C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N° : 500-06-000435-087

SUPERIOR COURT
(Class Action Division)

SHEILA CALDER

Plaintiff

v.

ROYAL BANK OF CANADA

-and-

RBC CAPITAL MARKETS CORPORATION

Defendants

-and-

LE FONDS D'AIDE AUX ACTIONS COLLECTIVES

Mis en cause

MOTION TO APPROVE A SETTLEMENT AGREEMENT AND FOR OTHER RELIEFS (Articles 590, 593 and 596 CCP)

TO THE HONOURABLE THOMAS M. DAVIS OF THE SUPERIOR COURT OF QUEBEC, THE PLAINTIFF RESPECTFULLY STATES AS FOLLOWS:

A) OVERVIEW

1. In May 2008, the motion for authorization of this class action (the "**Action**") was filed.

2. On October 30, 2013, the Action was authorized.

3. The Class was defined as follows:

> "All Canadian retail investors who purchased one of the Olympus United Funds Corporation shares (formerly First Horizon Holdings Ltd.) from June 27, 1999 to June 29, 2005, and who had outstanding shares in said corporations as of June 29, 2005, but to the exclusion of any person who is or was in any way related to John Xanthoudakis or any former director, administrator, representative or employee of the *Norshield Financial Group.*"

4. The conclusions sought were:

> **CONDEMN** [Defendants] to pay to the Class members the balance in Canadian dollars attributed to their unredeemed shares of *Olympus United Funds Corporation* or its predecessor First Horizon Holdings Ltd, as of June 29, 2005, less any amount received by class members pursuant to the judgment rendered by this Court on July 26th 2012, in court file 500-06-000434-080, and subject to the judgment of July 26th 2012 in the present instance, plus legal interest and the special indemnity provided by Article 1619 of the *Civil code of Quebec* calculated from the first date of the service of the proceedings;
>
> **ORDER** the collective recovery of the damages;
>
> **THE WHOLE** with costs including experts' fees.

5. In August of 2018, the Parties commenced settlement discussions. On August 6, 2020, the Parties entered into a Settlement Agreement for which the approval of this Court is sought; a copy of the Settlement Agreement is attached herewith as **Exhibit R-1**, along with its attached schedules;

6. Capitalized terms that are not defined herein shall be defined as set out in the R-1 Settlement Agreement;

7. The Plaintiff brings this motion for an Order:

   a. Approving the Settlement Agreement, the Plan of Allocation, the Claim Form and the Claims Bar Deadline;

   b. Approving Class Counsel Fees and Disbursments;

   c. Approving the payment of the levies and other payments, as applicable, to the Fonds d'aide aux actions collectives, as described herein; and

   d. Such further and other relief as counsels may request and as this Court may deem just;

B) FACTS RELEVANT TO APPROVAL OF THE SETTLEMENT AGREEMENT

Litigation positions of the Parties

8. In this Action, Plaintiff alleges, among others things, that in June 1999, the Norshield Financial Group (the "**NFG**") created the Olympus Investment Structure (the "OIS") whose financial foundation was based on leveraged assets acquired by way of a financial product offered by Royal Bank of Canada, through its agent RBC Capital Markets Corporation (then RBC Dominion Securities Corporation);

9. Plaintiff also alleges that the OIS and NFG collapsed in June 2005, which revealed that tens of millions of dollars of Canadian retail investors, Class Members, had vanished;

10. This Action seeks to establish, among other things, that the NFG, through the OIS, defrauded the Plaintiff and Class Members of the value of their unredeemable shares of OUFC as of June 29th, 2005, and that the Defendants knew or ought to have known of the fraudulent investment scheme by which the NFG defrauded the Class members;

11. Defendants have denied and continue to deny having committed any fault or wrongdoing, deny responsibility, and challenge the validity of the claims and damages set forth in the Action;

12. The principal questions of fact and law to be dealt with on a collective basis identified at the Authorization Judgment were:

    a. Did RBC participate in the creation of a financial product that was used to defraud the class members?

    b. Did RBC allow this fraudulent structure to evolve, strive, and survive until $159 million were lost by Class members?

    c. Did RBC know or ought to have known that the class members were being defrauded or at serious risk of losing their investments within that structure?

    d. Did RBC voluntarily blind itself because of the financial benefits it derived from the fraudulent structure?

    e. Did RBC omit to refrain from continuing its collaboration with *Norshield Financial Group*?

    f. Did RBC omit to inform authorities of obvious risks and irregularities they knew or should have known about within *Norshield Financial Group* and the *Olympus investment structure*?

    g. Did RBC lend their credibility to *Norshield Financial Group* and the *Olympus investment structure*, first by providing hundreds of millions of dollars in financing, and then by offering a principal protected financial product to the Canadian public which was directly based on the fraudulent structure?

    h. Did RBC authorize transfers of funds and/or assets from the *Norshield Financial structure* that caused such assets to be diverted from assets that would have benefited the Group?

    i. Does a positive answer to one or more of the questions above equate to an extra-contractual fault on the part of RBC?

j. If so, did RBC fault(s) cause the losses incurred by Class members?

Procedural background

The OUFC Receivership

13. On or around June 29, 2005, various Norshield entities, including Olympus United Funds Corporation ("**OUFC**"), were placed into receivership by the Ontario Superior Court of Justice (the "**Ontario Court**");

14. Richter was appointed as receiver, as appears from the Affidavit of Raymond Massi, dated August 7, 2020 and appended hereto as **Exhibit R-2**, paragraph 2;

15. The Richter receivership was extended to cover additional Norshield entities in the following months, and most Norshield entities worldwide were placed into various receiverships and liquidatorships, the whole as appears from the R-2 Massi Affidavit, paragraphs 2 to 5;

The Commencement of the RBC and KPMG Class Actions

16. On May 14, 2008, Sheila Calder, with the assistance of the initial class counsel, filed a motion to authorise a national class action (the "**RBC Action**") against, among others, Royal Bank of Canada and RBC Capital Markets Corporation (collectively **RBC**), as appears from the Court docket in this file, filed herewith as **Exhibit R-3**;

17. On May 9, 2008, Mrs. Calder had also filed a motion for authorisation to institute a class action against KPMG LLP (the "**KPMG Action**"), as appears from the Court docket in file number 500-06-000434-080, filed herewith as **Exhibit R-4**;

18. The RBC Action and the KPMG Action were essentially based on the same facts, although arguments for each defendant was adjusted according to each defendant's role in relation to Norshield;

The 2011 Motions to Dismiss the RBC Action and the KPMG Action

19. In May and June of 2011, RBC and KPMG filed motions to dismiss the RBC Action and the KPMG Action, as appears from motions to dismiss filed herewith as **Exhibits R-5** and **R-6** (the "**2011 Motions to Dismiss**");

20. The 2011 Motions to Dismiss alleged abuse of process in the form of, *inter alia*, then class counsel's failure to provide Plaintiff's undertakings following her out of court examinations despite a peremptory order, and on then class counsel's failure to respect an order enjoining him to identify and retain co-counsel in order to assist

him in both the RBC Action and the KPMG Action, the whole as appears from said motions[1];

21. The 2011 Motions to Dismiss were continued *sine die* on May 26, May 31, June 7 and August 26 of that year, as appear from, among others, entries 20, 21, 23 and 27 of the RBC Action Docket, Exhibit R-3;

The KPMG Settlement

22. Meanwhile, on July 27, 2011, KPMG and Richter, as Receiver of OUFC, entered into Minutes of Settlement, the NFG's external auditors for the relevant period (the "**KPMG Minutes of Settlement**"), as appears from the Supplementary Affidavit of Raymond Massi, dated November 25, 2020 and appended hereto as **Exhibit R-7**;

23. The KPMG Settlement was for an amount of 7.5M$ to be distributed to the OUFC retail investors, in final settlement of all actual and potential claims by OUFC creditors against KPMG, including the claims made in the KPMG Action;

24. On August 22, 2011, the Ontario Court issued an order in the receivership proceeding entitled Minutes of Settlement Approval Order[2], wherein paragraph 3 of said order reads:

> *"THIS COURT DECLARES that the Minutes of Settlement are fair and reasonable and hereby approves same."*

25. On August 24, 2011, the undersigned Class Counsel were retained to study the possibility of pursuing the RBC Action and the KPMG Action, as appears from two Professional Mandates and Agreements on Legal Fees, filed herewith as **Exhibit R-8 *en liasse***;

26. On September 3, 2011, the Ontario Court issued an order formally commencing the CCAA proceedings through which the KPMG Minutes of Settlement were to be implemented, and appointing Richter as Monitor of OUFC, the whole as appears from the CCAA Initial Order, Exhibit RM-08 to Massi's R-2 Affidavit[3];

27. On December 7 and 8, 2011, Richter sent letters to all known OUFC creditors disclosing the content of the KPMG Settlement, inviting creditors who had not filed proofs of claim to do so, and announcing a creditors' approval meeting regarding the KPMG Settlement to be held on February 29, 2012, the whole as appears from said letters, attached as Exhibit RM-17 to the Massi's R-7 Supplementary Affidavit;

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[1] See paras. 30 to 49 of KPMG's amended motion to dismiss, and paras. 16.1 to 19.3 of RBC's amended motion to dismiss.
[2] Exhibit RM-16 to the Massi R-7 Supplementary Affidavit.
[3] See paras. 8, 9 and 17 of the CCAA Initial Order.

28. On January 13, 2012, the undersigned attorneys appeared as Class Counsel in both the RBC Action and KPMG Action;

29. The approval meeting was held on February 29, 2012[4];

30. Out of the 1 497 OUFC creditors who had filed accepted proofs of claim at that time, 1 024 creditors voted, 987 of whom voted in favor of the KPMG Settlement, representing 96.39% of the voting creditors holding 95.33% in value of the voted proven claims[5];

31. On May 19, 2012, the Ontario Court sanctioned the CCAA Plan and hence the KPMG Settlement, as appears form the Ontario Court order[6];

The Motion to Discontinue the KPMG Action

32. On July 24, 2012, for the reasons expressed above in paragraphs 22 to 31, Plaintiff filed a motion to discontinue the KPMG Action, as appears from this Court's file;

33. On July 26, 2012, the Honourable Marc De Wever, S.C.J, granted the motion to discontinue the KPMG Action, as appears from the judgment attached hereto for ease of reference as **Exhibit R-9** (the "**Discontinuance Judgement**");

34. At paragraph 25 of the Discontinuance Judgment, this Court declared:

> *"(...) the CCAA Plan is fair and reasonable and in the best interests of the members of the proposed class in the Proposed Class Action"*[7]

35. The Discontinuance Judgment also provided for KPMG and Richter to provide assistance to Plaintiff in the following terms:

    a. KPMG to provide to Class counsel, for the benefit of the Class, any and all financial statements it consulted in order to produce and deliver First Horizon Holdings Limited's and Olympus United Funds Corporation's 2000 to 2003 financial statements; and

    b. KPMG and the Receiver to conserve any and all documents and information pertaining to KPMG's mandate with respect to First Horizon Holdings Limited and Olympus United Funds Corporation until a final judgment is rendered in the putative class action against RBC in the present file;

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[4] Massi's R-7 Supplementary Affidavit, paragraph 8.
[5] Massi's R-7 Supplementary Affidavit, paragraphs 9-10.
[6] Massi's R-7 Supplementary Affidavit, paragraph 11.
[7] The proposed class in the KPMG class action was the same as the class in this Action.

The Authorisation of the RBC Action

36. On November 1, 2013, the RBC Action was authorized, as appears from the judgment of the same date, attached hereto for ease of reference as **Exhibit R-10** (the "**Authorization Judgment**");

Common Issues Proceedings: Preliminary Motions

37. A motion to introduce proceedings was filed on March 18, 2014, as appears from the Court file;

38. On August 25, 2014, RBC filed a motion seeking to obtain information on the Class; said motion was initially opposed and RBC filed an amended motion on September 4, 2014; the parties ultimately found common ground and a consent judgment was rendered by the Court on November 11, 2014;

39. On August 14, 2015, RBC filed its defense, as appears from the Court file;

40. On October 23, 2015, RBC filed a motion to examine Class Members; the motion was initially opposed, but the Parties again found common ground in the form of an admission on a specific topic which eliminated the need for class members' examinations;

41. The intention and capacity of the Parties' counsels to manage this Action in an efficient and responsible manner, as shown by the approach taken in the context of the two above-mentioned motions, has been constantly present throughout these proceedings;

42. Notwithstanding said intent and capacity, the discovery phase of the proceedings was extremely hard fought and time consuming;

The Discovery Process

43. The discovery process in this file, staunchly contested throughout, was punctuated by case management motions regarding Plaintiff's requests to obtain documents from RBC prior to examinations, the first of which was filed on April 6, 2016, as appears form the Court file (the "**First Case Management Motion**");

44. On September 21, 2016, a second case management motion was filed; it was modified on October 26, 2016, and outlined the progress made since April 2016 and the outstanding contested requests; a copy of said modified case management motion is filed herewith as **Exhibit R-11** for ease of reference (the "**Second Case Management Motion**");

45. Following the Second Case Management Motion, RBC provided the Plaintiff with further documents and information, but, by September 15, 2017, or about one year following the Second Case Management Motion, there were still a significant number of contested requests, the whole as appears from a 130 pages motion by Plaintiff outlining the balance of documents and information requests which remained unanswered, and for which Class Counsel asked the Court to adjudicate; a copy of said motion is filed herewith as **Exhibit R-12** for ease of reference (the "**Documents and Information Motion**");

46. On October 13, 2017, Class Counsel sent to RBC's Counsel a letter and various notices seeking RBC's positions on evidentiary material which Plaintiff intended to adduce as evidence at trial, as appears from said letter of demand, **Exhibit R-13**;

47. On January 19, 2018, RBC sent their outline of arguments against the Documents and Information Motion, a copy of which is filed as **Exhibit R-14** (the "**RBC Argument Outline**");

48. As appears from the RBC Argument Outline, RBC took the position that Plaintiff's Documents and Information Motion was "*anything but legal*", an "*inappropriate use of the Code of Civil Procedure*", and that the whole process amounted to an attempt to " *conduct a discovery process similar to investigative powers granted to investigators under the Act respecting public inquiry commissions, CQRL c C-37*"[8];

49. As appears from the RBC Argument Outline, by that date, RBC had provided Class Counsel with approximately 600 documents representing approximately 9 000 pages[9];

50. Between the communication of the RBC Argument Outline and the Court hearing on the Documents and Information Motion, RBC provided Class counsel with over 1 600 additional pages of documentation;

51. A three-day hearing on the Documents and Information Motion was held on February 12, 13 and 14, 2018;

52. On April 11, 2018, judgment was rendered on the Documents and Information Motion, a copy of said judgment is filed herewith as **Exhibit R-15** (the "**Documents and Information Judgment**");

53. The Documents and Information Judgment dismissed 52 out of 65 (or 80%) of RBC's objections, the whole as appears from the Documents and Information Judgment;

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[8] See para. 4 of RBC Argument Outline.
[9] At sections 27, 30, 32, 36, 38, 39 and 46.

54. During the 90 days that followed the Documents and Information Judgment, RBC's counsel provided Class Counsel with approximately 15 000 additional pages of relevant documentation;

55. At that time, Plaintiff's discovery process had resulted in the communication by RBC of approximately 1 400 documents representing over 25 000 pages;

Documents obtained from other proceedings

56. Meanwhile, Plaintiff, through Class Counsel, obtained the following documents from third party sources:

    a. All exhibits filed in the Supreme Court of the State of New York proceedings against RBC involving similar facts[10];

    b. All exhibits, including expert reports, filed in the criminal case against John Xanthoudakis et al.[11]; and

    c. All available exhibits in the Ontario Securities Commission ("OSC") investigation into NFG, John Xanthoudakis and others;

57. Plaintiff also entered into discussions with Richter regarding means to assist Plaintiff on evidentiary matters, namely for the purpose of establishing the NFG/OUFC fraud and the extent of RBC's relationship with various NFG entities;

58. Said process with Richter and its procedural consequences are described in detail further below[12];

Plaintiff's Experts Witnesses

59. During the discovery process, Class Counsel retained the services of highly qualified expert witnesses;

60. The facts in dispute in this case occurred in New York between 1999 and 2005, where the defendant RBC Capital Markets Corporation offered, as agent of RBC, investment banking services and structured derivative financial products;

61. Plaintiff retained three New York based bankers knowledgeable in New York's investment banking and structured derivative product practices at the time; said three experts were employed by foreign investment banking institutions in New York during the relevant period;

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[10]Index No. 600949/09 (*Balanced Return Fund Ltd. and al.* v. *RBC and al.*). Those proceedings ultimately failed on a summary judgment motion, which was confirmed on appeal.

[11]A Court order was obtained from the honorable France Charbonneau, S.C.J. granting access to said evidentiary material exhibits from the Service des pieces à conviction in *R. v. Xanthoudakis* (500-01-051050-117), as appears from a November 25, 2016 judgment in said file.

[12] See paragraphs 72 to 78 herein.

62. Plaintiff also retained the services of a forensic accountanting firm familiar with structured derivative products and the Norshield fraud;

63. These expert witnesses provided Plaintiff with a unique perspective on the at issue financial transaction; said expert witnesses were consulted on, *inter* alia:

    a. the US and international regulatory environment applicable at the relevant period to foreign investment banks in New York and structured derivative products;

    b. Analysis of RBC's internal policies and procedures compared to that of other foreign investment banks operating in New York at the time;

    c. the structuring, marketing and oversight of structured derivative products such as the one at issue;

    d. treasury and cash flow aspect of structured derivative products such as the one at issue; and

    e. the examination of RBC representatives;

Out of Court Examinations

64. On March 28, 2019, Plaintiff filed a Motion for measures regarding pre-trial examinations (the "**Examinations Motion**"), by which Plaintiff sought, *inter alia*, permission to examine six RBC representatives, all of whom were either United States residents or non-Québec Canadian residents, as appears from said motion, filed hereto as **Exhibit R-16** for ease of reference;

65. RBC opposed the Examinations Motion, arguing, *inter alia*, that only one RBC representative should be examined, as appears from RBC's argument outline filed hereto as **Exhibit R-17**;

66. This Court heard the motion and rendered judgment on the Bench on May 13, 2019. The Court notably:

    a. Prayed act of RBC's undertaking to offer and prepare Mr. David Downie, RBC's Chief-Risk Officer for the Americas, to be first examined;

    b. Reserved Plaintiff's right to ask to examine three other of the sought RBC former employees;

    c. Prayed act of RBC's undertaking to collaborate in facilitating the occurrence of said three potential supplemental examinations; and

d. Reserved Plaintiff's right to seek permission of the Court should she wish to examine the remaining two sought RBC representatives, if she still deemed it necessary after having examined the other four witnesses;

the whole as appears from said judgment, transcribed on January 23rd, 2020, attached hereto as **Exhibit R-18** for ease of reference;

67. Mr. David Downie, Chief-Risk Officer for the Americas at RBC, was examined on July 3 and 4th, 2019;

68. Following said examination, Class Counsel deemed it necessary to proceed with the examination of Mr. Herve C. Leung, RBC's risk officer responsible for the at issue financial product structured by RBC for Norshield in 1999;

69. RBC did not contest Plaintiff's request to examine Mr. Leung;

70. Mr. Leung was examined in Toronto on February 19, 2020;

71. Following Mr. Leung's examination, Class Counsel intended to examine at least a third witness, namely Roger Blissett, a former employee of RBC and a U.S. resident; that possibility was still being considered when the Settlement Agreement was concluded;

Richter Collaboration Agreement

72. On October 8, 2019, Class Counsel reached an agreement with Richter regarding various forms of collaboration and the *modus operandi* for allowing said collaboration to occur, as appears from a copy of said agreement, filed herewith as **Exhibit R-19** (the **Richter Collaboration Agreement**);

73. The Richter Collaboration Agreement provided for collaboration by Richter in the form of, *inter alia*:

a. Communication by Richter to Class Counsel of a list of Richter's documents related to their investigation of Norshield (the **Norshield Documents**)[13];

b. Access to the Norshield Documents by Class Counsel[14], subject to Richter's confidentiality obligations[15];

c. Assistance from Richter in obtaining various court orders from various international jurisdictions, and in obtaining required third party permissions, the

[13] See section 8 of the Richter Agreement.
[14] See sections 2, 3 and 9 to 11 of the Richter Agreement.
[15] See sections 6 and 7.1 of the Richter Agreement.

whole with the goal of maximising access to documents and information by Class Counsel[16]; and

d. Financial assistance from Richter, from available capital of the OUFC creditors' mass, in the initial amount of 75 000 $;

74. The Richter Collaboration Agreement provided that it be approved notably by the Ontario Court;

75. A motion to that effect presentable before the Ontario Court was drafted by Class Counsel, and said motion's draft material was shared with RBC Counsel prior to filing;

76. RBC opposed the approval of the Richter Collaboration Agreement, and a hearing was held before Justice Dietrich of the Ontario Court on February 20, 2020;

77. The Richter Collaboration Agreement approval motion was dismissed by the Ontario Court on March 31, 2020, as appears from Justice Dietrich's Reasons for Decision, filed herewith as **Exhibit R-20**;

78. Following Justice Dietrich's Reasons for Decision, Plaintiff filed, on May 13, 2020, a *De Bene Esse* Motion for interlocutory Order with this Court as appears from the Court file; said motion was still pending at the time the parties concluded the R-1 Settlement Agreement;

Post Settlement Agreement Proceedings and Orders

79. By judgement dated September 10, 2020, this Court:

a. appointed Richter as Administrator to the Settlement Agreement;

b. approved the form of the Notice and the Plan of Notice;

c. authorized the use of Class members SIN numbers for the purpose of updating their addresses;

d. set the date for the hearing on Settlement Agreement approval; and;

e. ordered Richter to file, five days prior to said hearing, an affidavit confirming compliance with the Plan of Notice;

the whole as appears from said judgement in the Court file;

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[16] See sections 5, 6 and 7.1 of the R-19 Richter Collaboration Agreement.

80. On October 1st, 2020, this Court extended the date by which Notices had to be disseminated from October 1, 2020, to October 8, 2020;

Effective dissemination of the Notice

81. As appears from the joint affidavit of Raymond Massi and Ken Chong Le, representatives of Richter, dated November 25, 2020, filed herewith as **Exhibit R-21**:

a. The Plan of Notice was executed as per its provisions and as per the September 10, 2020 and October 1st, 2020 judgments;

b. Prior to dissemination, all known members' addresses were updated through the services of ISB Global Services Inc. (ISB);

c. On a total of 1 797 known members, 1 424 addresses (or 79.2%) were updated or optimized by ISB;

d. The Notice to Members, generally in the form attached as Schedule B to the Settlement Agreement in English and in French, was sent to all the Members on or prior to October 8, 2020, including to investors concerned by the claim of TD Waterhouse Canada Inc., and to TD Waterhouse Canada Inc.;

e. Following dissemination of the Notice to Members, more addresses were updated following communications from members, directly to Richter or through Plaintiff's counsels;

f. following dissemination of the Notice, reports by some members showed that the Notice had been sent to their prior address; it was noticed that those members had not had credit activity after their latest know address was collected by Richter; 189 members in the same situation were identified;

g. on November 5th, 2020, a Notice package was resent to those members' other known addresses;

h. Richter received 171 returned mail; of those, 78 were members for whom Richter disposed of another potential address;

i. of those 78 Members, 47 were part of the 189 Members to whom a second Notice package was resent on November 5th, 2020;

j. to the remaining 31 Members for whom Richter had another potential address, a Notice package was resent on November 13, 2020;

k. of the 220 members to whom a Notice package was resent on November 5th and 13th, 2020, 41 were non-CCAA Proven Claimants Class Members, or Members which needed to file a Claim Form by the Claims Bar Deadline;

82. Class Counsel also proceeded with the dissemination of the Notice to Members in accordance with the Plan of Notice and the judgments of this Court, as it appears from the affidavit of Marianne Cartier, paralegal, dated September 22, 2020, filed herewith as **Exhibit R-22**;

No Arguments or Objections by Members

83. No argument or objections were asserted as of the date of the present motion; any and all asserted argument or objections, if any, will be provided at the date of hearing;

C) SETTLEMENT AGREEMENT APPROVAL

84. Article 590 of the *Code of Civil Procedure* requires that a court approve a transaction settling a class action if the court is satisfied that the terms of the settlement are fair, reasonable and in the best interest of the Class;

85. In that regard, when determining whether a transaction should be approved, courts should bear in mind the following:

> [20] Le tribunal doit encourager le règlement à l'amiable en donnant effet à la volonté des parties, à moins qu'il y ait atteinte à l'ordre public.
>
> [21] Le tribunal doit prendre garde de ne pas modifier significativement le contrat de transaction conclu par les parties. Le tribunal doit l'approuver tel quel ou refuser de l'entériner, quitte à renvoyer les parties négocier des modifications.
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> [22] Le tribunal ne doit pas exiger la perfection mais décider si en fin de compte, les avantages pour les membres l'emportent sur les inconvénients.[17]
>
> [our emphasis]

[17] *Markus* c. *Reebok Canada inc.*, 2012 QCCS 3562, at paras. 20 to 22.

86. The reasonableness and fairness of a proposed settlement is determined pursuant to the following criteria:

    a. The terms and conditions of the settlement;

    b. The benefit to the class;

    c. The chances of success;

    d. The importance and nature of the administered proof;

    e. Counsel's recommendation and experience;

    f. The anticipated cost and time to obtain a recovery;

    g. The number and nature of objections to the settlement;

    h. The parties' good faith and absence of collusion; and

    i. The support of the Plaintiff;[18]

The Terms and Conditions of the Settlement Agreement (criteria a)

87. The R-1 Settlement Agreement provides for a monetary payment by the Defendants of $6,000,000;

88. It provides for the dissemination of Notice to members via direct mailing to the professionally updated addresses of all OUFC retail investors identified through a third-party list of OUFC investors retrieved by Richter in its capacity as Receiver of OUFC, except non-qualifying members;

89. It provides for the potential direct distribution of the Compensation Fund to at least 1,632 of the 1,797 known members; a potential of at least 90.82% in direct compensation to class members;

90. The Members who are not eligible to direct distribution were retail investors who had not previously filed admitted proofs of claims to Richter through the receivership or CCAA proceedings; those members were provided, at the same time as the Notice, with a one-page claim form that included their estimated number of outstanding shares;

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[18] *Markus* c. *Reebok Canada inc.*, supra note 16, at paras. 23.

The Benefit to the Class and the Chances of Success (criteria b and c)

91. From the moment the undersigned attorneys appeared in this Court file on behalf of the Plaintiff, the parties waged almost nine years of protracted litigation;

92. The cause of action advanced by Plaintiff in this case is rather novel;

93. During the last two years of hard fought litigation, the parties nonetheless engaged in arms length discussions; those discussions eventually led to the R-1 Settlement Agreement;

94. During those discussions, the protracted and hard fought litigation continued on and the case progressed relentlessly toward trial readiness;

95. According to the Class Counsel verification and knowledge:

    a. the present class action represents the last standing action against RBC in the world regarding the facts at issue, which occurred between 21 and 16 years ago in multiple international jurisdictions;

    b. in at least one other litigation instituted against RBC in relation to the at issue facts, RBC prevailed, with costs; and

    c. no known settlement occurred relating to the at issue facts where RBC agreed to pay sums of money in any form of compensation;

96. Meanwhile, Norshield's external auditors during the relevant period (KPMG) entered in 2011 into the KPMG Settlement with Richter, agreeing to a $ 7.5M payout to the benefit of the OUFC Canadian retail investors, essentially the members of this Action;

97. The Ontario Court and the Québec Court approved of the KPMG Settlement and declared it "*fair and reasonable*"[19], "*in the best interests of the Creditors*"[20], and "*in the best interests of the proposed class of the proposed class action.*"[21];

98. Richter had elected to take action against KPMG but not against the Defendants;

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[19] See paragraphs 24 and 34 above.
[20] See paragraph 31 above.
[21] See paragraphs 31 above.

99. In summary regarding these criteria, Class Counsel draws the attention of this Court to the fact that:

    a. In one other action brought against RBC regarding the at issue facts was dismissed on summary judgment (which decision was upheld on appeal), and no known settlement has occurred where RBC has agreed to pay any form of compensation;

    b. Richter, a fact aware and legally sophisticated party, elected to take action against KPMG but not against RBC;

    c. the cause of action against RBC in this Action is novel;

    d. the KMPG Settlement of $ 7.5M was declared fair, reasonable and in the best interest of the Creditors/Class by the Ontario Court and the Québec Court, where KPMG was the external auditors of OUFC during the alleged fraud;

100. Although the amount to be received by class members in relation to their initial investment in the Norshield fraudulent scheme is relatively modest in absolute numbers, it is significant in comparison to the KPMG Settlement;

101. In this context, it is Class Counsel's view that Plaintiff and the Class faced significant litigation risks, and that the Settlement Agreement is beneficial to the Class, and is comparable to the amount received by Class Members from the KMPG Settlement;

The Importance and nature of administered proof (criteria d)

102. As appears from paragraphs 43 to 78 of this motion, extensive judicial investigating was performed by Class Counsel in this file;

103. The pre-deposition discovery process allowed Plaintiff access to over 25 000 pages of relevant material regarding a set of complex facts having occurred in multiple international jurisdictions between 1999 and 2005;

104. Class Counsel deposed two high ranking officers of the Defendants over multiple days, one of them in Toronto;

105. Class Counsel retained and worked with four qualified experts, one forensic accountant knowledgeable of the NFG and three bankers working for foreign investment banks offering structured derivative financial products in New York during the relevant period;

106. Class Counsel secured evidentiary material from various judicial and quasi-judicial investigations of the perpetrators of the Norshield fraud;

107. Class Counsel obtained Richter's cooperation regarding the material it had assessed;

108. Those investigative efforts gave Class Counsel and its experts unique and in depth perspective on the relationship between Norshield and Defendants, a clear and detailed understanding of the practices in the investment banking world at the relevant time, and a clear and detailed understanding of the at issue transactions between Norshield and Defendants;

109. Those investigative efforts are at the core of the results achieved in this Action through the R-1 Settlement Agreement;

Counsel's recommendation and experience (criteria e)

110. Class Counsel's firm has 42 years of plaintiff class action experience;

111. Class Counsel's lead lawyer has 16 years of experience in said field of practice;

112. Class Counsel's firm has litigated class actions at the merits, and challenged rulings before the Québec Court of Appeal and to the Supreme Court of Canada in dozens of cases;

113. The experience of Class Counsel is extensive, and their reputation among the judiciary and the class action bar is excellent;

114. The undersigned senior counsel is a member of the *Groupe d'experts sur l'action collective du Barreau du Québec* and has appeared as speaker at numerous national class action symposiums across the country;

115. Class Counsel's opinions on the prospects of success of the claims advanced against the Defendants are thoroughly informed by their own investigations, their review of the voluminous amount of disclosure documents released by Defendants over the relevant time period as well as their review of the information and documents produced in other related proceedings, and their extensive consultation with relevant experts;

116. The Agreement required compromise and is the result of a balancing act between the risks in comparison to the potential benefits at the various stages of the litigation;

117. The legal and jurisprudential context surrounding this Action in addition to the level of litigation risk supported by Plaintiff in this Action justify the compromise arrived at in the Settlement Agreement;

118. For the reasons exposed throughout this motion, Class Counsel recommends the approval of the R-1 Settlement Agreement;

The anticipated cost and time to obtain a recovery (criteria f)

119. When the Settlement Agreement was reached on August 6, 2020, opposing counsel was in the midst of preparing to debate a motion Class Counsel had brought before this Court seeking to obtain orders regarding the Richter Collaboration Agreement;

120. RBC Counsel had previously successfully contested the motion presented by Class Counsel before the Ontario Court in February 2020 regarding the same Richter Collaboration Agreement;

121. The issues presented to this Court regarding that particular motion were complex;

122. The next procedural steps would have been the examination of at least one additional RBC representative, a New York resident, which likely would have been contested by RBC;

123. Following the completion of RBC representatives' examinations, expert reports would have been filed by both parties in the fields of forensic accounting and complex international investment banking products and practices;

124. Counter or complementary expert reports would have been expected;

125. Prior to trial, a debate on the governing law applicable to the common issue trial was expected;

126. It is reasonable to expect that the common issue trial in this Action would have lasted between one and three months;

127. Multiple appeals would also have to be expected given the nature of the arguments by both parties;

128. Hence, judicial closure of this litigation, had it followed its course to the end, would likely not have happened before at least 5 more years of protracted and expensive litigation had elapsed;

129. In this case, the losses to the class members were confirmed or incurred in June 2005;

130. Many class members, who were mostly elders investing some or all of their retirement money, have already passed away and will continue to pass away as the years go by, enhancing the value of the settlement for the surviving members;

The number and nature of objections to the settlement (criteria g)

131. At the time of filing the present motion, no objections to the Settlement Agreement were received;

132. To appreciate the value of this, Class Counsel refers the Court to the detailed nature of the Court approved Notice and the performance of the approved Plan of Notice;

133. The absence of any objection in this context indicates class members' support of the Settlement Agreement;

The parties' good faith and absence of collusion (criteria h)

134. The parties' good faith and absence of collusion should be presumed, and nothing in the chronology exposed herein or in the content of the Settlement Agreement suggests otherwise;

The support of the Plaintiff (criteria i)

135. Plaintiff Sheila Calder supports the Settlement Agreement, as appears from her mandate directing Class Counsel to sign the Settlement Agreement on her behalf, **Exhibit R-23**;

Conclusion

136. For the reasons stated above, Class Counsel and Plaintiff respectfully submit that the Settlement Agreement is fair, reasonable, and in the best interests of the members of this Action;

D) PLAN OF ALLOCATION, CLAIM FORM AND CLAIMS BAR DEADLINE

137. The Plan of Allocation, Schedule E to the Settlement Agreement, provides for the allocation of the Compensation Fund to Class Members who are CCAA Proven Claim Creditors and to Class Members who submitted a completed Claim Form by the Claims Bar Deadline (the **Authorized Claimants**), in proportion of the value of their balance of OUFC shares as of June 29, 2005[22];

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[22] Settlement Agreement, exhibit R-1, Plan of Allocation, section 5.

138. The Plan of Allocation gives the Administrator the duties, among others, to:

    a. identify OUFC unit holders who are not Class Members as per the Class definition[23];

    b. deliver the Notice to all Class Members and Claim Forms to Class Members who need to file them[24]; and

    c. provide assistance to Class Members in completing the claims application process[25];

139. The Plan of Allocation provides for a simple and efficient process by which to distribute the Compensation Fund to Class Members in a timely manner;

140. The Claim Form, Schedule F to the Settlement Agreement, is a simple, bilingual, two pages document communicated directly to all Class Members who are not CCAA Proven Claimants, as an attachment to the Notice;

141. The Claim Form was accompanied by a schedule that showed the value of OUFC shares outstanding as of June 29, 2005 for each specific non-CCAA Proven Claimant Class Member, thus facilitating the completing and filing of the Claim Form, by the Claims Bar Deadline;

142. The Claims Bar Deadline is set in the Settlement Agreement at seventy-five (75) days following the First Order[26];

143. The First Order was rendered on September 10, 2020; hence the Claims Bar Date was November 24, 2020;

144. Notices were sent to the professionally updated mailing addresses of Class Members on October 8, 2020, thus providing in principle about six weeks for non-CCAA Proven Claimant Class Members[27] to take cognizance of the Notice, the simple Claim Form and the attached schedule indicating the value of their OUFC shares' balance;

145. Class Members had about six weeks to complete and sign the simple and pre-filled Claim Form, and submit it by email, fax or mail.

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[23] Settlement Agreement, exhibit R-1, Plan of Allocation, sections 8 a) and b).
[24] Settlement Agreement, exhibit R-1, Plan of Allocation, sections 8 c) and d).
[25] Settlement Agreement, exhibit R-1, Plan of Allocation, sections g) to l).
[26] Settlement Agreement, section 2.1 (7).
[27] 267 out of the 1 797 Class Members.

146. After the initial sending of the Notice and Claim Form as of October 8, 2020, Class Counsel and Richter identified Class Members to whom the Notice should be sent to other available addresses following reports of wrong addresses by some Class Members and reception of returned mail[28];

147. As described at paragraph 81 and in Massi/Le's R-21 affidavit, a second Notice package was sent to Class Members on November 5th and 13th, 2020, given indications that the updated addresses for those Class Members might not be correct;

148. Of the 220 Class Members to whom a second Notice package was sent, 41 were non-CCAA Proven Claimants Class Members, or members who needed to file a Claim Form by the Claims Bar Deadline in order to receive part of the Compensation Fund;

149. Section 13 of the Plan of Allocation provides that Claim Forms received after the Claims Bar Date are not permitted to participate in in the Distribution *without permission of the Court*;

150. Class Counsel intends to present to the Court for adjudication, with notice to Defendants' Counsel, all Claim Forms of the 41 Class Members to whom a second Notice Package was resent on November 5th and 13th, 2020, who need to file a Claim Form, and who submit their Claim Form after the Claims Bar Deadline;

151. Given the provisions of Section 13 of the Plan of Allocation and Class Counsel's representations regarding a limited number of potential late claims, Class Counsel recommends the approval of the Plan of Allocation, the Claim Form and the Claims Bar Deadline as set out in the Settlement Agreement;

E) CLASS COUNSEL FEES

152. Fair and reasonable Class Counsel fees should be approved by the Court;

153. The measure of what is fair and reasonable is stated in the Code of Professional Conduct of Lawyers, CQLR c B-1, r 3.1, at section 102:

> **102.** The fees are fair and reasonable if they are warranted by the circumstances and proportionate to the professional services rendered. In determining his fees, the lawyer must in particular take the following factors into account:
>
> (1) experience;

[28] See Massi/Le's R-21 Affidavit, paras. 10-14.

(2) the time and effort required and devoted to the matter;

(3) the difficulty of the matter;

(4) the importance of the matter to the client;

(5) the responsibility assumed;

(6) the performance of unusual professional services or professional services requiring special skills or exceptional speed;

(7) the result obtained;

(8) the fees prescribed by statute or regulation; and

(9) the disbursements, fees, commissions, rebates, costs or other benefits that are or will be paid by a third party with respect to the mandate the client gave him.

154. Class Counsel is asking this Honourable Court to approve the fee agreement entered into with Plaintiff on August 24, 2011, which provides for fees of 25% plus applicable taxes of the amount recovered from Defendants, as appears from said fee agreement, Exhibit R-8 ;

155. As particularized below, Counsel respectfully submits that said fees are fair and reasonable and should be approved by this Court;

The Risk Assumed by Counsel

156. Although the element of risk is not specifically identified at section 102 of the *Code of Professional Conduct*, courts have held that they cannot disregard the fact that attorneys work on a case for a number of years without any guarantee of success[29];

157. The risk assumed by Counsel is also directly related to the complexity of a claim and difficulty of the matter;

158. The amount of work, time and resources devoted to this file by Class Counsel was massive and relentless;

159. An assessment of the risk associated with the Action is relevant for the purpose of determining Class Counsel's application for fees and disbursements' approval;

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[29] *Guilbert* c. *Sony BMG Musique (Canada) inc.*, 2007 QCCS 432, paragraphs 40-41.

160. As stated by this Honourable Court in *Pellemans* c. *Lacroix*[30]:

> [101] Lorsque, comme en l'instance, l'avocat accepte dès le départ d'assumer la responsabilité des coûts et des risques liés à l'exercice du recours collectif et à son rejet éventuel, à l'exclusion du représentant, il apparaît justifié que l'ampleur de ces risques soit reflétée dans l'honoraire à pourcentage négocié avec son client. Il faut s'attendre à une certaine adéquation entre l'importance des risques assumés par l'avocat, d'une part, et le pourcentage qui sera éventuellement payé par les membres, le cas échéant, d'autre part.
>
> [102] En l'absence d'une telle entente, il est raisonnable de présumer que dans de nombreux dossiers, un membre refuserait de se porter représentant aux fins de l'exercice du recours collectif. Ainsi, c'est l'accès même à la procédure du recours collectif, recours unique, qui se verrait compromis à une époque où de plus en plus d'intervenants de notre société se questionnent sur l'accessibilité à la justice.
>
> [our emphasis]

161. In assessing risk, this Court should also consider the fact that, when Class Counsel elected to appear in the Action, prior class counsel was virtually absent and ignoring peremptive orders for almost one year;

162. Also relevant in assessing risk is the fact the Richter, a sophisticated court officer with in depth knowledge of the facts at issue, had elected not to take legal action against Defendants, whereas it had elected to take legal action against KPMG;

Experience of Class Counsel

163. The experience of Class Counsel is discussed in paragraphs 110 to 114 of the present motion;

164. Class Counsel respectfully submits that they meet the experience requirement for the purpose of having assumed the challenges posed by representing Plaintiff and the Class in this matter;

165. Class Counsel also respectfully submits that they meet the experience requirement for the purpose of ascertaining the fairness and reasonableness of their fees for which approval is sought;

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[30] 2011 QCCS 1345.

Class Counsel's time and expenses

166. Class Counsel's involvement in this matter started more than eight years ago, in August 2011;

167. Class Counsel received no outside funding or reimbursement for their fees, except for the *Fonds d'aide aux actions collectives* (the **FAAC**), and for $50,000 from Richter and KMPG following the Discontinuance Judgment;

168. During this eight-year period and up to November 12, 2020, Class Counsel invested $1,423,975.75 in time and disbursements, as appears from:

    a. the Affidavit of Normand Painchaud dated November 20, 2020, filed herewith as **Exhibit R-23**;

    b. the Statement of account for the period from January 1, 2011 to August 7, 2020, filed herewith as **Exhibit R-24**;

    c. the Statement of account for the period from August 8, 2020 to November 12, 2020, filed herewith as **Exhibit R-25**; and

    d. the Affidavit of Maria Hernandez, dated November 20, 2020, filed herewith as **Exhibit R-27**, and the spreadsheet regarding the disbursements incurred by the Class Counsel, filed herewith as **Exhibit R-28**;

169. Class Counsel undertook significant risk and allocated substantial resources in litigating the Action;

170. The Action has been diligently advanced and has been the subject of intense litigation, substantial due diligence and an extensive review of tens of thousands of pages of evidence, of multiple court appearances, of consultation with multiple experts, and of out of Court examinations;

171. Class Counsel's work was coordinated and allocated strategically to lawyers with different levels of experience in order to maximize efficiency and limit the cost of the time incurred to advance this litigation;

172. The work done by Class Counsel up to this stage reflects its constant and skillful efforts, which ultimately led to a settlement against Defendants;

173. Class Counsel has included in the Settlement Agreement an efficient Plan of Allocation which provides for a wide access to justice through a mostly direct process of compensation to Class Members;

174. Class Counsel spent a considerable amount of time negotiating the Settlement Agreement and completing the work necessary for this motion seeking its approval by this Honourable Court. If the Settlement Agreement is not approved, the time and

expense devoted to achieving this settlement will be of little value in the prosecution of the claim and may never be recovered;

175. As of November 12, 2020, Class Counsel has invested over 3,483.91 hours[31] having a dollar value of over $1,225M, as appears from the statements of accounts and supporting affidavits, exhibits R-23 to R-26;

176. Class Counsel has devoted and will continue to devote time to fully implement the terms of the Settlement Agreement, including:

    a. Communicating with Class Members who contact Class Counsel with questions;

    b. Monitoring the implementation of the settlement to ensure that applicable procedures are followed;

    c. Addressing questions and issues raised by the Administrator;

    d. Reviewing the Administrator's updates;

    e. Reviewing the final distribution list; and

    f. Attending to any other matters that might be raised during the implementation of the Settlement Agreement, including motions for directions on behalf of Class Members;

177. Class Counsel has incurred disbursements of $196,801, before applicable taxes, as appers from supporting affidavit and spreadsheet, exhibits R-27 and R-28;

178. The Plaintiff has received $171,070.37 in funding from the FAAC;

The Difficulty of the Matter

179. Due to the fact that Defendants strongly deny fault and responsibility, and also do not admit to the existence of the NFG fraud, Plaintiff has the burden of establishing, among others:

    a. the nature and extent of the international fraud perpetrated by the NFG on the Canadian retail investors composing the Class; the relevant facts span a six year period and revolved around complex structured financial derivative products used by multiple entities operating in multiple international jurisdiction;

    b. the nature and extent of the NFG's banking relationship with Defendants,

[31] 98 hours were devoted to the KMPG Action.

internationally;

c. the means by which Defendants, as bankers to a subsidiary of Norshield, knew or ought to have known about the NFG, and the depth of said knowledge or lack of it;

d. the nature of a complex structured financial product;

e. the alleged lack of proper due diligence and insufficient knowledge and understanding by Defendants' risk functions of the risks posed by the NFG counterparty and the at issue transactions;

f. the nature and extent of the investment banking regulatory environment in multiple jurisdictions, more specifically for the development and marketing of structured derivative financial products;

g. the accepted practices in said fields at the time in said jurisdictions;

h. specific RBC internal guidelines, rules and principles in place at the relevant time, and their comparison to accepted guidelines, rules and principles;

i. the Defendants' organisational structures through which it created and marketed and supervised the structured derivative financial products at the time;

j. the six year contractual relationship between the NFG and Defendants, and the process leading to the decisions made during said period;

k. the Defendants' decision-making process leading to the partial liquidation of assets allegedly leading to the NFG's dissipation of assets that should have benefited the Class;

l. the alleged breaches by Defendants of their own internal guidelines, rules and principles and of accepted practices and the regulatory environment at the time;

m. whether Québec civil law, Canadian common law or New York law was applicable to the Action;

n. whether privacy laws would have prevented the sharing of information between the Defendants; and

o. causality between Defendants' faults, if proven, the NFG fraud, if proven, and the losses incurred by the Class;

180. The challenge posed by each of those demonstrations is amplified by the fact that the events at issue occurred 21 to 16 years ago, mostly in the United States;

181. This Action is extremely complex and constitutes a high-risk case which Class Counsel has advanced for eight years without any guarantee of remuneration;

182. The complexity of this Action is obvious from the volume of documents provided by Defendants as well as the significant number of documents produced in other proceedings involving the NFG, which were reviewed by Class Counsel in formulating and advancing the Class Members' case;

The result

183. When Class Counsel assumed that role in January 2012, the Action was on the verge of being dismissed[32];

184. A $8.25M total settlement had just occurred between Richter and KPMG, NFG's external auditors, and said settlement agreement had already been declared fair and reasonable by the Ontario Court, and went on the be declared as fair, reasonable and in the best interest of the Class by this Honourable Court[33];

185. KPMG was a much more obvious target for the sought remedy than the Defendants;

186. The fact that Defendants in this Action have agreed to settle for 6M$, or approximately 73% of the total settlement amount reached with KPMG is indicative of the satisfactory nature of the result generated by the Settlement Agreement in this file;

187. Although compromise has to be reached by both parties in any settlement, the relative importance of the Settlement Amount compared to that which occurred with NFG's external auditors is indicative of the acceptable compromise made by Plaintiff in this instance;

188. Said compromise also needs to be measured against the litigation risk faced by Plaintiff, which was significant;

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[32] See paras. 19 to 21 of this motion.
[33] See paras. 22 to 31 of this motion.

Conclusion as to the* Code of conduct*'s criteria

189. Class Counsel took on exceptional risks in engaging in a highly contested class action with arguably very unfavorable odds; they used their significant experience, invested considerable time and deployed constant efforts which resulted in an excellent outcome considering litigation risk and the context of surrounding litigation and their results;

The contingent fee agreement

190. Percentage fee agreements have long been recognized by Québec law, particularly in the context of class actions:

> [52] Les conventions d'honoraires à pourcentage sont reconnues depuis longtemps en droit québécois et particulièrement dans le domaine des recours collectifs. La jurisprudence, de façon unanime, a reconnu la légalité de telles conventions afin de récompenser adéquatement les procureurs qui acceptent des mandats complexes et coûteux en assumant les risques. Ces conventions dites « contingency fees » permettent aux procureurs d'être rémunérés en cas de succès seulement.
>
> [53] Le montant dû aux procureurs des représentants du groupe et des sinistrés sur la base de cette convention doit être approuvé par le Tribunal à moins qu'il ne soit pas juste et raisonnable dans les circonstances[34];

191. In fact, over the years, courts have generally approved and applied executed fee agreements for class actions limited to Québec[35];

192. When determining whether to approve a fee request from Class Counsel, Courts should take the Class Members' interests into account. That being said, as stated by this Honourable Court, the Class Members' interests should not be at the expense of their attorneys:

> [66] Pour le tribunal, veiller sur l'intérêt des membres ne consiste pas à prendre leur part au détriment indu des avocats qui travaillent pour le groupe, et encore moins à donner raison inconsidérément à tous les mouvements d'humeur. [...]
>
> [67] Dans certains cas, l'intérêt des membres peut consister à garder les avocats motivés à persévérer même quand les procédures sont

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[34] *Bouchard* c. *Abitibi Consolidated*, 2004 CanLII 26353 (QC CS), paragraphs 52-53.
[35] *Pellemans* c. *Lacroix*, 2011 QCCS 1345, paragraph 56.

> longues, ardues et risquées, au point où leur rémunération est nulle durant des mois et des années. Le paiement d'honoraires à un stade interlocutoire fait partie du coffre à outils à cet effet.[36]
>
> [our emphasis]

193. In *Options consommateurs* c. *Infineon Technologies*, a.g., the Plaintiff, an association devoted to promoting and defending consumers' interests, discussed the importance of motivating class counsel to advance such lawsuits:

> 9. It is important that contingency fee agreements are respected, and that the percentage contingency fees agreed to between class counsel and representative plaintiffs be honoured in order to ensure predictability and thereby promote access to justice, especially for consumers who almost invariably do not have sufficient resources to mount an individual lawsuit in circumstances such as exist in the Proceedings. I am concerned that, if the courts set an arbitrary dollar amount as the highest fee achievable by class counsel for public policy reasons, this might create a disincentive which could amount to conflict of interest between class counsel and class members, and jeopardize the relationship between class counsel and their representative plaintiff clients.
>
> 10. Since such an arbitrary fee will be reported as a precedent in jurisprudence, it will be public knowledge. In particular, defence counsel will become aware of such an arbitrary fee... In cases, such as the Proceedings, where Class Counsel seek interim fees and file contingency fee agreements as exhibits, some defendants may be motivated to decrease the amount of money that they are willing to offer to settle a class action because class counsel are at or near the maximum arbitrary fee that they are likely to be awarded.
>
> 11. Percentage contingency fee agreements create valuable incentives for class counsel, as they encourage class counsel to, among other things, achieve the highest settlements possible in order to generate the largest percentage fee. If class counsel are faced with an arbitrary maximum fee, then once they achieve sufficient settlements to get them at or near that maximum arbitrary fee, class members may think that class counsel will settle cheaply with any remaining defendants to close down the case. This conflicts with the class members' interest in maximizing recovery.
>
> 12. In summary, to impose a maximum arbitrary fee may create a disincentive that could be harmful for future class actions.[37]
>
> [our emphasis]

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[36] *Option Consommateurs* c. *Infineon Technologies, a.g.,* 2013 QCCS 1191, at paragraphs. 66-67.

[37] *Option Consommateurs* c. *Infineon Technologies, a.g.*, 2014 QCCS 4949, at paragraphs. 137.

194. Fee agreements should benefit from a presumption of validity and should only be set aside if it is demonstrated that in the circumstances, the agreement is unfair and unreasonable for the Class Members or if one of the grounds for nullity under the CCQ is applicable[38];

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

ORDER that for the purposes of this judgment, except to the extent that they are modified in this judgment, the definitions set out in the Settlement Agreement, exhibit R-1, and its schedules apply to and are incorporated into this judgment;

ORDONNER qu'aux fins du présent jugement, sauf si elles ont été modifiées dans le présent jugement, les définitions énoncées dans l'Entente de règlement, pièce R-1, et ses annexes s'appliquent et sont incorporées au présent jugement;

DECLARE that the Settlement Agreement is fair and reasonable and in the best interests of the Class Members and **APPROVE** the Settlement Agreement;

DÉCLARER que l'Entente de règlement est juste et équitable et dans le meilleur intérêt des Membres du Groupe et **APPROUVER** l'Entente de règlement;

ORDER AND DECLARE that all provisions of the Settlement Agreement (including Recitals and Definitions) form part of the judgment and are binding upon the Parties in accordance with the terms thereof;

ORDONNER ET DÉCLARER que toutes les dispositions de l'Entente de règlement (y compris les considérants et les définitions) font partie du présent jugement et lient les parties conformément à ses dispositions;

ORDER that the Settlement Agreement be implemented according to its terms;

ORDONNER que l'Entente de règlement soit appliquée conformément à ses modalités;

APPROVE:

a. the Plan of Allocation, schedule E to the Settlement Agreement;

b. the Claim Form, schedule F to the Settlement Agreement; and

APPROUVER :

a. le Plan de distribution, annexe E de l'Entente de règlement;

b. le Formulaire de réclamation, annexe F de l'Entente de règlement; et

[38] *Pellemans* c. *Lacroix*, supra note 35, paragraphe 50.

c. the Claims Bar Deadline shall be seventy-five (75) days following the First Order, or November 24, 2020;

c. la Date limite de réclamation de soixante-quinze (75) jours après la Première ordonnance;

ORDER AND DECLARE that in the event of a conflict between this judgment and the Settlement Agreement, this judgment shall prevail;

ORDONNER ET DÉCLARER qu'en cas de conflit entre le jugement et l'Entente de règlement, le jugement prévaudra;

DECLARE that the Defendants have no responsibility for the administration and management of the Settlement Agreement;

DÉCLARER que les Défendeurs n'ont aucune responsabilité quant à l'administration et à la gestion de l'Entente de règlement

ORDER the Administrator to withhold the sum of $75,000.00 on the Settlement Amount for payment of administration fees;

ORDONNER à l'Administrateur de retenir la somme de 75 000 $ plus taxes sur le montant du Règlement pour le paiement des frais d'administration;

ORDER that if Defendants do not elect to terminate the Settlement Agreement pursuant to the terms in the Settlement Agreement, the Administrator shall be paid from the Escrow Account a fee in an amount to be approved by the Superior Court;

ORDONNER que si les Défendeurs ne décident pas de résilier l'Entente de règlement conformément aux modalités de l'Entente de règlement, l'Administrateur sera payé à partir du Compte en fidéicommis des frais d'un montant devant être approuvé par la Cour supérieure;

ORDER that if the Settlement Agreement is terminated, the Administrator may apply to the Superior Court pursuant to the terms of the Settlement Agreement for directions relating to the amount it is to be paid for the services it rendered to the date of termination;

ORDONNER qu'en cas de résiliation de l'Entente de règlement, l'Administrateur, conformément aux modalités de l'Entente de règlement, puisse demander à la Cour supérieure des instructions relatives au montant qu'il doit être payé pour les services qu'il a rendus jusqu'à la date de résiliation;

ORDER AND DECLARE that each Releasor has fully, definitively and permanently resolved, settled and released the Releasees from all Released Claims related to or connected with, directly or indirectly, the Action against the Defendants by the Plaintiff on her own behalf and/or

ORDONNER ET DÉCLARER que chaque Renonciateur a totalement, définitivement et de manière permanente résolu, réglé et libéré les Renonciataires de toutes les réclamations libérées liées directement ou indirectement, à l'Action contre les Défendeurs par la Demanderesse en

on behalf of the Class she represents, to avoid the further expense, inconvenience, distraction of burdensome litigation and risks inherent to this uncertain, complex and protracted litigation, and thereby to put to rest this class action;

son propre nom et/ou au nom du Groupe qu'elle représentait, pour éviter les dépenses supplémentaires, les inconvénients, la distraction d'un contentieux lourd et les risques inhérents à ce litige incertain, complexe et prolongé, et ainsi conclure cette action collective ;

ORDER that the Class Counsel and Releasors shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada, the United States or elsewhere, on their own behalf or on behalf of any class or any other person, any action, suit, cause of action, claim or demand against any Releasee or any other person who may claim contribution or indemnity from any Releasee in respect of any Released Claim or any matter related thereto;

ORDONNER que les Avocats du Groupe et les Renonciateurs ne doivent pas, maintenant ou par la suite, intenter, continuer, maintenir ou affirmer, directement ou indirectement, que ce soit au Canada, aux États-Unis ou ailleurs, en leur propre nom ou au nom d'un groupe ou de toute autre personne, toute action, poursuite, cause d'action, réclamation ou demande contre tout Renonciataire ou toute autre personne qui peut réclamer une contribution ou une indemnité de tout Renonciateur concernant toute Réclamation abandonnée ou toute question y relative;

ORDER, unless the Class Member is a CCAA Proven Claim Creditor or the Court orders otherwise, that in order to participate in the Settlement Agreement, a Class Member must submit a properly completed Claim Form and the required supporting documentation with the Administrator on or before the Claims Bar Deadline;

ORDONNER, à moins que le membre du groupe ne soit un créancier d'une réclamation prouvée en vertu de la LACC ou que le tribunal n'en ordonne autrement, que pour participer à l'Entente de règlement, un membre du groupe doit soumettre un Formulaire de réclamation dûment rempli et les pièces justificatives requises à l'Administrateur le ou avant le Date limite de réclamation;

DECLARE that the Distribution of the Settlement Amount do not generate a new right to claim under the Norshield Receivership Proceedings or the CCAA proceedings;

DÉCLARER que la Distribution du Montant du règlement ne génère pas un nouveau droit de réclamation dans le cadre de la procédure de mise sous séquestre de Norshield ou de la procédure de la LACC;

DECLARE that the Distribution of the Settlement Amount does not affect the rights of CCAA Proven Claim Creditor to receive additional distributions, if any, under either the Norshield Receivership Proceedings or the CCAA Proceedings;

DÉCLARER que la Distribution du Montant du règlement n'affecte pas les droits du créancier de réclamations prouvées en vertu de la LACC de recevoir des distributions supplémentaires, le cas échéant, dans le cadre de la procédure de mise sous séquestre de Norshield ou de la procédure en vertu de la LACC;

ORDER the Administrator to file with the Superior Court a report on the administration of the Settlement Agreement once the distribution is completed;

ORDONNER à l'Administrateur de déposer auprès de la Cour supérieure un rapport sur l'administration de l'Entente de règlement une fois la distribution terminée;

ORDER that any one or more of the Parties, Class Counsel or the Administrator may apply to the Superior Court for directions in respect of any matter in relation to the Settlement Agreement and/or Plan of Allocation;

ORDONNER que l'une ou plusieurs des parties, les Avocats du groupe ou l'Administrateur peuvent demander à la Cour supérieure des instructions concernant toute question relative à l'Entente de règlement et / ou au Plan de distribution;

ORDER that no person may bring any action or take any proceedings against the Plaintiff, the Defendants, the Administrator or their employees, insurers, reinsurers, directors, officers, partners, employees, agents, trustees, servants, parents, consultants, underwriters, lenders, advisors, lawyers, representatives, successors, predecessors, assigns and each of their respective heirs, executors, attorneys, administrators, guardians, estates, trustees, successors and assigns for any matter in any way relating to the administration of the Plan of Allocation or the implementation of this judgment except with leave of the Superior Court;

ORDONNER que nul ne puisse intenter une action ou engager des poursuites contre la Demanderesse, les Défendeurs, l'Administrateur ou leurs employés, assureurs, réassureurs, administrateurs, dirigeants, associés, employés, agents, fiduciaires, préposés, parents, consultants, souscripteurs, prêteurs, conseillers, avocats, représentants, successeurs, prédécesseurs, ayants droit et chacun de leurs héritiers, exécuteurs testamentaires, avocats, administrateurs, tuteurs, successions, fiduciaires, successeurs et ayants droit respectifs pour toute question relative de quelque manière que ce soit à l'administration du plan d'attribution ou de l'exécution du présent jugement sauf avec l'autorisation de la Cour supérieure;

APPROVE:

a. the fee agreement between Sheila Calder and Class Counsel signed on August 24, 2011, Exhibit R-8, is approved;

b. Class Counsel Fees in the amount of twenty-five (25) percent of CDN $6,000,000, plus disbursements of $196,801, plus applicable taxes on Class Counsel Fees and disbursments, shall be paid from the Escrow Account forthwith after the Effective Date;

PRAY ACT of Class Counsel's undertaking to reimburse the *Fonds d'aide aux actions collectives* in the sum of $172,547.36;

ORDER that the levy payable to the Fonds d'aide aux actions collectives shall be paid according to the applicable regulations;

ORDER that in the event that the Settlement Agreement is terminated in accordance with its terms, this judgment shall be declared null and void;

ORDER AND DECLARE that all persons and entities provided with notice of this motion shall be bound by the declarations made in, and the terms of, this judgment;

REMIND that a judgment closing this Action needs to be delivered after the Administrator files a final report of the administration of the Settlement Agreement;

APPROUVE :

a. le Mandat professionnel entre Sheila Calder et les Avocats du Groupe signé le 24 août 2011, pièce R-8;

b. les honoraires des Avocats du Groupe d'un montant de vingt-cinq (25) pour cent de 6 000 000 $ CAN, plus les débours de 196 801$, plus les taxes applicables sur les honoraires et les déboursés, seront payés à partir du Compte en fidéicommis immédiatement après la date d'Entrée en vigueur;

PREND ACTE de l'engagement des Avocats du Groupe de rembourser le Fonds d'aide aux actions collectives la somme de 172 547,36 $;

ORDONNER que la redevance payable au Fonds d'aide aux actions collectives soit payée selon les règlements applicables;

ORDONNER qu'en cas de résiliation de l'Entente de règlement conformément à ses conditions, le présent jugement sera déclaré nul et non avenu;

ORDONNER ET DÉCLARER que toutes les personnes et entités ayant reçu un avis de la présente demande sont liées par les déclarations faites dans le présent jugement et de ses modalités;

RAPPELLE qu'un jugement clôturant la présente Action doit être rendu une fois que l'Administrateur aura déposé un rapport final sur l'administration de l'Entente de règlement;

THE WHOLE, without costs.

LE TOUT, sans frais.

MONTREAL, this 25 of November 2020

Sylvestre Painchaud et Associés

SYLVESTRE PAINCHAUD ET ASSOCIÉS
S.E.N.C.R.L.
Me Normand Painchaud
Me Vincent Blais-Fortin
Attorneys for the Plaintiff

NOTICE OF PRESENTATION

TO: **Me Shawn Irving**
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Me Frédéric Plamondon
fplamondon@osler.com
Osler, Hoskin & Harcourt S.E.N.C.R.L./ S.R.L.
Attorneys for Royal Bank of Canada and RBC Capital Markets Corporation

Me Frikia Belogbi
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Me Lory Beauregard
lory.beauregard@justice.gouv.qc.ca
Attorneys for Fonds d'aide aux actions collectives

TAKE NOTICE that the *Motion to approve a settlement agreement and for other reliefs* shall be presented to the Honourable Thomas M. Davis of the Superior Court, of the Province of Quebec, of the District of Montreal, at the Court House of Montreal located at 1 Notre-Dame ST. East, Montreal, Québec H2Y 1B6 on **December 2, 2020** at **9:30 a.m**. or as soon thereafter as Counsel may be heard. The room number will be posted on the door of room No. 2.08 prior to 9 a.m.

DO GOVERN YOURSELVES ACCORDINGLY.

MONTREAL, this 25 November 2020

Sylvestre Painchaud et associés

SYLVESTRE PAINCHAUD ET ASSOCIÉS
S.E.N.C.R.L.
Attorneys for the Plaintif

C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
Nº : 500-06-000435-087

SUPERIOR COURT
(Class Action Division)

SHEILA CALDER

Plaintiff

v.

ROYAL BANK OF CANADA

-and-

RBC CAPITAL MARKETS CORPORATION

Defendants

-and-

LE FONDS D'AIDE AUX ACTIONS COLLECTIVES

Mis en cause

APPLICATION TO APPROVE A SETTLEMENT AGREEMENT AND FOR OTHER RELIEFS

LIST OF EXHIBITS

Exhibit R-1	Settlement agreement;
Exhibit R-2	Affidavit of Raymond Massi dated August 7, 2020 and Exhibits RM-1 to RM-15;
Exhibit R-3	Court docket of file 500-06-000435-087;
Exhibit R-4	Court docket of file 500-06-000434-080;
Exhibit R-5	Motion to dismiss by RBC;
Exhibit R-6	Motion to dismiss by KMPG
Exhibit R-7	Supplementary affidavit of Raymond Massi dated November 25, 2020 and Exhibits RM-16 to 19;
Exhibit R-8	Professional Mandates and Agreements, en liasse;
Exhibit R-9	Judgement dated July 26, 2012, rendered by Marc De Wever, S.C.J., regarding the Plaintiff's Motion to discontinue the KPMG Action.

Exhibit R-10 Judgement dated November 1st, 2012, rendered by Marc De Wever, S.C.J., regarding the authorization of the class action;

Exhibit R-11 Second Case Management Motion dated September 21, 2016 and modified on October 26, 2016;

Exhibit R-12 Documents and Information Motion dated September 15, 2017;

Exhibit R-13 Formal notice to admit the origin of a documents or the integrity of the information they contain and other notices dated October 13, 2017;

Exhibit R-14 RBC Argument Outline dated January 19, 2018, regarding the Documents and Information Motion;

Exhibit R-15 Judgment dated April 11, 2018, rendered by Marc De Wever, S.C.J., regarding the Documents and Information Motion;

Exhibit R-16 Motion for measures regarding pre-trial examination dated March 28, 2019

Exhibit R-17 RBC Argument Outline dated January 18, 2019, on the Motion for measures regarding pre-trial examination;

Exhibit R-18 Transcription of the judgment dated May 13, 2019, regarding the Motion for measures regarding pre-trial examination;

Exhibit R-19 Agreement entered on October 8, 2019 between Richter Advisory Group Inc., Raymond Massi, Clifford Culmer and Sylvestre Painchaud et Associés;

Exhibit R-20 Judgment dated March, 31, 2020, rendered by Justice Dietrich regarding the Agreement entered on October 8, 2019 between Richter Advisory Group Inc., Raymond Massi, Clifford Culmer and Sylvestre Painchaud et Associés;

Exhibit R-21 Affidavit of Raymond Massi and Ken Chong Le dated November 25, 2020;

Exhibit R-22 Affidavit of Marianne Cartier, paralegal, dated September 22, 2020;

Exhibit R-23 Affidavit of Normand Painchaud dated November 25, 2020;

Exhibit R-24 Detailed statement of account for the period from January 1st, 2011 to August 7, 2020 (**marked confidential – for the Court's eyes only**);

Exhibit R-25 Detailed statement of account for the period from August 8, 2020 to

November 12, 2020(**marked confidential – for the Court's eyes only**);

Exhibit R-26 Table indicating relevant information's regarding the lawyers and staff involved;

Exhibit R-27 Affidavit of Maria Hernandez dated November 25, 2020;

Exhibit R-28 Spreadsheet regarding the disbursement incurred by the Plaintiff's counsels; and

Exhibit R-29 Email from Mrs. Sheilda Calder dated August 4, 2020.

MONTREAL, this 25 day of November, 2020

(S) Sylvestre Painchaud et associés

SYLVESTRE PAINCHAUD ET ASSOCIÉS
S.E.N.C.R.L.
Attorneys for the Plaintiff