

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF THE *INSURANCE COMPANIES ACT*, S.C. 1991, c. 47, AS AMENDED,
AND THE *MUTUAL PROPERTY AND CASUALTY INSURANCE COMPANY WITH NON-
MUTUAL POLICYHOLDERS CONVERSION REGULATIONS*, SOR/2015-168

IN THE MATTER OF A PLAN OF CONVERSION OF
ECONOMICAL MUTUAL INSURANCE COMPANY

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

**FACTUM OF THE RESPONDENT,
ECONOMICAL MUTUAL INSURANCE COMPANY**

(MOTION TO APPOINT COUNSEL FOR ELIGIBLE POLICYHOLDERS)

September 12, 2016

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PART I - NATURE OF THE MOTION

A. Motion to Appoint Counsel for Eligible Policyholders

1. Economical Mutual Insurance Company (“**Economical**”) has initiated a “demutualization process” pursuant to the *Mutual Property and Casualty Insurance Company with Non-Mutual Policyholders Conversion Regulations*, SOR/2015-168 (the “**Conversion Regulations**”).¹

2. While Economical is demutualizing in order to pursue its long-term business objectives, demutualization also results in financial benefits for policyholders. In particular, if demutualization succeeds, there would be a distribution of the newly created shares arising from the demutualization (or cash raised from selling those shares in an initial public offering) to the eligible policyholders of Economical and others they may designate. Given Economical’s book value of \$1.80 billion as of March 31, 2016,² the financial benefits from an initial public offering are substantial.

3. The Conversion Regulations provide that the two classes of eligible policyholders – mutual and non-mutual – will negotiate, by committees acting on their behalf, to determine the allocation of any such financial benefits. An important step in this process is the appointment by this Court of counsel to represent each of the two classes of eligible policyholders. On these motions, the Court is to determine which Counsel Applicant will be appointed as counsel to each class.

4. Pursuant to the Initial Order issued in this proceeding on July 15, 2016, counsel seeking appointment as counsel for either group of eligible policyholders were to bring a Counsel

¹ All capitalized terms not otherwise defined in this factum have the meanings given to them in the Affidavit of David Wilson, sworn June 7, 2016 (the “**Wilson Affidavit**”), and in the Initial Order, attached as Exhibit “A” to the Affidavit of Antonetta Murray, sworn September 6, 2016 (the “**Murray Affidavit**”).

² Wilson Affidavit, para. 36, Application Record Tab 2, p. 31.

Appointment Motion, returnable September 19, 2016, and to serve a motion record setting out various matters by August 12, 2016. Six law firms brought Counsel Application Motions and served motion records by the August 12, 2016, deadline in the Initial Order. Thornton Grout Finnigan LLP seeks to represent either class of policyholders; McCarthy Tetrault LLP seeks to represent the mutual policyholders; and three law firms (Gowling WLG (Canada) LLP, Siskinds LLP, and Torys LLP) seek to represent the non-mutual policyholders. Goodmans LLP, the sixth law firm, abandoned its motion.

5. The *Conversion Regulations* and the Initial Order provide an opportunity for eligible policyholders to deliver written objections to the appointment of Counsel Applicants. Seven objections were received, which are summarized below.

6. Economical does not take a position with respect to the selection of counsel for either class of policyholder. In this factum, Economical provides some background facts and some observations with respect to certain of the Counsel Applicants' applications, for the assistance of and consideration by this Court.

PART II - SUMMARY OF FACTS

A. The Demutualization Process

7. The demutualization process under the *Conversion Regulations* is lengthy and complex, involving participation by multiple stakeholders, regulatory reviews at key stages, and three policyholder votes. The *Conversion Regulations* prescribe four specific phases.

8. Phase one of the demutualization process required the board of directors to pass a resolution recommending demutualization in order to initiate the process. Economical's board passed this resolution on November 3, 2015.

Wilson Affidavit, para. 25, Application Record Tab 2, p. 26

9. Phase two required a meeting of eligible mutual policyholders to vote on whether to proceed to the current phase of the process (which is to negotiate with eligible non-mutual policyholders on the Allocation). This first policyholder meeting occurred on December 14, 2015, and the eligible mutual policyholders voted overwhelmingly in favour of proceeding to the current phase.

Wilson Affidavit, para. 26, Application Record Tab 2, p. 26

10. Phase three is the process to determine the Allocation (described in detail below) and for Economical to prepare the conversion proposal, opinions and other required materials for submission to the Office of the Superintendent of Financial Institutions.

11. The fourth and final phase of the demutualization process involves the final approvals of the conversion proposal and the demutualization.

Wilson Affidavit, para. 32, Application Record Tab 2, p. 30

B. Phase Three – The Allocation

12. The demutualization process is currently in phase three, during which the eligible policyholders (through committees acting on their behalf) will negotiate to determine the allocation of the demutualization benefits among them and others they may designate.

Conversion Regulations, s. 12(1)

Wilson Affidavit, paras. 20 and 21, Application Record Tab 2, p. 25

13. Phase three itself involves a number of steps. The first step in phase 3 was for Economical to submit an application to the court for an initial order setting out the process and requirements for legal counsel and policyholders to apply to be appointed for the committees, as well as addressing other matters. Economical commenced that application on June 13, 2016, and that order (the Initial Order) was made by this Court on July 15, 2016.

Notice of Application, Application Record Tab 1, p. 1

Initial Order, Murray Affidavit, Exhibit “A”, Economical Supplementary Responding Record Tab 1A, p. 4

14. Pursuant to the Initial Order and the *Conversion Regulations*, counsel interested in representing a group of eligible policyholders were required to bring a Counsel Appointment Motion (as described in the following section) at which motion the Court would appoint one counsel for each of the eligible policyholder classes.

Conversion Regulations, s. 8(1)

Initial Order, Murray Affidavit, Exhibit “A” paras. 2-4, Economical Supplementary Responding Record Tab 1A, pp. 6-7

15. Following the counsel appointments, eligible policyholders will then apply to the appointed counsel to be members of the policyholder committees. In accordance with the Initial Order, the Court will then appoint three to nine eligible mutual policyholders to form the eligible mutual policyholder committee, and three to nine eligible non-mutual policyholders to form the eligible non-mutual policyholder committee.

Conversion Regulations, s. 9(6)

**Initial Order, Murray Affidavit, Exhibit “A” paras. 10-15, Economical
Supplementary Responding Record Tab 1A, pp. 8-10**

C. Applications for Counsel Appointment

16. Counsel Applicants’ motion records were required by the Initial Order to include an affidavit that would disclose and set out:

- (a) The Counsel Applicant’s actual or potential conflicts;
- (b) Current relationships between the Counsel Applicant and Economical, or any other property and casualty insurer;
- (c) Engagements of any kind between the Counsel Applicant and any person adverse in interest to Economical;
- (d) The experience of the Counsel Applicant in financial law, corporate law, securities law, mediation, arbitration and in major corporate transactions and restructurings such as plans of arrangement; and
- (e) The Counsel Applicant’s proposed fee arrangements.

**Initial Order, Murray Affidavit, Exhibit “A” paras. 3-4, Economical
Supplementary Responding Record Tab 1A, pp. 6-7**

17. Six law firms submitted motion records to be appointed as counsel to an eligible policyholder group by the August 12, 2016, deadline provided in the Initial Order:

- (a) Goodmans LLP (“**Goodmans**”);³

³ Goodmans LLP has since delivered a Notice of Abandonment of its motion.

- (b) Gowling WLG (Canada) LLP (“**Gowling WLG**”);
- (c) McCarthy Tetrault LLP (“**McCarthy**”);
- (d) Siskinds LLP (“**Siskinds**”);
- (e) Thornton Grout Finnigan LLP (“**Thornton Grout Finnigan**”); and,
- (f) Torys LLP (“**Torys**”).

18. The following chart sets out each Counsel Applicant, identifies the eligible policyholder group(s) they seek to represent, and summarizes the Counsel Applicant’s proposed fee arrangement and/or budget estimate:

Counsel Applicant	Eligible Policyholder Group	Fee Arrangement Proposal Summary
Goodmans ⁴	Either	<ul style="list-style-type: none">• \$575 hourly rate maximum• Overall fee cap of \$150,000

⁴ Affidavit of Daniel J. Gormley sworn August 11, 2016, para. 10, Motion Record of Daniel J. Gormley Tab 2.

Counsel Applicant	Eligible Policyholder Group	Fee Arrangement Proposal Summary
Gowling WLG ⁵	Non-Mutual	<ul style="list-style-type: none"> • \$650 blended hourly rate • Estimated hours of 577, for a \$375,000 budgeted fee⁶ (the “Budgeted Fee”) • If actual work within 10% of the Budgeted Fee +/-, amount charged will equal the Budgeted Fee • If actual work more than 10% below Budgeted Fee, amount charged equal to hours worked at blended rate (though Gowling WLG reserves the right to request additional compensation) • If actual work exceeds Budgeted Fee by more than 10% but less than 100%, Gowling WLG will receive Budgeted Fee plus 50% of excess hours • If actual work exceeds Budgeted Fee by more than 100%, Gowling WLG and Economical will enter into good faith discussions to establish fee arrangements
McCarthy ⁷	Mutual	<ul style="list-style-type: none"> • Initial fee arrangement based on hourly rates • Assuming three meetings or calls per month, a fee estimate of \$50,000 per month (or \$600,000 per year)
Siskinds ⁸	Non-Mutual	<ul style="list-style-type: none"> • “Much reduced hourly rates between \$300 and \$500” • \$500,000 fee cap for negotiations during “2016” • Success fee of up to 5% of benefits achieved for eligible non-mutual policyholders

⁵ Affidavit of Peter Lukasiewicz sworn August 12, 2016, paras. 35-40, Motion Record of Filomena Frisina and Peter Koch Tab 2, pp. 14-15.

⁶ Excluding mediation and arbitration. Mediation will result in an additional \$100,000 in fees, assuming no more than a three-day mediation.

⁷ Affidavit of Garth M. Girvan sworn August 9, 2016, para. 23, Motion Record of McCarthy Tetrault LLP Tab 2.

⁸ Affidavit of Michael G. Robb sworn August 11, 2016 (the “**Robb Affidavit**”), paras. 49-51, Motion Record of Siskinds LLP Tab 2, pp. 23-24.

Counsel Applicant	Eligible Policyholder Group	Fee Arrangement Proposal Summary
Thornton Grout Finnigan ⁹	Either	<ul style="list-style-type: none">• Discount of 12.5% to normal hourly rates (which range from \$300 to \$1000)• Once better informed on the scope of the mandate and able to assess the range of possible outcomes, “TGF will consider and present alternate fee arrangements to the policyholders, subject to Court approval”
Torys ¹⁰	Non-Mutual	<ul style="list-style-type: none">• Blended hourly rate of \$575 per hour for lawyers, and \$175 for other professionals• Estimated billable hours of 3,200 to 5,400 (80% lawyers), for an estimated fee of \$1.6 million to \$2.7 million

19. The Initial Order directed Economical to post any motion records and factums served and filed by the Counsel Applicants on its demutualization process website. Economical posted to its website each of the motion records received from the Counsel Applicants (and will post any factums received) in accordance with that requirement.

Initial Order, Murray Affidavit, Exhibit “A” para. 1(c), Economical Supplementary Responding Record Tab 1A, p. 5

D. Counsel Applicant Undertakings Regarding Future Engagements in Respect of Economical’s Demutualization

20. On August 18, 2016, Osler, Hoskin & Harcourt LLP, counsel to Economical, sent a letter (the “Undertaking Letter”) to each of the Counsel Applicants. The Undertaking Letter stated that Economical’s primary interest is in a focussed, efficient and successful negotiation. The

⁹ Affidavit of Robert I. Thornton sworn August 11, 2016, paras. 23 and 25, Motion Record of Thornton Grout Finnigan LLP Tab 2.

¹⁰ Affidavit of Blair Keefe sworn August 11, 2016 (the “**Blair Affidavit**”), paras. 34-35, Motion Record of Torys LLP Tab 2, pp. 19-20.

Undertaking Letter also stated that Economical's desire is for finality for the company and policyholders in the lengthy and complex demutualization process.

**Chong Affidavit,¹¹ para. 2 and Exhibit "A", Economical Responding Record
Tabs 1 and 1A, pp. 1-2 and pp. 4-10**

21. In order to avoid circumstances that may undermine the process, the negotiations or any outcome of demutualization, the Undertaking Letter asked each Counsel Applicant to provide an undertaking that if they were not selected by the Court to act as counsel for either class of policyholders, that the Counsel Applicant "will not in the future take an engagement to act in respect of Economical's demutualization, including in respect of demutualization benefits to be distributed."

**Chong Affidavit, Exhibit "A", Economical Responding Record Tab 1A, pp.
4-10**

22. On August 18, 2016, the same day the Undertaking Letter was sent, Gowling WLG replied to the Undertaking Letter providing the requested undertaking.

Chong Affidavit, Exhibit "B", Economical Responding Record Tab 1B, p. 12

23. On August 19, 2016, the day after the Undertaking Letter was sent, Thornton Grout Finnigan replied to the Undertaking Letter providing the requested undertaking.

Chong Affidavit, Exhibit "C", Economical Responding Record Tab 1C, p. 14

24. On August 24, 2016, McCarthy replied to the Undertaking Letter and advised that if Economical recommends McCarthy to be appointed as representative counsel for the eligible mutual policyholders, then McCarthy would provide the undertaking requested in the Undertaking Letter. Otherwise, McCarthy stated it would not provide the undertaking. The foregoing is a

¹¹ Affidavit of Jennifer Chong, sworn August 26, 2016 (the "Chong Affidavit").

summary of the McCarthy reply, and its full response was filed with the Court by Economical in its Responding Record (together with all Counsel Applicant replies to the Undertaking Letter).

Chong Affidavit, Exhibit “D”, Economical Responding Record Tab 1D, pp. 16-17

25. On August 25, 2016, Siskinds replied to the Undertaking Letter, declining to provide the undertaking for a number of stated reasons. The Siskinds response is discussed in more detail below.

Chong Affidavit, Exhibit “E”, Economical Responding Record Tab 1E, pp. 19-20

26. On August 26, 2016, Torys replied to the Undertaking Letter providing the following undertaking:

If we are not selected as counsel to act for the non-mutual policyholders, our firm undertakes not to accept any engagement by someone attempting to challenge the validity of, intervene in or otherwise interfere with, the court-supervised demutualization process contemplated by Justice Hainey's initial court order dated July 15, 2016 and governed by the Mutual Property and Casualty Insurance Company with Non-mutual Policyholders *Conversion Regulations* under the *Insurance Companies Act*.

Chong Affidavit, Exhibit “F”, Economical Responding Record Tab 1F, p. 22

E. Objections from Policyholders

27. Section 8(5) of the *Conversion Regulations* provides that an eligible policyholder may object to the candidacy of any Counsel Applicant, in the time and manner set out by the court in the Initial Order. The Initial Order required that any eligible policyholder wishing to object send an objection in writing to Economical, to be received by Economical no later than September 2, 2016.

Conversion Regulations, s. 8(5)

Initial Order, Murray Affidavit, Exhibit “A” para. 6, Economical Supplementary Responding Record Tab 1A, p. 7

28. Neither the *Conversion Regulations* nor the Initial Order required eligible policyholders to identify whether they are a mutual or non-mutual eligible policyholder in order to object, and none of the objectors did so.

Conversion Regulations, s. 8(5)

Initial Order, Murray Affidavit, Exhibit “A” para. 6, Economical Supplementary Responding Record Tab 1A, p. 7

Murray Affidavit, Exhibit “B”, Economical Responding Record Tab 1B, pp. 33-85

29. By September 2, 2016, Economical had received seven objections from eligible policyholders. All of these objections were filed with the Court in Economical’s Supplementary Responding Record. The following chart sets out the name(s) of each objecting eligible policyholder, the Counsel Applicant objected to, and a brief summary of the objection:

Objecting Policyholder(s)	Objection To	Brief Summary of Objection
<ul style="list-style-type: none">• Allan Beaupre¹²• Donald Dickson and Jacqueline Dickson¹³• Richard J. Hobson¹⁴• Philip Rason¹⁵	Torys	<ul style="list-style-type: none">• Torys’ representation of Gore Mutual is a conflict under the <i>Conversion Regulations</i> because Gore Mutual’s board determined it wants Gore to remain a mutual company, and opposed enactment of the regulations for Economical to apply for demutualization• “They have acted in the past for Gore Mutual in their efforts to make all of the policyholders equal”

¹² Murray Affidavit, Exhibit “B”, Economical Supplemental Responding Record Tab 1B, p. 33.

¹³ Murray Affidavit, Exhibit “B”, Economical Supplemental Responding Record Tab 1B, pp. 34-45.

¹⁴ Murray Affidavit, Exhibit “B”, Economical Supplemental Responding Record Tab 1B, p. 46.

¹⁵ Murray Affidavit, Exhibit “B”, Economical Supplemental Responding Record Tab 1B, p. 47.

Objecting Policyholder(s)	Objection To	Brief Summary of Objection
<ul style="list-style-type: none"> • Jeffrey D. Stacey¹⁶ 	Siskinds	<ul style="list-style-type: none"> • Siskinds’ focus is on litigation and class proceedings • Both proposed Siskinds’ lead counsel are litigation counsel, with litigation and class action proceedings as their primary experience • Siskinds’ proposed success fee arrangement is commonly associated with class actions • Siskinds refused to provide the undertaking requested in the Undertaking Letter (as described below) • Siskinds’ application and response to the undertaking request “suggests that Siskinds approach as Counsel for the Non-Mutual Policyholders would be unduly adversarial in nature and not consistent with achieving a fair and equitable result for all policyholders”
<ul style="list-style-type: none"> • Ramanand Sunichura¹⁷ 	Siskinds	<ul style="list-style-type: none"> • “I have read the opinions of an individual on Rickards Read who has expressed his views on demutualization of Economical Mutual which I do not agree with”
<ul style="list-style-type: none"> • John Tobias¹⁸ 	Siskinds	<ul style="list-style-type: none"> • Siskinds has “retained the services of Claude Gingras, who is a known opponent of demutualization with extremely biased views, and will work to skittle [<i>sic</i>] the process of demutualization” (Siskinds has proposed that Mr. Gingras will provide “Canadian corporate insurance regulatory insight and industry experience”¹⁹) • Mr. Gingras vehemently opposed Economical’s intention to demutualize on the website www.RickardsReads.com

¹⁶ Murray Affidavit, Exhibit “B”, Economical Supplemental Responding Record Tab 1B, pp. 48-49.

¹⁷ Murray Affidavit, Exhibit “B”, Economical Supplemental Responding Record Tab 1B, p. 50.

¹⁸ Murray Affidavit, Exhibit “B”, Economical Supplemental Responding Record Tab 1B, pp. 51-74.

¹⁹ Robb Affidavit, para. 21, Motion Record of Siskinds LLP Tab 2, pp. 17-18.

30. In its application on the Counsel Appointment Motion, Siskinds has proposed as a member of its team Claude Gingras, to provide “Canadian corporate insurance regulatory insight and industry experience.” According to his professional profile, Mr. Gingras has not worked in the insurance industry in any capacity for 12 years.

**Robb Affidavit, para. 21 and Exhibit “F”, Motion Record of Siskinds LLP
Tab 2, pp. 17 and 37-38**

31. Mr. Gingras appears to have prepared a submission to the Department of Finance on his own behalf (*i.e.* not for a client) regarding the demutualization of federal property and casualty insurance companies that was posted on the website www.rickardsread.com. Two of the three objections by eligible policyholders to Siskinds’ appointment as counsel refer to that website. One of the objections complains that Mr. Gingras is “a known opponent of demutualization with extremely biased views,” and a vehement opponent of “Economical’s intention to demutualize.”

**Murray Affidavit, Exhibit “B”, Economical Supplemental Responding
Record Tab 1B, pp. 50 and 51-74**

32. In the Department of Finance submission, Mr. Gingras appears to have stated that voting policyholders “have no greater claim to ‘ownership’ of the company than those without voting rights. Consequently, they should not receive a greater benefit upon demutualization by virtue of their voting rights than the other policyholders.”

**Murray Affidavit, Exhibit “B”, Economical Supplementary Responding
Record Tab 1B, p. 54**

33. Those submissions also assert that demutualization is ultimately harmful: “There is no doubt that the disappearance of mutual companies in the insurance sector will greatly reduce competition.” They assert that policyholders of insurers with share structures “pay rent” to

shareholders through higher premiums, and that it is reasonable to assume that most Canadian property and casualty demutualized companies would pass into foreign hands, reducing market share of Canadian companies and leading to loss of jobs.

**Murray Affidavit, Exhibit “B”, Economical Supplementary Responding
Record Tab 1B, pp. 63-64**

34. Mr. Gingras also appears to have submitted comments, again on his own behalf, to the federal government on the proposed *Conversion Regulations* in March, 2015, and is quoted as commenting on the propriety of property and casualty insurer demutualization specifically for www.rickardsread.com. Mr. Gingras refers to certain of the *Conversion Regulations* as “questionable,” and is specifically critical of Economical in its approach to voting versus non-voting policyholders. He also implies that the independent actuary would not act properly and independently from the company actuary, states “there will be no genuine proportionality or practical fairness in the negotiation process,” and asserts there is “no doubt” that Economical will favour and assist mutual policyholders over the non-mutual policyholders.

**Murray Affidavit, Exhibit “B”, Economical Supplementary Responding
Record Tab 1B, pp. 77, 78, and 83**

35. Apparently repeating his earlier opposition to demutualization, in a post dated April, 2015, Mr. Gingras expresses a “solid conviction that mutuality [*i.e.* a mutual company structure] ... is the best way to serve the insurance needs of the Canadian population.”

**Murray Affidavit, Exhibit “B”, Economical Supplementary Responding
Record Tab 1B, p. 83**

36. In accordance with the Initial Order, all objections received by Economical by the September 2, 2016, deadline were provided to the Counsel Applicants on September 6, 2016, and then filed with the Court in Economical's Supplementary Responding Record.

Initial Order, Murray Affidavit, Exhibit "A" para. 7, Economical Supplementary Responding Record Tab 1A, p. 8

Murray Affidavit, Exhibit "B", Economical Supplementary Responding Record Tab 1B, pp. 32-85

37. Since receiving a copy of the objections, Torys has served a supplementary motion record addressing its representation of Gore Mutual.

PART III - LAW & SUBMISSIONS

38. The matter before this Court on these motions is the appointment of counsel for each class of eligible policyholders, pursuant to section 8 of the *Conversion Regulations*.

A. Applicable Law

39. Section 8(6) of the *Conversion Regulations* states:

Appointment

8 (6) The court must appoint counsel for each of the two classes of policyholders and must notify the converting company of its decision following a hearing at which the court assesses the ability of each applicant to fairly and adequately represent the interests of the class of policyholders in question, including by taking into account their experience in financial law, corporate law, securities law or mediation and arbitration and by having regard to any objections filed under subsection (5).

40. In selecting counsel, that section directs the Court to consider:

- (a) The ability of Counsel Applicants to fairly and adequately represent the interests of the policyholders in question, taking into account matters as it sees fit, including:

- (i) Any objections filed under subsection 8(5) of the *Conversion Regulations*; and,
- (ii) The Counsel Applicants' experience in financial law, corporate law, securities law or mediation and arbitration.

Conversion Regulations, s. 8(6)

41. Section 11(1) of the *Conversion Regulations* requires Economical to pay the legal fees of the Counsel Applicants appointed by the Court. The Initial Order required Counsel Applicants to include in their supporting affidavit a proposed fee arrangement, including an estimate of the total of such fees and any proposed alternative fee arrangements such as fee caps. Economical submits that proposed fees are another appropriate factor for this Court to consider in appointing counsel.

Conversion Regulations, s. 11(1)

Initial Order, Murray Affidavit, Exhibit "A" para. 4(e), Economical Supplementary Responding Record Tab 1A, p. 7

B. Observations On the Applications for Counsel Appointment

42. Economical has reviewed and appreciates the Counsel Applicants' applications in their respective motion records.

43. Economical does not take a position with respect to the selection of counsel for either class of eligible policyholder, but provides observations with respect to proposed fee arrangements and the Undertaking Letter requested of all Counsel Applicants.

(a) Economical's Observations on Proposed Fee Arrangements

44. As mentioned above, given that the *Conversion Regulations* require counsel fees to be paid by Economical, Economical has an interest in ensuring that the fees proposed and ultimately charged are appropriate and commensurate with counsels' roles.

45. As part of its proposed fee arrangement, Siskinds, in contrast to all of the other Counsel Applicants, has included a success fee of up to “5% of the benefits achieved” for eligible non-mutual policyholders in the demutualization process. Economical offers the following observations on this proposal:

- (a) The *Conversion Regulations* require Economical to pay the reasonable fees of counsel representatives on a basis to be set by the Court. Accordingly, unlike the class proceeding setting, counsel representatives do not take on any risk whatsoever of non-payment in representing a group of eligible policyholders, including in respect of the eligible non-mutual policyholders Siskinds has applied to represent.
- (b) Moreover, in the event of a successful negotiation, Siskinds’ success fee proposal would result in a windfall to Siskinds in an amount materially incommensurate with the role counsel will undertake in representing a group of eligible policyholders. As mentioned above, Economical’s book value as of March 31, 2016, was \$1.8 billion and thus the demutualization benefits allocated to the eligible policyholders would be in that range. In addition to receiving its discounted hourly fees, Siskinds proposes to be paid a success fee of up to 5% of the eligible non-mutual policyholders’ share of that allocation which, based on Economical’s book value and a range of hypothetical allocation percentages, would be as follows:

<u>Non-Mutual Allocation</u>	<u>Siskinds' Success Fee (at 5%)</u>
5%	\$4.5 million
10%	\$9 million
20%	\$18 million
30%	\$27 million
40%	\$36 million
50%	\$45 million
60%	\$54 million
70%	\$63 million
80%	\$72 million
90%	\$81 million
95%	\$85.5 million

- (c) The *Conversion Regulations* provide that negotiations must conclude within one year from the time that the members of the policyholder committees are selected (the Member Appointment Motion is to be heard by this Court November 7, 2016). As such, legal fees in the range proposed by Siskinds could well be extremely disproportionate to the amount of work involved in the retainer and far exceed the fees any other Counsel Applicant has sought.

Conversion Regulations, s. 14(5)

Initial Order, Murray Affidavit, Exhibit "A" para. 13, Economical Supplementary Responding Record Tab 1A, pp. 9-10

Robb Affidavit, para. 51, Motion Record of Siskinds LLP Tab 2, p. 24

46. Economical further observes that the fee arrangement proposals and estimates of the other Counsel Applicants vary broadly, from a proposed fee cap of \$150,000 in the case of Goodmans (whose motion has since been withdrawn), to \$375,000 (with a cap/collar) in the case of Gowling WLG, to an estimate of fees in the range of \$1.6 million to \$2.7 million in the case of Torys.

47. It therefore appears to Economical that the Counsel Applicants are using very different assumptions about the scope, nature and requirements of the role of counsel for the eligible policyholder committees. Economical is concerned that some assumptions – particularly those generating the larger estimates – may not be accurate and would entail work beyond the role envisioned by the *Conversion Regulations*. The role of the Counsel Applicants is not to design or structure the demutualization as a whole or involve themselves in the initial public offering – but simply to assist the committees in negotiations to allocate the demutualization benefits.

48. Economical observes that Torys has proposed that the Honourable Frank Iacobucci of that firm as their “lead mediator.” While Justice Iacobucci is unquestionably a highly skilled and respected jurist and mediator, Economical is concerned that there is no need for a second individual acting in a role which appears to be similar to that of former Associate Chief Justice of Ontario, Dennis O’Connor, Q.C., who has already been engaged by Economical to act as “process facilitator” to assist in the negotiations between the policyholder committees. In any event, apart altogether from the integrity and skill of any individual, Economical does not consider a member of either firm appointed as counsel for the two classes to be a suitable candidate for a mediation role.

Blair Affidavit, para. 28, Motion Record of Torys LLP Tab 2, p. 17.

Wilson Affidavit, para. 44, Application Record Tab 2, p. 32

(b) Economical’s Observations on the Requested Undertaking

49. In seeking the undertaking requested in the Undertaking Letter, Economical is of the view the undertaking sought might be of assistance to the demutualization process and the negotiations of the eligible policyholder committees. Economical considers the undertaking to be in the nature

of a request that the parties engaged in this process respect the outcome of this Court's decision in selecting which Counsel Applicant will represent each eligible policyholder committee.

50. Economical notes the following:

- (a) Gowling WLG provided the requested undertaking the same day it received the Undertaking Letter, and Thornton Grout Finnigan provided the requested undertaking the following day. Torys provided the undertaking described above in paragraph 26 on August 26, 2016.

Chong Affidavit, Exhibit "B", Economical Responding Record Tab 1B, p. 12

Chong Affidavit, Exhibit "C", Economical Responding Record Tab 1C, p. 14

Chong Affidavit, Exhibit "F", Economical Responding Record Tab 1F, p. 22

- (b) McCarthy would only provide the undertaking if Economical recommended its appointment. Economical does not understand the logic of this request.

Chong Affidavit, Exhibit "D", Economical Responding Record Tab 1D, pp. 16-17

51. As noted above, Siskinds stated it would not provide the undertaking. In doing so, it appeared to Economical that Siskinds is contemplating that some former or current policyholders may wish to challenge the outcome of the allocation and demutualization process, and Siskinds wishes – if not selected – to be able to represent such adverse groups on a class action basis, or otherwise. Siskinds stated in its reply to the Undertaking Letter:

If we are not appointed by the court, we believe that there is a risk, however small, of an ineffective and unsuccessful negotiation, or worse - an unfair result that cannot be justified to eligible non-mutual policyholders.

...

We note that there are access to justice implications for eligible non-mutual policyholders if such an undertaking is given by our firm and the demutualization process fails to achieve a fair and just result.

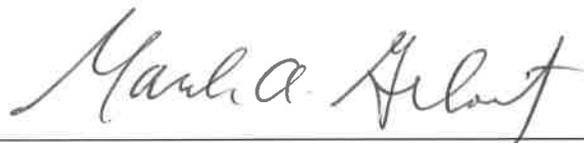
Chong Affidavit, Exhibit "E", Economical Responding Record Tab 1E, pp. 19-20

PART IV - ORDER SOUGHT

52. Economical requests that one Counsel Applicant be appointed to act for the eligible mutual policyholders and that one Counsel Applicant be appointed to act for the eligible non-mutual policyholders, and act in accordance with the terms of the Initial Order (for example, with respect to the seeking of account approvals) going forward.

All of which is respectfully submitted,

September 12, 2016.



Mark A. Gelowitz



Laura K. Fric



Geoffrey J. Hunnisett

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Mutual Property and Casualty Insurance Company with Non-mutual Policyholders
Conversion Regulations (SOR/2015-168)***

Application by counsel

8 (1) A member in good standing of the bar — or of the Chambre des notaires du Québec — of the province in which the application for the initial order is made may apply to the court, in the time and manner set out in the initial order, to be appointed as counsel for either the eligible mutual policyholders or the eligible non-mutual policyholders of a converting company in respect of the negotiations referred to in section 12.

...

Objections

(5) Eligible policyholders may file, in the time and manner set out by the court in the initial order, an objection to the candidacy of any counsel who has submitted an application.

Appointment

(6) The court must appoint counsel for each of the two classes of policyholders and must notify the converting company of its decision following a hearing at which the court assesses the ability of each applicant to fairly and adequately represent the interests of the class of policyholders in question, including by taking into account their experience in financial law, corporate law, securities law or mediation and arbitration and by having regard to any objections filed under subsection (5).

...

Appointment

9 (6) The court must appoint at least three and not more than nine eligible policyholders to be members of each policyholder committee and must notify the converting company and counsel for the class of policyholders represented by that committee of its decision following a hearing at which the court assesses the ability of each applicant to fairly and adequately represent the interests of the class of policyholders in question, including by taking into account their experience in negotiations and business and financial affairs and by having regard to any objections filed under subsection (5).

...

Costs payable by converting company

11 (1) The court must determine, having regard to their reasonableness, the amounts payable by a converting company in relation to the negotiations referred to in section 12, including the costs of counsel and any experts consulted by the policyholder committees, remuneration for policyholder committee members and reimbursement of their expenses for travel, accommodation and meals in respect of attendance at policyholder committee meetings.

...

Method and Benefits

Purpose of negotiations

12 (1) The policyholder committees, with the assistance of the counsel appointed by the court, must enter into negotiations to establish the method of allocating the value of the converting company and to determine whether any benefits will be provided to any persons or classes of persons — other than eligible policyholders — as a result of the conversion.

...

Deadline

14 (5) The conversion proposal and the opinions referred to in paragraph (2)(b) must be submitted no later than one year after the day on which the court appoints the members of the policyholder committees.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FACTUM OF ECONOMICAL
MUTUAL INSURANCE COMPANY
(MOTION TO APPOINT COUNSEL FOR
ELIGIBLE POLICYHOLDERS)

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