

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**JOSEPH FANTL**

Plaintiff

-and-

**ivari**

Defendant

Proceeding under the *Class Proceedings Act 1992*

**FACTUM – FEE APPROVAL**

**December 4, 2023**

**ROY O’CONNOR LLP**

Barristers

1920 Yonge Street, Suite 300

Toronto, ON M4S 3E2

**Peter L. Roy (LSO No. 161320)**

Tel: 416-362-1989

Email: [plr@royoconnor.ca](mailto:plr@royoconnor.ca)

**David F. O’Connor (LSO No. 33411E)**

Tel: 416-362-1989

Email: [dfo@royoconnor.ca](mailto:dfo@royoconnor.ca)

**J. Adam Dewar (LSO No. 46591J)**

Tel: 416-362-1989

Email: [jad@royoconnor.ca](mailto:jad@royoconnor.ca)

Lawyers for the Plaintiff, Joseph Fantl

**TO: BLAKE, CASSELS & GRAYDON LLP**

Barristers & Solicitors  
199 Bay Street, Suite 4000  
Commerce Court West  
Toronto, ON M4L 1A9

**Jeff Galway (LSO No. 28423P)**

Tel: 416-863-3859

Email: [jeff.galway@blakes.com](mailto:jeff.galway@blakes.com)

**Doug McLeod (LSO No. 58998Q)**

Tel: 416-863-2705

Email: [doug.mcleod@blakes.com](mailto:doug.mcleod@blakes.com)

**Eric Leinveer (LSO No. 71357S)**

Tel: 416-863-2517

Email: [eric.leinveer@blakes.com](mailto:eric.leinveer@blakes.com)

Lawyers for the Defendant, ivari

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**PART I: OVERVIEW**

1. This is a motion for approval of the Retainer Agreement between the Plaintiff and Class Counsel, and for an order awarding Class Counsel their fees and disbursements in accordance with the Agreement. The Retainer Agreement provides that if this action results in a court-approved settlement benefitting the Class, Class Counsel shall be entitled to a 30% contingency fee, plus disbursements and taxes, in addition to retaining the fee component of previous costs awards.
2. Class Counsel devoted substantial time and effort to bring the claims in this action to a successful conclusion. To date, significant litigation steps undertaken by Class Counsel include:
  - Assuming carriage of this case, which had previously not progressed;

- amending the claim to advance negligent misrepresentation claims for the majority of Class Members who did not have a policy with an express best efforts commitment;
- good-faith but ultimately unsuccessful settlement negotiations in 2012;
- certification in 2013;
- multiple certification appeals culminating with the Defendant being refused leave to appeal to the Supreme Court of Canada in 2017;
- a lengthy discovery process that saw Class Counsel review tens of thousands of productions and other evidence with the assistance of his expert; and
- a successful mediation in May 2023 that resulted in the present proposed settlement.

3. In pursuing these claims, Class Counsel assumed various risks, including the risk of:

- failing to have the action certified, or to secure certification for the bulk of the class (who did not have policies with any express best efforts commitment);
- failing to prevail on the merits of the issues relating to best efforts replication at the common issues trial;
- failing to prevail on the certified common issues relating to the negligent misrepresentation claim (duty of care, an untrue representation of fact, and whether it was negligently made);
- even if successful at a common issues trial on the contract related issues, failing to establish damages or material damages for the breach of contract claims,
- the Misrepresentation Class Members, or some subset thereof, not being prepared to pursue claims through individual hearings,
- the Misrepresentation Class Members who did pursue individual claims failing to succeed on any of the reliance, causation or damages issues.

4. In terms of the benefit to Class Members, the \$7 million settlement compares favourably with the \$4.166 million to \$5.24 million that Class Counsel estimated (as set out in the settlement approval factum) might reasonably have been expected following a trial and an individual issues resolution process. The compensation is available to Class Members now without Class Members having to supply any information or make any claim, and without the risk and delay of further litigation.
  
5. If awarded by this Honourable Court, Class Counsel's requested 30% contingency fee plus the retained fee portion of previous costs awards will result in Class Counsel and previous plaintiff counsel (whose time Class Counsel agreed to protect) recouping well less than their straight time of approximately \$3.4 million to date. More specifically, 30% of \$6,817,106.36 (\$7 million minus unrecouped disbursements of \$182,893.64) is \$2,045,131.91. If this Court approves the request for Class Counsel to retain the fee portions of previous costs awards in respect of the best efforts claims (which total \$198,249.05 before taxes), Class Counsel's effective total fees will be \$2,243,380.96 – which is approximately 66% of Counsel's base time. If Counsel's estimated additional \$200,000 in time to see the settlement through final implementation is also taken into account, the percentage return on base time reduces to approximately 60%.

## **PART II: THE FACTS**

6. In addition to the facts set out in the Plaintiff's Settlement Approval Factum, Class Counsel rely on the following facts in support of their fee and disbursement request.

## ***Retainer Agreement***

7. Copies of the Retainer Agreement between Mr. Fantl and Roy Elliott Kim O'Connor LLP, and letter agreement confirming same in respect of Roy O'Connor's direct predecessor, Roy Elliott O'Connor, are attached as **Exhibits "B" and "C"** to the McKay Affidavit, sworn November 7, 2023.
8. In relevant part, clause 9 of the Retainer Agreement provides that Class Counsel shall be entitled to 30% of any settlement amount secured for the Class, plus the fee portion of any costs awarded to the Plaintiff in the proceeding.
9. Pursuant to clauses 12 and 13 of the Retainer Agreement, the disbursements covered by Class Counsel ("case expenses") are to be a first deduction from the gross settlement amount, with Class Counsel's 30% contingency fee then calculated on and deducted from the resulting reduced sum.
10. Mr. Fantl spoke to Class Counsel at length about his Retainer Agreement before he signed it in 2006. Mr. Fantl (a retired litigator) understood that, if the case was successful, Class Counsel's fees would be 30% of money recovered, plus the fee portion of any prior costs awards as well as disbursements and taxes.<sup>1</sup>

## ***Fees Requested***

11. The unrecouped disbursements of counsel total \$182,893.64, inclusive of taxes, which when subtracted from \$7 million yields the sum of \$6,817,106.36.<sup>2</sup>

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<sup>1</sup> McKay Affidavit at para. 13  
Fantl Affidavit at para.11

<sup>2</sup> McKay Affidavit at para. 103

12. Consistent with the terms of the Retainer Agreement, Class Counsel respectfully requests fees equal to 30% of \$6,817,106.36 – or \$2,045,131.91 – plus the fee portion of previous costs awards attributable to the Best Efforts Claim, which total \$198,249.05.<sup>3</sup> Combined, these two amounts would result in total fees of \$2,243,380.96. Class Counsel submit that such fees are fair and reasonable in the circumstances given, among other things, the risks taken and results/return achieved, and the fact that this sum represents less than Class Counsel's base fees.

***Disbursements Incurred to Date***

13. As noted above, Class Counsel has incurred unrecovered disbursements, inclusive of taxes, totaling \$182,893.64 in this action. This sum is inclusive of \$5,456.86 in disbursements incurred by REKO before August 22, 2007 in respect of the Best Efforts Claim. This sum also includes the unrecovered disbursements attributable to the Best Efforts (replication) Claim of prior counsel – Sutts, Strosberg LLP and Camp Fiorante Matthews LLP – in the amount of \$3,899.51, inclusive of taxes, which Class Counsel agreed to protect when it assumed carriage of the action.<sup>4</sup>

14. The Class Proceedings Fund funded disbursements in this action totaling \$349,877.10<sup>5</sup>. The great majority of this sum, \$291,878.79 inclusive of HST, went to the payment of the Plaintiff's expert (Mr. Rocchi), whose services were important to the successful resolution of the remaining contract and misrepresentation claims.<sup>6</sup>

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<sup>3</sup> McKay Affidavit at para. 104 and **Exhibit "K"** thereto.

<sup>4</sup> The \$3,899.51 figure is calculated on 50% of total disbursements incurred by prior counsel before August 22, 2007, and thus represents the 50% of disbursements notionally attributable to the replication claim (with the remaining 50% being notionally attributable to the previously settled management fee claim).

<sup>5</sup> McKay Affidavit at para. 113

<sup>6</sup> Affidavit of James Katsuras, sworn December 4, 2023, at para. 3.

15. Class Counsel expect to incur several thousand dollars of additional disbursements through the settlement approval and implementation process<sup>7</sup>.

***Straight Time Incurred to Date***

16. As set out above, Class Counsel has unrecouped fees before taxes of \$3,348,936.45, which includes \$254,015.30 of previously unclaimed REKO time expended up to August 22, 2007 that was attributed to the Best Efforts Claim.<sup>8</sup> To this sum, Class Counsel has added the \$44,321.00 in fees (exclusive of taxes) of previous counsel – Sutts, Strosberg LLP and Camp Fiorante Matthews LLP – whose time Class Counsel agreed to protect when we assumed carriage of this action. Class Counsel intend to pay prior counsel a proportionate share of any fees awarded by the Court.<sup>9</sup> The combined unrecouped fees of Class Counsel and previous counsel total approximately \$3.4 million before taxes<sup>10</sup>.

17. The tasks performed by Class Counsel to date include:

- a. factual and documentary research;
- b. interviewing the Plaintiff and the drafting of his affidavit in support of certification;
- c. amending the claim;
- d. reviewing the Defendant's certification record;
- e. arguing the certification motion;

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<sup>7</sup> McKay Affidavit at para. 109

<sup>8</sup> The prospect of settling of the prior Management Fee Overcharge Claim was raised on or about August 22, 2007. The time incurred in the case thereafter through the formal settlement in 2009 was focused on that Management Fee Overcharge Claim. Prior to August 22, 2007, Class Counsel on both the Fee Overcharge Claim and the Can-Am replication or Best Efforts Claim. When the Management Fee Overcharge Claim in this action settled in 2009, Class Counsel ascribed 50% of the time and disbursements to August 22, 2007 to the fee overcharge claim and its settlement, and ascribed the remaining 50% to the Best Efforts Claim (which Class Counsel accordingly did not claim in costs or otherwise as a basis for fees in the context of the settlement of the fee overcharge claim).

<sup>9</sup> As Class Counsel did with all undifferentiated REKO time and disbursements, we notionally divided previous counsel's time and disbursements incurred up to August 22, 2007 equally between the Management Fee Overcharge Claim that settled in 2009 and the Best Efforts Claim now before the Court.

<sup>10</sup> McKay Affidavit at para.



- f. arguing the appeals to the Divisional Court and Court of Appeal (two appeals in the CA);
- g. resisting the Defendant's request for leave to appeal to the Supreme Court of Canada;
- h. overseeing the certification notice and opt-out process;
- i. obtaining information from various industry participants and experts;
- j. retaining and working with our industry technical expert, Mr. Rocchi;
- k. reviewing and analyzing the Defendant's extensive productions;
- l. conducting the written examinations for discovery of the Defendant, including preparing, reviewing and responding to various rounds of written questions;
- m. preparing for and engaging in a two-day two mediation that resulted in the proposed settlement;
- n. communicating with putative Class Members;
- o. drafting the Settlement Agreement and preparing material for settlement approval;
- p. drafting the Notice Program for the proposed Settlement;
- q. attending various case management meetings; and,
- r. retaining and instructing the proposed Settlement Administrator<sup>11</sup>.

18. As noted above, Class Counsel expects to incur approximately \$200,000 in additional time to implement the Settlement if it is approved<sup>12</sup>. If this estimated future time or fees of \$200,000 is added to the actual time incurred to date of approximately \$3.4 million, the fees incurred will total \$3.6 million. Class Counsel's requested 30% contingency fee of \$2,045,131.91 plus the retained fee portion of costs awards in the amount of \$198,249.05, yield a total fee of \$2,243,380.96. This total fee would translate to an effective multiplier of approximately 0.60 (or 60%) on total base fees (\$2.3 million ÷ (\$3.6

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<sup>11</sup> McKay Affidavit at para. 108

<sup>12</sup> McKay Affidavit at para. 109

million + approx. \$0.2 million in recouped fees) = 0.59)<sup>13</sup>.

#### ***Payment of the Third-Party Settlement Administrator***

19. The parties have retained Epiq to act as the third-party administrator of this settlement. Epiq's fees will be paid out of the \$7 million settlement fund. Epiq estimates that their fees will be approximately \$425,000, inclusive of HST. Class Counsel has proposed to reserve from the \$7 million fund the sum of \$425,000 plus a buffer of \$100,000 to cover any unanticipated additional administrative costs<sup>14</sup>.

#### ***Class Proceedings Fund Repayment and Levy***

20. The Plaintiff was approved for funding by the CPF. Pursuant to s. 10 of O. Reg. 771/92, as this action resulted in a settlement in favour of the Class, the CPF must be paid its levy. That levy is the total of its funded disbursements plus 10% of the amount of the award or settlement funds payable to the Class Members. As noted above, the CPF has covered \$349,877.10 of the Plaintiff's litigation expenses, inclusive of HST, the great majority of which comprised expert fees.<sup>15</sup>

### **PART III: ISSUES & THE LAW**

21. The single issue on this motion is whether the Retainer Agreement and Class Counsel's fee request (plus disbursements and taxes) should be approved. Class Counsel recognize that the legal concepts and principles discussed below are well known to this Court but are set out in part because this factum will be filed and made publicly available to the Class Members.

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<sup>13</sup> McKay Affidavit at para. 110

<sup>14</sup> McKay Affidavit at para. 111

<sup>15</sup> McKay Affidavit at para. 112-113

### ***Court Approval of Retainer Agreement & Class Counsel's Fee Request***

22. Pursuant to section 32(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “CPA”), a retainer agreement between the plaintiff and class counsel is not enforceable unless it is approved by the Court.

### ***General Principles & Benefits of Percentage-Based Contingency Fees***

23. The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.<sup>16</sup>

24. Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.<sup>17</sup>

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<sup>16</sup> *Cavanaugh v. Grenville Christian College*, 2023 ONSC 6520 (CanLII) at para. 53; *Smith v. National Money Mart*, [2010 ONSC 1334](#) at paras. 19-20, var'd [2011 ONCA 233](#); *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Parsons v. Canadian Red Cross Society*, [2000 CanLII 22386 \(ON SC\)](#), [2000] O.J. No. 2374 at para. 13 (S.C.J.).

<sup>17</sup> *Cavanaugh* supra at para. 54; *Smith v. National Money Mart*, [2010 ONSC 1334](#), var'd [2011 ONCA 233](#); *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

25. The risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding.<sup>18</sup>

26. This Honourable Court recently summarized other aspects of the test or approach on fee approval as follows:

[56] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well.

[57] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved. Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee. The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.<sup>19</sup>

27. Ontario courts have approved percentage class action retainer fees of between 25% and to 33.3% in numerous cases. An illustrative but not exhaustive list of examples of more recently approved class action fees of between 25% and 33.3% is set out at **Appendix 1** of this factum.

28. The fee approval factors that Class Counsel submits may be relevant in this case are addressed below, with the discussion of some of the factors being combined to avoid duplication of submissions.

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<sup>18</sup> *Cavanaugh* supra at para. 55; *Endean v. Canadian Red Cross Society*, [2000 BCSC 971](#) at paras. [28 and 35](#); *Gagne v. Silcorp Ltd.*, [1998 CanLII 1584 \(ON CA\)](#), [1998] O.J. No. 4182 t para. 17 (C.A.).

<sup>19</sup> *Cavanaugh* supra.

### ***Complexity of This Case***

29. This action was of relatively high factual complexity and moderate legal complexity. The core factual allegation – that the Defendant mismanaged the Can-Am Fund by failing to use “best efforts” – required Class Counsel to absorb technical and somewhat complex information relating to index fund management. To understand and argue the case, Class Counsel was required to develop a working understanding of various fund management operations and the factors that can influence the performance of such funds including, without limitation: the need for time-sensitive daily rebalancing of futures contract holdings in response to foreign exchange movements, fund inflows and fund redemptions, in order to avoid leverage or market under-exposure; coordinating the term-to-maturity of futures contracts and backing assets; quarterly “roll” strategies (also time sensitive) for futures contracts (selling of expiring contracts and purchase of new contracts); maximization of the yield to risk ratio in the choice of backing assets (e.g., choosing high quality, higher yield corporate commercial paper rather than lower yielding government debt instruments).

30. The Plaintiff’s “best efforts” legal theory was moderately complex and nuanced. Although Canadian case law contains some helpful statements to effect that a “best efforts” obligation imposes a high onus, Class Counsel is not aware of any case where a fund manager was found liable for breaching an obligation to use “best efforts” in the management of an investment fund. Based on answers received from the Defendant during discoveries and the position generally staked by the Defendant, Class Counsel believe that the Defendant was likely to argue at trial that: (a) the “best efforts” statement

was merely intended to convey to policyholders that replication of the S&P 500 was not guaranteed, and (b) the accepted industry custom or norm is that an investment fund manager need only meet the standard of “reasonable prudence” which grants the manager broad investment discretion. As part of our preparation for litigation on the merits, Class Counsel were marshalling evidence and preparing arguments to address the possibilities that the Defendant was subject to either a higher best efforts standard or a lower reasonable efforts or prudence standard.

### ***Degree of Risk***

31. The risks taken by Class Counsel in advancing this action include:

- a. *Certification Risk* – Class Counsel was only partially successful in having the case certified (certification was limited to the 5 policies with express best efforts language). Class Counsel was only successful in certifying the misrepresentation claim on behalf of the majority of the Class on appeal.
- b. *Risk of Litigation on the Merits* – There was a real risk that the Plaintiff would not be successful in establishing that ivari breached its contracts with the Class or that it made negligent misrepresentations. Among other things, and as detailed in the Plaintiff’s Settlement Approval Factum, there was a real risk that the court might reject the “best efforts” interpretation underpinning the Plaintiff’s theory of liability, or else find that the Defendant met its fund management obligations and satisfied its standard of care;
- c. *Risk Relating to Damages and Individual Assessments* – As detailed in the Plaintiff’s Settlement Approval Factum, even if the Plaintiff were entirely successful at the

common issues trial, there was a real risk that the damages recovered for the Class might be quite limited. More than 80% of potential damages in this case were attributable to misrepresentation-claimant Class Members, who would still need to prove reliance, causation and damages following the common issue trial (namely, that but for their reliance on the Defendant's "best efforts" replication representations they would have invested or otherwise dealt with their Can-Am Fund investment monies in a more profitable manner). There was a substantial risk that few misrepresentation claimants could establish such detrimental reliance, and a further risk that of those that could, only a fraction would come forward to do so given the modest sums at stake for the average claimant (Class Counsel estimated that the maximum average quantum of individual damages for misrepresentation likely would not exceed \$150). Thus, even if entirely successful at the common issues trial, it is conceivable that recovered damages might be largely limited to the recovery for the contract claims, which we estimate had an objectively reasonable maximum value of approximately \$2.1 million (based on a comparison to the top comparing fund) or \$1.66 million (based on a comparison to the average comparator funds), inclusive of prejudgment interest.

- d. Hours/Work Required to Date – As set out above, Class Counsel have devoted more than \$3.3 million in base time to date to the presently settling claims. The Settlement was not achieved in one or two hours, but took several thousand hours to achieve.

***The Monetary Value & Importance of the Matter to the Class***

32. The monetary stakes of this action for the Class as a whole were modest but real. Some

Qualifying Class Members will receive thousands of dollars in compensation.

***Competence of Class Counsel***

33. Class Counsel are experienced class action lawyers having acted successfully for both plaintiffs and defendants in numerous class proceedings.

***Results Achieved***

34. As set out above and as discussed in more detail in the Plaintiff's Settlement Approval Factum, the Settlement compares favourably with the results that might reasonably have been achieved had the matter gone to trial. In Class Counsel's view, the Settlement appropriately maximizes recovery for the approximately fifteen thousand Class Members who would be entitled to a non-trivial share of the net settlement amount. The use of a \$50 threshold to determine the set of qualifying Class Members minimizes the ratio of administration-expense to recovery by avoiding the costs of administering payments for relatively trivial amounts. A large number of Class Members had relatively small Can-Am Fund holdings. Assuming a \$3.4 million net settlement amount, the total value of initial entitlements below the \$50 cutoff is \$596,000, for an average of approximately \$13.64 per non-qualifying Class Member. When that nearly \$600,000 is reattributed to the approximately fifteen thousand qualifying Class Members, the average payout will be \$226.89, with payouts ranging from \$12,942.32 to \$60.64.<sup>20</sup>

35. Qualifying Class Members will receive material compensation without having to make an individual application, without having to prove that they read and relied on the Summary Information Folders (which many would likely not be able to do), and without having to

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<sup>20</sup> McKay Affidavit at para. 97.



provide evidence for any kind of individual assessment of damages.

***Expectations of the Class as to the Amount of the Fees***

36. Mr. Fantl understood and agreed that, in the event this action was successful, Class Counsel would be compensated for its work and taking on the real risks that arose in this litigation. Mr. Fantl's Retainer Agreement provides for a 30% contingency fee for a successful outcome in this case plus the fee portions of any prior costs awards. Mr. Fantl supports Class Counsel's fee request<sup>21</sup>.

37. Pursuant to the Class notice program in this case, the Class was advised that Class Counsel will be paid only in the event this action is successful and would be seeking a 30% contingency fee plus disbursements, taxes and the CPF's levy. As set out in the Plaintiff's Settlement Approval Factum, no Class Member objected to this Settlement or Class Counsel's proposed fee.

***Request to Not Deduct Costs Award from Approved Fee***

38. As noted, consistent with the Retainer Agreement, Class Counsel respectfully request that the \$198,249.05 fee component (excluding tax) of the certification costs and appeal costs awards not be deducted from Class Counsel's approved fee<sup>22</sup>.

39. While the current *Solicitors Act* permits a lawyer to be paid a contingency fee in addition to costs awards<sup>23</sup>, at the time the retainer was executed in 2009, s. 28.1(8) (now revoked)

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<sup>21</sup> Fantl Affidavit at paras. 12-17

<sup>22</sup> McKay Affidavit at para. 104 and Exhibit K thereto.

<sup>23</sup> Former s. 28.1(8) which permitted such an arrangement only with leave of the court was revoked. In its place, ss. 1 and 2 of O. Reg. 563/20, "Contingency Fee Agreements", now provide that only disbursements must be deducted from the award or settlement before application of the contingency fee:

of the *Solicitors Act* only permitted such an arrangement with leave. Then applicable s. 28.1(8):

***Agreement not to include costs except with leave***

(8) A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless,

- (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
- (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them.

40. If leave is required, Class Counsel respectfully requests that this Honourable grant leave for Counsel to retain the fee portion of the prior costs awards. Support for leave being granted may be found in the principle or doctrine of “exceptional circumstances” that applied to former s. 28.1(8) of the *Solicitors Act*.

41. In *Hodge v. Neinstein*,<sup>24</sup> the court addressed the concept of exceptional circumstances under s. 28.1(8) in part as follows:

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**Contingency fee not to exceed award or settlement**

1. A solicitor for a client who is a claimant shall not recover more in fees under a contingency fee agreement than the amount recovered by the client under an award or settlement from the party or parties against whom the claim was made, including any costs but excluding disbursements and taxes.

**Certain disbursements to be excluded**

2. A contingency fee agreement that provides that the fee is determined as a percentage of the amount recovered by the client under an award or settlement shall exclude any amount that is specified as being in respect of disbursements that a court allows or would allow as recoverable from an adverse party.

<sup>24</sup> *Hodge v. Neinstein*, 2014 ONSC 4503 (CanLII), *rev'd on other grounds*, 2015 ONSC 7345 (CanLII).

[37] [Section 28.1\(8\)](#) of the [Solicitors Act](#) precludes a solicitor from recovering both a proportion of the client's award and also costs unless the court approves. A contingency fee agreement cannot provide for both the payment of costs received from the defendant and a percentage based on damages recovered, unless the court is satisfied that there are exceptional circumstances and the court approves the inclusion of the costs: *Williams (Litigation Guardian of) v. Bowler* (2006), [2006 CanLII 19466 \(ON SC\)](#), 81 O.R. (3d) 209 (S.C.J.); *Séguin v. Van Dyke*, [2013 ONSC 6576](#).

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[39] The exceptional circumstances referred to in s. 28.1(8) include assuming an extraordinary risk that would justify the solicitor charging a premium for his or her work; *Williams (Litigation Guardian of) v. Bowler*, *supra*. In the *Williams* case, the contingency fee was approved where counsel's assumption of significant and unusual risk, together with complications arising from feuding plaintiffs, amounted to extraordinary circumstances that justified granting approval. See also: *Re Cogan*, [2010 ONSC 915](#); *Oakley & Oakley Professional Corp. v. Aitken*, [2011 ONSC 5613](#).

[40] In authorizing the court to allow a lawyer to obtain both a contingency fee and to recover the costs awarded to his or her client in "exceptional circumstances," the Legislature recognized that there will be cases where having regard to the nature of the litigation and the associated risks, a contingency fee alone would not fairly compensate the lawyer for taking on the case: *Oakley & Oakley Professional Corp. v. Aitken*, *supra* at para. [17](#).

[41] In determining whether there are "exceptional circumstances" under [s. 28.1\(8\)](#) of the [Solicitors Act](#), the court needs to know how much of a premium is being sought over by the solicitor and the solicitor should provide the court with his or her dockets or time records: *Re Cogan*, [2010 ONSC 915](#).

42. Class Counsel respectfully suggest that the following factors provide a basis for finding

that the requirement of exceptional circumstances, if it applies to this case, is met:

- a. The real risks assumed by Class Counsel, as described above;
- b. The value of compensation secured for Class Members;
- c. The fact that even with the retention of the fee portion of the costs awards in this case, Class Counsel will still recoup well less than straight time; and,
- d. The fact that Class Counsel will need to perform additional work going forward to implement and oversee the settlement through to its completion.

43. As supporting precedent, we note that, without expressly addressing the principle of exceptional circumstances, this Honourable Court approved class counsel retaining or being paid costs in addition to their percentage contingency fee in *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 7285 (CanLII) at paras. 21 and 22, *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, 2009 CanLII 44271 (ON SC) at paras. 63-68 and *Lipson v Cassels Brock and Blackwell* (unreported) at paragraph 95. In *Farkas*, this Honourable Court specifically noted that the total fees (including the costs award) were still less than the straight time incurred by class counsel.

***No Request for Plaintiff's Honourarium***

44. The Plaintiff's Retainer Agreement provides that Class Counsel may seek an honourarium on his behalf. Mr. Fantl has advised that he does not seek an honourarium in this case<sup>25</sup>.

**PART IV: ORDER REQUESTED**

45. Class Counsel respectfully requests an Order and Directions from this Court that:

- a. approve the Retainer Agreement;
- b. fix and direct that Class Counsels' disbursements and fees be paid from the

Settlement Fund as follows:

|   |                              |
|---|------------------------------|
| Gross Settlement Amount:                    | \$7,000,000                  |
|   | less                         |
| (Class Counsel Disbursements, incl. of HST) | (\$182,893.64)               |
| <b><u>Subtotal:</u></b>                     | <b><u>\$6,817,106.36</u></b> |

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<sup>25</sup> Fantl Affidavit at para. 18

(Class Counsel's Requested 30% Fee) (\$2,045,131.91)

(HST on Fees) (\$265,867.15)

- c. direct that the Settlement Administrator's fees be paid as a next, subsequent charge on the remainder after deduction of Class Counsel's disbursements and fees, inclusive of taxes.
- d. direct that the Class Proceedings Fund be repaid the sum of funded expenses in the amount of \$349,877.10.
- e. direct that the Class Proceedings Fund's be paid its 10% levy calculated on the remainder after deduction of all of the foregoing.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

December 4, 2023



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Peter L. Roy, LSO No. 161320



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David F. O'Connor, LSO No. 33411E



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J. Adam Dewar, LSO No. 46591J

## Appendix 1 – Recent Examples of Approved Contingency Fees

- a. In the recent decision of *Lipson v Cassels Brock and Blackwell LLP* (unreported) this Honourable Court awarded class counsel their requested 25% contingency fee on a settlement where the value of class counsel’s docketed time exceeded the requested percentage based contingency fee. According to this Court at paragraph 94:

“Although there was a contingency fee agreement, practically speaking, Class Counsel has recovered on a fee for service rendered basis. Class Counsel more than earned their fee and should be commended for their hard work and diligence.”
- b. In *Davidson v. Solomon (Estate)*, 2020 ONSC 2898 (CanLII) at paragraph 73, Justice Mew awarded a 33% fee in a comparatively small settlement (\$430,000) against the estate of a dentist accused of surreptitiously videotaping his patients. In that case, class counsel’s docketed time exceeded their percentage-based contingency fee;
- c. In *Rezmuves v. Hohots*, 2020 ONSC 5595 (CanLII) at paragraphs 10 and 43, where this Court approved a 30% contingency fee in a very small (\$500,000) solicitor’s negligence class action settlement;
- d. In *Vester v. Boston Scientific Ltd.*, 2020 ONSC 3564 (CanLII) at paragraphs 44 and 56, where this Court approved a 30% contingency fee in a \$21.5 million medical device class action;
- e. In *Harper v. American Medical Systems Canada Inc.*, 2019 ONSC 5723 (CanLII) at paragraphs 14 and 54, this Court approved a 30% contingency fee in a \$20 million medical device class action;
- f. In *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090 (CanLII) at paragraph 32, this Court approved a 33.3% fee of \$7,033,225.40 on a \$21,120,797 settlement in a wrongful solitary confinement class action;

- g. In *Brazeau v. Attorney General (Canada)*, 2019 ONSC 4721 (CanLII) at paragraph 29, this Court awarded class counsel a 33.3% contingency fee in a wrongful solitary confinement class action;
- h. In *Park v. Nongshim Co., Ltd.*, 2019 ONSC 1997 (CanLII) at paragraph 81, Justice Glustein adopted the “presumptive approval” of the retainer agreement as set out in *Cannon* and approved a 1/3<sup>rd</sup> (33.3%) contingency fee in a price fixing class action;
- i. In *Cass v. WesternOne Inc.*, 2018 ONSC 4794 (CanLII), at paragraphs 125-128 Justice Glustein approved a 30% contingency fee (plus disbursements and taxes) on a \$1 million securities settlement. In *Cass*, the plaintiff was approved for Class Proceedings Fund funding and as such, the Fund’s 10% levy was deducted from the settlement as well;
- j. In *Ronald J. Valliere v. Concordia International Corp.*, 2018 ONSC 5881 Justice Morawetz approved a 33.3% contingency fee as set out in the retainer agreement as applied to the portion of a \$18 million securities settlement relating to non-Quebec residents (the fees for the Quebec residents would be sought separately by Quebec class action counsel);
- k. In *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537 (CanLII), at paragraphs 19 and 20 Justice Belobaba approved the 33% contingency fee (plus disbursements and taxes) as specified in the retainer agreement on a \$26.5 million securities class action; and,
- l. In *Silver v. Imax Corp.*, 2016 ONSC 403 (CanLII), Justice Baltman approved a 33% contingency fee (plus disbursements and taxes) in a securities case (there were two co-counsel firms – the retainer with one was set at 33% and the second was set at a range of 25-33% with the second firm requesting the fee be set at 33%).

JOSEPH FANTL  
Plaintiff

- and -

**ivari**  
Defendant

Court File No.: 06-CV-306061-CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act 1992*

**FACTUM – FEE APPROVAL**

**ROY O'CONNOR LLP**

Barristers

1920 Yonge Street, Suite 300

Toronto, ON M4S 3E2

**Peter L. Roy (LSO No. 161320)**

**David F. O'Connor (LSO No. 33411E)**

**J. Adam Dewar (LSO No. 46591J)**

Tel: 416-362-1989

Fax: 416- 362-6204

Email: [plr@royoconnor.ca](mailto:plr@royoconnor.ca)

Email: [dfo@royoconnor.ca](mailto:dfo@royoconnor.ca)

Email: [jad@royoconnor.ca](mailto:jad@royoconnor.ca)

Lawyers for the Plaintiff, Joseph Fantl