COURT FILE NO.: 98-CV-143334
DATE: 2007/06/08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
MICHAEL McCARTHY, CHRISTINE McCARTHY and DEREK MARCHAND Plaintiffs	**David Harvey, Peter L. Roy,** and **R. Douglas Elliott**, for the Plaintiffs.
- and -	
THE CANADIAN RED CROSS SOCIETY and THE ATTORNEY GENERAL OF CANADA Defendants	**Paul B. Vickery, John Spencer, William Knights,** and **Catharine Moore**, for the Defendants The Attorney General of Canada
	L. Waxman –for the Children's Lawyer
	Laurie Redden – for the Public Guardian and Trustee
AND BETWEEN:	
MICHAEL McCARTHY and CHRISTINE McCARTHY Plaintiffs	**David Baker, John Plater**, for the Proposed Intervener Gary Gagnier
	W.A. Derry Millar –for Class Counsel
- and -	
CONNAUGHT LABORATORIES LIMITED, CONNAUGHT BIOLOGICS LIMITED, CONTINENTAL PHARMA CRYOSAN INC., NORTH AMERICAN BIOLOGICALS INC. and THE ATTORNEY GENERAL OF CANADA Defendants	
	HEARD: February 5 and 6, 2007

Proceeding under the *Class Proceedings Act, 1992*

W.K. Winkler R.S.J.:

Nature of the Motions

[1] The plaintiffs and class counsel bring a number of motions in these actions. They seek certification of the actions as class proceedings against the Attorney General of Canada for the purpose of approval of a proposed settlement. A settlement was previously reached, and approved by this court, with the other named defendants. In addition, class counsel seek approval of their fees. Finally, a class member brings a motion seeking intervenor status.

[2] As is now the norm in class action practice where multi-jurisdictional or national classes are concerned, the proposed settlement before the court is pan-Canadian in nature. Save for the intervenor motion, similar motions have been brought before the courts in Alberta, British Columbia and Quebec. All four courts must approve the proposed settlement without material changes or the settlement fails. The Attorney General has consented to the certification, conditional upon the approval of the settlement. Should the proposed settlement fail to receive approval from all courts, the parties will revert to their positions prior to these motions.

Settlement Approval

[3] The putative classes are persons who were infected with Hepatitis C through the receipt of blood from the Canadian blood supply system and their family members. In 1999, this Court approved a settlement in a similar class action, albeit for a circumscribed period from January 1, 1986 to July 1, 1990 (see *Parsons v. Canadian Red Cross,* [1999] O.J. No. 3572 (S.C.J.)). The classes described in this action span time periods prior to and after the period at issue in *Parsons.* Under the terms of the settlement, the courts in Alberta, British Columbia and Quebec will have jurisdiction over the classes in their respective provinces and this Court will have jurisdiction over Ontario and the remaining provinces as well as claimants who may currently be residing outside the country.

[4] Unlike the United States federal court system, Canada does not have specific legislation to deal with the multi-jurisdictional aspects of class proceedings where putative class actions in

respect of the same subject matter have been commenced in the superior courts of two or more provinces. Fortunately, in keeping with the access to justice principle that underpins class action legislation, courts and counsel have developed practical *ad hoc* means of minimizing procedural obstacles where multi-jurisdictional settlement approvals are involved.

[5] One practical approach to removing procedural hurdles utilized in this case, as it has been in other similar situations recently, is to ensure that courts have the ability to communicate with each other in respect of the settlement approval and ancillary motions. Here, counsel have facilitated that communication by consent, meaning that judges are in a position to discuss with each other the aspects of the settlement. This is a positive development and should be encouraged in the future.

[6] As a result of that ability to communicate, I have had the advantage of reading the Reasons of Ouellette J. in respect of the settlement approval motion brought in Alberta in the action styled as *Adrian v. Canada (Minister of Health)*. Although his decision has been written in the context of Alberta legislation, the factors he has considered in granting approval of the settlement are equally applicable to the approval of a proposed settlement under the *Class Proceedings Act, 1992*, S. O. 1992, c. 6. I adopt the Reasons of Ouellette J. and I approve the settlement as being fair, reasonable and in the best interests of the class.

[7] It is implicit in my decision to approve the settlement that the motion to intervene has been dismissed and that I have not accepted the objections made to the settlement. However, since those matters were not raised before Justice Oullette, I have set out my Reasons in respect of each below.

Motion to Intervene

[8] A motion was brought for leave to intervene by Gary Gagnier, a putative family class member. Mr. Gagnier's membership in the family class is based on the contention his brother would be a "Primarily-Infected Class Member" as defined in the settlement.

[9] The issue underlying the motion for leave to intervene is essentially an objection to the settlement. There is no need for such a motion in order for a class member to posit an objection to the settlement. Although the *CPA* does not expressly provide a process for receiving objections by class members, there is now a well-established practice of combining the settlement approval motion with a fairness hearing, on notice to the class, at which objections to the settlement are routinely received and considered by the court. The statutory authority for the receipt and consideration of objections is to be found in ss. 12 and 19(1) of the *CPA*, which provide, respectively,

> 12. The court, on the motion of a party or class member, may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> ...
>
> 19. (1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

[10] Similarly, the *CPA* also provides for participation by class members, if necessary, under s. 14(1):

> 14. (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

[11] Although the *CPA* states in s. 35 that "the rules of court apply to class proceedings", the preceding provisions of the *CPA*, specifically ss. 12, 14 and 19(1), render the general rule regarding intervenors inapplicable insofar as class members are concerned. Where a class member wishes to participate in a proceeding, the proper approach is to bring a motion under s. 14 of the *CPA*. However, where the participation is sought simply for the purpose of making an objection to a proposed settlement, and a process for objections has been otherwise provided, there is no basis for granting a participation order.

[12] As stated above, Mr. Gagnier's motion essentially concerns an objection to the settlement. Mr. Gagnier is infected with Hepatitis C. He claims that he became infected through contact with his brother who, it is claimed, was infected himself through a blood transfusion in the class period. While acceptance of his brother's claim will make Mr. Gagnier a family member under the settlement, he will not be entitled to compensation for infection on that basis. Only spouses will be able to obtain benefits for that manner of indirect infection under the terms of the settlement.

[13] Secondarily infected siblings, unlike spouses, are not a defined class under the terms of the settlement. Mr. Gagnier's objection is that this is an arbitrary exclusion that should be revisited with the result that an additional class definition, relating to secondarily infected siblings, should be added to the proposed settlement. I am unable to accept that objection.

[14] In my view, the class definitions are not under-inclusive or particularly "arbitrary" in the sense that there is a basis for the distinction between siblings and spouses. Since Hepatitis C is spread by the virus coming into contact with the blood of a previously uninfected person, it is common knowledge that blood transfusions are not the only means of transmission. Sexual activity is one such recognized means of transmission and certain reasonable assumptions can be made about spousal relationships in determining whom to include as class members entitled to compensation. On the other hand, siblings may be in no different position than friends, roommates, working colleagues or others who may come into occasional or even more frequent contact with an infected person.

[15] In effect, the true arbitrary distinction would be the inclusion of a sibling class without the addition of classes comprised of similarly situated people. The parties in negotiating this settlement have drawn a line to circumscribe the class definitions and the line is neither unreasonable nor "arbitrary". In addition, quite apart from the reasonableness of the class definitions set out in the settlement, the amendment proposed by Mr. Gagnier would constitute a material change and is beyond the power of the Court to impose on the parties in the context of a settlement approval. It would not amount to the creation of a sub-class within an already defined class, but would rather create a new class to include persons in the settlement who would not otherwise have been entitled to claim benefits for infection with Hepatitis C under this settlement.

[16] In conclusion, I note that in Mr. Gagnier's motion, although ostensibly styled as a motion for leave to intervene, he does set out s. 14 of the *CPA* as one of the grounds relied upon. Since it is primarily an objection to the settlement, I find no basis to grant a participation order under that provision and I cannot give effect to the objection.

Objections

[17] The other objections received by the court relate to the allocation of the monies among the class members. Although I understand the concerns expressed by the objectors, it is trite law that settlements do not have to be perfect. Where there is a finite fund, decisions have to be made as to how best to allocate that fund. As this Court stated in respect of similar objections in *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.) at para 13:

> This settlement is conditional on having a distribution formula. Without this aspect the entire settlement, which no one objects to, would be lost to the plaintiff class. The test applied by the court is whether the settlement is fair and reasonable and in the best interests of the class as a whole. See: *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151. The court does not, and cannot, seek

> perfection in every aspect, nor can it insist that every person be treated equally. The settlement must, however, come within a zone or range of reasonableness.

Here, the allocation falls within that range of reasonableness.

Fees

[18] The total fees being sought by class counsel across Canada in respect of the settlement is $37.29 million plus disbursements. From that amount, the Ontario class counsel seek approval of a fee in the amount of $11 million plus disbursements. In addition, Ontario class counsel are seeking a fee for the time and expenses of the representative plaintiff, Mr. McCarthy, in the amount of $75,000.

[19] I will deal with the two requests made in Ontario in reverse order. I am unable to accede to the fee request on behalf of Mr. McCarthy. While I have no doubt his efforts and perseverance have benefited the class through the attainment of this settlement, the statute requires that type of commitment on the part of the representative plaintiff. As stated by McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para 41:

> ...the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class... (Emphasis added, internal citation omitted).

[20] Mr. McCarthy has fulfilled his obligation to the class as their representative. However, a distinction must be drawn between the professional advisors to the class and the representative plaintiff with respect to fees. Where it is necessary for the representative plaintiff to incur out-of-pocket expenses in acting in that capacity, such as attendance at discoveries as one example, it may be appropriate for class counsel to reimburse such amounts and claim it as a disbursement subject to recovery on approval by the Court. While each case turns on its facts, in my view, it is not generally appropriate for a representative plaintiff to receive a payment for fees or for time expended in the pursuit of the action. Further, any payment made to a representative plaintiff in connection with the action, whether directly or indirectly, and whether for re-imbursement or otherwise, must be disclosed to the Court.

[21] The global fees being sought are subject to an agreement between class counsel and the Attorney General. However, such agreements do not eliminate the requirement of court approval. The main concern of the court in settlements in complex cases such as this is to ensure that claimants are able to access, in total, the benefits promised. This means that the administrative system proposed is of paramount importance. It must be adequate and complete at the point at which the administration of the settlement begins. Here, in seeking the approval of the fee request, class counsel in all of the jurisdictions, in response to concerns expressed by the courts have undertaken to perform such administrative work as may be required to implement the settlement without any further fees or charges, save for disbursements. In consideration of this, as well as the risk undertaken by counsel and the results achieved for the class, I am prepared to approve the fees and disbursements sought on this motion.

[22] Orders to go accordingly.

W.K. Winkler R.S.J.

Released: June 8, 2007

COURT FILE NO.: 98-CV-143334
DATE: 2007/06/08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL McCARTHY, CHRISTINE McCARTHY and DEREK MARCHAND

Plaintiffs

- and -

THE CANADIAN RED CROSS SOCIETY and THE ATTORNEY GENERAL OF CANADA

Defendants

A N D B E T W E E N:

MICHAEL McCARTHY and CHRISTINE McCARTHY

Plaintiffs

- and -

CONNAUGHT LABORATORIES LIMITED, CONNAUGHT BIOLOGICS LIMITED, CONTINENTAL PHARMA CRYOSAN INC., NORTH AMERICAN BIOLOGICALS INC. and THE ATTORNEY GENERAL OF CANADA

DEFENDANTS

REASONS FOR JUDGMENT

W.K. WINKLER RSJ

Released: June 8, 2007