affidavit at para. 23.
[23] Dewar Affidavit at para. 41.

32. A substantial part of the Plaintiff's case rested on the attack on CIBC's overtime policies and record-keeping practices as being contrary to the *Code*. Class Counsel believed that, if they were not ultimately successful on the *Code* issues, they would be unlikely to prevail on the merits. As the Court of Appeal found in its certification decision: "[A]t the common issues trial, the motion judge's [Justice Lax's] view may be found to be the correct interpretation of the relevant provisions of the Code." Indeed, as it turned out, these issues were all contested by the parties until February 2022 when the Court of Appeal released its decision rejecting CIBC's appeal from this Court's summary judgment decision on those issues.[24]

(c) Risks of not Obtaining Systemic Evidence

33. It was clear to Class Counsel from the outset that the Plaintiff would need evidence of systemic practices and omissions, including, ideally, evidence that CIBC knew of its systemic issues of unpaid hours – evidence which Class Counsel could only reasonably hope to secure in productions from CIBC. Even following successful certification, Class Counsel could not know what particular evidence would be found in CIBC's productions on the merits, and whether it would be sufficient to establish systemic issues and causation. Class counsel knew from the outset that, if the productions and admissions (if any) that they could secure in cross-examination of CIBC on the merits did not reveal evidence that persuasively supported the Plaintiff's systemic theory, the action would very likely fail. [25]

34. The parties' eventual, post-certification fight over productions included one motion by the Plaintiff and an unsuccessful attempt by CIBC to assert privilege over certain documents. The discovery phase of the litigation began in 2014 and did not conclude until 2019, shortly before the hearing of the summary judgment motion in December of that year. The litigation over evidence

[24] Dewar Affidavit at para. 43; *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115 at para. 30.

[25] Dewar Affidavit at para. 45.

in this case was long, difficult and existential for the case, but ultimately fruitful, with Class Counsel's perseverance rewarded.[26]

(d) Risk of not certifying aggregate damages as a common issue

35. From the start, Class Counsel were aware of the very real risk of contested and individualized damages hearings. Pursuant to Class Counsel's theory of the case, CIBC's records of hours worked were inaccurate and could not be used to establish the monetary entitlement of Class Members. Consequently, Class Counsel were determined to pursue an aggregate assessment of damages.[27] This was extremely important for the viability of the case. As this Court would itself later observe in its August 2020 remedies decision, the failure to obtain an aggregate assessment meant that damages would likely be "modest at best":

> "This last question – whether aggregate damages should be added as a common issue – generated the most debate. This was understandable. **If aggregate damages are not allowed and class members are required to individually advance and prove claims (stretching over many years), the bank's financial exposure, in practical terms, will probably be modest at best.** If aggregate damages are permitted, the monetary liability of the defendant bank could well be in the tens of millions of dollars. Hence, the importance of this issue."[28]

36. As noted above, while the Court of Appeal ordered this case certified in 2012, it declined to certify aggregate damages as a common issue, holding that "the preconditions in s. 24(1) of the CPA for ordering an aggregate assessment of monetary relief cannot be satisfied in this case."[29] Nonetheless, despite this significant setback, Class Counsel were still determined to find a viable means of assessing damages in the aggregate.[30]

37. In late 2013, a ray of hope emerged with the Supreme Court of Canada's decision in *Pro-sys v. Microsoft*, holding that trial judges could award aggregate damages even where the issue

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[26] Dewar Affidavit at para. 46.
[27] Dewar Affidavit at para. 47.
[28] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 at para. 17 [emphasis added].
[29] *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444 (C.A.) at para. 109.
[30] Dewar Affidavit at para. 50.

was not previously certified. The decision supported Class Counsel's intention to seek aggregate damages at a hearing on the merits. However, Class Counsel still had to develop a viable aggregate methodology and persuade the Court that this methodology satisfied the test under the *CPA*. The development of this methodology and Class counsel's pursuit of aggregate damages is discussed in detail in the Brown affidavit in support of settlement approval.[31]

38. It was not until this Court's August 2020 remedies ruling (eight years after the Court of Appeal's certification decision and rejection of aggregate damages as a common issue) that the prospect of obtaining even a partial award of aggregate damages substantially improved, with the certification of a new common issue on aggregate damages. Nevertheless, there remained a real risk that, at a contested hearing on the merits, aggregate damages would be refused, since the Court could still find that an award of aggregate damages was not justified or appropriate, or that (as the Court of Appeal noted[32]) the untested methodology for calculating aggregate damages using time-stamp data ran afoul of the Court of Appeal's ruling in *Fulawka* that random sampling of class members cannot be used to determine aggregate damages. In addition, it was a near certainty that claims for the presumptively statute-barred damages would need to be pursued in an individual claims process.[33]

(e) Limitation period risks

39. From early on in this litigation, there was a clear and significant risk that most of the claims for unpaid overtime worked during the presumptively time-barred periods in each province or territory (largely the period covered by CIBC's1993 Overtime Policy) would fail. Nonetheless, in contrast to the typical limitations-defined class period advanced in most class actions, Class

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[31] Dewar Affidavit at para. 51; Brown Affidavit at paras. 55-56 and 64-71 and 76-77.

[32] *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115 (C.A.) at para. 90 ("Time will tell if statistical sampling will be needed to fill evidentiary gaps. If it is used, then the Bank could challenge the result based on this court's ruling on the sampling methodology.").

[33] Dewar Affidavit at para. 52.

Counsel were determined at the outset and throughout the case to pursue claims for these presumptively time-barred periods going back to 1993 (described as "Period 2" in the Brown Affidavit), in order to maximize Class Members' recovery.

40. Adding to the limitations risk facing the Period 2 claims, CIBC advanced a constitutional challenge to the extra-territorial reach of the s. 28(1) limitations-tolling provisions of the *CPA*.[34]

41. In reasons dated October 21, 2020,[35] this Court dismissed CIBC's defence seeking a class-wide provincial limitations order limiting damages, and further held that CIBC's requested constitutional declaration was premature. However, the Court also refused the Plaintiff's requested class-wide ruling on discoverability (namely, that CIBC's prevented class members from discovering their claims by representing that its policies were legal and consistent with the *Code*). Instead, this Court found that limitations issues were individual in nature.[36]

42. This Court's limitations conclusions kept the earlier Period 2 claims alive. However, they also meant that the limitations issues would be very unlikely to be resolved on a common basis. Accordingly, there remained serious risks that individual claims would be time-barred, that resolution of any individual claims would be years away and that final resolution of the action might still be further delayed by CIBC's constitutional challenge (which, given its potential wide-reaching implications, might well have attracted the interest of the Supreme Court of Canada).[37]

(iii) Risk of Summary Judgement

43. When CIBC advised in 2015 that its productions were complete, Class Counsel made the challenging decision to seek summary judgment. Class Counsel determined that the potential benefit of bringing this case to a conclusion sooner was worth the risk. However, this meant

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[34] Dewar Affidavit at paras. 54-55.
[35] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 6098 (S.C.).
[36] Dewar Affidavit at para. 55.
[37] Dewar Affidavit at para. 56.

foregoing the advantages of an extensive examination for discovery process and the procedural advantages of trial. Moreover, if the Court decided that the case was not suitable for summary judgment, Class Counsel would have wasted years and millions of dollars of unrecoverable time. As it turned out, while the summary judgment process in this case was a difficult one and took years to complete, the approach taken by Class Counsel was ultimately successful.[38]

(iv) The existence of CPF funding

44. When this action was commenced in 2007, it was not clear whether it was ethical or permissible for Class Counsel to provide an indemnity to a representative plaintiff, or whether to do so would be considered champertous.[39] Given that uncertainty, Class Counsel took the prudent step of securing an indemnity and initial disbursement funding from the Class Proceedings Fund ("**CPF**"), which was particularly appropriate in a case like this, where the potential adverse costs to a representative plaintiff were untenable.[40]

45. Many years later, when it was long-settled that Class Counsel are permitted to indemnify the plaintiff, this Court held that "it is time to acknowledge that third-party funding should be considered in the 'risks incurred' analysis."[41] However, the Court added that "it may be unfair to impose this metric retroactively on a class action that probably began under a different expectation 15 years ago."[42] Class Counsel respectfully agrees with the latter statement.

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[38] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 75 (S.C.) (summary judgment on liability common issues); *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 (S.C.) (summary judgment on remedy common issues and certification of aggregate assessment); *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 6098 (S.C.) (refusing CIBC's requested class-wide limitations order); collectively *aff'd* 2022 ONCA 115 (C.A.).

[39] See The Honourable Chief Justice Warren K. Winkler and Sharon D. Matthews, "Caught in a Trap – Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings".

[40] Dewar Affidavit at para. 61. See Ontario's New Class Proceedings Legislation – An Analysis found in v. 2 of the 2007 edition of Watson and McGowan, *Ontario Civil Practice* (Carswell), at p. 855.

[41] *MacDonald, supra*, para. 44.

[42] *Ibid.*, para. 44.

46. In any event, the indemnity and disbursement coverage provided by the CPF, although helpful, did not remove the substantial financial risks facing Class Counsel. While the CPF funding helped to mitigate some risk, it did not fund all disbursements and Class Counsel was required to carry, in addition to the many millions of dollars in WIP, several million dollars of disbursements for months at a time, with no guarantee of reimbursement by the CPF; and ultimately self-funded over $1.8 million in disbursements.[43] Few if any firms would be willing to prosecute a case such as this through its many complex and uncertain stages if they not only had to risk more than $16.52 million in work-in-progress, but also assume the risk of significant adverse costs while self-funding millions of dollars in disbursements.

(v) Financial risks assumed by Class Counsel

47. In *MacDonald.*, this Court noted the relevance of Class Counsel providing "hard evidence" in respect of the financial risk on class counsel, and stated that, "the more serious the financial impact on class counsel – the larger the premium."[44]

48. Relatively few law firms in Canada have taken on unpaid overtime class actions. That is because these cases are difficult and high-risk. Unlike less complex and less risky cases (the lower hanging fruit), they do not generate carriage disputes. Not only did this case pave the path for other unpaid overtime class actions, but it was also the most challenging and hard fought of any unpaid overtime class action.[45]

49. Moreover, the complexity and scale of this case required and justified the involvement of more than one law firm. At all times, Class Counsel faced a well-resourced and sophisticated corporate defendant that continually defended this action, its policies and systems in a vigorous

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[43] Dewar Affidavit at paras. 63 and 73.
[44] *MacDonald*, *supra*, at paras. 41-42.
[45] Dewar Affidavit at para. 70.

manner. The co-counsel arrangement among the Plaintiff's firms allowed Class Counsel to leverage their respective strengths and expertise: Goldblatt Partners LLP in the area of labour and employment law and Roy O'Connor LLP in the field of class actions (with Sotos LLP only becoming involved after Mr. Sokolov left Goldblatt Partners to join Sotos in 2013).[46]

50. Class Counsel have invested significant time in prosecuting this action. The following chart details the time devoted by firm up to February 21, 2023.[47]

Law Firm	**Total Docketed Time (without applicable taxes)**
Goldblatt Partners LLP	$6,137,391.85
Roy O'Connor LLP	$6,351,329.25
Sotos LLP	$3,790,135.00
Regional Counsel	$242,471.75
Total	**$16,521,327.85**

51. This enormous time commitment placed a significant burden on each firm, but was necessary to overcome the numerous and serious risks and obstacles outlined above and to bring this action to an exemplary conclusion.[48] On their own, each firm had limited ability to take on a case of this kind. Even in combination, Class Counsel's firms were not so large that they could absorb such a case without major consequences. For all Class Counsel firms, the more than 15 years of enormous work devoted to this file significantly limited their ability to take on other high-risk cases.[49] Two of the lead counsel, Mr. O'Connor and Mr. Sokolov, have spent more than half

[46] Mr. Sokolov was originally one of the lead lawyers on the file at the predecessor to Goldblatt Partners LLP. His joining Sotos LLP in 2013 and the addition of that firm to the Class Counsel group did not materially change or add to the Plaintiff's lawyer team.
[47] Dewar Affidavit at paras. 79-80.
[48] Dewar Affidavit at para. 71.
[49] Dewar Affidavit at para. 74.

of their respective careers on this case (and thousands of hours each), with Mr. Barrett having spent just less than half of his career proportionately on this case (sixteen of his thirty-eight years). It is difficult to imagine lead counsel spending similar time and risking similar resources on another comparably high-risk and long case in the remaining years of their legal careers.[50]

C. Analysis of the results achieved

52. As this Court held in *MacDonald*, the result achieved is one of the most significant factors in analyzing the reasonableness of the fee requested.[51]

53. The $153 million settlement covers the entirety of the Class Period, including presumptively time-barred periods, and offers compensation to each and every one of the more than 31,000 Class Members. Compensation is provided through a simple, user-friendly and non-adversarial method, without Class Members having to prove or defend their claim, or make their identity known to CIBC (for some, their current employer). In addition, no portion of the Settlement Amount will revert to CIBC.[52]

54. The settlement is an excellent result for Class Members. In the view of Class Counsel, it is as good as what the Class could likely have expected to be recovered after a contested hearing on Common Issue 9, which would likely only result in an aggregate damages award for Period 1, and after what could be achieved in total after factoring in the probable modest results from years of possible individual issues assessments for Period 2 claims.

55. In all likelihood, Period 2 damages could only have been established on an individual basis had the matter continued to a contested hearing. Class Counsel reasonably believe that fewer than

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[50] Dewar Affidavit at para. 81.
[51] *MacDonald*, *supra*, at para. 26.
[52] Dewar Affidavit at paras. 64(b) and (c).

20% of Class Members would have made claims for this period under an individual claims process and that those that did would face serious barriers to success.

56. The resulting settlement value provides significant compensation for the presumptively time-barred claims.[53]

D. Summary of the risk and results

57. In the face of the risks and complexities of the case outlined above, over a period of more than 15 years, Class Counsel managed to: (i) reverse two levels of Court decisions denying certification and obtaining certification at the Court of Appeal; (ii) litigate issues relating to productions over a five-year period in order to prosecute the case on the merits; (iii) obtain summary judgment on the liability common issues; (iv) certify aggregate damages as a common issue, notwithstanding an earlier denial by the Court of Appeal; (v) maintain these rulings on appeal; (vi) obtain an expert report proposing a methodology for calculating aggregate damages, notwithstanding severe challenges resulting from the absence of records and data that had been inadvertently lost; and (vii) obtain the largest employment class action settlement in aggregate in Canada.[54] In brief, this was a *sui generis* national class action that required ingenuity, assumption of risk, hard work, and perseverance to achieve the settlement amount.

E. Comparison to other cases

58. It is important to put the value of this settlement in context relative to the "mega fund" cases discussed below. The $153 million recovered in this case did not arise from a defective consumer widget or financial product that was purchased by hundreds of thousands of class members, nor is it the product of a government defendant correcting a historical policy error. Either

[53] Brown Affidavit at paras. 110-111.
[54] Dewar Affidavit at para. 64(a).

of those scenarios may result in unusually large and well-defined pool of damages from which class counsel may seek to draw their fees. Unlike those cases, this settlement is rooted in the unpaid overtime wages of more than 30,000 Class Members across a 16-year class period. In that context, given the uncertainties and risks discussed above, Class Counsel's efforts had significantly more impact on the total quantum of compensation secured by the settlement than would be the case in a more typical mega-fund settlement where, due to the nature of the claim, the damages determination is less dependant on the role of Class Counsel.

59. In *Macdonald,* this Court held that, to determine class counsel fees in "mega-fund" cases, the Court "must revert to the case-by-case approach and determine the fair and reasonable legal fee by considering the applicable law and comparable decisions."[55] The Plaintiff submits that the most helpful characteristics to examine in comparing cases are the risk borne by Class Counsel,[56] the result achieved for the Class,[57] and a cross-check of the effective multiplier on docketed time.[58]

60. This Court identified a number of comparator mega-fund fee approval decisions in *MacDonald* that informed the Court's analysis. Below, we briefly address each of those comparator cases for guidance as to the "cross-check" ranges of base fees, multipliers and gross premiums. For completeness, we also include *MacDonald* itself. For ease of reference, tables setting out relevant fee statistics of these comparators as well as recent U.S. employment mega-fund class actions are attached as Appendix "A".

- ***Endean v. Canadian Red Cross Society***[59] – $1.6 billion "tainted blood" settlement, of which $352 million was notionally attributed to B.C. class members – B.C. class counsel docketed $4 million – $15 million in fees awarded – a 3.75 multiplier and premium of $11 million.

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[55] *MacDonald*, *supra*, at para. 25.
[56] *Ibid*. at para. 26.
[57] *Ibid*. at para. 26.
[58] *Brown*, *supra*, at paras. 58-60 and 67; *MacDonald*, *supra*, at paras. 29 and 37.
[59] *Endean v. The Canadian Red Cross Society*, 2000 BCSC 971 (B.C. S.C.).

- ***Baxter v. Canada (Attorney General)***[60] – a $1.9 billion Residential Schools settlement – lead counsel docketed $14.6 – $40 million in fees awarded – an effective 2.73 multiplier and premium of $25.4 million.

- ***Manuge v. Canada***[61] – an $887 million veterans' pension settlement – class counsel docketed $3.2 million – $35.5 million in fees awarded – an effective multiplier of 11 and a premium of $32.3 million.

- ***Brown v. Canada***[62] – an estimated $550 million "Sixties Scoop" settlement — a settlement approval decision and not a fee approval decision – lead Class Counsel took on significant risks and docketed $7 million – this Court would have awarded $25 million – a 4.0 multiplier on adjusted base time ($6 million) plus $1 million for future work, for an effective premium of $18 million.

- ***Quenneville v. Volkswagen***[63] – a $2.1 billion settlement in the Volkswagen "defeat device" class action following less than two years of litigation that "piggybacked" on U.S. regulatory findings and more advanced U.S. proceedings - fees of $26 million awarded on base fees of $8 million (3.25 multiplier) for a premium of $18 million.

- ***McLean v. Canada (Attorney General)***[64] – a $2+ billion Indian Day Schools settlement following less than three years of litigation – Gowling WLG docketed $8 million and predicted $2.5 in future work – awarded $55 million in fees – a 6.5 multiplier on the time incurred at time of settlement and a premium of $47 million.

- ***CIBC v. Deloitte***[65] – a $122 million auditor's negligence settlement –first $7.17 million in fees (more than 40% of total docketed fees) paid on a risk-free, fee-for-service basis – thereafter docketed additional $9.6 million -- awarded $19.2 million per the 2 times multiplier in the retainer agreement – total contingent and fee-for-service fees were $26.4 million

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[60] *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673 (Ont. S.C.).
[61] *Manuge v. Canada*, 2013 FC 341 (Fed. Ct.).
[62] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 (S.C.).
[63] *Quenneville v. Volkswagen*, 2017 ONSC 3594 (S.C.).
[64] *McLean v. Canada*, 2019 FC 1077 (Fed. Ct.).
[65] *Canadian Imperial Bank of Commerce v. Deloitte*, 2017 ONSC 5000 (S.C.).

- ***The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.***[66] **–** a $110 million secondary markets securities settlement – Ontario class counsel docketed $9.1 million and were awarded $23.25 million – a 2.54 multiplier and a premium of $14.15 million.
- ***MacDonald v. BMO Trust Company***[67] -- a $100 million undisclosed forex fees settlement – class counsel docketed $5.5 million – awarded $20 million in fees – an effective 3.64 multiplier and premium of $14.5 million.

61. Viewed as a survey of comparator lodestar "cross checks", the multipliers awarded in the above fee approval decisions range from 2 to 11 times base fees with an approximate average of a 4.38 times multiplier. Excluding the outlier 11 times multiplier in *Manuge*, the average is approximately 3.55 times. In terms of base straight time, the cases range from $3.2 million to $14.6 million, for an average base fee of less than $8 million. In terms of premium on base time, the comparators range from $9.6 million to $47 million, for an average premium of $23.7 million. We note that the recent fee approval decision in *Green v. CIBC*,[68] also falls within the above ranges: $14.8 million in base fees, a 2.5 times multiplier and a premium of $22.7 million. It is important to note that the fees awarded in the above cases have not been seen as calling the integrity of the profession into question.

62. Class Counsel's requested fees in this case fall squarely within the ranges of multipliers and premiums awarded in the above mega-fund comparator cases. This alone supports a conclusion that the requested fees fall within a reasonable range and would not impugn the integrity of the profession or judicial system.

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[66] *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2018 ONSC 6447 (S.C.).
[67] *MacDonald v. BMO Trust Company*, 2021 ONSC 3726.
[68] *Green v. CIBC*, 2022 ONSC 373 (S.C.).

63. Moreover, Class Counsel further submits that this case, when viewed in terms of the risks taken, is deserving of a multiplier and premium at the higher side of the comparator ranges. The time and effort risked by Class Counsel in this case, as reflected in the $16.52 million in WIP to date, greatly exceeds the comparator average of less than $8 million, and exceeds the highest comparator base fees of $14.6 million in *Baxter* and $14.8 million in *Green.*

64. This case is also distinguishable from each of the three mega-fund cases with settlements in the $100 million range where the risks were plainly lower. In *SNC-Lavalin,* where a 2.54 multiplier was awarded on $9.1 million in based time, (a) the litigation was commenced against a backdrop of a slew of criminal and regulatory investigations and charges[69] upon which plaintiff counsel could hope to **piggy-back** (as in *Volkswagen*), and (b) the defendant **did not oppose the motion for leave** to commence a statutory secondary markets securities class action and **consented to certification**.[70] The risks confronted by class counsel in *CIBC v. Deloitte* were similarly lower. That case involved admitted misstatements and restatements in audited financial statements. There, the plaintiff class of financial lenders set aside millions to cover Gowlings' initial fees, and did in fact pay counsel's first $7.2 million of docketed fees. Only an additional $9.6 million in fees were incurred on a contingent basis, and even then, the retainer agreement promised a two times multiplier.[71] Thus, **more than 40%** of class counsel's total docketed fees ($7.2 million of $16.8 million) **were never at risk**. Lastly, as this Court observed in *MacDonald* where counsel were awarded an effective 3.64 times multiplier, "the risks incurred by class counsel were **real but not**

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[69] *SNC-Lavalin*, *supra*, at paras. 15, 23 and 24. Among other things: the RCMP had searched the defendant's head office and announced that criminal proceedings would be initiated; two former SNC employees were charged under the *Corruption of Foreign Public Officials Act*; Switzerland was investigating nearly $200 million in possibly illegal payments by the defendant; and the defendant's former CEO was arrested and charged with fraud and other criminal offences. Not surprisingly, numerous groups of plaintiff counsel vied for carriage of this case.
[70] *SNC-Lavalin*, *supra*, at paras. 20-21.
[71] *CIBC v. Deloitte*, *supra*, at paras. 12, 29 and 32.

remarkable."[72] By contrast, in this case, as described at length above, Class Counsel took on very significant risks that were more comparable to those taken by lead counsel in *Brown*, where this Court would have awarded a 4 times multiplier.

65. Finally, *Fulawka v. Bank of Nova Scotia* may be seen as a partial comparator for this case: it involved a similar theory of liability against a similar defendant (another national bank) and was prosecuted by the same Class Counsel as in this case. Despite these similarities, this CIBC case was litigated for a much longer time against a well-resourced defendant that vigorously defended the action, a fact reflected in the difference in base fees: $3.8 million in *Fulawka* compared to the $16.5 million in this case. In contrast to this case, *Fulawka* was certified at first instance, certification was upheld on appeal, and the case was settled without any productions or any hearings on the merits six and one-half years after it was launched. In *Fulawka*, this Court awarded $10.45 million in fees, approving a 2.75 times multiplier of docketed time as arbitrated and determined by Stephen Goudge.[73] Applying a cross-check, this case is **at least** deserving of the same 2.75 times multiplier awarded in *Fulawka*. Class Counsel's requested $44 million in fees equate to a multiplier of approximately 2.66. Even if this Court were to reduce the base fee by approximately 15%, as it did in *Brown,* the multiplier cross-check on the requested contingency fee would still only amount to 3.06 times the base fee,[74] which would not amount to a windfall and comfortably falls within a zone of reasonableness.

66. In summary, in appropriate cases – this being one of them – fees in the range of those requested in this case have been found to be fair and reasonable, and have not been regarded as calling into question the integrity of the profession.

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[72] *McDonald*, *supra*, at para. 38.
[73] *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743 (S.C.) at para. 20.
[74] $44 million - $1 million (time required to be spent overseeing the settlement) = $43 million / $14.04 million (base fee discounted by 15%) = 3.06 multiplier.

F. Additional Relevant Factors

(i) Importance of this Case

67. As set out in the Plaintiff's settlement approval factum, the settlement provides "real money" to the Class Members that should make a material difference in their lives.

68. In addition to achieving significant monetary compensation for Class Members, this case clarified the legal rights of all non-unionized employees entitled to overtime pay under the *Canada Labour Code* – and, by analogy, under similar provincial labour standards legislation – and provided much needed guidance to employers regarding their overtime pay obligations, including their duty to pay or prevent unwanted work.[75]

69. As the Supreme Court of Canada observed in *Reference Re Public Service Employee Relations Act (Alta.)*, the employment relationship is of great importance:

> "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." [76]

70. Until this Court's summary judgment decision, there was no settled court authority on important issues such as the legality of pre-authorization as a condition for payment of overtime, the legality of placing the burden of hours of work recording on employees, and whether an employer having actual or constructive knowledge that unpaid overtime is being worked for its benefit has an obligation to take reasonable steps to prevent such work or compensate it. The summary judgment decision of this Court, confirmed by the Court of Appeal, has now resolved these questions in favour of the protection of employees. As well, it has blazed a trail for certification of systemic liability claims in the employment context (and other contexts). As a

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[75] Dewar Affidavit at para. 69.
[76] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 (S.C.C), at para. 91.

result, employees have the benefit of a clear legal precedent to support claims for compensation for their unpaid hours of work. The approach Class Counsel took in this case has informed numerous other cases, including cases seeking compensation for unpaid wages.[77] Indeed, the decision on the merits was listed by Lexpert as the first case on the top 10 list of business decisions of the last year.[78]

71. This Court's findings and the settlement obtained have vindicated Class Members' complaints about unpaid overtime.[79] Notably, Class members who have replied to the notice of settlement approval hearing have almost universally praised the outcome of the litigation and the result.

(ii) The importance of incentivizing Class Counsel

72. The approval of the fees requested in this case will also incentivize the profession to take on comparably novel, important and inevitably risky and hard-fought cases. The class actions regime in Ontario is premised on class counsel being appropriately motivated to advance litigation with wider social utility. As this Court stated in *McCallum-Boxe v Sony*, "Judges should as a rule approve legal fee arrangements that incentivize class counsel to press for the highest possible recovery for the class […]."[80] That is exactly what Class Counsel did in this case.

73. Limiting generally acceptable fee percentages and multipliers to lower dollar value settling cases encourages the pursuit of lower hanging and quicker ripening fruit – cases that will generate

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[77] See, for example: *Matthews v. La Capitale Civil Service Mutual*, 2020 BCSC 787 (S.C.) (court certifying class action on behalf of sales agents of the defendant insurer for unpaid wages); *Levac v. James*, 2023 ONCA 73 (C.A.) (Court of Appeal affirming a common issues trial decision finding the defendant doctor liable for systemic negligence by presumptively causing infections via non-sterile epidural injections, citing *Fresco* for the principle that a defendant may be liable for subjecting a class to a systemic risk of harm, even if not all class members did in fact suffer harm); and *RBC Insurance Agency Ltd. v. Ali*, 2021 CanLII 44090 (ON LRB) (tribunal applies *Fresco* to interpret the overtime entitlement provisions of the *Employment Standards Act*).

[78] Aidan Macnab, "Lexpert's Top 10 Business Decisions of 2021/2022", *LEXPERT*, Nov. 23, 2022.

[79] Dewar Affidavit at para. 66.

[80] *McCallum-Boxe v Sony*, 2015 ONSC 6896 (S.C.) at para. 15.

a fee at the agreed (presumptive) retainer percentage and in a faster and more consistent manner. It is respectfully submitted that risky, novel cases such as this require a real and proportionate financial incentive for class counsel to risk millions of dollars, and for individual lawyers to invest significant years and portions of their careers.

G. Conclusion Regarding Fee Request

74. In summary, this case was novel in its approach to the subject-matter when it was started and unique in the resources required over the next fifteen years to prosecute it to a successful resolution and achieve settlement. Class Counsel faced significant risks throughout this litigation, including $16.52 million in foregone fees and lost opportunity cost if the case was lost. They fought a well-resourced defendant that resisted the case over 15 years, represented by top Canadian lawyers

75. While the settlement value in this case involves what this Court has termed a "mega-fund" amount, the requested fee is not akin to a lottery windfall, given all the factors discussed above, including the amount and complexity of the work, the risks involved, and the results achieved. Class Counsel respectfully request an order approving a fee award of 30 percent, as provided for in the retainer agreement.

H. Disbursements Sought

76. As of January 31, 2023, the disbursements incurred totaled nearly $6.3 million (with $194,863.32 (inclusive of taxes) having been recovered from costs paid by CIBC to date). A detailed chart of the disbursements is set out in the Dewar Affidavit.[81]

[81] Dewar Affidavit at para. 82 and Exhibit "B".

I. HONOURARIUM FOR MS. FRESCO

77. Class Counsel request that the Court award an honorarium of $30,000 to Ms. Fresco in recognition of her contribution to the successful resolution of this case. If approved, Class Counsel are prepared to have the honorarium being paid out Class Counsel's fees.

78. Courts will approve the payment of honoraria to plaintiffs where they have made significant contribution to bringing the litigation to a conclusion in the best interests of the class. The honorarium is not an award but a recognition that the "representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice."[82]

In *MacDonald*, the Court approved a $50,000 honorarium for Mr. MacDonald in recognition of his "extraordinary level of dedication and commitment over a long and difficult 15-year litigation."[83] Ms. Fresco has demonstrated an at least comparable level of dedication and commitment. Simply put, this case would not have been brought had Ms. Fresco not been willing to courageously act as a representative plaintiff. It is highly unusual, in Class Counsel's experience, for an employee to be willing to sue his or her current employer, let alone act as the face of a class action. Ms. Fresco agreed to do so notwithstanding that she could reasonably fear that doing so would not positively impact her employment relationship. Throughout the nearly sixteen years of this case, Ms. Fresco remained involved, interested and engaged with Class Counsel.[84]

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[82] *Toth v Canada*, 2019 FC 125 (Fed. Ct.) at para 95.
[83] *MacDonald*, *supra*, at para. 56.
[84] Dewar Affidavit at para. 82. It should hopefully go without saying that Ms. Fresco at no time requested (and at no time was offered) an honorarium or any other payment for agreeing to act as representative plaintiff: *ibid*. at para. 83.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of February 2023.

David F. O'Connor	Steven Barrett	Louis Sokolov
	Per:	Per:
Roy O'Connor LLP	Goldblatt Partners LLP	Sotos LLP

APPENDIX "A"

Canadian Comparators

Case	Litigation Length (years)	Docketed Time	Settlement Value	Approved Fees	Approved Multiplier
Fresco	15+	$16.52 million	$153 million		
MacDonald et al v. BMO Trust Company et al, 2021 ONSC 3726	15 years (para 20)	**$5.5 million** in docketed time (para 38)	**$100 million** (para. 1)	**$20 million** for legal fees, plus disbursements and taxes. (para 53)	3.64
CIBC v. Deloitte & Touche, 2017 ONSC 5000.	**17 years** (para 1)	**$9,629,855 contingency fees plus $7,639,387 (guaranteed in advance and previously paid by clients)** (paras. 12, 29 and 32)	**$122 million** (para 24)	**$19,259,710** (in addition to the **$7.6 million** previously paid directly by the clients) (paras. 33 and 45)	**2** (paras. 33 and 45)
Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc., 2018 ONSC 6447.	**6 years** (paras. 13 and 36)	**$9,114,909** (para. 60)	between **$294.4 million** and **$439.9 million** (para 47)	**$25.25 million** - global fee (including fee sought in Quebec action) **$23.25 million for Ontario counsel** (para 64)	**2.54** (para 64)
Brown v. Canada (Attorney General), 2018 ONSC 3429	**8+ years** (para 68)	**$7+ million** (para 68)	estimated likely value of **$550 million** (para. 9)	This Court would have awarded lead counsel **$25 million**, calculated as base fee of $6 million multiplied by a factor of 4, plus an additional $1 million for future work (para. 71)	**4** x adjusted base fee (para. 71)
Endean v. Canadian Red Cross Society, 2000 BCSC 971	unstated	**$4 million** (B.C. counsel - para. 74)	**$352 million** attributed to B.C. (para. 76)	**$15 million** (para. 89)	**3.75** (para. 74)

Baxter v. Canada (Attorney General), 2006 CanLII 41673	unstated	**$14.6 million** (para. 57)	**$1.9 billion** (para. 16)	**$40 million** (paras. 57-59 and 69)	**2.73** (para. 57)
Manuge v. Canada, 2013 FC 341	6 years (paras. 1-3)	**$3.2 million** (para. 39)	**$887 million** (para. 7)	approx. **$35.5 million** (paras. 7 and 51)	**10+**
Quenneville v. Volkswagen, 2017 ONSC 3594	< 2 years	unstated	**$2.1 billion** (para. 1)	**$26 million** (para. 3)	unknown
McLean v. Canada, 2019 FC 1077	1+ year	**$8 million** at time of fee approval; estimated **$2.5 million** in future work (paras. 34-35)	**$2+ billion** (para. 26)	**$55 million** + up to an additional **$7 million** (paras. 47 and 49)	**5** (para. 36), excluding the potential additional $7 million
Green v. CIBC, 2022 ONSC 373	13+ years (para. 2)	**$14.8 million** (para. 86)	**$125 million**	**$37.5 million** (paras. 72 and 99)	approx. **2.5** (para.88)

Recent U.S. Employment Class Action Comparators

Case Name	Type of Claim	Settlement Value	Awarded Fees	Percentage
ABM Industries Overtime Cases, 19. Cal.App. 5th 277 (Apr. 7, 2022)	Wage and hour violations	$140,000,000	$46,666,666	33.33%
Virginia Van Dusen et. al v Swift Transportation Co. Inc. et. al., No. 2:10-cv-00899-JWS (D.Az., Jan. 22, 2020)	Misclassification	$100,000,000	$29,000,000	29%
Helmick, et. al. v Air Methods Corporation. No. RG-13665373 (ND Cal, Oct. 16, 2020)	Unpaid overtime	$78,000,000	$27,42,615.21	33.33%

SCHEDULE "A"

LIST OF AUTHORITIES

Cases (in order of citation)

1. *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288 (S.C.) (summary judgment on damages).
2. *Lavier v.* MyTravel *Canada Holidays Inc.*, 2013 ONCA 92 (C.A.).
3. *MacDonald v. BMO Trust Company*, 2021 ONSC 3726 (S.C.).
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5. *Gagne v. Silcorp Ltd*., 1998 CanLII 1584, 41 OR (3d) 417 (Ont. C.A.).
6. *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.).
7. *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4206 (S.C.).
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20. *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc*., 2018 ONSC 6447 (S.C.).

21. *Green v. CIBC*, 2022 ONSC 373 (S.C.).

22. *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743 (S.C.).

23. *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 (S.C.C.).

24. *Matthews v. La Capitale Civil Service Mutual*, 2020 BCSC 787 (S.C.)

25. *Levac v. James*, 2023 ONCA 73 (C.A.)

26. *RBC Insurance Agency Ltd. v. Ali*, 2021 CanLII 44090 (ON LRB)

27. *McCallum-Boxe v Sony*, 2015 ONSC 6896 (S.C.).

28. *Toth v Canada*, 2019 FC 125 (Fed. Ct.).

Journal Articles and Commentary (in order of citation)

1. The Honourable Chief Justice Warren K. Winkler and Sharon D. Matthews, "Caught in a Trap – Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings".

2. Ontario's New Class Proceedings Legislation – An Analysis found in v. 2 of the 2007 edition of Watson and McGowan, *Ontario Civil Practice* (Carswell), at p. 855.

3. Aidan Macnab, "Lexpert's Top 10 Business Decisions of 2021/2022", *LEXPERT*, Nov. 23, 2022.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Class Proceedings Act, 1992*, SO 1992, c 6.** (hyperlink)

Fees and disbursements (hyperlink)

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).

Fees must be fair and reasonable

(2.1) The court shall not approve an agreement unless it determines that the fees and disbursements required to be paid under the agreement are fair and reasonable, taking into account,

(a) the results achieved for the class members, including the number of class or subclass members expected to make a claim for monetary relief or settlement funds and, of them, the number of class or subclass members who are and who are not expected to receive monetary relief or settlement funds;

(b) the degree of risk assumed by the solicitor in providing representation;

(c) the proportionality of the fees and disbursements in relation to the amount of any monetary award or settlement funds;

(d) any prescribed matter; and

(e) any other matter the court considers relevant. 2020, c. 11, Sched. 4, s. 29 (1).

Same

(2.2) In considering the degree of risk assumed by the solicitor, the court shall consider,

(a) the likelihood that the court would refuse to certify the proceeding as a class proceeding;

(b) the likelihood that the class proceeding would not be successful;

(c) the existence of any other factor, including any report, investigation, litigation, initiative or funding arrangement, that affected the degree of risk assumed by the solicitor in providing representation; and

(d) any other prescribed matter. 2020, c. 11, Sched. 4, s. 29 (1).

Same

(2.3) In determining whether the fees and disbursements are fair and reasonable, the court may, by way of comparison, consider different methods by which the fees and disbursements could have been structured or determined. 2020, c. 11, Sched. 4, s. 29 (1).

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); 2020, c. 11, Sched. 4, s. 29 (2).

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).

Considerations

(5) In making an order under clause (4) (a), the court shall take into account the factors set out in subsection (2.1), in accordance with subsections (2.2) and (2.3). 2020, c. 11, Sched. 4, s. 29 (3).

Holdback

(6) The court may determine and specify an amount or portion of the fees and disbursements owing to the solicitor under this section that shall be held back from payment until,

(a) the report required under subsection 26 (12) or 27.1 (16), as the case may be, has been filed with the court and the court is satisfied that it meets the requirements of that subsection; and

(b) the court is satisfied with the distribution of the monetary award or settlement funds in the circumstances, including the number of class or subclass members who made a claim for monetary relief or settlement funds and, of them, the number of class or subclass members who did and who did not receive monetary relief or settlement funds. 2020, c. 11, Sched. 4, s. 29 (3).

Agreements for payment only in the event of success (hyperlink)

33 (1) 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); 2020, c. 11, Sched. 4, s. 30 (1).

(2) Repealed: 2020, c. 11, Sched. 4, s. 30 (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; 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); 2020, c. 11, Sched. 4, s. 30 (3).

Idem

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

Same

(9) In making a determination under clause (7) (b), the court shall take into account the factors set out in subsection 32 (2.1), in accordance with subsections (2.2) and (2.3) of that section. 2020, c. 11, Sched. 4, s. 30 (4).

DARA FRESCO
Plaintiff

-and-

CANADIAN IMPERIAL BANK OF COMMERCE
Defendant

Court File No. 07-CV-334113-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

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