

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DARLENE WOODARD

Plaintiff
(Moving Party)

- and -

CANADIAN IMPERIAL BANK OF COMMERCE and CIBC TRUST CORPORATION

Defendants

Proceedings under the *Class Proceedings Act, 1992*

**FACTUM OF THE PLAINTIFF
(Motions for Approval of Class Counsel Fees, Disbursements and an Honorarium)**

Returnable: December 22, 2025

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PART I - NATURE OF THE MOTION

1. The Plaintiff, Darlene Woodard, and class counsel seek an order in connection with a proposed settlement with the Defendants, Canadian Imperial Bank of Commerce (“**CIBC**”) and CIBC Trust Corporation (“**CIBC Trust**” and collectively, the “**Defendants**”), approving: (a) the contingency fee retainer agreement between Ms. Woodard and Kalloghlian Myers LLP (“**class counsel**”); (b) the payment of legal fees and disbursements to class counsel; and (c) the payment of an honorarium to Ms. Woodard, both out of the settlement funds.

2. This factum should be read in conjunction with, and after, Ms. Woodard’s factum filed in support of her motion for settlement approval.

PART II - OVERVIEW

3. This was complex litigation involving a technical area of Canadian capital markets and financial services. Class counsel started the case (the “**Woodard Action**”) in 2022 after extensive due diligence and expert consultation, which supported the assessment that several class actions that had been started earlier against the same defendants in relation to improper trailing commissions had mistakenly left out millions of mutual fund investors.

4. Over the past three years, the Woodard Action has been litigated on multiple fronts—directly against CIBC and CIBC Trust as Defendants to the Woodard Action; against six other groups of defendants (each represented by leading defence firms) that are all part of the 2022 Actions; and against four leading plaintiff-side firms prosecuting the Pozgaj Action (along with the other 2018 Actions) and the Frayce Action.

5. A settlement has now been reached after hard-fought negotiations and two formal mediation sessions. Although the \$11 million recovery is lower than the \$26 million obtained in the Pozgaj Action, on an objective comparative basis in relation to each action's two-year look-back benchmark, the recovery here is slightly higher than that obtained in the Pozgaj Action. At the same time, the recovery here measured against total trailing commissions paid is significantly higher than that obtained under the TDAM settlement (the Aggarwal Action), approved by this Court in January 2025.

6. In tandem with the motion for settlement approval, class counsel seeks approval of a contingency fee of 33.3% of the settlement fund (\$3,663,000) plus reimbursement of incurred disbursements, along with an honorarium of \$500 for Ms. Woodard.

7. The fee request is fair and reasonable assessed under s. 32 of the *Class Proceedings Act, 1992*. The key factors are:

- (a) **Result obtained**: the settlement delivers a substantial, timely recovery to class members;
- (b) **Risk incurred**: the risks assumed by class counsel from the outset of the litigation, which, among other things, was brought on a contingency basis against a group of well-resourced and sophisticated defendants and adverse plaintiffs from the parallel competing cases;
- (c) **Horizontal stare decisis**: this Court has routinely approved a 33.3% contingency fee outside the “mega-fund settlement” context, including earlier this year in connection with class counsel's fee request in the TDAM settlement (the Aggarwal action);
- (d) **Multiplier on WIP**: the proposed fee yields a multiplier on counsel's incurred time of 3.53 that is at the low end of the customary range; and

- (e) **Class support/no objections**: the representative plaintiff supports the fee request and no class members have objected.

8. Finally, the requested honorarium is modest and appropriate in the circumstances. Ms. Woodard's personal losses were minimal (approximately \$25), yet she undertook the duties and risks of a representative plaintiff and devoted substantial time and effort without which there would have been no recovery for the class.

PART III - FACTS

A. Factual background, procedural history and the litigation dynamic

9. This factum should be read together with Ms. Woodard's settlement approval factum. The facts set out there are not repeated here.

10. Ms. Woodard relies on the evidence in two supporting affidavits of Garth Myers. Portions of the supplementary Myers affidavit contain privileged and confidential information that has been redacted from the public version of the affidavit filed with the Court. Justice Leiper will be provided with an unredacted version as was done in relation to the approval of the TDAM settlement earlier this year.

11. The same procedure was also used here as was used in the Aggarwal Action in relation to notifying the media under the standard "Notice of Request for Publication Ban" protocol.

12. A motion will be scheduled before Leiper J. in 2026 to address whether the redactions should be lifted. The Advocates' Society is considering whether to seek to intervene in that motion.

13. This factum assumes the Court is familiar with the confidential evidence and none of it is repeated here.

B. The contingency fee retainer agreement and class counsel's fee request

14. Ms. Woodard executed a contingency fee retainer agreement, dated October 11, 2022, under which class counsel is entitled to a contingency fee of 33.3% upon a successful resolution.¹

15. As confirmed in her supporting affidavit filed in connection with this motion, Ms. Woodard read, discussed and understood the retainer agreement, including the contingency fee, before she agreed to it and signed the retainer agreement.²

16. Class counsel requests legal fees of \$3,663,000, representing 33.3% of the \$11,000,000 settlement fund.

17. Ms. Woodard supports this fee request.³

C. Time incurred by class counsel

18. Courts commonly use class counsel's WIP as a cross-check when assessing the reasonableness of a percentage contingency fee, by comparing the fee to pre-tax WIP to derive a multiplier.

19. For example, \$1 million in WIP and a 33% fee on a \$10 million recovery yields a \$3.3 million fee, or a 3.3× multiplier on the WIP.

¹ Affidavit of Darlene Woodard sworn December 15, 2025 ("Woodard Affidavit"), para. 6, Plaintiff's Motion Record, Tab 7, p. 440. Contingency Fee Retainer Agreement, Exhibit "C" to the Woodard Affidavit, Plaintiff's Motion Record, Tab 7, p. 492.

² Woodard Affidavit, paras. 7-8, Plaintiff's Motion Record, Tab 7, p. 440-441.

³ Woodard Affidavit, para. 30, Plaintiff's Motion Record, Tab 7, p. 445.

20. The 33.3% contingency fee sought here represents a 3.54× multiplier on class counsel's WIP, which, as explained below, lies at the low end of accepted multipliers in class-action practice.

21. By comparison, the recent approval of counsel fees in connection with the parallel settlement in *Pozgaj v. CIBC et al.* involved a multiplier of 7.84×.⁴

22. The First Myers Affidavit provides a detailed breakdown of class counsel's docketed time. Counsel tracked time for the collective 2022 Actions separately from time specific to the Woodard Action.

23. Class counsel's WIP attributable to Woodard equals: (a) one-seventh of time docketed to all 2022 Actions; plus (b) time docketed specifically to Woodard. These amounts total \$1,039,051.93 (pre-tax) as of December 17, 2025.

24. The WIP covers the following work:

- (a) factual and documentary research;
- (b) interviewing the representative plaintiff and drafting the Statement of Claim;
- (c) service of the Statement of Claim;
- (d) preparing and presenting a Class Proceedings Fund application;
- (e) attending case management conferences;
- (f) drafting and arguing the response to the 2018 plaintiffs' stay motion;
- (g) attending the stay rehearing before Akbarali J.;

⁴ The Court-approved multiplier in the Aggarwal settlement earlier this year was 2.7×.

- (h) negotiating stay orders and attending related case management conferences;
- (i) opposing the defendants' lift stay motion and arguing before Akbarali J.;
- (j) preparing the response to defendants' summary judgment motions on limitations;
- (k) preparing for and defending cross-examination of Ms. Woodard's affidavits;
- (l) responding to the 2018 plaintiffs' intervention motion;
- (m) conducting extensive settlement negotiations;
- (n) attending mediations with Joel Wiesenfeld;
- (o) obtaining expert advice from Prem Lobo on damages;
- (p) retaining and obtaining expert reports from:
 - (i) Professor Eric Kirzner (merits);
 - (ii) Dr. Sunita Surana (allocation between current and former unitholders); and
 - (iii) Prem Lobo (allocation among current unitholders);
- (q) drafting the settlement agreement and approval materials;
- (r) drafting the notice and notice program;
- (s) communicating with class members;
- (t) preparing for and attending the approval motion and notice program implementation;
- (u) implementing the notice program;
- (v) preparing the plan of allocation; and
- (w) work related to settlement administration.

25. The WIP figure excludes anticipated post-settlement work (approval hearing attendance, class inquiries, and coordination with the administrator), which class counsel estimates will require approximately 100 additional hours.

D. Disbursements incurred by class counsel

26. Class counsel incurred disbursements, inclusive of taxes, totalling \$127,726.20. All of these disbursements were necessary and consisted of:

- (a) \$8,475.00 for the cost of mediator services with Mr. Wiesenfeld;
- (b) \$86,446.05 for work conducted by Prem Lobo, who provided Ms. Woodard expert evidence about the damages sustained by the class and prepared an expert report to assist with the allocation of settlement proceeds;
- (c) \$28,687.92 for the work of Dr. Sunita Surana who prepared a report to assist with the allocation of settlement proceeds;
- (d) \$3,430.14 for the work of Professor Eric Kirzner, who prepared an expert report on the merits of the Woodard Action case theory relied on by Ms. Woodard in connection with the stay motion;
- (e) \$468.32 for filing fees and process servers; and
- (f) \$218.96 for transcripts.⁵

E. The levy payable to the Class Proceedings Fund

27. The Class Proceedings Fund agreed to fund the Woodard Action, covering approved disbursements and providing Ms. Woodard with an adverse cost indemnity.

28. By regulation, a mandatory levy is payable to the Fund whenever a monetary award or settlement benefits a class that includes a plaintiff who received Fund support. The levy equals:

⁵ Myers Affidavit, paras. 185-186, Plaintiff's Motion Record, Tab 6, p. 313-314.

(a) any financial support paid for disbursements; plus (b) 10% of the award or settlement funds payable to class members who are beneficiaries of the Fund (calculated after deduction of class counsel fees, disbursements, taxes, notice and administration costs).⁶

F. Notice to class members

29. On September 12, 2025, Leiper J. approved the notice distribution plan for the proposed settlement, including procedures for objections or comments on class counsel fees, disbursements and the plaintiff's honorarium.

30. Notice has been disseminated to class members in accordance with that order.

31. No opt-outs, objections, or comments on the settlement or any relief sought on this motion have been received.⁷

PART IV - ARGUMENT

32. The issues to be decided on this motion are:

- (a) Should the Court approve the requested counsel fee and the repayment of disbursements to class counsel?
- (b) Should the Court approve an honorarium for Ms. Woodard?

⁶ O. Reg. 771/92 s. 10, Plaintiff's Factum, Schedule "B".

⁷ Myers Affidavit, para. 157, Plaintiff's Motion Record, Tab 6, p. 307.

A. The law regarding fee approval

i. The *Class Proceedings Act*, 1992

33. Prior to 2020, the *CPA* required court approval of class counsel fees in the context of any class action settlement. While section 33(8) at the time referred to a “reasonable fee”, it provided no criteria to guide the court’s assessment of whether a particular fee was reasonable in a specific circumstance. As such, courts gradually developed an approach for assessing counsel fees that required consideration of up to ten factors.

34. In 2020, the Ontario Legislature amended the *CPA*’s fee approval provisions, largely codifying the existing criteria but doing so in a way that simplified the analysis. These new provisions apply to the Woodard Action and the submissions below are organized around them.

35. Under new section 32(2.1), the court shall not approve an agreement respecting fees and disbursements between counsel and the representative plaintiff unless it determines that the fees and disbursements required to be paid under the agreement are fair and reasonable, taking into account:

- (a) the results achieved for the class members, including the number of class or subclass members expected to make a claim for monetary relief or settlement funds and, of them, the number of class or subclass members who are and who are not expected to receive monetary relief or settlement funds;
- (b) the degree of risk assumed by the solicitor in providing representation;
- (c) the proportionality of the fees and disbursements in relation to the amount of any monetary award or settlement funds;
- (d) any prescribed matter; and

- (e) any other matter the court considers relevant.⁸

36. In assessing “the degree of risk” assumed by counsel under section 32(2.1)(b), the court is required by section 32(2.2) to consider:

- (a) the likelihood that the court would refuse to certify the proceeding as a class proceeding;
- (b) the likelihood that the class proceeding would not be successful;
- (c) the existence of any other factor, including any report, investigation, litigation, initiative or funding arrangement, that affected the degree of risk assumed by the solicitor in providing representation; and
- (d) any other prescribed matter.⁹

37. The amendments were significantly influenced by an extensive report delivered by the Law Commission of Ontario in July 2019 entitled “Class Actions: Objectives, Experiences and Reforms”.¹⁰

ii. The common law

38. While the new provisions of the *CPA* set out the ultimate criteria, numerous principles have emerged from the case law that still inform the court’s assessment. Several of these are canvassed below.

39. Justice Morgan noted in *Austin v. Bell Canada* that “the amount payable under the contract [*i.e.*, the retainer agreement] is the starting point for the application of the court’s judgment.”¹¹

⁸ *Class Proceedings Act, 1992*, [S.O. 1992, c. 6](#), s. 32(2.1), Plaintiff’s Factum, Schedule “B”.

⁹ *Class Proceedings Act, 1992*, [S.O. 1992, c. 6](#), s. 32(2.2), Plaintiff’s Factum, Schedule “B”.

¹⁰ Law Commission of Ontario, “[Class Actions: Objectives, Experiences and Reforms](#)” (July 2019).

¹¹ *Austin v. Bell Canada*, [2021 ONSC 5068](#), at para. 10.

40. In terms of the actual percentage used to calculate a contingency fee, in 2010 Strathy J. (as he then was) held that a one-third percentage contingency fee was “standard in class action litigation” and had “come to be regarded by lawyers, clients and the courts as fair.” Likewise, in *MacDonald et al. v. BMO Trust Company et al.*, Belobaba J. held that an approach that presumes a contingency fee of up to one-third is valid is appropriate in most class action settlements—aside from “mega fund” settlements of \$100 million or higher.¹²

41. In the oft-cited decision of *Cannon v. Funds for Canada Foundation*, plaintiff’s counsel requested and received one-third (33.3%) of the \$28.2 million settlement amount. In making this award, Belobaba J. grappled with the difficulty of assessing the factors relevant to fee approval (*i.e.*, risk undertaken and results achieved), instead adopting the approach that contingency fee arrangements, provided they are fully understood and accepted by the representative plaintiff, should be presumptively valid and enforceable, finding that the judicial acceptance of the contingency fee agreement as presumptively valid would further the development of the class action in at least three ways:

- (a) class counsel’s legal fees would be more easily understood, more principled and more “reasonable” than under the “multiplier” approach;
- (b) the percentage-based contingency fee approach would inject predictability into class counsel’s compensation calculus and thereby encourage greater use of the class action vehicle, enhancing access to justice; and
- (c) according presumptive validity to a one-third contingency fee, and thus making class counsel’s compensation more certain would take the pressure

¹² *MacDonald et al. v. BMO Trust Company et al.*, [2021 ONSC 3726](#), at para. [21](#).

off certification-motion costs awards as a method for forward financing the class action lawsuit.

42. At the same time, Belobaba J. held that the presumption of a valid contingency fee could be rebutted when:

- (a) there is a lack of full understanding or true acceptance on the part of the representative plaintiff;
- (b) the agreed-to contingency amount is excessive; and
- (c) applying the presumptively valid one-third contingency fee leads to a legal fees award that is so large as to be unseemly or otherwise unreasonable.¹³

43. *Cannon* and the principle that the amount payable under the retainer agreement was the starting point for the analysis of counsel fees became the leading authority for fee approval in Ontario. And for good reason. As noted by Strathy J. (as he was then) in *Osmun v. Cadbury Adams Canada Inc.*, a percentage-based approach rewards efficiency, quality, practical strategies and results:

There is much to be said in favour of contingent fee [percentage] arrangements. Litigants like them. They provide access to justice by permitting the lawyer, not the client, to finance the litigation. They encourage efficiency. They reward success. They fairly reflect the considerable risks and costs undertaken by class counsel, including the risk that they will never be paid for their work, the risk that their compensation may come only after years of unpaid work and expense, and the risk that they will be exposed to substantial cost awards if the action fails. Effective class actions simply would not be possible without contingent fees. Contingent fee awards serve as an incentive to counsel to take on difficult but important class action litigation.¹⁴

¹³ *Cannon v. Funds for Canada Foundation*, [2013 ONSC 7686](#), at paras. 8-10.

¹⁴ *Osmun v. Cadbury Adams Canada Inc.*, [2010 ONSC 2752](#), at paras. 19-22.

44. Justice Strathy expanded on the benefits of percentage-based fee agreements in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, where he stated, after listing percentage fee approvals in various class actions ranging from 24% to 36%, that:

[64] [...] Personal injury litigation has been conducted in this province for years based on counsel receiving a contingent fee as high as 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the “no cure, no pay” principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings. The contingent [percentage] fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well paid for a good result.

[65] My second observation reflects the reality of class action litigation. Defendants tend to be well-resourced and represented by larger law firms ... The Collectives [defendants] were represented by a 200 lawyer firm. These were some of the best law firms in the country, charging substantial hourly rates, with virtually unlimited resources and no incentive to roll over and play dead.

[66] Due to the nature of the work, Class Counsel are frequently associated with smaller firms and are invariably engaged on a contingent basis. Without wanting to paint all with the same brush, defendants frequently employ a strategy of wearing down the opposition by motioning everything, appealing everything and settling nothing. If class proceedings are to realize the goal of access to justice, Class Counsel must be liberally compensated to ensure that they take on challenging but difficult briefs such as this one.

[67] There must be an economic incentive to encourage lawyers to take on litigation of this kind and this is a factor to be considered in assessing the reasonableness of a fee: [citations omitted] If first-class lawyers cannot be assured that the Courts will support their reasonable fee requests, how can the Courts and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution?¹⁵

45. As held by Strathy J. in the quotes above, a percentage fee approach also appropriately recognizes that the overall risk for class counsel may be measured not in any one case, but over an

¹⁵ *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, [2011 ONSC 7105](#), at paras. [64-68](#). See also, *Helm v. Toronto Hydro-Electric System Limited*, [2012 ONSC 2602](#), at paras. [25-26](#).

entire practice. Such an approach considers that some cases will be lost early; some will be lost after many years of hard-fought litigation against well-funded defendants; some cases will be won or settle, but the fee award may not cover the actual fees incurred; some cases will settle early and some late, and so on.¹⁶

46. The presumptive enforceability of a valid contingency fee agreement has been described by Belobaba J. as “the most principled approach to Class Counsel compensation” and “best assures the future viability of the class action as a significant vehicle for access to justice”.¹⁷

B. Class counsel’s fee request should be approved

i. CPA s. 32(1): form and content of retainer agreement

47. The retainer complies with s. 32(1): it specifies fee and disbursement payment terms (para. 5), provides an estimated fee (Schedule A), and sets out the payment method (para. 14).¹⁸

ii. CPA s. 32(2.1)(a): results achieved

48. As explained in the settlement approval factum, the proposed cash settlement is a good result for the class.

49. The Defendants advanced multiple potentially dispositive defences, most notably the limitations defence, which posed an existential threat to the Woodard Action.

¹⁶ See, e.g.: “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” per Belobaba J., *Middlemiss v. Penn West Petroleum*, [2016 ONSC 3537](#), at para. 19. See also: *Ramdath v George Brown College*, [2016 ONSC 3536](#), footnote 14.

¹⁷ *O’Brien v Bard*, [2016 ONSC 3076](#), at para. 16. In the decision of *Brown v. Canada (Attorney General)*, Belobaba J. reiterated that the percentage approach should presumptively apply in settlements under \$50 million. *Brown v. Canada (Attorney General)*, [2018 ONSC 3429](#), at para. 56.

¹⁸ Woodard Affidavit, Exhibit “C”, [Plaintiff’s Motion Record](#), Tab 7-C, p. 492.

50. Although vigorously litigated over three years, the settlement achieves an expeditious recovery for class members.

51. A key settlement term requires Defendants to directly deposit the portion of the net settlement allocated to current CIBC unitholders and Renaissance unitholders into the mutual-fund trusts. This delivers a significant class benefit—an effective 100% take-up for those class members and elimination of any need for a *cy-près* distribution.¹⁹

iii. CPA s. 32(2.1)(b): degree of risk assumed by class counsel

1. General litigation and class action risk

52. Class counsel’s practice is plaintiff-side class actions, supplemented by fee-for-service commercial work. Each class action requires foregoing fee-for-service opportunities.

53. Class actions also carry the real risk that counsel will invest substantial time and resources without recovery. No matter how strong the case appears, counsel cannot treat any matter as a “sure thing.”

54. From January 2019 (when KM’s predecessor was established) through December 2022 (when this action was commenced), class counsel commenced or accepted 14 contingency-fee mandates. Of those, five were dismissed, two settled, and seven remain ongoing. In each dismissed matter counsel believed the merits to be strong at the outset.²⁰

¹⁹ See Akbarali J. in *Dufault v. The Toronto-Dominion Bank*, [2024 ONSC 961](#), paras. 27(a), 45(b).

²⁰ Myers Affidavit, para. 167, Plaintiff’s Motion Record, Tab 6, p. 309.

55. It is uncommon for a class action to settle within a few years of commencement. Counsel proceed on the assumption that litigation will be hard-fought and lengthy, with defendants likely to challenge most if not all interlocutory rulings.

2. Case-specific risk on certification and the merits

56. At the fee approval stage, the risks assumed by class counsel are measured from the commencement of the action.²¹

57. The case-specific risks here relevant to the fee approval request are summarized below (full detail is provided in the settlement-approval factum):

(a) **Certification risk:** Woodard advanced a theory distinct from Pozgaj and Frayce, creating a risk the action would not be certified.

(b) **Liability risks, including that:** (i) payment of trailing commissions to discount brokers was lawful, industry-standard and regulator-known; (ii) the declarations of trust and management agreements authorized the management fee structure and the impugned payments were consistent with these documents and disclosures to class members; (iii) the trust instruments and management agreements defined and limited defendants' duties, excluding the duties pleaded; (iv) unitholders are not the beneficiaries of the management agreements and cannot enforce duties arising thereunder; (v) s. 23.1 *Trustee Act* relief for improper expenses was displaced by the trust instruments; (vi) there was no misrepresentation under s. 130 *OSA* because the payments were

²¹ *Robinson v. Medtronic, Inc.*, [2020 ONSC 1688](#), para. 89.

adequately disclosed, and, even if there was a misrepresentation, it was not material.

(c) **Damages risks**, including that: (i) the Pozgaj plaintiff contends any damages were confined to discount broker unitholders; (ii) the trust instruments release claims on unit sale, potentially limiting recoverable losses to current holdings; (iii) the services provided by discount brokers justified the commissions, negating damages; (iv) 0.25% trailing-commission rate is presumptively reasonable, capping recoverable excess fees; and (v) class members had constructive knowledge of the practice, undermining recoverability.

(d) **Evidentiary and proof risks**: many claims may be effectively stale due to lost or unavailable records, reducing provable recoveries.

58. The existence of the Pozgaj Action materially increased risk: even with a favorable merits finding in Woodard, a court could determine that recoverable damages belonged only to Pozgaj class members.

3. Other risk-related factors

(i) Risk arising from overlooked claims

59. Before the Woodard Action was commenced, four firms—Siskinds, Koskie Minsky, Bates Barristers and Investigation Counsel—investigated trailing commission practices and concluded the viable claims were limited to discount-broker purchasers. None advanced the interests of non-discount unitholders.

60. From the outset, the litigation dynamic posed additional risk: the dispute was not simply plaintiff versus defendant but also involved adversarial positions between Ms. Woodard and the plaintiffs in Pozgaj and Frayce.

(ii) The funding arrangements

61. The Court must consider any funding arrangement as part of its holistic assessment of a fee request.

62. The Class Proceedings Fund committed financing in January 2023. Prior to obtaining funding, class counsel indemnified the representative plaintiff for disbursements and adverse cost awards. Class counsel is still responsible for funding the disbursements in the first instance and is reimbursed by the Fund on a periodic basis.

63. Commentators and courts recognize that external funding can improve class outcomes. Contingency arrangements align counsel's incentives with the class by focusing on maximizing recovery; where counsel personally bears financing risk, that exposure can create conflicting incentives to avoid personal loss rather than pursue optimal class recovery.²²

64. It is common for courts to approve contingency fees of 33% where external funding is in place.²³

²² See e.g., Gina Papageorgiou, "The Class Proceedings Fund: Separating Fact from Fiction" (2015), 10 Class Action Review, Volume 10, p. 81.

²³ *Aggarwal v. TD Asset Management Inc.*, 2025 ONSC 989, at paras. 37 and 58. *Cannon v. Funds for Canada Foundation*, [2017 ONSC 2670](#), at paras. 11-12. See also: *Middlemiss v. Penn West Petroleum*, [2016 ONSC 3537](#), paras. 19-20. *Dine v. Biomet Inc.*, [2024 ONSC 5949](#), paras. 1(iii), 154. *Pinizzotto v. TILT Holdings, Inc.*, [2021 ONSC 8001](#), at para. 71, 73. *Renk v. Audi Canada et al.*, [2020 ONSC 7998](#), at para. 19, 21. *Brazeau v. Canada (Attorney General)*, [2020 ONSC 7229](#), at para. 54. *Reddock v. Canada (Attorney General)*, [2019 ONSC 7090](#), at paras. 3-6.

(iii) Reports, investigations, litigation or initiatives that affect the degree of risk

65. None of the following considerations reduced the litigation risk:

- (a) **Regulatory activity:** Despite criticism, regulators took no enforcement action against trailing commissions paid to discount brokers prior to the Canadian Securities Administrators' June 2022 prohibition. Before that date, the practice was not prohibited, and there were no regulatory findings that trailing-commission payments breached trust or fiduciary duties or involved misrepresentations in fund disclosure.
- (b) **Parallel litigation:** Pozgaj and Frayce materially increased the risk, complexity and litigation costs involved. In Frayce, Belobaba J. denied certification based in part on an argument that the discount brokers' conduct was lawful; that same "no-illegality" defence has been advanced here. Although Woodard's theory differs, Frayce's certification defeat on a similar defence heightened the liability risk in this action.

iv. CPA s. 32(2.1)(c): The proportionality of the fees in relation to the settlement

66. The fees sought are proportional to the settlement.

67. The retainer agreement here specifies a 33.3% contingency fee, which is the appropriate starting point for the Court's assessment, which should be conducted in light of the presumed validity of a 33.3% contingency fee outside of mega-fund settlements.

68. The proposed 33.3% fee equates to a 3.54× multiplier on class counsel's WIP, which falls at the low end of accepted ranges.²⁴

²⁴ *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*, [2021 ONSC 6956](#), at para. 28.

v. **CPA s. 32(2.1)(d): Any prescribed matter**

69. This section requires the court to take into account “any prescribed matter”. No other considerations have to date been prescribed.

vi. **CPA s. 32(2.1)(e): Any other matter the court considers relevant**

70. Class counsel submits the following additional considerations are relevant:

- (a) **The fees are within the expectation of the class:** The fees sought are within the expectation of the class. The amount sought is consistent with the contingency fee retainer agreement.
- (b) **No objections:** The court-approved notice set out the fees that class counsel would seek. No objection to class counsel’s proposed fee was raised. The representative plaintiff supports class counsel’s claim to fees.
- (c) **Factual and legal complexities of the matter:** This matter involved significant legal and procedural complexity.
- (d) **The degree of skill and competence demonstrated by class counsel:** Class counsel has significant experience and the skill employed in this litigation is demonstrated in the result achieved.
- (e) **The ability of the class to pay:** No class member will pay out-of-pocket for counsel’s fee. The class was not otherwise able to fund the litigation, since individual damages were relatively low.
- (f) **The opportunity cost to class counsel:** Class counsel devoted over \$1,039,051.93 in WIP to this action that could otherwise have been used to take on paying clients.

vii. CPA s. 32(2.3): Different ways fees could be structured

71. The provision is not applicable here because there was no prospect of structuring the payment of fees and disbursements other than through a contingency fee retainer agreement.

C. Ms. Woodard’s request for an honorarium should be approved

72. Ms. Woodard seeks approval of a \$500 honorarium.

73. The test for the availability of honoraria was set out by the Divisional Court in *Doucet v. The Royal Winnipeg Ballet*. One of the factors the court should consider is whether “[t]he nature of the remedies available for the cause of action asserted, particularly cases where even complete success would lead to only a tiny monetary remedy for each class member or none at all.”²⁵

74. This precisely describes the circumstances here. Ms. Woodard’s personal damages are estimated to be only \$25. Ms. Woodard was nonetheless still willing to act as representative plaintiff knowing that the value of time she would need to devote to the litigation would far outweigh the value of her individual damages.

75. Further, the requested honorarium is modest enough to overcome any concern that Ms. Woodard is being rewarded for the ordinary work of serving as a representative plaintiff.

76. Additional factors also support the honorarium request—all of which were accepted by this Court in *Dufault v. The Toronto-Dominion Bank*:

- (a) the results achieved;

²⁵ *Doucet v The Royal Winnipeg Ballet*, [2023 ONSC 2323](#), para. [92\(2\)](#). This test has been affirmed by the Court of Appeal. See e.g., *Fresco v. Canadian Imperial Bank of Commerce*, [2024 ONCA 628](#), para. [106](#).

- (b) Ms. Woodard was instrumental in securing a direct deposit element, ensuring that the take-up rate arising from the Defendants' direct deposit will be high;
- (c) without the litigation, in view of the small amount of loss suffered by each class member, any remedy would have been impractical;
- (d) Ms. Woodard was actively involved in the litigation (this in itself is not an exceptional circumstance, but is relevant in the context of all the circumstances);
- (e) the quantum of payment requested is on the low end of honoraria; and
- (f) the honorarium sought cannot be said to create a conflict of interest or an appearance of a conflict of interest.²⁶

PART V - ORDERS REQUESTED

77. Ms. Woodard and class counsel request an order in the form of the draft order provided.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: December 17, 2025



Paul Guy / Serge Kalloghlian

Lawyers for the Plaintiff

²⁶ *Dufault v. The Toronto-Dominion Bank*, [2024 ONSC 961](#), at para. [51](#).

SCHEDULE “A” - AUTHORITIES

Jurisprudence:

1. *Aggarwal v. TD Asset Management Inc.*, 2025 ONSC 989
2. *Austin v. Bell Canada*, [2021 ONSC 5068](#)
3. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, [2011 ONSC 7105](#)
4. *Brazeau v. Canada (Attorney General)*, [2020 ONSC 7229](#)
5. *Brown v. Canada (Attorney General)*, [2018 ONSC 3429](#)
6. *Cannon v. Funds for Canada Foundation*, [2013 ONSC 7686](#)
7. *Cannon v. Funds for Canada Foundation*, [2014 ONSC 953](#)
8. *Cannon v. Funds for Canada Foundation*, [2017 ONSC 2670](#)
9. *Dine v. Biomet Inc.*, [2024 ONSC 5949](#)
10. *Doucet v The Royal Winnipeg Ballet*, [2023 ONSC 2323](#)
11. *Dufault v. The Toronto-Dominion Bank*, [2024 ONSC 961](#)
12. *Fresco v. Canadian Imperial Bank of Commerce*, [2024 ONCA 628](#)
13. *Helm v. Toronto Hydro-Electric System Limited*, [2012 ONSC 2602](#)
14. *MacDonald et al. v. BMO Trust Company et al.*, [2021 ONSC 3726](#)
15. *Middlemiss v. Penn West Petroleum*, [2016 ONSC 3537](#)
16. *O’Brien v Bard*, [2016 ONSC 3076](#)
17. *Osmun v. Cadbury Adams Canada Inc.*, [2010 ONSC 2752](#)
18. *Pace Securities Corp. et al v. First Hamilton Holdings Inc. et al.*, [2021 ONSC 6956](#)
19. *Pinizzotto v. TILT Holdings, Inc.*, [2021 ONSC 8001](#)
20. *Ramdath v George Brown College*, [2016 ONSC 3536](#)
21. *Reddock v. Canada (Attorney General)*, [2019 ONSC 7090](#)
22. *Renk v. Audi Canada et al*, [2020 ONSC 7998](#)
23. *Westwood v. TD Asset Management Inc.*, [2024 ONSC 6872](#)

Secondary Sources:

24. Gina Papageorgiou, “The Class Proceedings Fund: Separating Fact from Fiction” (2015), 10 Class Action Review, Volume 10
25. Law Commission of Ontario, [*Class Actions: Objectives, Experiences and Reforms: Final Report*](#) (Toronto: July 2019).

SCHEDULE “B” - STATUTES

Class Proceedings Act, 1992, S.O. 1992, c. 6

Fees and disbursements

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

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Court to approve agreements

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

Fees must be fair and reasonable

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

- (a) the results achieved for the class members, including the number of class or subclass members expected to make a claim for monetary relief or settlement funds and, of them, the number of class or subclass members who are and who are not expected to receive monetary relief or settlement funds;
- (b) the degree of risk assumed by the solicitor in providing representation;
- (c) the proportionality of the fees and disbursements in relation to the amount of any monetary award or settlement funds;
- (d) any prescribed matter; and
- (e) any other matter the court considers relevant.

Same

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

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

- (b) the likelihood that the class proceeding would not be successful;
- (c) the existence of any other factor, including any report, investigation, litigation, initiative or funding arrangement, that affected the degree of risk assumed by the solicitor in providing representation; and
- (d) any other prescribed matter.

Same

(2.3) In determining whether the fees and disbursements are fair and reasonable, the court may, by way of comparison, consider different methods by which the fees and disbursements could have been structured or determined.

O. Reg. 771/92: CLASS PROCEEDINGS

Levies Against Awards and Settlement Funds

10. (1) This section applies in a proceeding in respect of which a party receives financial support from the Class Proceedings Fund. O. Reg. 771/92, s. 10 (1).

(2) A levy is payable in favour of the Fund,

(a) when a monetary award is made in favour of one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act; or

(b) when the proceeding is settled and one or more persons in such a class is entitled to receive settlement funds.

(3) The amount of the levy is the sum of,

(a) the amount of any financial support paid under section 59.3 of the Act, excluding any amount repaid by a plaintiff; and

(b) 10 per cent of the amount of the award or settlement funds, if any, to which one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act is entitled.

DARLENE WOODARD
Plaintiff

and

CANADAN IMPERIAL BANK OF COMMERCE et al.
Defendant

Court File No.: CV-22-0000690374-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE PLAINTIFF
(Motions for Approval of Class Counsel Fees,
Disbursements and an Honorarium)**

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