CITATION: Fresco v. Canadian Imperial Bank of Commerce, 2023 ONSC 3335
COURT FILE NO.: 07-CV-334113-00CP
DATE: 20230602

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DARA FRESCO Plaintiff	)	*David F. O'Connor, Steven Barrett, Louis Sokolov,* and *J. Adam Dewar* for the Plaintiff
- and –	)	
CANADIAN IMPERIAL BANK OF COMMERCE Defendant	)	*Linda Plumpton* and *Lauri Reesor* for the Defendant
Proceeding pursuant to the *Class Proceedings Act, 1992*	)	**HEARD**: April 24, 2023

PERELL, J.

REASONS FOR DECISION

Cannon to right of them,
Cannon to left of them,
Cannon in front of them
Volleyed and thundered;
Stormed at with shot and shell,
Boldly they rode and well,
Into the jaws of Death,
Into the mouth of hell
Rode the six hundred.[1]

Contents

[1] Alfred, Lord Tennyson, *The Charge of the Light Brigade*.

A. Introduction

[1] Settlement and fee approval motions are the most important, most difficult, and from time to time the most unpleasant task of a judge managing a class proceeding under the *Class Proceedings Act, 1992*.[2] The motion now before the court provides an opportunity to review the law, the practice, and the reality of settlement and fee approval motions in proceedings governed by the *Class Proceedings Act, 1992*. In particular, this motion provides an opportunity to examine the methodology to use in cases with multi-mega million dollar settlement funds.

[2] Sometimes, the metaphor for settlement and fee approval motions in class actions is Hans Christian Andersen's *The Emperor's New Clothes*. That fairy tale probes the human psychology of the situation in which a person portrays as true and valuable something that is false or that has little value, and the throng accepts the portrayal as true because of the persuasive force of self-deception, gullibility, laziness, conformity, and obedience to authority. Sometimes, the very fine legal work by Class Counsel is not continued into the fee and settlement approval motion where Class Counsel's ironic general arguments about how fees must be determined in class proceedings and their ironic particular arguments for their own gargantuan fees do not withstand critical analysis.

[3] In the immediate case, Class Counsel were forthcoming in addressing the court's concerns; however, the motion does raise many of the *Emperor's New Clothes'* challenges associated with settlement and counsel fee approval motions. In particular, this motion raises issues about the dysfunctionality of using the lodestar method to set or to cross-check what is the appropriate counsel fee. A contingency fee awards a percentage of the class's recovery, and the lodestar method uses a multiplier of class counsel's reasonable hourly rate and reasonable number of hours expended, which base fee American lawyers call the "lodestar", to calculate the appropriate fee; however, both methodologies are just fodder for the weavers of tall tales. Most significantly, this

[2] S.O. 1992, c. 6.

motion raises the question of how to incentivize Class Counsel to prosecute class actions while protecting what has been called "the integrity of the profession."

B. Overview

[4] This is a motion for approval of Class Counsel's fee pursuant to the *Class Proceedings Act, 1992*. By Order dated March 3, 2023, the late Justice Belobaba has already approved a **$153.0 million** non-reversionary settlement and a distribution plan. This case qualifies as a mega-million dollar settlement. Before his sad and untimely death, Justice Belobaba, however, adjourned the fee approval motion, and he requested additional information from Class Counsel. Class Counsel has dutifully reported, but unfortunately because of illness and then his passing, Justice Belobaba was unavailable to complete the motion, and the case management of this action has been assigned to me. With just Orders from Justice Belobaba and without the benefit of Reasons for Decision for the Settlement Approval, the fee approval motion was reargued before me.

[5] On the fee approval motion, Class Counsel requested: (a) reimbursement for disbursements of approximately $6.0 million; (b) a fee of **$44.0 million**, which is based on a **30% contingency fee**; and (c) the taxes on the fee, i.e., $5.7 million.

[6] The 30% contingency fee equates to: a 2.7 multiplier against a lodestar of $16.5 million; or a multiplier of 3.3 against an adjusted lodestar of $13.5 million. If the requested counsel fee were approved, the net recovery for the 31,000 class members is **$86.0 million**, i.e., $153.0 million less: (a) the unpaid disbursements, (b) the counsel's fee, (c) the taxes, (d) the expense of administration, including the costs of the notice program and of the Claims Administrator, approximately $1.0 million, and (e) the 10% levy of the Class Proceedings Fund, $10.0 million.

[7] For the reasons that follow, I approve a fee of **$25.0 million**. That fee equates to a **17% contingency fee** (a multiplier of 1.5 times the lodestar of $16.5 million or 1.9 times the lodestar of $13.5 million). With that counsel fee, the net recovery for the class is **$106.0 million**, i.e., $153.0 million less: (a) unpaid disbursements, (b) counsel's fee, (c) taxes of $3.2 million, (d) expense of administration, and (e) the 10% levy of the Class Proceedings Fund, $11.8 million.

[8] In the immediate case, Class Counsel achieved a good settlement, but the appropriate reward for taking on that risk and achieving the good result that was achieved does not justify a counsel fee of greater than $25.0 million.

[9] Class Counsel also seeks an honorarium of **$30,000** for Dara Fresco, the representative plaintiff. For the reasons expressed below, I do not approve of the honorarium.

C. Factual Background

[10] Class Counsel is a consortium of three law firms: (a) Goldblatt Partners LLP; (b) Roy O'Connor LLP; and (c) Sotos LLP. From 2007 until 2013, the consortium of Goldblatt Partners and Roy O'Connor LLP prosecuted Ms. Fresco's action. In 2013, Mr. Sokolov moved from Roy O'Connor LLP to Sotos LLP, and this firm joined the consortium. From time to time, the consortium received the assistance of regional firms in British Columbia, Alberta, Manitoba, Québec, and Atlantic Canada.

[11] In **2006,** before parental leave, Dara Fresco, a CIBC employee, spoke to the lawyers at Sack Goldblatt Mitchell LLP, the predecessor firm of Goldblatt Partners LLP, about making an

employment law claim. The firm, known for its expertise in employment law, at its own expense, began investigating the viability of advancing Ms. Fresco's claim as a class proceeding about the CIBC's overtime practices and policies, which appeared to be contrary to the *Canada Labour Code*.[3] The firm invested $167,595 in docketed time in the course of preparing legal and factual research to set the foundation for the proposed class action. This time is not accounted for in any part of Class Counsel's fee request.

[12] In **June 2007**, Ms. Fresco entered into a retainer agreement to prosecute a proposed class action against the CIBC. The agreement provided for a contingency fee of 30% plus GST. or a contingency fee multiplier of 4.0 times the ordinary hourly rates of counsel (the lodestar).

[13] Class Counsel did not provide Ms. Fresco with an indemnity to protect her from her personal exposure to an adverse costs award. Rather, Class Counsel secured an indemnity and initial disbursement funding from the Class Proceedings Fund of the Law Foundation of Ontario.

[14] On **June 18, 2007**, Ms. Fresco commenced her proposed class action on behalf of all current and former CIBC front-line employees at retail branches who worked unpaid overtime. The estimated class size was 31,000 CIBC employees from 1993 to 2009 (17 years). The Statement of Claim sought $600.0 million in general, aggravated, and punitive damages.

[15] CIBC retained a team of firms to represent it, consisting of Torys LLP and Hicks Morley LLP, firms with over 300 and over 100 lawyers respectively and offices across Canada.

[16] Class Counsel served its certification motion record in **November 2007**, and CIBC delivered its responding motion record in **May 2008,** and in **December 2008**, there was a five-day certification motion before Justice Lax and on **June 18, 2009**, Justice Lax dismissed the certification motion,[4] and on **February 12, 2010** she released her costs decision awarding the CIBC costs of $525,000, inclusive of fees, disbursements, and GST.[5]

[17] Pausing here in the narrative of the factual background, it shall be important to note for the litigation risk analysis later in this decision, that at the same time as Class Counsel were litigating Ms. Fresco's case, they were prosecuting two other employment law class actions, in which the outcomes were more favourable. On **February 19, 2010**, Justice Strathy, as he then was, certified a similar overtime pay class action against the Bank of Nova Scotia known as *Fulawka v. Bank of Nova Scotia*[6] and on **August 17, 2010**, I certified an employment law class action about the alleged misclassification of employees working for the Canadian National Railway. That class action was known as *McCracken v. Canadian National Railway Company*.[7]

[18] Returning to the narrative, Ms. Fresco appealed Justice Lax's decision to the Divisional Court, and the appeal was heard on **March 24 and 25, 2010**, and on **September 10, 2010**, a majority of the Divisional Court (Justices Ferrier and Swinton) dismissed Ms. Fresco's appeal.[8] Justice Sachs dissented.

[19] Having lost at the Divisional Court, Ms. Fresco required leave to appeal to the Court of

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[3] R.S.C. 1985, c. L-2.
[4] *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.).
[5] *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1036.
[6] *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, aff'd 2011 ONSC 530 (Div. Ct.), aff'd 2012 ONCA 443, leave to appeal to S.C.C. ref'd [2012] S.C.C.A. No. 326.
[7] *McCracken v. Canadian National Railway Company*, 2010 ONSC 4520, rev'd 2012 ONCA 445.
[8] *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 4274 (Div. Ct.).

Appeal. The leave motion was heard in writing and leave was granted on **January 21, 2011**.

[20] Meanwhile on **June 3, 2011**, the Divisional Court upheld the certification in *Fulawka v. Bank of Nova Scotia.*[9]

[21] On **November 30 and December 1, 2011**, Ms. Fresco's appeal to the Ontario Court of Appeal was heard along with the appeals in *Fulawka v. Bank of Nova Scotia* and *McCracken v. Canadian National Railway*, and on **June 26, 2012**, the Court of Appeal granted the appeal and certified Ms. Fresco's class action.[10] The Court of Appeal certified eight common issues about liability; however, it rejected Ms. Fresco's request to certify aggregate damages as a common issue. The Court of Appeal also held that the CIBC's limitation period defence would have to be determined at individual issues trials.

[22] Pausing here, it is pertinent again to note for the risk analysis later in these Reasons for Decision that the Court of Appeal also upheld the certification of *Fulawka v. Bank of Nova Scotia*[11] as an employment law class action, but the Court reversed my decision in *McCracken v. Canadian National Railway*,[12] where I had certified a proposed employment law misclassification class action.

[23] Returning to the immediate case, the CIBC sought leave to appeal to the Supreme Court of Canada, as did the Bank of Nova Scotia in *Fulawka*, but in **March 2013**, the Supreme Court refused to grant leave in either case. With the refusal to grant leave to appeal, Ms. Fresco abandoned a conditional cross-appeal to the Supreme Court of Canada. As a by-product of the Court of Appeal's decision, Justice Lax's costs decision was set aside, Ms. Fresco received $613,000 in costs from the CIBC plus disbursements in respect of the certification motion and related appeals.

[24] On **February 27, 2014**, the CIBC delivered its Statement of Defence.

[25] Pausing again to discuss *Fulawka v. Bank of Nova Scotia*, on **August 27, 2014**, Justice Belobaba approved a settlement in this similar employment law class action.[13] In *Fulawka,* there were 5,000 class members, and the scheme of the settlement was that: (a) the Bank of Nova Scotia would pay the full amount of the unpaid overtime based on a claims application process; and (b) the Bank of Nova Scotia separately would pay Class Counsel's fee of $10.45 million, which had been calculated in an arbitration in which the Honourable Stephen Goudge was the arbitrator. Mr. Goudge had determined the lodestar to be $3.8 million, and he applied a 2.75 multiplier. Disbursements and taxes were also to be paid by the bank. Mr. Goudge assumed that the class members would recover $95.0 million in unpaid overtime, which as I shall discuss below, did not occur. The $10.45 million fee reflected a contingency fee of 11% based on an assumed $95.0 million take-up.

[26] Returning to the immediate case, in **June 2015**, Ms. Fresco brought the first of several production motions.

[27] In **October 2015**, Ms. Fresco served a notice of motion for a summary judgment on all the

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[9] *Fulawka v. Bank of Nova Scotia*. 2011 ONSC 530 (Div. Ct.).
[10] *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 443, leave to appeal to the S.C.C. ref'd [2012] S.C.C.A. No. 379.
[11] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443.
[12] *McCracken v. Canadian National Railway Company*, 2012 ONCA 445.
[13] *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743.

common issues and also for a summary judgment on aggregate damages based on a newly proposed expert methodology analyzing time-stamped electronic data generated by the computer applications used in the CIBC workplace.

[28] Pausing yet again to discuss *Fulawka v. Bank of Nova Scotia*, on **March 3, 2016**, Justice Belobaba approved a revised settlement and an additional counsel fee.[14] The claims process under the original settlement for the employees had not gone as planned, and it was alleged that the Bank of Nova Scotia was breaching the settlement. The parties negotiated a new settlement in which the Bank agreed to pay: (a) a further $20.6 million to the class members in addition to the $18.7 million that had already been paid out to date (not the assumed $95.0 million); and (b) a further separate $2.3 million in legal fees. Justice Belobaba approved the revised settlement. In his reasons for decision, he noted that of the $52.1 million expended by the Bank over the two settlements, the $12.75 million in counsel fees was the equivalent of a contingency fee of about 24%.

[29] Returning to the immediate case, the summary judgment motion was scheduled for September 2017. Ms. Fresco served her initial summary judgment motion record in **July 2016** and on **April 17, 2017**, the CIBC served its responding record for the summary judgment motion. In its summary judgment materials, the CIBC unexpectedly produced documents that had not previously been produced during the documentary discovery phase. The consequence was that the summary judgment motion did not proceed as scheduled, and instead in **May 2017**, Ms. Fresco served a notice of motion for production of additional documents. The CIBC responded with additional productions, but Ms. Fresco proceeded with her productions motion, after which the CIBC agreed to a cross-examination on its affidavit of documents which occurred in **January 2018**.

[30] On **June 7, 2019**, on Ms. Fresco's motion, Justice Belobaba rejected CIBC's claim for privilege over certain documents.[15]

[31] In **August 2019**, CIBC served a cross-motion for summary judgment, and on **December 2019**, the first phase of the summary judgment motions was argued, and on **March 30, 2020**, Justice Belobaba held that: (a) CIBC's overtime policies contravened the Code and its pre-approval requirement was unlawful; (b) CIBC breached its duty to record actual hours worked; (c) the *Canada Labour Code* imposed a duty of care on the CIBC to prevent unpaid overtime and CIBC's overtime policies breached this duty; (d) some class members had worked uncompensated overtime hours during the sixteen-year class period of February 1, 1993 to June 18, 2009; and (e) the CIBC had breached its employment contracts with the class but had not breached its contractual duty of good faith and did not lie or knowingly mislead class members.[16]

[32] On **June 29, 2020**, the second phase of the summary judgment motions was argued, and on **August 10, 2020**, Justice Belobaba dismissed Ms. Fresco's claims for punitive damages, restitution, and unjust enrichment. He held that the class members only had claims for damages for breach of contract. Justice Belobaba certified aggregate damages as an additional common issue.[17]

[33] On **October 9, 2020,** the third phase of the summary judgment motions was argued, and on **October 21, 2020**, Justice Belobaba rejected CIBC's request for a class-wide order regarding

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[14] *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576.
[15] *Fresco v. Canadian Imperial Bank of Commerce*, 2019 ONSC 3309.
[16] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 75.
[17] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288.

its limitation period defence and with respect to the constitutionality of s. 28 of Ontario's *Class Proceedings Act, 1992* to suspend the running of limitation periods in other provinces. He held that the application of limitation periods was an issue to be determined at individual issues trials. Further, Justice Belobaba held that the class members' claim for aggregate damages would have to be proven on its merits at a subsequent hearing.[18]

[34] Before the merits and quantification of the class members' aggregate damages claim was determined, the CIBC appealed the three summary judgment decisions to the Court of Appeal, and Ms. Fresco moved to have the appeals pertaining to limitations and aggregate damages quashed as appeals of interlocutory orders appealable only with leave to the Divisional Court. On **January 26, 2021**, the Court of Appeal dismissed Ms. Fresco's motion to quash.[19]

[35] While the appeals to the Court of Appeal were pending, Ms. Fresco continued her preparation for the further continuation of the summary judgment motion to determine aggregate damages. Instructions were given for the finalization of the expert's report calculating aggregate damages. Based on differing assumptions, Stefan Boedeker, Ms. Fresco's expert, produced three different models to calculate aggregate damages. Under Mr. Boedeker's Model 3, which was the model to be advanced at the summary judgment motion, the class members' claim from the commencement of the class period until the present was **$369.0 million** with simple interest and **$426.0 million** with compound interest. Applying the provincial limitation periods, the class members' claims until the present was $236.0 million with simple interest to $265.0 million with compound interest. The applicability of these limitation periods, however, would have to be determined at individual issues trials.

[36] In **September 2021**, the Court of Appeal heard the appeals from the summary judgment Orders, and on **February 9, 2022**, the Court of Appeal dismissed the appeals.[20] The Court of Appeal confirmed that the issue of aggregate damages could be determined at a common issues trial, but the Court held that it was open to the CIBC to challenge Ms. Fresco's methodology as an unavailable means to aggregate damages because of the principle established in the Court of Appeal's decision in *Fulawka*, which prohibited the use of statistical sampling evidence in the calculation of aggregate damages. The Court of Appeal confirmed that matter of the CIBC's limitation period defences was a matter to be determined at individual issues trials. The Court of Appeal did not decide the issue of the constitutionality of s. 28 of Ontario's *Class Proceedings Act, 1992* to apply extraterritorially, and the Court indicated that this issue remained open.

[37] There was no application for leave to appeal to the Supreme Court of Canada, and in **April 2022**, the parties agreed to mediation and to adjourn the resumption of the summary judgment motion which had been scheduled for September 2022 to February 2023.

[38] William Kaplan, an experienced arbitrator and mediator in employment law matters, was appointed mediator. The mediation proceeded over two days in **August 2022** but without success, and the parties agreed to cancel the third day that had been scheduled. The settlement negotiations, however, resumed in **September 2022** with Mr. Kaplan facilitating the discussions. On **October 3, 2022**, the parties reached an agreement in principle to settle for $153.0 million, all-inclusive.

[39] On **December 28, 2022**, the parties signed a formal comprehensive Settlement Agreement.

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[18] *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 6098.
[19] *Fresco v. Canadian Imperial Bank of Commerce*, 2021 ONCA 46.
[20] *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115.

The principle terms of the settlement were: (a) CIBC pays $153.0 million, all inclusive; (b) a formula would be used to calculate the Class Member's entitlement to the net settlement funds based on length of tenure, the presumptive limitation periods, position(s) held, and average wages; (c) the net settlement funds will be allocated for the entire class period on a *pro rata* claims-made basis, with a discount for claims for the potentially time-barred periods by 50%; and (d) there is no reversion to the CIBC.

[40] Subsequently, Justice Belobaba made an Order providing for a notice program to notify the class members of the hearing to seek approval of the settlement, the distribution plan, and Class Counsel's fee, and on **March 3, 2023**, the motions were heard. Justice Belobaba approved the settlement and the distribution scheme. He signed a settlement approval Order. He signed a distribution plan Order. He did not release reasons for decision. He adjourned the motion for fee approval.

[41] During the hearing, Justice Belobaba questioned Class Counsel about the lodestar. In adjourning the motion for fee approval, he requested Class Counsel review and analyze the time expended on the case, to determine what adjustment to the lodestar, if any, should be made having regard to overlap and/or duplication of work by the consortium of law firms.

[42] In compliance with Justice Belobaba's inquiry, Class Counsel undertook a detailed "sharp pencil" review of their dockets and prepared additional submissions in support of their request for fee approval. Class Counsel reported that they had expended $16.52 million in straight time to prosecute this case, with a further $1.0 million in expected future legal expense to see the case through the settlement phase. At various times, Class Counsel carried millions of dollars in disbursements. Making adjustments to address and remove any concerns about unnecessary duplication or overlap, they reduced the lodestar by approximately $3.0 million to $13.5 million. This lodestar would represent a discount of more than 18% from Class Counsel's total actual fees, but would still justify, a counsel fee of $44 million.[21]

D. Class Counsel's Submissions

[43] In paragraphs 1 to 10 of their factum for the fee approval motion, Class Counsel submitted that the requested $44.0 million fee was fair and reasonable. Class Counsel submitted:

> 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.
>
> 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 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.

[21] The fee ultimately awarded to Class Counsel will be reduced by $652,666.18, the portion of costs awarded to Ms. Fresco in this proceeding and that were applied against fees exclusive of taxes.

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 megafund 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;
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> (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
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> (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*:
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> > "[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".[22]

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;
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> (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

[22] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 at para. 56.

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";

(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 timestamped 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 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 "megafund" 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.

E. Contingency Fees and Class Proceedings

[44] Class Counsel in the immediate case seek to enforce a 30% contingency fee agreement. Contingency fee agreements, because they involve the sharing of proceeds recovered from a proceeding, appear to be champertous. Until 1992, although the legal profession in Ontario had managed some workarounds, contingency fee agreements were illegal in Ontario although they were permitted in other provinces. In 1992, contingency fee agreements became lawful in Ontario but only for class proceedings. Section 33 (1) of the *Class Proceedings Act, 1992*, authorized contingency fee agreements. Section 33 (1) states:

> 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.

[45] Ten years later, in 2002, the availability of contingency fees retainers in Ontario was expanded to litigation generally. In *McIntyre Estate v. Ontario (Attorney General)*,[23] the Court of Appeal held that the prohibition against champerty should only apply to prohibit conduct that actually interferes with the administration of justice.

[46] The Law Society of Upper Canada (now the Law Society of Ontario) promptly responded by amending its *Rules of Professional Conduct* to permit contingency fees in most but not all types of litigation. The provincial government also responded and amended the *Solicitors Act*,[24] to legalize and regulate contingency fee agreements.[25] The contingency fee agreement cannot be in respect of a family law matter, a proceeding under the *Criminal Code* or any other criminal or

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[23] (2002), 61 O.R. (3d) 257 (C.A.). See also: *Re Cogan* (2007), 88 O.R. (3d) 38 (S.C.J.). *Tri Level Claims Consultants Ltd. v. Koliniotis*, [2005] O.J. No. 3381 (C.A.); *Raphael Partners v. Lam* (2002), 61 O.R. (3d) 417 (C.A.), rev'g (2001), 55 O.R. (3d) 289 (S.C.J.).

[24] R.S.O. 1990, c. S.15.

[25] *Justice Statute Law Amendment Act, 2002*, S.O. 2002, c. 24.

quasi-criminal proceeding.

[47] The contingency fee agreement must be in writing, and the formalities for the signing and requirements and restrictions on the content of contingency agreements are set out in a regulation enacted under the *Solicitors Act.*[26]

[48] Recently in *Adams v. Apple Inc.*,[27] Justice Raikes held that the provisions of the *Solicitors Act* about the form, content, and legality of contingency fee agreements also apply to contingency agreements under the *Class Proceedings Act, 1992*.

F. Fee Approval: General Principles

[49] Section 29 of the *Class Proceedings Act, 1992* governs settlement approvals. Sections 30 and 31 are the sections of the Act that are relevant to fee approval. Sections 30 and 31 were amended by the *Smarter and Stronger Justice Act, 2020*.[28]

[50] Technically and juridically speaking, under the transition provisions of the amended *Class Proceedings Act, 1992*, the amendments to sections 30 and 31 do not apply to the immediate case, but for present purposes, nothing turns on the amendments, which largely are a codification of the pre-existing law. The Law Commission of Ontario in its Final Report: *Class Actions – Objectives, Experiences and Reforms* (July 2019) had recommended other changes to the law of settlement and fee approval, but those recommendations did not make their way into the amended statute.

[51] Fee approval motions arise in the context of settlement approval motions pursuant to s. 29 of the *Class Proceedings Act, 1992*, which states:

> *Discontinuance, abandonment and dismissal for delay*
>
> *Court approval required*
>
> 29 (1) A proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> *Notice*
>
> (2) In approving a discontinuance or abandonment, or in dismissing a proceeding for delay, other than under section 29.1, the court shall consider whether notice should be given under section 19, and whether such notice should include,
>
> (a) an account of the conduct of the proceeding;
>
> (b) a statement of the result of the proceeding;
>
> (c) any other prescribed information; and
>
> (d) any other information the court considers appropriate.

[52] Section 32 (2) of the *Class Proceedings Act, 1992* stipulates that an agreement respecting fees and disbursements between class counsel and a representative plaintiff is not enforceable

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[26] Formerly O. Reg. 195/04, now O. Reg. 563/20.
[27] *Adams v. Apple Inc.*, 2023 ONSC 2957.
[28] S.O. 2020, c. 11, Sched. 4.

unless approved by the court. The amended sections 32 and 33 are set out below.

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.

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.

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.

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.

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.

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.

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.

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).

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.

Agreements for payment only in the event of success

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.

(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;

"multiplier" means a multiple to be applied to a base fee.

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.

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.
>
> *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.
>
> *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.
>
> *Idem*
>
> (8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee.
>
> *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.

[53] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.[29]

[54] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[30] The actual take-up rate as a measure of the success of the settlement is a relevant factor in determining an appropriate counsel fee.[31]

[55] The risks of a class proceeding include all of liability risk, recovery risk, and the risk that

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[29] *Smith v. National Money Mart,* 2010 ONSC 1334 at paras. 19-20, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).
[30] *Smith v. National Money Mart,* 2010 ONSC 1334, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).
[31] *Lavier v. MyTravel Canada Holidays Inc*., 2013 ONCA 92.

the action will not be certified as a class proceeding.[32]

[56] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well.[33] In *Gagne v. Silcorp Ltd*.,[34] Justice Goudge stated:

> The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfil its promise, that opportunity must not be a false hope.

[57] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the class members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved.[35] Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee.[36] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[37]

G. *The Emperor's New Clothes*

[58] In the Introduction to these Reasons for Decision, I stated that settlement and fee approval motions are the most important, most difficult, and sometimes the most unpleasant task of a judge assigned to manage a class proceeding under the *Class Proceedings Act, 1992*. I shall begin the discussion and analysis of Class Counsel's fee request in the immediate case by explaining why this is so. I shall then continue these topics in the analysis and discussion portion of these reasons.

[59] Doctoral theses, books, articles, law reform commission reports, government policy papers, and short and long judgments have been written on settlement and fee approval motions, but the explanation for their importance, difficulty, and unpleasantness can be explained as follows.

[60] The fundamental goals of class proceedings are access to justice, behaviour modification, and judicial economy. These fundamental goals are achieved in one of two ways. One way is by a judicial determination of liability after a trial. The other way of achieving access to justice, behaviour modification, and judicial economy is by settlement of the class proceeding. A trial decision, which is subject to correction by appeal, provides the Class Member all that he or she deserves in compensation plus the costs of litigating, usually on a partial indemnity basis, but potentially on a substantial or full indemnity basis. In comparison, settlements are by their nature a compromise in achieving access to justice, behaviour modification, and legal costs, but settlements achieve maximum judicial economy.

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[32] *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35; *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 t para. 17 (C.A.).
[33] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61(S.C.J.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.).
[34] *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.).
[35] *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.
[36] *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at para. 92.
[37] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (C.A.).

[61] The settlements in class actions are negotiated by the Defendant's Counsel receiving instructions from the defendant (or the defendant's insurer) and by Class Counsel taking instructions from the representative plaintiff on behalf of the class members. The *Class Proceedings Act, 1992* requires that these negotiated settlements and the Class Counsel fee associated with the contingency fee authorized by the *Class Proceedings Act, 1992* be approved by the court.

[62] The policy reason for requiring court approval of settlements and Class Counsel's fee is that the legislators realized that class actions have high litigation risk, which risk is being assumed by entrepreneurial Class Counsel and Class Counsel have a conflict of interest in becoming a partner with the class members, and therefore, the probity or righteousness of the settlement and the fee requires scrutiny from an unbiased not self-interested authority. Thus, settlements and fee approvals require scrutiny by the judiciary who are obliged to protect the interests of class members.

[63] Put bluntly, Class Counsel has far, far more to gain than the individual class members, including the representative plaintiff. This is true in every class action. For example, in the immediate case, approximately 100 lawyers of three law firms seek to divide $44.0 million, $440,000 *per lawyer capita*, and assuming a 100% take up, the 31,000 class members would recover approximately $2,800 *per capita*.

[64] The legislators realized that contingency fee agreements are inherently and unavoidably champertous. In a settlement, the class members share their recovery with their lawyer and the class members do not recover any costs as a partial or substantial indemnity for the expense of having to litigate. Class Counsel has an unavoidable conflict of interest. There are very powerful incentives compelling Class Counsel to seek instructions to settle as opposed to prosecuting the action to a determination of the truth of the alleged wrongdoing. The legislators, however, were not prepared to institute as they have for the criminal law, which is a form of public law, a public prosecutor who has nothing personal to lose or gain in the prosecution of the case.

[65] Class proceedings are essentially public law on the civil side, but rather than having a public prosecutor for class proceedings to provide the public, i.e., the class members, with genuinely independent and impartial advice about their case, the legislators out-sourced access to justice and behaviour modification to entrepreneurial Class Counsel. And, as a public policy decision, the legislators assigned to the judiciary the task of scrutinizing the settlement achieved by Class Counsel and the fee approval requested by Class Counsel. The judiciary is assigned the task of determining whether the settlement and the fee sought for settling the case are fair, reasonable, and in the best interests of the class members.

[66] From the judiciary's perspective, the legislator's policy decision makes settlement and fee approval the most important, the most difficult, and sometimes the most unpleasant part of the management and administration of class proceedings. The importance of this task is obvious. Judges are placed in the position of ensuring that the settlement fulfills the public purposes of the class proceedings regime and also does honour to the administration of justice and to the legal profession. In *Fairness in Class Action Settlements*,[38] Professor Piché, now Justice of the Québec Superior Court stated: "While settling cases promotes judicial economy … the peculiarity of the class action device makes the application of a public policy favouring settlements problematic if

[38] K. Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2011).

made without safeguards or restrictions." In *Accessing Justice: Appraising Class Actions Ten Years after Dutton, Hollick & Rumley*,[39] Professor Kalajdzic writes: "Unlike adjudicators overseeing traditional individual disputes, class action judges are the protectors of the class, exercising inquisitorial functions to ensure the adequacy and fairness of the proposed settlement. Only in this way can the mechanism of the class proceeding deliver a "just" justice." In *Class Action Dilemmas: Pursuing Public Goals for Private Gain-Executive Summary*, the Rand Institute for Civil Justice[40] stated: "The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society." In the Ontario Law Reform Commission's *Report on Class Actions*,[41] the Commission wrote:

> The Commission recognizes that class representatives or class lawyers acting out of self-interest, may occasionally attempt to make a settlement that is unfair to class members. However, such abuse of civil proceedings is not unique to class actions. Moreover, the Committee does not believe that this possibility is a sufficient ground to reject the adoption of an expanded class action procedure. […] Rather, an expanded class action procedure should be designed to give to the judiciary an effective discretion to supervise all settlements and lawyers' fees. This discretion would permit the courts to preclude settlements that are unfair to class members or to the defendant, and to ensure that the measure of compensation received by lawyers reflects the adequacy of their representation of the class.

[67] However, as Professor Chiodo notes in *The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act*,[42]: "the [*Class Proceedings Act, 1992*] leaves much to the discretion of judges … and while this gives courts a great deal of flexibility, it can also lead to insufficient attention to the fairness and adequacy of the settlement." Professor Chiodo goes on at some length to discuss the difficulties confronted by judges in the settlement and fee approval process and the need for amendments to the Law Society of Ontario's *Rules of Professional Conduct* to provide guidance to the lawyers (which although recommended to the law societies for decades has not yet occurred). Professor Chiodo also observes that: "Because the settlement approval process relies on full and frank disclosure by lawyers, judges may be seeing only the most egregious infractions committed by the most shameless counsel."[43]

[68] While the importance of the judge's role is readily apparent, the difficulties and the unpleasantries, however, are not as obvious. Judges are placed in the odd position of having the assignment of protecting the class members, often referred to as absent parties, since they were represented by just one of their number, i.e., the representative plaintiff, from the possibility that their lawyers, out of risk aversion, collusion with the Defendant's Counsel, champerty, and, or profiteering have negotiated a settlement that undoubtedly is very good for the lawyers but which does not achieve meaningful substantive justice for the class members or meaningful behaviour modification of the wrongdoing defendants.

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[39] J. Kalajdzic, *Accessing Justice: Appraising Class Actions Ten Years after Dutton, Hollick & Rumley* (ed.), (Markham, LexisNexis Canada, 2011), p. 9.
[40] D.R. Hensler, B. Dombey-Moore, B. Giddens, J. Gross, E.K. Moller, N. M. Pace, *Class Action Dilemmas: Pursuing Public Goals for Private Gain; Executive Summary*, (RAND, Santa Monica, CA, 1999), p. 33.
[41] Ontario Law Reform Commission, *Report on Class Actions*, (Toronto: Ministry of the Attorney General, 1982), Volume 1, p.168.
[42] S. Chiodo, *The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act*, (Toronto: Osgoode Society for Canadian Legal History, Irwin Law, 2018), p. 212.
[43] *Ibid.*, p. 214.

[69] The procedure for this judicial scrutiny is difficult, awkward, and uncomfortable. Under our adversary system of adjudication, the role of judges is to decide cases. Judges are not placed to be the protector of the parties from possibly cowardly or greedy lawyers. However, abruptly at the end of a fiercely fought class proceeding, in an otherwise adversary system, the procedure becomes quasi-inquisitorial, and by design, the judge has the task of protecting one of the litigants. Moreover, the system has a design flaw because the inquisitor-judge is dependent on the conflicted Class Counsel to provide the information necessary to justify the settlement and the associated fee, but there is no opponent to test the information.

[70] There is an adversarial gap in the settlement and fee approval quasi-inquisitorial system. The class action statute and the case law attempts to fill that gap with information to test the probity of the settlement and the fee approval. In *McCarthy v. Canadian Red Cross Society*,[44] Justice Winkler, as he then was, said that Class Counsel in unopposed motions in class proceedings are under a special duty to make full and frank disclosure. He stated at paragraph 20 of his decision:

> 20. By comparison, a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the court. These absent class members are dependent on the Court to protect their interests. In order to do so, the court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the court to all relevant information that would impact on the court's determination. This is especially important where the motion is for the approval of settlement agreements, class counsel fees, or consent certifications for the purpose of settlement.

[71] However, notwithstanding Justice Winkler's aspirational message, Class Counsel do provide information that is "even potentially misleading" and, in any event, the information is not subject to any verification or cross-examination or rebuttal with other information. In *Smith Estate v. National Money Mart*,[45] Justice Juriansz for the Court of Appeal stated:

> In our adversarial system, in which the case is prepared by the parties, the court should not be expected to scrutinize in detail a massive set of counsel's dockets for duplicative or excessive hours. Winkler J.'s comments in *McCarthy* [at para. 21] are worth repeating: "The court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself." A court must also guard against appearing confrontational by embarking on a cross-examination of counsel about the dockets or on matters such as whether they perform work at other than the "usual" rates indicated in the fee agreement, and if so, at what rate and for what type of client.

[72] The adversarial gap is partially filled by the information that the case management judge may have garnered from the certification motion or other motions in the proceeding, but the gap remains. The appointment of an *amicus* is a theoretical solution to the adversarial gap, but an *amicus*, who is freshly introduced into the case and has no direct experience with it, will be in less good position than the case management judge in analyzing the probity of the settlement against what might have occurred if access to justice had been achieved by a trial on the merits.

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[44] *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.).
[45] *Smith Estate v. National Money Mart*, 2011 ONCA 233, var'g 2010 ONSC 1334.

[73] To make the system work, judges adopt a litany of factors to serve as surrogates for an absent adversary system and the inept quasi-inquisitorial system. As I shall explain in more detail below, ultimately the judge must consider all the circumstances of the case and then ask, as a matter of objective – not subjective - judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession, which is a euphemism for champerty and collusion and four or five of the seven deadly sins of pride, greed, wrath, envy, lust, gluttony, and sloth.

[74] But truth be told, Class Counsel have developed a routine mantra of arguments that satisfy the surrogate factors and who's to doubt them. Indeed, the Court of Appeal in *Smith Estate v. National Money Mart* said it was wrong and the court was not equipped to doubt what Class Counsel say about their lodestar.

[75] Given the absence of any counterarguments to approving the settlement and the fee, it is very difficult – but not impossible – for a judge to carry out his or her very important assignment of ensuring the probity of the settlement and ensuring that Class Counsel's fee does honour not only to Class Counsel but also to the administration of justice and the social utility and public policies associated with class proceedings. The factors and the judge's experience with the particular case and his or her acquired expertise in evaluating the potential of many cases makes the settlement and fee approval system functional and usually adequate for its purposes, but for the judge, the process is an always difficult and sometimes an unpleasant undertaking.

[76] From the judiciary's perspective, the settlement and fee approval become unpleasant because of what I have described as the *Emperor's New Clothes* phenomena. I need not retell that well known children's story about magical and imaginary beings and lands, save to say that from time to time - not always - a judge on a settlement and fee approval motion feels like the emperor who is told by the weavers (Class Counsel) that their cloth (the settlement) is so special that anyone who cannot see it must be very stupid.

[77] And it is not pleasant to see egotism on parade. Modesty in circumstances of achievement is attractive, while arrogant conceit in circumstances of modest achievement is off-putting, but a settlement and fee approval motion compels Class Counsel to be boastful about how diligent and brilliant they have been. A settlement and fee approval motion compels Class Counsel to be boastful about how wonderful is the settlement, which is actually wonderful for just Class Counsel, Defendants' Counsel, and the defendant, who are the chief beneficiaries of the compromise.

[78] Many times, the court is told that Class Counsel are David battling Goliath and Goliath's army of powerful lawyers. Courage in circumstances of high risk is attractive, but cowardice is not, but a settlement and fee approval motion compels Class Counsel to laud how prudent - but not cowardly - they have been in negotiating such a wonderful settlement that provides reasonable and timely access to justice much sooner than actually stoning Goliath and his warrior minions would achieve.

[79] And, it is also unpleasant and a part of the *Emperor's New Clothes* phenomena that nobody talks about how pro-defendant are class proceedings, where defendants have the leverage of the pressure on Class Counsel to settle and the leverage of the judiciary's encouragement of settlements, which eases the burden on the under-resourced court system. Defendants can use this leverage to pay what amounts to a modest licensing fee for wrongdoing in exchange for the absent class members' release of their claims. It is not pleasant to be put into the position of taking the opposite side of a debate about how wonderful is the compromise, when the victims of the

wrongdoing, the class members, are in desperate need for more compensation, but the optics of the settlement are that the winners are the lawyers for both sides and the defendant, not the victims of the wrongdoing.

[80] It is not pleasant to be lectured about litigation risk, which is a euphemism of the measure of the likelihood that the court will come to the wrong decision about liability or the quantum of damages. The lecture is particularly cringeworthy when at the carriage motion or at the certification motion, Class Counsel so confidently boasted that the necessary route to substantive access to justice and behaviour modification was their powerful winning theory of the case.

[81] It is not pleasant to be lectured about the law's delay, which entails that it is preferable to settle now for a lesser prize than to wait in the queue of the under-resourced administration of justice for a trial and then an appeal and then a leave to appeal and then an appeal to the Supreme Court of Canada.

H. Discussion and Analysis

[82] In the discussion below, I shall examine six interconnected topics in the following order. First, I shall examine the results achieved in the immediate case. Second, I shall quantify, in monetary terms, the value of the settlement in the immediate case. Third, I shall examine the matter of quantifying the monetary value of Class Counsel's work in the immediate case. Fourth, I shall examine the matter of risk and the incentives in this case and risk and incentives generally under the class actions regime. Fifth, I shall examine the matter of the so-called integrity of the profession as a factor in fee approvals in this case and generally. Sixth, and finally, I shall integrate these topics and examine the fairness and reasonableness of a $44.0 million fee in light of the risk undertaken by Class Counsel in prosecuting the litigation in the immediate case and in light of the degree of success achieved and the integrity of the profession.

1. The Degree of Success Factor

[83] Beginning with the degree of success or the result achieved in conducting the litigation, in the immediate case, Justice Belobaba approved the settlement. That indicates that at a minimum, the result achieved was fair, reasonable, and in the best interests of the class members. That minimum, of course, does not end the analysis. My assessment is that for fee approval purposes, Class Counsel achieved a good result for the class members when compared to the alternative of taking the matter to a judgment about aggregate damages.

[84] I do not share, however, Class Counsel's effusive praise for the settlement in the immediate case. By way of comparison, in the settlement of *Fulawka v. Bank of Nova Scotia*,[46] which Justice Belobaba praised as excellent, the defendant bank's liability payment was uncapped and undiluted by legal fees which were paid separately by the bank. In contrast, in the immediate case, the CIBC's potential liability of over $426.0 million is capped at $153.0 million and the settlement fund, which is to be distributed ratably, is diluted by legal fees, taxes, disbursements, costs of administration, and the Class Proceedings Fund's levy. As noted above, with a $44.0 million counsel fee, class members will recover $86.0 million or their $426.0 million loss, a recovery of approximately 20% of their loss.

[46] *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148.

[85] For the immediate case, sadly we will never know whether Justice Belobaba would have shared Class Counsel's view that the outcome was an excellent one and as good or better than what would have been achieved had the litigation continued. My guess is that Justice Belobaba would have thought that Class Counsel could have pressed on for more. The trend of Justice Belobaba's judgments during the summary judgment phase of this action would suggest that the class members would have had a reasonably good chance of achieving a judgment in line with Boedeker's Model 3. In other cases, Justice Belobaba had granted aggregate damages and he had been upheld by the Court of Appeal.[47] If this speculative assessment of the results achieved in comparison to pressing on to trial is correct, then the settlement was a still a good one for the class, but it also was a good one from the CIBC's perspective because it was settling for $153.0 million, all inclusive, when its exposure was in excess of $426.0 million.

[86] In any event, for present purposes, the settlement was a good enough settlement for approval and the results achieved were good. However, the consortium of Class Counsel cannot claim a goodness credit, as they repeatedly did, for advancing the law about aggregate damages. Any progress in the substantive law or the forensics of aggregate damages remains to be determined.

[87] Further, Class Counsel cannot claim a goodness credit, as they repeatedly did, for the immediate case as some sort of exclusive ground breaker in employment law class actions. Ms. Fresco's case cannot claim exclusivity or some sort of litigation copyright. She commenced her proposed class action in June 2007, and it was certified by the Court of Appeal in June 2012. Meanwhile, Alison Corless commenced a similar action against KPMG LLP in August 2007, and I approved the settlement that saw KMPG's employees fully compensated for unpaid overtime one year later in 2008.[48] *Fulawka v. Bank of Nova Scotia* was commenced in December 2007, and it was certified by Justice Strathy in February 2010. In *McCracken v. Canadian National Railway Company*, Michael McCracken commenced his proposed class action against the Canadian National Railway Company in March 2008, and although the decision was reversed by the Court of Appeal, it was certified in August 2010 as a viable employment law class action. Employment law class actions were well known in the United States under Rule 23 of the *Federal Rules of Civil Procedure*, and although it was more a civil or labour rights case and not an unpaid overtime case, the first employment law class action in the United States under Rule 23 may have been the 1970s case of *Cooper v. General Dynamics Corp*.[49] The legal work that Class Counsel did in the immediate case was very admirable, but this exercise of asking for judicial congratulatory backslapping for originality and litigation bravery is part of the unpleasantness of fee approval motions (and also carriage motions for that matter).

2. The Quantification of the Success Factor

[88] The multiplicand of a contingency fee in a class proceeding is the judgment awarded by the court exclusive of any costs award or the settlement fund after a deduction for disbursements. Therefore, in the immediate case, Class Counsel quantified the success as $147.0 million ($153.0 million less $6.0 million), which Class Counsel multiplied by 0.3 (30%) for a costs request of $44.0 million.

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[47] *Ramdath v. George Brown College*, 2014 ONSC 3066, aff'd. 2015 ONCA 921.
[48] *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.).
[49] *Cooper v. General Dynamics Corp*., 533 F.2d 163 (5th Cir. 1976).

[89] For immediate purposes, I am prepared to use $147.0 million as the multiplicand for the contingency fee. However, there is a case to be made that $147.0 million overstates the multiplicand.

[90] The argument for a lower multiplicand begins by noting that the settlement negotiated by Class Counsel in the immediate case was all inclusive. In the immediate case, the counsel fee was not treated separately as was the case in the *Fulawka* settlement, where the fee and disbursements were not deducted from the class's recovery. Then, in the immediate case, it should be noted that comparatively and hypothetically speaking, had the class members in the immediate case proceeded to an assessment of damages and completed the summary judgment process case and had the court awarded $153.0 million, the court also would have awarded costs at least on a partial indemnity basis for the class members, which would have been a credit to paying the contingency fee. Next, it should be noted that it is common practice in contingency fee approval motions (in say infant settlements) to attribute a notional sum for costs (typically 10%) and then deducting that sum from the multiplicand before applying the multiplier. Applying this line of reasoning, for the immediate case, the argument would conclude by reducing the multiplicand in the immediate case by approximately $15 million (10% of the settlement fund being attributed to costs). Applying the 30% contingency fee to $132 million yields a counsel fee of $39.6 million.

[91] Although I think this is a strong argument,[50] nevertheless, as already mentioned above, for immediate purposes, I am prepared to use $147.0 million as the multiplicand for the contingency fee. I, however, mention this argument for two reasons. The first reason is that it is some justification for reducing Class Counsel's fee as I will be doing in any event. The second reason is that this discussion discloses that there are tricks of the trade in how settlements are structured that because of the *Emperor's New Clothes* phenomenon often go unmentioned in the assessment of the multiplicand.

[92] One of the tricks of the trade that I have seen developed during my fifteen years of class action experience is the use of smaller monetary value non-residual fixed sum settlement funds rather than higher value residual settlements in which the value of the settlement cannot be determined until the extent of the take-up is determined. One wonders, but one will never know, whether Class Counsel adopted this trick of the trade of negotiating a non-residual fund – with a lower multiplicand - because while the defendant's liability to compensate the class is reduced, the non-residual element means that Class Counsel's contingency fee is not tied to the take-up. In the immediate case, none of the $153.0 million will be returned to the CIBC and therefore it is quite easy for Class Counsel to say that the multiplicand in the immediate case is $147.0 million. There is nothing necessarily nefarious in this approach, but it does at a minimum complicate determining what is the quality and the quantification of the success factor in any case including the immediate case.

[93] A related complication to both non-residual and residual settlement funds is whether to hold back a portion of the counsel fee in order to encourage Class Counsel a promote a greater take-up. In other words, courts from time to time will hold back a portion of the settlement fund and require Class Counsel to reapply for the balance of the approved fee, which will be apportioned depending on the take-up. I shall not do this in the immediate case. In the immediate case, the class period extends back to thirty years to February 1993, and as demonstrated by the results in *Fulawka,* one can expect that a small portion of the class will take up the settlement fund. How

[50] See *Adams v. Apple Inc.*, 2023 ONSC 2957.

much will go cy-prés remains to be seen. In any event, I have no doubt that Class Counsel will make diligent efforts to complete the administration of the settlement.

[94] There are other complications such as settlements that involve coupons or discounts or discharges of indebtedness of the class members that make the quantification of the success factor difficult but these complications do not arise in the immediate case.[51]

3. The Quantification of the Risk Factor

[95] Moving on to discuss the risk element of fee approval, before discussing the "quality" of the risk in the immediate case, I shall first examine the "quantity" of that risk and the unpleasantries associated with that quantification.

[96] In a class action, there are two potential risks to quantify.

a. First, there is the risk of losing the class proceeding and having to pay an adverse costs award to the successful defendant. In the immediate case, the risk of an adverse costs award and also the risk of paying for disbursements to prosecute the action was assumed by the Law Foundation's Class Proceedings Fund, although for periods of time, Class Counsel financed the disbursements. In the immediate case, Class Counsel took the prudent step of obtaining the support of the Class Proceedings Fund, which provided Ms. Fresco with protection from her exposure to adverse costs consequences. Class Counsel thus avoided the need to itself provide an indemnity to protect Ms. Fresco.

b. Second, there is the risk of non-payment.[52] There is the risk of losing the class action and having to write off Class Counsel's work in progress, or unpaid legal charges, the lodestar, which was calculated by Class Counsel in the immediate case to be $16.5 million.

[97] In the immediate case, Class Counsel assumed only the second kind of risk. From Class Counsel's perspective, the quantification of the risk in the immediate case is $16.5 million and with that background, the unpleasantries can begin.

[98] Justice Belobaba apparently was sceptical that Class Counsel needed to expend $16.5 million in lawyer's time and he asked Class Counsel to trim the fee fat, which Class Counsel dutifully did reducing the quantification of the risk to $13.5 million. For my part, I would not have bothered Class Counsel with this exercise, and I would have accepted Class Counsel's word that they "devoted", to use Class Counsel's word, $16.5 million of lawyer's time to prosecuting *Fresco v. CIBC*.

[99] But here's the rub; in the entrepreneurial model that drives class action litigation in Ontario, there is little reason for Class Counsel to be efficient or parsimonious and to reduce their risk by doing only what is necessary to prosecute the action. Rather, the incentives built into the entrepreneurial system are to be wasteful in the allocation of work and in the hours of work and in the pricing of the work. After all, Class Counsel have more to gain than the individual class members and the representative plaintiff has no reason to restrain the expenditure of legal fees under a contingency fee retainer. A plaintiff in normal litigation will demand efficiency, unlike a

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[51] See *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233.

[52] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 at paras. 41-45; *Jeffery v. Nortel Networks Corporation*, 2007 BCSC 69 at para. 73; Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. III, at p. 737.

representative plaintiff protected by the Law Foundation from an adverse costs award and protected from having to pay fees for legal services by the contingency fee agreement.

[100] And, as I pointed out to Class Counsel during the argument in the immediate case, if Class Counsel had devoted $44.0 million in hours of legal work, it would have been very easy to approve their fee request, because the multiplier, which is the measure of the premium, would be 1.0, i.e., no premium, and the appearance would be that Class Counsel had actually earned the $44.0 million. In other words, it is beneficial for the lawyers to be wasteful, because in the *Emperor's New Clothes* world of fee approvals, the hours will look beautiful.[53]

[101] In the immediate case, I was told that the senior lawyers dedicated their professional lives to this case, which is a bit cringeworthy, when that dedication was not altruistic. I repeat that Class Counsel did very admirable legal work and achieved a good result, but they took the risk willingly in pursuit of a big payday and they had little reason to reduce their risk of wasted legal fees.

[102] Outside the entrepreneurial system of class actions, there are ways to measure the value of the lawyer's work that is put at risk, such as assessments by an assessment officer. But in the *Emperor's New Clothes* world of fee approvals, these methods are generally eschewed and instead a variety of information proxies, the lodestar methodology, and comparisons to other class actions are used as a cross-check. None of this is a reliable verification. For the reasons expressed above, there is no discipline in determining who and how many should do the legal and forensic work and what and how much work should be done. The juridical methodology of *stare decisis*, comparing cases, is of little assistance because while the legal principles are constant and while Class Counsel's arguments are uniformly predicable in their consistency, each genre of class action is different, and each and every class action is unique.

[103] Therefore, for present purposes, although I have good reason to be sceptical, as did Justice Belobaba, I take counsel at their word that the monetary measure of the risk in the immediate case, is $16.5 million.

4. The Quality of the Risks Factor and Incentives

[104] Turning then to the assessment of the "quality" of the risks incurred in the immediate case, this involves assessing the risks over the sixteen-year period between the commencement of the action in June 2007 and this fee approval motion in May 2023.

[105] In 2007, when Class Counsel negotiated its retainer agreement with Ms. Fresco, it knew that it had a potentially very remunerative national class action. It had evidence that the CIBC had breached Ms. Fresco's rights and hundreds if not thousands of other employees of their rights under the *Canada Labour Code*. The case for CIBC being liable to individual class members was very strong and there were 31,000 current or former employees that were potential class members. The risks in the case were essentially fourfold: (a) Would the court truncate the class size because of limitation periods?; (a) Would the court refuse to certify the action because the class members'

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[53] In *Killough v. The Canadian Red Cross*, 2007 BCSC 941 at para. 48 (the Hepatitis C settlement), Justice Pitfield observed that "class actions must not represent an open-ended invitation to accumulate time without regard to productivity." In *Manuge v. Canada*, 2013 F.C. 341 at para. 77, Justice Barnes noted that: "The efficacy of multipliers is affected by the reasonableness, which cannot be assessed with any confidence, of the base of accumulated time and hourly rates from which the multiplier is derived. The percentage of recovery comparison is reduced and therefore made to appear more favourable by comparing the total fee to a global settlement.…".

claims were idiosyncratic and there was no meaningful common issue?; (c) Would the court certify aggregate damages as a common issue, which would obviate the need for individual issues trials?, and (d) If the claim was certified, would the Bank's argument that it had the right to preapprove overtime prevail over Ms. Fresco's systemic negligence argument and her argument that the overtime approval policy contravened the *Canada Labour Code.*

[106] These heads of risk are all significant, but the risk was significantly reduced once the action was certified and significantly reduced again when Justice Belobaba granted a summary judgment on liability and certified aggregate damages as a common issue.

[107] In 2007, there were indeed significant risks, but none of the four risks would threaten the economic viability of the retainer. The truncation of the class size for limitation periods would still leave a large class size, and truncation for limitation periods was unlikely given that the likely outcome would have been that discoverability would be treated as an issue for the individual issues trials. In 2007, employment law class actions were novel, and the risk of non-certification was high. However, the risk of non-certification was not so high as to dissuade or deter Class Counsel from taking the retainer, particularly because the case for individual liability was so strong and there was a reasonably strong case that there were meaningful common issues. The risk in the case that the court would certify the action but not certify aggregate damages as a common issue would entail that apart from costs awards for certification and for a successful common issues trial, the remunerative work would only occur at individual issues trials.

[108] Although the risks in the immediate case attenuated over its fifteen-year duration, the immediate case qualities as high risk litigation for which Class Counsel undoubtedly deserves a commensurate fee that recognizes the good work that was done and the good result that was achieved in the face of those risks.

[109] In the immediate case, Class Counsel set the contingency fee at 30% or a multiplier of 4.0. Class Counsel say that these measures were set because Class Counsel recognized from the outset that the challenges and risks of this novel case would be multiple, daunting, and prolonged. Not surprisingly, as is typical, Class Counsel relied on the direction from the Court of Appeal in *Gagne v. Silcorp*[54] that if a multiplier is used, the range of the appropriate multiplier is from slightly greater than one to three or four in the most deserving case. Class Counsel argued that they had a most deserving case that justified the 30% contingency fee and the 4.0 multiplier.

[110] I have no reason to doubt that Class Counsel subjectively believed that a 30% contingency fee or a multiplier of 4.0 reflected their views of the risk associated with the case; however, that subjective view is not determinative of whether the fee was fair and approvable. I do not share Class Counsel's view that having regard to the risks of the immediate case, they would not have undertaken the case without the incentive of a contingency fee of 30% or a multiplier of 4.0.

[111] I was not moved by Class Counsel's argument that since the immediate case was an example of: (a) a case of exceptional risks, (b) an excellent result that vindicated fundamental rights, (c) a successful effort to break new ground on certification and liability, (d) an advance on methodologies for aggregate damages, if the court failed to approve the $44.0 million fee, this would cause Class Counsel to shy away from such cases to pursue instead the "low-hanging or quick ripening fruit" of less risky class actions.

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[54] *Gagne v. Silcorp* (1998), 41 O.R. (3d) 417 at p. 425 (C.A.).

[112] That is a cringeworthy argument, and I was not persuaded by it for five reasons.

a. First, generally speaking, a 30% contingency fee is not necessary to incentivize Class Counsel. As the Court of Appeal noted in *Lavier v. MyTravel Canada Holidays Inc.*[55] "the viability of the class action regime does not depend on an overly generous award being approved in every case."

b. Second, Class Counsel overstated the risks and the results in the immediate case and, generally speaking, the incentives for Class Counsel should not be set so high as to unduly impact on the access to justice and the compensation needs of the class members, whose plight should not be lost sight of.

c. Third, objectively speaking, Class Counsel did not need to be incentivized by a 30% contingency fee. They had invested over a $100,000 in lawyer time and thoroughly investigated the merits of Ms. Fresco's individual case before they launched the litigation. They had instructions from Ms. Fresco and they had interviewed hundreds of other employees. Class Counsel thought that the class had damages of $650 million. In the case at bar, the actual incentives were strong individual claims, a class size of 31,000 claimants with strong individual claims, and a Schedule A bank as a defendant.

d. Fourth, in every class action fee approval motion, there has never been low-hanging fruit. Every class action is the Charge of the Light Brigade, and this fee approval motion was like every other fee approval motion.

e. Fifth, there is another *Emperor's New Clothes* phenomenon in every fee approval motion about the risk of "betting the farm" on the litigation, that undermines Class Counsel's argument in the immediate case about risk.

[113] The metaphor of "betting the farm" was a notion developed in the early days of class proceedings when it was accepted that law firms could or would fold if they lost a high risk class action. This plight may have been true thirty years ago, but since then the high majority of class actions are certified, and since then by careful selection of their high risk cases, class action firms have won more farms than they have lost.

[114] And, in any event, the risk of firm bankruptcy seems to have been much overstated. Using the immediate case where there was no exposure to an adverse costs award, Class Counsel's writing off $13.5 million (the work in process trimmed of the fat) at first blush sounds like a crippling blow; however, that $13.5 million was expended over fifteen years and is less than $1.0 million per year during a time when Class Counsel was winning other class actions and receiving costs and disbursement awards from the certification motion and interlocutory motions in the immediate case of approximately $1.0 million. And, in any event, the risk of firm bankruptcy can always be avoided by settling the case or by seeking to have the court approve a discontinuance, which inevitably the defendant will consent to on a without costs basis.

[115] In the immediate case, because of the incentives of a prize of $650 million and a defendant with the ability to pay, Class Counsel forged ahead undaunted. A large prize where there are strong individual cases is itself an incentive unrelated to any percentage of the large prize. For example, in the immediate case 7% of $650 million, which was the amount sought in the Statement of Claim, is more than the $44 million requested by Class Counsel, which makes the point, that as the prize

[55] 2013 ONCA 92 at para. 63.

increases, the percentage of the contingency may fairly be reduced without disincentivizing Class Counsel. Many courts have made the point that an unadjusted percentage approach that does not account for a mega-million dollar multiplicand will yield legal fees that are unseemly, unreasonable, champertous, and impugn the integrity of the legal profession.[56]

[116] Although there are numerous exceptions,[57] the caselaw demonstrates that the percentage spelled out in the contingency fee agreement can lose its relevancy as the multiplicand (the settlement fund) increases. Visualize.

a. In *MacDonald v. BMO Trust Company*,[58] the counsel fee was $20.0 million, which is 20.0% of the $100.0 million settlement.

b. In *Labourers' Pension Fund of Central Eastern Canada v. Sino-Forest Corporation*,[59] the counsel fee was $17.8 million, which is 15.2 % of the $117.0 million settlement.

c. In *Riddle v. Canada*[60] and *Brown v. Canada*,[61] the counsel fee was $75 million, which is 4.6% of the $625-$875 million settlement.

d. In *Manuge v. Canada*,[62] the counsel fee was $35.5 million, which is 4% of the $887.0 million settlement.

e. In *Endean v. Canadian Red Cross Society*,[63] the counsel fee was $52.5 million, which is 4.3% of the $1.6 billion settlement.

f. In *McLean v. Canada*,[64] the counsel fee was $55.0 million, which is 3.0% of the $1.8 billion settlement.

g. In *Baxter v. Canada*,[65] the counsel fee was $40.0 million, which is 2.0% of the $1.9 billion settlement.

h. In *Quenneville v. Volkswagen*,[66] the counsel fee was $31.2 million, which is 1.2% of the $2.1 billion settlement.

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[56] *Green v. CIBC*, 2022 ONSC 373; *MacDonald v. BMO Trust Company*, 2021 ONSC 3726; *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4206; *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 at paras. 46-66; *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752; *Lavier v. MyTravel Canada Holidays Inc*., 2013 ONCA 92; *Manuge v. Canada*, 2013 F.C. 341; *Endean v. The Canadian Red Cross Society*, 2000 BCSC 971; *Gagne v. Silcorp* (1998), 41 O.R. (3d) 417 at p. 425 (C.A.). See also: *Commonwealth Investors Syndicate Ltd. v. Laxton* (1994), 94 B.C.L.R. (2d) 177 (C.A.), leave to appeal to the S.C.C. ref'd [1994] S.C.C.A. No. 427.

[57] Visualize. In *Coburn and Watson's Metropolitan Home v. Bank of Montreal*, 2021 BCSC 2398, there was a series of settlement and fee approvals, and the aggregate counsel fee was $52.8 million, which is 28.0% of the aggregate $188.5 million settlement. The companion case in Ontario was *Bancroft-Snell v. Visa Canada Corp*., 2021 ONSC 8126. Another exception is my decision in *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc*., 2018 ONSC 6447, where the counsel fee was $25.25 million, which is 22.9% of the $110 million settlement.

[58] *MacDonald v. BMO Trust Company*, 2021 ONSC 3726.

[59] *Labourers' Pension Fund of Central Eastern Canada v. Sino-Forest Corporation*, 2014 ONSC 62.

[60] *Riddle v. Canada*, 2018 F.C. 641.

[61] *Brown v. Canada* 2018 ONSC 5456.

[62] *Manuge v. Canada*, 2013 F.C. 341.

[63] *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254.

[64] *McLean v. Canada*, 2019 FC 1077.

[65] *Baxter v. Canada (Attorney General)* [2006] O.J. No. 4968 (S.C.J).

[66] *Quenneville v. Volkswagen*, 2017 ONSC 3594.

[117] Justice Belobaba, who in *Cannon v. Funds for Canada Foundation*[67] and *Rosen v. BMO Nesbitt Burns Inc.*,[68] invented the approach to counsel fee approval that posited that the percentage spelled out in the contingency fee agreement was presumptively a good measure of what was needed to incentivize class action lawyers to assume the risk of a class action retainer and to do their job well, came to appreciate in *MacDonald v. BMO Trust Company*[69] and *Brown v. Canada*[70] that this approach did not necessarily apply to cases where there is a huge multiplicand (settlement fund). In *Brown v. Canada*, he stated:

> 22. A straight-line application of the contingency fee percentage in mega-settlements can result in undeserved windfalls and transform class action litigation into something approaching a lottery. Here is how I put it in *Brown*:
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> > It is of course important to incentivize class action lawyers to take on risky actions on a contingent fee basis and do them well. However, it is also important that the court's approval of class counsel's legal fees not result in windfalls … Mega-fund cases are rare and when they settle, and almost all of them settle, the size of the settlement fund can be in the hundreds of millions of dollars. A percentage of the fund approach, given economies of scale, will result in windfalls. Windfalls should be avoided because class action litigation is not a lottery and the CPA was not enacted to make lawyers wealthy.

[118] Still dealing with the matter of the quality of the risk in general and in the immediate case, and before moving on to the next topic, there are two cringeworthy arguments that the court may encounter on a fee approval motion. These arguments concern risk and the justification for a high contingency fee.

[119] The first of these arguments, which was not made in the immediate case, is that Class Counsel should be lauded for sparing the class from the 10% levy of the Class Proceedings Fund or the slightly lower levy of a third party funder when Class Counsel directly undertakes to protect the representative plaintiff from adverse costs consequences.

[120] It is argued that this circumstance complements the justification for the 30% or more contingency fee. This argument, however, is most frequently made in cases where there was a carriage fight by several light brigades of lawyers, with horses champing at the bit to ride into the class action valley of death. My take on this argument is that it indicates that the class action was not as risky as class counsel is suggesting.

[121] The second cringeworthy argument, which was made in the immediate case, is connected to the factor of fee approval about the importance of the case to the class members.

[122] In the immediate case, Class Counsel relied on the observation of Chief Justice Dickson in his dissenting judgment in the Supreme Court of Canada's constitutional law case about freedom of association about the importance of work. In *Reference Re Public Service Employee Relations Act (Alta.),*[71] the Chief Justice at paragraph 91 observed that:

> 91 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

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[67] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.
[68] *Rosen v. BMO*, 2016 ONSC 4752.
[69] *MacDonald v. BMO Trust Company*, 2021 ONSC 3726.
[70] *Brown v. Canada*, 2018 ONSC 3429.
[71] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

> employment is an essential component of his or her sense of identity, self-worth and emotional well-being. […]

[123] Relying on this observation, Class Counsel argued that Ms. Fresco's class action was important to the class members because: (a) it achieved significant monetary compensation for class members for their work; (b) it clarified the legal rights of all non-unionized employees entitled to overtime pay under labour standards legislation across the country; and (c) it vindicated class members' complaints about unpaid overtime for their work.

[124] While all of this is true about the importance of this action to the class members who worked for the CIBC, the argument becomes modestly cringeworthy because if employment is the most fundamental aspects in a person's life, why should 100 lawyers make a $27 million dollar profit on their employment and their 31,000 clients take a $340.0 million loss on their $426.0 million claim for unpaid overtime? I say that the argument is modestly cringeworthy because it is an inherent phenomenon in all class actions that the class action is important to the class but that Class Counsel can be depicted in an avaricious way, and, nevertheless, it remains true that but for Class Counsel taking on the enormous risk, the class members would not recover anything.

[125] My point is that the factor of the importance of the class action to the class members as a factor for justifying the fee and a high percentage or multiplier usually goes without saying or should be said with some circumspection because of the optics. Moreover, while this type of argument turns out to be modestly cringeworthy in the immediate case, it is not always cringeworthy, and in most cases, it is an argument that turns out to be a neutral factor because the class action regime does depend upon entrepreneurial lawyers. Further still, there are many class actions where the individual class members have small claims and will have no reason to begrudge how much money the lawyers are making from the case.

[126] In the immediate case, there were no objectors to the counsel fee and there is no reason to begrudge Class Counsel from receiving a premium for their achievements.

5. The Integrity of the Profession Factor

[127] With this background of a good result, high risk litigation, and the quantification of risk at $16.5 million, I turn to the matter of the integrity of the profession as a factor in the determination of a fair and reasonable fee for Class Counsel. This brings the analysis and the discussion to Class Counsel's argument, set out in detail above, that 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 because the fee requested is consistent with the range of fees and fee premiums awarded in other mega-fund cases, which have not been found to call, and have not in fact called, the integrity of the profession into question.

[128] I disagree with this submission. In my opinion, and I mean no disrespect to Class Counsel, who are talented lawyers worthy of considerable respect, it would call the integrity of the profession into question if I were to award $44 million to Class Counsel in the immediate case. From the Class Members' perspective, the potential price of achieving discounted access to justice in the immediate case is 56% of the $153.0 million settlement fund when disbursements, a contingency fee of 30%, a Class Proceedings Fund levy of 10%, the costs of administering the settlement and government taxes are taken into account.

[129] It is unfortunate that the case law has used the phrase "integrity of the profession", which

connotes dishonesty and it is unfortunate that the case law has used the metaphor of a lottery, which suggests an unearned fortune or blind luck rather than good works, but what the integrity of the profession actually denotes and connotes is that the fee is not champertous.

[130] That in the context of contingency fee agreements, the integrity of the profession is connected to champerty is made manifest by the Ontario Court of Appeal's decision in *McIntyre Estate v. Ontario (Attorney General)*,[72] where the Court of Appeal ruled that contingency fee agreements are not *per se* champertous but may be depending on the particular circumstances of the case. In *McIntrye*, Associate Chief Justice O'Connor stated at paragraphs 76-77:

> 76. When considering the propriety of the motive of a lawyer who enters into a contingency fee agreement, a court will be concerned with the nature and the amount of the fees to be paid to the lawyer in the event of success. One of the originating policies in forming the common law of champerty was the protection of vulnerable litigants. A fee agreement that so over-compensates a lawyer such that it is unreasonable or unfair to the client is an agreement with an improper purpose -- i.e., taking advantage of the client. See Thai Trading, supra, at pp. 788, 790 Q.B. The applications judge in this case dealt with this concern as follows, at p. 157 O.R.:
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> > 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.
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> 77. I agree with these comments.

[131] The etymology of champerty is from the Latin *campī* ("fields") and pars ("part") which came to be the Middle French *champart* and *champartie* in Middle English, which in both cases was the word used for the crop portion of a field rent paid by a serf to a feudal lord. In other words, champerty began as rent paid in produce to a feudal lord and then somehow evolved to mean the support of litigation by a stranger in return for a share of the proceeds of the litigation. The integrity of the profession is impugned by champerty because instead of just being a professional who is paid for a service, the lawyer becomes a feudal lord extracting a part of the proceeds of the client's litigation. The fundamental aim of the law of champerty and maintenance has always been to protect the administration of justice from abuse.[73]

> Lawyers should be paid for the services they provide, but when the fee becomes champertous, they are not being dishonest, but they do impugn the integrity of the profession. The optics to the public of champerty are particularly bad in class actions precisely because the lawyer has so much more to gain than the individual clients that comprise the class and because there comes a point where the notion of facilitating access to justice becomes a pretence and a disguise for champerty. In the realm of class actions, the reputation of the profession is tarnished by a champerty that indicates that the class action is more for and about Class Counsel than about the class members.

[132] The acute problem for the court, however, is that determining when a fee is justified and when a fee is champertous has no easy litmus test in class proceedings. The problem is acute in class proceedings because of the absence of an effective adversarial system. In class proceedings, the court must examine a host of factors without the benefit of the crucible of the adversary system and then decide whether the contingency fee has crossed over into the field of champerty. This

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[72] *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.).
[73] *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 at para. 32 (C.A.).

examination, however, is not subjective. It is not a gag test, although it sometimes feels that way. It is not an "I know it when I see it" test. It is an objective examination of the circumstances of the particular case by strictly adhering to the directives of subsections 32 (2), 32 (2.1), 32 (2.2), 32 (2.3) of the *Class Proceedings Act, 1992*. Without being a pessimist, the court must be like the clear-eyed child in the *Emperor's New Clothes* who sees what is actually going on as the emperor parades by. Ultimately, the court must keep in mind that: (a) the purposes of the *Class Proceedings Act, 1992* are for the class members and for the public at large in terms of social utility; and (b) the lawyers and the court for that matter are only the means and not the end of those purposes.

[133] It should be noted this examination is not special for mega-million dollar class actions. The courts use the euphemism of the integrity of the profession and the misleading metaphor of a lottery win for these cases, but the reality is that the mega-million dollar class action is just very fertile ground for the field rent of champerty and the seven deadly sins of pride, greed, wrath, envy, lust, gluttony, and sloth. The criteria that I shall and have been employing in the immediate case, apply to all class actions.

6. The Appropriate Contingency Fee

[134] Returning to the immediate case, where all this discussion about rewards, risks, work in progress, the integrity of the profession, lotteries, windfalls, and champerty takes the analysis is that in my opinion, the appropriate continency fee is 17%, which would yield a fee of $25.0 million. I would regard that fee as not champertous. In the immediate case, Class Counsel achieved a good settlement, but the appropriate reward for taking on that risk and achieving the good result that was achieved does not justify a counsel fee of greater than $25.0 million plus taxes and disbursements.

[135] As it happens, in the immediate case, a contingency fee of 17% is lower than the 20% contingency fee that was ultimately achieved in *Fulawka v. Bank of Nova Scotia* which seems appropriate given that it is arguable that the settlement in *Fulawka* was modestly better than the settlement in the immediate case and was achieved much sooner.

[136] As it happens, in the immediate case, a $25.0 million counsel fee is a multiplier of 1.5 times the lodestar of $16.5 million. For the reasons expressed above, this cross-check is not a reliable cross-check and comparable cases are also of little assistance, save to indicate that as the multiplicand of a contingent fee increases the multiplier should decrease.

[137] When I apply the factors used to assess the reasonableness of the fees of class counsel and to protect the integrity of the profession, the numbers I arrive at are: $25.0 million Class Counsel, $11.8 million for the Law Foundation of Ontario, and $106.0 million for the Class Members, which is a result that Class Counsel can be proud of and that is consistent with the purposes of the *Class Proceedings Act, 1992*.

I. The Honorarium

[138] Class Counsel requests that Ms. Fresco should receive an honorarium of $30,000. Granting or refusing honorarium requests is another sometimes unpleasant feature of fee approval motions.

[139] In *Doucet v. Doucet v. The Royal Winnipeg Ballet*,[74] I expressed the view that the current

[74] *Doucet v. The Royal Winnipeg Ballet*, 2022 ONSC 976, rev'd 2023 ONSC 2323.

law about honorarium in class actions, which practice is an anomaly from normal litigation, where plaintiffs are not paid to do what lawyers are paid to do, i.e., advance the litigation, should be changed and that as a matter of principle, there should not be honorarium paid to representative plaintiffs. However, the Divisional Court reversed my decision, and I now have the task of applying the current law to explain why I am refusing an honorarium for Ms. Fresco.

[140] The current law is that where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by a modest honorarium.[75] However, the court should only rarely approve this award of compensation to the representative plaintiff.[76] Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.[77]

[141] Under the current law about honorarium, in 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.[78]

[142] In my decision in *Doucet v. Doucet v. The Royal Winnipeg Ballet*, I explained the anomalies associated with the current law that led me to my decision to ban honorarium in class actions, as some jurisdictions have done. I shall not repeat that discussion here save to say two things.

> a. First, in the circumstances of an adversarial void, it is both awkward and unpleasant to engage in a debate about what counts for extraordinariness, when in every case in which an honorarium is requested, Class Counsel profusely extol the contribution of their representative plaintiff as extraordinary and fundamental to the success of the class action.
>
> b. Second, it is hard enough determining whether a settlement and counsel fee is fair and reasonable with the assurance that the representative plaintiff has no personal selfish reason for endorsing the settlement or the counsel fee. Assessing the fairness of a settlement just becomes even more difficult when the representative plaintiff has a conflict of interest with the class members that taints the assurance of representing the

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[75] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090; *Brazeau v. Attorney General (Canada)* 2019 ONSC 4721; *Houle v. St. Jude Medical Inc.*, 2019 ONSC 4560; *Dolmage v. HMQ*, 2013 ONSC 6686; *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528 at para. 43; *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26–43; *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at paras. 133–136; *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *Windisman v. Toronto College Park Ltd*., [1996] O.J. No. 2897 at para. 28 (Gen. Div.).

[76] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Sutherland v. Boots Pharmaceutical plc*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).

[77] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.

[78] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

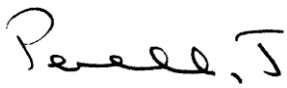
> class without conflict of interest, which is why he or she got appointed in the first place. The primary role of the representative plaintiff is to be a real plaintiff and not take sides with the Class Counsel. It should not be the case that the representative plaintiff has more to gain personally than the class members he or she is representing.

[143] Enough said, in the immediate case, I have the unpleasant task of telling the admirable, praiseworthy, courageous, diligent, and helpful Ms. Fresco that: (a) because of the involvement of the Class Proceedings Fund and the contingency fee retainer, she was under no exposure to a real risk of costs; (b) while there was perhaps some threat of reprisals from the CIBC, there was no significant personal hardship or inconvenience in connection with the prosecution of the litigation; and (c) while she was commendably actively involved in the initiation of the litigation and in the prosecution of the litigation through its many stages, and in communicating with class members, nevertheless, her involvement was not so extraordinary to the success of the action, such as it was as to justify a honorarium.

[144] Ms. Fresco thank you for your service for the administration of justice and to the class members, but honorariums are to be rarely awarded.

J. Conclusion

[145] For the above reasons I approve a class counsel fee of $25.0 million plus applicable taxes which may be deducted from the settlement fund.



Perell, J.

Released: June 2, 2023

CITATION: Fresco v. Canadian Imperial Bank of Commerce, 2023 ONSC 3335
COURT FILE NO.: 07-CV-334113-00CP
DATE: 20230602

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DARA FRESCO

Plaintiff

- and –

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant

REASONS FOR DECISION

PERELL J.

Released: June 2, 2023