

COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MIRAMICHI

Date : July 4, 2019

NC-041-2008

BETWEEN :

**ALBERT JOHN GAY, KIMBERLEY ANN
DOYLE and JAMES BLISS WILSON,**

Plaintiffs,

- and -

**REGIONAL HEALTH AUTHORITY 7, a
corporation incorporated under the laws of
the Province of New Brunswick,**

First Defendant,

- and -

**THE ESTATE OF DR. RAJGOPAL S. MENON,
AS REPRESENTED BY DR. SANJAY
SIDDHARTHA AS LITIGATION
ADMINISTRATOR,**

Second Defendant.



ORAL DECISION

BEFORE: The Honourable Justice Jean-Paul Ouellette

AT: Miramichi, New Brunswick

DATE OF HEARING: July 4, 2019

DATE OF DECISION: July 4, 2019

APPEARANCES:

Raymond F. Wagner, Q.C., Ches F. Crosbie,
Q.C. for the Plaintiffs and Madeleine Carter,
David T. Hashey, Q.C., and Catherine Bowlen
for the Defendants, Regional Health Authority 7
Catherine Fawcett and Laura Carter for the
Estate of Dr. Rajgopal S. Menon

OUELLETTE, J.Overview

[1] This is a motion for approval of Class Counsel Fees (inclusive of disbursements) and Claims Administration Costs with respect to a negotiated settlement agreement entered into with the First Defendant, Regional Health Authority 7 and the Second Defendant, Dr. Rajgopal S. Menon (hereinafter "Dr. Menon"), as represented by Dr. Sanjay Siddhartha as Litigation Administrator (the "Settlement Agreement").

[2] Class Counsel – Wagners (Halifax, NS) and Ches Crosbie, Q.C. (St. John's, NL) - have successfully negotiated a \$2,500,000.00 settlement to bring to a resolution the within class action.

[3] There are three representative plaintiffs in this action. On March 26, 2008, the Representative Plaintiff, Mr. Albert John Gay, entered into a contingency fee agreement ("CFA") and indemnity agreement (the "Indemnity Agreement") with Wagners. The terms of the CFA and Indemnity Agreement were explained to Mr. Gay by counsel prior to its execution.

[4] The CFA and Indemnity Agreements entered into by the remaining two representatives are identical to those of Mr. Gay. On July 23, 2008, the Representative Plaintiff Ms. Kimberley Ann Doyle entered into a CFA and Indemnity Agreement with Wagners. The terms of the CFA and Indemnity Agreement were explained by counsel prior to its execution.

[5] On July 22, 2008, the Representative Plaintiff Mr. James Bliss Wilson entered into a CFA and Indemnity Agreement with Wagners.

[6] According to the CFA, legal fees and disbursements are payable to Wagners only in the event that the proceeding is successful, which includes a settlement benefitting one or more class members.

[7] The Settlement Agreement uses the defined term "Class Counsel Fees". This defined term includes two components: legal fees, which are paid according to the CFA, and reasonable disbursements. Applicable taxes on both components are of course also recoverable.

[8] The CFA provides for legal fees of 25% of the first \$10 million or on any part thereof. The CFA also provides that in addition to any legal fee, Wagners is entitled to recover from any settlement all disbursements incurred along with interest accrued on such disbursements, subject to Court approval.

[9] Pursuant to s. 40(2) of the *Class Proceedings Act* (the "Act")¹¹ the Court is charged with the responsibility of approving contingency fee agreements and thus approving the class counsel fee in a settlement of a class action.

[10] The CFA meets the requirements of s. 40(1) of the *Act* and should be approved pursuant to s. 40(2) of the *Act*.

[11] The legal test for approval of fees in a class action directs the Court to consider whether the fees sought by class counsel are fair and reasonable.

[12] Class Counsel expended significant efforts over eleven years in advancing this action, including in relation to achieving its certification upon an appeal of a lower court decision, engaging in document disclosure, the exchange of extensive written

interrogatories and the discovery examination of Mr. Gay, responding to a motion with respect to the permitted use of a commission of inquiry report, preparing for trial (including obtaining several expert reports), and after several years of resolution meetings including a two-part mandatory settlement conference, ultimately negotiating a successful conclusion that will benefit Eligible Class Members.

[13] Legal fees calculated at 25% of the value of the settlement - \$2,500,000 – plus applicable taxes equals \$625,000.00 + \$93,750.00 (HST of 15%) for a total of \$718,750.00.

[14] The disbursements incurred by Class Counsel to date are \$336,895.15 plus applicable tax of \$45,394.18. This is inclusive of the costs, paid directly by Class Counsel, of publishing the two phases of notice associated with this Settlement Agreement: phase I notice of the proposed settlement and upcoming settlement approval hearing (already paid), and phase II notice of approval of the settlement (to be paid if the Settlement Agreement is approved).

[15] Claims Administration Costs have been quoted as being \$88,392.00 plus applicable tax of \$13,258.80 as provided by Epiq Class Action Services Canada Inc.¹⁵ These are the total costs for Epiq's role in administering the settlement, which role is described in detail in this brief and in the brief filed by the Plaintiffs in support of approval of the Settlement Agreement.

[16] This motion seeks an order approving Class Counsel Fees (legal fees plus disbursements) as well as Claims Administration Costs.

The Issue

[17] The issue for the Court's consideration in this motion is whether to approve Class Counsel Fees and Claims Administration Costs as being fair and reasonable.

Law and Analysis

A. Fees in Class Proceedings

[18] The fixing of fees in a class proceeding is governed by section 40 of the Act, under which the Court may approve an agreement respecting fees and disbursements (s. 40(2)).

[19] In the context of a class proceeding, a premium on fees is typically awarded to class counsel for taking on meritorious but complex and risky matters. Courts have recognized that the objectives of the Act are dependent in part upon rewarding counsel for taking on the risk inherent in litigating class proceedings.

[20] Class counsel fees have been awarded and accepted as a reality in the class action context, as explained by Justice Winkler (as he was then) in *Parsons v. Canadian Red Cross Society*:

The legislature has not seen fit to limit the amount of fees awarded in a class proceeding by incorporating a restrictive provision in the CPA. On the contrary, the policy of the CPA, as stated in *Gagne*, is to provide an incentive to counsel to pursue class proceedings where absent such incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding.

[21] In the settlement and fee approval decision of *Lozanski v. Home Depot, Inc.*,²² Justice Perell of the Ontario Superior Court of Justice succinctly outlined the principles applicable to assessment and approval of fees. At paragraphs 86 to 88 he states:

[86] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.) at para. 13; *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA

233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.) at para. 25.

[87] Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee which may include a premium for the risk undertaken and the result achieved, but the fee must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole: *Sparvier v. Canada (Attorney General)*, [2006] S.J. No. 752 (Q.B.) at para. 43, *aff'd* [2007] S.J. No. 145 (C.A.).

[1] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society*, *supra*; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at paras. 59-61.

[22] The general test for a class action fee approval asks the Court to consider whether the fees sought by class counsel are “fair and reasonable”.²³ The analysis is not one of determining in the abstract what would be a fair and reasonable fee, but rather whether the actual fee sought is fair and reasonable.

B. Contingency Fee Agreements

[23] The *Act* gives proposed representative plaintiffs the right to enter into percentage-based fee arrangements with class counsel. Such fee arrangements are not enforceable until they have received court approval:

40(1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff shall be in writing and shall:

- a) state the terms or conditions under which fees and disbursements are to be paid;
- b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding;
- c) if interest is payable on fees or disbursements referred to in paragraph (a), state the manner in which the interest will be calculated, and

- d) state the method by which payment is to be made, whether by lump sum or otherwise.

40(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the motion of the solicitor.

[24] The CFA entered into between Wagners and the three Representative Plaintiffs complies with the requirements of s. 40(1) of the *Act* and ought to be approved by the Court. The CFA states the terms under which fees and disbursements are payable, the fee that will be charged if successful, and explains the nature of a contingent fee in clear terms.

[25] Justice Winkler (as he was then) addressed the benefits of a percentage-based approach in *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*:

Why should it matter how much actual time was spent by Class Counsel? What if the settlement was achieved as a result of "one imaginative, brilliant hour" rather than "one thousand plodding hours"? If the settlement is in the best interests of the class and the retainer agreement provided for, say, a one-third contingency fee, and was fully understood and agreed to by the representative plaintiff, why should the court be concerned about the time that was actually docketed?

[...]

In my view, it would make more sense to identify a percentage-based legal fee that would be judicially accepted as presumptively valid. This would provide a much-needed measure of predictability in the approval of Class Counsel's legal fees and would avoid all of the mind-numbing bluster about the time-value of work done or the risks incurred.

What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons.

[26] A robust contingency compensation system has been found to appropriately reward class counsel for the wins and losses over many years of litigation, and furthers the viability of class actions as a meaningful vehicle for access to justice.

[27] Some guidance may be obtained from precedent, although recognizing that each case must be decided on its own basis. The Settlement Payment is \$2,500,000, and the CFA provides for the recovery by Class Counsel of 25% of that amount, plus disbursements and applicable HST. In *Baker Estate v. Sony BMG Music (Canada) Inc.*, Justice Strathy (as he then was) stated that “a contingent fee retainer in the range of 20% to 30% is very common in class proceedings.”³⁰ The requested fee percentage therefore falls within the middle of the range of reasonableness established by the jurisprudence.

[28] In the context of a \$2,500,000 settlement, a 25% fee falls within the range of what is fair and reasonable.

C. The Multifactorial Approach Supports the Fee as Fair and Reasonable

[29] In assessing whether the claimed fees are fair and reasonable, the jurisprudence directs that the Court is to adopt a multifactorial approach. The factors considered in making this determination are as follows:

- time expended by the solicitor;
- the legal complexity of the matter;
- the degree of responsibility and risk assumed by the solicitor;
- the monetary value of the matter at issue;
- the importance of the matter to the client;
- the degree of skill and competence demonstrated by the solicitor;

- the results achieved and the contribution of counsel to the result;
- the ability of the client to pay; and
- the client's expectations as to the amount of the fees.

i. Time Expended by Class Counsel

[30] Class Counsel has been actively litigating the claims of the Class Members for approximately 11 years. The time was expended on a contingent basis, without assurance of payment.

[31] Over 5300 hours have been expended by lawyers and paralegals on the file to date, not including anticipated future work relating to answering questions from Class Members, communicating with the Claims Administrator in setting up the claims administration process, facilitating communication between Class Members and the Claims Administrator and working with the Claims Administrator as needed in administering the Settlement Agreement.

[32] A reasonable fee should bear an appropriate relationship to the amount recovered. As stated by Justice Barnes, and cited by Justice LeBlanc in *Elwin*, “[c]ases that generate a recovery of a few million dollars may well justify a 25% to 30% costs award.”

[33] Class counsel legal fees in the amount of \$625,000.00 + \$93,750.00 (HST of 15%) for a total of \$718,750.00, bears a reasonable relationship to the amount recovered, the risks undertaken, and time expended by Class Counsel in this litigation.

ii. Complexity of the Issues

[34] The certified common issues were, in summary, whether the Defendants' conduct constituted negligence, breach of contract and breach of fiduciary duty.

[35] Each of these common issues presented complexities, and indeed expert evidence had already been served in preparation for trial.

[36] Particular legal complexities were presented by the issues concerning breach of contract.

[37] The liability of the First Defendant for the Second Defendant's conduct was a live issue in the litigation, as the First Defendant argued that it was not liable for the conduct of a physician by virtue of the nature of the role of the pathologist.

[38] With respect to the breach of contract issue, Class Counsel recognizes that there is, to date and to Class Counsel's knowledge, little jurisprudence directly considering the application of contract law to the specific facts at hand.

[39] Advancing within a class action claims of negligence against a physician are novel and with little guiding precedent, therefore heightening the risk of this issue. Within negligence, the issues of causation of harm, the ability of Class Members to satisfy the "but for" causation test, as well as to meet the *Mustapha* test for recovery for mental harm, were all challenges cited by the Defendants.

[40] Had the matter proceeded to trial, the Court would have been asked to resolve the above complex issues.

iii. Responsibility Assumed by Class Counsel

[41] Class Counsel assumed all responsibility for the proceeding, funding all disbursements and working on a contingency fee basis.

[42] This factor supports the fairness and reasonableness of the fees being sought.

iv. Monetary Value of the Matters at Issue

[43] The Settlement Agreement provides compensation for Eligible Class Members that would otherwise not have been achieved without Class Counsel's filing and advancement of the case, diligent advancement of the action over nearly 11 years and assumption of the inherent and significant risks posed by this litigation.

[44] The maximum number of Eligible Class Members is estimated to be 3,475, based upon an estimate provided by Ms. Chris Rokosh, Registered Nurse, Legal Nurse Consultant and President of CanLNC Experts in Calgary. Ms. Rokosh was retained by the Plaintiffs to summarize the findings from the review of 5271 of the pathology reports involved in the Miramichi Regional Health Authority investigation of Dr. Menon. The reports were initially prepared by Dr. Menon and subsequently reviewed by Ottawa based Gamma Dynacare Laboratories. Ms. Rokosh's conclusions are described in the Plaintiff's brief filed in support of approval of the Settlement Agreement. In summary, 3,475 is the estimated number of patients whose pathology slides were read by Dr. Menon and were determined to have undergone tissue sampling in order to confirm or disprove a potential cancer or cancer related condition.

[45] It is difficult to ascertain a precise estimate of how many Eligible Class Members will ultimately participate in the settlement and obtain compensation. Unfortunately, given the age and in some cases pre-existing states of health of Class Members, inevitably a sizeable fraction of Eligible Class Members will have passed away. Exactly what fraction is unknown. The passage of time is a consideration for plaintiffs' counsel in all litigation, but it was an especially pressing consideration for Class Counsel in this case given the demographics of Class Members.

[46] Through the dissemination of the Hearing Notice and execution of the Notice Plan, Wagners has encouraged Class Members to contact the law firm to provide any updated mailing address. This is intended to maximize the number of individuals to whom Wagners can provide direct notice of the approved settlement, as one measure to ultimately maximize the participation by Eligible Class Members in the administration of the Settlement Agreement.

[47] Consideration of the monetary value of the settlement to the Class Members weighs in favour of the fee approval as fair and reasonable.

v. Skill, Competence, Counsel's Contribution, and Results Achieved

[48] Class Counsel skillfully navigated this class proceeding, involving an initially unsuccessful certification motion, certain novel points of law and strong opposition from the Defendants at every juncture in the litigation, through to a successful settlement, with a real prospect throughout that the matter would go to a contested trial.

[49] Class Counsel was essential to achieving a result favourable to the Class. Without the persistent efforts of Class Counsel over nearly 11 years, the Class would not have gained the benefits conferred by the Settlement Agreement.

[50] Class Counsel is experienced in class actions⁴⁵ and advanced the claims with diligence and at a substantial risk.

[51] Class Counsel incurred costly disbursements and carried a significant financial burden in moving this case forward for over a decade.

[52] These factors weigh in favour of the requested fee being held as fair and reasonable.

vi. Importance to the Client, Client Expectations and Ability to Pay

[53] Class Members whose pathology reports were prepared by Dr. Menon were affected by the Defendants' alleged misconduct in a variety of ways. Some alleged to have been caused physical and/or mental harm by Dr. Menon's partial or complete misdiagnosis, due to treatment decisions and timing being impacted by the misdiagnosis. Some alleged mental harm due to the stress they suffered when they were made aware of the error, if they otherwise weren't impacted by the misdiagnosis.

[54] The nature of this action is such that the expense and risk of filing an individual action on behalf of an individual plaintiff who alleged physical and/or mental harm as a result of the conduct of the Defendants would, in most if not all cases, considerably outweigh any potential individual award. The Class had no other accessible avenue to justice, were it not for Class Counsel's willingness to fund the litigation and expend significant hours with no assurance of being paid.

[55] As to the clients' expectations of the fees, the Representative Plaintiffs were clearly aware of the contents of the contingency fee agreement,⁴⁸ the terms of which are clear and were explained to them.

[56] In sum, the factors reviewed above suggest that the fee requested is fair and reasonable.

D. Disbursements are Fair and Reasonable

[57] The Carter Fee Affidavit, affirmed June 25, 2019, details the disbursements incurred by Class Counsel – Wagners and Ches Crosbie - to date.

[58] The disbursements incurred total CAD \$382,289.33 (inclusive of HST).⁵⁰ This amount includes Class Counsel's payment for filing and service fees, postage, courier, prints and photocopies.⁵¹ Cross examinations for certification and discovery

examinations took place in New Brunswick, which involved the renting of a boardroom, court reporter services, and travel on behalf of counsel. Travel expenses were incurred by Class Counsel in attending various hearings, including the certification hearing and the appeal of certification, in addition to various meetings and case management conferences over the duration of the litigation.

[59] Another category of disbursement is retention of experts. In preparation for certification and for the common issues trial, the Plaintiffs retained four experts, Dr. Charles Hutton, Dr. David Owen, Dr. Douglas Sinclair and Chris Rokosh, RN. This was the costliest expense in furthering the litigation, without which the Plaintiffs would have had no expert evidence to advance the case.

[60] Settlement meetings with counsel for the Defendants, mediations and a mandatory settlement conference took place in New Brunswick, which required travel and accommodation expenses on behalf of Class Counsel.

[61] The costs of distributing both phases of notice associated with this Settlement Agreement are also included in the disbursements. These amounts, being paid directly by Wagners, include the costs of publishing phase I and phase II notices in the applicable newspaper publications set out in the Notice Plan. Such an expenditure was deemed necessary in this case to notify Class Members in the relevant geographical areas about the upcoming approval hearing and, if approved, approval of the Settlement Agreement. These costs are broken down as follows:

Hearing Notice:

April 26, 2019 - Miramichi Leader & Telegraph Journal - \$4,362.40 + HST

April 26, 2019 - Acadie Nouvelle - \$2,688.00 + HST

May 3, 2019 - Miramichi Leader & Telegraph Journal - \$4,362.40 + HST

May 3, 2019 - Acadie Nouvelle - \$2,688.00 + HST

Settlement Approval Notice (to be incurred if Settlement Agreement approved):

July 12, 2019 (estimated date) – Miramichi Leader & Telegraph Journal - \$4,362.40 + HST

July 12, 2019 (estimated date) – Acadie Nouvelle - \$2,688.00 + HST

July 12, 2019 (estimated date) – Miramichi Leader & Telegraph Journal - \$4,362.40 + HST

July 12, 2019 (estimated date) – Acadie Nouvelle - \$2,688.00 + HST

[62] The total costs for the publication of phase I and phase II notices will be \$28,201.60 plus \$4,230.24 HST for a total of \$32,431.84.

[63] The disbursements for which Class Counsel seek approval are fair and reasonable sums that were necessary to further the litigation and to achieve a settlement for Class Members.

E. Claims Administration Costs are Fair and Reasonable

[64] Should the Settlement Agreement be approved, the Claims Administration Costs are estimated to be \$88,392.00 plus \$13,258.80 HST for a total of \$101,650.80.⁵⁵ This amount includes the following services provided by Epiq Class Action Services Canada Inc.:

- Data Standardization
- Project Management and Reporting
- Toll-Free Contact Center
- Claims Processing and Claimant Report

- Distribution and Fund Management
- Postage and Expenses

ON HEARING the submissions of counsels for the Plaintiffs;

AND ON READING the materials filed on this motion;

AND WHEREAS any capitalized terms used in this Order and not otherwise defined have the meanings given to them in the Settlement Agreement;

1. THIS COURT ORDERS that:

Class Counsel Fees in the amount of \$1,101,039.33 (inclusive of applicable HST) consisting of:

- a. Legal fees: \$718,750.00 (inclusive of applicable HST); and
 - b. Disbursements: \$382,289.33 (inclusive of applicable HST)
- are hereby approved.

2. THIS COURT FURTHER ORDERS THAT:

Claims Administration Costs in the amount of \$101,650.80 (inclusive of applicable HST) are hereby approved.

Oral decision rendered on the 4th day of July, 2019, at Moncton, New Brunswick.



The Honourable Mr. Justice Jean-Paul Ouellette
Judge of the Court of Queen's Bench