

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**BARBARA KRANJCEC, on her own behalf and on behalf
of all retired former employees of the Ontario Government
receiving coverage under the Supplementary Health and
Hospital Insurance, Dental and Life Insurance Plan as of
June 1, 2002**

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM
(Motion to Approve Class Counsel Fees and Disbursements)**

PART I - NATURE OF MOTION

1. This is a motion by Class Counsel for an order approving a Class Counsel fee, inclusive of taxes and disbursements, of \$2,823,807.21. This fee equates to 13.9% of the settlement, after disbursements and taxes have been accounted for.

PART II - FACTS

2. This litigation was commenced on October 31, 2002. From the outset, Class Counsel was engaged in collecting information and conferring with respect to litigation strategy and the prospects for success. In the course of the litigation, Class Counsel have collectively spoken and corresponded with more than 2,000 Class Members about the litigation.

3. The two firms comprising the Class Counsel team, Cavalluzzo Hayes Shilton McIntyre & Cornish^{LLP} ("Cavalluzzo") and Siskind, Cromarty, Ivey & Dowler^{LLP} ("Siskinds"), were uniquely positioned to analyse the types of issues which arose in this case. The competencies of the two firms made it easy to divide out tasks which were undertaken. In general, Cavalluzzo undertook the substantive research, drafting, and argument, including all work related to documentary production and examinations for discovery. Siskinds researched, drafted, and argued class action specific issues. Collectively, the firms conferred and reached consensus with respect to overall strategy and the direction of the litigation.

4. Considerable efficiencies were achieved through the joint retainer of Siskinds and Cavalluzzo, which efficiencies are reflected in relatively low docketed time when compared to reported costs decisions in other complex proceedings. For example, each of the firms had prior knowledge of relevant case law and were able to access applicable precedents thereby expediting the litigation process. Given that the two firms were pursuing other unrelated joint retainers simultaneously with this case, there was little or no cost associated with meeting to prepare materials or discuss strategy. Further efficiencies were achieved by delegating legal research and drafting to more junior lawyers at each of the firms.

5. Notwithstanding the significant number of class members and their geographic diversity, no other actions were commenced. At the time that Class Counsel undertook the

litigation, and throughout the litigation, they were aware that there were significant procedural and substantive risks, including:

- a. The risk that the court would dismiss the action based on a preliminary motion;
- b. The risk that the court would not certify the action;
- c. The risk that the court would not agree that an aggregate damage assessment was possible, thus making the proof for individual class members onerous;
- d. The risk that following certification, the court would dismiss the action on a motion for summary judgment;
- e. The risk that the court would accept one of the substantive defences put forward by the defendant in the course of the litigation, which defences included:
 - i. The Ontario Government did not enter into a binding promise or contract with its retired employees.
 - ii. The Ontario Government is not in a fiduciary relationship with the retirees.
 - iii. There is no statutory regime for the vesting of retiree benefits and the benefits did not presumptively vest.

- iv. The retirees have not had a vested right to benefit improvements since retirement; and

- f. Even in the event that the plaintiff was successful in all phases in the litigation, the plaintiff was aware that the defendant would likely file appeals in respect of multiple issues, thus resulting in a considerable delay in compensation for class members.

Affidavit of Michael Wright, para. 21

6. The risks undertaken in this case are underscored in *MacDougall v. Ontario Northland Transportation Commission*, a case which has factual similarities to the within case. Like this case, the plaintiffs in *MacDougall* are retirees who are advancing claims relative to the administration of their retirement benefits (in *MacDougall* it is pension benefits that are the focus). The action was commenced in July, 2002, shortly before the commencement of the within litigation. Cavalluzzo and Siskinds are both on the Class Counsel team in the *MacDougall* case. Following lengthy pre-certification proceedings, certification was denied in that case (and is under appeal). Cavalluzzo and Siskinds jointly have invested over \$600,000 of time at their regular hourly rates and over \$35,000 in disbursements to date in the *MacDougall* litigation.

Affidavit of Michael Wright, para. 23

7. In this case, the diligent litigation conducted against the defendant, which was vigorously advocating its position can be summarized by the following steps which were taken:
- a. The defendant contested the plaintiff's motion for certification resulting in the cross-examination of seven affiants, including the representative plaintiff. Extensive records and facta were filed.

- b. The defendant served an extensive Demand for Particulars on the plaintiff which required significant work by the plaintiff to answer.
- c. The defendant filed a Statement of Defence.
- d. Documentary discovery was completed by both the plaintiff and the defendant. The defendant produced 343 documents which were reviewed by Class Counsel.
- e. Examinations for discovery were commenced. Class Counsel conducted an examination for discovery of the defendant's representative, John Goodman, over two days. In the course of the examination for discovery, the defendant refused to produce various requested documents. As a result, the plaintiff filed a motion for an order requiring the defendant to produce the requested documents and to answer undertakings. Shortly before the scheduled motion, the defendant agreed to produce the disputed documents and to comply with its undertakings. In total, the defendant responded to 62 undertakings and also produced additional documents.
- f. In December, 2005, the certification order was amended by agreement of the parties to remove one of the common issues in order to facilitate an early trial of the matter.
- g. Dates for the examination for discovery of class representatives had been scheduled but had not yet taken place when the parties reached a settlement. The trial of this matter was scheduled for three weeks in November, 2006.

Affidavit of Michael Wright, para. 5

8. Despite the significant risks, and despite the strong defence position taken, Class Counsel achieved a settlement for Class Members with considerable monetary and non-monetary benefits. The monetary component of the settlement, \$20,000,000 was paid into trust on or about March 23, 2006 and will accrue interest in the amount of approximately \$481, 339.79 to October 15, 2006.

Affidavit of Michael Wright, para. 24

9. The total Settlement Amount, plus interest but less Class Counsel Fees (inclusive of disbursements, taxes, notice and administration), will be distributed to Class Members on a per capita basis. Class Counsel estimates that each of the approximately 48,789 Class Members will receive \$353.53 in settlement benefits. Additionally, Class Members will be entitled to non-monetary benefits including increased coverage for vision care, diabetic equipment, and a new drug benefit card designed to eliminate the up-front costs associated with prescription medication.

Affidavit of Michael Wright, para. 27

10. By agreement with the representative plaintiff, Class Counsel funded all of the disbursements in this proceeding. Pursuant to section 10(3)(b) of *The Law Society Act*, O.Reg. 535/95, if funding had been pursued and obtained from the Class Proceedings Fund, \$2,000,000 would now be payable to the Fund.

11. Even with the numerous efficiencies achieved by Class Counsel, significant time and money have been expended in pursuing this litigation. Collectively, Cavalluzzo and Siskinds have docketed time of \$590,081.50 plus G.S.T., up to August 29 and incurred total disbursements of \$45,015.21 plus applicable G.S.T., up to August 22. Given the ongoing work to be done by Class Counsel during the twelve month administration period, Class

Counsel has estimated an additional \$180,000.00 in time, and \$5,000.00 in disbursements will be incurred through the conclusion of the administration process.

12. In the course of the litigation, Class Counsel has received two cost awards from the defendant, one valued at \$1,500 and the other valued at \$45,000.

13. The fee being sought by Class Counsel is substantially less than that provided for in the retainer agreement. The retainer agreement provides that Class Counsel may seek up to twenty-five percent (25%) of all benefits received for the class, including party and party costs. In addition to the legal fees the retainer agreement provides for taxes and disbursements to be paid. A fee paid pursuant to the retainer agreement would be in excess of \$5,000,000 plus disbursements and applicable taxes. Following certification, the class was provided with a notice of certification which advised them that Class Counsel could request a fee of up to 25% from the court plus expenses in the event of judgment or settlement in favour of the class. Those class members who did not opt out were advised of the fee agreement entered into with the representative plaintiff.

14. Despite the provisions of its retainer agreement, in the context of the negotiated settlement, Class Counsel agreed to seek approval of an all inclusive legal award on account of fees, disbursements, and taxes in an amount not to exceed fifteen percent (15%) of the Total Settlement Amount, which is valued at \$20,306,190.79 (including accumulated interest and \$46,500.00 in collected cost awards). After accounting for disbursements and taxes, such a legal award would result in a fee equal to 13.9% of the monetary component of settlement, calculated as follows:

Total Outstanding Fee Request

Settlement Amount	\$20,000,000.00
Interest Accumulated on Settlement Amount (less estimated taxes payable on interest)	\$259,690.79
Cost Awards	\$46,500.00
Total Settlement Benefits	\$20,306,190.79

Total Class Counsel Fee @15% (inclusive of disbursements and taxes)	\$3,045,928.12
Less Cost Awards Collected	\$46,500.00
Total Outstanding Fee Request	\$2,999,428.12

Fee Request as a Percentage of the Total Settlement Amount

Total Class Counsel Fee (15% inclusive of disbursements and taxes)	\$3,045,928.12
Less Total Disbursements Incurred (as of August 22, 2006)	\$45,015.21
Less G.S.T. on Disbursements (as of August 22, 2006)	\$2,677.27
Less Future Disbursements (estimated – including G.S.T.)	\$5,000.00
Less G.S.T. on legal fees	\$169,428.43
Total Legal Fee	\$2,823,807.21
Total Legal Fee as a Percentage of the Total Settlement Amount	13.9%

Fee Request Expressed as a Multiple of Time Expended

Class Counsel time (as of July 31, 2006)	\$590,081.50
Future Class Counsel time (estimated)	\$180,000.00
Total Class Counsel time (through conclusion of file)	\$770,081.50
Total Class Counsel legal fee requested	\$2,820,979.58
Multiplier cross-check	3.66

PART III - ISSUES AND SUBMISSION

(A) Governing Legislation

15. The right of representative plaintiffs to enter into contingent fee arrangements with Class Counsel was first recognized in the *Class Proceedings Act, 1992*, at a time when contingent fees were not otherwise available to counsel in Ontario. Despite subsequent amendments to the *Solicitors Act* proclaimed in 2004 which made contingent fees permissible in Ontario, the *Class Proceedings Act, 1992* is the governing legislation in respect of class proceedings.

16. The *Class Proceedings Act, 1992* is a "special Act" which governs a specific type of civil litigation in Ontario. The *Solicitors Act* is properly considered a "general Act" which generally governs solicitors in Ontario. The law is clear that "where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject-matter of the rule from the general Act". The rule in the general Act must yield to the rule in the special Act, in this case, the *Class Proceedings Act, 1992*.

Ottawa (City) v. Eastview (Town), [1941] S.C.R. 448, at para. 60 (S.C.C), online: QL (S.C.R.).

17. The *Class Proceedings Act, 1992* carves out the *Solicitors Act* from application in respect of contingent fee arrangements, indicating the legislature's specific intent that the *Class Proceedings Act, 1992* would govern contingent fee arrangements in the class proceedings context.

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

Class Proceedings Act, 1992, S.O. 1992, c.6, s.33.

(B) Approval of the Retainer Agreement

18. The *Class Proceedings Act, 1992* stipulates that an agreement respecting fees and disbursements shall be in writing and shall:

- i. State the terms under which fees and disbursements shall be paid;
- ii. Give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- iii. State the method by which payment is to be made, whether by lump sum, salary or otherwise.

Class Proceedings Act, 1992, S.O. 1992, c.6, s.32(1).

19. On July 30, 2002, in advance of the contingent fee amendments to the *Solicitors Act*, the representative plaintiff, Barbara Kranjcec, executed a retainer agreement with Class Counsel. In keeping with the requirements of the *CPA*, the retainer agreement: 1) stipulates that fees and disbursements will only be paid in the event of "success" including judgement in favour of the class or a settlement benefiting class members; 2) provides an estimate of what a reasonable settlement or judgment might be and an example of how fees would be calculated; and 3) stipulates that fees will be paid on a percentage basis.

Affidavit of Barbara Kranjcec, Exhibit "A"

(C) Approval of Class Counsel Fees and Disbursements

(i) Fees in Class Proceedings Generally

20. One of the primary goals of the *Class Proceedings Act, 1992* is to provide enhanced access to justice. In order to realize this objective, courts have recognized that there must be an economic incentive for lawyers to take on an appropriate case and pursue it diligently:

The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and do it well. However, if the *Act* is to fulfill its promise, that opportunity must not be a false hope.

***Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at 422 (C.A.).**

***Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 at 287 (S.C.J.).**

21. In the context of the *Class Proceedings Act, 1992*, a premium on fees is the reward for taking on meritorious but difficult matters. As set out in the Report of the Ontario Law Reform Commission on the then proposed class proceeding legislation:

Under the kind of fee arrangement permitted by the *Act*, the class lawyer will receive a fee only in the event of success. If he agrees to act on this basis, the class lawyer will be assuming a risk that, after the expenditure of time and effort, no remuneration may be received. It is essential that the successful lawyer be compensated for accepting the risk of non-payment.

Ontario Law Reform Commission, 1982, p. 135

22. Class Counsel pursued the within action diligently and obtained a very good result for the class with significant efficiency. A percentage based arrangement, such as the one entered into with the plaintiff, rewards efficiency and should be encouraged. As stated by the Court in *Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada*:

A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending on the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this court the settlement averted a seven to ten day trial. Fee arrangements that reward efficiency and results should not be discouraged.

Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998),
40 O.R. (3d) 83 at 88 (Gen. Div.).

Stone Paradise Inc. v. Bayer Inc. et al (12 April 2006), London 45604CP,
at para. 16 (S.C.J.) [unreported].

(ii) Factors to Consider in Assessing Class Counsel Fees

23. As outlined in section 33 of the *Act*, the fee awarded must be fair and reasonable in light of the risk undertaken by Class Counsel, and the manner in which Class Counsel conducted the proceeding.

Class Proceedings Act, 1992 S.O. 1992, C.6, ss. 33(7), 33(9).

24. Although multiplier and lump sum methods may be used to calculate class counsel fees, the preferred method of calculating fees is as a percentage of class recovery. Unless a compelling case can be mounted for regarding the percentage fee agreement as unsuitable, compensation at the rate agreed to by the representative plaintiff should be the court's starting point in deciding a "fair and reasonable fee."

In most Ontario class actions, the retainer agreement between class counsel and representative plaintiffs provides for a contingency fee calculated on a percentage of the settlement or judgment. Unless a compelling case can be mounted for regarding this agreement as unsuitable, compensation at the rate agreed to by the

representative plaintiff should be the court's starting point in deciding a "fair and reasonable fee." First resort should not be made to the base fee and multiplier method, because of the considerable incentives class counsel and defendants have for tacit collusion in allowing class counsel's base fee to rise to a level conducive to settlement, and the inefficiencies this endangers. If this recommendation is taken up, and the percentage method (if agreed to by the representative plaintiff and class counsel) is specified in the retainer agreement, there are four specific concerns judges should consider. First, the court should examine whether there is any reason to think that the compensation provided for by the retainer agreement does not represent a fair and reasonable return to class counsel given what was known *ex ante* about the strength of the case, the costs of making the case, and the likelihood of success. This may be a difficult determination to make; nevertheless, courts should strive to make accurate determinations in this regard. Second, the court should consider whether the settlement takes the form of coupons or in-kind benefits to class members. If so, the court should discount the judgment appropriately. Third, if there is a reversionary interest to the defendant of the settlement fund, then the court should consider allowing class counsel to recover the stated percentage only of the amount actually distributed to class members. Finally, the court should be attuned to the incentives class counsel have under the percentage method for premature settlement. If it appears that class counsel has settled too quickly for an amount grossly lower than what one might consider to be the value of the claims of the class members, then the lodestar method might be more appropriately used than the percentage method (assuming the percentage method is provided for in the retainer agreement).

***Stone Paradise Inc. v. Bayer Inc. et al* (12 April 2006), London 45604CP, at para. 21 (S.C.J.) [unreported] citing Benjamin Alarie, Assistant Professor of Law, University of Toronto, *Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions* (prepared for the 2006 Class Actions Without Borders conference) at pg 23 and 24.**

25. Taking into account the percentage fee agreement agreed upon, the court must also consider the following factors in determining what constitutes a fair and reasonable fee:
- a. The degree of risk and responsibility assumed by counsel;
 - b. The results achieved and the degree of success in the proceeding;
 - c. The time expended by the solicitor;
 - d. The legal complexity of the matters to be dealt with;
 - e. The monetary value of the matters in issue;

- f. The importance of the matter to the client;
- g. The degree of skill and competence demonstrated by the solicitor;
- h. The ability of the client to pay; and
- i. The client's expectations as to the amount of the fee.

Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83 at 88 (Gen. Div.).

Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 at 393 (Gen. Div.).

The Degree of Risk and Responsibility Assumed by Counsel

26. The litigation risk assumed by counsel is materially related to the complexity of the proceedings. A more complex proceeding requires that Class Counsel invest more time and resources in pursuing the litigation:

Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some consideration must also be given to the commitment of resources made by the Class Counsel and the impact that this will have in the event the litigation is unsuccessful.

Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281 at 293 (S.C.J.).

27. The risks involved in pursuing the class litigation must be assessed as they existed when the litigation commenced, and as it continued. Risk cannot be assessed with the benefit of hindsight.

Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 at 423 (C.A.).

28. The large size of this class (over 45,000 class members) and their relatively high level of interest in the litigation, required class counsel to carefully consider the management and communication issues involved in the class action. In *Serwaczek v. Medical Engineering Corp.*, Winkler J. observed:

The size of the class is considerable. Counsel estimate that between 3000 and 5000 class members will ultimately receive compensation under this settlement agreement. Administration of any class proceeding is a formidable task, however with a class of that size the task is virtually Herculean.

***Serwaczek v. Medical Engineering Corp.* (1996), 3 C.P.C. (4th) 386 at 395 (Gen. Div.).**

Results Achieved and Degree of Success

29. The degree of success achieved is a relevant consideration in assessing whether the fees sought by counsel are fair and reasonable, but total recovery is not the only criterion on which to judge the settlement. The relative ease or difficulty with which benefits may be accessed is an important consideration. It is of significance in this case that benefits will be sent directly (via direct deposit or regular mail) to class members without the need for those class members to submit individual claim forms. It is submitted that the court should give weight to the ease with which benefits are available through the settlement.

***Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 at 289 (S.C.J.).**

30. The fees sought must be assessed in relation to the total class recovery, in this case \$20,000,000 plus interest, party and party costs, and non-monetary health care benefits, and not the individual amount of each class members' claim.

Ontario Law Reform Commission, 1982, p. 135

***Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* [2005] O.J. No. 1117.**

31. In considering the results achieved, all benefits recovered must be considered, including those paid on account of costs, class counsel fees, and administration expenses. In *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche*, the negotiated settlement of a price-fixing class action contained a payment of \$10 million on account of Class Counsel Fees and Administration Expenses. In holding that such amount must be included as part of the global recovery for class members for the purposes of determining an appropriate fee for Class Counsel, Cumming J. stated:

A Court must be cognizant that any amount so labelled in a class action as being "on account of Class Counsel Fees" does not imply the minimum starting point in a determination of the quantum of fair and reasonable legal fees. The isolated amount, if such there is, should properly be seen as simply an indistinguishable part of the total global recovery for the class with fair and reasonable fees then being determined by looking to the global recovery along with all other appropriate factors.

***Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* [2005] O.J. No. 1117 at para. 19 (S.C.J), online: QL (ORP)**

Time Expended

32. In analysing the fairness and reasonableness of Class Counsel's fees, the Court may employ the corroborating tests set out by Goudge J.A. in *Gagne*. These tests involve:

...testing the fee as a percentage against recovery, as a multiple of base fees, as against the retainer agreement, and whether, in the circumstances, the fee will provide sufficient incentive for counsel to take on difficult cases in the future.

***Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at 425 (C.A.).**

***Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 at 305 (S.C.J.).**

33. However, the court should be wary of placing too much emphasis on the size of the multiplier as it is not necessarily a reliable measure. As stated by the British Columbia court in *Endean v. Canadian Red Cross*: "[g]ood counsel should not be penalized for their acuity and efficiency by basing their fees only on the amount of time that it took them to accomplish their client's objectives".

***Endean v. Canadian Red Cross* [2000] B.C.J. No. 1254 at para. 74 (B.C.S.C.), online: QL (B.C.J.).**

34. Using a percentage calculation in determining Class Counsel fees properly places the emphasis on the quality of representation, and the benefit conferred to the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours". As stated by the British Columbia Court in *Endean*:

[I]t must be remembered that good counsel can often achieve with a minimal effort what it might take less skilful counsel a great deal of time to achieve.

***In Re Warner Communications Securities Litigation*, 618 F. supp. 735 at 747 (S.D.N.Y.) 1985).**

***Endean v. Canadian Red Cross* [2000] B.C.J. No. 1254 at para. 74 (B.C.S.C.), online: QL (B.C.J.).**

35. Unlike many class actions in which more than one firm is retained by a plaintiff, this was not a case which was over-lawyered or where work was duplicated by multiple firms. In all instances Class Counsel sought to avoid duplication of work and to pursue the litigation in as efficient manner as possible. For example, Cavalluzzo undertook the substantive research, drafting, and argument, including all work related to documentary production and examinations for discovery. Siskinds researched, drafted, and argued class action specific issues. Collectively, the firms conferred and reached consensus with respect to overall strategy and the direction of the litigation. Although the time expended in the

course of contentious litigation was significant, the total time expended was less than that incurred in many cases for certification alone.

Andersen v. St. Jude Medical, Inc., [2004] O.J. No. 3102 (S.C.J.), online: QL (ORP).

Mandeville v. Manufacturers Life Insurance Co., [2002] O.J. No. 5388 (S.C.J.), online: QL (ORP).

Legal Complexity

36. This action deals with novel issues about which there is little Canadian case law. While the most relevant case on point, *Dayco v. C.A.W.*, provides helpful discussion, it is not determinative of the issues in this case. Many of the substantive defences raised by the defendant would have been litigated for the first time in Canada.

Value of the Matters in Issue

37. The aggregate value of the matters in issue for the class members is sizeable. In addition to a monetary payment of \$20,000,000 plus interest, Class Members will be entitled to all new benefits negotiated by OPSEU and the Ministry of Government Services in June, 2005, including increased coverage for vision care, diabetic equipment, and a new drug benefit card designed to save the up-front costs associated with prescription medication. Despite the considerable value which undoubtedly could be attributed to these non-monetary benefits, Class Counsel is limiting its fee request to the monetary component of the settlement.

Importance of the Matter to the Class

38. This action was brought on behalf of a class of persons of advanced age, many of whom are in precarious health. Through the action, the plaintiff sought redress for the defendant's unilateral reduction in retirement benefits, including health care benefits, an area of obvious importance for class members.

39. Class Counsel have collectively spoken and corresponded with over 2,000 class members through the course of the litigation. These class members have generally been concerned with the defendant's reduction of their benefits as well as the time it was taking to obtain a remedy.

Class Counsel Skill and Competence

40. The Class Counsel team, comprised of Cavalluzzo and Siskinds, pursued this litigation with skill and efficiency. While Cavalluzzo was uniquely positioned to analyse the substantive legal issues, Siskinds was well positioned to analyze and advance the class action specific issues. Through a division of labour which utilized the unique skills of each firm, Class Counsel succeeded in its motion for certification and ultimately achieved a sizeable settlement for the class in a relatively short period of time.

41. The skill and competence that Class Counsel brought to bear in this litigation is a factor which the court ought to consider in determining a fair and reasonable fee. As stated by the Court of Appeal in *Gagne*,

Section 33(9) invites the court, in determining whether a multiplier is appropriate, to consider the manner in which the solicitor conducted the proceeding. Just as the

real opportunity to receive an enhanced reward for incurring the risks of the litigation serves as an incentive for the solicitor to take on the retainer, that opportunity is also designed to serve as an incentive for the solicitor to achieve the best possible results for the class, expeditiously and efficiently.

Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 at 424 (C.A.).

Plaintiff Fee Expectation

42. At the time this action was commenced, the representative plaintiff signed a retainer agreement with Class Counsel which provided that Class Counsel could seek up to twenty-five percent (25%) of all benefits received for the class, including party and party costs. In addition to legal fees the retainer agreement provides for taxes and disbursements to be paid. A fee paid pursuant to the retainer agreement would be in excess of \$5,000,000 plus disbursements and applicable taxes. Importantly, the Class was given notice of the retainer agreement after the proceeding was certified and before the Opt Out deadline.

43. Despite the provisions of the retainer agreement, Class Counsel, are seeking approval of an all inclusive legal award on account of fees, disbursements, and taxes of fifteen percent (15%) of the monetary component of the Settlement Fund (13.9% after accounting for disbursements and taxes), valued at approximately \$2,999,428.12. The fee sought is significantly less than that contemplated by the plaintiff at the outset of the litigation.

44. The representative plaintiff has sworn an affidavit indicating her support for the all-inclusive fee being sought by Class Counsel.

(iii) Appropriateness of the Class Counsel Fees Sought

45. The all inclusive fee sought by Class Counsel is fair and reasonable. Indeed, it is at the low end of percentage fee awards for similarly litigated cases in Canada. For example, in *White v. Canada (Attorney General)*, the British Columbia court awarded a fee of 30% of a settlement which was reached following a contested certification hearing, extensive discovery of documents, three days of examinations for discovery of the defendant's representative, and numerous communications with class members. The total class recovery in *White* was \$8,000,000 plus \$200,000 for administration expenses and accumulated interest. In approving the 30% fee, the court noted:

Additionally, approval of such a fee in this case fulfills the policy objective of encouraging greater access to justice through the mechanism of class proceedings for those who might otherwise be unable, by compensating counsel for the realistic and significant risk they expose themselves to by taking on difficult and time consuming cases with no guarantee of success on a contingency basis.

***White v. Canada (Attorney General)* [2006] B.C.J. No. 760 at para. 37 (B.C.S.C.), online: QL (B.C.J.).**

46. In British Columbia, where contingent fees have been permissible for some time, the vast majority of fee awards fall between fifteen (15%) and thirty three and one third percent (33 1/3%). In canvassing recent contingent fee awards, the B.C. court in *Endean* made the following observations:

The vast majority of percentage contingent fees in British Columbia range between 15% and 33 1/3%. In *Harrington v. Dow Corning Corp.*, supra E.R.A., Edwards J. observed that class counsel fees in the United States commonly range between 15% and 50%, and that a "presumptively reasonable rate" is 30%. He approved a contingent fee of 15%, which produced a fee in the order of \$6,000,000 for plaintiffs' class counsel. In *Sawatzky*, supra a contingent fee of 20% amounting to \$760,000 was approved. In *Fischer*, supra a fee of 30% of shares in a public company issued

in settlement was approved, although the value of the fee in monetary terms is not apparent.

The fee proposed here compares favourably in percentage terms with contingent fees approved in Ontario and Quebec, as well. In *Nantais*, supra Brockenshire J. approved a percentage fee of 30%, which yielded a fee of approximately \$6,000,000. In *Doyer v. Dow Corning Corp.* (1 September 1999), Montreal 500-06-000013-934 (Q.S.C.) a percentage of 20% was approved yielding a fee of \$10,400,000. In *Pelletier v. Baxter Health Care Corp.*, [1999] Q.J. No. 3038 (S.C.), a percentage of 16.9% yielding \$3,648,000 in fees was approved.

I note, as well, the observation of McEachern C.J.B.C., speaking for the Court in *Commonwealth No. 2*, supra at p. 188, para. 49, that he saw nothing unreasonable or threatening to the integrity of the profession in a fee of 25% "for the skilful recovery of \$6.5 million."

***Endean v. Canadian Red Cross* [2000] B.C.J. No. 1254 at paras. 77-79 (B.C.S.C.), online: QL (B.C.J.).**

47. It is submitted that a fee of 13.9% (after accounting for taxes and disbursements) is eminently reasonable in light of the risks faced at the outset of the litigation, risks which will continue until the settlement is approved. For Class Counsel to continue to take on meritorious, but risky cases, there must be a level of predictability in the nature and amount of the award if success is achieved. As stated by Professor Garry D. Watson Q.C. in a paper entitled *Class Action: Uncharted Procedural Issues*, and cited by the court in *Endean*:

It is vital to the viability of class actions that class counsel not be met on "judgment day" with judicial pronouncements (issued with the benefit of hindsight) that class counsel "spent too much time, had hourly rates that were too high and in any event were conducting a case which was not really risky at all" and awarded a low base fee and a niggardly multiplier – except in very clear cases.

***Endean v. Canadian Red Cross* [2000] B.C.J. No. 1254 at para. 87 (B.C.S.C.), online: QL (B.C.J.).**

PART IV - RELIEF SOUGHT

48. The plaintiff requests that this court grant an order approving the retainer agreement entered into with Barbara Kranjcec, and approving a fee award of \$2,999,428.12, inclusive of disbursements and applicable taxes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of August, 2006

August 30, 2006

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