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 To Approve Settlement

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I. OVERVIEW

1. The Parties have reached a proposed settlement of this certified class action. On this motion, the Plaintiffs seek approval of the Settlement Agreement, with the consent of the Defendants.[1]

2. The proposed Settlement was reached more than a decade after the commencement of this class action, which arises from the crash-landing of Air Canada Flight AC624 at Halifax Stanfield International Airport in the early hours of March 29, 2015 ("AC624"). The Action alleges that the negligence and failures of the Defendants caused the crash and, in the case of certain Defendants, that their conduct in the aftermath further exacerbated the injuries sustained by Class Members.

3. The claims in this Action relate to the operation of Flight AC624, the design and performance of the aircraft and its systems, the adequacy of navigational aids and runway lighting at the Airport, air navigation, weather and visibility conditions, and the emergency response following the crash. These allegations raised distinct factual and legal issues against different Defendants, engaging both strict liability and fault-based liability regimes.

4. The claims of Class Members travelling on international tickets against Air Canada are governed by the strict liability regime of the *Convention for the Unification of Certain Rules for International Carriage by Air* (the "*Montreal Convention*"), as enacted in Canada by the *Carriage by Air Act*, RSC 1985, c C-26, as amended.

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[1] Except where otherwise indicated or required by context, the capitalized terms that are not defined in this Brief have the meanings given to them in the Settlement Agreement, which is attached to the Draft Settlement Approval Order as Schedule "A".

5. Under the *Montreal Convention*, Air Canada is strictly liable, on a no-fault basis, for bodily injury damages up to approximately CAD $196,000. For bodily injury damages exceeding this threshold, Air Canada remains liable unless it can establish that it was not negligent.[2]

6. There are 80 international Class Members ("Convention Class Members") and 51 domestic Class Members ("Non-Convention Class Members"), for a total of 131 Class Members.[3]

7. In addition to the Convention Class Members' claims against Air Canada, the Plaintiffs asserted negligence claims against all Defendants arising from the circumstances of the crash and its aftermath.[4]

8. Following certification in December 2016, the Action proceeded through extensive document production, discovery examinations of the three Representative Plaintiffs and representatives of each Defendant, the preparation and exchange of individualized settlement valuations for all 131 Class Members, and further discovery examinations of 14 passengers. The Plaintiffs retained six liability experts and were in active trial preparation at the time the Settlement was achieved. Settlement discussions proceeded in parallel with these litigation steps over the course of approximately seven years.

9. The Settlement Agreement is the product of protracted negotiations amongst the parties, and with the eventual involvement of the Court and mediators. It reflects a careful assessment of the litigation risks, including liability and causation issues and the uncertainty surrounding recovery for psychological injuries suffered by Convention Class Members. Importantly, the Settlement was reached with the benefit of detailed,

[2] Affidavit of Kate Boyle affirmed May 11, 2026 ("Settlement and Fee Approval Affidavit"), paras 15-16.
[3] Settlement and Fee Approval Affidavit, para 14.
[4] Settlement and Fee Approval Affidavit, paras 16-17.

individualized damages assessments developed for each Class Member over the course of the Action.

10. For the Settlement to be implemented, the *Class Proceedings Act,* SNS 2007, c 28 (the "*Act*") requires Court approval. The Plaintiffs therefore seek an Order on this motion: (i) approving the Settlement Agreement and the Distribution Protocol as fair, reasonable, and in the best interests of the Class; (ii) approving the Phase II Notice and Phase II Notice Plan; (iii) dismissing the Action with prejudice as of the Effective Date; and (iv) approving the payment of honoraria to the Representative Plaintiffs.

11. This proposed Settlement reflects the realities and risks of this litigation. The Action was proceeding toward a lengthy common issues trial focused on liability and the interpretation of the *Montreal Convention*, with no determination of individual damages at that stage. Even if the Plaintiffs were successful at trial, Class Members would have faced further delay, likely appeals, and individualized damages proceedings, with particular uncertainty for Convention Class Members seeking recovery for psychological injuries.[5]

12. The Settlement avoids all of those risks by providing compensation that is grounded in individualized damages valuations. Through arm's length negotiations with Air Canada and Nav Canada, agreement was reached on the individual valuation of approximately 79 percent of the Class Members' claims. The remaining valuations were assessed by Class Counsel using the same valuation principles, and informed by the ongoing negotiations.[6] The Settlement therefore reflects a bottom-up aggregation of individual damages

[5] Settlement and Fee Approval Affidavit, paras 95-96.
[6] Settlement and Fee Approval Affidavit, paras 51-52.

assessments, plus a surplus to cover Class-wide Disbursements and a portion of the Class Counsel Fee.

13. As a result of the upfront work, Class Members are not required to submit claim forms or supporting medical documentation following Settlement approval in order to establish their entitlement to compensation; the amounts payable are already determined. Payment may therefore proceed promptly following approval, delivering real and certain compensation to Class Members, rather than an uncertain amount at an indeterminate future time following further trial proceedings and appeals.

14. The Settlement Agreement is a fair and reasonable result that is in the best interests of the Class. It warrants the approval of this Honourable Court.

II. SUMMARY OF SETTLEMENT

15. Under the Settlement Agreement, Air Canada, Nav Canada, and HIAA have agreed to pay CAD $18,075,000.00 (the "Settlement Amount") in full and final settlement of the Action as against all Defendants. The Settlement Amount is inclusive of all damages, PHI Subrogated Claims, private subrogated claims, disbursements, administration fees and expenses, honoraria, legal fees, costs, taxes and interest.[7]

16. Of the 133 passengers on board Flight 624 on March 29, 2015, 131 qualify as Class Members, with two having opted out.[8] Class Counsel has maintained contact with the

[7] Settlement Agreement, s. 1: "Settlement Amount".
[8] Settlement and Fee Approval Affidavit, paras 8, 10, 21.

overwhelming majority of the Class, having communicated with all but two of the 131 Class Members.[9]

17. Individual settlement valuations were developed for each of the 131 Class Members through direct engagement with each Class Member and review of their available medical, employment, and insurance records.[10]

18. As negotiations with the Defendants progressed on a claim-by-claim basis, it became apparent to the parties that a number of individually assessed claims fell within similar valuation ranges. Those valuations resolved within defined "Tier" ranges, while other valuations reflected more individualized amounts outside those ranges. Specifically:

    (i) 72 "Tiered" Class Members had individually assessed claims that resolved within common ranges of $10,000, $20,000, or $30,000; and

    (ii) 59 "Non-Tiered" Class Members had individually assessed claims involving circumstances that did not fit within the Tiers, including ongoing physical or psychological injuries, income loss, cost of care claims, and/or larger subrogated claims.[11]

19. As individualized damages assessments were completed for all Class Members, this Settlement does not depend on a post-approval claims process. Each Class Member has already been provided with their individual estimated net recovery by letter in March or April of 2026.[12] As a result, the Distribution Protocol at Schedule "B" to the Settlement

[9] Settlement and Fee Approval Affidavit, para 22.
[10] Settlement and Fee Approval Affidavit, para 25.
[11] Settlement and Fee Approval Affidavit, paras 31-41, 44.
[12] Settlement and Fee Approval Affidavit, para 119.

Agreement is straightforward and administratively efficient. Compensation can be paid to Class Members promptly following Court approval based on work that has already been done.

III. BACKGROUND

A. Litigation Status

(i) Initial Steps in the Action and Certification

20. This Action was commenced on April 28, 2015, alleging that failures across multiple layers of safety by the Defendants caused the crash, and that certain Defendants' pre- and post-crash conduct further exacerbated Class Member injuries.[13]

21. The Honourable Justice Denise Boudreau was appointed as case management judge in the fall of 2015, and the certification hearing was scheduled for December, 2016.[14] In the lead-up to certification, the Plaintiffs filed their certification record in March, 2016, which included affidavits from the proposed Representative Plaintiffs and expert evidence.[15] The Plaintiffs subsequently filed amendments to the Notice of Motion and pleadings in August, 2016.[16]

22. In October of 2016, prior to certification, the Plaintiffs successfully brought a production motion requiring Air Canada to disclose the passenger manifest containing the names and

[13] Settlement and Fee Approval Affidavit, paras 9, 11, 155.
[14] Settlement and Fee Approval Affidavit, paras 10, 156, 157.
[15] Settlement and Fee Approval Affidavit, para 158.
[16] Settlement and Fee Approval Affidavit, para 159-160.

contact information of passengers on board AC624, and filed further amended certification materials in November, 2016.[17]

23. The certification hearing proceeded on December 12–13, 2016, with all Defendants except the Attorney General of Canada consenting to certification. Justice Boudreau certified the Action, and the Certification Order was issued on December 14, 2016.[18] The Certification Order was subsequently amended by Justice Ann Smith on April 10, 2025, to permit revision of the common issues relating to Airbus.[19]

24. On December 19, 2016, Notice of Certification was disseminated. As Class Counsel had access to the passenger manifest, direct notice was possible for all Class Members, save for two with whom Class Counsel were unable to establish contact.[20]

25. The Opt-Out Deadline was March 24, 2017. Two individuals opted out of the Action and the Court was advised on April 3, 2017.[21]

(ii) Co-Counsel Agreement and Related Litigation

26. On April 21, 2015, MacGillivray Law filed a proposed class action on behalf of passengers on board Flight AC624 (the "Cameron Action"), and on October 5, 2015, filed a mass tort action on behalf of 28 passengers arising from the same crash.[22]

[17] Settlement and Fee Approval Affidavit, paras 161-162.
[18] Settlement and Fee Approval Affidavit, paras 10, 164-165.
[19] Settlement and Fee Approval Affidavit, para 167, Exhibit "C".
[20] Settlement and Fee Approval Affidavit, para 168.
[21] Settlement and Fee Approval Affidavit, para 169.
[22] Settlement and Fee Approval Affidavit, paras 170-171.

27. Following certification, then Class Counsel (Wagners and CFM Lawyers) brought a motion to permanently stay the Cameron Action. On January 16, 2017, Justice Boudreau issued a Consent Order granting the permanent stay.[23]

28. Shortly thereafter, on February 27, 2017, Wagners and CFM Lawyers entered into a co-counsel agreement with MacGillivray Law, pursuant to which MacGillivray Law agreed to discontinue the Mass Tort,[24] consented to the stay of the Cameron Action, and joined the co-counsel team advancing this Action.[25]

(iii)Document Disclosure and Examinations for Discovery

29. In July of 2017, the parties exchanged Affidavits of Documents pursuant to the agreed-upon document exchange protocol, with the Defendants collectively producing over 46,000 documents. Examinations for discovery of the three Representative Plaintiffs took place in August and October, 2017, followed by discoveries of the Defendants' representatives in October through December, 2017.[26]

30. The progression of the Action between approximately June 2018 and November 2022 was materially affected by motions and related appeals (including to the Supreme Court of Canada, as described below) seeking and opposing the production of the Cockpit Voice Recorder ("CVR").[27]

[23] Settlement and Fee Approval Affidavit, paras 172-173.
[24] Settlement and Fee Approval Affidavit, para 175.
[25] Settlement and Fee Approval Affidavit, para 174.
[26] Settlement and Fee Approval Affidavit, paras 176-182.
[27] Settlement and Fee Approval Affidavit, para 183.

31. Following resolution of that issue, further examinations of the two Air Canada pilots were conducted in August 2023 arising from the CVR production.[28]

(iv) The CVR Production Motion

32. In June, 2018, counsel for Airbus wrote to the Transportation Safety Board of Canada ("TSB") and Air Canada requesting production of the CVR. The TSB resisted this request, and Airbus brought a motion for an Order requiring production of the audio data from the CVR and any transcripts thereof made in the Air Canada aircraft on flight AC 624.[29]

33. Litigation relating to the production of the CVR spanned approximately three and a half years – from the Spring of 2019 until late fall of 2022 – including an appeal that was ultimately heard by the Supreme Court of Canada.[30]

34. On November 25, 2022, the SCC issued its decision regarding the CVR Appeal, upholding the Courts below, and ordering that the CVR be produced.[31]

35. On November 29, 2022, the TSB produced the CVR to the parties to the litigation under the terms of the Order.[32]

(v) Expert Reports

36. Between 2018 and 2023, the Court established a series of deadlines, amended periodically by agreement, for the filing of liability expert reports. The Plaintiffs filed their liability expert reports on April 19, 2024. Those reports addressed key aspects of liability advanced

[28] Settlement and Fee Approval Affidavit, para 187.
[29] Settlement and Fee Approval Affidavit, paras 188-189.
[30] Settlement and Fee Approval Affidavit, paras 190-202.
[31] Settlement and Fee Approval Affidavit, para 202.
[32] Settlement and Fee Approval Affidavit, para 203.

by the Plaintiffs, including pilot conduct, non-precision approaches and cold-weather correction; aviation accident investigation with a focus on human factors; Airport safety and emergency preparedness; the failure of HIAA's backup power system; and the technical and computational aspects of true altitude determination and managed vertical guidance.[33]

37. The Defendants filed numerous rebuttal expert reports in November, 2024, with Air Canada addressing human factors and aircraft piloting; Airbus addressing aviation accident investigation, cold temperature correction, and Air Canada's standard of care; Nav Canada addressing aircraft accident reconstruction; and HIAA addressing Airport operations, management, compliance, and safety.[34]

38. The Plaintiffs and Nav Canada filed rebuttal expert reports in March, 2025.[35]

(vi)Scheduling and Lead-up to Trial

39. The certified common issues focused on liability of each of the Defendants and the interpretation of the *Montreal Convention*. The common issues trial was not intended to determine the quantum of individual Class Member damages, which would only be determined at a later stage if liability were established.[36]

40. After the Supreme Court of Canada released its decision in the CVR Appeal, the parties resumed active case management to advance the Action toward trial. The parties began

[33] Settlement and Fee Approval Affidavit, paras 204-205.
[34] Settlement and Fee Approval Affidavit, para 206.
[35] Settlement and Fee Approval Affidavit, para 207.
[36] Settlement and Fee Approval Affidavit, para 96, 167, Exhibit "C".

preparing for a common issues liability trial, and the Court set timelines to move the matter toward hearing on the merits.[37]

41. The Honourable Justice Ann Smith was appointed as the trial judge for the Action, and the common issues trial was scheduled to commence on January 26, 2026, for a duration of 45 days.[38]

42. At the subsequent case management conference in March, 2025, Justice Smith set a detailed pre-trial schedule, including the exchange of expert qualification statements and any admissibility objections; notice requirements relating to the CVR at trial (including notice to the TSB); completion of remaining disclosure steps; exchange of witness lists; the scheduling of pre-trial motions; and preparation of the joint exhibit book and agreed statement of facts, followed by pre-trial briefs and books of authorities. The finish date was set for October 22, 2025 – just over one month after the parties reached the proposed Settlement.[39]

B. Negotiations and Settlement

43. The Settlement achieved was the product of extensive, multi-year negotiations conducted in parallel with the litigation. Following certification, Class Counsel developed a process to value each Class Member's damages on an individualized basis, with settlement proposals supported by medical records, employment documentation, insurance summaries, and medico-legal reports.[40]

[37] Settlement and Fee Approval Affidavit, paras 208-209.
[38] Settlement and Fee Approval Affidavit, para 211.
[39] Settlement and Fee Approval Affidavit, paras 212-215, Exhibit "D".
[40] Settlement and Fee Approval Affidavit, para 216.

44. Beginning in approximately May 2018, Class Counsel prepared and disclosed individual written Class Member settlement proposals to the Defendants in batches. Negotiations of these claims continued through written communications, in-person and virtual meetings, additional disclosure, obtaining of medio-legal reports, and discovery examinations.[41]

45. A settlement meeting between the parties held in December, 2019, did not produce a global resolution.[42]

46. Negotiations continued between Class Counsel and counsel for Air Canada and Nav Canada between May, 2020 and May, 2022, involving approximately 18 meetings or conference calls and extensive written exchanges, ultimately resulting in agreements in principle on 104 of the 131 individual Class Member claims. Despite engaging a third-party mediator for a few of the claims with larger income loss and earning capacity components, the remaining claims reached an impasse.[43]

47. A two-day Judicial Settlement Conference with the involvement of all parties before Justice Chipman on May 1 and 2, 2024, similarly did not achieve a global resolution, and the Action continued toward a scheduled 45-day trial in January, 2026.[44]

48. In March, 2025, with all liability expert reports exchanged and trial preparations underway, Air Canada proposed a further mediation.[45] The parties agreed to a two-day mediation before Cliff Hendler in Toronto on August 27 and 28, 2025. While the in-person sessions did not produce a resolution, negotiations continued by telephone with the mediator's

[41] Settlement and Fee Approval Affidavit, paras 217-229.
[42] Settlement and Fee Approval Affidavit, paras 230-231.
[43] Settlement and Fee Approval Affidavit, paras 233-241.
[44] Settlement and Fee Approval Affidavit, paras 242-245.
[45] Settlement and Fee Approval Affidavit, para 247.

assistance, and the Action resolved in principle, subject to instructions, on September 19, 2025.[46] Class Counsel spoke with each of the Representative Plaintiffs to explain the proposed settlement and provide advice, who provided their instructions to accept the Defendants' offer.[47] Throughout October and November, Minutes of Settlement were finalized, and via case management before Justice Smith, the Settlement Approval and Fee Approval Hearings and related procedural steps were subsequently scheduled for June 22, 2026, by Order issued January 15, 2026.[48]

C. Contribution of the Representative Plaintiffs

49. The Representative Plaintiffs played an active role in advancing this Action over more than a decade. Each remained engaged throughout the litigation, and took on responsibilities that went beyond those of the other Class Members. This included providing information to support the pleadings, reviewing and affirming affidavits, preparing for and attending examinations for discovery, reviewing materials to ensure accuracy, and remaining available to address developments as the case progressed. Over the years, they received updates from Class Counsel and provided instructions.[49]

50. In these circumstances, Class Counsel seeks approval of a modest honorarium of $2,500 for each Representative Plaintiff in recognition of the time, responsibility, and sustained

[46] Settlement and Fee Approval Affidavit, paras 248-252.
[47] Settlement and Fee Approval Affidavit, para 253; Affidavit of Kathleen Carroll-Byrne, affirmed May 11, 2026 ("Carroll-Byrne Affidavit"), para 21 (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 ("Hodara Affidavit") para 21; Affidavit of Malanga Georges Liboy, affirmed April 29, 2026 ("Liboy Affidavit"), para 21.
[48] Settlement and Fee Approval Affidavit, paras 254-256.
[49] Settlement and Fee Approval Affidavit, para 118; Carroll-Byrne Affidavit, paras 10-18; Hodara Affidavit, paras 10-18; Liboy Affidavit, paras 10-18.

participation they assumed on behalf of the Class,[50] which is further described later in this brief.

IV. SETTLEMENT METHODOLOGY

51. The proposed distribution of the Settlement Amount is as follows:[51]

Settlement Amount	$18,075,000.00
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 Honoraria	$7,500.00

52. To arrive at the Settlement Amount, Class Counsel invested considerable time and resources in developing individualized assessments for each Class Member. These assessments drew on medical records, employment files, and public and private health insurance summaries, and reflected each Class Member's non-pecuniary and pecuniary

[50] Settlement and Fee Approval Affidavit, para 300.
[51] Settlement and Fee Approval Affidavit, para 19.

damages, subrogated claims, and individual disbursements. The resulting proposals were disclosed to Defence counsel in batches between May, 2018 and August, 2021, and formed the foundation for the damages negotiations that ultimately led to the Settlement.[52]

53. This process revealed a wide range of injuries and losses across the Class. Class Members' injuries varied in type (physical, psychological, or both), as well as in severity and duration, ranging from injuries requiring short-term treatment to those with persisting symptoms and ongoing care. Class Members' claims similarly spanned multiple categories of damages, including non-pecuniary general damages, income loss, loss of valuable services, and costs of care and special damages.[53]

54. 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.[54]

A. Tiered Class Members

55. During the course of negotiating individualized settlement proposals with counsel for Air Canada and Nav Canada, it became apparent that several Class Members had experienced sufficiently similar harms arising from the crash that their damages valuations fell within common ranges. As described above, these claims were resolved within three defined damages bands, or "Tiers," each representing an all-inclusive amount covering both non-pecuniary and pecuniary damages. There are 72 Tiered Class Members in total.[55]

[52] Settlement and Fee Approval Affidavit, paras 23-27.
[53] Settlement and Fee Approval Affidavit, para 29.
[54] Settlement and Fee Approval Affidavit, para 30.
[55] Settlement and Fee Approval Affidavit, paras 31-34: Of the 72 Class Members, 49 are Convention Class Members and 23 are Non-Convention Class Members.

56. The Tier amounts were informed by a $5,000 advance payment previously made by Air Canada to Class Members.[56] This means that the true values of the Tier amounts described below are $15,000, $25,000, and $35,000.

57. The three Tiers were defined as follows:

(i) **Tier 1 ($10,000)** applies to Class Members who (a) sustained modest physical and/or non-clinical psychological injuries that generally resolved within months, with no significant persisting symptoms (e.g., bruising, headaches, minor sprains, body soreness/stiffness, fear of flying, increased stress, flashbacks, or nightmares); and (b) sought limited or no medical treatment, or had very limited evidence substantiating the alleged crash-related harm; and (c) had no significant or substantiated ongoing treatment costs, income loss or loss of earning capacity, or claims for loss of valuable services;

(ii) **Tier 2 ($20,000)** applies to Class Members who (a) sustained moderate physical and/or psychological injuries of moderate duration, with no significant persisting symptoms (e.g., significant bruising, minor whiplash-type injuries, mild concussion symptoms, sprains, prolonged soreness/stiffness, fear of flying affecting lifestyle or work, situational medication for flying, psychological distress, or exacerbation of prior injuries where causation was difficult to establish); and/or (b) sought limited medical treatment, or had limited evidence substantiating the alleged crash-related harm; and (c) had no significant or substantiated ongoing treatment costs, income loss or loss of earning capacity, or claims for loss of valuable services;

[56] Settlement and Fee Approval Affidavit, para 39.

(iii) **Tier 3 ($30,000)** applies to Class Members who (a) sustained ongoing physical and/or psychological injuries that were not disabling, not debilitating in daily life, and not requiring ongoing treatment beyond limited therapeutic care and/or situational medication for flying (e.g., whiplash-type injuries, mild concussion symptoms, sprains, PTSD-type symptoms, fear of flying affecting travel patterns, or exacerbation of prior injuries where causation was difficult to establish); and (b) sought medical treatment for crash-related injuries and had medical evidence substantiating the alleged harm; and (c) had no significant ongoing treatment costs, no associated significant income loss or loss of earning capacity, and no substantiated claims for loss of valuable services.[57]

58. In arriving at the Tier valuations, Class Counsel considered the nature, duration, and impact of the injuries reported by Tiered Class Members, the quality of the supporting record available for each claim, and the litigation risks associated with proving ongoing harm where contemporaneous medical or employment documentation was limited.[58]

59. Class Counsel also considered Nova Scotia case law for comparable "persistently troubling but not totally disabling" injuries.[59]

60. In addition, Class Counsel considered the threshold requirements for compensable psychological harm, and risk for those with generally resolved injuries and little to no records to substantiate harm.[60] In particular, Courts have rejected recovery based on

[57] Settlement and Fee Approval Affidavit, paras 35-37.
[58] Settlement and Fee Approval Affidavit, para 38.
[59] *Smith v Stubbert*, 1992 CarswellNS 250, [1992] N.S.J. No. 532, 117 N.S.R. (2d) ("*Smith*") (NSCA), at para 33; see also *Hayward v Young*, 2013 NSCA 64 at paras 47-50 (confirming the continued use of the *Smith* range, adjusted for inflation); Settlement and Fee Approval Affidavit, para 38.
[60] Settlement and Fee Approval Affidavit, para 38.

emotional upset alone in mass-injury contexts,[61] and the Supreme Court of Canada has confirmed that mental injury is compensable without a formal diagnosis only where the harm is serious and prolonged and rises above ordinary distress.[62]

61. Importantly, during the negotiations it was agreed that subrogated claims and individual disbursements will not be deducted from Tier amounts, which were specifically negotiated to preserve a predictable net recovery for Tiered Class Members of approximately $10,000, $20,000, or $30,000, subject only to modest adjustments for Court-approved legal fees and Class-wide disbursements.[63]

B. Non-Tiered Class Members

62. For 59 Class Members, their claims involved circumstances such as ongoing physical and/or psychological injuries, continued treatment or care requirements, claims for past or future income loss or diminished earning capacity, along with more substantial public and private subrogated claims. As a result, these "Non-Tiered" valuations varied widely in amount.[64]

63. The Non-Tier amounts were also informed by the $5,000 advance payment previously made by Air Canada to Class Members.[65]

64. Unlike Tiered Class Members, the net amounts payable to Non-Tiered Class Members are determined after resolving applicable subrogated claims and deducting individual

[61] E.g. *Kotai v "Queen of the North" (The)*, 2009 BCSC 1405 (six mini-trials); 2010 BCSC 1180 (Settlement Approval).
[62] *Saadati v Moorhead*, 2017 SCC 28 [*Saadati*].
[63] Settlement and Fee Approval Affidavit, para 40.
[64] Settlement and Fee Approval Affidavit, para 41-42, 44.
[65] Settlement and Fee Approval Affidavit, para 39.

disbursements (such as costs associated with obtaining their medical records, employment records, medico-legal reports and independent medical examinations), along with a modest contribution toward Court-approved legal fees and Class-wide disbursements.[66]

C. PHI Subrogated Claims

65. Six provinces have asserted public health insurance subrogated claims ("PHI Subrogated Claims") in connection with this Action. Throughout the litigation, Class Counsel maintained ongoing communication with the relevant PHIs, obtaining updated PHI subrogated claim summaries and working directly with Class Members to identify which treatments and expenses were crash-related and therefore potentially subject to subrogation.[67]

66. In early 2026, Class Counsel commenced negotiations with the PHIs to resolve these subrogated claims on a Class Member-by-Class Member basis. Five of the six PHIs have agreed to receive negotiated amounts totaling $1,918.28 from the Settlement Amount in satisfaction of their respective claims.[68] Class Counsel remains in discussions with Nova Scotia to resolve the PHI claim related to one final passenger. The total for Nova Scotia's PHI claims without the unresolved claim is $242,467.11. Once this final claim is resolved, Class Counsel will provide an update to the Court with Nova Scotia's final PHI amount, and well as the global PHI allocation.[69]

67. Under the Settlement Agreement, the Administrator is responsible for administering the PHI Allocation. PHI subrogated claims are expressly excluded from the Released Claims,

[66] Settlement and Fee Approval Affidavit, para 43.
[67] Settlement and Fee Approval Affidavit, para 105-106.
[68] Settlement and Fee Approval Affidavit, paras 106-110.
[69] Settlement and Fee Approval Affidavit at para 111

and no PHI Subrogated Claim will be paid from the PHI Allocation unless and until the Administrator receives a release from the applicable PHI confirming that the payment constitutes full satisfaction of that insurer's subrogated claims in relation to the Action.[70]

68. As is explained further in the Settlement and Fee Approval Affidavit as well as the Fee Approval Brief, Class Counsel will not charge any fee on amounts paid from the PHI Allocation.[71]

D. Comparing the Settlement with Ongoing Litigation

69. While Class Counsel maintains that this action is meritorious and ought to succeed at trial, there is significant risk associated with pursuing continued litigation. It is not clear that a better result would be obtained at trial.

(i) Liability of Air Canada

70. The liability framework differed between Convention and Non-Convention Class Members. For the 80 Convention Class Members, claims against Air Canada were governed by the *Montreal Convention's* strict liability regime, while the 51 Non-Convention Class Members' claims were governed by the common law of negligence. In both cases, the Plaintiffs' position at trial would have been that Air Canada's negligence caused or contributed to Class Member injuries through inadequate operational procedures and flight crew decisions that fell below the applicable standard of care.[72]

[70] Settlement and Fee Approval Affidavit, para 112; Settlement Agreement, ss. 1 ("Released Claims") and 8; Schedule "B" ("Distribution Protocol"), ss. 1-3.
[71] Settlement and Fee Approval Affidavit, para 113.
[72] Settlement and Fee Approval Affidavit, paras 58-61.

71. A significant litigation risk for Convention Class Members concerned the definition of "bodily injury" under Article 17 of the *Montreal Convention*, which is commonly interpreted to exclude psychological injuries not caused by a physical injury.[73]

72. One of the common issues to be determined at trial was whether psychological conditions, whether unaccompanied by physical trauma, accompanied by physical trauma, or resulting from physical injury, were compensable under the *Montreal Convention*.[74] Had the Court determined that purely psychological injuries were not compensable under the *Montreal Convention*, Convention Class Members suffering from such injuries would have had no recourse against Air Canada. Their only path to recovery would have been through establishing fault against one of the other Defendants.[75] As set out below, establishing liability against each of the other Defendants posed challenges that Class Counsel considered in assessing the fairness of the Settlement compared to ongoing litigation.

(ii) Liability of Airbus

73. The Plaintiffs alleged that Airbus, as the aircraft's designer and manufacturer, was liable on two grounds: first, that it failed to include managed vertical guidance for the type of approach being flown at the time of the crash; and second, that it failed to include an automatic cold temperature altitude correction feature in the flight computers. The absence of the latter required pilots to manually correct for inaccurate altitude readings, increasing workload and making it harder to assess whether the aircraft was on the correct approach path.[76]

[73] Settlement and Fee Approval Affidavit, paras 63-64.
[74] Settlement and Fee Approval Affidavit, paras 65, 167; Exhibit "C" [Certification Order].
[75] Settlement and Fee Approval Affidavit, para 66.
[76] Settlement and Fee Approval Affidavit, para 67.

74. Airbus's anticipated defence was that the crash resulted primarily or exclusively from pilot error and Air Canada's failure to follow Airbus-recommended procedures (specifically, a cross-check of aircraft altitude and distance from the runway against the approach chart), which Air Canada admittedly did not perform. On standard of care, Airbus would have argued that its design met all applicable regulatory standards and that no accepted industry standard required the features the Plaintiffs identified as deficient. There was a real possibility the Court could find the design of the aircraft was not unreasonable. [77]

75. Even if a breach of the standard of care were established, causation presented further complications. The Plaintiffs would have needed to persuade the Court that managed vertical guidance would have kept the aircraft on the correct flight path, and that automatic temperature correction would have made a difference. The combined weight of these risks meant there was meaningful uncertainty about whether the Class would have succeeded against Airbus at trial.[78]

(iii)Liability of Nav Canada

76. Nav Canada is the company that provided air traffic services at the Airport. Nav Canada faced allegations on three fronts: providing inaccurate visibility information to the flight crew, leaving approach and runway lights at a lower brightness setting than the pilots had requested, and sharing responsibility with other Defendants for the selection of ground-based navigation aids at the Airport. As with Airbus, Nav Canada's anticipated defence was that the crash was the result of pilot error and that liability rested solely with Air

[77] Settlement and Fee Approval Affidavit, paras 68-70.
[78] Settlement and Fee Approval Affidavit, para 71.

Canada, with the additional argument that light intensity played no role in the pilots' decision-making.[79]

77. Both of Nav Canada's alleged failures presented significant evidentiary challenges for the Plaintiffs. On the visibility issue, the Plaintiffs were unable to obtain an expert opinion on actual conditions at the time of the accident and would have had to rely on cross-examination and testimony from a retired weather observer to show that proper procedures were not followed - a difficult path to establishing that the reported visibility was inaccurate. On the lighting issue, competing expert opinions existed as to whether brighter lights would have changed the outcome, and none of the expert evidence was considered conclusive.[80]

78. Taken together, the risks on both fronts were substantial. The Court could reasonably have found that Nav Canada's weather reporting was conducted properly, or that even if the lights had been at the requested higher setting, the outcome of the flight would have been the same. These evidentiary gaps and competing opinions represented real litigation risk for the Class in establishing Nav Canada's liability.[81]

(iv) Liability of HIAA

79. HIAA has managed the Airport since 2000. The Plaintiffs alleged that HIAA were at fault for: inadequate ground-based navigation aids that made the approach unreasonably risky,

[79] Settlement and Fee Approval Affidavit, paras 72-74.
[80] Settlement and Fee Approval Affidavit, para 75.
[81] Settlement and Fee Approval Affidavit, para 76.

an inadequate emergency response to the crash, and negligent maintenance and testing of backup generators that resulted in an unreliable electrical system.[82]

80. HIAA, Nav Canada, and Transport Canada were all involved in decisions related to the installation of ILS on runways. In Class Counsel's assessment, the plaintiffs had a very strong case that the runway would have been safer, and the crash would not have occurred, if an ILS had been installed on the runway. However, there was a real risk that the Court would not accept that failure to install an ILS was a breach of the standard of care.

81. HIAA's anticipated defence with respect to emergency response focused primarily on causation. It would have argued that the emergency response timeline showed minimal delay, that any generator failure and resulting power outage did not materially affect that emergency response, and that Plaintiffs would need to establish a substantial connection between any alleged delay and their specific injuries - a burden made more difficult by the legal principle that ordinary psychological upset and anxiety are not compensable at law.[83]

(v) Liability of Transport Canada

82. Transport Canada, as owner and occupier of the Airport, faced claims limited to statutory occupiers' liability, after the Plaintiffs' regulatory negligence claims were refused at certification.[84] The Plaintiffs would have argued that Transport Canada bore responsibility for the failure to install an Instrument Landing System ("ILS") on the accident runway,

[82] Settlement and Fee Approval Affidavit, para 77.
[83] Settlement and Fee Approval Affidavit, para 78-79; *Saadati, supra*.
[84] Settlement and Fee Approval Affidavit, para 80.

both in its capacity as the Airport's former operator until 2000 and as HIAA's lessor since that time.[85]

83. Transport Canada's defence would have centred on its lack of control over the Airport at the time of the crash, having transferred operational responsibility to HIAA some 15 years earlier. It would have argued that this transfer meant it was not an "occupier" under Nova Scotia's *Occupiers' Liability Act*, as it no longer had physical possession or control over Airport conditions. While the liability risk for Transport Canada mirrored that of HIAA on the ILS issue, it was considered somewhat higher given that the lease arrangement may have led the Court to conclude that Transport Canada lacked sufficient control to be held responsible.[86]

E. Quantifying Risk for Convention Passengers' Psychological Damages

84. The Settlement is particularly significant for Convention Class Members, whose recovery for psychological injuries depended on how the Court would resolve the common issues at trial regarding the meaning of "bodily injury" under the *Montreal Convention*. Had liability been established only against Air Canada and not the other Defendants, Convention Class Members whose injuries were primarily psychological and not causally linked to a physical injury faced a real risk of recovering little or nothing.[87] The Settlement eliminates this risk by compensating Convention Class Members for both their physical and psychological injuries.[88]

[85] Settlement and Fee Approval Affidavit, para 81.
[86] Settlement and Fee Approval Affidavit, para 82-83.
[87] Settlement and Fee Approval Affidavit, paras 84-86.
[88] Settlement and Fee Approval Affidavit, para 94.

85. To understand the exposure and the downside for Convention Class Members, Class Counsel assessed psychological harm on an individual basis. To do this, Class Counsel conducted an individualized review of each Convention Class Member's records, including notes identifying symptoms, duration of emotional distress, and the effects on well-being and quality of life. Based on applicable Nova Scotia case law, Class Counsel determined that general damages for psychological harm could range between $10,000 and $100,000,[89] and concluded that no Convention Class Member had experienced the maximum level of compensable psychological harm. A specific monetary value was then assigned to the general damages portion of each claim to reflect the individual's mental anguish, emotional trauma, and any ongoing psychological harm.[90]

86. For the purposes of the JSC, Class Counsel estimated the aggregate total of psychological damages for Convention Class Members at approximately $2.665 million.[91]

87. To ensure consistency and fairness across the Convention Class Members, Class Counsel assigned values within reasoned ranges informed by Nova Scotia awards, as summarized in the Settlement and Fee Approval Affidavit.[92] The minimum band, valued at up to $10,000, covered the least severe psychological harm, such as non-clinical or short-duration injuries lasting less than six months, including situational fear of flying. The moderate-to-severe band, valued at up to $40,000, applied to more significant harm lasting more than six months and supported by corroborating records. The maximum band, valued

[89] Settlement and Fee Approval Affidavit, para 89; E.g., *Laybolt v Irving Equipment Limited*, 2021 NSSC 165, para 54 ($8,352 for emotional injury alone); e.g., *Trenholm v. H & C Trucking Ltd*., 2014 NSSC 90 ($75,000.00 for psychological injury alone), the later decision valued at approximately $100,000 in "current dollars" as the "top" of the range.
[90] Settlement and Fee Approval Affidavit, para 87-91.
[91] Settlement and Fee Approval Affidavit, para 92.
[92] Settlement and Fee Approval Affidavit, paras 90-91.

at up to $75,000, was reserved for the most serious cases involving disabling or debilitating psychological injuries lasting a year or more, clearly documented by medical records or opinions, and requiring extended treatment.[93]

88. This analysis was also important to the settlement dynamics. Even a modest allocation of fault to one of the other Defendants (who are not subject to the *Montreal Convention*) could have exposed them to the full scope of Convention Class Members' psychological damages.[94]

F. Advantages of Settlement Over Trial

89. The Settlement represents a fair and reasonable compromise of the Class's claims, particularly when measured against the risks, costs, and delays that continued litigation would entail. The Action was heading toward a 45-day common issues liability trial. Even if the Plaintiffs were successful, the litigation would likely have been followed by appeals and then into individualized damages assessments for each Class Member. This process could have taken several more years with no assurance of a better result for the Class.[95]

90. Indeed, even if the Plaintiffs were ultimately able to achieve an award comparable to the Settlement Amount after trial and individual damages proceedings, that would not have translated into the same net recovery for Class Members. A 45-day liability trial would have generated substantial disbursements and trial expenses. In addition, under the Contingency Fee Arrangements the Representative Plaintiffs entered into with Class Counsel, the applicable contingent percentage increases from 30% to 33 1/3% once trial

[93] Settlement and Fee Approval Affidavit, para 91.
[94] Settlement and Fee Approval Affidavit, para 93.
[95] Settlement and Fee Approval Affidavit, paras 95-97.

begins.[96] The practical result is that continued litigation would have reduced the amount that could be paid to Class Members, even if the gross outcome were similar, which itself is uncertain.

91. A further practical advantage of this Settlement is that it is ready to be implemented. This is not a claims-made settlement requiring Class Members to complete claim forms or assemble supporting records during a claim period after approval. As entitlement and quantum are already determined, distribution can proceed promptly following approval.[97]

92. This ground-up, individualized approach also gives Class Counsel a high degree of confidence that the Settlement falls within a reasonable range of outcomes. Drawing on years of direct interaction with Class Members and review of medical, employment, and insurance records, Class Counsel developed a concrete and informed understanding of the range and distribution of damages across the Class, providing a level of insight that is uncommon in class action settlements.[98] In practical terms, the Settlement Amount reflects the aggregation of individual claims, rather than a global number reached on estimates.

93. Class Counsel also considered whether a partial settlement structure would improve the Class's position. In this case, any attempt to settle with Air Canada (the Defendant most likely to bear the greatest share of fault at trial) and proceed only against the remaining Defendants would have materially increased the Class's risk. The Class would have been

[96] Carroll-Byrne Affidavit at para 28, Exhibit "A"; Hodara Affidavit at para 28, Exhibit "A"; Liboy Affidavit at para 28, Exhibit "A".
[97] Settlement and Fee Approval Affidavit, para 98.
[98] Settlement and Fee Approval Affidavit, paras 99-100.

required to prove liability and an allocation of fault against the remaining Defendants, with a real possibility of an unsuccessful outcome and adverse cost consequences.[99]

94. The Settlement delivers certainty, finality, and immediate practical benefit to Class Members by eliminating the risk and cost inherent in a 45-day trial, that recovery could be further delayed, or that individual damages claims might ultimately be reduced or denied following trial or appeal.[100]

V. DISTRIBUTION PROTOCOL

95. The Plaintiffs seek the Court's approval of the Distribution Protocol, at Schedule "B" to the Settlement Agreement. The Distribution Protocol sets out how compensation will be distributed to Class Members.

96. The Distribution Protocol is structured to avoid the delays and administrative burdens typically associated with class proceedings. Rather than requiring Class Members to submit claim forms or prove entitlement after approval, individual compensation amounts have been determined in advance through individualized damages valuations.[101] Further explanation of the extensive individualized damages valuations are set out above at paragraphs 52-64.

97. The proposed Distribution Protocol allows for streamlined dissemination of Settlement Funds, with the Administrator's role limited to administering payments rather than assessing claims. Identity verification steps are built into the process, and where a Class

[99] Settlement and Fee Approval Affidavit, paras 101-104.
[100] Settlement and Fee Approval Affidavit, para 105.
[101] Settlement and Fee Approval Affidavit, para 46.

Member is a minor, payment will be directed to a parent or legal guardian subject to satisfactory verification.[102]

98. Agreement on individual valuations was reached with counsel for Air Canada and Nav Canada for 104 of the 131 Class Members (approximately 79.4%). For the remaining 27 Class Members where negotiated agreement could not be reached, Class Counsel independently assessed and finalized valuations based on the evidentiary record, established valuation principles, knowledge of negotiated ranges across the class, and relevant judicial guidance. Those valuations represent Class Counsel's reasoned assessment of a fair and reasonable recovery for each unresolved claim.[103]

99. The Distribution Protocol contains no internal appeal or review mechanism. This decision was made deliberately, taking into account the length of the litigation (over 11 years), the importance of finality and closure for Class Members, and the risk that an appeal process would delay compensation for the entire Class. Class Counsel also considered that a third-party adjudicator would be no better positioned than counsel who had conducted extensive individualized negotiations and would cost the class money. Finally, reassessment of individual awards within a fixed global fund could create inconsistency and unfairness by reducing amounts available to other Class Members.[104]

100. For these reasons, Class Counsel recommends the Distribution Protocol as a fair and reasonable framework for distributing Individual Compensation in the best interests of the Class.

[102] Settlement and Fee Approval Affidavit, paras 47-49.
[103] Settlement and Fee Approval Affidavit, paras 51-52.
[104] Settlement and Fee Approval Affidavit, paras 50, 53.

VI. CLASS COUNSEL ENGAGEMENT WITH THE CLASS

101. Throughout the course of this Action, Class Counsel has maintained regular communication with Class Members through written updates, phone calls, and in-person townhall sessions, including an information session held in Halifax shortly after the Action was commenced. To date, Class Counsel has provided approximately 23 written updates to Class Members, covering milestones such as certification, the CVR Production Motion, trial scheduling, and the proposed Settlement, as well as periodic updates to keep Class Members informed of ongoing progress.[105]

102. The three Representative Plaintiffs have received more detailed and frequent communications, including numerous written updates and conversations to discuss the litigation and settlement efforts.[106]

103. In March and April, 2026, Class Counsel provided letters to all Class Members setting out their anticipated net recovery amounts.[107]

VII. NOTICE

(i) Phase I Notice Distribution

104. The Phase I Notice and the Phase I Notice Plan were approved by this Court on March 16, 2026.[108] The Phase I Notice Plan was implemented by the Administrator on March 23, 2026.[109]

[105] Settlement and Fee Approval Affidavit, paras 114-117.
[106] Settlement and Fee Approval Affidavit, para 118.
[107] Settlement and Fee Approval Affidavit, paras 119-122.
[108] Settlement and Fee Approval Affidavit, para 123.
[109] Settlement and Fee Approval Affidavit, paras 124-132.

(ii) Objections

105. As of the date hereof, two Class Members have objected to the terms of the Settlement and the Class Counsel Fee ("Objectors"). The objections are attached to the Settlement and Fee Approval Affidavit at Exhibit "B".[110]

106. Generally, both Objectors take the position that Class Counsel refused to disclose fee and disbursement information prior to the objection deadline, forcing them to object without access to relevant information. One Objector also requests the appointment of an independent Special Counsel (Amicus Curiae) to review the appropriateness of the damages, the fairness of the distribution, and the reasonableness of the fees.[111]

107. With respect to the Settlement Agreement itself, the Objectors contend that Tiered Class Members were not informed that approximately 59 other Class Members were pursuing individualized claims accounting for the vast majority of the $18 million settlement, and that had this information been shared, some Tiered Class Members may have opted out. They further argue that the overall distribution is unfair, as the 72 Tiered Class Members collectively receive only approximately $1,230,000 of the total settlement, and that the Tier structure fails to account for consequential financial losses and long-term economic impacts on affected households. One Objector also objects to Article 30 of the Settlement Agreement, which they argue inappropriately requires Class Members to release Class Counsel and the Administrator from liability.[112]

[110] Settlement and Fee Approval Affidavit, paras 133-134, Exhibit "B".
[111] Settlement and Fee Approval Affidavit, para 135.
[112] Settlement and Fee Approval Affidavit, para 135; Settlement Agreement, s 30.

108. Regarding Class Counsel's fees, the Objectors argue that high contingency fees are unjustified given that liability was never genuinely in dispute and that Class Counsel effectively acted as spectators for 11 years. As a proposed remedy, they request that Class Counsel not be given a fee, or that approximately $1,230,000 be reallocated from Class Counsel's legal fees for equal distribution among the Tiered Class Members.[113]

109. Class Counsel has committed to updating the Court if any further objections are received or withdrawn prior to the approval hearing.[114]

(iii) Phase II Notice

110. The Phase II Notice is attached as Schedule "B" to the Draft Settlement Approval Order. The Phase II Notice Plan is attached as Schedule "C" to the Draft Settlement Approval Order.

111. Within 30 days of the Settlement's Effective Date, the Administrator and Class Counsel will implement the Court-approved Phase II Notice Plan. The Phase II Notice will inform Class Members of the Settlement approval, the Distribution Protocol, the steps required to participate in the distribution, and the approval of the Class Counsel Fees and Disbursements. Importantly, Class Members will be advised that no claim form is required, as individual valuations have already been completed.[115]

[113] Settlement and Fee Approval Affidavit, para 135.
[114] Settlement and Fee Approval Affidavit, para 137.
[115] Settlement and Fee Approval Affidavit, paras 138-139.

112. Notice will be delivered directly to Class Members by the Administrator using the most current contact information available, and indirectly through postings on Class Counsel's websites, a press release, and copies of the notice provided to any person upon request.[116]

VIII. ADMINISTRATION FEES

113. CFM Lawyers was appointed as Claims Administrator by Court Order dated March 16, 2026, and is not seeking a fee for claims administration services. This represents a meaningful benefit to Class Members, as claims administration costs, even for relatively simple administrations, can be significant.[117]

114. The decision for Class Counsel to serve as Administrator is also practically efficient. Throughout the litigation, Class Counsel accumulated substantial file-specific knowledge by developing individualized valuations, corresponding with Class Members, and reviewing medical, employment, and insurance records. Transferring this detailed knowledge to a third-party administrator would require significant additional time and expense, without any corresponding benefit to Class Members. As claims administration costs would ordinarily be paid from the Settlement Amount, the decision that CFM Lawyers will administer the settlement in-house, at no charge, preserves more of the settlement funds for distribution to Class Members.[118]

[116] Settlement and Fee Approval Affidavit, paras 140-141.
[117] Settlement and Fee Approval Affidavit, paras 142-144.
[118] Settlement and Fee Approval Affidavit, para 145.

IX. REPORTING TO THE COURT

115. Under the Settlement Agreement, within six months of the Administration End Date, Class Counsel shall submit to the Court, via letter, a Final Claim Report prepared by Class Counsel that summarizes the notice and administration process.[119]

X. ISSUES

116. There are four main issues to be determined on this motion:

(i) Should the Court approve the Phase II Notice and Phase II Notice Plan?

(ii) Should the Court approve the Settlement Agreement as being fair and reasonable and in the best interests of the Class?

(iii) Should the Court approve the Distribution Protocol?

(iv) Should the Court approve the proposed honoraria of $2,500 to each of the Representative Plaintiffs?

117. For the reasons that follow, Class Counsel respectfully submits that each issue should be answered in the affirmative.

[119]Settlement Agreement, s 13.

XI. LAW AND ANALYSIS

A. Phase II Notice

118. The *Act* specifies certain milestones at which notice to the class is generally required. Subsection 38(5) of the *Act* requires that in approving a settlement the Court consider whether notice should be given.

119. Where notice is given, subsections 22(3) to (5) of the *Act* apply. These provisions leave the type of notice to the discretion of the Court, while enumerating certain factors to consider, including the cost of providing notice and the size of the Class.[120] Notice may be by personal mail, advertising, or by any other means that the Court considers appropriate.[121]

120. It is customary for Notice of Settlement Approval (the "Phase II Notice") to be given to Class Members, and the parties have presented a plan for doing so.

121. The Phase II Notice is in plain language and will inform Class Members of the Settlement approval, the Distribution Protocol, and the approval of the Class Counsel Fee and Disbursements. Importantly, Class Members will be advised that no claim form is required, as individual valuations have already been completed.

122. The Phase II Notice Plan mirrors the same effective methods used for the Phase I Notice Plan. Notice will be delivered directly to Class Members by the Administrator using the most current contact information available, and indirectly through postings on Class Counsel's websites, a press release, and copies of the notice provided to any person upon request. Given Class Counsel's ongoing contact with Class Members throughout the

[120] *Class Proceedings Act*, SNS 2007, c 28 ["*Act*"] at s 22(3).
[121] *Act* at ss 22(4), 22(5).

litigation, and the address updates obtained through the Phase I Notice campaign implemented on March 23, 2026, Class Counsel has a high degree of confidence that direct notice will reach the Class.

B. Settlement Approval

(i) General Principles

123. The requirement for Court approval of a proposed class action settlement is set out in subsections 38(1) and (3) of the *Act* as follows:

> 38 (1) A class proceeding may be settled or discontinued only
>
> (a) with the approval of the court; and
>
> (b) on the terms or conditions the court considers appropriate.
>
> …
>
> (3) A settlement under this Section is not binding unless approved by the court.

124. The legal test for approval of a proposed class action settlement is whether it is fair and reasonable and in the best interests of the class as a whole.[122]

125. A non-exhaustive list of factors this Court may take into account in determining whether to approve a settlement includes:

(a) The likelihood of recovery or success;

(b) The amount and nature of discovery evidence;

[122] *Gallant v The Roman Catholic Episcopal Corporation of Halifax*, 2022 NSSC 347 at para 8 [*Gallant*]; *Sweetland v GlaxoSmithKline Inc.*, 2019 NSSC 136 at para 7 [*Sweetland*].

(c) Settlement terms and conditions;

(d) The recommendation and experience of counsel involved;

(e) Future expense and likely duration of litigation;

(f) Recommendation of neutral parties, if any;

(g) The number and nature of objections;

(h) Presence of good faith and the absence of collusion;

(i) Degree and nature of communications by counsel with class members;

(j) The dynamics of, and positions taken during the negotiations; and

(k) The risk of not unconditionally approving the settlement.[123]

126. In assessing the reasonableness of the settlement, these factors are not necessarily given equal weight, and not all enumerated factors need to be present in each case. The factors are to be treated as a guide in the process, and in a particular case, it is likely that some factors will have greater significance than others.[124]

127. Settlements are a product of compromise and must fall in the "zone or range of reasonableness", not be held to a standard of perfection.[125]

[123] *Gallant, supra* at para 8; *Estey v. Attorney General (Nova Scotia)*, 2025 NSSC 368 [*Estey*] at para 14.
[124] *Gallant, supra* at para 9; *Estey, supra* at para 15.
[125] *Gallant, supra* at para 10; *Estey, supra* at para 16.

128. Where a settlement is reached after arm's length negotiations by experienced counsel, there is a "strong initial presumption that the settlement reached is a fair one."[126]

(ii) Other Airline Accident Class Action Settlements

129. Before applying these general principles to the Settlement Agreement, the Plaintiffs refer to several airline accident class action settlements throughout Canada. Each settlement reflects that action's unique strengths, weaknesses, and dynamics, and a comparison ought not to be determinative of the reasonableness of this Settlement. Nonetheless, settlements in similar contexts may provide instructive benchmarks. They demonstrate a range of settlement amounts and examples of claims and distribution processes that may assist the Court in evaluating the fairness and reasonableness of the proposed Settlement.

(a) Somwar v Fly Jamaica, 2024 ONSC 209

130. In 2024, the Ontario Superior Court of Justice approved a class action settlement arising from an accident involving Fly Jamaica Flight OJ 256, which departed from Georgetown Cheddi Jagan International Airport in Guyana bound for Toronto Pearson International Airport and ran off the runway, coming to rest beyond the Airport perimeter fence. The aircraft sustained substantial damage and passengers suffered injuries.[127]

131. Out of the 120 passengers onboard, 31 settled directly with Fly Jamaica and 5 opted out of the action. As a result, there were 84 class passenger class members who received benefits under the settlement. The settlement also included payment to a small number of family members of passenger class members.

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[126] *Gallant, supra* at para 11; *Estey, supra* at para 16.
[127] *Somwar v Fly Jamaica Airways Ltd.*, 2024 ONSC 209 [*Somwar*] at para 1.

132. As in this Action, the *Montreal Convention* governed the Plaintiffs' claims against the airline, Fly Jamaica. The claim also named The Boeing Company and Mexicana MRO S.A. de C.V. The Defendants agreed to pay an all-inclusive sum of $5,550,000.00 as an all-inclusive settlement covering all legal fees, disbursements, and subrogated costs, with the total amount reflecting the assessed value of each individual passenger's claim.[128]

133. In approving the settlement, the Court found that the proposed terms were very reasonable, having regard to the likelihood of success, the extent of the investigation and evidence, the experience of Class Counsel, the likely expense of continued litigation, and the good faith, arms-length nature of the negotiations. The Court also noted the litigation risks arising from the liability limitations applicable to airlines under the *Montreal Convention*.[129]

(b) Abdulrahim v. Air France, 2011 ONSC 398

134. This class action arose from the crash of Air France Flight 358, travelling from Paris to Toronto, which overran the runway at Pearson International Airport on August 2, 2005. All 297 passengers and crew were able to evacuate before the aircraft was destroyed by fire.[130]

135. Of the 297 passengers, 47 initially opted out of the class action (including two passengers whose opt-outs were later rescinded by the Court), and 68 others settled with Air France and signed releases before certification. However, Class counsel took the position those releases did not bind the other defendants. Upon reviewing those settlements, class counsel determined that most of the 68 settling passengers were undercompensated and would be

[128] *Somwar, supra* at para 2.
[129] *Ibid* at paras 21-22.
[130] *Abdulrahim v Air France,* 2011 ONSC 398 [*Abdulrahim 2011*] at para 4.

entitled to additional compensation from the non-Air France defendants, while some were adequately compensated. The remaining 182 passengers had not settled with any defendant before the action commenced.[131]

136. In January, 2011 the Ontario Superior Court of Justice approved a final settlement with Nav Canada and Air France, which resulted in the conclusion of the class action for the total sum of $20,750,000, all inclusive.[132]

137. In that case, class counsel assessed the claim of each class member and was reasonably confident that each class member would receive approximately 80% of his or her recoverable damages out of the available fund after payment of his or her share of Class Counsel fees and other expenses. The Court held that the fact that every class member would receive a very substantial indemnity for his or her damages was an extremely important factor. The Court also found that it was highly significant that the payments would be made to class members within the very near future and without a complicated claims process, as Class Counsel has already done the heavy lifting in that regard.[133]

138. The claims process in *Air France* was modeled on the process that was approved by Cullity J. in *Nunes v. Air Transat A.T. Inc.,* 2005 CanLII 21681 (ON SC), discussed below.[134]

[131] *Ibid* at para 7.
[132] *Ibid* at para 3; Nav Canada and Air France agreed to pay the class $7,100,000.00, plus accrued interest, which, along with the other partial settlements formerly approved by the Court, brought the total all-inclusive settlement in the proceeding to $20,750,000.00.
[133] *Ibid* at para 27.
[134] *Ibid* at para 28.

(c) Nunes v Air Transat A.T. Inc., 2005 CanLII 21681 (ON SC)

139. This decision of the Ontario Superior Court approved a class action settlement related to Air Transat Flight 236, which ran out of fuel over the Atlantic in 2001 and made an emergency landing in the Azores Islands.[135]

140. The settlement fund of $7,650,000 was for distribution among class members for damages including psychological injuries and loss of income, with contributions from Air Transat (the operator), Airbus (the aircraft manufacturer), and Rolls-Royce (the engine manufacturer).[136]

141. Out of 291 passengers, 115 either opted out or entered into individual settlements with Air Transat, leaving 176 class members to share in the settlement benefits.[137]

142. The Ontario Superior Court approved the settlement as fair, reasonable, and in the class's best interest, citing significant litigation risks for Plaintiffs: most claims involved psychological harm not clearly covered as "bodily injuries" under the then-applicable *Warsaw Convention*, weakening recovery prospects. Class Counsel also faced difficulty in their claims against Airbus and Rolls-Royce due to evidentiary challenges, such as proving design defects or that components deviated from accepted standards.[138]

[135] *Nunes v Air Transat AT Inc,* 2005 CanLII 21681 (ON SC) [*Nunes*] at para 2.
[136] *Ibid* at paras 2-3.
[137] *Ibid* at para 3.
[138] *Ibid* at para 10.

(d) Common Factors Considered in Comparable Settlements

143. Each of these three aviation class settlements were approved by the Court based on consideration of similar factors as are relevant in the assessment of this proposed Settlement:

(i) **Likelihood of Success and Litigation Risks:** Each court weighed the likelihood of success in the action and the significant litigation risks faced by the plaintiffs if the cases were to proceed to trial. Similar to this Action, risks included the *Montreal Convention*/*Warsaw Convention* and the interpretation of "bodily harm"[139] and evidentiary risks in establishing fault against the non-airline defendants.[140]

(ii) **Experience and Recommendation of Class Counsel:** The courts placed significant weight on the recommendations and experience of Class Counsel, deferring to their competence, diligence, and judgment in assessing litigation risks and negotiating the settlements.[141]

(iii) **Extent of Investigation and Evidence:** The thoroughness of the investigation and the evidence gathered by Class Counsel were crucial factors. In *Nunes*, Class Counsel obtained questionnaires and medical reports from nearly all class members.[142] Similarly, in *Abdulrahim*, Class Counsel made a thorough assessment of each class

[139] *Nunes, supra* at para 10; *Somwar, supra* at para 21.
[140] *Abdulrahim 2011, supra* at para 31.
[141] *Nunes, supra* at para 10; *Abdulrahim 2011, supra* at para 31; *Somwar, supra* at para 21.
[142] *Nunes, supra* at para 11.

member's claim.[143] In *Somwar*, the overall settlement amount reflected individualized assessments of damages claims.[144]

(iv) **Arms-Length Bargaining and Absence of Collusion:** The courts confirmed that the settlements resulted from extensive, hard-fought, and arm's-length negotiations between experienced counsel, with no suggestion of collusion.[145]

(v) **Future Expense and Duration of Litigation:** A common benefit highlighted was that the settlements brought finality to the litigation, avoiding years of further proceedings with uncertain outcomes and significant expense.[146]

(iii) Consideration of Relevant Factors

(a) Likelihood of recovery or success; future expense and likely duration of litigation; risk of not unconditionally approving the settlement

144. Three relevant factors - the likelihood of recovery or success; future expense and likely duration of litigation; and the risk of not unconditionally approving the settlement - all engage the comparison of the proposed Settlement with the alternative of continuing to litigate.

145. If the Action continued, two major stages would remain ahead for Class Members: the common issues trial and, if successful there, the resolution of individual issues. Both stages will continue in an adversarial setting. They will bring continued uncertainty of results and a great deal of additional time and expense.

[143] *Abdulrahim 2011, supra* at para 27.
[144] *Somwar, supra* at para 14.
[145] *Nunes, supra* at para 10; *Abdulrahim 2011, supra* at para 30; *Somwar, supra* at para 21.
[146] *Nunes, supra* at para 10; *Abdulrahim 2011, supra* at para 32; *Somwar, supra* at para 21.

146. The common issues trial would have addressed the certified liability issues against all five Defendants, each of which presented meaningful litigation risks, described above. While Class Counsel remains confident in the strength of the case, developed through documentary discovery, examinations for discovery, and expert reports, Class Counsel's experience in aviation and product liability class actions informed a realistic assessment of the risks of proceeding to trial.

147. As explained, against Air Canada this risk was not whether it would be liable at all. Rather, the central risk for Convention Class Members was whether purely psychological injuries qualified as "bodily injury" under Article 17 of the *Montreal Convention*. Canadian courts have generally required a causal link to bodily injury for recovery of psychological harm under Article 17.[147] An adverse ruling on that question would have left Convention Class Members without any recourse against Air Canada for purely psychological injuries.

148. Against Airbus, the Plaintiffs faced the challenge of establishing defective design and procedural failures in the face of a defence that Air Canada was already not following

[147] "Bodily injury", as used in the *Montreal Convention*, has commonly been interpreted around the world to exclude psychological injuries that are not caused by physical injuries. As summarized by Andrew Harakas and Robert Lawson, K.C. in "Article 17: Death and injury of passengers – damage to baggage", *The Montreal Convention: A Commentary* (Edward Elgar Publishing, 2023) at para 17.18, "there is a considerable weight of high authority in common law jurisdictions that 'bodily injury' equates to *physical* injury." The trend of high authority began with the US Supreme Court decision *Eastern Airlines v. Floyd* 499 US 530, which interpreted "bodily injury" under the *Warsaw Convention*. There have been some international decisions that go against the trend. In *Doe v. Etihad Airways*, the U.S. 6th Circuit Court of Appeals held that, so long as a passenger suffered some physical injury, they could recover for psychological injury that was not causally connected to the physical injury. In *BT v Laudamotion GmbH* (C-111/21), the European Court of Justice held that a passenger could recover for psychological injury, so long as it was severe enough to require medical treatment, even in the absence of physical injury. However, no Canadian court has accepted either of these decisions to date. Canadian courts, including the Quebec Court of Appeal, have followed other decisions which hold that psychological injury is not compensable unless it is related to physical injury. See *Plourde c. Service aérien FBO inc. (Skyservice)*, 2007 QCCA 739; *O'Mara v. Air Canada*, 2013 ONSC 2931; *Lukács v. United Airlines Inc. et al.*, 2009 MBCA 111 at para 11.

Airbus procedures, and that there was no clear industry standard that made it clear Airbus' design was unreasonably dangerous.[148]

149. Nav Canada, HIAA, and Transport Canada each presented their own causation and liability hurdles. Nav Canada and HIAA both would have argued that they did not breach the standard of care, and if they did their breaches did not cause the crash. HIAA would have contested causation on the emergency response and generator failure theories. Transport Canada's exposure was narrowed by Justice Boudreau's refusal to certify regulatory negligence claims, leaving only occupiers' liability claims that were further complicated by the lease agreement's indemnity and release provisions.[149]

150. Class Counsel explored whether partial settlement options, including a *Pierringer* agreement, would improve the Class' position, but concluded that it would not. Given that most fault was expected to be allocated to Air Canada, a partial settlement with Air Canada would have left the Class to prove liability and allocation against the remaining Defendants alone. An unsuccessful result would also have exposed the Class to adverse cost consequences. The global settlement with all Defendants was ultimately determined to be a more certain and favourable outcome for the Class.[150]

151. Even if the common issues were resolved in favour of the Plaintiffs, there would still need to be an assessment of individual Class Members' damages.

152. Under the Litigation Plan attached as Schedule "C" to the Amended Order for Certification, the process for resolving individual Class Member damages was to be discussed and agreed

[148] Settlement and Fee Approval Affidavit, paras 68-71.
[149] Settlement and Fee Approval Affidavit, paras 74-76, 78-79, 82-83.
[150] Settlement and Fee Approval Affidavit, paras 101-102.

upon by the parties following the liability trial, with each Class Member required to advance their own individual claim to establish their damages.[151]

153. This Settlement is grounded in individualized valuations. The quantum was reached on the basis of arm's-length negotiations with Air Canada and Nav Canada on the individual valuation of 104 of 131 Class Member claims (approximately 79.4%).[152] Those negotiated outcomes provide a practical check that the valuations are within a reasonable range. For the remaining 27 claims where agreement could not be reached, those valuations were finalized by Class Counsel using the same valuation approach applied throughout the negotiations, informed by outcomes negotiated for similarly situated Class Members and judicial guidance on damages ranges.[153]

154. There is nothing to suggest that proceeding through years of further litigation would produce greater recovery to the Class. In fact, achieving a comparable quantum to this Settlement at a later stage, which is uncertain, may net individual Class Members less in the end, with increased disbursements of a 45-day trial, potential appeals, potential adverse costs, and a higher contingency fee for the time and risk invested in trial.

155. Rejecting the proposed Settlement would expose Class Members to further, and potentially significant, delay. Given that more than a decade has passed since the crash, an individual assessment process years down the road would carry its own risks and practical difficulty. The further removed the assessments are from the crash, the harder it may be for some Class Members to prove the persistence and extent of symptoms, the need for ongoing

[151] Settlement and Fee Approval Affidavit, para 167, Exhibit "C", Schedule "C".
[152] Settlement and Fee Approval Affidavit, para 51.
[153] Settlement and Fee Approval Affidavit, para 52.

treatment, and the impact on work and daily functioning. It would also increase the likelihood of intervening events and alternative explanations becoming issues, which in turn would add time, cost, and uncertainty to the individual issues stage.

(b) Settlement Terms and Conditions

156. The Court's role in reviewing a settlement is not to renegotiate the deal. While it is within the power of the Court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement, it is not in the court's jurisdiction to modify the terms of the negotiated settlement.[154] The Court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a "zone of reasonableness".[155]

157. The Settlement Agreement provides a comprehensive resolution to the settlement of all 131 Class Member claims. As explained, the total settlement amount of CAD $18,075,000 was arrived at following a detailed, individualized assessment process and negotiations over many years.

158. Both Tiered and Non-Tiered Class Members are subject to a modest, pro-rata contribution toward the Court-approved Class Counsel Fee and Class-wide disbursements. Class Counsel estimates 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 the Class Counsel Fee and Disbursements. This level of recovery is higher than the 80% recovery

[154] *Cass v. WesternOne Inc.*, 2018 ONSC 4794 at para 86; citing *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (S.C.J.) at para 10.
[155] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, 2005 CanLII 8751 (ON SC) at para 115.

approved by the Court in *Abdulrahim*, which the Court cited in that case as an "extremely important factor" in approving the settlement.[156]

159. The Settlement terms are also designed to be workable and efficient in implementation. The Distribution Protocol sets out straightforward identity verification steps prior to the distribution of Individual Compensation to Class Members. There is no claim form, post-approval claims process, or need for Class Members to compile or prove anything. In practical terms, the Settlement can be implemented promptly after approval through direct payment to Class Members, with limited administrative delay.[157]

160. The Settlement structure will accomplish the goal of providing fair and reasonable compensation to Class Members in an economically feasible way through a straightforward direct payment process carried out by the Administrator, one of the Class Counsel firms, at no cost to the Class.

(c) Amount and nature of discovery evidence; recommendation and experience of counsel; presence of good faith, arm's length bargaining

161. In considering these factors, it is relevant that the settlement discussions were both extensive and protracted. Negotiations began in 2018. An agreement in principle was reached in September, 2025. There was another approximately six months of negotiations to finalize the Minutes of Settlement and Settlement Agreement.[158]

162. The primary remaining step in the common issues litigation was the trial scheduled to begin in January, 2026. The Parties had completed documentary production and discoveries.

[156] *Abdulrahim 2011, supra* at para 27.
[157] Settlement and Fee Approval Affidavit, paras 46-48.
[158] Settlement and Fee Approval Affidavit at para 254.

Class Counsel obtained detailed information from all Class Members except for the two Class Members whom Class Counsel has never been able to make contact with. All parties had provided their liability expert reports and rebuttal reports. As a result, the knowledge base of counsel about the nature and extent of Class Members' injuries, as well as the liability risks, is very high.

163. In these circumstances, the Parties were well equipped to evaluate the risks and rewards of further litigation. The evidentiary record permitted a grounded evaluation of both liability exposure and damages.

164. In particular, Class Counsel had an unusually high knowledge base about the quantum of the damages across the class, based on the individualized information obtained from Class Members.

165. This level of knowledge and preparedness is consistent with the circumstances in which courts have recognized settlements as being informed and reliable. In *Estey v. Attorney General (Nova Scotia),* Associate Chief Justice Jamieson emphasized the significance of a well-developed evidentiary record at the time of settlement in an action commenced in May 2022 and resolved in April 2025:

> 18 This settlement occurred a number of years into the litigation process and at a stage where the knowledge base of counsel was very high. As stated in *Klegg v. HMQ Ontario*, 2016 ONSC 2662, at para 34:
>
> > Their [the parties'] knowledge base going into the mediation was as high as it ever would be, short of completing the trial and reading the reasons of the trial judge. In short, the mediation that led to this settlement was based on layers and layers of actual, and not just

> imagined, information about the risks and rewards of further litigation.[159]

166. The same is true, perhaps even to a greater extent, here.

167. Class Counsel are highly experienced in class actions and mass tort litigation.[160] They have successfully negotiated settlements of numerous class action files, including aviation cases.

168. There is a strong presumption of fairness when a proposed class settlement, negotiated at arm's length by Class Counsel is presented to the court for approval and in this case, there is no reason to challenge or otherwise rebut that presumption.[161]

169. In light of the legal challenges faced by the Plaintiffs, and the inevitable delay associated with continued litigation, this Settlement was recommended by Class Counsel to the Plaintiffs, and this recommendation was accepted by them as fair, reasonable, and in the best interests of the Class.[162]

(d) Objections

170. Two objections have been received as of the date of the filing of this Brief. The Objection Deadline was April 23, 2026.[163]

171. The two objections received by Class Counsel address both the Settlement and Class Counsel Fee.

172. Class Counsel provides the following comments to the content of the objections:[164]

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[159] *Estey, supra* at para 18.
[160] Settlement and Fee Approval Affidavit, paras 258-272.
[161] *Gallant, supra* at paras 11-12.
[162] Carroll-Byrne Affidavit, para 21; Hodara Affidavit, para 21; Liboy Affidavit, para 21.
[163] Settlement and Fee Approval Affidavit, paras 133-134.
[164] These are paraphrased. The Objections can be found at Settlement and Fee Approval Affidavit, Exhibit "B".

(i) **Class Counsel refused to disclose fee and disbursement information before the objection deadline, forcing them to object without access to relevant information**: Class Counsel advised both Objectors that Class Counsel would provide the Court with any addendum to their objection should they wish to provide one after reading the filed Settlement and Fee Approval Materials.

(ii) **Article 30 of the Settlement Agreement improperly requires Class Members to release Class Counsel and the Administrator from liability:** Section 30 of the Settlement Agreement releases the Administrator of liability in relation to the Settlement Agreement, except with leave of the Court. This provision is appropriate and balanced given the opportunity to seek leave of the Court.

(iii) **A high contingency fee is unjustified given that liability was never genuinely in dispute and that Class Counsel played a limited role over the eleven years of litigation:** Objections relating to the proposed legal fee are discussed further in the Fee Approval Brief. However, as it relates to liability, as described above, the Plaintiffs faced considerable liability risks at the common issues trial. There were further risks for Class Members in the individual assessments of their damages if successful at the liability trial.

(iv) **The Tier structure is unfair because Tiered Class Members collectively receive only approximately $1,230,000 of the total settlement, and the Tier structure fails to account for consequential financial losses and long-term economic impacts. Tiered Class Members were not informed that approximately 59 other Class Members were pursuing individualized claims that account for the vast majority**

of the $18 million settlement, and that this omission may have affected some Tiered Class Members' decision not to opt out: Every Class Member's claim was individually assessed. Individual valuation proposals were prepared based on the information provided by each Class Member, including available medical, employment, and insurance records, and those proposals were negotiated on a claim-by-claim basis. The Tier ranges did not replace individualized assessment. They emerged during negotiations because a significant number of individually assessed claims fell within similar valuation ranges. Claims that did not fall within those ranges were valued outside the Tier framework, based on their individualized features.

Class Counsel was not in a position to provide Class Members with the negotiated valuation outcomes of other Class Members. Those valuations are personal to the individual Class Member and were negotiated on the basis of that individual's records and circumstances.

Class Counsel agrees that the Tier structure does not account for consequential financial losses and long-term economic impacts, however it is not designed to do so. Class Members who provided evidence of ongoing injury, income loss, reduced earning capacity, or other long-term impacts were assessed outside of the Tier damages ranges.

173. On this last point, the Court's reasoning in *Martell v. Nova Scotia (Attorney General)* is applicable. Responding to concerns that compensation levels were inadequate and uneven as between class members, Justice Rosinski emphasized that:

> 29 However, by its nature, a class action does not intend to provide precisely tailored individual compensation to class members.

> 30 A class action comprised of many members inevitably requires some common legal position regarding the issues in dispute between the parties, including creating categories of claimants and assigning compensation based on those categories, in light of the total compensation that the Defendants are prepared to pay.
>
> 31 The Class Members rely upon their legal counsel, and specifically their Representative Plaintiffs to "get the best deal" for their membership at large. Such decisions involve complex and conflicting considerations.[165]

174. The same principles apply here, but with an important distinction. While the use of categories or ranges is a common feature of class action settlements, the present Settlement was in fact grounded in individualized assessment. In that sense, the Settlement reflects a high degree of individualization within a collective framework, while still achieving a resolution that is evidence-based, and fair to the class as a whole.

175. The Court will be informed by Class Counsel if any objections are received after the Objection Deadline.

C. Distribution Protocol Approval

176. The Plaintiffs request that this Court approve the proposed Distribution Protocol, which is Schedule "B" to the Settlement Agreement.

177. The analysis to be applied in approving a distribution protocol is the same as that used in deciding whether to approve a settlement: a proposed distribution of settlement funds will be appropriate if, in all the circumstances, the plan of distribution is fair, reasonable, and in the best interests of the class.[166]

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[165] *Martell v. Nova Scotia (Attorney General)*, 2026 NSSC 36 at paras 29-31.
[166] *Zaniewicz v. Zungui Haixi Corporation,* 2013 ONSC 5490 at para 59.

178. The Distribution Protocol reflects a high degree of individualization. Rather than applying a formulaic or uniform allocation, individualized damages valuations were conducted for each of the 131 Class Members. Agreement on those valuations was reached with defence counsel for approximately 79.4% of the class (104 of 131 members), lending those amounts the credibility of an adversarial negotiation process. For the remaining 27 Class Members where agreement could not be reached, Class Counsel independently assessed and finalized valuations drawing on the evidentiary record, established valuation principles, knowledge of the negotiated ranges across the class, and relevant judicial guidance. This approach ensures that each Class Member's individual circumstances were considered.

179. This valuation and distribution approach was similarly endorsed and approved by the Courts in *Nunes, Abdulrahim, and Somwar*, discussed above. In all three of these cases, class counsel proposed distributing settlement funds to class members based on individualized valuations arrived at by class counsel after interviewing class members, reviewing the available evidence, and consulting experts.[167]

180. The absence of an internal appeal or review mechanism warrants scrutiny under the test, but the rationale offered is sound. Class Counsel made a deliberate and reasoned decision to omit such a mechanism, taking into account the length of the litigation (over 11 years), the importance of finality for Class Members, and the structural risk that reassessment of individual awards within a fixed global fund could reduce amounts available to other Class Members, thereby creating inconsistency and unfairness across the Class as a whole. The concern that a third-party adjudicator would be no better positioned than Class Counsel,

[167] *Nunes* at para 11; *Abdulrahim* at para 27; *Somwar* at para 14; *Abdulrahim v. Air France*, 2009 CanLII 72086 (ON SC) ("*Abdulrahim 2009"*) at paras 21, 26.

who conducted the individualized negotiations and understood the risks of the Action, further supports this choice.[168]

181. The distribution protocols approved by the Courts in *Abdulrahim* and *Somwar* did have review mechanisms built in should class members wish to challenge their individual valuation as assessed by class counsel, however no class members asked for a review of their individualized valuations in either case.[169]

182. The Distribution Protocol is structured to minimize administrative burden and delay, which supports its approval. Class Members are not required to submit claim forms or prove entitlement after approval - a feature that eliminates a common source of friction, cost, and delay in class action distributions. The Administrator's role is limited to administering payments rather than assessing claims. Identity verification steps are built into the process, and appropriate protections are in place for the one minor Class Member, whose payments will be directed to their parent or legal guardian subject to satisfactory verification.[170]

183. The Distribution Protocol serves the best interests of the Class by prioritizing timely, certain, and individualized compensation. Given the duration of the litigation, the interests of Class Members are best served by a protocol that delivers compensation efficiently and with finality. Class Counsel's recommendation of the Distribution Protocol, grounded in their extensive involvement in the individualized negotiations and their knowledge of the evidentiary record, further supports the conclusion that the protocol advances the collective interests of the Class.

[168] Settlement and Fee Approval Affidavit, paras 50, 53.
[169] Settlement and Fee Approval Affidavit, para 54.
[170] Settlement and Fee Approval Affidavit, para 49.

184. In all the circumstances, the Distribution Protocol satisfies the applicable test. It reflects an individualized approach to valuation that is streamlined and administratively efficient, and prioritizes finality and prompt compensation for Class Members.

D. Representative Plaintiff Honoraria

185. Class Counsel respectfully request that Ms. Carroll-Byrne, Mr. Hodara, and Mr. Liboy be awarded modest honoraria of $2,500 each to recognize the meaningful contributions they have made to this case. They retained counsel, swore affidavits, attended examinations for discovery and communicated with Class Counsel for the duration of the Action. Class Members have been the beneficiaries of their efforts, as they have been afforded recourse for the same subject matter without the need to submit to the same time commitment and litigation process.

186. The modest honoraria sought, if approved, would be paid out of the Settlement Amount.

187. This Court's approach to the matter of honoraria is to approve them if there are exceptional circumstances to justify doing so. Relevant factors to consider in assessing whether exceptional circumstances exist include: active involvement in the initiation of the litigation and retainer of counsel; significant personal hardship or inconvenience in connection with the prosecution of the litigation; time spent and activities undertaken in advancing the litigation; communication and interaction with other class members; and participation at various stages in the litigation, including discovery and settlement negotiations.[171]

[171] *Sweetland, supra* at paras 41, 42; *Purvis v Dell Technologies Inc et al*, Hfx No. 500912, Unofficial Transcript of the Unreported Reasons of Justice John A. Keith (NSSC, 27 February 2025) ("Purvis Transcript") at pp 12-14. For

188. Approval of the Court may be provided where a representative plaintiff has committed significant time to the litigation and suffered some degree of personal hardship or prejudice.[172]

189. In *Sweetland*, *supra*, Class Counsel sought approval of payment, out of the settlement funds, of honoraria totaling $25,000 to be distributed to all of the Plaintiffs in the 18 Avandia proceedings commenced in Canada, including Mr. Sweetland and Ms. Fontaine, the two representatives in the Nova Scotia action. The Honourable Justice Wood (as he then was) awarded a $3,000 honorarium to Mr. Sweetland, who had been actively involved in the litigation since its initiation in 2009, provided affidavit evidence, and produced private medical and pharmaceutical records for the defendants' review. He declined to award an honorarium to Ms. Fontaine, who had been added as a representative plaintiff very shortly before settlement approval.[173]

190. More recently, in approving a class action settlement arising from the theft of data, the Honourable Justice John Keith approved the award of a $3,000 honorarium to the sole representative plaintiff, Mr. Christopher Purvis.[174] Mr. Purvis was responsible for initiating an investigation into the matter by the Office of the Privacy Commissioner of Canada. This fact satisfied Justice Keith that there was an exceptional circumstance to warrant approval of the honorarium.[175] The settlement had been reached after a contested certification

context, see *Purvis v Dell Technologies Inc et al*, Hfx No. 500912, Fee Approval Order; *Purvis v Dell Technologies Inc et al*, Hfx No. 500912, Settlement Approval Order.

[172] *Sweetland, supra* at paras 41, 42.

[173] *Ibid* at paras 42, 44.

[174] Purvis Transcript, *supra* at p 14.

[175] *Ibid* at p 13.

motion was argued but before a decision was released. The action had reached the stage of document disclosure and examinations for discovery.

191. Nova Scotia courts have similarly recognized that honoraria are warranted where representative plaintiffs have made sustained and meaningful contributions to the advancement of the litigation, particularly over an extended period. In *Martell v. Nova Scotia (Attorney General)*, the Court approved honoraria of $15,000 to each of the representative plaintiffs, emphasizing their "courageous decision" to come forward and their commitment over more than a decade to advancing the litigation for the benefit of a vulnerable class.[176]

192. Likewise, in *Estey v. Attorney General (Nova Scotia)*, the Court endorsed the governing principle that honoraria are appropriate where representative plaintiffs have "committed significant time to the litigation and suffered some degree of personal hardship or prejudice," citing *Sweetland*. In approving a $15,000 honorarium, the Court emphasized the representative plaintiff's sustained involvement over a multi-year period (the action commenced in 2022 and resolved in 2025), the personal nature of the disclosures required, and the central role he played in achieving a settlement that enabled broad class recovery through an efficient and confidential process.

193. In other class actions in this province, Judges have granted honoraria when approving class action settlements, but have done so without offering reasons, including in the following matters:

[176] *Martell, supra* at para 8.

(a) *Rodrick Desborough v. Wright Medical Technology Inc. et al*, Hfx. No. 355381 (June 26, 2020) (Arnold, J.) [unreported]: Settlement Order authorized payment of $1,500 to the Representative Plaintiff;[177] and

(b) *Dawn Rae Downton v. Organigram Inc. et al*., Hfx No. 460984 (August 31, 2022) (A.E. Smith, J.) [unreported]: Settlement Order authorized payment of $5,000 to the Representative Plaintiff.[178]

194. These decisions reflect a consistent approach: honoraria are justified where representative plaintiffs have meaningfully advanced the litigation, assumed personal burdens, and contributed to a result that benefits the class as a whole.

195. From the time of the initial evaluation of the potential action by Class Counsel to the present time, Ms. Carroll-Byrne, Mr. Hodara, and Mr. Liboy have continuously and reliably contributed to the advancement of this litigation on behalf of the Class. A non-exhaustive list of the contributions Ms. Carroll-Byrne, Mr. Hodara, and Mr. Liboy have made over the course of these approximately eleven years includes:

(a) Providing Class Counsel with information for the drafting of the original Notice of Action and Statement of Claim;

(b) Reviewing the original Notice of Action and Statement of Claim, as well as subsequent amendments;

[177] *Rodrick Desborough v Wright Medical Technology Inc et al,* Hfx. No. 355381, Settlement Approval Order.
[178] *Dawn Rae Downton v Organigram Inc et al*, Hfx No. 460984, Settlement Approval Order.

(c) Providing detailed information for the drafting of the affidavits in support of the certification motion, reviewing drafts, providing input, and reviewing edits, and executing the affidavit once satisfied with its contents;

(d) Attending an out-of-court discovery-examination during which they were each asked questions relating to their experiences of the crash; and

(e) Communicated with Class Counsel on numerous occasions to provide information, discuss the progression of the case, prepare for discovery examinations on their evidence, and discuss and provide instructions on the exchange of numerous settlement proposals.[179]

196. Over the course of approximately a decade, Ms. Carroll-Byrne, Mr. Hodara and Mr. Liboy have demonstrated enduring commitment to the advancement of the Action. By putting themselves forward to lead the litigation, they have borne a disproportionate burden on behalf of the Class.

197. Class Counsel submits that the requested honoraria of $2,500 for Ms. Carroll-Byrne, Mr. Hodara and Mr. Liboy are reasonable and proportionate in light of their efforts and the benefit achieved for the Class. Such honoraria appropriately acknowledge their contributions to the success of this matter.

[179] Carroll-Byrne Affidavit, paras 10-18; Hodara Affidavit, paras 10-18; Liboy Affidavit, paras 10-18.

XII. ORDER REQUESTED

198. For the reasons set out above, the proposed Settlement falls well within a reasonable range of outcomes for this Class. Class Counsel are confident that resolving this matter pursuant to the terms of the Settlement Agreement is fair and reasonable and in the best interests of the Class.

199. Class Counsel respectfully request an Order: (i) approving the Settlement Agreement and its schedules, including the Distribution Protocol, as being fair, reasonable and in the best interests of the Class; (ii) approving the Phase II Notice and Phase II Notice Plan; (iii) dismissing the Action with prejudice, to take effect on the Effective Date; and (iv) approving the payment of honoraria to the Representative Plaintiffs.

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

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SCHEDULE "A"
LIST OF AUTHORITIES

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25. *Zaniewicz v. Zungui Haixi Corporation,* 2013 ONSC 5490

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26. *Carriage by Air Act*, RSC 1985, c C-26

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

Other Court Materials

28. *Dawn Rae Downton v. Organigram Inc et al*, Hfx No. 460984, Settlement Approval Order

29. *Purvis v. Dell Technologies Inc et al*, Hfx No. 500912, Fee Approval Order

30. *Purvis v. Dell Technologies Inc et al*, Hfx No. 500912, Settlement Approval Order

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