CITATION: MacDonald et al v. BMO Trust Company et al, 2021 ONSC 3726
COURT FILE NO.: 06-CV-316213 CP
DATE: 20210617

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMES RICHARD MACDONALD, LYNN D. ZOPPAS, JOHN A. ZOPPAS and MICHAEL HALASZ

Plaintiffs

- and -

BMO TRUST COMPANY, BMO NESBITT BURNS INC. and BMO INVESTORLINE INC.

Defendants

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *Michael Eizenga, Odette Soriano, Linda Rothstein, Jeffrey Larry, Paul Davis and Douglas Montgomery* for the Plaintiffs

Peter Griffin and Jonathan Chen for the Defendants

HEARD: May 12, 2021 via Zoom video and subsequent written submissions

Settlement and Legal Fees Approval

[1] This class action about hidden foreign exchange fees on currency conversions in registered accounts has settled for $100 million. The plaintiffs seek judicial approval of the settlement agreement, class counsel's legal fees based on the 25 per cent contingent fee retainer and the payment of significant honoraria to the representative plaintiffs.

[2] For the reasons that follow, I approve the settlement agreement and the requested honoraria. I also approve a generous legal fees award but not on the basis of a straight-line application of a contingent fee percentage. In a large recovery or "mega" settlement

such as we have here, the legal fees approved must take into account not only the risks incurred and results achieved but also the need to maintain the integrity of the legal profession.

Background

[3] The proposed class action against the BMO defendants for failing to disclose its foreign exchange mark-up in RRSP and other registered accounts was filed in 2006. The action was certified as a class proceeding seven years later in 2013.[1]

[4] The parties' motion for summary judgment on the common issues was heard and decided in 2020.[2] On the liability issues, I found that the BMO defendants were liable to the class over the 10-year class period for breach of trust, breach of fiduciary duty and breach of contract, and concluded that the appropriate remedy for the defendants' wrongdoing was an accounting and disgorgement of profits.[3]

[5] On damages, counsel agreed that the total amount of the impugned mark-up (excluding interest) was $102.9 million. Two issues had to be decided: (i) the profits realized on this amount after the deduction of 'reasonable and necessary expenses' and (ii) the appropriate "time value of money" or PJI amount.

[6] The defendants and their experts argued at the summary judgment motion that after the deduction of all reasonable and necessary expenses, the profit on the $102.9 million was about $38 million. Adding a simple PJI rate, the damages award would be about $52 million. The plaintiffs and their experts pushed for a much larger recovery based on an elevated measure of the time value of money. The class sought disgorgement of $420 million (based on the bank's internal rate of return) or $210 million (based on a typical rate of return on a balanced portfolio). If the court concluded that a simple PJI rate as prescribed by the *Courts of Justice Act* [4] was more appropriate, then the amount requested by class counsel was approximately $148 million.

[7] In the summary judgment decision, I directed that the 'reasonable and necessary expenses' (and hence the determination of the profits) would be decided on a reference

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[1] *MacDonald v BMO Trust.* 2012 ONSC 759.

[2] *MacDonald et al v. BMO Trust Company et al,* 2020 ONSC 93.

[3] *Ibid.,* at paras. 102-103.

[4] *Courts of Justice Act,* R.S.O. 1990, c. C.43.

and I concluded that the appropriate PJI rate would be the simple interest rate as set out in the legislation. I said this in my reasons for decision:

> The core finding is that the defendants' failure to disclose the amount of the markup fee charged on the foreign exchange conversions and the unauthorized self-payment are a breach of trust and fiduciary duty. The most appropriate remedy is an equitable accounting of the profits that were realized on the $102.9 million in undisclosed markup fees. There is no basis for an elevated interest award.
>
> The said profits, as well as the precise PJI amount, will be determined on the reference that will be conducted as soon as convenient. [5]

[8] Both sides filed notices of appeal. The defendants appealed primarily on the liability findings and the plaintiffs appealed on the time value of money issues and my "simple rate of interest" decision. Counsel on both sides, however, agreed to defer the appeals and first complete the reference as scheduled. Additional expert reports and factums were filed by both sides. The calculations in this additional material proceeded on the basis of my finding that a simple (and not elevated) PJI rate would be used. As class counsel explained in an affidavit filed on this motion for settlement approval:

> In terms of quantum, the defendants' position on the reference had not changed materially from summary judgment. They advanced a profit number of $37.6 million which, together with simple interest of 3.8% as per the *Courts of Justice Act*, resulted in a total of $52.4 million.
>
> The evidence of the class was that the defendants' profits were between $62 million and $97.8 million after accounting for the statute-barred amounts. Adding prejudgment interest under the *Courts of Justice Act*, the total recovery for the class would be between approximately $100 million and $145 million.

[9] Just days before I was to hear the reference, counsel advised that they had reached a settlement. After 15 years of litigation (12 years if you deduct the three-year stay[6]) the parties agreed to settle this action for a non-reversionary, all-inclusive sum of $100 million.

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[5] *MacDonald, supra,* note 2, at paras. 102-103.

[6] The parties agreed to stay the action until another proceeding commenced by other counsel, *Skopit v. BMO Nesbitt Burns Inc.,* was decided. As it turned out, the *Skopit* action settled for a much smaller amount but the waiting time added three years to this action.

The settlement

[10] The settlement agreement provides for a speedy, no-claim process that will distribute the funds to some 135,000 class members. An accounting firm (Deloitte) will calculate each class member's entitlement based on the foreign currency transactions in their registered accounts. The defendants will distribute the funds directly to the class members on a pro-rata basis (subject to a $25 minimum threshold) either by direct deposit if the class member still has an account with the defendants or by cheque mailed to the class member.

[11] Because the distribution costs are $12 to $23 per class member, the parties agreed that payments will be made only if they exceed a $25 threshold. The defendants estimate that this $25 minimum (as well as any cheques that are returned uncashed) will mean that approximately $380,000 will not be distributed to class members and must therefore go cy-pres. The parties have agreed that the first $250,000 in cy-pres will be paid to the Class Action Clinic at the University of Windsor and the second $250,000 to the United Way of Canada which funds financial literacy programs across the country.

[12] The settlement agreement also provides that in addition to the $100 million settlement fund, the defendants will pay the costs of notice, administration, and distribution. All class member payments paid by direct deposit (estimated to be 41 per cent of the payments) will be completed within 90 days of settlement approval and reasonable efforts will be made to ensure that payments paid by cheque will be completed within 150 days of settlement approval.

Settlement approval

[13] As I advised counsel at the hearing, this settlement is easily approved.

[14] The $100 million settlement amount is well within the required zone of reasonableness[7] — recall that the amount in dispute (with PJI included) ranged from a low of $52.4 million to a high of $145 million. The $100 million settlement amount is almost exactly in the middle.

[15] Add to this the fact that the action settled just a few days before the scheduled reference to determine the "profits" on the impugned $102.9 million in revenues. As the designated referee, I had already reviewed the expert reports and counsels' written

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[7] *Dabbs v. Sun Life Assurance*, (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.).

submissions about ‘reasonable and necessary expenses’ and the appropriate ‘profits’ award and had a good understanding of what might be awarded. I can therefore advise the parties with a reasonable degree of confidence that the $100 million settlement amount (which arguably consists of about $64 million in principal and $36 million in simple PJI) is indeed fair and reasonable and in the best interests of the class.

[16] The settlement is approved. Kudos again to both sides for achieving a reasonable resolution to such a long and hard-fought litigation.

Legal fees approval

[17] This is the issue that consumed most of the time at the hearing and that prompted several follow-up written submissions.

[18] The retainer agreement provides that class counsel (Paliare Roland Rosenberg Rothstein LLP) will be paid a contingency fee of 25 per cent of recovery (plus disbursements and taxes) and 10 per cent of any amount in excess of $500 million. The action settled for $100 million. Class counsel docketed $5.5 million in unbilled time and ended up carrying just under $900,000 in disbursements. They ask that the court approve the agreed-to $25 million in legal fees (plus disbursements and taxes).

[19] The applicable law is not in dispute. Under ss. 32 and 33 of the *Class Proceedings Act*,[8] class counsel’s fee agreement must be judicially approved. The court will approve the fee agreement if it is “fair and reasonable.”[9] If the agreement is not approved, then under s. 32(4)(a), the court may determine the appropriate amount.

[20] There is no question that class counsel have earned a premium legal fee well in excess of the $5.5 million in docketed time. This class action was truly self-made. It did not piggy-back on parallel U.S. proceedings; it did not use product recalls, corporate guilty pleas or government studies as a spring-board. Mr. MacDonald, the lead plaintiff, discovered a problem with the defendant’s foreign currency conversion methods and retained class counsel. Class counsel embarked on a hard-fought 15-year litigation that involved a difficult summary judgment motion and an unexpected accounting reference and, as already noted, ended with a very fair and reasonable settlement.

[21] The issue is the determination of the appropriate legal fee. As I reminded counsel during the hearing, the straight-line application of the agreed-to contingency fee

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[8] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[9] *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, at para. 27.

percentage — the "presumed validity" approach that I adopted in *Cannon*[10] and refined in *Brown*[11] — works well for most class action settlement amounts that average under $40 million but is not appropriate in large, "mega fund" settlements that are in the $100 million range or higher. As I noted in *Brown*:

> In *Cannon*, I embraced the percentage of the fund approach and accorded presumptive validity to the percentage that was agreed to in the contingent fee retainer agreement (up to one third) if certain conditions were satisfied … the risk incurred by class action lawyers, like personal injury lawyers, was best measured by the wins and losses in many cases over many years and not just by the specific case that was before the court. I was comfortable doing this because almost all of the settlements were under $40 million (i.e. they were not mega-fund cases) and there was rarely, if ever, any direct evidence in the record that the straight-forward application of the percentage approach resulted in legal fees that were excessive or otherwise unreasonable.[12]

[22] A straight-line application of the contingency fee percentage in mega-settlements can result in undeserved windfalls and transform class action litigation into something approaching a lottery. Here is how I put it in *Brown*:

> It is of course important to incentivize class action lawyers to take on risky actions on a contingent fee basis and do them well. However, it is also important that the court's approval of class counsel's legal fees not result in windfalls …
>
> Mega-fund cases are rare and when they settle, and almost all of them settle, the size of the settlement fund can be in the hundreds of millions of dollars. A percentage of the fund approach, given economies of scale, will result in windfalls. Windfalls should be avoided because class action litigation is not a lottery and the CPA was not enacted to make lawyers wealthy.[13]

[23] My suggestion in *Brown* that *Cannon* should not be used where the recovery is more than $50 million was not intended as an automatic cut-off or "bright line" — indeed

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[10] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[11] *Brown v. Canada (Attorney General)* 2018 ONSC 3429.

[12] *Ibid.*, at para. 46.

[13] *Brown*, *supra*, note 11, at paras. 50-51.

in *Manulife Financial*[14] I approved a 22.5 per cent contingency on a $69 million settlement. And here, as I freely admitted to class counsel during the hearing, I would have approved a 25 per cent contingency fee on say a $64 million settlement (which is arguably the core settlement amount minus PJI).

[24] Here, however, we have a $100 million settlement and a request for $25 million in legal fees.[15]

[25] The concern is the 9-digit size of the settlement and the need to ensure that the approval of legal fees in these so-called mega-settlements remains as principled as possible and not result in undeserved and unseemly windfalls. Because *Cannon* should not be used in mega-settlements, one must revert to the case-by-case approach and determine the fair and reasonable legal fee by considering the applicable law and comparable decisions.

[26] Although a wide range of factors may be considered,[16] the case law makes clear that the most important factors in determining whether the requested legal fee is fair and reasonable are the risks incurred and the results achieved[17] and also "whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession".[18]

[27] It is the concern about the integrity of the profession that may best explain judicial approval of premium legal fees in mega-settlements. The concern about the integrity of the profession is said to be a concern about the "decency, honour and high-mindedness of

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[14] *Ironworkers Ontario Pension Fund v. Manulife Financial Corp.*, 2017 ONSC 2669.

[15] At the hearing, class counsel reduced their request to $23 million and in their final written submission suggested that the approved legal fees should be "over $20 million."

[16] The list of factors that judges may consider when assessing whether the legal fees request is fair and reasonable are lengthy and include (a) the time spent and work done; (b) the factual and legal complexities; (c) the risk undertaken; (d) the degree of responsibility assumed by class counsel; (e) the monetary value of the matters in issue; (f) the importance of the matter to the class; (g) the degree of skill and competence demonstrated by class counsel; (h) the results achieved; (i) the ability of the class to pay; (j) the expectations of the class as to the amount of the fees; and (k) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement. See *Smith v. National Money Mart*, 2010 ONSC 1334, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

[17] *Lavier, supra*, note 9, at para. 27. Also see Winkler J. in *Baxter v. Canada (Attorney General)* [2006] O.J. No. 4968 (S.C.J) at para. 61: "Premium fees are awarded in respect of class actions in recognition of the risk undertaken and result obtained for the class."

[18] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690, at para. 47 (B.C.C.A.); *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2018 ONSC 6447, at para. 76.

the profession, both in substance and in public perception."[19] And the approval of straight-line percentages in mega-settlements resulting in undeserved or unseemly legal fees will obviously not maintain "the integrity of the profession."[20]

[28] It is therefore not surprising that the court's primary focus in mega-settlements is the actual dollar amount of the approved legal fee, not percentages or multipliers.[21] It is one thing to approve a $8 million legal fee (say 20 per cent of a $40 million settlement). It is quite another to approve a $50 million fee (20 per cent of a $250 million settlement).[22] The former is still a large number to be sure, but easier to explain and justify in terms of risks incurred and results achieved than the latter which is more akin to a lottery win.

[29] It is evident from a survey of the mega-settlement decisions that the judge's approval of class counsel's legal fees, although certainly driven by an analysis of risks and results, is ultimately determined with an eye on the final dollar amount. The approved dollar amount is kept within appropriate bounds by using multipliers and fee/recovery ratios or percentages as cross-checks and guard-rails.

[30] This is particularly apparent in the billion-dollar settlements where legal fees ranging from $25 million to $50 million have been judicially approved. For example:

- *Endean v. Canadian Red Cross Society*[23] - $1.6 billion settlement in the Hepatitis C class action – court approved $52.5 million in legal fees – court noted involvement of multiple law firms in various provinces – and that the legal fees were 4.26 per cent of the recovery.

- *Baxter v. Canada (Attorney General)*[24] - $1.9 billion settlement in the Residential Schools class action – court approved $40 million in legal fees for the "national

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[19] *Richardson (Guardian ad litem of) v. Low*, (1996), 23 B.C.L.R. (3d) 268 at paras. 29-30; discussed in ***Endean v. Canadian Red Cross Society,*** [2000] B.C.J. No. 1254 at para. 73 et seq.

[20] No judge would ever approve (and to their credit, no class counsel has ever asked for) a 25 per cent contingency fee on say a $1 billion settlement.

[21] *Richardson v. Low* (1996), 23 B.C.L.R. (3d) 268 (S.C.) at para. 35.

[22] Especially when the size of the "mega" recovery is more attributable to the happenstance of a large class size than to any corresponding assumption of risk or increase in effort on the part of class counsel.

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

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

consortium" of class counsel and noted that the approved legal fees reflected a 2.73 multiplier (that is 2.73 times the docketed time).

- *Manuge v. Canada*[25] - $887 million settlement in the veterans' pension class action – court approved $35.5 million in legal fees and noted that the approved legal fees were 4 per cent of recovery.

- *Brown v. Canada*[26] - $800 million settlement in the "Sixties Scoop" class action – I would have awarded class counsel in the *Brown* side of the litigation (who had literally "bet the firm" and whose efforts were extraordinary in every respect) a maximum legal fee of $25 million –which amounts to about 6 per cent of the recovery.[27]

- *Quenneville v. Volkswagen*[28] - $2.1 billion settlement in the Volkswagen "defeat device" class action - consortium of 8 law firms sought $65 million in legal fees – agreed to accept $31.2 million plus disbursements and taxes – which I approved.

- *McLean v. Canada (Attorney General)*[29] - $2 billion settlement of the Indian Day Schools class action – court approved $55 million in legal fees – noted docketed time of $10 million – and that "legal fees will be in the 3% range."[30]

[31] For settlements in the billion-dollar-plus range, Canadian courts have approved legal fee amounts of $25 million to $50 million. As here, each of these class actions were hard-fought, multi-year lawsuits that generated a significant level of docketed time and, in the end, resulted in a good settlement. In addition to assessing the risks and results, the court also considered the number of law firms involved, sometimes used a multiplier on the docketed time as a cross-check, and almost always expressed the final dollar amount in terms of a fee/recovery percentage with the objective of staying within an acceptable 4 per cent.

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

[26] *Brown, supra*, note 11.

[27] Assuming that one-half of the $800 million settlement can be attributed to counsel in *Brown*, the resulting fee/recovery percentage would be 25/400 or just over 6 per cent. As it turned out, the final payment to class counsel was higher than the suggested maximum of $25 million because of an unexpected decision from my Federal Court counterpart: see *Brown v. Canada (Attorney General)* 2018 ONSC 5456, at paras. 18-20.

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

[29] *McLean v Canada (Attorney General)*, 2019 FC 1077.

[30] *Ibid.*, at para. 54.

[32] The lesson from legal fee approvals in the billion-dollar settlements — one that also applies to this $100 million settlement — is two-fold: (i) keep an eye on the actual dollar amount; and (ii) explain and justify the approved legal fee in a principled fashion that is consistent with comparable caselaw.

[33] In the billion-dollar settlements, judges have achieved an admirable level of consistency by using the fee/recovery ratio and concluding that a 3 to 5 percentage was acceptable. I do not suggest that the legal fees herein should be limited to 4 percent of recovery or $4 million. The docketed time alone was more than $5 million. And, as already noted, I would have approved $16 million in legal fees on a $64 million recovery by extending my approach in *Cannon*. And probably even $18 million on a $72 million recovery, given the length of the litigation, the docketed time and the commendable resolution. But as the billion-dollar decisions clearly show, nine or ten-digit settlements and legal fee requests of $25 million or more take judges into a very different comfort zone.

[34] What about mega-settlements in the $100 million range? These, of course, are more directly relevant. There are two comparable cases:

- *CIBC v. Deloitte & Touche*[31]– $122 million settlement of an auditor's negligence class action – the second stage of the litigation proceeded on the basis of a contingency fee agreement which provided for "two times docketed time" plus disbursements and taxes – Perell J. approved $22 million in legal fees based on the agreed 2.0 multiplier.

- *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) SNC-Lavalin Group Inc.*[32] – $110 million settlement of a securities class action – Perell J. approved $23.25 million in legal fees for Ontario class counsel, noting docketed time of $9.1 million and the corresponding 2.54 multiplier.

[35] As I read these decisions (admittedly a small sample), a $100 million settlement can result in approved legal fees of $20 million where they reflect 2 or 2½ times the docketed time.

[36] Here however, as already noted, class counsel docketed $5.5 million in time and at the end were carrying just under $900,000 in disbursements. A 2.5 multiplier would allow $13.75 million in fees. A 3.0 multiplier would allow $16.5 million in fees. The 4.0

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[31] *CIBC v. Deloitte & Touche*, 2017 ONSC 5000.

[32] *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2018 ONSC 6447.

multiplier, reserved for "the most deserving case"[33] and used by me in *Brown,* would result in $22 million in legal fees. However, this is not *Brown* where a tiny law firm risked its very survival and where I concluded that the use of the highest multiplier as a cross-check was fully justified.[34]

[37] In any event, as I have made clear in other decisions, I am not a fan of multipliers. I agree with the observation of a Federal Court colleague that in the context of mega-settlements, "the use of percentages and multipliers to assess class action legal fees is appropriate, but mainly to test their reasonableness and not to determine absolute entitlement."[35] In other words, their value is mainly in their use as cross-checks and guard-rails.

[38] Having examined the applicable caselaw, I come to the following conclusion: on a $100 million settlement, such as here, where the risks incurred by class counsel were real but not remarkable (more on this below), with about $5.5 million in docketed time, the upper bounds of a fair and reasonable legal fees award is at most $20 million.

[39] The question is this: given that I would have approved $16 million in legal fees on a $64 million recovery, and possibly even $18 million on a $72 million recovery, should any additional amount should be awarded to class counsel for achieving a $100 million recovery? Is there anything in the "risks incurred" or "results achieved" analysis that is particularly noteworthy and would move the legal fees needle closer to $20 million?

Risks incurred

[40] As discussed in *Brown,*[36] the primary risk incurred by class action is the risk of non-payment — that after many years of effort, several million dollars in docketed time and sizeable disbursements the action will fail, nothing will be recovered and class counsel will not be paid.[37] Most judges understand that it is the actual "impact"[38] of the

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[33] See the Court of Appeal's direction in *Gagne v. Silcorp* (1998), 41 O.R. (3d) 417 (C.A.) at 425: that if a multiplier is used, the range of the appropriate multiplier is from "slightly greater than one to three or four in the most deserving case."

[34] *Brown, supra,* note 10, at paras. 68-71.

[35] *Manuge supra,* note 25, at para. 47.

[36] *Brown, supra,* note 10, at paras. 41-44.

[37] Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. III, at 737.

[38] *Parsons v. Canadian Red Cross Society,* [2000] O.J. No. 2374 (S.C.J.) per Winkler J., at para. 29.

non-payment that explains why the risk of non-payment is rewarded with a legal fee premium. A British Columbia judge put it best:

> It is well-recognized that when counsel assume a significant risk of not being paid, they are entitled to fees that exceed what would otherwise be reasonable when they succeed. The real risk of failure with personal consequences to counsel cannot be ignored. An enhanced fee is appropriate.[39]

[41] The greater the risk of failure and non-payment – that is, the more serious the financial impact on class counsel – the larger the premium. Hence, in *Brown*, where class counsel had "bet the firm", I would have approved $25 million in legal fees on a $400 million recovery. I hasten to add that class action litigation should not be about betting the firm — my point is simply that if "risk incurred" is to be a meaningful analytical tool, judges must go beyond a formulaic recitation of the well-known catalogue of "risks" (such as, for example, the risk of losing the certification motion) and assess the nature and extent of the actual financial impact on the particular class counsel firm.[40]

[42] Here, however, class counsel presented no hard evidence in this regard. Or even evidence that their firm was obliged to turn away paying retainers in order to conduct this litigation. They simply repeated the familiar menu of "risks" without any demonstration of actual financial impact on them or their firm.[41]

[43] Class counsel also resisted what I thought was a self-evident observation — that third-party funding should be a relevant factor in the "risks incurred" analysis. Here, class counsel had arranged for the Class Proceedings Fund to cover the risk of adverse cost awards and agreed to the CPF's usual 10 per cent levy. Given that no class action will ever proceed without a cost indemnity for the representative plaintiff,[42] class counsel will typically assume the adverse costs risk themselves or secure third-party funding. If the

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[39] *Jeffery v. Nortel Networks Corporation*, 2007 BCSC 69, at para. 73.

[40] It was the unworkability of the conventional approach to risk analysis in the context of "every day" settlements that compelled me to replace the "case by case" approach with the broader and more principled approach set out in *Cannon* and refined in *Brown*.

[41] Risk is best understood in terms of individualized impact. For example, an 80 per cent risk of rain (should it materialize) will have little if any impact on an indoor-wedding but enormous impact on an outdoor event. The risk that $1 million of docketed time will not be recovered will obviously have less of an impact in a large law firm than in a two-person law office.

[42] As Strathy J. noted in *Dugal v. Manulife*, 2011 ONSC 1785 at para. 28: "No rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousands of dollars."

latter is arranged, the levy or price charged for this particular type of 'insurance policy' is routinely paid out of the settlement funds and not out of class counsel's legal fees.[43]

[44] In my view, it is time to acknowledge that third-party funding should be considered in the "risks incurred" analysis. Indeed, the amended CPA explicitly requires it.[44] However, I concede that it may be unfair to impose this metric retroactively on a class action that probably began under a different expectation 15 years ago.

[45] In any event, I conclude that there is nothing particularly noteworthy in the "risks incurred" by class counsel in this matter that would move the legal fee needle from the $16 or $18 million level to the $20 million level.

Results achieved

[46] Nor is there anything in the "results achieved" assessment that would do the same.

[47] I agree that class counsel achieved a good result. I also agree that even in the stratosphere of nine or ten-digit mega-settlements, large recoveries should be rewarded with appropriately commensurate legal fees.[45] Indeed, we saw this in our review of the billion-dollar settlements where fees in the range of $25 million to $50 million were judicially approved.

[48] My concern in this case is the sizeable PJI component and the extent to which this should figure in the "results achieved" analysis. It is beyond dispute that this litigation was propelled from the outset with a clear understanding that "the time value of money" would be a significant ingredient in the compensation calculation. This was evident from the statement of claim, the submissions on the summary judgment motion and the accounting reference, the terms of settlement and the settlement agreement itself.

[49] If part of the $100 million settlement includes PJI (perhaps as much as $36 million) should not the "results achieved" be adjusted to accommodate this reality? For example, if only $64 million was actually recovered by class counsel's efforts and the

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[43] Private sector funders typically charge 7 to 8 per cent of recovery; the CPF levy is 10 per cent.

[44] Section 32(2.2) of the amended CPA, S.O. 2020, c. 11, Sched. 4 (which applies to proposed class proceedings filed after October 1, 2020) provides that "the court shall consider …. (c) the existence of any funding arrangement that affected the degree of risk assumed by the solicitor in providing representation."

[45] As the B.C. court noted in *Endean, supra,* note 23, at para. 80: "A reasonable fee should bear an appropriate relationship to the amount recovered."

rest simply by the passage of time and the application of a legislatively prescribed interest rate, should this not be relevant in the determination of "fair and reasonable" legal fees?

[50] Here, it is reasonably arguable that at least $30 million of the $100 million was PJI and that the $18 million legal fee that would probably have been awarded on a $72 million settlement is already fair and reasonable and needs no further enhancement. However, it can also be noted, from a class member's perspective, that class counsel recovered almost the entirety of the $102.9 million amount in dispute, full stop.

[51] The upshot of the "risks incurred" and "results achieved" analysis is this: the most this court can justify and explain in a principled fashion consistent with comparable caselaw is a legal fees award that falls within a range of $18 million to $20 million. The right number may well be around $19 million.

[52] However, given that this was a truly self-made class action that consumed 15 years of litigation, 10,000 hours in docketed time and resulted in a genuinely commendable settlement, I am prepared to err on the side of caution and in favour of class counsel.

[53] This court approves $20 million for legal fees, plus disbursements and taxes.

Honoraria approval

[54] Class counsel asks for judicial approval of honoraria totalling $70,000 for the representative plaintiffs — $50,000 to Mr. MacDonald, $10,000 to Mr. and Mrs. Zopas together, and $10,000 to Mr. Halasz. Class counsel have filed detailed evidence describing their specific contributions.

[55] As a general rule, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. It is only where they can demonstrate a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary, or where there is evidence that they were financially harmed because of their role as class representative that a significant honorarium will be justified.[46]

[56] Here, I am persuaded on the evidence that a performance honorarium at a level of $10,000 is justified for Mr. MacDonald and for Mr. and Mrs. Zopas because of their extraordinary level of dedication and commitment over a long and difficult 15-year litigation. The same can be said about Mr. Halasz although he only joined the action as a representative plaintiff in 2017. I note, however, his level of contribution and the fact that

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[46] *Aps v. Flight Centre Travel Group,* 2020 ONSC 6779, at para. 43; *Casseres v. Takeda Pharmaceutical Company*, 2021 ONSC 2846, at para. 10.

he lives in Ottawa and had to take personal time off work from his job at the National Research Council to attend in Toronto for cross-examinations and participate in a mediation. The requested honorarium is justified.

[57] Mr. MacDonald deserves more than just a performance honorarium. He is entitled to the additional $40,000 because of the financial harm he sustained as the lead plaintiff in what became a high-profile class action in the banking community. His employment as an investment advisor became strained and he had to leave the industry well before his retirement age. Comparable employment was hard to find. Mr. MacDonald eventually obtained a contract position teaching banking and finance courses at a local community college. However, his income today is much less than when he worked as an investment advisor. And, as Mr. MacDonald noted in his affidavit, the repercussions from this class action continue to be felt: "I … worry that the publicity associated with the action has and may continue to have a negative impact on my future career prospects."

[58] I therefore have no difficulty concluding that Mr. MacDonald suffered significant financial hardship in taking on the role and responsibilities of the lead representative plaintiff. The request for a $50,000 honorarium is more than justified.

[59] Each of the requested honoraria is approved.

Disposition

[60] The settlement is approved. As are class counsel's legal fees in the amount of $20 million, plus disbursements and taxes, and the requested honoraria.

[61] Orders to go accordingly.

[62] My thanks again to all counsel for their assistance. I am particularly grateful to Mr. Eizenga, who represented class counsel on the legal fees issue, for his submissions and insights.

Signed: *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment is effective from the date it is made and is enforceable without any need for entry and filing.

Date: June 17, 2021