Court File No. CV-18-595380-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

PETER WESTWOOD

Plaintiff

- and -

TD ASSET MANAGEMENT INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

CONSOLIDATED FACTUM OF THE PLAINTIFF

(1) MOTION FOR DISMISS ORDER AND DISTRIBUTION ORDER

(2) MOTION FOR FEES, HONORARIUM AND FUNDING ORDER

November 29, 2024

Siskinds LLP
275 Dundas Street, Unit 1
P.O. Box 2520
London, ON N6B 3L1

Michael G. Robb (LSO#: 45787G)
Email: michael.robb@siskinds.com
Garett M. Hunter (LSO#: 71800D)
Email: garett.hunter@siskinds.com
Gigi Pao (LSO#: 80151M)
Email: gigi.pao@siskinds.com
Tel: 519-660-2121
Fax: 519-672-6065

65 Queen Street West, Suite 1155
Toronto, ON M5H 2M5

Anthony O'Brien (LSO#: 56129U)
Email: anthony.obrien@siskinds.com
Tel: 416-594-4394
Fax: 519-672-6065

Lawyers for the Plaintiff

TO: **MCCARTHY TETRAULT LLP**
Suite 5300
TD Bank Tower
Box 48, 66 Wellington Street West
Toronto, ON M5K 1E6

Shane D'Souza
Email: sdsouza@mccarthy.ca
Agatha Wong
Email: agathawong@mccarthy.ca

Tel: 416-601-8196
Fax: 416-868-0673

Lawyers for the Defendant

AND TO: **BATES BARRISTERS P.C.**
40 Oaklands Avenue, Suite 314
Toronto, ON M4V 2Z3

Paul Bates
Email: pbates@batesbarristers.com

Tel: 416-869-9898 x 101

TABLE OF CONTENTS

PART I – OVERVIEW

1. On these motions, the Plaintiff[1] requests that the Court make three Orders in connection with the proposed settlement of this action:

   (a) an Order, among other things, approving the Settlement and dismissing the action against the Defendant without costs and with prejudice ("**Dismiss Order**");[2]

   (b) an Order, among other things, approving Second Notice and the Plan of Notice for disseminating Second Notice, the Distribution Protocol, the form and content of the Claim Form and the claims process, and the appointment of RicePoint Administration Inc., doing business as Verita Global ("**Verita**") as the Administrator ("**Distribution Order**");[3] and

   (c) an Order, among other things, approving counsel fees and disbursements, an interim payment of the Funding Commission to the Funder, the release to the Funder of the security previously paid into court, and an honorarium for the Plaintiff ("**Fees, Honorarium and Funding Order**").[4]

2. The action has been ongoing for over six years. In 2020, it was certified as a class proceeding following a contested certification motion.[5] Although the formal discovery process was in the early stages at the time the settlement was reached, the Plaintiff and his counsel have access to key pieces

---

[1] Capitalized terms used herein that are not otherwise defined herein have the meaning given to those terms in the Settlement Agreement between the Plaintiff and the Defendant dated September 11, 2024 ("**Settlement Agreement**"), Ex B to Affidavit of Charles M. Wright affirmed November 28, 2024 ("**Second Wright Affidavit**"), MR Tab 5B, p 391.
[2] The Dismiss Order is attached as Schedule "A" to the Notice of Motion (Dismiss Order and Distribution Order) dated November 28, 2024 ("**Dismiss and Distribution NOM**"), Consolidated Motion Record of the Plaintiff dated November 28, 2024 ("**MR**") Tab 1A, p 8.
[3] The Distribution Order is attached as Schedule "B" to the Dismiss and Distribution NOM, MR Tab 1B, p 85.
[4] The Fees, Honorarium and Funding Order is attached as Schedule "A" to the Notice of Motion (Fees, Honorarium and Funding Order) dated November 28, 2024 ("**Fees, Honorarium and Funding NOM**"), MR Tab 2A, p 205.
[5] *Stenzler v TD Asset Management Inc*, 2020 ONSC 111; *Stenzler v TD Asset Management Inc*, 2020 ONSC 5987.

of evidence and information from various sources, and have a firm grasp on the strengths and weaknesses of his case.

3. The settlement negotiations have been protracted and complex, in large measure because they have involved quadripartite discussions between (i) the Plaintiff in this action, (ii) the plaintiff in *Aggarwal v TD Asset Management Inc*, Court File No CV-22-691344-00CP ("***Aggarwal* Action**"), (iii) the plaintiff in *Frayce v BMO InvestorLine Inc et al*, Court File No CV-20-638868-CP ("***Frayce* Action**"), and (iv) the Defendant and its affiliate TD Waterhouse Canada Inc. ("**TDW**") (a defendant in the *Frayce* Action), which houses TD Direct Investing ("**TDDI**"). The three actions overlap with each other in different ways and to differing degrees, including as to the identity of the defendant, the class members, the causes of action, and the damages. In this setting with divergent interests and in which settlement positions ebbed and flowed with litigation developments in all three actions over a lengthy period of time, the negotiations had to address complex issues about both the settlement sum (or sums) to be paid, as well as the allocation of the settlement sum (or sums) between the respective classes in the three actions.[6]

4. Following hard-fought arm's-length negotiations, the Plaintiff secured a settlement of $70.25 million for the Class Members. By contrast, the class members in the *Frayce* Action will receive nothing from that action because certification was denied,[7] and the class members in the *Aggarwal* Action will receive $8.5 million (subject to court approval of that settlement) or approximately 12% of the Settlement Amount in this action.

[6] Affidavit of Charles M. Wright affirmed September 16, 2024 ("**First Wright Affidavit**") at paras 35, 39, MR Tab 6, p 514.
[7] *Frayce v BMO InvestorLine Inc*, 2023 ONSC 16, aff'd 2024 ONSC 533.

5. This is an excellent result for the Class. It reflects a fair and reasonable compromise made by the Plaintiff on the recommendation of experienced counsel who were well-apprised of the facts and the strengths and weaknesses of the case. The Settlement Agreement ought to be approved.

6. The Distribution Protocol will allow the Net Settlement Amount to be distributed to Class Members in a fair, equitable and efficient manner. It makes use of actual customer data from the Defendant for what is expected to be a large portion of the Class, which should substantially increase take-up as well as the speed, user-friendliness, and efficiency of the claims process.

7. Siskinds LLP ("**Siskinds**") and Bates Barristers P.C. ("**Bates Barristers**") request Class Counsel Fees in the aggregate sum of $17,920,000 (plus applicable taxes) and the reimbursement of Class Counsel Disbursements of $299,627.99 (plus applicable taxes). The fee request appropriately reflects the risks undertaken by counsel at the outset of the action, the substantial investment of time and money made, and the excellent result achieved for the Class. The disbursements were necessary for the action to be litigated to a successful resolution.

8. An honorarium of $10,000 is requested for the Plaintiff, Peter Westwood. His contributions to this substantial settlement that benefits a large group of investors meets the criteria for an award of an honorarium.

9. The Plaintiff also seeks an interim payment of $3,250,000 to the Funder on account of the Funding Commission that was already approved by Justice Belobaba. Paying an interim commission now based on a conservative estimate of the full commission, instead of waiting for the distribution process to be completed (at which point the final amount of the commission will be determined), is fair, consistent with precedent, and will encourage the participation of third-party financing in future cases, which in turn will facilitate access to justice.

PART II – FACTS

A. Background to the action

10. This action was commenced in April of 2018.[8]

11. The Plaintiff and Class Members are unitholders of the TD Mutual Funds, which are structured as trusts. They held their TD Mutual Fund units through Discount Brokers, which are often referred to as "DIY" or "online" brokers. A Discount Broker provides "order execution only services" as defined in applicable laws and regulations, which essentially means that Discount Brokers execute trades for clients, but they are prohibited from providing investment recommendations and advice to clients.[9]

12. The Defendant is the trustee and manager of the TD Mutual Funds.[10]

13. The Plaintiff alleges that the Defendant improperly paid trailing commissions to Discount Brokers on the Plaintiff and Class Members' behalf for services and advice that were never provided, and engaged in other misconduct that harmed the Class Members. The Plaintiff asserts that the Defendant's improper payment of trailing commissions to Discount Brokers was, *inter alia*, a breach of trust and fiduciary duty. He also asserts claims under section 130 of the *Securities Act* for misrepresentations in the Defendant's Fund Facts documents.[11]

14. The Plaintiff seeks to recover the trailing commissions he alleges were improperly paid, along with any investment returns or interest flowing from the payment of those trailing commissions.[12]

---

[8] First Wright Affidavit at para 6, MR Tab 6, p 508.
[9] First Wright Affidavit at para 7, MR Tab 6, p 509.
[10] First Wright Affidavit at para 8, MR Tab 6, p 509.
[11] First Wright Affidavit at para 9, MR Tab 6, p 509.
[12] First Wright Affidavit at para 10, MR Tab 6, p 509.

15. The Defendant denied and continues to deny these allegations.[13]

16. On February 27, 2020, Justice Belobaba certified this action as a class proceeding following a hotly-contested certification motion that served as an important "test case" for the certification of this action and the Other 2018 Actions.[14] In advance of the certification motion, the parties filed voluminous evidentiary records, conducted cross-examinations, and exchanged facta.[15] On October 2, 2020, the Divisional Court dismissed the Defendant's motion for leave to appeal from the certification order.[16]

17. In early 2022, notice of certification was disseminated. The period for members of the certified class to opt out of this action expired as of April 8, 2022.[17]

18. On February 5, 2021, by Order of Justice Belobaba, Peter Westwood was added as the Plaintiff to this action in substitution for Mr. Stenzler, and Mr. Westwood was appointed as the representative plaintiff.[18]

19. Shortly before the certification motion, Mr. Stenzler filed an uncontested motion for approval of a third-party litigation funding agreement ("**Funding Agreement**") with Claims Funding International, PLC ("**Funder**"). The Court approved the Funding Agreement by Order dated June 20, 2019.[19] Pursuant to the terms of the Funding Agreement, the Funder posted security with the

[13] First Wright Affidavit at para 11, MR Tab 6, p 509.
[14] Order dated February 27, 2020, Ex B to First Wright Affidavit, MR Tab 6B, p 566; *Stenzler v TD Asset Management Inc*, 2020 ONSC 111.
[15] First Wright Affidavit at paras 12-17, MR Tab 6, p 509-510.
[16] First Wright Affidavit at paras 18-19, MR Tab 6, p 510; *Stenzler v TD Asset Management Inc*, 2020 ONSC 5987.
[17] First Wright Affidavit at para 20, MR Tab 6, p 510-511; Order dated December 14, 2021, Ex C to First Wright Affidavit, MR Tab 6C, p 573.
[18] First Wright Affidavit at para 21, MR Tab 6, p 511.
[19] Order dated June 20, 2019, Ex G to Second Wright Affidavit, MR Tab 5G, p 484.

Accountant of the Superior Court of Justice in the amount of $75,000 in July 2019 and an additional $325,000 in October 2020.[20]

20. In the Fall of 2020, the parties commenced the negotiation of a discovery plan, which was ultimately finalized on May 18, 2023. Pursuant to the endorsement of this Court dated May 23, 2024, a revised schedule was established for production of documents and examinations for discovery.[21] To date, the Defendant has produced 2,730 documents as part of the discovery process.[22]

B. Related litigation

21. On March 27, 2020, the *Frayce* Action was filed against numerous Discount Brokers, including TDW. The *Frayce* Action sought recovery from those Discount Brokers for the trailing commissions that they received from mutual fund managers, including TDAM.[23] On January 20, 2023, the plaintiffs' motion for certification in the *Frayce* Action was dismissed.[24] On January 24, 2024, the plaintiffs' appeal from the denial of certification was dismissed.[25] The Court of Appeal refused leave to appeal on September 6, 2024.[26]

22. The *Aggarwal* Action was filed on December 7, 2022. It is brought on behalf of investors who held TD Mutual Fund units through a full-service broker or other non-Discount Broker channel. The *Aggarwal* Action targets the same trailing commission payments as this action (*i.e.* payments to Discount Brokers). However, the *Aggarwal* Action seeks to recover the losses flowing from those

[20] First Wright Affidavit at para 22, MR Tab 6, p 511.
[21] First Wright Affidavit at paras 23-24, MR Tab 6, p 511.
[22] Second Wright Affidavit at para 27(p), MR Tab 5, p 340.
[23] First Wright Affidavit at para 29, MR Tab 6, p 512.
[24] First Wright Affidavit at para 30, MR Tab 6, p 513; *Frayce v BMO InvestorLine Inc*, 2023 ONSC 16.
[25] First Wright Affidavit at para 31, MR Tab 6, p 513; *Frayce v BMO InvestorLine Inc*, 2024 ONSC 533.
[26] Second Wright Affidavit at para 39, MR Tab 5, p 344.

trailing commission payments that are alleged to have been suffered by individuals who held TD Mutual Funds outside the Discount Broker channel.[27]

23. The *Aggarwal* Action was temporarily stayed on August 1, 2023 until the resolution of the common issues in this action, the settlement of the claims being asserted in this action or the *Aggarwal* Action, or the dismissal, discontinuance or abandonment of this action.[28]

C. Events leading to the Settlement Agreement

24. The Settlement Agreement was reached following complicated arm's-length negotiations over a lengthy period.

25. Joel Wiesenfeld was engaged to mediate. Mr. Wiesenfeld is a highly experienced mediator. His experience and expertise as a mediator in class actions has been judicially recognized.[29] Before becoming a mediator, Mr. Wiesenfeld practiced as securities regulatory counsel for 31 years, concluding his career as a partner at Torys LLP in 2012. During that time, he was repeatedly recognized as one of the top securities litigation practitioners in Canada, including among others as a leading practitioner in securities litigation by Lexpert/American Lawyer's Guide to the Leading 500 lawyers in Canada 2007, 2009, 2010, 2011 and 2012. Mr. Wiesenfeld was the co-founder and co-chair of The Advocates' Society's Securities Litigation Practice Group and is an editorial board member of The Canadian Securities Law Reporter. Since leaving private practice Mr. Wiesenfeld has successfully provided mediation services on securities related matters, including helping successfully mediate the resolution of securities class actions.[30]

---

[27] First Wright Affidavit at para 26, MR Tab 6, p 512.
[28] First Wright Affidavit at paras 27-28, MR Tab 6, p 512; *Ciardullo v 1832 Asset Management LP*, 2023 ONSC 4466.
[29] See *e.g. Haase v Reliq Health Technologies Inc*, 2022 BCSC 1754 at para 21; *Majestic Asset Management c Banque Toronto-Dominion*, 2024 QCCS 225 at para 37; *Berg v Canadian Hockey League*, 2024 ONSC 1573 at para 24.
[30] First Wright Affidavit at para 34, MR Tab 6, p 513.

26. As the settlement negotiations unfolded over a long period, Mr. Wiesenfeld provided his assistance to the parties to this action and the related actions on an ongoing basis during the process.

27. To facilitate settlement discussions, the Defendant agreed to gather and produce data related to the quantum of trailing commissions paid by the Defendant to Discount Brokers. That was a lengthy process. The Plaintiff received the trailing commission data in tranches between January and August 2022.[31]

28. The discussions to resolve the action were made significantly more complex by the existence of the *Aggarwal* Action against TDAM (the first iteration of which was filed on July 28, 2022, not long before the first scheduled mediation in the action in November 2022) and the *Frayce* Action against TDW.[32] At different points in time, Siskinds and one or more of counsel for TDAM, counsel for TDW, counsel for Mr. Frayce and counsel for Mr. Aggarwal were involved in the settlement discussions.[33]

29. The settlement negotiation process involved formal mediations as well as informal settlement discussions. There were four formal mediation sessions with Mr. Wiesenfeld involving different configurations of the parties across the three sets of actions. The Plaintiff and the Defendant held the first mediation on November 7, 2022. In advance of the first mediation, the parties exchanged lengthy mediation briefs, which included expert opinions on damages.[34]

30. Through these various efforts, the Plaintiff and the Defendant ultimately arrived at a settlement in principle and then negotiated the Settlement Agreement.[35]

---

[31] First Wright Affidavit at para 33, MR Tab 6, p 513.
[32] First Wright Affidavit at para 35, MR Tab 6, p 514.
[33] First Wright Affidavit at para 36, MR Tab 6, p 514.
[34] First Wright Affidavit at paras 37-38, MR Tab 6, p 514.
[35] First Wright Affidavit at paras 40-41, MR Tab 6, p 514-515.

D. The Settlement Agreement and its implementation

31. The Defendant agreed to resolve the action for $70.25 million, without admission of liability. The Settlement Amount includes all legal fees, disbursements, taxes and administration expenses.[36]

32. If the Settlement Agreement is approved, the claims of all Class Members asserted or that could have been asserted in the action will be fully and finally released, and the action will be dismissed. The settlement is not an admission of liability, wrongdoing or fault on the part of the Defendant, who continues to deny the allegations against it.[37]

33. Other key terms of the Settlement Agreement include the following:[38]

(a) the Settlement Amount of $70.25 million is non-reversionary;

(b) the Settlement Amount was required to be paid into the Trust Account under the control of Siskinds by November 8, 2024. The Settlement Amount must be invested in a guaranteed investment product, liquid money market account or equivalent security with a rating equivalent to or better than that of a Canadian Schedule I bank. The Settlement Amount was received by Siskinds on November 7, 2024. It has been invested in a Cashable GIC with The Bank of Nova Scotia, which earns interest at a rate of 3.12% per annum (if held until the maturity date of November 8, 2025, the Settlement Amount would mature at $72,441,800). The investment proceeds will accrue to the benefit of Class Members;

(c) within 30 days of the Effective Date of the Settlement Agreement, the Trust Account will be transferred to the Administrator. The Administrator will continue to invest the

[36] First Wright Affidavit at para 42, MR Tab 6, p 515.
[37] First Wright Affidavit at para 43, MR Tab 6, p 515.
[38] Second Wright Affidavit at para 9, MR Tab 5, p 330-331.

Settlement Amount. The investment proceeds will continue to accrue for the benefit of Class Members;

(d) the Effective Date of the Settlement Agreement occurs if and when the Dismiss Order is granted and becomes a final order;

(e) on the Effective Date of the Settlement Agreement, the action will be dismissed with prejudice and without costs. At that time, the Settlement Agreement will fully and finally release the "Released Claims" of all "Releasors" as against the "Releasees", as each of those terms is defined in the Settlement Agreement. The releases do not apply to the Other 2018 Actions, the 2022 Actions, including the *Aggarwal* Action (which is the subject of a separate settlement), the Discount Broker Actions, or to any Person other than the Releasees;

(f) the Plaintiff and Defendant have termination rights if, among other things, the Court declines to approve the Settlement Agreement or the Settlement Agreement is approved in a materially modified form;

(g) the Court's refusal to approve the Distribution Order, Class Counsel Fees or Class Counsel Disbursements does not provide a basis for termination of the Settlement Agreement;

(h) the Defendant will provide information and data to assist with distribution of the Net Settlement Amount to Class Members; and

(i) the Court retains supervisory jurisdiction over the administration of the Settlement Agreement.

34. The Settlement Agreement also contains terms relating to the potential settlement of the Other 2018 Actions. It provides that:[39]

(a) Siskinds intends to maximize the recovery of damages in the Other 2018 Actions and Siskinds will, acting reasonably and in good faith, seek to negotiate terms in any Subsequent Settlement that are at least as favourable to class members in the Other 2018 Actions as the Settlement Agreement is to Class Members in this action. This is consistent with Siskinds' obligation owed to class members in the Other 2018 Actions irrespective of the existence of this provision, which is to maximize their recovery;

(b) if a Subsequent Settlement of one of the Other 2018 Actions is reached, and when disclosure is permitted, Siskinds shall advise the Defendant in writing of the Subsequent Settlement, the amount of that Settlement, and acting reasonably and in good faith, whether that Subsequent Settlement is at least as favourable to the class members in the Other 2018 Action as the Settlement Agreement is to the Class Members in this action. Siskinds' assessment of a Subsequent Settlement will have regard to, among other things:

(i) the Subsequent Settlement Amount as a percentage of the amount of trailing commissions paid by the applicable Defendant to Discount Brokers, compared to the Settlement Amount as a percentage of the trailing commissions paid to Discount Brokers by TDAM (recognizing that there may be limitations in the available data);

(ii) factual differences between this action and the Other 2018 Action impacting the quantum of potential recovery;

[39] Second Wright Affidavit at para 10, MR Tab 5, p 332-333; Settlement Agreement at s 13, Ex B to Second Wright Affidavit, MR Tab 5B, p 414-417.

(iii) whether a Material Adverse Litigation Event has occurred; and

(iv) any other factor that, in Siskinds' opinion, impacted the quantum of potential recovery and likelihood of success of the Other 2018 Action compared to this action;

(c) any motion for Court approval of a Subsequent Settlement shall include Siskinds' opinion on whether the Subsequent Settlement is at least as favourable to the class members in the Other 2018 Action as the Settlement Agreement is to the Class Members in this action. This informational obligation does not fetter Siskinds' discretion with respect to the Other 2018 Actions or the discretion of the plaintiffs in the Other 2018 Actions. Rather, the obligation requires information to be provided to the Court that is substantially similar to the information Siskinds would expect to provide irrespective of the existence of the obligation under the Settlement Agreement; and

(d) other than as is expressly stated in section 13 of the Settlement Agreement, no rights of standing are created in favour of TDAM in the Other 2018 Actions.

E. Dissemination of First Notice

35. First Notice was disseminated in accordance with Part 1 of the Plan of Notice and the Order of this Court made on October 1, 2024.[40]

F. Second Notice

36. The parties have agreed on the form, content and method of disseminating Second Notice.

[40] Order dated October 1, 2024 at paras 5-6, Sch 2-5, Ex A to Second Wright Affidavit, MR Tab 5A, p 386-387; Second Wright Affidavit at paras 11-12, 15, MR Tab 5, p 333-334; Affidavit of Ivan Bobanovic sworn November 28, 2024 ("**Bobanovic Affidavit**") at para 13, MR Tab 4, p 304.

37. Part 2 of the Plan of Notice provides that Second Notice will be disseminated as follows:[41]

(a) Short-form notice:

(i) posted by Siskinds on https://www.siskinds.com/class-action/mutual-fund-trailing-commissions/ ("**Siskinds Case Webpage**"), in English and French;

(ii) provided (by email, if possible) by Siskinds to any potential Class Member who has previously contacted Siskinds for the purposes of receiving notice of developments in the action (in English and French);

(iii) disseminated as a news release in Canada across Canada NewsWire (in English and French);

(iv) published once in the business section of the national weekend edition of *The Globe and Mail*, in English;

(v) published once in the business section of *La Presse*, in French;

(vi) sent electronically and/or in paper form to Discount Brokers in Canada with a cover letter requesting that they distribute the notice through their electronic message systems to the attention of their clients who may be Class Members and post the notice on their news boards directed to the attention of their clients who may be Class Members; and

(vii) filed by the Defendant as a news release on SEDAR;

[41] Second Wright Affidavit at para 20, MR Tab 5, p 335-337; Plan of Notice, Sch 5 to Distribution Order, Sch "B" to Dismiss and Distribution NOM, MR Tab 1B, p 85.

(b) Long-form notice:

(i) posted by Siskinds on the Siskinds Case Webpage, in English and French; and

(ii) provided (by email, if possible) by Siskinds to any potential Class Member who has previously contacted Siskinds for the purposes of receiving notice of developments in the action (in English and French);

(c) Internet banner:

(i) published as a Google banner ad for approximately 700,000 impressions/views across Canada to an investor focused audience, in English and French, for no less than 30 days and no more than 35 days; and

(ii) published as a 12-day sponsored news link on Stockhouse.

38. Second Notice provides notice that the Court approved, among other things, the settlement, counsel fees and disbursements, the appointment of the Administrator, the start of the claims process, the deadline to file a claim, and the procedure for making a claim.[42]

G. No objections or opt-outs

39. No objections to, or comments on, the Settlement Agreement, the Distribution Protocol, or the counsel fee and disbursement request were received.[43]

40. A supplemental opt-out procedure for Class Members who held units of a TD Mutual Fund through a Discount Broker for the first time on or after April 9, 2022 was approved by Order of this

[42] Second Wright Affidavit at para 18, MR Tab 5, p 335.
[43] Second Wright Affidavit at para 23, MR Tab 5, p 337.

Court dated October 1, 2024.[44] The Supplemental Opt-Out Deadline is December 8, 2024. To date, no supplemental opt-out requests have been received.[45]

H. Factors supporting the fairness and reasonableness of the settlement

(a) Information available to Siskinds

41. Siskinds possessed more than adequate information to make an informed recommendation concerning resolution of the action on the basis upon which it was resolved.[46] Although the discovery process was in its early stages, the Plaintiff and Siskinds had access to documentary evidence, expert evidence and other sources of information that are indicative of a mature understanding of possible trial outcomes and risks facing the Plaintiff and Class Members. In particular:[47]

(a) the reports and studies of securities regulators on the payment of trailing commissions, including reports discussing the rationale for the payment of trailing commissions and disclosure issues;

(b) the submissions of industry organizations to securities regulators on the payment of trailing commissions and purported services offered by Discount Brokers;

(c) TDAM's disclosure documents filed on SEDAR (now SEDAR+), including Simplified Prospectuses and Fund Facts;

(d) the constating documents for the TD Mutual Funds, including the Declarations of Trust and amendments thereto;

(e) the reasons of Justice Belobaba on the certification motion in this action;

[44] Order dated October 1, 2024 at paras 7–11, Ex A to Second Wright Affidavit, MR Tab 5A, p 387.
[45] Second Wright Affidavit at para 24, MR Tab 5, p 338.
[46] Second Wright Affidavit at para 28, MR Tab 5, p 341.
[47] Second Wright Affidavit at para 27, MR Tab 5, p 338-341.

(f) the evidence filed by TDAM on the certification motion, including the affidavit of Huck Oon discussing, among other things, purported services provided by Discount Brokers and TDAM's disclosures;

(g) the expert opinion of Ermanno Pascutto filed by the Plaintiff in support of the certification motion, which discusses the history and rationale for the payment of trailing commissions to Discount Brokers;

(h) the transcripts from cross-examinations on the certification motion, including of Mr. Oon and of the former representative plaintiff Gary Stenzler;

(i) the Defendant's written and oral submissions on the certification motion;

(j) the reasons of this Court on the motions to stay the 2022 Actions and the submissions of the 2022 Plaintiffs, including Mr. Aggarwal, on those motions;

(k) the evidence and factums filed by the parties to the 2022 Actions on the Defendants' motions for summary judgment seeking to dismiss the 2022 Actions as statute-barred;

(l) the reasons of Justice Belobaba and the Divisional Court on the certification motion in the *Frayce* Action;

(m) the Defendant's Statement of Defence;

(n) the Plaintiff's documents, including his account statements;

(o) data provided by TDAM facilitating the calculation of the amount of trailing commissions paid by TDAM to Discount Brokers (which was subject to certain assumptions);

(p) 2,730 documents produced by TDAM in its initial round of documentary discovery, including:

(i) TDDI data related to trailing commissions paid;

(ii) disclosure documents, including Simplified Prospectuses, Annual Information Forms, Declaration of Trusts and Fund Facts; and

(iii) email and other documents collected from the relevant custodians;

(q) TDAM's mediation brief and the positions taken by TDAM throughout the mediation process;

(r) two reports prepared for the mediation by TDAM's expert, KPMG, on damages and purported services provided by Discount Brokers;

(s) the report of the Plaintiff's expert, Errol Soriano of KSV Advisory, on damages prepared for the mediation and the input received from Mr. Soriano and his team throughout the mediation and negotiation process leading to the Settlement Agreement;

(t) the positions taken by Mr. Aggarwal in settlement negotiations;

(u) the positions taken by the defendants in the Other 2018 Actions; and

(v) the insights and recommendations of Mr. Wiesenfeld.

(b) Litigation risks

42. The action faces various generic risks inherent in all litigation that influence the range of outcomes, as well as case-specific risks.[48]

[48] Second Wright Affidavit at para 30, MR Tab 5, p 341.

43. The generic risks include the risks arising from the passage of time, and the procedural risks that inhere in litigation of this complexity, such as the risk that witnesses will not appear or will not give the evidence expected of them, and the risk of adverse procedural or evidentiary rulings.[49]

44. With the passage of time, documentary evidence may no longer be available, and witnesses may die or their memories of the material events may fade, all of which would impact the Plaintiff's ability to prove his case.[50]

45. There was a risk that the passage of time would have an impact on the amount that could be recovered in the action if the Plaintiff was successful on the common issues but individual issues remained, such that an aggregate damages award was not available. By the time the two-stage common issues trial process concluded, including appeals, more than 10 years would likely have passed from the start of the action. With the passage of that amount of time, some Class Members may no longer be alive, corporate Class Members may no longer exist, some Class Members may not have retained the required transaction records to support their claims or it may not be possible to obtain their records from TDAM, its affiliated Discount Broker TDDI or Discount Brokers other than TDDI ("**External Discount Brokers**"), and some Class Members may be less inclined to file a claim or come forward to prove their individual case. That is compounded by the fact that the alleged misconduct in this case dates back to the start of the 2000s or earlier.[51]

46. The case-specific risks are those related to issues and challenges arising on the particular facts of the action. The main risks are explained below. These risks are acute because the trial judge would

[49] Second Wright Affidavit at para 33, MR Tab 5, p 342.
[50] Second Wright Affidavit at para 34, MR Tab 5, p 342.
[51] Second Wright Affidavit at para 35, MR Tab 5, p 342.

only need to accept one of the various defence arguments discussed below for the claims of some or all of the Class Members to fail on liability or damages.[52]

(i) Risk that the Court would find that TDAM adequately disclosed the trailing commissions

47. Disclosure was a central theme of TDAM's defence. It argued that the trailing commissions paid to Discount Brokers were clearly and repeatedly disclosed by TDAM to investors in Fund Facts, Simplified Prospectuses and other disclosure documents, and as such the investors cannot complain about these payments. TDAM emphasized explicit language in its Fund Facts stating that "TDAM pays the trailing commission to your representative's firm, including a discount broker" (emphasis added). It argued that it made disclosure using the language required by Canadian securities regulators and the issuance of the disclosures was authorized by the regulators.[53]

48. The adequacy of TDAM's disclosure was likely to be one of the most hotly-contested issues in the action. The Plaintiff was confident in his position on this issue. However, if the trial judge accepted that TDAM adequately disclosed the trailing commissions and other impugned conduct, it could have defeated some or all of the claims of the Class Members. The disclosure argument fed into virtually all aspects of the pleaded claims and defences, including TDAM's limitations and consent/acquiescence defences discussed below.[54]

(ii) Risk that the Court would find that there was no misconduct or breach of duty

49. ***No illegality argument:*** TDAM argued that its payment of trailing commissions to Discount Brokers was not illegal. It contended that the mutual fund industry is heavily regulated in Canada and regulators permitted the payment of trailing commissions to Discount Brokers until the prohibition

[52] Second Wright Affidavit at para 31, MR Tab 5, p 341.
[53] Second Wright Affidavit at para 36, MR Tab 5, p 343.
[54] Second Wright Affidavit at para 37, MR Tab 5, p 343.

came into force on June 1, 2022. TDAM argued that it complied with the regulatory ban and stopped paying trailers, and that it has no liability to unitholders for paying trailing commissions to Discount Brokers when it was legally allowed to do so.[55]

50. The existence of that risk is evidenced by the failure of the *Frayce* Action. The plaintiffs' certification motion in the *Frayce* Action was dismissed by Justice Belobaba because "the practice of paying trailing commissions to discount brokers, although controversial and needing reform, was not illegal or unlawful until the law was changed effective June 1, 2022."[56]

51. The nature of the allegations in the *Frayce* Action and this action are significantly different. In particular, as pleaded and argued on the certification motion, the *Frayce* Action focused narrowly on whether Discount Brokers complied with Canadian securities laws in receiving trailing commissions from mutual fund managers. By contrast, the allegations in this action do not turn on whether the Defendant complied with Canadian securities laws, and instead focus on TDAM's obligations as a trustee and fiduciary. There was, nevertheless, a risk that the Court would accept similar arguments made by TDAM.[57]

52. ***Compliance with the terms of the trust instruments:*** TDAM asserted that it had broad discretion to manage the day-to-day affairs of the TD Mutual Funds under the terms of the operative trust instruments. TDAM argued that this general discretion, coupled with the express terms of the trust instruments regarding its ability to pay management fees (in which the trailing commissions were embedded), gave it the discretion to determine whether it paid trailing commissions to Discount Brokers and in what amount. TDAM took the position that there could be no breach of trust or

[55] Second Wright Affidavit at para 38, MR Tab 5, p 343.
[56] *Frayce v BMO InvestorLine Inc*, 2023 ONSC 16 at para 27, aff'd 2024 ONSC 533. The Court of Appeal refused leave to appeal on September 6, 2024: Second Wright Affidavit at para 39, MR Tab 5, p 344.
[57] Second Wright Affidavit at para 40, MR Tab 5, p 344.

fiduciary duty in circumstances where it exercised the discretion and rights conferred on it by the trust instruments.[58]

53. ***No obligation to create Series D units or other non-trailer paying series***: One of the breaches of trust and fiduciary duty alleged by the Plaintiff is that TDAM failed to create a series of units that did not pay trailing commissions and failed to restrict units held through Discount Brokers to non-trailer paying series, such as Series F units (or, alternatively, Series D units, which paid a reduced trailing commission during the material time). TDAM asserted that it had no obligation to do so under the terms of the trust instruments or general trust law. It argued that under the terms of the trust instruments, it had sole discretion over the creation of new series, redesignation of series of units and the fees associated with a series of units. Moreover, TDAM contended that such an obligation would amount to a prospective duty owed to future unitholders, which was untenable at law and under the terms of the trust instruments.[59]

54. ***Limited duty and no standing argument:*** TDAM asserted that, under the terms of the operative trust instruments, it only owed heavily circumscribed obligations to Class Members. TDAM said it fulfilled those obligations, the most prominent of which was the right of Class Members to "receive payment from the Fund at the time, place, in the manner and subject to the conditions herein expressly provided".[60]

55. TDAM recognized that a standard and duty of care exists under the terms of the trust instruments. However, TDAM took the position that the standard and duty of care was owed to the TD Mutual Funds as a whole, not individual beneficiaries such as the Plaintiff and Class Members. TDAM argued that Class Members had no standing to enforce the standard and duty of care owed to

[58] Second Wright Affidavit at para 41, MR Tab 5, p 344.
[59] Second Wright Affidavit at para 42, MR Tab 5, p 345.
[60] Second Wright Affidavit at para 43, MR Tab 5, p 345.

the TD Mutual Funds. To support this argument, TDAM pointed to the terms of the trust instruments that purportedly restricted "in every conceivable manner" the ability of the Plaintiff and Class Members to insert themselves in the management of the TD Mutual Funds.[61]

56. ***No claim under section 23.1 of the Trustee Act*:** The Plaintiff alleged that the payment of trailing commissions out of trust assets should be disallowed as an improper expense under section 23.1 of the *Trustee Act*. TDAM asserted that the terms of the trust instruments supersede the rights granted under the *Trustee Act*, including section 23.1. Consequently, TDAM took the position that the Plaintiff and Class could not rely on that provision.[62]

57. ***No relationship between TDAM qua manager and the Class Members***: TDAM argued that it had no legal relationship with unitholders in its role as manager of the TD Mutual Funds. Accordingly, it asserted that, *qua* manager, it did not owe the Plaintiff or Class Members any obligations under the trust instruments or otherwise.[63]

(iii) Risk that the Court would accept the "services" argument

58. While acknowledging that the Class Members did not receive investment advice from Discount Brokers, TDAM argued that Discount Brokers did provide valuable services to Class Members, which justified the payment of reasonable trailing commissions to those Discount Brokers. This argument had implications for liability and damages in the proceeding.[64]

59. One position that TDAM took was that a reasonable payment for the services provided by Discount Brokers was the typical Series D or Series E trailing commission rate of 0.25% (the advisor or full-service trailing commission typically ranges from 0.50% to 1.00%). If the Court accepted this

[61] Second Wright Affidavit at para 44, MR Tab 5, p 345.
[62] Second Wright Affidavit at para 45, MR Tab 5, p 345-346.
[63] Second Wright Affidavit at para 46, MR Tab 5, p 346.
[64] Second Wright Affidavit at para 47, MR Tab 5, p 346.

argument, it would result in a significant reduction in the value of the recoverable trailing commissions in this action. For Class Members who held Series D or Series E units of the TD Mutual Funds or any other series paying a trailing commission of 0.25% or less, there would be no liability and no damages. The recovery on all other series would be a function of the difference between the actual trailing commission percentage rate and the 0.25% trailing commission rate.[65]

60. Another position taken by TDAM was that Discount Brokers provide services that are worth *more* than the value of the trailing commissions paid on behalf of the Plaintiff and Class Members. The Defendant adduced evidence from its expert at the mediation that the cost of research tools provided to investors, recreating the fund portfolio and the time it would take Class Members to replicate the services provided by Discount Brokers would exceed the value of the trailing commissions paid. If this argument was accepted, then no Class Member would be entitled to recovery.[66]

(iv) Risk that the claims of some or all Class Members were statute-barred

61. TDAM raised limitation defences under the *Limitations Act, 2002*.[67] It argued that Class Members' claims were discoverable at the time they acquired their TD Mutual Fund units. TDAM relied on disclosures it made in documents that were required to be sent to, or were accessible by, Class Members at the time they acquired their TD Mutual Fund units. If this argument was accepted, any losses in relation to trailing commissions paid more than two years prior to the action being commenced (*i.e.* prior to April 2016) would not be recoverable.[68]

[65] Second Wright Affidavit at para 48, MR Tab 5, p 346.
[66] Second Wright Affidavit at para 49, MR Tab 5, p 346-347.
[67] *Limitations Act, 2002*, SO 2002, c 24, Sch B.
[68] Second Wright Affidavit at para 50, MR Tab 5, p 347.

62. TDAM also made the argument that any trailing commissions paid on TD Mutual Fund units acquired more than two years prior to the action being commenced would not be recoverable. Otherwise put, TDAM's position was that the limitation period did not "roll" with the payment of trailing commissions. If the trial judge accepted TDAM's argument, then claims in respect of trailing commissions paid on TD Mutual Fund units acquired prior to April 2016, regardless of when those trailing commissions were paid, would be statute-barred and unrecoverable. This would adversely impact a substantial number of Class Members who continued to hold TD Mutual Fund units after April 1, 2016. Indeed, many investors, including Mr. Westwood, bought and held many of their TD Mutual Fund units before April 2016 and continued to hold them after April 2016.[69]

63. TDAM also raised limitation defences under the Ontario *Securities Act* with respect to the misrepresentation claim.[70] TDAM argued that a three-year limitation period applies to the *Securities Act* misrepresentation claim that is not subject to discoverability. Consequently, TDAM's position was that all misrepresentation claims based on units acquired prior to April 2015 were statute-barred.[71]

(v) Risk that a consent and/or acquiescence defence would apply

64. TDAM relied on consent (concurrence) and acquiescence defences to the asserted breaches of trust and fiduciary duty.[72] For the defences to succeed, the beneficiary must be fully informed of their rights and of all material facts and circumstances of the case. The beneficiary must also provide their approval through a positive act or words that demonstrate knowledge and approval of the breach. The consent/concurrence defence arises where fully-informed approval arises before the breach

[69] Second Wright Affidavit at para 51, MR Tab 5, p 347.
[70] *Securities Act*, RSO 1990, c S.5, s 138.
[71] Second Wright Affidavit at para 52, MR Tab 5, p 347-348.
[72] Second Wright Affidavit at para 53, MR Tab 5, p 348.

occurs. The acquiescence defence arises where fully-informed approval is given after the breach occurs. Concurrence or acquiescence provide a full defence to a breach of trust or fiduciary duty.[73]

65. TDAM argued that the trailing commission payments to Discount Brokers were fully disclosed to Class Members before they invested in the TDAM Mutual Funds, and that the Plaintiff and Class Members nevertheless chose to purchase their TD Mutual Fund units. TDAM argued that the Plaintiff and Class cannot resile from that informed choice. TDAM's position, therefore, was that a concurrence or acquiescence defence was available. There was a risk that the Court would accept this argument.[74]

(vi) Risk that Class Members' claims were released

66. TDAM asserted that the terms of the operative trust instruments provided a release in its favour from "all liability" to Class Members who redeemed their TD Mutual Fund units with respect to the units so redeemed. If the Court accepted this argument, then those former unitholder Class Members would not have a claim with respect to the TD Mutual Fund units they redeemed.[75]

67. TDAM also argued that the terms of the operative trust instruments extinguish its liability "with respect to the propriety of [TDAM's] acts and transactions" if it does not receive a written objection within ninety days after it provides its financial statements. If the Court accepted this argument, then the claims of a substantial number of the Class Members would be extinguished.[76]

(vii) Risk that the Plaintiff would be unable to establish a misrepresentation

68. There was a risk that the Plaintiff's statutory misrepresentation claim under section 130 of the *Securities Act* would be unsuccessful. TDAM took the position that the payment of trailing

[73] *Royal Bank of Canada v Fogler, Rubinoff*, 1991 CanLII 7071; *Barker v Barker*, 2022 ONCA 567 at para 130.
[74] Second Wright Affidavit at para 53, MR Tab 5, p 348.
[75] Second Wright Affidavit at para 54, MR Tab 5, p 348.
[76] Second Wright Affidavit at para 55, MR Tab 5, p 348.

commissions to Discount Brokers was adequately disclosed and that its disclosures cannot attract liability because they track regulatory requirements. Moreover, TDAM argued that any alleged misrepresentation would not reasonably be expected to have an impact on the market price or value of the TD Mutual Fund units.[77]

(viii) Risks relating to the damages that would be recoverable

69. Based on an analysis of TDAM's data undertaken by Siskinds and the Plaintiff's expert, Mr. Soriano, there was a maximum of approximately $622 million in trailing commissions recoverable from November 1, 2002 to the end of May 2022 (when the trailing commission ban came into effect). The defence expert's position was that the quantum of trailing commissions paid was less: approximately $602 million.[78]

70. The $622 million figure included approximately $552 million in trailing commissions paid to the Defendant's affiliated Discount Broker TDDI, and $70 million to External Discount Brokers.[79]

71. The amounts that Siskinds and Mr. Soriano estimated were subject to certain assumptions and extrapolations owing to limitations on available data. For example, data was not available for trailing commissions paid to External Discount Brokers from 2003 to 2009. Data on payments to some External Discount Brokers did not differentiate between the trailing commissions paid to the External Discount Broker and its affiliated full-service channel. Consequently, assumptions had to be used to allocate trailers between those paid in the Discount Broker channel and those paid in the non-Discount Broker channel.[80]

[77] Second Wright Affidavit at paras 56-57, MR Tab 5, p 349.
[78] Second Wright Affidavit at para 58, MR Tab 5, p 349.
[79] Second Wright Affidavit at para 59, MR Tab 5, p 349.
[80] Second Wright Affidavit at para 60, MR Tab 5, p 349.

72. There were risks that even if the Plaintiff and Class were successful on the merits, recoverable trailing commissions would be much lower than the best-case scenario outlined above.

73. *First*, recoverable trailing commissions would be substantially lower if the Defendant's limitation period arguments discussed above were accepted.[81]

74. If the Court accepted that only trailing commissions paid within two years of the action being commenced (April 2016 onwards) were recoverable, then recoverable trailing commissions would be approximately $171 million. The worst-case scenario on the limitation period argument was that all trailing commissions paid on TD Mutual Fund units that were acquired prior to April 2016 (including trailing commissions paid after April 2016) were unrecoverable. That would substantially reduce the quantum of recoverable trailing commissions even further.[82]

75. *Second*, if the Court accepted the Defendant's argument that the Series D trailing commission rate of 0.25% was reasonable compensation for the services provided by Discount Brokers, then based on the calculations of the Defendant's expert, aggregate recoverable trailing commissions would be reduced by approximately 52%.[83]

76. The impact of this Series D argument was even more pronounced when combined with the argument that only trailing commissions paid within two years of the action being commenced (April 2016 onwards) were recoverable. That is because more TD Mutual Fund units were held in a discount series during that period, particularly subsequent to June 2019 when TDAM automatically converted all Series A units (or their equivalents) held through Discount Brokers to Series D units. With the

[81] Second Wright Affidavit at para 62, MR Tab 5, p 350.
[82] Second Wright Affidavit at para 63, MR Tab 5, p 350.
[83] Second Wright Affidavit at para 64, MR Tab 5, p 350.

combination of the Series D and limitations arguments, the reduction for the post-April 2016 period would be greater than the above-noted 52%.[84]

77. Notably, the defence expert's opinion at the mediation, depending on the assumptions used, was that recoverable trailing commissions were as low as $13 million if TDAM's limitations and discount series arguments were accepted. This represented significant downside damages risk to the Plaintiff and Class Members even if they were otherwise successful on the merits.[85]

(ix) Risks arising from the Aggarwal Action

78. The first of the 2022 Actions was filed on July 28, 2022. It was an omnibus proceeding targeting a number of mutual fund trustees and managers, including TDAM. Mr. Aggarwal was a named plaintiff in the second 2022 Action filed on August 12, 2022. The *Aggarwal* Action, in which TDAM was the sole defendant, was subsequently filed on December 7, 2022.[86]

79. The filing of the first 2022 Action on July 28, 2022 occurred at a time when the Plaintiff and the Defendant had been preparing for some time for the first formal mediation to take place on November 7, 2022. It created risks for the Plaintiff and the Class Members in terms of litigation outcomes and it also added significant complexity to the settlement discussions to resolve the action.[87]

80. While Siskinds viewed the *Aggarwal* Action and the other 2022 Actions as opportunistic and legally and factually flawed, there was nevertheless a risk that, even if the Defendant's liability was established, the trailing commissions that are recoverable in this action could be reduced due to the *Aggarwal* Action. The *Aggarwal* Action was brought on behalf of all people who held TD Mutual Fund units through a financial advisor or other non-Discount Broker channel. The *Aggarwal* Action

[84] Second Wright Affidavit at para 65, MR Tab 5, p 350.
[85] Second Wright Affidavit at para 66, MR Tab 5, p 350-351.
[86] Second Wright Affidavit at para 67, MR Tab 5, p 351.
[87] Second Wright Affidavit at para 68, MR Tab 5, p 351.

and this action targeted the same pool of trailing commissions. Mr. Aggarwal claims that the losses for trailing commissions paid to Discount Brokers should be split between the *Aggarwal* Action's class members and the Class Members in this action based on the proportionate value of their holdings. If the Court accepted this argument, a very high percentage of the recovery would go to class members in the *Aggarwal* Action, with a correspondingly small percentage going to the Class Members in this action. In assessing the risk created by the *Aggarwal* Action, it was necessary for Siskinds to balance what they viewed as a very low probability of the *Aggarwal* Action being successful against the high magnitude of the impact if it was successful.[88]

(c) Immediate benefit

81. The Settlement Agreement eliminates the above-identified risks to recovery and provides an immediate and substantial benefit to Class Members in exchange for the release of their claims. The immediate benefit contrasts with the multiple years of highly contested litigation that would need to be undertaken to finally resolve the action on its merits, including the two common issues trials necessitated by the filing of the *Aggarwal* Action.[89]

(d) Data available to assist with the distribution

82. The Settlement Agreement requires the Defendant to provide customer data that will streamline the claim filing process for a significant number of Class Members. That should significantly increase the ease and efficiency of making a claim for those Class Members. This provides them with a substantial non-monetary benefit.[90]

[88] Second Wright Affidavit at para 69, MR Tab 5, p 351.
[89] Second Wright Affidavit at para 70, MR Tab 5, p 352.
[90] Second Wright Affidavit at para 71, MR Tab 5, p 352; Bobanovic Affidavit at para 34, MR Tab 4, p 311.

I. Distribution Protocol and claims process

83. The Plaintiff seeks approval of the Distribution Protocol for the purpose of allocating the Net Settlement Amount[91] and distributing it to Class Members who file valid and timely claims.

84. The key elements of the Distribution Protocol are as follows (definitions in the Distribution Protocol apply to this section):

(a) the objective of the Distribution Protocol is to equitably distribute the Net Settlement Amount among Claimants (*i.e.* Class Members who submit a valid claim), while avoiding double compensation;[92]

(b) pursuant to the terms of the Settlement Agreement, the Defendant will provide Client Information to the Administrator in respect of the TD Mutual Fund units held by Class Members through the Defendant's affiliated Discount Broker, TDDI, to determine "Trailing Commissions Paid" for Class Members who were clients of TDDI.[93] The administration will rely on such Client Information which should substantially increase the speed, user friendliness and efficiency of the claims process for the benefit of Class Members;[94]

(c) the Administrator will administer all claims pursuant to the terms of the Distribution Protocol, the Settlement Agreement and orders of the Court;[95]

---

[91] "Net Settlement Amount" means "the amount available in the Trust Account for distribution pursuant to the Distribution Protocol after payment of all Class Counsel Fees, Class Counsel Disbursements, Administration Expenses, the Funding Commission and any other amounts approved by the Court": Settlement Agreement at s 1(33), Ex B to Second Wright Affidavit, MR Tab 5B, p 400.
[92] Second Wright Affidavit at paras 78, 83(a), MR Tab 5, p 353, 357; Distribution Protocol at para 3, Sch 6 to Distribution Order, Sch "B" to Dismiss and Distribution NOM, MR Tab 1B, p 173.
[93] Second Wright Affidavit at para 73, MR Tab 5, p 352; Bobanovic Affidavit at paras 21-27, MR Tab 4, p 306-308; Distribution Protocol at para 6, Sch 6 to Distribution Order, Sch "B" to Dismiss and Distribution NOM, MR Tab 1B, p 173-174.
[94] Second Wright Affidavit at para 77, MR Tab 5, p 353; Bobanovic Affidavit at para 34, MR Tab 4, p 311.
[95] Second Wright Affidavit at para 83(b), MR Tab 5, p 357.

(d) Claimants will have until 180 days after Second Notice is first disseminated to make a claim;[96]

(e) in the event of a denial of a claim by the Administrator, there is a process whereby a Claimant can request reconsideration of their claim. A decision of the Administrator on reconsideration can be appealed, in prescribed circumstances, to an arbitrator appointed by the Court. The arbitrator's decision will be final and not subject to appeal;[97]

(f) if there is money remaining six months after the initial distribution, the Administrator will make a second distribution to Authorized Claimants to the extent it is economical to do so and, to the extent it is not, distribute the money *cy-près*;[98] and

(g) the Net Settlement Amount will be distributed on a *pro rata* basis to Authorized Claimants. A Claimant that has Trailing Commissions Paid greater than zero will be an Authorized Claimant eligible to receive a *pro rata* share of the Net Settlement Amount based on their Trailing Commissions Paid relative to the Trailing Commissions Paid of all Authorized Claimants. However, an Authorized Claimant will only be compensated if their minimum *pro rata* entitlement calculated under the Distribution Protocol is greater than $25.[99] The Administrator's calculation of Trailing Commissions Paid will be determined as follows:[100]

[96] Second Wright Affidavit at para 83(d), MR Tab 5, p 357.
[97] Second Wright Affidavit at para 83(i), MR Tab 5, p 358; Distribution Protocol at paras 39-50, Sch 6 to Distribution Order, Sch "B" to Dismiss and Distribution NOM, MR Tab 1B, p 183-184.
[98] Second Wright Affidavit at para 83(j), MR Tab 5, p 359.
[99] Second Wright Affidavit at para 79, MR Tab 5, p 354.
[100] Second Wright Affidavit at para 80, MR Tab 5, p 354-355; Distribution Protocol at paras 8-13, Sch 6 to Distribution Order, Sch "B" to Dismiss and Distribution NOM, MR Tab 1B, p 174-177.

(i) ***Actual Trailers Paid:*** Where the Administrator has Client Information showing the actual amount of trailing commissions paid by TDAM on the Claimant's behalf, that amount shall be the Trailing Commissions Paid for the Claimant;

(ii) ***Estimated Trailers Paid Based on Asset Value:*** If the information described in "A" is unavailable, Trailing Commissions Paid will be based on the aggregate market value of a Claimant's TD Mutual Fund units held through a Discount Broker assuming that trailing commissions were charged at a rate of 0.75% annually, calculated as follows:

If monthly asset value information is available:	For each month, Trailing Commissions Paid equals the [Aggregate market value of all TD Mutual Fund units held by the Claimant through the Discount Broker in the applicable month] multiplied by [0.75%] multiplied by [1/12]. The amount determined for each month over the period during which the TD Mutual Fund units were held by the Claimant will be added together.
If quarterly asset value information is available:	For each quarter, Trailing Commissions Paid equals the [Aggregate market value of all TD Mutual Fund units held by the Claimant through the Discount Broker in the applicable quarter] multiplied by [0.75%] multiplied by [1/4]. The amount determined for each quarter over the period during which the TD Mutual Fund units were held by the Claimant will be added together.
If asset value information in six-month intervals is available:	For each six-month interval, Trailing Commissions Paid equals the [Aggregate market value of all TD Mutual Fund units held by the Claimant through the Discount Broker in the applicable six-month period] multiplied by [0.75%] multiplied by [1/2]. The amount determined for each six-month interval over the period during which the TD Mutual Fund units were held by the Claimant will be added together.
If annual asset value information is available:	For each year, Trailing Commissions Paid equals the [Aggregate market value of all TD Mutual Fund units held by the Claimant through the Discount Broker in the applicable 12-month period] multiplied by [0.75%].

	The amount determined for each year during which the TD Mutual Fund units were held by the Claimant will be added together.
If asset value information is available at a different interval between one month and a year:	The Administrator will calculate the Trailing Commissions Paid in a manner analogous to the above.

(iii) ***Priority scheme:*** Where the Administrator has a combination of the information described above, the Administrator will give priority to "A" and then "B". For "B", the Administrator will use the information available over the shortest time interval first (*e.g.* using monthly first, then quarterly, then at six-month intervals, then annually);

(iv) ***Post June 1, 2022 Trailing Commissions Paid:*** For all Claimants, Trailing Commissions Paid on or after June 1, 2022 shall be deemed to be zero; and

(v) ***Questrade:*** Trailing Commissions Paid shall be deemed to be zero for TD Mutual Fund units held through Questrade from January 2009 onwards.

J. Counsel Fees and Disbursements

(a) Overview of the request

85. Siskinds and Bates Barristers seek the approval of fees and disbursements, plus applicable taxes on both, in accordance with an executed retainer agreement, as follows:[101]

(a) Class Counsel Fees in the amount of $17,920,000;

(b) applicable taxes on the Class Counsel Fees of $2,329,600;

(c) Class Counsel Disbursements of $299,627.99; and

[101] Second Wright Affidavit at para 98, MR Tab 5, p 362.

(d) applicable taxes on the Class Counsel Disbursements of $38,840.09.

(b) Retainer Agreement with the Plaintiff

86. The request is consistent with the contingency fee retainer agreement entered into with the Plaintiff ("**Retainer Agreement**"). The Retainer Agreement provides for a contingency fee of 28% of the "Amount Recovered" plus applicable taxes.[102] The Retainer Agreement explicitly built in a 5% reduction to the maximum contingency fee percentage (33%) to account for the fact that third-party litigation funding was obtained.[103]

87. The entitlement under the Retainer Agreement of 28% of the "Amount Recovered" is $19.67 million (28% multiplied by $70.25 million), which is $1.75 million higher than the fee being sought ($17.92 million). The $17.92 million figure equates to approximately 25.51% of the $70.25 million.[104]

88. Siskinds agreed to reduce the fee request by $1.75 million from the maximum that could be made under the Retainer Agreement to facilitate the resolution of the action. In the late stages of settlement negotiations, an impasse arose. TDAM offered to resolve both this action and the *Aggarwal* Action for $77 million, of which $72 million was allocated to this action and $5 million was allocated to the *Aggarwal* Action. Those offers were contingent on the acceptance of both Plaintiffs. Mr. Aggarwal was not prepared to settle at that number and TDAM was not prepared to pay the additional amount that Mr. Aggarwal was seeking for his action. To help resolve the impasse, $1.75 million of the $72 million allocated to this action was re-allocated to the *Aggarwal* Action and Siskinds undertook to Mr. Westwood to reduce their maximum fee request by $1.75 million to

[102] Second Wright Affidavit at para 98, MR Tab 5, p 362; Contingency Fee Retainer Agreement dated October 23, 2020 ("**Retainer Agreement**") at para 19, Ex A to the Ex A to Affidavit of Peter Westwood sworn November 25, 2024 ("**Westwood Affidavit**") MR Tab 3A, p 292.
[103] Retainer Agreement at paras 18-19, Ex A to the Westwood Affidavit MR Tab 3A, p 292.
[104] Second Wright Affidavit at para 100, MR Tab 5, p 362-363.

neutralize the effect of the reduced settlement amount on Class Members. In fact, the fee reduction was greater than $1.75 million when compared against the maximum fee entitlement on a settlement of $72 million.[105]

89. The Retainer Agreement also allows Siskinds to charge interest on disbursements incurred. The interest is $30,128.91. Siskinds is forgoing that interest request.[106]

90. Consistent with the terms of the Retainer Agreement, costs awarded to the Plaintiff of $75,000 for the certification motion and $10,000 for the Defendant's motion for leave to appeal from the certification order are not included in the calculation of the fee request. The entirety of those costs awards accrues to the benefit of the Class Members.[107]

(c) Risks assumed by counsel supporting the fee request

91. Prior to the commencement of the action, Siskinds and Bates Barristers assumed the risk of being paid their fees and reimbursed for disbursements incurred only if the action was successful. This risk was significant. The action is a complex class action against a well-resourced institutional defendant that had an uncertain outcome at the outset. In Siskinds' experience, the cost in legal fees incurred and disbursements expended in prosecuting a complex securities class action like this one can be very large. Class actions of this nature are typically hard fought and can be protracted with multiple interlocutory steps and appeals.[108]

92. Some examples help demonstrate that before a complex class action is commenced in Ontario, it is anticipated that the prosecution of the case will be hard fought and expensive, will often take a long time and will involve significant risks to the recovery of fees and disbursements by class counsel.

[105] Second Wright Affidavit at para 101, MR Tab 5, p 363.
[106] Second Wright Affidavit at para 103, MR Tab 5, p 363.
[107] Second Wright Affidavit at para 104, MR Tab 5, p 364.
[108] Second Wright Affidavit at paras 105-106, MR Tab 5, p 364.

93. The first example is *Fischer v IG Investment Management Ltd et al*, otherwise known as the "market timing" class action. It involves claims against a number of mutual fund companies alleging that the companies failed to stop certain trading activity in their mutual funds that harmed long-term investors in the fund. The action was commenced in 2006. The certification motion was a protracted battle, involving decisions from the Superior Court,[109] the Divisional Court,[110] the Court of Appeal[111] and the Supreme Court of Canada[112] between 2010 and 2013. The action went to a common issues trial on liability in 2022, approximately 17 years after the commencement of the action. In the trial decision released on February 13, 2023,[113] the plaintiffs were partly successful in their claims against the two remaining mutual fund company defendants. The plaintiffs lost on the breach of fiduciary duty claim but won on the negligence claim. The issue of damages still needs to be assessed by the trial judge and appeals still need to be decided. Assuming the plaintiffs succeed at those later stages, the class members will not receive compensation from the remaining defendants for a number of years. That will likely be more than 20 years after the commencement of the action. Similar claims against three other mutual fund companies were settled a number of years ago, resulting in early compensation to the class members in those cases.[114]

94. The second is *Rahimi v SouthGobi Resources Ltd et al*, a case in which Siskinds acts as class counsel. That action is a secondary market misrepresentation case. It involves SouthGobi's restatement of its financials in November 2013. The action was commenced in January 2014 and has

[109] *Fischer v IG Investment*, 2010 ONSC 296.
[110] *Fischer v IG Investment*, 2011 ONSC 292.
[111] *Fischer v IG Investment Management Ltd*, 2012 ONCA 47.
[112] *AIC Limited v Fischer*, 2013 SCC 69.
[113] *Fischer v IG Investment*, 2023 ONSC 915.
[114] Second Wright Affidavit at para 108, MR Tab 5, p 364-365.

been hotly contested since that time, involving a significant commitment of counsel time and resources.[115]

95. In *SouthGobi*, the motion for leave to assert the secondary market misrepresentation right of action under the *Securities Act* was argued over three days in 2015. The plaintiff was partially successful on those motions. Both the plaintiff and defendants appealed. The plaintiff was successful on the appeal to the Court of Appeal. Leave to appeal to the Supreme Court of Canada was refused in May 2018. The case was subsequently certified later in 2018.[116]

96. The parties have since that time conducted examinations for discovery. Productions in the case are in the tens of thousands of pages. There have been multiple interlocutory motions brought, including on discovery and abuse of process issues. The action was originally set down to be heard in the Fall of 2022. Those trial dates were ultimately adjourned. It is now expected that the trial will be heard in late 2025 or early 2026, approximately 12 years after it was commenced.[117]

97. The third case is *Swisscanto Fondsleitung AG v BlackBerry Limited et al*, a case in which Siskinds also acts as class counsel. It is a secondary market misrepresentation case that alleges misrepresentations related to Blackberry's revenue recognition policy. The action was commenced in December 2013. As with *SouthGobi*, the case against Blackberry has been hotly contested necessitating a significant investment of counsel time and resources over an extended period.[118]

98. In the Blackberry case, leave was granted to assert the statutory right of action under the *Securities Act* in 2015 following a two-day hearing.[119] Certification was granted in January 2016.[120]

---

[115] Second Wright Affidavit at para 109, MR Tab 5, p 365.
[116] Second Wright Affidavit at para 110, MR Tab 5, p 365; *Rahimi v SouthGobi Resources*, 2015 ONSC 5948, rev'd 2017 ONCA 719, leave to appeal to SCC refused 2018 CanLII 48396.
[117] Second Wright Affidavit at para 111, MR Tab 5, p 365.
[118] Second Wright Affidavit at para 112, MR Tab 5, p 366.
[119] *Swisscanto v BlackBerry*, 2015 ONSC 6434.
[120] *Swisscanto v BlackBerry*, 2016 ONSC 534.

Following the certification and leave motions, the parties engaged in extensive written and oral discoveries, including the production of tens of thousands of documents. A contested production motion was fully briefed but ultimately resolved on the eve of the hearing. The action was set down for trial this summer, which is well over 10 years since the action was commenced.[121]

99. The fourth and fifth examples are class actions that were commenced after the commencement of this action. They are nevertheless illustrative of the risk of failure in complex cases of this nature.

100. The fourth example is the *Frayce* Action. Justice Belobaba refused certification on the basis of an argument that the Discount Brokers' conduct was not illegal. Justice Belobaba was the same judge who heard the certification motion in this action. The no illegality argument has also been advanced by TDAM in this action (as described at paragraphs 49 to 51 above). Although the case theories are substantially different, the *Frayce* Action's failure at certification on a defence argument that is also advanced in this action demonstrates the risk that class counsel will not recover their investment in time and disbursements when taking on litigation of this type.[122]

101. The fifth example is a British Columbia class action, *Turpin v TD Asset Management Inc*. That case involved claims against TDAM (the same defendant as in this action) alleging that it engaged in "closet indexing", which means that mutual funds that are marketed as being actively-managed are nothing more than index-tracking funds, which allowed TDAM to charge higher fees than it could for an index fund, but essentially with the same investment returns as an index fund. After being certified on consent, the action proceeded to a trial of the common issues in 2021 and 2022. In a decision released on June 28, 2022, the trial judge dismissed the claims against TDAM in

[121] Second Wright Affidavit at para 113, MR Tab 5, p 366.
[122] *Frayce v BMO InvestorLine Inc*, 2023 ONSC 16, aff'd 2024 ONSC 533.

their entirety.[123] The class members recovered nothing, and class counsel did not recover their significant investment in time and disbursements.

102. Bates Barristers was co-counsel for the plaintiffs in both the *Frayce* Action and *Turpin*. Bates Barristers made a significant investment of resources in those cases, all of which was lost when the *Frayce* Action was dismissed at certification and *Turpin* was dismissed at trial.[124]

103. The risks at the outset of the action were similar to those that arose in the examples given and are typical of the risks arising in complex class actions against large institutional defendants. At the outset, it was anticipated that:

(a) the litigation would be hard fought by a defence firm that is an expert in the defence of class actions of this nature;

(b) there would be significant resistance to the certification motion;

(c) if successful at certification, following appeals, there would be productions of tens of thousands of documents and lengthy examinations for discovery;

(d) there would likely be hard-fought interlocutory motions to resolve discovery issues;

(e) if the case did not settle, there would be one or two lengthy common issues trials with an uncertain outcome; and

(f) if third party funding was not secured, there would be exposure to adverse costs awards, including the fees and disbursements of defence counsel, which would be considerable, most certainly in the millions of dollars.[125]

[123] *Turpin v TD Asset Management Inc*, 2022 BCSC 1083.
[124] Second Wright Affidavit at para 117, MR Tab 5, p 367.
[125] Second Wright Affidavit at para 118, MR Tab 5, p 367-368.

104. Many of those risks have been borne out in this action. It was commenced more than six years ago. Certification was granted following a hotly-contested motion. Leave to appeal that decision was sought but refused. The parties engaged in protracted negotiations regarding the proper scope of discovery and were only able to resolve many of the issues on the eve of a hearing. The parties reached a Settlement Agreement but only after an extremely complex and protracted set of settlement negotiations that spanned over two years, requiring a considerable devotion of resources.[126]

(d) Efforts of Siskinds and Bates Barristers

105. Siskinds and Bates Barristers (prior to its resignation) have performed significant work on behalf of Class Members. They:[127]

(a) undertook an investigation into TDAM's alleged misconduct, including a review of TDAM's disclosure documents, TDAM's constating documents and a review of consultations undertaken by securities regulators;

(b) undertook substantial research and analysis to develop the rights of action advanced (at the outset of the litigation and on an ongoing basis);

(c) prepared the Statement of Claim and made amendments thereto;

(d) prepared voluminous evidentiary materials for the certification motion;

(e) cross-examined TDAM's affiant on the certification motion and defended TDAM's cross-examination of Mr. Stenzler;

(f) prepared lengthy written submissions and successfully argued the certification motion;

[126] Second Wright Affidavit at para 119, MR Tab 5, p 368.
[127] Second Wright Affidavit at para 120, MR Tab 5, p 368-369.

(g) prepared written materials in response to TDAM's request for leave to appeal the certification motion;

(h) negotiated a discovery plan and schedule for productions, and filed material for a case management conference, which led to the resolution of discovery issues on the eve of the conference;

(i) brought a successful motion to stay the *Aggarwal* Action (and other 2022 Actions);

(j) undertook extensive negotiations, including multiple mediation sessions, with TDAM, the plaintiff in the *Frayce* Action and the plaintiff in the *Aggarwal* Action;

(k) obtained partial documentary production from TDAM and started reviewing those documents, including documents concerning the quantum of trailing commissions paid to Discount Brokers;

(l) obtained a damages opinion from Errol Soriano for the mediation; and

(m) responded to Class Member inquiries.

(e) Division of Siskinds' fees and disbursements

106. Siskinds' docketed time and disbursements discussed below comes from two sources:[128]

(a) Siskinds has maintained a matter number for work and disbursements that are exclusively related to this action ("**TDAM Matter**"); and

(b) this action is one of seven cases commenced by Siskinds against the trustees and managers of mutual funds related to their payment of trailing commissions to Discount Brokers. Throughout the litigation of this action and the Other 2018 Actions, Siskinds has

[128] Second Wright Affidavit at para 121, MR Tab 5, p 369-370.

spent docketed time and incurred disbursements that are related to, and for the benefit of, all seven cases jointly as opposed to any one of the individual seven cases. This includes time spent on legal and factual research and analysis, the motions to stay the 2022 Actions, and other efforts to respond to and manage overlapping litigation generally (e.g. the *Frayce* Action and 2022 Actions). The time that Siskinds has spent on such matters has been docketed to a matter number ("**Joint Matter**") that is separate from the TDAM Matter. Similarly, disbursements of this kind have been allocated to the Joint Matter.[129]

(f) Fees financed to date

(i) Siskinds

107. Up to and including November 25, 2024, Siskinds has docketed fees of $2,345,501 plus applicable taxes on the TDAM Matter, representing 4,823.4 hours.[130]

108. Up to and including September 11, 2024 (when the Settlement Agreement was executed), Siskinds has docketed fees of $1,014,081 plus applicable taxes on the Joint Matter, representing 1,882.3 hours. If that time is divided equally between all seven cases, then $144,868.71 (pre-tax) is attributable to this action.[131]

[129] Siskinds has also maintained separate matter numbers for each of the six Other 2018 Actions, which are separate from the TDAM Matter and the Joint Matter.
[130] Second Wright Affidavit at para 122, MR Tab 75, p 370. A detailed chart showing the hourly rates and hours expended by the primary lawyers, students-at-law and law clerks up to and including November 25, 2024 on the TDAM Matter can be found in the Second Wright Affidavit at para 124, MR Tab 5, p 371-372.
[131] Second Wright Affidavit at para 123, MR Tab 5, p 370. A detailed chart showing the hourly rates and hours expended by the primary lawyers, students-at-law and law clerks up to and including September 11, 2024 on the Joint Matter can be found in the Second Wright Affidavit at para 125, MR Tab 5, p 373-374.

(ii) Bates Barristers

109. Bates Barristers has docketed fees of $1,041,360 plus applicable taxes on work that is exclusively or partly related to this action.[132] This includes time spent on this action alone and time spent for the benefit of all seven actions (including this action), which breaks down as follows:

(a) 508.35 hours (equating to $610,020 pre-tax) relate specifically to this action; and

(b) 359.45 hours (equating to $431,340 pre-tax) relate to, and were for the benefit of, all seven cases (including this action) jointly as opposed to any one of the individual seven cases. If that time is divided equally between all seven cases, then $61,620 (pre-tax) is attributable to this action.[133]

(g) Class Counsel Disbursements

(i) Siskinds

110. Up to and including November 11, 2024, Siskinds has incurred disbursements of $296,665.24 plus applicable taxes on the TDAM Matter. The following chart provides a breakdown of those disbursements on the TDAM Matter by category:[134]

Disbursement	Amount
Taxable Disbursements	
Courier	$179.91
Copies	$14,086.54
Long Distance Telephone Charges	$402.04
Postage	$38.08

[132] Second Wright Affidavit at para 126, MR Tab 5, p 374. A chart showing the hourly rate and hours expended by Mr. Bates can be found in the Second Wright Affidavit at para 127, MR Tab 5, p 374-375.
[133] Second Wright Affidavit at para 128, MR Tab 5, p 375.
[134] Second Wright Affidavit at para 129, MR Tab 5, p 375-376.

Disbursement	Amount
Binding Supplies	$25.85
Research/Resource Material	$17,176.24
News Releases/Media	$2,830.21
Agent's Fees and Disbursements	$4,786.98
Bank Fees, Corporate Searches and Misc. Charges	$23.00
Expert Fees	$202,646.25
Mileage/Travel/Meals	$11,569.48
Mediation/Arbitration Fees	$14,025.00
Notice Fees	$23,128.96
Transcripts	$1,285.10
E-Discovery Services and Data Hosting in Relativity	$3,789.60
Parking	$132.00
TOTAL TAXABLE DISBURSEMENTS	**$296,125.24**
HST ON TAXABLE DISBURSEMENTS	**$38,496.28**
Non-Taxable Disbursements	
Statement of Claim Fee	$220.00
Notice of Motion Fee	$320.00
TOTAL NON-TAXABLE DISBURSEMENTS	**$540.00**
TOTAL DISBURSEMENTS (TAXES INCLUDED)	**$335,161.52**

111. Up to and including September 11, 2024 (when the Settlement Agreement was executed), Siskinds has incurred disbursements of $5,256.75 plus applicable taxes on the Joint Matter. The following chart provides a breakdown of those disbursements on the Joint Matter by category:[135]

Disbursement	Amount
Taxable Disbursements	
Copies	$606.75
Research/Resource Material	$3,331.70
Agent's Fees and Disbursements	$1,113.00
Mileage/Travel/Meals	$205.30
TOTAL TAXABLE DISBURSEMENTS	**$5,256.75**
HST ON TAXABLE DISBURSEMENTS	**$683.38**
TOTAL DISBURSEMENTS (TAXES INCLUDED)	**$5,940.13**

112. If those disbursements on the Joint Matter are divided equally between all seven cases, then $750.96 (plus taxes) is attributable to this action.[136] Accordingly, in total across the TDAM Matter and the Joint Matter, Siskinds has incurred disbursements of $297,416.20 ($296,665.24 plus $750.96) plus applicable taxes referable to this action.[137]

113. Most of the disbursements incurred on the TDAM Matter were for the expert fees of Ermanno Pascutto ($44,500.00) and Errol Soriano ($157,646.25).[138]

[135] Second Wright Affidavit at para 130, MR Tab 5, p 376-377.
[136] Second Wright Affidavit at para 131, MR Tab 5, p 377.
[137] Second Wright Affidavit at para 132, MR Tab 5, p 377.
[138] Second Wright Affidavit at para 133, MR Tab 5, p 377.

114. Mr. Pascutto is a senior securities regulator and legal practitioner. He was Executive Director and head of staff of the Ontario Securities Commission between 1984 and 1989. He was the founding director and Vice-Chairman of the Hong Kong Securities and Futures Commission between 1989 and 1994. He was an independent director of Market Regulation Services Inc., a predecessor to the Investment Industry Regulatory Organization of Canada. In 2008, he founded FAIR Canada, an independent non-profit organization and registered charity, dedicated to enhancing the rights of Canadian shareholders and investors. He now consults on securities regulation in Canada and Hong Kong.[139]

115. Mr. Pascutto prepared an expert affidavit for the certification motion on the history and rationale for the payment of trailing commissions to Discount Brokers, including the positions taken by Canadian securities regulators. Mr. Pascutto's affidavit also replied to the affidavit TDAM filed on the certification motion from Mr. Oon. Mr. Pascutto's report informed the Plaintiff's position at the certification motion and was relied on in written submissions. Mr. Pascutto's report was also relied on at the mediation. The disbursements incurred on Mr. Pascutto's expert work were necessary for the successful result achieved for Class Members in the action.[140]

116. Mr. Soriano is the managing director of KSV Advisory's Valuation and Disputes practice. He is a Chartered Professional Accountant (1987), Chartered Business Valuator (1991) and Certified Fraud Examiner (1993). Mr. Soriano and his team at KSV Advisory prepared an expert damages report for the mediation. Mr. Soriano and his team also played an ongoing consulting role on damages issues throughout the lengthy mediation process. After the Settlement Agreement was reached, Mr. Soriano and his team have assisted with understanding the data TDAM will provide the Administrator

[139] Second Wright Affidavit at para 134, MR Tab 5, p 377.
[140] Second Wright Affidavit at para 135, MR Tab 5, p 378.

for purposes of the claims process and the processing of the data that will need to be undertaken. The efforts of Mr. Soriano and his team were necessary for the successful result achieved in the action for Class Members.[141]

117. The remaining disbursements were incurred primarily on engaging Mr. Wiesenfeld as mediator, travel, document storage and costs associated with preparing and filing motion materials.[142]

(ii) Bates Barristers

118. Bates Barristers has incurred disbursements of $2,211.79 plus applicable taxes of $246.18. Of the pre-tax amount, $2,191.69 was for travel expenses and $20.10 was for telephone expenses.[143]

(h) Anticipated Fees and Disbursements to be Incurred

119. Siskinds estimates that it will spend an additional 350 to 500 hours to complete the administration of the Settlement, if approved by this Court. This additional time will be spent to:

(a) prepare for and attend the approval hearing on December 9, 2024;

(b) assist in the dissemination of Second Notice;

(c) liaise with the Administrator to ensure the fair and efficient administration of the Settlement Agreement and Distribution Protocol, which Siskinds anticipates will occupy the bulk of its additional time; and

(d) respond to inquiries from Class Members and their lawyers, if applicable, regarding the Settlement Agreement and the Distribution Protocol.[144]

[141] Second Wright Affidavit at para 136, MR Tab 5, p 378.
[142] Second Wright Affidavit at para 137, MR Tab 5, p 378.
[143] Second Wright Affidavit at para 138, MR Tab 5, p 378.
[144] Second Wright Affidavit at para 139, MR Tab 5, p 379.

PART III – ISSUES AND LAW

120. The issues to be considered by this Honourable Court are approval of:

(a) the Settlement Agreement and the dismissal of the action without costs and with prejudice on the Effective Date of the Settlement Agreement;

(b) the form, content and method of disseminating Second Notice;

(c) the Distribution Protocol and the claims process;

(d) the appointment of Verita as Administrator;

(e) Class Counsel Fees and Class Counsel Disbursements;

(f) Mr. Westwood's honorarium request;

(g) an interim payment of the approved Funding Commission to the Funder; and

(h) the release of the Funder's Security.

A. Settlement Approval

121. The Defendants have agreed to pay $70.25 million to resolve the claims in the action. This is an excellent result for Class Members. It reflects a fair and reasonable compromise made by the Plaintiff on the recommendation of experienced and well-informed counsel uniquely positioned to evaluate the fairness and reasonableness of the Settlement Agreement.

122. The function of this Court is to examine the structure of the Settlement Agreement for indicia of collusion or a conflict of interest and determine whether it falls within a zone of reasonableness.[145]

[145] *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8; *Green v CIBC*, 2022 ONSC 373 at para 17.

There are no indicia of collusion or a conflict of interest here and the settlement is well within the zone of reasonableness. The Settlement Agreement ought to be approved.

(a) Settlement structure

123. It is appropriate and necessary for the Court to scrutinize the Settlement Agreement and supporting materials in search of "structural" indicators of collusion or conflicts of interest.[146] The Court should ask whether class counsel negotiated in the best interests of the class. The Court should guard against efforts to make a settlement seem larger than it is; undue expansion of class size; inappropriate protection of defendants from liability; and any measures that discourage objection to the settlement or fee request.[147] The Court is well-placed to identify structural features of settlements indicative of collusion or conflicts of interest in the negotiations and the agreement.

124. Broadly speaking, agreements that place a high value on non-monetary or conditional compensation,[148] contemplate a possible reversion of settlement funds to defendants without a concomitant reduction in class counsel's compensation,[149] make settlement approval contingent on fee approval,[150] and have optics that suggest the settlement is more favourable to class counsel than class members,[151] are examples of the types of features of which courts should be cautious.

---

[146] *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 8; *Robinson v Medtronic, Inc*, 2020 ONSC 1688 at para 65(i)-(ii).
[147] Howard M Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859 at 873, Condensed Book of Authorities ("**BoA**"), Tab 8.
[148] *Smith Estate v National Money Mart Co*, 2010 ONSC 1334 at para 95, varied in part *Smith Estate v National Money Mart Co*, 2011 ONCA 233; *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at footnote 10.
[149] Howard M Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859 at 892, BOA Tab 8.
[150] *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 85-86.
[151] *Smith Estate v National Money Mart Co*, 2010 ONSC 1334 at para 33, varied in part *Smith Estate National Money Mart Co*, 2011 ONCA 233.

125. Canadian courts have scrutinized these types of issues before. For example:

(a) in *Smith Estate v National Money Mart Co*, the proposed settlement was ostensibly valued at $120 million. Pursuant to that settlement, some class members were to receive debt forgiveness, while other class members were to receive "transaction credits." A cash payment of $30.5 million was to be made, but applied almost entirely to class counsel's fee first. In rejecting the settlement as proposed, the Court noted: "[c]lass counsel's fee takes up all the cash portion of this settlement, [and] Class Members who have repaid their loans to Money Mart will get no repayment of the allegedly illegal fees, which […] was the rallying point for the class action […] in the first place";[152]

(b) in *Bilodeau v Maple Leaf Foods Inc*, the proposed settlement included so-called "Enhanced Payments." In the event that there remained a residue following payment of all eligible claims, Enhanced Payments on a *pro rata* basis were to be made to claimants who experienced high levels of physical harm. If Enhanced Payments were made and there remained a residue, class counsel was permitted to apply for approval of further fees to be paid from that residue. If a balance remained thereafter, then *cy-près* payments would be made as agreed upon and approved by the court. Although the settlement was ultimately approved, it warranted particular scrutiny because of the risk that it arguably created incentives for class counsel not to maximize the distribution of notice and the settlement proceeds to the greatest number of claimants;[153]

(c) in *Garland v Enbridge Gas Distribution Inc*, a settlement term made the approval of the settlement conditional on payment of class counsel's fee. Justice Cullity declined to

[152] *Smith Estate v National Money Mart Co*, 2010 ONSC 1334 at para 94, varied in part *Smith Estate National Money Mart Co*, 2011 ONCA 233.
[153] *Bilodeau v Maple Leaf Foods Inc*, 2009 CanLII 10392.

approve the settlement, stating that such an arrangement created an inherent conflict of interest between class counsel's interests and those of the class they sought to represent;[154] and

(d) similarly, in *Brown v Canada (Attorney General)*, the approval of the settlement was conditional on the approval of class counsel's fee. Justice Belobaba refused to approve the fee request and accordingly was not able to approve the settlement. Linking legal fees to the settlement approval undermined class counsel's ability to give independent legal advice on the merits of the settlement.[155]

126. The type of structural features that indicate conflicts of interest are not present here:

(a) there are no non-monetary benefits. This is an all-cash settlement. Class Members will receive cash compensation distributed in accordance with the Distribution Protocol;

(b) approval of the Settlement Agreement is not conditional on fee approval. Siskinds is able to provide an independent recommendation on the merits of the Settlement Agreement;

(c) Siskinds and the Plaintiff have entered into the Retainer Agreement that incentivizes Siskinds to maximize overall recovery. Both the Class Members and Siskinds' interests were aligned through the course of the litigation; and

(d) there is no reversion. If any remainder exists after the Net Settlement Amount is distributed *pro rata* in accordance with the Settlement Agreement and the Distribution Protocol, then (a) a second distribution will occur if it is economical to do so, and (b) if it is uneconomical to do so, it will be distributed *cy-près*.

[154] *Garland v Enbridge Gas Distribution Inc*, 2006 CanLII 36243.
[155] *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 81, 85.

127. The settlement structure is fair and admits of none of the defects identified in the case law. Siskinds was incentivized to maximize recovery for the Class Members and did so.

(b) Zone of reasonableness

128. A court's scrutiny of a settlement is tempered by its recognition that the resolution need not be perfect. Rather, it must only fall within a range or "zone" of reasonableness.[156]

129. The zone of reasonableness assessment allows for variation between settlements depending upon the subject matter of the litigation and nature of the damages for which settlement provides compensation.[157] A less than perfect settlement may be in the best interests of those affected by it when considered in light of the risks and obligations associated with continued litigation.[158] The settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.[159] The Court should also take into account practical considerations such as future expense and likely duration of the litigation in assessing the reasonableness of the settlement.[160]

130. In settlements where counsel is in possession of significant factual information and knowledge of risks from interlocutory motions or other sources, "the supervising class action judge will be justified in assuming that class counsel had a complete or almost complete understanding of the risks and rewards of further litigation, and the court will be more comfortable relying on class counsel's recommendation that the settlement is indeed in the best interests of the class."[161]

---

[156] *Dabbs v Sun Life Assurance Co of Canada*, 1998 CanLII 14855; *Robinson v Medtronic, Inc*, 2020 ONSC 1688 at paras 64(iii)-(iv), 66; *Pinizzotto v TILT Holdings, Inc*, 2021 ONSC 8001 at para 54.
[157] *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 70, BOA Tab 4.
[158] *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647 at paras 25, 33; *Robinson v Medtronic, Inc*, 2020 ONSC 1688 at para 64(iv).
[159] *Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932 at para 80, BOA Tab 4.
[160] *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622 at para 22.
[161] *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670 at paras 5-10.

131. In *Clegg v HMQ Ontario* and *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, the Court catalogued features typical of settlements reached in the later stages of an action, which signalled that a settlement was fair, reasonable and in the best interests of the class.[162]

132. Although the discovery process was in the early stages in this case, many of those features are present:

(a) *comprehensive research and understanding of legal issues*: In preparing for mediation, arguing the hotly-contested certification motion, and litigating the Other 2018 Actions, as well as addressing issues relating to the *Frayce* Action and the *Aggarwal* Action, the Plaintiff gained significant insight into the legal and factual issues that would form the subject matter of the trial(s);[163]

(b) *receipt of highly relevant documents and information*: as catalogued in paragraph 41 above, the Plaintiff and Siskinds reviewed a wide range of documents and information, which were highly relevant to liability and assisted the Plaintiff in understanding the strength of his case;

(c) *expert analysis*: including (i) the expert opinion of Ermanno Pascutto filed by the Plaintiff in support of the certification motion, which discusses the history and rationale for the payment of trailing commissions to Discount Brokers; (ii) the report of the Plaintiff's expert Errol Soriano of KSV Advisory on damages prepared for mediation; and (iii) the two reports prepared for mediation by the Defendant's expert, KPMG, on damages and purported services provided by Discount Brokers.[164]

---

[162] *Clegg v HMQ Ontario*, 2016 ONSC 2662 at para 33. See also *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at para 13.
[163] Second Wright Affidavit at paras 27(e)-(l), (q)-(v), 36-57, 67-69, MR Tab 5, p 339-341, 343-349, 351-352.
[164] Second Wright Affidavit at paras 27(g), (r)-(s), 58-66, MR Tab 5, p 339-341, 349-351.

133. Siskinds' understanding of the factual and legal issues is mature. The resolution was informed by actual information about the risks and rewards of further litigation. The settlement was negotiated from a deep knowledge gained through the significant time and effort spent prosecuting the action leading to a fair and reasonable settlement in the best interests of the Class Members.

134. Litigation cannot be valued with a high degree of precision.[165] It is clear that the Settlement falls within a range of reasonableness and is in the best interests of the Class Members, taking into account, in addition to the hallmarks of fairness detailed above, the following key case-specific risks as described in detail at paragraphs 46 to 80 above:

(a) the risk that the trial court would find that TDAM had adequately disclosed the trailing commissions;

(b) the risk that the trial court would find that there was no misconduct or breach of duty;

(c) the risk that the trial court would accept that Discount Brokers had provided valuable services which justified the payment of trailing commissions;

(d) the risk that the claims of some or all Class Members would be found to be statute-barred;

(e) the risk that a consent and/or acquiescence defence would apply;

(f) the risk that the trial court would accept that the Class Members' claims were released;

(g) the risk that the Plaintiff would be unable to establish a misrepresentation;

(h) the risk with respect to the amount of damages that would be recoverable; and

(i) the risks arising from the *Aggarwal* Action.

[165] *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 at para 12.

135. The Settlement provides for a total payment of $70.25 million to resolve all claims against the Defendant in relation to the action. Siskinds was well apprised of the risks and rewards of continued litigation. The Settlement Agreement eliminates the downside risk of non-recovery or limited recovery and provides an immediate benefit to Class Members in exchange for the release of their claims. Siskinds respectfully recommends approval of the Settlement.

(c) Other factors support approval of the Settlement Agreement

136. The courts have articulated the following principles to be applied in considering the approval of the settlement of a class proceeding:

(a) the settlement of complex litigation is encouraged by courts and favoured by public policy;[166]

(b) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;[167]

(c) the court's role is to inquire whether the settlement secures an adequate advantage for the class members in the surrender of their litigation rights;[168]

(d) it is within the power of the court to indicate areas of concern and afford parties the opportunity to answer and address those concerns through, if necessary, changes to the agreement. However, a court's power to approve or reject a settlement agreement does not permit the court to modify its terms; and

[166] *Robinson v Medtronic, Inc*, 2020 ONSC 1688 at para 64(i), (iv).
[167] *Robinson v Medtronic, Inc*, 2020 ONSC 1688 at para 64(ii).
[168] *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at para 31(e), aff'd 2010 ONCA 841, leave to appeal to SCC denied 2011 CanLII 40927.

(e) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement, nor is it the court's function to litigate the merits of the action or simply rubber-stamp a proposed settlement.[169]

137. In sum, the Settlement Agreement is fair and reasonable under all of the circumstances. It is consistent with both the purpose and spirit of the *Class Proceedings Act*,[170] which encourages settlement after a reasonable investigation and careful consideration of the merits, costs and risks of continuing litigation.

B. Distribution Protocol

138. The Distribution Protocol should be approved as it provides for a plan of distribution of the Net Settlement Amount that is fair, reasonable and in the best interests of the Class Members.[171]

139. As described above, the Distribution Protocol provides for a *pro rata* distribution of the Net Settlement Amount by calculating each Authorized Claimant's Trailing Commissions Paid, which is done based on either Client Information for a Claimant provided by the Defendant, or a formula that applies a certain multiplier to the aggregate market value of all TD Mutual Funds held by the Claimant. This is consistent with the methodology that has been used to distribute settlement funds in other overcharge or fee misrepresentation class actions.[172]

140. By basing Class Members' entitlement to compensation from the Net Settlement Amount on Trailing Commissions Paid, the Distribution Protocol will distribute money to Class Members in a

---

[169] *Ford v F Hoffman-La Roche Ltd*, 2005 CanLII 8751 at paras 116, 127; *Robinson v Medtronic, Inc*, 2020 ONSC 1688 at para 64(v).
[170] The *Class Proceedings Act, 1992*, SO 1992, c 6 in force between June 22, 2006 and September 30, 2020 applies to the action. It is referred to herein as the "***Class Proceedings Act***".
[171] *Zaniewicz v Zungui Haixi Corporation*, 2013 ONSC 5490 at para 59.
[172] See e.g. *Mancinelli v Royal Bank of Canada*, 2018 ONSC 4192 at paras 32, 49-52; *Charette v Trinity Capital Corporation*, 2019 ONSC 3153 at paras 50, 78.

manner that tracks the losses alleged in the litigation. Dividing compensation amongst Class Members who make a claim based on their relative alleged losses is fair and reasonable.

141. In addition, key assumptions and limitations underpinning a Claimant's Trailing Commissions Paid are reasonable and fair:[173]

(a) ***The use of actual trailing commissions paid to calculate a Class Member's entitlement***: Actual trailing commissions paid will only be used where a Class Member's Client Information is provided to the Administrator by the Defendant;

(b) ***0.75% of the value of the TD Mutual Funds units held***: Information on the actual amount of the trailing commissions that the Defendant paid to the Class Member's Discount Broker on their TD Mutual Fund units is not readily available to Class Members. Their account statements and other records received from their Discount Broker will show their TD Mutual Fund units' value at different points in time.[174] Trailing commissions paid by TDAM to Discount Brokers on Class Members' behalf was based on a percentage of the value of their TD Mutual Fund holdings. That percentage varies depending on the series of the TD Mutual Fund held and the type of fund. The percentage rates generally range from 0.10% to 1.00%. The average percentage rate charged varied over time, including significantly in 2019 when the Defendant automatically converted Series A units (or their equivalents) to Series D, which is a reduced trailer series. To reduce complexity, increase efficiency and promote a user-friendly administration, an assumed trailer rate of 0.75% annually is applied in all situations

[173] Second Wright Affidavit at para 82, MR Tab 5, p 356-357; Submission from Questrade to Canadian Securities Administrators dated February 4, 2020, Ex E to Second Wright Affidavit, MR Tab 5E, p 473-477.
[174] Note those records may also show the aggregate compensation the Discount Broker received in the form of trailing commissions (at least after CRM2 reforms were implemented) but will not differentiate between the amount paid to the Discount Broker from TDAM on the TD Mutual Funds and the amounts paid on other mutual fund units.

where Trailing Commissions Paid are based on the value of a Claimant's TD Mutual Fund units;

(c) ***No compensation post-June 1, 2022***: The regulatory ban on the payment of trailing commissions to Discount Brokers went into effect on June 1, 2022. To the best of the Plaintiff's knowledge and belief, the Defendant stopped paying trailing commissions to Discount Brokers in compliance with the regulatory ban. As such, holdings after that date will not be eligible for compensation; and

(d) ***No compensation for Questrade holdings***: In January 2009, Questrade launched its "Mutual Fund Maximizer" program. Under that program, Questrade rebated trailing commissions to its customers less the administrative costs for managing the program. Accordingly, Questrade clients have no or minimal losses on the case theory advanced in the action.

142. If there is money remaining after one or more distributions to Authorized Claimants and it is uneconomical to do another distribution, the remainder will be distributed *cy-près*. The precedent for *cy-près* distribution is well established.[175] The Supreme Court has recognized that *cy-près* awards further the deterrence objective of class proceeding legislation.[176]

143. A number of lower-level decisions have also recognized that *cy-près* distributions further the objectives of the class proceeding legislation. By benefiting the class, at least indirectly, the *cy-près* distribution provides access to justice, and the expenditure at the expense of the defendant may provide some behaviour modification.[177] The Court in *Harper v American Medical Systems* similarly

[175] *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 at para 25.
[176] *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58.at paras 24-27.
[177] *Sorenson v easyhome Ltd*, 2013 ONSC 4017 at para 28.

held that "from a policy perspective, *cy-près* awards fulfill the compensatory and access to justice purposes of the *Class Proceedings Act, 1992*, and they also fulfill the behaviour modification policy goals of the *Act.*"[178]

144. The proposed *cy-près* recipient is the Osgoode Hall Law School Investor Protection Clinic ("**Osgoode IPC**"). It is a pro bono clinic that provides free legal advice to retail investors who cannot afford a lawyer. The Osgoode IPC also undertakes research to help regulators, policymakers and courts understand issues facing retail investors. It undertakes investor education initiatives and develops educational resources for retail investors. Any *cy-près* grant that goes to the Osgoode IPC will be used to support these initiatives.[179]

145. The Class Members in this action consist largely of do-it-yourself retail investors. This is the precise group that the Osgoode IPC tries to help through its various initiatives. Siskinds expects that services provided by the Osgoode IPC will benefit at least some Class Members as result. A *cy-près* distribution to the Osgoode IPC is consistent with the access to justice rationale underpinning the *Class Proceedings Act, 1992* because of the pro bono legal services it provides and its advocacy efforts on behalf of retail investors.[180]

C. Second Notice

146. A court must consider whether notice of settlement should be given pursuant to section 29(4) of the *Class Proceedings Act*.[181] The factors in considering the form and scope of the notice are set out in section 17 of the *Class Proceedings Act*. Relevant factors include the cost of giving notice, the nature of the relief sought, the size of the individual claims of the class members, the number of class

[178] *Harper v American Medical Systems Canada Inc*, 2019 ONSC 5723 at para 47.
[179] Second Wright Affidavit at para 84, MR Tab 5, p 359.
[180] Second Wright Affidavit at para 85, MR Tab 5, p 359.
[181] *Class Proceedings Act*, s 29(4).

members, and the places of residence of class members. The notice may be given by posting, advertising, or publishing.[182]

147. The parties have agreed on the form, content and method of disseminating Second Notice. It provides notice of the approval of the Settlement Agreement and the deadline to make a claim for compensation. Part 2 of the Plan of Notice will be disseminated as described in paragraph 37 above.

148. The notice proposed here is intelligible, informative and tailored to the circumstances of this case.

149. In addition to Part 2 of the Plan of Notice, the streamlined claims process will also bring the fact of the Settlement Agreement and the process for making a claim for compensation to the attention of a large number of Class Members. This creates a robust notice program. It is consistent with the manner of providing notice in similar cases. The Plan of Notice for disseminating Second Notice is the same as for the First Notice and is virtually identical to the method for disseminating notice of certification that was approved by Justice Belobaba on December 14, 2021.[183] The combination of direct and indirect methods of providing notice should cause the Second Notice to come to the attention of a significant portion of the Class.[184]

D. Appointment of Verita as Administrator

150. After soliciting bids from three experienced class action administrators and considering their experience, their respective bids and their ability to engage in the significant data management and processing this administration will entail, Siskinds believes it is in the best interests of Class Members to appoint Verita, formerly operated under the RicePoint brand, as Administrator to:[185]

[182] *Class Proceedings Act*, s 17(3)-(5).
[183] Order dated December 14, 2021, Ex C to First Wright Affidavit, MR Tab 6C, p 573.
[184] Second Wright Affidavit at para 22, MR Tab 5, p 337.
[185] Second Wright Affidavit at paras 86-87, MR Tab 5, p 359-360.

(a) facilitate dissemination of Second Notice;

(b) manage and process Client Information to calculate Class Members' entitlements under the Distribution Protocol;

(c) set up and manage the online claims portal;

(d) receive and review claims from Class Members; and

(e) administer the Settlement Amount in accordance with the Distribution Protocol and Settlement Agreement, subject to the Court's approval of both.

151. Verita, under the RicePoint brand, has been appointed as the claims administrator by courts in Ontario and other provinces on numerous occasions.[186]

152. Verita estimates that the cost to administer the settlement is in the range of $165,966 to $1,159,045 (not including notice costs or taxes). The range in estimated costs varies depending on the number of claims made (5,000 on the low end of the estimate and 100,000 on the high end), the extent to which correspondence (and in particular the letters sent for the streamlined claims process) is via email or regular mail, and the number of payments made via e-transfers versus cheques because cheques are more expensive to issue.[187] This estimate is within the range of estimated costs to administer class action settlements that have been approved as reasonable by this Court.[188]

153. The estimate does not account for processing and managing the Client Information that Verita will undertake if appointed. Verita has provided an estimate of $25,000 for that task. The actual cost could vary depending on the quality of the Client Information received.[189]

---

[186] Second Wright Affidavit at para 87, MR Tab 5, p 360; Bobanovic Affidavit at paras 7–12, MR Tab 4, p 300–303.
[187] Second Wright Affidavit at para 88, MR Tab 5, p 360.
[188] *Bernstein v Peoples Trust Company*, 2020 ONSC 5880 at paras 40, 76.
[189] Second Wright Affidavit at para 89, MR Tab 5, p 360.

154. Siskinds considers the costs of the administration proportionate and reasonable when considered in relation to the size of the settlement, the complexity of the settlement and the number of claims that will likely be processed. The projected cost is also consistent with the quotes received from other potential administrators.[190] Siskinds is confident in Verita's ability to undertake the notice program and claims administration effectively and efficiently, having regard to Verita's expertise and experience in executing notice programs and undertaking complex claims administrations.[191]

E. Approval of Class Counsel Fees and Class Counsel Disbursements

155. The request by Siskinds and Bates Barristers for fees of $17,920,000 (plus taxes) and disbursements of $299,627.99 (plus taxes) is made pursuant to the terms of the Retainer Agreement with the Plaintiff, which was carefully designed to provide the appropriate incentives while providing for a fair fee.

156. The fee appropriately reflects the recovery secured for Class Members, the serious risks inherent in hotly contested litigation of this nature, and the substantial investment of time and money made. The fee requested is consistent with past precedent. It is fair and reasonable and ought to be approved.

[190] Second Wright Affidavit at para 90, MR Tab 5, p 360.
[191] Second Wright Affidavit at para 91, MR Tab 5, p 361.

(a) The Retainer Agreement complies with the *Class Proceedings Act*

157. The *Class Proceedings Act* gives proposed representative plaintiffs the right to enter into contingent fee arrangements with putative class counsel.[192] Such agreements are not enforceable until they have received Court approval.[193] A retainer agreement is required to be in writing and must:

(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.[194]

158. The Retainer Agreement between Siskinds and the Plaintiff complies with these requirements and ought to be approved by the Court.[195]

(b) Percentage approach in the Retainer Agreement results in an appropriate fee

159. A percentage fee arrangement promotes the policy objective of judicial economy in that it encourages efficiency in the litigation and discourages unnecessary work that might otherwise be done simply to increase the lawyer's base fee.

160. In *Crown Bay*, Justice Winkler (as he then was) addressed the benefits of a percentage-based fee arrangement:

> A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending on the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this

[192] *Class Proceedings Act*, s 32(1).
[193] *Class Proceedings Act*, s 32(2).
[194] *Class Proceedings Act*, s 33.
[195] Retainer Agreement at paras 13-29, Westwood Affidavit, MR Tab 3A, p 291-294.

> court the settlement averted a seven to ten day trial. Fee arrangements that reward efficiency and results should not be discouraged.[196]

161. In *Vitapharm Canada Ltd v F Hoffman-La Roche Ltd*, Justice Cumming observed the benefits of percentage-based fee arrangements:

> Using a percentage-based calculation in determining class counsel fees "properly places the emphasis on the quality of representation, and the benefit conferred to the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours."[197]

162. In *Helm v Toronto Hydro*, Justice Strathy reasoned:

> The proposed fee represents a significant premium over what the fee would be based on time multiplied by standard hourly rates. Is that a reason to disallow it? If the settlement had only been achieved four years later, on the eve of trial, when over a million dollars in time had been expended, would the fee be any more or less appropriate? Should counsel not be rewarded for bringing this litigation to a timely and meritorious conclusion?[198]

163. Contingency fees induce the lawyer to maximize recovery for the client and are fair to the client because there is no pay without success.[199] They help to promote access to justice in that they allow counsel, not the client, to finance the litigation.[200]

164. The Retainer Agreement in this case provides for a 28% fee on the Amount Recovered, plus the recovery of disbursements and applicable taxes. The fee requested by Siskinds and Bates Barristers is lower than the percentage provided for in the Retainer Agreement. The amount requested equates to approximately 25.51% of the Settlement Amount.

165. Contingency fee retainer agreements in the range of 20% to 33% are very common in class proceedings and have been held to be presumptively valid, with the caveat that there may be an upper limit to the size of the fund to which a one-third contingency fee may presumptively be applied.[201]

---

[196] *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada*, 1998 CanLII 14842.
[197] *Ford v F Hoffmann-La Roche Ltd*, 2005 CarswellOnt 1094 at para 107, BOA Tab 1.
[198] *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602 at para 25.
[199] *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at para 64.
[200] *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 21.
[201] *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 11; *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at para 47.

The profession and the public have for years recognized that the system works and is fair. This approach works especially well for all-cash settlements, as is the case here. Compensating counsel through a percentage of recovery is "generally considered to reflect a fair allocation of risk and reward as between lawyer and client".[202]

166. In *Manulife*, Justice Belobaba accorded presumptive validity to a contingency fee arrangement of 22.5% on a settlement of $69 million.[203] In *MacDonald* and *Brown,* Justice Belobaba endorsed the presumptive validity of a contingency fee arrangement to a settlement below $100 million.[204] Consistent with that line of jurisprudence, the contingency fee provided for in the Retainer Agreement should be considered presumptively valid on the settlement of $70.25 million.

167. In this case, the Retainer Agreement aligns the interests of Siskinds with the Plaintiff and Class Members. It ensures compensation is within an appropriate range. Mr. Westwood has a full understanding of the fees sought and supports the request.[205] There is no reason to question the validity of the Retainer Agreement, and the fee sought pursuant to its terms should be approved.

(c) The fee request is fair and reasonable

168. In class proceedings, the court has "supervisory jurisdiction over the fees charged by class counsel."[206] The court is tasked to determine whether the fee requested is fair and reasonable.[207]

---

[202] *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at footnote 2; *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at paras 63-64.
[203] *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at para 24.
[204] *MacDonald et al v BMO Trust Company et al*, 2021 ONSC 3726 at para 21; *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at para 48. See the comment by the Court of Appeal in *Fresco v Canadian Imperial Bank of Commerce*, 2024 ONCA 628 at footnote 5.
[205] Westwood Affidavit at paras 22-28, MR Tab 3, p 285-287.
[206] *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 12.
[207] *Gagne v Silcorp Ltd*, 1998 CanLII 1584.

169. In *Smith Estate v National Money Mart Co*, the Ontario Court of Appeal confirmed the following as factors to be considered in assessing the fairness and reasonableness of requested fees:

(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 fees; and

(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[208]

170. Recently, courts have also considered the integrity of the profession as a relevant factor.[209]

171. The weight to be afforded to a particular factor varies from case-to-case but the results achieved and the risks undertaken by class counsel will typically be important factors.[210]

---

[208] *Smith Estate v National Money Mart Co*, 2011 ONCA 233 at paras 80-81; *Suzic v VIB Event Staffing*, 2022 ONSC 3837 at para 63.
[209] *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335 at paras 127-133, aff'd 2024 ONCA 628 at paras 101-102.
[210] *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at para 71; *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335 at para 82, aff'd 2024 ONCA 628 at paras 55-57.

(i) Factual and legal complexity

172. The factual and legal complexity of this case was high, including by virtue of the following factors (among others discussed herein):

(a) while there is an established body of trust and fiduciary law principles, those principles needed to be molded to the particular situation of the management of commercial trusts in the investment fund industry;

(b) the complexity that arises from assessing questions about misconduct and breach of duty, given the terms of the trust instruments and the relationship between the Defendant and Class Members;

(c) the complexity arising from the disclosure defence asserted by the Defendant, given that it fed into virtually all aspects of the pleaded claims and defences, including the Defendant's limitations and consent/acquiescence defences; and

(d) the existence of the *Frayce* Action and the *Aggarwal* Action (and the other 2022 Actions) created risks for the Plaintiff and the Class Members in terms of litigation outcomes, in addition to the complexity that it brought to the settlement discussions to resolve the action.

(ii) Risks assumed by counsel

173. In assessing the fairness and reasonableness of fees, courts consider the risk that counsel undertook in conducting the litigation, and the degree of success or result achieved.[211] Risk in this context is measured from the commencement of the action and not with the benefit of hindsight.[212]

[211] *Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962 at para 35; *Pinizzotto v TILT Holdings, Inc*, 2021 ONSC 8001 at para 71(x)-(xi).
[212] *Gagne v Silcorp Ltd*, 1998 CanLII 1584.

These risks are "the exposure to substantial personal liability for costs and the risk of receiving no compensation for the time and disbursements invested in the case."[213]

174. Ontario courts, including the Court of Appeal, have emphasized the need to provide a sufficient incentive to class counsel in light of risks undertaken when considering fee requests.[214] Defendants tend to be well resourced, engage large law firms, and employ a strategy of wearing down the opposition.[215] This is particularly true in litigation involving large sums of money where the large potential loss spurs greater litigation spending by the defendants.

175. Compensation in class proceedings must be sufficiently appealing to justify counsel's lost opportunity to take on paying clients and the years-long carrying costs of a case, especially when faced with well-funded defendants in high-stakes litigation.

176. The incentive to class counsel must also be large enough when assessed in the context of counsel's class action practice as a whole. Class counsel's assessment of risk-reward does not hinge on any one case, but the sum of successes and losses. As the Court has stated, "[o]ver a period of years, plaintiff-side class action firms will win cases and lose cases […] [t]he 'risk' that contingency lawyers face cannot be assessed case-by-case or one-off, but must be measured across a great many files. A 'large' contingency recovery in one case will offset the loss or losses in other cases."[216]

177. In the action, Siskinds and Bates Barristers carried the cost of its significant investment of time of $3,162,009.71 before taxes[217] and disbursements totaling $299,627.99 before taxes. They pursued the action knowing that doing so would be very expensive and resource intensive, all with

---

[213] *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at para 14.
[214] *Ainslie v Afexa Life Sciences Inc*, 2010 ONSC 4294 at para 44; *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at paras 12-13.
[215] *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at paras 65-66.
[216] *Ramdath v George Brown College of Applied Arts and Technology*, 2016 ONSC 3536 at FN 14.
[217] This is $2,345,501+$144,868.71+610,020+$61,620=$3,162,009.71. See Second Wright Affidavit at paras 122-123, 128(a), MR Tab 5, p 370, 375.

the real possibility of little or no recovery after trial. The fee awarded must justify the significant risk that they took on.

178. Although the Plaintiff eventually received adverse costs protection from the Funder, that agreement was not approved until June 20, 2019. Prior to that time, Siskinds and Bates Barristers indemnified the Plaintiff against adverse costs awards from the outset of the action in April of 2018. The Retainer Agreement provides for a specified reduction in the percentage contingency fee to reflect the fact that third-party litigation funding was obtained.[218]

179. This case was a large undertaking, as is evidenced by the length of time it took, the number of hours spent, the number of people involved, and the considerable amounts spent on disbursements. The fee request is amply justified.

(iii) Result achieved

180. The Settlement Agreement provides an immediate monetary benefit to Class Members in the amount of $70.25 million. This is an excellent result for the Class having regard to the particular risks of the case.

181. As described above, there were many ways the Plaintiff could lose in this case: they could fail to establish that there was any misconduct or breach of duty by the Defendant, the Defendants could have successfully relied on the disclosure defence, or damages could have been substantially limited due to the limitation period arguments and the *Aggarwal* Action.

182. Moreover, due to the position of the plaintiff in the *Aggarwal* Action, Siskinds and Bates Barristers agreed to reduce their fee request by $1.75 million from the maximum that could be made

[218] Retainer Agreement at para 19, Ex A to Westwood Affidavit, MR Tab 3A, p 292.

under the Retainer Agreement to facilitate the resolution of the action. This accrues to the benefit of the Class Members.

(iv) Skill and competence of counsel

183. Siskinds and Bates Barristers are experienced in litigating and resolving complex class action litigation. They diligently pursued the action and exercised skill and judgment to secure an excellent recovery.

(v) Class Members' expectations

184. The fee requested is consistent with prior cases and the Retainer Agreement, and thus within the range of what Class Members should reasonably expect in a resolution of this magnitude in an action of this complexity.

185. After notice of Siskinds' and Bates Barristers' fee request and the right to object to it being provided, no objection to the fee request has been received.[219] This is evidence that the fee request is consistent with Class Members' expectations.

(vi) The ability of the class to pay

186. Siskinds and Bates Barristers have delivered a cash fund from which their requested fee may be paid. The Class has the resources to pay the proposed fee.

(vii) The fee request is consistent with past precedent

187. Siskinds and Bates Barristers request a global fee of $17.92 million on a recovery of $70.25 million. This equates to approximately 25.51% of the Settlement Amount. This fee is consistent with the fees that courts have approved in the past.

[219] Second Wright Affidavit at para 23, MR Tab 5, p 337.

188. Courts have frequently approved contingency fee retainer agreements between 25% to 33%,[220] as "it is only through a robust contingency fee system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice."[221] The fee requested in this case is at the low end of that range.

189. The fee request compares favourably with that made in *Eidoo v Infineon Technologies AG*, where this Court approved $24 million in counsel fees on an $80 million recovery (a contingency of 30%) plus an additional $1 million in disbursements.[222]

190. The requested fee is also broadly consistent with fees that have been approved in other large settlement cases:

(a) in *Canadian Imperial Bank of Commerce v Deloitte & Touche*, an aggregate of legal fees and disbursements representing 22.2% of a $121.896 million settlement was approved;[223]

(b) in *Ironworkers Ontario Pension Fund v Manulife Financial*, the Court approved a contingency fee of 22.5% plus disbursements and taxes on a settlement of $69 million where a third party indemnification agreement was in place. The indemnification agreement resulted

[220] See e.g. *Abdulrahim v Air France*, 2011 ONSC 512; *Robertson v ProQuest Information & Learning Co*, 2011 ONSC 2629; *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752; *Pichette v Toronto Hydro*, 2010 ONSC 4060; *Robertson v Thomson Canada Ltd*, 2009 CarswellOnt 3660, BOA Tab 5; *Martin v Barrett*, 2008 CarswellOnt 3151, BOA Tab 3; *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532; *Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752; *Urlin Rent a Car Ltd v Furukawa Electric Co*, 2016 ONSC 7965; *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537.

[221] *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537 at para 19.

[222] *Eidoo v Infineon Technologies AG*, 2016 ONSC 3628 at para 2. The Supreme Court of British Columbia (*Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2016 BCSC 964 at para 8) and the Superior Court of Québec (*Option Consommateurs v Infineon Technologies AG*, 2016 QCCS 2454) also approved the fee request.

[223] *Canadian Imperial Bank of Commerce v Deloitte & Touche*, 2017 ONSC 5000 at paras 24, 34.

in an additional 7% being paid from the Ontario settlement, after the deduction of fees, disbursements and administrative expenses;[224]

(c) in *Cassano v Toronto Dominion Bank*, counsel's requested contingency fee of 20% plus disbursements on a $55 million settlement was approved;[225]

(d) in *Quenneville v Volkswagen*, fees of $26 million plus disbursements of approximately $1 million and taxes of $3.5 million were approved with respect to a large settlement reached in the early stages of the litigation;[226] and

(e) in *Slark (Litigation Guardian of) v Ontario*, the Court approved a contingency fee of 20.68% plus disbursements of $1.6 million and taxes of $1.78 million on a $67.7 million settlement where disbursement funding and indemnification for adverse costs was received from the Law Foundation of Ontario. The Law Foundation funding resulted in an additional 10% levy being paid out of the settlement funds after the deduction of legal fees, disbursements and administrative expenses.[227]

(viii) Integrity of the profession

191. In *Fresco*, Justice Perell found that the analysis of whether a fee undermined the integrity of the profession ought to focus on whether the fee is champertous.[228] In *McIntyre Estate v Ontario (Attorney General)*, the Ontario Court of Appeal said that a fee is champertous where it "compensates a lawyer such that it is unreasonable or unfair to the client" to the extent it takes advantage of the client.

---

[224] *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at paras 26-27, 29.
[225] *Cassano v Toronto-Dominion Bank*, 2009 CanLII 35732 at paras 50, 63.
[226] *Quenneville v Volkswagen*, 2017 ONSC 3594 at paras 3, 6.
[227] *Slark (Litigation guardian of) v Ontario*, 2014 ONSC 1283 at paras 4, 15-17.
[228] *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335 at para 129, aff'd 2024 ONCA 628 at para 84.

192. Champerty concerns do not exist here. The fee request, as explained in more detail above, appropriately compensates Siskinds and Bates Barristers for the risks undertaken and the results achieved after years of hard-fought litigation. If they had not undertaken those risks, there would have been no recovery for the Class Members. The Plaintiff is fully aware of the fee request and supports it. The fee is consistent with the range of contingency fees frequently approved in Ontario for settlements of this size.

(d) Multiplier cross-check confirms the reasonableness of the fee request

193. Although a percentage approach is the preferred methodology for assessing a fee request, some courts find it useful to cross-check the reasonableness of the fee request based on a multiplier of counsel's docketed time. The multiplier approach, like a percentage fee, is designed to reward class counsel for bearing the risks of the litigation and as a reward for the success attained.[229]

194. To date, counsel has docketed time of $3,162,009.71 before taxes.[230] This results in a multiplier of 5.67.[231] This does not account for the considerable work that remains to be done by Siskinds to bring the action to a conclusion.

[229] *Gagne v Silcorp Ltd*, 1998 CanLII 1584.
[230] This is $2,345,501+$144,868.71+610,020+$61,620=$3,162,009.71. See: Second Wright Affidavit at paras 122-123, 128(a), MR Tab 5, p 370, 375.
[231] $17,920,000 / $3,162,009.71 = 5.67.

195. The multiplier in this case confirms the reasonableness of the fee requested. It is consistent with past fee awards. Canadian courts have approved multipliers in a similar range in a number of cases across a range of settlement values, including:

Decision	Multiplier	Recovery
Brown v Canada (Attorney General)[232]	*Brown*: 4 *Riddle:* 1.5	$550,000,000
Hislop v Canada (Attorney General)[233]	4.8	Est. $81,000,000
Cassano v Toronto-Dominion Bank[234]	5.5	$55,000,000
Pichette v Toronto Hydro[235]	4.42	$17,037,500
Endean v The Canadian Red Cross Society; Mitchell v CRCS[236]	Transfused Group: 3.75 Haemophilic Group: 5.5	$352,000,000 $16,533,000
Shaver v British Columbia[237]	3.7-4.25	$5,572,953.33
McClean v Canada[238]	5.2	Est. $2,000,000,000

(e) The agreement between Siskinds and Bates Barristers should be approved

196. In January 2018, Siskinds and Bates Barristers agreed to work together to litigate the action as co-counsel, share the risk of the litigation, and share any fees that may be awarded in the event of success.[239]

[232] *Brown v Canada (Attorney General)*, 2018 ONSC 3429 at paras 71, 77.
[233] *Hislop v Canada (Attorney General)*, 2004 CarswellOnt 1785 at para 26, BOA Tab 2.
[234] *Cassano v Toronto-Dominion Bank*, 2009 CanLII 35732 at paras 59-63.
[235] *Pichette v Toronto Hydro*, 2010 ONSC 4060 at paras 31-33.
[236] *Endean v The Canadian Red Cross Society; Mitchell v CRCS*, 2000 BCSC 971 at paras 74, 89, 100-101.
[237] *Shaver v British Columbia*, 2018 BCSC 2539 at paras 26-30.
[238] *McLean v Canada*, 2019 FC 1077 at paras 36, 61.
[239] Second Wright Affidavit at para 93, MR Tab 5, p 361.

197. In April 2020, Bates Barristers resigned as counsel for the Class. In May 2020, Siskinds served a Notice of Change of Lawyer. At the time of Bates Barristers' resignation in April 2020, Siskinds and Bates Barristers reached an agreement on, among other things, the allocation of any counsel fees that may be awarded in the action, which preserved the allocation set out in the January 2018 agreement between Siskinds and Bates Barristers.[240]

198. Prior to the resignation, Bates Barristers played an important role in the advancement of this action, including involvement in the development of the case theory underpinning the action, the preparation of the pleading, the preparation of evidence for the certification motion, cross-examinations on the affidavits filed on the certification motion (including Mr. Bates conducting the cross-examination of the Defendant's deponent, Huck Oon, on his affidavit), the preparation of written submissions on the certification motion, making oral submissions at the hearing of the certification motion in January 2020.[241] Through those efforts, the action was successfully certified in February 2020.[242]

199. The April 2020 agreement between Siskinds and Bates Barristers was amended and restated in March 2024 ("**2024 Agreement**").[243] As part of the 2024 Agreement, Bates Barristers agreed to reduce its percentage entitlement compared to the earlier agreement. This compromise facilitated the breaking of the impasse in the settlement discussions,[244] as discussed in paragraph 88 above.

[240] Second Wright Affidavit at para 94, MR Tab 5, p 361.
[241] Second Wright Affidavit at paras 96-97, 120, MR Tab 5, p 362.
[242] *Stenzler v TD Asset Management Inc*, 2020 ONSC 111.
[243] Second Wright Affidavit at para 95, MR Tab 5, p 361; Amended and Restated Agreement Regarding Trailers Actions dated March 8, 2024 at para 5, Ex F to Second Wright Affidavit, MR Tab 5F, p 480.
[244] Second Wright Affidavit at para 102, MR Tab 5, p 360.

200. Consistent with the jurisprudence,[245] the Plaintiff has disclosed the Amended and Restated Agreement and produced a copy of it,[246] and is seeking its approval by the Court.

201. At the time that the 2024 Agreement was reached, approximately six years into the litigation, Siskinds and Bates Barristers were well-placed to assess what was a fair and reasonable allocation of any fees awarded as between them for their efforts and the risks they took on. The 2024 Agreement explicitly states that the allocation reflected in the agreement "is intended to represent a reasonable *quantum meruit* fee payment to Bates for cooperation and assistance provided to Siskinds in the development and conduct of the Class Actions", which include this action.[247]

202. The "cooperation and assistance provided to Siskinds in the development and conduct" of this action includes the direct role played by Bates Barristers prior to its resignation,[248] which entailed Bates Barristers devoting 508.35 hours (valued at $610,020 pre-tax) specifically to this action, and 359.45 hours (valued at $431,340 pre-tax) partially for the benefit of this action.[249] It also encompasses Bates Barristers' willingness to absorb most of the counsel fee reduction that facilitated the breaking of the impasse in the settlement discussions.[250]

(f) The disbursement request is fair and reasonable

203. The disbursements incurred by Siskinds and Bates Barristers were necessary for the successful litigation of the action.[251] The most significant expense relates to expert fees. It is not unusual for

[245] *Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275, 2015 ONSC 7411, var'd 2016 ONCA 896; *Persaud v Talon International Inc*, 2022 ONSC 6359.
[246] Amended and Restated Agreement Regarding Trailers Actions dated March 8, 2024, Ex F to Second Wright Affidavit, MR Tab 5F, p 479-482.
[247] Second Wright Affidavit at para 96, MR Tab 5, p 362; Amended and Restated Agreement Regarding Trailers Actions dated March 8, 2024 at para 5, Ex F to Second Wright Affidavit, MR Tab 5F, p 480.
[248] Second Wright Affidavit at paras 96-97, 120, MR Tab 5, p 362.
[249] Second Wright Affidavit at paras 126-128, MR Tab 5, p 374-375.
[250] Second Wright Affidavit at paras 101-102, MR Tab 5, p 363.
[251] Second Wright Affidavit at para 131-137, MR Tab 5, p 377-378.

courts to approve expert fees in the hundreds of thousands of dollars where there are relatively few experts available, and the experts are required to research and gain an in-depth knowledge of the market at issue.[252] The disbursements requested pursuant to the terms of the Retainer Agreement are fair and reasonable and ought to be approved.

204. Under the Retainer Agreement, Siskinds is also entitled to claim interest on disbursements incurred. Consistent with the *Class Proceedings Act*, the interest is to be calculated based on the total at the end of each six-month period and shall accrue at the post-judgment interest rate set by the Ministry of the Attorney General under the *Courts of Justice Act* and *Publication of Postjudgment and Prejudgment Interest Rates* regulation.[253] Siskinds is forgoing interest on disbursements for the benefit of the Class.

(g) Ongoing work

205. Significant work remains to be done. Siskinds will remain actively involved in the implementation of the Settlement. Siskinds estimates that it will accrue approximately 350-500 hours in additional time before the work on the action is completed.[254]

F. Honorarium

206. Siskinds requests that $10,000 by allocated to the Plaintiff, Mr. Westwood, as an honorarium.

---

[252] *Ironworkers Ontario Pension Fund v Manulife Financial*, 2017 ONSC 2669 at para 25 and FN 18 (disbursements of $2.3 million, largely for the work of experts, were approved); *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc*, 2018 ONSC 6447 at paras 60, 74-77 (disbursements of $2,393,423.69 were approved).
[253] Second Wright Affidavit at para 103, MR Tab 5, p 363; *Class Proceedings Act*, s 33(7)(c).
[254] Second Wright Affidavit at para 139, MR Tab 5, p 379.

207. On the current state of the law, exceptional circumstances should exist to justify the award of an honorarium to a representative plaintiff.[255] The award of an honorarium and its quantum are in the discretion of the Court.

208. The payment of an honorarium to Mr. Westwood is justified. Since his appointment as representative plaintiff, Mr. Westwood has played an active role in the litigation and has taken seriously his role to protect and advance the interests of the Class Members. He was an engaged participant in the process of negotiating the Settlement. Mr. Westwood reviewed and provided comments on the mediation briefs that were exchanged. He virtually attended a mediation on May 3, 2023. Mr. Westwood engaged in detailed discussions and correspondence with Siskinds about the ongoing negotiations and how different offers would impact the recovery of Class Members. Mr. Westwood carefully considered Siskinds' recommendations and provided instructions in the best interests of the Class.[256] He even independently prepared and provided a financial evaluation of the monetary range for settlement negotiations,[257] which was a way of testing the analyses prepared by Siskinds. He brought an objective and independent eye to the assessment of the settlement value.

209. Mr. Westwood has also subjected himself to greater scrutiny than other Class Members in taking on the role of representative plaintiff on behalf of Class Members. There was a serious risk that without a representative plaintiff to represent the Class, the action could have stalled. Mr. Westwood stepped up to fill the gap created by the departure of the previous representative plaintiff. In doing so, he ensured that the action would continue, ultimately leading to the successful resolution achieved for Class Members.[258]

---

[255] *Doucet v The Royal Winnipeg Ballet*, 2023 ONSC 2323 at para 92; *Fresco v Canadian Imperial Bank of Commerce*, 2024 ONCA 628 at para 110.
[256] Second Wright Affidavit at para 142, MR Tab 5, p 379; Westwood Affidavit at paras 8-10, MR Tab 3, p 282-284.
[257] Westwood Affidavit at para 9(e), MR Tab 3, p 283.
[258] Second Wright Affidavit at para 143, MR Tab 5, p 380; Westwood Affidavit at paras 5-6, MR Tab 3, p 282.

210. Mr. Westwood has secured a large pool of cash for the benefit of the Class Members. There is a very sizeable group of investors who stand to benefit from this accomplishment. Mr. Westwood's individual entitlement out of the settlement pool is likely to be modest given the number of Class Members. In the circumstances, it is appropriate to recognize Mr. Westwood's efforts in securing the recovery for the Class Members.

211. The results of this Settlement are excellent, and the honorarium requested is consistent with amounts granted for representative plaintiffs that have exerted similar efforts and achieved similar results, both before and after *Doucet* was decided.[259]

212. In view of the settlement result and the hard-fought negotiation process, the honorarium would not create a conflict of interest or an appearance of a conflict of interest.

G. Interim funding commission

213. Justice Belobaba previously approved the Funding Agreement, which sets out the commission payable to the Funder. Under the terms of the Funding Agreement, the "Commission" payable to the Funder is 7% of the "Net Resolution Sum", which is defined as the "Resolution Sum" less "(i) Lawyers' fees and disbursements, including HST; and (ii) Administration Expenses".[260]

214. The "Administration Expenses" are all fees, disbursements, expenses, costs and taxes and other amounts incurred or payable relating to implementation of the settlement. That amount cannot be quantified with certainty until the conclusion of the administration of the Settlement Agreement, and as such the final amount of the "Commission" payable to the Funder cannot be determined until

[259] See *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc*, 2018 ONSC 6447 at paras 51-52, 73; *Dufault v The Toronto-Dominion Bank*, 2024 ONSC 961 at para 51; *Somwar v Fly Jamaica Airways Ltd*, 2024 ONSC 209 at paras 7, 16, 32; *Relvas v Auxly Cannabis Group Inc*, 2023 ONSC 6394 at paras 15-18, 29.

[260] Second Wright Affidavit at paras 145, 147, MR Tab 5, p 380; Funding Agreement at s 1.1(f), (n), Ex H to Second Wright Affidavit, MR Tab 5H, p 490, 491.

the conclusion of the administration.[261] The amount of interest that accrues on the Settlement Amount will also be determined at the conclusion of the administration.

215. The Plaintiff requests that part of the Commission be paid now in the amount of $3,250,000. This interim amount is approximately 93.13% of the Funder's estimated full entitlement. The remainder of the Commission will be paid at the conclusion of the administration, when the final Administration Expenses and other items are known.[262]

216. It can take more than a year after settlement is approved for funds to be distributed to settlement claimants. An interim payment is fair to the Funder, which has carried the risk of adverse costs through most of the period of the litigation. That financial support has contributed to the successful resolution of the litigation. An interim payment to the Funder will encourage the participation of third-party financing in future cases, which in turn will facilitate access to justice. The approach of making an interim payment to the litigation funder has been followed in a number of cases.[263]

H. Release of the Funder's Security

217. The Funder has paid $400,000 into court by electronic funds transfer to the Accountant of the Superior Court of Justice as security for costs in the action pursuant to the Funding Order.[264] The Plaintiff requests an order that the security be released to the Funder forthwith after the Effective Date

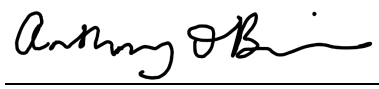
[261] Second Wright Affidavit at para 148, MR Tab 5, p 380-381; Funding Agreement at s 1.1(a), Ex H to Second Wright Affidavit, MR Tab 5H, p 489.
[262] Second Wright Affidavit at paras 149-151, MR Tab 5, p 381-382.
[263] *Rooney et al v ArcelorMittal SA et al*, Order dated September 19, 2019 at para 5, BOA Tab 6; *Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669 at paras 26-28; *Dyck v 0799714 BC Ltd et al*, Order dated October 3, 2023 at para 4, BOA Tab 7.
[264] Second Wright Affidavit at paras 153-154, MR Tab 5, p 382; Statement of Account dated as of October 31, 2024, Ex I to Second Wright Affidavit, MR Tab 5I, p 501-505.

of the Settlement Agreement. At that time, the action will be at an end and the rationale for the Funder posting security for costs related to the action will no longer exist.

PART IV – ORDERS REQUESTED

218. The Plaintiff respectfully requests that the Court grant the Dismiss Order, the Distribution Order, and the Fees, Honorarium and Funding Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 29TH DAY OF NOVEMBER, 2024.



Siskinds LLP, *Lawyers for the Plaintiff*

SCHEDULE "A" – AUTHORITIES

Case Law	
1.	*Abdulrahim v Air France*, 2011 ONSC 512
2.	*AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532
3.	*AIC Limited v Fischer*, 2013 SCC 69
4.	*Ainslie v Afexa Life Sciences Inc*, 2010 ONSC 4294
5.	*Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105
6.	*Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275
7.	*Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7411
8.	*Bancroft-Snell v Visa Canada Corporation*, 2016 ONCA 896
9.	*Barker v Barker*, 2022 ONCA 567
10.	*Berg v Canadian Hockey League*, 2024 ONSC 1573
11.	*Bernstein v Peoples Trust Company*, 2020 ONSC 5880
12.	*Bilodeau v Maple Leaf Foods Inc*, 2009 CanLII 10392
13.	*Brown v Canada (Attorney General)*, 2018 ONSC 3429
14.	*Canadian Imperial Bank of Commerce v Deloitte & Touche*, 2017 ONSC 5000
15.	*Cannon v Funds for Canada Foundation*, 2013 ONSC 7686
16.	*Cannon v Funds for Canada Foundation*, 2017 ONSC 2670
17.	*Cassano v Toronto-Dominion Bank*, 2009 CanLII 35732
18.	*Charette v Trinity Capital Corporation*, 2019 ONSC 3153
19.	*Ciardullo v 1832 Asset Management LP*, 2023 ONSC 4466
20.	*Clegg v HMQ Ontario*, 2016 ONSC 2662
21.	*Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada*, 1998 CanLII 14842
22.	*Doucet v The Royal Winnipeg Ballet*, 2023 ONSC 2323
23.	*Dufault v The Toronto-Dominion Bank*, 2024 ONSC 961
24.	*Eidoo v Infineon Technologies AG*, 2016 ONSC 3628

25.	*Endean v The Canadian Red Cross Society; Mitchell v CRCS*, 2000 BCSC 971
26.	*Fischer v IG Investment*, 2010 ONSC 296
27.	*Ford v F Hoffman-La Roche Ltd*, 2005 CanLII 8751
28.	*Ford v F Hoffmann-La Roche Ltd*, 2005 CarswellOnt 1094
29.	*Frayce v BMO InvestorLine Inc*, 2023 ONSC 16
30.	*Frayce v BMO InvestorLine Inc*, 2024 ONSC 533
31.	*Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335
32.	*Fresco v Canadian Imperial Bank of Commerce*, 2024 ONCA 628
33.	*Gagne v Silcorp Ltd*, 1998 CanLII 1584
34.	*Garland v Enbridge Gas Distribution Inc*, 2006 CanLII 36243
35.	*Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829
36.	*Haase v Reliq Health Technologies Inc*, 2022 BCSC 1754
37.	*Harper v American Medical Systems Canada Inc*, 2019 ONSC 5723
38.	*Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602
39.	*Hislop v Canada (Attorney General)*, 2004 CarswellOnt 1785
40.	*Ironworkers Ontario Pension Fund v Manulife Financial Corp*, 2017 ONSC 2669
41.	*Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532
42.	*Majestic Asset Management c Banque Toronto-Dominion*, 2024 QCCS 225
43.	*Mancinelli v Royal Bank of Canada*, 2018 ONSC 4192
44.	*Martin v Barrett*, 2008 CarswellOnt 3151
45.	*McIntyre Estate v Ontario (Attorney General)*, 2002 CanLII 45046
46.	*McLean v Canada*, 2019 FC 1077
47.	*Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537
48.	*Option Consommateurs v Infineon Technologies AG*, 2016 QCCS 2454
49.	*Osmun v Cadbury Adams Canada Inc*, 2010 ONCA 841
50.	*Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643
51.	*Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752

52.	*Osmun v Cadbury Adams Canada Inc*, 2011 CanLII 40927
53.	*Parsons v Canadian Red Cross Society*, 1999 CarswellOnt 2932
54.	*Persaud v Talon International Inc*, 2022 ONSC 6359
55.	*Pichette v Toronto Hydro*, 2010 ONSC 4060
56.	*Pinizzotto v TILT Holdings, Inc*, 2021 ONSC 8001
57.	*Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2016 BCSC 964
58.	*Quenneville v Volkswagen*, 2017 ONSC 3594
59.	*Rahimi v SouthGobi Resources*, 2015 ONSC 5948
60.	*Rahimi v SouthGobi Resources*, 2017 ONCA 719
61.	*Rahimi v SouthGobi Resources*, 2018 CanLII 48396
62.	*Ramdath v George Brown College of Applied Arts and Technology*, 2016 ONSC 3536
63.	*Robertson v Thomson Canada Ltd*, 2009 CarswellOnt 3660
64.	*Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647
65.	*Robinson v Medtronic, Inc*, 2020 ONSC 1688
66.	*Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752
67.	*Royal Bank of Canada v Fogler, Rubinoff*, 1991 CanLII 7071
68.	*Sayers v Shaw Cablesystems Ltd*, 2011 ONSC 962
69.	*Shaver v British Columbia*, 2018 BCSC 2539
70.	*Slark (Litigation guardian of) v Ontario*, 2014 ONSC 1283
71.	*Smith Estate v National Money Mart Co*, 2010 ONSC 1334
72.	*Smith Estate v National Money Mart Co*, 2011 ONCA 233
73.	*Sorenson v easyhome Ltd*, 2013 ONSC 4017
74.	*Stenzler v TD Asset Management Inc*, 2020 ONSC 111
75.	*Stenzler v TD Asset Management Inc*, 2020 ONSC 5987
76.	*Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58
77.	*Suzic v VIB Event Staffing*, 2022 ONSC 3837
78.	*Swisscanto v BlackBerry*, 2015 ONSC 6434

79.	*Swisscanto v BlackBerry*, 2016 ONSC 534
80.	*The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc*, 2018 ONSC 6447
81.	*Turpin v TD Asset Management Inc*, 2022 BCSC 1083
82.	*Urlin Rent a Car Ltd v Furukawa Electric Co*, 2016 ONSC 7965
83.	*Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622
84.	*Zaniewicz v Zungui Haixi Corporation*, 2013 ONSC 5490
Law Journals and Articles	
85.	Howard M Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2016) 92 Notre Dame L Rev 859

SCHEDULE "B" – LEGISLATION

***Securities Act*, RSO 1990, c S.5**

Limitation periods

138 Unless otherwise provided in this Act, no action shall be commenced to enforce a right created by this Part more than,

(a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or

(b) in the case of any action, other than an action for rescission, the earlier of,

(i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or

(ii) three years after the date of the transaction that gave rise to the cause of action. R.S.O. 1990, c. S.5, s. 138.

The *Class Proceedings Act, 1992*, SO 1992, c 6

s 17(3)-(5).

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the places of residence of class members; and

(f) any other relevant matter. 1992, c. 6, s. 17 (3).

Class Proceedings Act, s 29(4).

Notice: dismissal, discontinuance, abandonment or settlement

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

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

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

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

Fees and disbursements

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

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

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

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

Court to approve agreements

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

Agreements for payment only in the event of success

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

Interpretation: success in a proceeding

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

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

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

Definitions

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

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

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

Agreements to increase fees by a multiplier

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

Motion to increase fee by a multiplier

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

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

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

Idem

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

Idem

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

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

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

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

Idem

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

Idem

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

CONSOLIDATED FACTUM OF THE PLAINTIFF (1) MOTION FOR DISMISS ORDER AND DISTRIBUTION ORDER (2) MOTION FOR FEES, HONORARIUM AND FUNDING ORDER

Siskinds LLP
Barristers & Solicitors
275 Dundas Street, Unit 1
P.O. Box 2520
London, ON N6B 3L1

Michael G. Robb (LSO#: 45787G)
Garett Hunter (LSO#: 71800D)
Gigi Pao (LSO#: 80151M)
Tel: 519.660.2121
Fax: 519.672.6065

65 Queen Street West, Suite 1155
Toronto, ON M5H 2M53

Anthony O'Brien (LSO#: 56129U)
Tel: 416.594.4394
Fax: 519.672.6065

Lawyers for the Plaintiff