

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

DARA FRESCO

Plaintiff

and

CANADIAN IMPERIAL BANK OF COMMERCE

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**PLAINTIFF'S FACTUM
(Distribution Protocol Approval)
(returnable March 3, 2023)**

February 23, 2023

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PART I- OVERVIEW

1. The plaintiff seeks approval of the proposed Distribution Protocol (the "Protocol"). The Protocol will guide how Class Members receive their compensation from the Net Settlement Amount.¹ Distribution protocols are assessed under the same legal test as settlement approval, namely, whether the protocol is fair, reasonable and in the best interests of the class.² The Protocol will provide for an efficient and fair distribution in what is, to date, the largest employment class action settlement on an aggregate basis in Canada. The Protocol ensures a non-adversarial process. Class Members will not be required to prove their hours of work in order to receive a payment under the Protocol.

2. Each Class Member's payment will be unique and will be calculated based on the Class Member's Tenure with CIBC, their average wage in the position they worked and any applicable provincial limitation period.³ Available employment records will be utilized to distribute the entire Net Settlement Amount to Class Members, or when records are not available or disputed, a simple and non-adversarial process of determinations will be conducted by the Administrator.⁴ The simplicity and ease of the process will remove many barriers for Class Members, encouraging an increased take-up rate.

¹ Defined terms are as set out in the Settlement Agreement.

² *Zaniewicz v. Zungui Haixi Corp.*, 2013 ONSC 5490, para. 59, Protocol Authorities, Tab 1; *Eidoo v Infineon Technologies AG*, 2014 ONSC 6082, para. 74, Protocol Authorities, Tab 2; *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2018 ONSC 6447, para. 72, Protocol Authorities, Tab 3; *Welsh v. Ontario*, 2018 ONSC 3217, para. 68, Protocol Authorities, Tab 4 .

³ Distribution Protocol, Section 4, paras. 5-8, Exhibit "A" to the Affidavit of Jody Brown affirmed February 22, 2023 ("Brown Protocol Affidavit"), Motion Record of the Plaintiff – Distribution Protocol Approval ("Protocol Record"), Tab 2(A), p. 58.

⁴ Distribution Protocol, Section 6. Exhibit "A" to the Brown Protocol Affidavit, Protocol Record, Tab 2(A), p. 62.

3. The Protocol strikes the appropriate balance between efficiency and individual compensation. Class Members who worked longer, and/or with a higher average wage, will receive more compensation, relative to Class Members who worked for a shorter period of time for a lower average wage.⁵

4. The proposed claims notice is robust and should be approved. The notice program will include direct notice to 31,785 Class Members based on current or last known contact information.⁶ In addition to direct notice, Class Counsel is proposing a digital media campaign displayed on Google Display Network and Facebook, along with notice to be published in digital editions of national newspapers and print editions of national newspapers.⁷

5. It is respectfully submitted that the Protocol is fair, reasonable, and in the best interests of the class, and should be approved.

PART II - THE FACTS

A. Protocol Overview

6. The proposed Protocol is designed to meet two principal objectives:

- (a) To facilitate an expeditious, non-adversarial and practical distribution of the entire Net Settlement Amount to the Class Members (including by encouraging the highest take-up rate possible); and
- (b) To provide compensation which is easily understood by Class Members and is individualized based on a Class Member's work history with CIBC.

⁵ Brown Protocol Affidavit, para. 19, Protocol Record, Tab 2, p. 40.

⁶ Brown Protocol Affidavit, para. 39, Protocol Record, Tab 2, p. 47.

⁷ Brown Protocol Affidavit, para. 41, Protocol Record, Tab 2, p. 48.

7. To ensure that the distribution will not become bogged down in multiple determinations, the Protocol prioritizes a straight forward distribution.⁸

8. Each Class Member's Relative Share of the Net Settlement Amount will be a function of their employment Tenure and the average wage applicable to the Employment Position(s) they held during the Class Period.

9. No Class Member will have to prove their claim and there will be no challenge to their claim by CIBC.

10. The Net Settlement Fund is non-reversionary and the entire Net Settlement Amount will be distributed to Class Members pursuant to the proposed Protocol, subject to any *cy-près* distribution resulting from uncashed cheques.⁹

11. Analysis of the available time-stamped records, blotters and payroll data that formed the basis for the Plaintiff's proposed methodology for calculating aggregate damages has influenced the design of the Protocol, which focuses on the individualised characteristics of Tenure, Employment Position and average wage. The Protocol therefore seeks to reflect what could have been the damages outcome on the merits.¹⁰

⁸ Brown Protocol Affidavit, para. 7, Protocol Record, Tab 2, p. 35.

⁹ Brown Protocol Affidavit, para. 9, Protocol Record, Tab 2, p. 35.

B. Operation of the Protocol

12. The Distribution Protocol contains the following operational elements:

(a) To the extent available, the Claims Administrator will be provided the Tenure, Employment Position(s) and average wage for each Class Member which will form the basis for the Class Member payments;¹¹

(b) When a Class Member makes a claim through an online claims portal, the claims portal will pre-populate information about the Class Member's Tenure, Employment Position(s) and average wage. Class Members will not be required to provide any further evidence or historical work records;¹²

(c) In the event that records do not exist for a Class Member, or they disagree with the available records, they will be entitled to submit records or reasons to demonstrate their Tenure and Employment Position(s), all to be solemnly affirmed. The Claims Administrator will then determine their Relative Share. The Defendant has no role in this determination;¹³

(d) Presumptively statute-barred time will be discounted by 50%;¹⁴

(e) There will be a two-stage distribution, ensuring any discrepancies or errors in the distribution can be remedied;¹⁵ and

(f) The Administrator will be responsible for making all Remittances from the compensation payments, such as income tax deductions, CPP and EI as necessary.¹⁶

¹¹ Brown Protocol Affidavit, para. 14(b), Protocol Record, Tab 2, p. 38.

¹² Brown Protocol Affidavit, para. 14(c), Protocol Record, Tab 2, p. 38.

¹³ Brown Protocol Affidavit, para. 14(d), Protocol Record, Tab 2, p. 38.

¹⁴ Brown Protocol Affidavit, para. 14(e), Protocol Record, Tab 2, p. 38.

¹⁵ Brown Protocol Affidavit, para. 14(f), Protocol Record, Tab 2, p. 38.

¹⁶ Brown Protocol Affidavit, para. 14(g), Protocol Record, Tab 2, p. 38-39.

(i) Points Calculation and Distribution Formula

13. Once a Class Member submits a claim form, the Claims Administrator will calculate points applicable to the Class Member's Claim in the following manner:

(a) The total points applicable to a Claim shall be calculated by multiplying a Class Member's Tenure by the average wage applicable to the Employment Position(s) in a given year, represented by the following formula:¹⁷

Tenure in Employment Position X Average wage for Employment Position = points

(b) The monetary value of one (1) point shall be calculated by dividing the Net Settlement Amount by the total numbers of points calculated from all valid Claim Forms, represented by the following formula:¹⁸

Net Settlement Amount / total points for all valid claims = monetary value of one (1) point

(c) The Class Member shall then be awarded the monetary value of their points by multiplying their total points for all Employment Positions in the Class Period by the monetary value of a point; and

(d) For any points calculated for Tenure outside the applicable provincial limitation period for the Class Member, the monetary value of each point shall be reduced by 50%.¹⁹

14. Using the above method, the Claims Administrator will be able to calculate what each Class Member's Relative Share of the Net Settlement Amount will be using individualized information in an expeditious and cost-effective manner.

¹⁷ Brown Protocol Affidavit, para. 16, Protocol Record, Tab 2, p. 39.

¹⁸ Brown Protocol Affidavit, para. 17, Protocol Record, Tab 2, p. 40.

¹⁹ Brown Protocol Affidavit, para. 18, Protocol Record, Tab 8, p. 40.

C. Hypothetical Example of Distribution

15. The take-up rate will affect the quantum received by any individual Class Member under the Distribution Protocol. Inevitably some Class Members will not seek their share of the Net Settlement Amount. In such case, their share will be redistributed (pro rata) among the rest of the Class.

16. The Plaintiff's expert concluded that the total work months for the Class consisted of 1,744,960 months. By way of illustration only, below is a chart summarizing the gross settlement value before deductions for legal fees, disbursements, taxes and the CPF levy.²⁰

17. To prepare this chart, Class Counsel has used hypothetical take-up rates of 40% and 65%, based on total months in the Class. In Class Counsels' experience, the take-up rates in employment class action settlements range from a low of approximately 20% in an individual claims process to a high of 65% in a process, like this one, with a simple form.²¹ Class Counsel has also assumed, for illustration only, that at each Take-up rate, 30% of the total claimed months are from months that are subject to the 50% limitations period discount.²²

18. Two hypothetical Class Members are illustrated below, one Class Member has a 5-year career with no limitations discount, another Class Member has an 8-year career wherein half their career is subject to a limitations discount. The amounts below, like regular employment income, would be subject to withholding taxes and any deductions for CPP and EI.

²⁰ Brown Protocol Affidavit, para. 20, Protocol Record, Tab 2, p. 40.

²¹ Brown Protocol Affidavit, para. 20, Protocol Record, Tab 2, p. 41.

²² Brown Protocol Affidavit, para. 20, Protocol Record, Tab 2, p. 41.

	5-year Tenure (all timely)	8-year Tenure (half subject to limitations discount)
65% Take-up	\$9,522	\$11,426.40
40% Take-up	\$15,473	\$18,567.84

D. User-Friendly Claims Procedure

19. As discussed above, the Claims Administrator in this case will be provided with the available employment records for Class Members to identify their Tenure and Employment Position(s).

20. To submit a Claim through the online portal, a Class Member will only be required to provide:

- (a) First name, middle name and last name;
- (b) Date of birth;
- (c) SIN number; and
- (d) Contact information.²³

21. The estates of deceased Class Members are also entitled to make claims and will be able to take advantage of any available employment records.²⁴

22. The online portal is intended to be a ‘one-stop shop’ wherein the Class Member can make a claim and simultaneously be advised of the available records that will be used to calculate their individual compensation.

²³ Brown Protocol Affidavit, para. 24, Protocol Record, Tab 2, p. 42.

²⁴ Brown Protocol Affidavit, para. 26, Protocol Record, Tab 2, p. 43.

23. For what Class Counsel anticipates being a relatively small number of Class Members for whom records of Tenure and Employment Position(s) are not available, or for those Class Members who disagree with the available records, Class Members can submit their own records or statements. This process is subject to a Class Member solemnly affirming that their submission is true. Under no circumstances will a Class Member be cross-examined or will the Defendant be permitted to make inquiries. The Claims Administrator solely determines the resulting Tenure and Employment Position(s) from a Class Member's submission and is directed to do so considering the principles of access to justice, accessibility and expediency (a "Determination").²⁵

24. Class Counsel is entitled to review the first thirty (30) Determinations made by the Claims Administrator and may subsequently request statistics on Determinations or additional reviews going forward.²⁶

E. Notice

25. The most up to date class list contains 31,785 class members (excluding opt-outs), of which 3,368 are current employees. Within the most recent class list, CIBC has been able to provide last known or current addresses for each Class Member and, when available, personal email addresses and telephone numbers, except for 13 Class Members. The source for the class list was CIBC's benefits application (TBA), which is the record for terminated employees' address information and contains a daily update for active employees, ensuring the information is current.

²⁵ Brown Protocol Affidavit, para. 28, Protocol Record, Tab 2, p. 43.

²⁶ Distribution Protocol, Section 6 para. 5, Exhibit "A" to the Brown Protocol Affidavit, Protocol Record, Tab 2(A), p. 62; Brown Protocol Affidavit, para. 29, Protocol Record, Tab 2, p. 43.

The source for the data also includes available information from CIBC's database for retired Class Members with a pension. This class list will be used for notice of the claims process.²⁷

26. Class Members who reside in Quebec will receive French and English notices and Class Members who reside outside Quebec will receive English notices.²⁸

27. In order to notify the Class Members of their chance to make a claim, Class Counsel has proposed an enhanced notice program created in conjunction with the proposed Claims Administrator. The notice program consists of:

- (a) a direct postage mailing to addresses provided by CIBC, updated against the National Change of Address Database and any updated addresses received by Class Counsel from Class Members;
- (b) An email notice to Class Members with valid email addresses based on the Publication Notice;
- (c) A digital media campaign consisting of a digital media banner displayed on Google Display Network and Facebook that will likely generate over 1 million impressions;
- (d) Publication of the Publication Notice in print media consisting of advertisements in the paper editions of the Globe and Mail (National Edition), Toronto Star, Calgary Herald, The Province (Vancouver) and La Presse; and
- (e) Publication of the Publication Notice in online versions of the Globe and Mail (National Edition), Toronto Star, Calgary Herald, The Province (Vancouver) and La Presse.²⁹

²⁷ Brown Protocol Affidavit, para. 40, Protocol Record, Tab 2, p. 47.

²⁸ Brown Protocol Affidavit, para. 41, Protocol Record, Tab 2, p. 48.

²⁹ Brown Protocol Affidavit, para. 42, Protocol Record, Tab 2, p. 48.

28. By the time that the claims procedure is commenced, Class Members will have already been provided with the notice of certification, notice of the settlement approval hearing, press releases regarding the settlement and general media coverage. Direct notice spillover will also have raised awareness, which occurs when former employees receive direct notice and pass it on to other colleagues or acquaintances they previously worked with.³⁰

F. Claims Administrator

29. Class Counsel is proposing RicePoint Administration Inc. (“RicePoint”) as Claims Administrator.

30. RicePoint is an experienced Canadian claims administrator affiliated with KCC, a leading class action settlement administration company in the United States. RicePoint and KCC are both owned by Computershare. Computershare is a large multinational company that provides payroll services, pension services, accounting and a range of other administration services for public and private companies.³¹

31. RicePoint has significant experience in settlement administration of employment class actions and most recently successfully administered a settlement in the *Livingston* employment class action. RicePoint’s experience includes multi province employment cases in Canada that involved the distribution of T4 slips and remittances. Those cases include:

- (a) *Bozsik v. Livingston International Inc.*;
- (b) *Horner v. Primary Response Inc.*;

³⁰ Brown Protocol Affidavit, para. 43, Protocol Record, Tab 2, p. 49.

³¹ Brown Protocol Affidavit, para. 35, Protocol Record, Tab 2, p. 45; Ricepoint, KCC, Compushare Experience, Exhibit “B” to the Brown Protocol Affidavit, Protocol Record, Tab 2(B).

(c) *Grigoryev v. Russell Security Services Inc.*; and

(d) *Baroch v. Canada Cartage*.³²

32. RicePoint was selected after a tendering process between RicePoint and Epiq Class Action Services Canada Inc., the two principal settlement administration companies operating in Canada with experience administering employment class action settlements. Both administrators were asked to submit detailed cost estimates. Class Counsel were of the opinion that RicePoint, in conjunction with KCC, had greater experience and infrastructure to administer an employment settlement of this scope and would administer the settlement more cost-effectively. The Defendant has agreed to RicePoint acting as administrator.³³

33. RicePoint estimates that the administration expense for this case will be between **\$513,083** and **\$657,701**, depending on the take-up rate.³⁴ In order to carry out the administration, the available employment information regarding Tenure, Employment Position(s) and average wages will have to be collected and programmed into a distribution tool that can be used by the Claims Administrator to easily calculate each Class Member's Relative Share. It is estimated that this tool will cost approximately \$65,000.³⁵

G. Notice of Protocol and Response

34. A copy of the Distribution Protocol was delivered with the direct notice mailing that was distributed for notice of the settlement approval hearing. The Protocol has also been published on

³² Brown Protocol Affidavit, para. 36, Protocol Record, Tab 2, pp. 45-46.

³³ Brown Protocol Affidavit, para. 38, Protocol Record, Tab 2, pp. 46-47.

³⁴ Ricepoint Estimate for Administration, Exhibit "C" to the Brown Protocol Affidavit, Protocol Record, Tab 2(C).

³⁵ Brown Protocol Affidavit, para. 39, Protocol Record, Tab 2, p. 47.

the websites of Class Counsel and www.CIBCunpaidovertime.ca since January 19th. As of the date of this factum, no objections to the Protocol have been received.³⁶

PART III -LAW AND ARGUMENT

A. Overview

35. Distribution protocols are an essential element of class actions which bridge the gap between settlement approval and Class Members receiving compensation.³⁷ An approved settlement is only as good as the method by which it ultimately reaches class members.

36. This Court's authority to approve the Protocol is grounded in the Settlement Agreement,³⁸ for which approval is sought on a separate motion. The Settlement Agreement in this action states "Class Counsel shall propose for approval by the Court (or Courts, if settlement approval is required in Quebec) a Distribution Protocol in the form attached as Schedule "E" or such other form as may be directed by the Courts."³⁹

B. Proposed Distribution Protocol Meets the Test for Approval

37. It falls upon Class Counsel to develop a distribution protocol that is reasonable, fair and in the best interests of the class. Generally, the consideration of the distribution protocol follows a consideration of the proposed settlement, considering similar factors, as held by Justice Perell:

Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole

³⁶ Brown Protocol Affidavit, para. 13, Protocol Record, Tab 2, p. 37.

³⁷ *Eidoo v Infineon Technologies AG*, 2015 ONSC 5493, para. 23, Protocol Authorities, Tab 2.

³⁸ *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192, para. 49, Protocol Authorities, Tab 5.

³⁹ Settlement Agreement, section 5, para. 2.

or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the scheme of distribution under the proposed settlement.⁴⁰

38. This motion is concerned with the second exercise described above.

39. The test for approving a distribution protocol is analogous to the test that the Court applies when deciding whether to approve a settlement.⁴¹ A settlement must fall within a zone of reasonableness to be approved.⁴² Deciding what is fair and reasonable can involve considerations of what is economical and practical on the facts of a particular case.⁴³

40. The zone of reasonableness assessment allows for variation between settlements depending upon the subject matter of the litigation and the nature of the damages for which settlement provides compensation.⁴⁴ A settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.⁴⁵

41. The proposed Protocol is well within the zone of reasonableness. The Protocol's proposed distribution scheme aligns with the analysis of the time-stamped data that formed the basis for the pending aggregate damages motion.⁴⁶ The Protocol also ensures that all Class Members are

⁴⁰ *Welsh v. Ontario*, 2018 ONSC 3217, para. 68, Protocol Authorities, Tab 4.

⁴¹ *Zaniewicz v. Zungui Haixi Corp.*, 2013 ONSC 5490, para. 59, Protocol Authorities, Tab 1; *Eidoo v Infineon Technologies AG*, 2014 ONSC 6082, para. 74, Protocol Authorities, Tab 2; *Mancinelli. Royal Bank of Canada*, 2018 ONSC 4192, para. 49, Protocol Authorities, Tab 5.

⁴² *Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752, 133 OR (3d) 73, para. 12, Protocol Authorities, Tab 6; *Leslie v Agnico-Eagle Mines*, 2016 ONSC 532, para. 8, Protocol Authorities, Tab 7.

⁴³ *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192, para. 49, Protocol Authorities, Tab 5; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936, para. 34, Protocol Authorities, Tab 8.

⁴⁴ *Parsons v Canadian Red Cross Society*, [1999] O.J. no 3572, para. 70, Protocol Authorities, Tab 9.

⁴⁵ *Parsons v Canadian Red Cross Society*, [1999] O.J. no 3572, para. 80, Protocol Authorities, Tab 9.

⁴⁶ Brown Protocol Affidavit, para. 46, Protocol Record, Tab 2, p. 49.

eligible for compensation and are likely to be notified of the ability to receive money from the Settlement.⁴⁷

C. User Friendly and Non-Adversarial Procedure Warrants Approval

42. Providing compensation based on CIBC's records, without the need for individual proof, removes significant barriers to take-up. The Protocol does not require proof from any individual Class Member as to their hours worked in order to establish an entitlement to compensation. Compensation payments will be a function of Tenure at CIBC and the average wage of the Class Member's Employment Position.

43. In *Aps v. Flight Centre Travel Group*, another employment class action settlement, Justice Belobaba approved a protocol that was substantially similar in terms of accessibility and ease of use as the proposed Protocol:

The defendant has also agreed to a simple and fair-minded distribution protocol. Class members will not be required to prove their overtime hours. Instead, class member entitlements will be determined using a formula that takes into account the length of their employment (both before and after the applicable limitation period) and the province in which they worked...

The proposed claim process is straightforward. The class member submits a claim form that sets out their employment start and stop dates and the province in which they were employed. The agreed-to formula is then used to calculate the payout. The amounts paid pursuant to this settlement are, of course, income and the claims administrator will deduct/remit employee and employer portions of CPP, EI and income tax, and prepare the T4A forms as needed...

The obvious advantage of the proposed distribution protocol is the simplicity of the claims process and the formula-based payout calculation. Costly individual assessments – that would normally be needed to decide discoverability and limitation issues and appropriate payout amounts – will be avoided.⁴⁸

⁴⁷ Brown Protocol Affidavit, para. 43, Protocol Record, Tab 2, p. 49.

⁴⁸ *Aps v. Flight Centre Travel Group*, 2020 ONSC 6779, paras. [18](#), [20](#) and [23](#), Protocol Authorities, Tab 10.

44. The ease of distribution identified in *Aps* is matched or exceeded in the Proposed Protocol. Ease and speed of distribution has been held to be a valuable factor in approving a proposed Protocol in several other employment class action settlements, as held by Justice Belobaba in *Rosen v. BMO*:

Here, of course, class members will receive an 'equal share' payout that does not depend on months worked and thus does not require a costly claims process, individual adjudications and related appeals. This alone provides a significant benefit to every class member. As I noted in *Fulawka*, 'The overall benefit to class members of an immediate and substantial payout, without further delay or uncertainty, is significant and justifies judicial approval.'⁴⁹

45. As in *Aps v. Flight Centre*, *Baroch v. Canada Cartage*, *Rosen v. BMO*, and in *Fulawka v. BNS*, the proposed Protocol warrants judicial approval for providing compensation in an expeditious and non-adversarial manner without the need for individual proof.

D. Tailored Compensation Warrants Approval

46. The proposed Protocol strikes the correct balance between expeditious payments and compensating class members based on their anticipated fair share of damages. Class Members with historically higher unpaid wages will be compensated in accordance with their average wages.⁵⁰ Class Members who worked for longer periods of time, accumulating more unpaid time, will be compensated more than Class Members will relatively less working time.⁵¹

⁴⁹ *Rosen v BMO Nesbitt Burns Inc.*, 2016 ONSC 4752, para. 20, Protocol Authorities, Tab 6; see also *Fulawka v Bank of Nova Scotia*, 2016 ONSC 1576, Protocol Authorities, Tab 11; See also *Baroch v. Canada Cartage*, 2021 ONSC 7376, para. 19, Protocol Authorities, Tab 12.

⁵⁰ Brown Protocol Affidavit, para. 46, Protocol Record, Tab 2, p. 49.

⁵¹ Brown Protocol Affidavit, paras. 15-16, Protocol Record, Tab 2, p. 39.

47. The individualized compensation payments that will be distributed under the Protocol, is a further factor supporting approval. In modifying a proposed distribution protocol, Justice Morgan held in *Micevic v. Johnson & Johnson* that:

To reiterate, a settlement is inevitably the product of compromise; but that does not mean that it should simply strike a median level of payment for every class member such that it seriously undercompensates those whose damages are greatest... the interests of all class members must be taken into account. Any settlement must be fair to the entire class, including those who suffered the most.⁵²

48. The proposed Protocol ensures those who would have likely had the greatest damages will receive a relatively larger share of the Net Settlement Amount, while simultaneously avoiding an onerous claims procedure in a settlement of over 31,000 Class Members.

E. Limitations Period Discount is Appropriate

49. The Protocol discounts by 50% all working time that would be presumptively time-barred and the applicable limitation periods will vary depending on the province or territory where the Class Member worked. This discount is appropriate because it accounts for the risk, delay and expense that would have likely resulted from individual issue determinations on limitations.⁵³ Class Counsel also believes this discount is fair for the Class as a whole and ensures that those with stronger claims are not subsidizing Class Members with weaker claims.⁵⁴

50. Even if the Plaintiff had obtained an award of aggregate damages at a contested hearing that covered the presumptively statute-barred period, it was likely that damages for individual

⁵² *Micevic v. Johnson & Johnson*, 2019 ONSC 665, para. 21, Protocol Authorities, Tab 13.

⁵³ Brown Protocol Affidavit, para. 30, Protocol Record, Tab 2, p. 43.

⁵⁴ Brown Protocol Affidavit, para. 31, Protocol Record, Tab 2, p. 44.

Class Members during these periods could still be subject to individual rebuttals. This individual rebuttal of limitation periods was a significant risk, as noted by the Court of Appeal.⁵⁵

51. Class Members with time that was presumptively statute-barred could have been required to engage in an individualized claims-based process. That process would be time consuming, open the Class Member to potential adverse costs and would still carry the risk of loss.

52. As a general principal in approving plans of distribution, courts have found that distinguishing between different types of claimants is reasonable and appropriate. For example, in *Gould v BMO Nesbitt Burns Inc*, a case involving a securities class action, Justice Cullity approved a protocol discounting certain categories of purchasers "to reflect increased certification and substantive litigation risks affecting their claims."⁵⁶

53. Limitations period discounts of 50% or greater have been used in other similar employment class action settlements approved by our courts.

54. In *Baroch v. Canada Cartage* the protocol included a discount for limitation periods,⁵⁷ and Justice Belobaba noted the significant limitations risk at settlement in that proceeding: "The plaintiff also had to overcome numerous limitation hurdles. Indeed, the imposition of a two-year limitation period (which was certainly plausible) could have reduced the class-wide damages to \$16 million."⁵⁸ The settlement range presented by experts in the *Baroch v. Canada Cartage* case was between \$3 million to a high of \$45 million.⁵⁹

⁵⁵ *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, paras. [102-103](#), Protocol Authorities, Tab 14.

⁵⁶ *Gould v. BMO Nesbitt Burns Inc*, 2007 CanLII 9239 (ON SC), paras [2](#), [19-23](#), Protocol Authorities, Tab 15.

⁵⁷ Brown Protocol Affidavit, para. 32, Protocol Record, Tab 2, p. 44.

⁵⁸ *Baroch v. Canada Cartage*, 2021 ONSC 7376, para. [13](#), Protocol Authorities, Tab 12.

⁵⁹ *Baroch v. Canada Cartage*, 2021 ONSC 7376, para. [18](#), Protocol Authorities, Tab 12.

55. In *Aps v. Flight Centre*, a limitation period discount up to 75% was also accepted with the court noting the settlement avoided the potential for “costly individual assessments” related to limitations issues.⁶⁰

56. A protocol with a 50% discount for limitation periods was also accepted in *Bozsik v. Livingston*.⁶¹

PART IV - ORDER REQUESTED

57. The plaintiff requests that the Protocol be approved, RicePoint Administration Inc. be appointed as Claims Administrator and the notice of settlement approval be distributed in accordance with the Settlement Agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of February, 2023.

 PER:  PER: 

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⁶⁰ *Aps v. Flight Centre Travel Group*, 2020 ONSC 6779, para. 23, Protocol Authorities, Tab 10.

⁶¹ Brown Protocol Affidavit, para. 32, Protocol Record, Tab 2, p. 44.

SCHEDULE “A”
LIST OF AUTHORITIES

Tab	Authority	Para #
1	<i>Zaniewicz v. Zungui Haixi Corp.</i> , 2013 ONSC 5490	59
2	<i>Eidoo v Infineon Technologies AG</i> , 2014 ONSC 6082	74, 23
3	<i>The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.</i> , 2018 ONSC 6447	72
4	<i>Welsh v. Ontario</i> , 2018 ONSC 3217	68
5	<i>Mancinelli v. Royal Bank of Canada</i> , 2018 ONSC 4192	49
6	<i>Rosen v BMO Nesbitt Burns Inc</i> , 2016 ONSC 4752, 133 OR (3d) 73	12, 20
7	<i>Leslie v Agnico-Eagle Mines</i> , 2016 ONSC 532	8
8	<i>Pro-Sys Consultants Ltd. v. Infineon Technologies AG</i> , 2014 BCSC 1936	34
9	<i>Parsons v Canadian Red Cross Society</i> , [1999] O.J. No. 3572	70, 80
10	<i>Aps v. Flight Centre Travel Group</i> , 2020 ONSC 6779	23
11	<i>Fulawka v Bank of Nova Scotia</i> , 2016 ONSC 1576	
12	<i>Baroch v. Canada Cartage</i> , 2021 ONSC 7376	19, 13, 18
13	<i>Micevic v. Johnson & Johnson</i> , 2019 ONSC 665	21
14	<i>Fresco v. Canadian Imperial Bank of Commerce</i> , 2022 ONCA 115	102-103
15	<i>Gould v. BMO Nesbitt Burns Inc</i> , 2007 CanLII 9239 (ON SC)	2, 19-23

SCHEDULE “B”
RELEVANT STATUTES

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

Settlement

27.1 (1) A proceeding under this Act may be settled only with the approval of the court. 2020, c. 11, Sched. 4, s. 25.

Subclass

(2) A settlement may be concluded in relation to the common issues affecting a subclass only with the approval of the court. 2020, c. 11, Sched. 4, s. 25.

Not binding without court approval

(3) A settlement under this section is not binding unless approved by the court. 2020, c. 11, Sched. 4, s. 25.

Effect of settlement

(4) If a proceeding is certified as a class proceeding, a settlement under this section that is approved by the court binds every member of the class or subclass, as the case may be, who has not opted out of the class proceeding, unless the court orders otherwise. 2020, c. 11, Sched. 4, s. 25.

Settlement must be fair and reasonable

(5) The court shall not approve a settlement unless it determines that the settlement is fair, reasonable and in the best interests of the class or subclass members, as the case may be. 2020, c. 11, Sched. 4, s. 25.

Differences not a bar

(6) The court may approve a settlement even if individual class or subclass members, including a representative party, are subject to different settlement terms. 2020, c. 11, Sched. 4, s. 25.

Evidentiary requirements

(7) On a motion for approval of a settlement, the moving party shall make full and frank disclosure of all material facts, including, in one or more affidavits filed for use on the motion, the party's best information respecting the following matters, which the court shall consider in determining whether to approve the settlement:

1. Evidence as to how the settlement meets the requirements of subsection (5).
2. Any risks associated with continued litigation.
3. The range of possible recoveries in the litigation.

4. The method used for valuation of the settlement.
5. The total number of class or subclass members, as the case may be.
6. A plan for allocating and distributing the settlement funds, including any proposal respecting the appointment of an administrator under subsection (14), and the anticipated costs associated with the distribution.
7. The number of class or subclass members expected to make a claim under the settlement and, of them, the numbers of class or subclass members who are and who are not expected to receive settlement funds.
8. The number of class or subclass members who have objected or are expected to object to the settlement, and the nature or anticipated nature of the objections.
9. A plan for giving notice of the settlement to class or subclass members in the event of an order under section 19, and the number of class or subclass members who are expected to obtain the notice.
10. Any other prescribed information. 2020, c. 11, Sched. 4, s. 25.

Notice of settlement hearing

(8) The court shall consider whether notice of a hearing of a motion for approval of a settlement should be given under section 19, and whether such notice should include,

- (a) a statement of the purpose of the hearing;
- (b) the process for objecting to the approval of the settlement;
- (c) any other prescribed information; and
- (d) any other information the court considers appropriate. 2020, c. 11, Sched. 4, s. 25.

Public Guardian and Trustee

(9) Notice of a motion for approval of a settlement and other materials filed on the motion, as well as any notice given under subsection (8), shall be served on the Public Guardian and Trustee, if there is a reasonable possibility that the Public Guardian and Trustee is authorized to act on behalf of one or more class or subclass members. 2020, c. 11, Sched. 4, s. 25.

Same

(10) An entitlement to receive materials under subsection (9) includes an entitlement to make submissions at the hearing of the motion, unless the court orders otherwise. 2020, c. 11, Sched. 4, s. 25.

Children's Lawyer

(11) If there is a reasonable possibility that the class or subclass includes minors, the court may direct that,

(a) the notice of motion and other materials filed on the motion be served on the Children's Lawyer; and

(b) the Children's Lawyer make any recommendations it may have in connection with the proposed settlement in writing to the court. 2020, c. 11, Sched. 4, s. 25.

Notice of settlement approval

(12) In approving a settlement, the court shall consider whether notice of the settlement should be given under section 19, and whether such notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding;

(c) a description of any plan for distributing settlement funds;

(d) any other prescribed information; and

(e) any other information the court considers appropriate. 2020, c. 11, Sched. 4, s. 25.

Supervisory role of the court

(13) The court shall supervise the administration and implementation of the settlement. 2020, c. 11, Sched. 4, s. 25.

Court-appointed administrator

(14) The court may appoint a person or entity to act as an administrator to administer the distribution of settlement funds. 2020, c. 11, Sched. 4, s. 25.

Duty of administrator, other person or entity

(15) An administrator appointed by the court or, if no administrator is appointed, the person or entity who administers the distribution of the settlement funds, shall administer the distribution in a competent and diligent manner. 2020, c. 11, Sched. 4, s. 25.

Report

(16) No later than 60 days after the date on which the settlement funds are fully distributed, including any distribution under section 27.2, the administrator or other person or entity who administered the distribution shall file with the court a report containing their best information respecting the following:

1. The amount of the settlement funds before distribution.
2. The total number of class or subclass members.

3. Information respecting the number of class members identified in each affidavit filed under subsection 5 (3) in the motion for certification.
4. The number of class members who received notice associated with the distribution, and a description of how notice was given.
5. The number of class or subclass members who made a claim under the settlement and, of them, the numbers of class or subclass members who did and who did not receive settlement funds.
6. The amount of the settlement funds distributed to class or subclass members and a description of how the settlement funds were distributed.
7. The amount and recipients of any distribution under section 27.2, and the amount, if any, that was subject to reversion or otherwise returned to the defendant.
8. The number of class or subclass members who objected to the settlement and the nature of their objections.
9. The number of class or subclass members who opted out of the class proceeding.
10. The smallest and largest amounts distributed to class or subclass members, the average and the median of the amounts distributed to class or subclass members, and any other aggregate data respecting the distribution that the administrator or other person or entity who administered the distribution considers to be relevant.
11. The administrative costs associated with the distribution of the settlement funds.
12. The solicitor fees and disbursements.
13. Any amount paid to the Class Proceedings Fund established under the Law Society Act or to a funder under a third-party funding agreement approved under section 33.1.
14. Any other information the court requires to be included in the report. 2020, c. 11, Sched. 4, s. 25.

Same

(17) Once the court is satisfied that the requirements of subsection (16) have been met with respect to a filed report, the court shall make an order approving the report and append the report to the order. 2020, c. 11, Sched. 4, s. 25.

Same

(18) If the regulations so provide, the administrator or other person or entity who administered the distribution, or such other person or entity as may be prescribed, shall provide, in accordance with the regulations, a copy of the approved report to the person or entity specified by the regulations. 2020, c. 11, Sched. 4, s. 25.

Section Amendments with date in force (d/m/y)

Distribution on cy-près basis

Award amounts

27.2 (1) The court may order that all or part of an award under section 24 that has not been distributed to class or subclass members within a time set by the court be paid to the person or entity determined under subsection (3) on a cy-près basis, if the court is satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly. 2020, c. 11, Sched. 4, s. 25.

Settlement funds

(2) In approving a settlement under section 27.1, the court may approve settlement terms that provide for the payment of all or part of the settlement funds to the person or entity determined under subsection (3) on a cy-près basis, if the court is satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly. 2020, c. 11, Sched. 4, s. 25.

Recipient

(3) For the purposes of subsections (1) and (2), payment may be made on a cy-près basis to,

(a) a registered charity within the meaning of the Income Tax Act (Canada) or non-profit organization that is agreed on by the parties, if the court determines that payment of the amount to the registered charity or non-profit organization would reasonably be expected to directly or indirectly benefit the class or subclass members; or

(b) Legal Aid Ontario, in any other case. 2020, c. 11, Sched. 4, s. 25.

DARA FRESCO
Plaintiff

-and-

CANADIAN IMPERIAL BANK OF COMMERCE
Defendant

Court File No. 07-CV-334113PD2

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

FACTUM
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