

Court Administration

MAY 11 2026

Halifax, NS

2015

Hfx No. 438657

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

**KATHLEEN CARROLL-BYRNE, ASHER HODARA and
GEORGES LIBOY**

PLAINTIFFS

– AND –

**AIR CANADA, AIRBUS S.A.S., NAV CANADA, HALIFAX
INTERNATIONAL AIRPORT AUTHORITY, THE
ATTORNEY GENERAL OF CANADA** representing His
Majesty the King in Right of Canada, **JOHN DOE #1** and **JOHN
DOE #2**

DEFENDANTS

Proceeding under the *Class Proceedings Act*, S.N.S. 2007, c.28

PLAINTIFFS' BRIEF

Re: Motion Approving Class Counsel Fee and Class Counsel Disbursements

Waguers

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Filed: May 11, 2026

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I. OVERVIEW

1. In this motion, Class Counsel seeks approval for payment of a Class Counsel Fee of \$5,039,521.34, plus applicable taxes of \$705,532.99, for a total of \$5,745,054.33, as well as Class Counsel Disbursements in the amount of \$888,806.42 plus applicable taxes of \$125,907.28, for a total of \$1,014,713.70.¹
2. Under the *Class Proceedings Act* (the “*Act*”),² the Court is charged with the responsibility of approving retainer agreements and class counsel fees in the settlement of a class action. The Court must determine if the fee is fair and reasonable in the circumstances, the contingency fee agreement being a significant consideration in the analysis.³
3. The total value of the Settlement for the Class is CAD \$ 18,075,000.00. The Settlement Amount is inclusive of all damages, PHI Subrogated Claims, private subrogated claims, disbursements, administration fees and expenses,⁴ honoraria, legal fees, costs, taxes and interest.⁵
4. The proposed distribution of the Settlement Amount is as follows:⁶

| | |
|--------------------------|-----------------|
| Settlement Amount | \$18,075,000.00 |
|--------------------------|-----------------|

¹ Except where otherwise indicated or required by context, the capitalized terms that are not defined in this Brief have the meanings ascribed to them in the Settlement Agreement dated February 20, 2026.

² SNS 2007, c 28, s 41 [*Act*] [Plaintiffs’ Fee Authorities, Tab 12].

³ *Gallant v The Roman Catholic Episcopal Corporation of Halifax*, 2022 NSSC 347 at para 40 [*Gallant*] [Plaintiffs’ Fee Authorities, Tab 6].

⁴ The Settlement Agreement stipulates that Administration Fees and Expenses will be paid out of the Settlement Amount, however CFM Lawyers (as Administrator) will not be charging a fee or expenses for claims administration. For more information on this, see section IX of the Affidavit of Kate Boyle, affirmed May 11, 2026 (“Settlement and Fee Approval Affidavit”).

⁵ Draft Settlement Approval Order, Schedule “A”, Settlement Agreement, s 1, “Settlement Amount”.

⁶ Settlement and Fee Approval Affidavit, para 19.

| | |
|--|-----------------|
| PHI Allocation | \$254,381.84 |
| Private Health Insurance Subrogated Claims | \$54,411.82 |
| Class-wide Disbursements (inclusive of taxes) | \$568,797.39 |
| Individual Disbursements (inclusive of taxes) | \$445,916.31 |
| Legal Fee (inclusive of taxes) | \$5,745,054.33 |
| Individual Class Member Payments | \$10,998,938.30 |
| Representative Plaintiff Honouraria | \$7,500.00 |

5. The Representative Plaintiffs each signed a Contingency Fee Agreement (the “CFA”) entitling Class Counsel to “a percentage of the total value of any settlement or judgment to the class inclusive of any award of costs.” The applicable percentage is “thirty percent (30%) of the collected compensation if the action is resolved after certification but before trial”, less “all reasonable and proper disbursements”. HST is additional.⁷
6. Taking into account the terms of the CFA, the results achieved for the Class, and the risks and time borne by Class Counsel over the course of the litigation, the requested fee is fair and reasonable.

⁷ Settlement and Fee Approval Affidavit, paras 148-153; Affidavit of Kathleen Carroll-Byrne, affirmed May 11, 2026 (“Carroll-Byrne Affidavit”), para 28, Exhibit “A”(Note: Ms. Kathleen Carroll-Byrne has since changed her surname and is now known as Kathleen Reese-Byrne. References in these materials to “Carroll-Byrne” are to the same individual); Affidavit of Asher Hodara, affirmed April 30, 2026, para 28, Exhibit “A” (“Hodara Affidavit”); Affidavit of Malanga Georges Liboy, affirmed April 29, 2026 (“Liboy Affidavit”), para 28, Exhibit “A” .

7. The amount of the Class Counsel Disbursements for which the Court's approval is sought on this motion reflects all out-of-pocket expenses of Class Counsel incurred between the date of commencement of work on the Action and May 7, 2026.⁸ This figure therefore reflects over a decade's worth of out-of-pocket expenses incurred and paid directly by Class Counsel at the various stages of the Action, and carried for this period with no interest being charged by Class Counsel or any third party: certification; the preparation of 131 individualized settlement proposals with supporting records; the CVR Production Motion and subsequent appeals up to the Supreme Court of Canada; trial preparation, including document disclosure, discovery examinations, and consultation and retainers with trial experts; and during extensive settlement discussions.⁹
8. Considering the duration of the litigation and these circumstances, it is submitted that the Class Counsel Disbursements are fair and reasonable.
9. Additional disbursements have and will be incurred from May 7, 2026 onwards, including for the administration of the Settlement Agreement, if approved. Class Counsel will bear these expenses without reimbursement.¹⁰
10. Further, CFM Lawyers (acting as the Court-appointed Administrator) will not charge any administration fee and will also bear any expenses associated with the Settlement administration (the "Administration Expenses") without reimbursement.¹¹

⁸ Settlement and Fee Approval Affidavit, para 295.

⁹ Settlement and Fee Approval Affidavit, para 296.

¹⁰ Settlement and Fee Approval Affidavit, para 299.

¹¹ Settlement and Fee Approval Affidavit, para 298.

11. Class Counsel respectfully submit that the Class Counsel Fee of \$5,039,521.34, plus applicable taxes of \$705,532.99, for a total of \$5,745,054.33, and the Class Counsel Disbursements of \$888,806.42, plus applicable taxes of \$125,907.28, are fair and reasonable and should be approved by this Honourable Court.

II. BACKGROUND

A. Procedural History

12. Evidence relevant to this motion is contained in the affidavit of Kate Boyle affirmed on May 11, 2026, the affidavit of Kathleen Carroll-Byrne, affirmed on May 11, 2026, the affidavit of Asher Hodara affirmed on April 30, 2026, and the affidavit of Malanga Georges Liboy affirmed on April 29, 2026, all of which are being filed in support of the present motion as well as the contemporaneous, but separate, motion seeking approval of the Settlement Agreement.

B. The Settlement Agreement

13. The Settlement and Fee Approval Affidavit provides evidence relating to the settlement negotiations and an explanation of the terms of the Settlement Agreement, including the distribution process.
14. Reference is also made to the Brief filed in support of the motion seeking approval of the Settlement Agreement.

C. The Contingency Fee Agreement

15. The Representative Plaintiffs, Kathleen Carroll-Byrne, Asher Hodara, Malanga Georges Liboy, each entered into a CFA with Class Counsel on April 9, April 13, and July 24, 2015,

respectively.¹² The CFA governs the terms under which the Class Counsel Fee and Disbursements are payable, both being subject to Court approval.

16. The CFA specifies that the payment of the Class Counsel Fee and Disbursements are contingent upon the successful adjudication or settlement of the action and must be approved by the Court. Payment is determined as a percentage of the total value of any settlement or judgment to the class, inclusive of any award of costs. Applicable taxes are additional.¹³
17. The CFA adopts a tiered fee structure that applies a different percentage depending on the stage at which the action is resolved:
 - (a) **25%** if resolved before certification;
 - (b) **30%** if resolved after certification but before the commencement of the common issues trial;
 - (c) **33.33%** if resolved after the commencement of the common issues trial.¹⁴
18. In addition, the CFA permits the reimbursement of reasonable disbursements.¹⁵
19. The Action was resolved after certification and before the commencement of the common issues trial, scheduled to commence in January, 2026. The key procedural milestones are as follows:

¹² Settlement and Fee Approval Affidavit, paras 148-153.

¹³ Carroll-Byrne Affidavit, para 28, Exhibit "A"; Hodara Affidavit, para 28, Exhibit "A"; Liboy Affidavit, para 28, Exhibit "A", s. 4.

¹⁴ Carroll-Byrne Affidavit, para 28, Exhibit "A"; Hodara Affidavit, para 28, Exhibit "A"; Liboy Affidavit, para 28, Exhibit "A", s. 5.

¹⁵ Carroll-Byrne Affidavit, para 28, Exhibit "A"; Hodara Affidavit, para 28, Exhibit "A"; Liboy Affidavit, para 28, Exhibit "A", s. 5.

- (a) The certification hearing occurred on December 12-13, 2016;¹⁶
 - (b) the liability trial was scheduled to commence on January 26, 2026, for an estimated duration of 45 days;¹⁷
 - (c) The Settlement Agreement was fully executed on February 20, 2026.¹⁸
20. Given these circumstances, the applicable percentage under the CFA is 30% of the total value of the settlement to the class.
21. No costs have been recovered from the Defendants.¹⁹ No third-party financing has been obtained by Class Counsel in this Action (and thus no interest from a third-party financier has accrued on the incurred disbursements).²⁰ Class Counsel have not obtained adverse costs protection, instead bearing all the risk.²¹
22. The CFA was reviewed with Ms. Carroll-Byrne, Mr. Hodara, and Mr. Liboy prior to execution. They were made aware of and understood its terms. Ms. Carroll-Byrne, Mr. Hodara, and Mr. Liboy all provide evidence that they would not have been in a position to advance this litigation had Class Counsel not acted on a contingency basis, and that they consider the arrangement to be fair, reasonable, and favourable to both themselves and fellow Class Members.²²

¹⁶ Settlement and Fee Approval Affidavit, para 164.

¹⁷ Settlement and Fee Approval Affidavit, para 211.

¹⁸ Settlement Agreement.

¹⁹ Settlement and Fee Approval Affidavit, para 280; Although the Plaintiffs were awarded costs in the amount of \$1,000 in connection with the CVR Production Motion, no payment of that amount was received. Under the Settlement Agreement, the Settlement Amount is expressly inclusive of all costs, and no separate recovery of costs is therefore sought or anticipated outside the Settlement.

²⁰ Settlement and Fee Approval Affidavit, para 278.

²¹ Settlement and Fee Approval Affidavit, para 276.

²² Carroll-Byrne Affidavit, paras 28-33; Hodara Affidavit, paras 28-33; Liboy Affidavit, paras 28-33.

D. Fee Sought and Time Expended

23. From the time that work on this Action began in April 2015, up to April 20, 2026, Class Counsel have docketed time with a total value of \$5,016,339.75, before tax. This represents approximately 12,973.4 hours of work spent on this matter, with an average hourly rate of approximately \$387.²³
24. The value of this docketed time likely fails to capture all historical time spent on the Action.²⁴ Additionally, it does not include the time that will be spent between April 21, 2026, and the hearings scheduled for a full day on June 22, 2026, during which time Class Counsel will respond to questions directly received from Class Members arising from Phase I Notice, continue to resolve subrogated claims, actively participate in preparation for the Phase II Notice Plan and the settlement administration, finalize the materials for the two motions, and prepare for the motions.²⁵
25. The value of the docketed time only reflects work already done. It does not include the work required of Class Counsel post-approval, if the Settlement Agreement is approved, to bring the administration to a conclusion.
26. It is estimated that between \$150,000 and \$200,000 in additional work will be required post-approval.²⁶ A non-exhaustive list of this work includes: answering general questions from Class Members regarding the Settlement, implementing the Phase II Notice Plan; implementing and administering the Settlement, and reporting to the Court.²⁷

²³ Settlement and Fee Approval Affidavit, para 283.

²⁴ Settlement and Fee Approval Affidavit, para 284.

²⁵ Settlement and Fee Approval Affidavit, para 286-288.

²⁶ Settlement and Fee Approval Affidavit, para 290.

²⁷ Settlement and Fee Approval Affidavit, para 289.

27. Further, CFM Lawyers will be administering the Settlement instead of a hired Administrator to reduce costs. CFM Lawyers is not charging an administration fee for this work.²⁸
28. Class Member engagement with Class Counsel is expected to be high throughout the various stages of notice and administration of the Settlement, as it has been throughout the Action.²⁹
29. The value of the docketed time as of April 20, 2026 amounts to 99.54% of the Class Counsel Fee sought to be approved. This means that the value of Class Counsel's docketed time on the file is approximately equal to the value of the fee sought.

E. Risks Undertaken

30. Class Counsel pursued the Action on a contingency fee basis. As set out in the CFA, Class Counsel paid all expenses and would only be paid fees and disbursements in the event of success, and subject to Court approval.
31. Class Counsel was not indemnified or protected by any third-party funder from potential adverse cost awards. Rather, Class Counsel indemnified the Representative Plaintiffs from any adverse costs award, in the form of an Indemnity Agreement, and thereby assumed the risk of an adverse costs award.³⁰
32. In undertaking this litigation, at the outset and throughout, Class Counsel were cognizant of various litigation risks. These risks are thoroughly canvassed in the Brief filed in support

²⁸ Settlement and Fee Approval Affidavit, para 143.

²⁹ Settlement and Fee Approval Affidavit, para 288.

³⁰ Settlement and Fee Approval Affidavit, para 291-293.

of Motion to Approve Settlement, and they are also relied upon on this motion, to demonstrate the risks undertaken by Class Counsel.³¹

33. Class Counsel has invested significant time and resources over the last 11 years to advance the claims of Class Members, without payment to date.

F. Class Member Response

34. The Phase I Notice Plan was implemented on March 23, 2026.³² Through the several direct and indirect means of communication included in the Phase I Notice Plan, Class Members were informed that Class Counsel would be seeking approval of a 30% legal fee, plus disbursements.³³ While the Notice described the percentage and its application, it did not specify a total fee amount, as that figure could not be determined at the time and is calculated net of approved Disbursements as well as the final PHI Allocation.
35. The Objection Deadline was April 23, 2026.
36. As of the date of filing, Class Counsel have received two objections. In summary, the objection related to the Class Counsel Fee asserts that:
 - (a) liability was not a genuinely contested issue and that Class Counsel's role over the course of the litigation did not justify a contingency fee at the level sought; and
 - (b) the requested fee should be reduced, with approximately \$1,230,000 reallocated from Class Counsel's fees for distribution among Tiered Class Members.³⁴

³¹ Settlement and Fee Approval Affidavit, Section III.

³² Settlement and Fee Approval Affidavit, para 125.

³³ Settlement and Fee Approval Affidavit, para 123, Exhibit "A".

³⁴ Settlement and Fee Approval Affidavit, paras 133, 134; Exhibit "B".

G. Disbursements Incurred

37. Class Counsel seek this Honourable Court's approval of Class Counsel Disbursements in the amount of \$888,806.42 plus HST of \$125,907.28 for a total of \$1,014,713.70.³⁵
38. These disbursements have been incurred since work on the Action began in 2015 to advance the litigation, advance damages negotiations, and ultimately reach a Settlement. They include: liability expert costs, damages expert costs (including independent medical examinations and medical-legal reports); court reporter and transcription services; costs of obtaining medical and related records; administrative expenses; travel expenses; document management and storage and costs associated with discovery examinations. They also include expenses related to specific steps in the proceeding, including the certification motion, the CVR Production Motion, and mediation in 2025.³⁶
39. Although additional disbursements will be incurred following approval to administer the Settlement, neither Class Counsel nor the Administrator will seek reimbursement for those expenses and will bear them personally.³⁷
40. CFM Lawyers, as Administrator, is also not charging a fee to administer the Settlement, resulting in savings for the Class.³⁸

III. ISSUES

41. The issues in this motion are:

³⁵ Settlement and Fee Approval Affidavit, paras 295-297.

³⁶ Settlement and Fee Approval Affidavit, para 295-297.

³⁷ Settlement and Fee Approval Affidavit, paras 298-299.

³⁸ Settlement and Fee Approval Affidavit, para 143.

- (a) whether the Class Counsel Fee is fair and reasonable and should be approved; and
- (b) whether Class Counsel Disbursements should be approved.

IV. LAW AND ANALYSIS

A. Fee Approval in Class Proceedings

42. This motion is governed by section 41 of the *Act* (reproduced below) which provides that, to be enforceable, an agreement respecting fees and disbursements between a solicitor and a representative party must be approved by the Court. If not approved, the Court may otherwise determine the amount owing to class counsel for fees and disbursements.³⁹

Agreements respecting fees and disbursements

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

- (a) state the terms or conditions under which fees and disbursements are to be paid;
 - (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding;
 - (c) where interest is payable on fees or disbursements referred to in clause (a), state the manner in which the interest will be calculated; and
 - (d) state the method by which payment is to be made, whether by lump sum or otherwise.
- (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the application of the solicitor.
- (3) An application under subsection (2) may
- (a) unless the court otherwise orders, be made without notice to any other party; or

³⁹*Act, supra* at ss 41(2), (5)(a).

(b) where notice to any other party is required, be made on the terms or conditions that the court may order respecting disclosure of the whole or any part of the agreement respecting fees and disbursements.

(4) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(5) Where an agreement is not approved by the court, the court may

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct that a taxation be conducted in accordance with the Civil Procedure Rules; or

(c) direct that the amount owing be determined in any other manner.

(6) Sections 65 to 70 of the *Legal Profession Act* do not apply in respect of an agreement referred to in this Section.

43. The commonly applied test for assessing class counsel fees is whether the fees and disbursements sought by class counsel are fair and reasonable.⁴⁰

44. There are relatively few reported decisions of this Court in class action settlement and fee approval motions. In the Court's most recent reported, written decision on a motion to approve a class counsel fee, *Martell v Attorney General (Nova Scotia)*,⁴¹ the Court agreed with Justice Brothers' reasoning in *Gallant v The Roman Catholic Episcopal Corporation of Halifax*,⁴² in which the CFA was described as the starting point for the analysis of whether the fees are fair and reasonable:

71 I agree with the tenor of Justice Brothers' reasoning from *Gallant*, 2022 NSSC 347 at paragraph 40, regarding her Class Counsel Fee award, that: "While, I will not apply a presumption in favour of adopting the terms of the Contingency

⁴⁰ *Gallant*, *supra* at para 37.

⁴¹ *Martell v. Nova Scotia (Attorney General)*, 2026 NSSC 36 [*Martell*] [Plaintiffs' Fee Authorities, Tab 9].

⁴² *Gallant*, *supra* at para 37.

Fee Agreement, the agreement will be a significant consideration in the starting point of my analysis".⁴³

45. Two earlier decisions of this Court on class counsel fee approval motions, including the first such reported decision in Nova Scotia,⁴⁴ indicate that the general approach was to consider contingency fee agreements “relevant but not determinative.”⁴⁵ More recently in *Gallant*, and subsequently followed in *Martell* and *Estey*, however, the Court has arguably reinforced the role of the CFA as the clear starting point in the analysis.⁴⁶ In placing significant weight on the existence of a contingency fee agreement, Justice Brothers approach in *Gallant* moved toward alignment with the approach, adopted by several Courts, that the agreement should be presumptively valid and enforceable, and the fee varied from the calculation only if there is a principled reason to do so.⁴⁷
46. In the recent settlement and fee approval decision, *Martell*, Justice Rosinski emphasized the central role of risk, and the corresponding function of contingency fee agreements:

73 Let me first make a general observation.

74 There are a limited number of legal firms in Nova Scotia which have the experience, expertise, resources, and the interest in supporting the maintenance of a class action over an extended period of time.

75 Such cases are risky: the risks include the carrying costs of the expenses of the litigation which may never be reimbursed, and the opportunity cost of other legal matters that were not undertaken, but which may well have brought greater financial benefit to the Class Counsel.

⁴³ *Martell*, *supra* at para 71, citing *Gallant* at para 40 (emphasis added). This was also endorsed by the Court in *Estey v. Attorney General (Nova Scotia)*, 2025 NSSC 368, at para 31 [*Estey*] [Plaintiffs’ Fee Authorities, Tab 5].

⁴⁴ *Elwin v. Nova Scotia Home for Colored Children*, 2014 NSSC 375 [*Elwin*] at para 14 [Plaintiffs’ Fee Authorities, Tab 4].

⁴⁵ *Elwin* at para 29; *Sweetland v Glaxosmithkline Inc.*, 2019 NSSC 136 at para 31 [Plaintiffs’ Fee Authorities, Tab 11].

⁴⁶ *Gallant*, *supra* at para 40; *Martell*, *supra* at para 71; *Estey*, *supra* at para 31.

⁴⁷ For e.g. *Jost v Canada*, 2025 FC 1193 at para 40 [Plaintiffs’ Fee Authorities, Tab 8]; *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 [Plaintiffs’ Fee Authorities, Tab 2]; *Condon v Canada*, 2018 FC 522 at para 85 [*Condon*] [Plaintiffs’ Fee Authorities, Tab 3].

76 Typically, to the extent that the Class/Plaintiffs are unsuccessful, Class Counsel will suffer very serious financial consequences.

77 Most drastically, if the lawsuit is entirely unsuccessful, Class Counsel may be paid no fees at all by the Class.

78 Such risks are not to be underestimated as a potent factor which will discourage a great majority of counsel from taking on such cases.

79 It is generally desirable to the pursuit of justice in Nova Scotia, that localized firms are available and willing to take on class actions arising from events arising in Nova Scotia.

80 To its credit, Wagners is such a firm.

81 Generally, in a free market situation, the greater the risk, the greater the return should be for those who take the risk.

82 Wagners took on this challenging class action on the expectation that, if successful, the CFA would govern its financial reward.⁴⁸

47. Justice Jocelyne Gagné of the Federal Court, in *Condon v Canada*,⁴⁹ has also provided a detailed rationale for this approach:

[84] Over the years, courts have expressed a preference for utilizing percentage-based fees in class actions (*Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324 (Ont. S.C.J.) at para 52). A percentage-based fee should be paid based on a percentage of the amounts recovered and should be awarded at a level that appropriately incentivizes and rewards class counsel.

[85] The percentage-based fee set out in a contingency fee retainer agreement is presumed to be fair and "should only be rebutted in clear cases based on principled reasons" (*Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 (Ont. S.C.J.) at para 8). Examples of where a court may rebut the presumption that a percentage-based fee is fair include where:

- a. There is a lack of full understanding or true acceptance on the part of the representative plaintiff;
- b. The agreed-to contingency amount is excessive; or

⁴⁸ *Martell, supra* at paras 73-82.

⁴⁹ *Condon, supra* at para 85.

c. The presumptively valid contingency fee would result in a fee award so large as to be unseemly.

(*Cannon*, above at para 9.)

[86] The main alternative to a percentage-based fee is applying a multiplier to class counsel's time. This multiplier approach has been criticized for, *inter alia*, encouraging inefficiency and duplication and discouraging early settlement (*Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.) (QL) at para 60). Courts have indicated that "the application of a multiplier ... is unacceptably subjective if not completely arbitrary" (*Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743 (Ont. S.C.J.) at para 22).

[87] Percentage-based fees, on the other hand, encourage a results-based approach to rewarding counsel. As noted by the British Columbia Supreme Court in *Endean*, percentage-based fees are common in class actions and properly reward class counsel for their effectiveness, rather than being based solely on the time incurred to achieve success (above at paras 74, 75).

[88] In *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 (Ont. S.C.J.), Justice Strathy explained that compensating counsel through a percentage of recovery is "generally considered to reflect a fair allocation of risk and reward as between lawyer and client" (at para 64). A percentage-based fee encourages the lawyer to maximize recovery for the client efficiently; it is fair to the client since there is no payment without success (*Baker*, above at para 64).

48. While there may be hesitancy to award the contingency fees set out in a retainer agreement in the case of 'mega-fund' cases of \$100 million or more, those concerns are clearly not engaged here.⁵⁰
49. The goals of class proceedings – especially access to justice – are furthered when counsel are appropriately incentivized to advance complex and risky litigation. Therefore these goals are to be considered on a fee approval motion. This was stated by this Court in

⁵⁰ See discussion in *Imperial Tobacco Company Limited*, 2025 ONSC 4497 [*Imperial Tobacco*] at paras 49-50 [Plaintiffs' Fee Authorities, Tab 7].

Martell, as quoted above, and also in *Gallant*, citing *Abdulrahim v. Air France*, which is discussed in the Plaintiff's Settlement Approval Brief:

[62] In considering the reasonableness of the fees and disbursements, I must also be mindful of the three goals of class proceedings. The following comments in *Abdulrahim v. Air France*, 2011 ONSC 512, are apt:

[9] In class action litigation, the court must also consider the goals of class proceedings, particularly in terms of access to justice. The fee of class counsel must be both fair and reasonable. It should not only reward counsel for meritorious efforts, but it should also encourage counsel to take on difficult and risky class action litigation. The risk undertaken by the lawyer, and the success achieved, are important considerations in determining the fee: *Maxwell v. MLG Ventures Ltd.* (1996), 1996 CanLII 8039 (ON SC), 30 O.R. (3d) 304, [1996] O.J. No. 2644 (Gen. Div.); *Windisman v. Toronto College Park Ltd.*, above; *Serwaczek v. Medical Engineering Corp.*, above; *Parsons v. Canadian Red Cross Society (2000)*, 2000 CanLII 22386 (ON SC), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (S.C.J.).

[10] The courts have recognized that the objectives of the *C.P.A.* – judicial economy, access to justice and behaviour modification – are dependent, in part, upon counsel's willingness to take on class proceedings. This, in turn, depends on the incentives available to counsel to assume the risks and accept the financial burden of carrying class proceedings. A premium on fees is the reward to class counsel for accepting this risk and taking on meritorious but difficult matters: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61 (S.C.J.); *Parsons v. Canadian Red Cross Society*, above, at 287.

[63] The objectives of judicial economy, access to justice and behaviour modification were all advanced by class counsel's decision to bring this proceeding, and the fees sought are sufficient to reward them for their efforts and to encourage counsel to continue to take on complex and risky class action litigation. Without counsel willing to take on these cases, meritorious claims like these could languish and vulnerable people in our society would not have an opportunity to obtain access to justice. In addition, these types of claims advance behaviour modification, not just for individuals, but for institutions and organizations as well. [...] Finally, judicial economy was advanced by the bringing of class proceedings rather than individual claims.⁵¹

⁵¹ *Gallant*, *supra* at paras 62-63.

50. Accordingly, fee approval must be approached in a manner that not only assesses fairness in the individual case, but also maintains the broader incentive structure necessary to ensure that meritorious class proceedings can be brought and effectively prosecuted.
51. The “fair and reasonable” test to be applied by this Court has been guided by factors drawn from case law in Nova Scotia and beyond, with slight variations over time.
52. In *Gallant*, Justice Brothers described the factors as follows:
- (a) the legal and factual complexities of the action;
 - (b) the risks undertaken, on both the merits and the prospects of certification;
 - (c) the degree of responsibility assumed by class counsel;
 - (d) the monetary value of the matters at issue;
 - (e) the importance of the issues to the class members;
 - (f) skill and competence demonstrated by class counsel throughout the action;
 - (g) results achieved;
 - (h) ability of the class to pay and the class’ expectation of legal fees;
 - (i) the opportunity cost to class counsel in the expenditures of time in pursuit of the litigation.⁵²
53. These factors were endorsed and applied in the recent decision of *Martell*. In that case, the Court further observed that quantitative measures, such as a lodestar cross-check using a multiplier, may serve as a “yardstick” in assessing reasonableness.⁵³ However, the multiplier approach was not treated as a standalone method of determining fees, but rather as a supplementary tool to assess whether the result produced by the contingency fee agreement is fair and proportionate in light of the risks assumed and the outcome achieved.

⁵² *Ibid* at para 37; *Martell*, *supra* at para 95; *Estey*, *supra* at para 42.

⁵³ *Martell*, *supra* at paras 95-96.

54. Class Counsel submits there is no definitive list of factors for determining a “fair and reasonable” fee, and that the framework in *Gallant* and *Martell* is a practical and appropriate guide. This submission applies that framework.
55. Under the approach articulated in *Gallant*, the CFA in this case is “the starting point” of the analysis.
56. It was entered into with the full knowledge and consent of the proposed Representative Plaintiffs, Ms. Carroll-Byrne, Mr. Hodara, and Mr. Liboy, who deposed that they reviewed the agreement, understood its terms, and found them to be fair and reasonable. The CFAs set out a fee of 30% of the total settlement value to the class, to be applied when the action is resolved after certification but before the commencement of a common issues trial.⁵⁴
57. Applying Justice Brothers’ approach, which recognizes that consideration of a class counsel fee should “start from” the 30% rate identified in the CFA, the Class Counsel Fee requested is both fair and reasonable.

B. Application of the *Gallant* Factors

(i) The degree of responsibility assumed by Class Counsel

58. Class Counsel pursued this Action on a contingency fee basis for over 11 years, self-financing all legal services and covering all litigation expenses necessary to advance the Action,⁵⁵ with payment of their fee and reimbursement of expenses contingent solely on the outcome.

⁵⁴ Carroll-Byrne Affidavit, paras 28-30; Hodara Affidavit, paras 28-30; Liboy Affidavit, paras 28-30.

⁵⁵ Settlement and Fee Approval Affidavit, Section XIII.C and XIII.D.

59. Unlike cases involving third-party funding or indemnification, Class Counsel assumed full responsibility for prosecuting the Action without any protection against a potential adverse costs award.⁵⁶
60. This placed on Class Counsel a materially higher degree of responsibility than in a conventional fee-for-service retainer, where payment is ongoing and financial risk is borne, at least in part, by the client. Here, Class Counsel assumed 100% of both the litigation risk and the financial burden of carrying the proceeding to resolution.
61. This factor was discussed in *Martell*, where the Court recognized that class counsel undertake “genuine risk” as to both the merits and the financial viability of the litigation, including the possibility of no recovery after years of work.⁵⁷ Further, Justice Rosinski acknowledged:

117 The opportunity costs of other litigation that may have been more lucrative, in addition to the carrying costs borne by Class Counsel by virtue of not receiving any payment for Class Counsel's work over the preceding 10 years, favour the Court's being satisfied that the claimed Class Counsel Fee is reasonable and proportionate given all the circumstances.⁵⁸

62. This factor was also discussed by the Court in *Abdulrahim*, where Justice Strathy noted the following as a particularly significant factor in determining the fee:

[16] It should be noted in this regard that this action was commenced in 2005. Thus, for over five years class counsel has undertaken this action without any remuneration. In the meantime, rent had to be paid, lawyers and staff had to be paid salaries, and expenses were incurred and paid. Without a substantial firm infrastructure and resources, an action of this kind would be an impossible undertaking.⁵⁹

⁵⁶ Settlement and Fee Approval Affidavit, para 278.

⁵⁷ *Martell*, *supra* at paras 115-116.

⁵⁸ *Ibid* at para 117.

⁵⁹ *Abdulrahim v. Air France*, 2011 ONSC 512 [*Abdulrahim 2011*] at para 16 [Plaintiffs' Fee Authorities, Tab 1].

63. To incentivize Class Counsel to accept such risks and support access to justice for Class Members, this factor warrants significant weight in the Court's consideration.

(ii) The monetary value of the matters at issue

64. The Settlement Agreement provides monetary benefits to the Class Members.
65. The monetary value of the benefits negotiated on behalf of the Class Members mitigates the risks involved in proceeding through a common issues trial, which would extend both the litigation risks and the duration of the action. Further, the Claims Administration process will provide benefits to Class Members in an expeditious, efficient process of distribution.
66. The total value of Class Members' individual claims (net of PHI Subrogated Claims and private subrogated claims, representative honoraria, as well as individual and Class-wide disbursements and contribution to legal fees) is \$10,998,938.30.⁶⁰
67. All Class Members valuations were also informed by the \$5,000 advance payments previously made by Air Canada to Class Members, which formed part of the overall damages recovered as a result of the Crash.⁶¹
68. Class Counsel is reasonably confident that each Class Member will receive approximately 89% of his or her recoverable damages out of the available fund after payment of his or her share of counsel fees and other expenses, if approved by this Court.⁶² This level of net

⁶⁰ Settlement and Fee Approval Affidavit, para 30.

⁶¹ Settlement and Fee Approval Affidavit, para 39.

⁶² Settlement and Fee Approval Affidavit, para 30.

recovery is not typical. An 80% recovery was noted by the Court in *Abdulrahim* as being “a very significant accomplishment.”⁶³

69. In many class proceedings, the compensation payable to class members is subject to reduction to account for their proportionate contribution to class-wide disbursements and to class counsel fees, typically calculated as a percentage of recovery, plus applicable taxes, such that the amounts ultimately received by class members reflect a net recovery after those deductions.
70. In this case, however, the Settlement Amount exceeds the aggregate value of Class Members’ individually assessed claims. Class Counsel were able to negotiate a sum that included an additional contribution specifically directed toward class-wide Disbursements, subrogated claims and individual disbursements for Tier Class Members (so their net recovery is not impacted by these amounts), and a portion of the Class Counsel Fee. As a result, the impact of fees and disbursements on individual recoveries has been largely mitigated.⁶⁴
71. As recognized by the Court in *Martell*:

68 In the normal course, Class Counsel would have been entitled to be paid their Fee and Disbursements out of the settlement funds which were to be for the benefit of the Class members pursuant to the terms of the CFA.

69 That the Defendants had agreed to pay the Class Counsel Fee and Disbursements independently of the compensation provisions thereof is a further benefit to the Class.⁶⁵

⁶³ *Abdulrahim 2011, supra* at para 12.

⁶⁴ Note that for the Non-Tier Class Members, the individual disbursements incurred to advance their individual claim will be deducted from their valuation, along with the subrogated claims, to arrive at a net.

⁶⁵ *Martell, supra* at paras 68-69: In *Martell*, the Class Counsel Fee was payable by the Defendants in addition to the compensatory funds, collective redress fund, and administration costs, such that it did not reduce the amounts

72. While the structure in the present case is not identical, the same principle applies. The Settlement reflects a negotiated outcome in which the burden of the Class Counsel Fee and Disbursements on Class Members has been reduced, resulting in a comparatively high proportion of recovery being preserved for the Class.
73. An additional feature of the Settlement Agreement that provides a benefit to Class Members is that the claims of public and private health insurers have already been resolved, such that no separate settlement needs to be negotiated on behalf of individual Class Members.⁶⁶

(iii) The importance of the issues to the Class Members

74. The Representative Plaintiffs and Class Members have been awaiting the resolution of the Proceedings for over 11 years. The resolution of this matter is tremendously important to the Representative Plaintiffs and other Class Members, as it will give many of them access to benefits, as well as finality and closure to their claims and a traumatic and, for many, life-altering experience in their lives. It will also avoid the delay, expense and risks of a common issues trial and spares Class Members from the emotional and legal effort of proving individual causation and damages at a subsequent trial or hearing.

(iv) The skill and competence demonstrated by Class Counsel throughout the Action

75. This proceeding involved complex issues of liability and causation arising in an aviation context, together with the coordination of numerous individualized claims. It required not

available for distribution to class members. In the present case, while the Class Counsel Fee and Disbursements are not structured as entirely separate, “on top” payments, the Settlement includes additional contributions directed toward disbursements and a portion of legal fees beyond the amounts allocated to satisfy Class Members’ individually assessed claims.

⁶⁶ Settlement and Fee Approval Affidavit, Section IV.

only class actions expertise, but also the ability to engage meaningfully with technical aviation evidence and to advance the claims in a manner that was both procedurally efficient and responsive to the circumstances of individual Class Members.

76. Class Counsel brought that combined expertise to bear throughout the litigation. They have successfully litigated and negotiated settlements of numerous class action and mass tort files, including aviation cases.⁶⁷ That experience informed the development of the evidentiary record, the engagement with expert evidence, a realistic evaluation of litigation risk, and the achievement of a settlement that reflects Class Members' individualized circumstances.
77. As recognized in *Martell*, the experience, resources, and expertise of Class Counsel are significant factors in assessing the reasonableness of a fee.⁶⁸
78. Class Members will also continue to benefit from representation by Class Counsel throughout the administration of the Settlement, if approved. Over the course of the litigation, Class Counsel have developed substantial file-specific and individualized knowledge regarding Class Members' claims. Retaining that knowledge within the administration process promotes efficiency and continuity. By contrast, transferring that information to a third-party claims administrator would require significant additional time and expense, increasing the overall cost of administration without a corresponding benefit to Class Members.⁶⁹

⁶⁷ Settlement and Fee Approval Affidavit, paras 258-261, 265-266, 270.

⁶⁸ *Martell*, *supra* at paras 113-114. Also see *Estey*, *supra* at para 35.

⁶⁹ Settlement and Fee Approval Affidavit, para 145.

(v) The results achieved

79. The Representative Plaintiffs have deposed to their belief that the results achieved are fair, reasonable, and in the best interests of the Class.⁷⁰
80. For the reasons set out in greater detail in the Affidavit of Kate Boyle and the Settlement Approval Brief, this was an action in which liability and damages were uncertain. Class Counsel, nevertheless, negotiated a settlement that ensures a reasonable measure of compensation for all Class Members on an expedited basis.

(vi) The ability of the Class to pay and the Class's expectation of legal fees

81. The Representative Plaintiffs have provided evidence affirming that they would not have been in a position to advance this litigation had Class Counsel not been prepared to act on a contingency basis.⁷¹
82. Class Counsel submits that given the scale, complexity, and duration of the litigation, but for the willingness of Class Counsel to act on a contingency basis, rather than an hourly fee-for-service basis, and/or “pay as you play” disbursement arrangement, this class proceeding would likely not have been brought and advanced to a successful resolution. Without the efforts of Class Counsel, the losses suffered by Class Members may well have remained unaddressed.

⁷⁰ Carroll-Byrne Affidavit at para 21; Hodara Affidavit at para 21; Liboy Affidavit at para 21.

⁷¹ Carroll-Byrne Affidavit at para 33; Hodara Affidavit at para 33; Liboy Affidavit at para 33.

83. The Representative Plaintiffs have deposed that they entered into the CFA and Indemnity Agreements in 2015, and that they were fully aware of and understood their material terms respecting fees and disbursements.⁷²
84. Each of the Representative Plaintiffs provide evidence that they “consider this arrangement to be fair, reasonable and favourable to both myself and my fellow Class Members.”⁷³
85. Expectations regarding legal fees were therefore clear from the outset, having been reduced to writing, reviewed, and accepted by the Representative Plaintiffs acting on behalf of the Class.
86. The Phase I Notice distributed to Class Members gave notice of the percentage of the Class Counsel Fee for which approval would be sought.⁷⁴ The deadline to object was April 23, 2026. To date, two objections by Class Members have been received by Class Counsel.⁷⁵
87. One of those objections raises concern that the Class Counsel Fee is too high relative to the amounts to be received by certain Class Members. Class Counsel acknowledges that perspective – it is understandable that, when viewed from an individual standpoint, any deduction for fees may be seen as reducing the compensation available to a particular claimant.

⁷² Settlement and Fee Approval Affidavit at paras 148-153; Carroll-Byrne Affidavit, paras 28-31; Hodara Affidavit, paras 28-31; Liboy Affidavit at paras 28-31.

⁷³ Carroll-Byrne Affidavit, para 32; Hodara Affidavit at para 32; Liboy Affidavit at para 32.

⁷⁴ Settlement and Fee Approval Affidavit, Exhibit “A”, Schedule “B” (Phase I Notice). Note: The Phase I Notice conveyed the percentage and on what that applied, but did not convey the precise legal fees sought, as that number was unknown at the time, given it is calculated net of Disbursements and the PHI Allocation, which had yet to be finalized.

⁷⁵ Settlement and Fee Approval Affidavit, para 134, Exhibit “B”.

88. However, the fee must be assessed having regard to the framework governing class proceedings. As set out above, the contingency fee arrangement was agreed to at the outset, was understood and accepted by the Representative Plaintiffs. It reflects the risk assumed by Class Counsel in advancing the litigation over an extended period with no guarantee of recovery. The fee must also be assessed in light of the result achieved for the Class as a whole, rather than on an individualized basis, as well as the other factors relevant to the reasonableness analysis identified in the case law, including *Gallant* and *Martell*.
89. While the objection has been considered, Class Counsel submits that the requested fee remains fair and reasonable when assessed against the applicable legal principles.
90. The other objection received raises the concern that Class Counsel's work on the file does not warrant a contingency fee, as liability was not seriously in dispute. The liability issues that faced the Class and individual Class Members are fully canvassed in the Affidavit of Kate Boyle in support of Settlement Approval and Fee Approval, as well as in the Settlement Approval Brief. Class Counsel has expended considerable time and resources litigating and negotiating this Action to its resolution.

(vii) The opportunity cost to Class Counsel in the expenditures of time in pursuit of the litigation

91. Class Counsel's docketed time as of April 20, 2026 indicates that 12,973.4 hours have been expended on this Action, representing a value of \$5,016,339.75.⁷⁶ This fails to capture all historical work on the Action, as well as the future work that will be involved in preparing

⁷⁶ Settlement and Fee Approval Affidavit, para 283.

for and attending the two concurrent motions, and, if the Settlement Agreement is approved, in administering the Settlement through distribution.⁷⁷

92. Class Counsel and the Administrator (CFM Lawyers) will carry out this future work without seeking additional fees beyond the Class Counsel Fee of \$5,039,521.34 being requested herein, further underscoring the fairness of the fee requested. That work includes responding to Class Member inquiries, completing remaining subrogation steps, implementing Phase II Notice, administering payments, dealing with issues as they arise, and reporting to the Court as required.
93. The value of Class Counsel's docketed time amounts to 99.54% of the Class Counsel Fee sought to be approved. This means that the value of Class Counsel's docketed time on the file is approximately equal to the value of the fee sought, and demonstrates that the fee request is highly reasonable in light of the substantial time and resources expended.

C. Class Counsel Fee Approvals in Other Airline Accident Class Actions

94. A review of some examples of class counsel fee approvals in other airline accident class action settlements reinforces the reasonableness of the Class Counsel Fee for which approval is sought on this motion. The background of these cases are discussed in greater detail at Section XI.B.(ii) of the Settlement Approval Brief.

- (a) *Somwar v. Fly Jamaica Airways Ltd.*, 2024 ONSC 209

⁷⁷ Settlement and Fee Approval Affidavit, paras 284, 286, 289.

95. Class Counsel sought approval of fees of 25% of the settlement amount (approximately \$1.29 million plus HST) and disbursements of \$295,000 inclusive of taxes.⁷⁸
96. The Court applied the fairness and reasonableness standard to fee approval, taking into account the risk assumed by Class Counsel and the degree of success achieved for the class. The Court held that a 25% contingency fee falls comfortably within the accepted range of 20–30%, and found that courts have gone so far as to accord presumptive validity to fees as high as one-third of recovery.⁷⁹ Given that each representative plaintiff confirmed they fully understood and agreed to the fee arrangement, the Court approved Class Counsel’s fees and disbursements as requested.⁸⁰

(b) *Abdulrahim v. Air France*, 2011 ONSC 512

97. This decision concerns the approval of class counsel fees arising from the settlement of a class action on behalf of approximately 250 passengers class members and some 454 family relatives affected by the crash of Air France Flight 358.⁸¹ The global settlement totalled \$20,750,000 inclusive of costs, resulting in compensation of approximately 80% of each class member’s compensable damages with no individual issues left for determination.⁸² Class Counsel sought fees of \$6,225,000, representing 30% of the settlement, below the 33% provided for in the retainer agreement, plus disbursements and taxes.⁸³

⁷⁸ *Somwar v. Fly Jamaica Airways Ltd.*, 2024 ONSC 209 [Somwar] at para 24 [Plaintiffs’ Fee Authorities, Tab 10].

⁷⁹ *Ibid* at para 26.

⁸⁰ *Ibid* at para 28.

⁸¹ *Abdulrahim 2011*, *supra* at para 2.

⁸² *Ibid* at para 12.

⁸³ *Ibid* at para 3.

98. The Court approved the fees as fair and reasonable, applying a multi-factor analysis. Key considerations included the complexity of the litigation (which involved international aviation conventions, multi-jurisdictional issues, and a wide range of liability and damages questions), the significant time invested by counsel (over \$4.7 million in docketed time over more than five years without remuneration), and the substantial risk assumed by Class Counsel in carrying disbursements exceeding \$1 million on a contingency basis with no guarantee of recovery against several of the defendants. The Court also emphasized the skill and diligence of the counsel team, particularly in building a system to assess and document each class member's individual damages, which was instrumental in achieving the negotiated result.⁸⁴
99. The Court further noted that a one-third contingency fee is standard and well-accepted in class action litigation, and that the goals of the class proceedings (access to justice, judicial economy, and behaviour modification) depend on incentivizing counsel to take on difficult, risky cases.⁸⁵
100. The Court concluded that the fee was well-earned given the outstanding result achieved, the complexity of the matter, and the exemplary communication maintained with class members throughout the proceedings. Fees of \$6,225,000 plus applicable taxes and disbursements were approved accordingly.⁸⁶

D. Class Counsel Disbursements

101. Class Counsel seek this Honourable Court's approval of Class Counsel Disbursements in

⁸⁴ *Ibid* at paras 11-29.

⁸⁵ *Ibid* at para 13.

⁸⁶ *Ibid* at para 30-31.

the amount of \$888,806.42, plus HST of \$125,907.28, for a total of \$1,014,713.70.⁸⁷

102. This figure reflects all out-of-pocket expenses incurred since April of 2015 to advance the litigation and the parallel settlement track.⁸⁸
103. The general categories of expenses to which the Class Counsel Disbursements relate are set out in Tables at paragraphs 296 and 297 of the Settlement and Fee Approval Affidavit.
104. In Class Counsel's submission, these disbursements are fair and reasonable sums that were necessary to further the litigation and achieve a resolution for Class Members, and ought to be approved. Their approval is supported by the circumstances of this proceeding, including its highly technical nature, the 11-year duration of the litigation, and the existence of 131 individual Class Member files requiring detailed individualized investigation and management. Much of this work was functionally analogous to claims administration that was conducted during the litigation phase, as opposed to post-approval, requiring significant Class Member-specific attention. In addition, Class Counsel will not seek reimbursement of any post-approval disbursements they may incur, nor have they charged interest on disbursements. In this context, the disbursements are reasonable and proportionate to the work undertaken.⁸⁹

V. ORDER REQUESTED

105. Class Counsel respectfully seek an Order from this Honourable Court as follows:

⁸⁷ Settlement and Fee Approval Affidavit, para 295.

⁸⁸ Settlement and Fee Approval Affidavit, para 295.

⁸⁹ Settlement and Fee Approval Affidavit, para 298-299.

- (a) A Class Counsel Fee of \$5,039,521.34, plus applicable taxes of \$705,532.99, for a total of \$5,745,054.33 is approved as fair and reasonable; and
- (b) Approving the payment of Class Counsel Disbursements in the amount of \$888,806.42, plus applicable taxes of \$125,907.28, for a total of \$1,014,713.70.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of May, 2026.



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SCHEDULE “A”**LIST OF AUTHORITIES****Jurisprudence**

1. *Abdulrahim v. Air France*, 2011 ONSC 512
2. *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686
3. *Condon v. Canada*, 2018 FC 522
4. *Elwin v. Nova Scotia Home for Colored Children*, 2014 NSSC 375
5. *Estey v. Attorney General (Nova Scotia)*, 2025 NSSC 368
6. *Gallant v. The Roman Catholic Episcopal Corporation of Halifax*, 2022 NSSC 347
7. *Imperial Tobacco Company Limited*, 2025 ONSC 4497
8. *Jost v. Canada*, 2025 FC 1193
9. *Martell v. Nova Scotia (Attorney General)*, 2026 NSSC 36
10. *Somwar v. Fly Jamaica Airways Ltd.*, 2024 ONSC 209
11. *Sweetland v. Glaxosmithkline Inc*, 2019 NSSC 136

Legislation

12. *Class Proceedings Act*, S.N.S. 2007, c. 28