

Court File No. CV-08-361464CP

Date: March 9, 2009

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**CEZANNE BILODEAU, OLGA POUSTOVAR,
ELIZABETH MOROSKY by her litigation guardian DAVID MOROSKY,
DAVID MOROSKY personally, WILLIAM GRIMES,
ANNE GRIMES, RONALD J. ROSE, HEATHER DOWLING,
SHIRLEY VANDAELE, DAVID DOWLING, ARTHUR COLE
and DONNA HYLAND**

Plaintiffs

- and -

MAPLE LEAF FOODS INC. and MAPLE CONSUMER FOODS INC.

Defendants

PROCEEDING UNDER THE *Class Proceedings Act, 1992*, S.O. 1992, c. C.6.

COUNSEL:

J.P. Rochon and C.P. Stevenson for the Plaintiffs
S. Stieber and E. Bowker for the Defendants
L. Redden for the Public Guardian and Trustee
L. Waxman for Children's Lawyer

HEARING DATE: March 5, 2009

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] This proposed Ontario class action (and several actions in Ontario that have been consolidated with it), along with several other class actions from across Canada, followed a food product recall by the defendants Maple Leaf Foods Inc. and Maple Leaf Consumer Foods Inc. (collectively "Maple Leaf Foods"). I am told that these actions are the largest consumer food contamination class proceeding in Canadian history.

[2] From the list of plaintiffs for the Ontario action, the proposed representative plaintiffs are Ronald J. Rose and David Morosky.

[3] The proposed Class Counsel are a consortium of nine law firms from across Canada; namely: (1) Merchant Law Group, (2) Rochon Genova LLP, (3) Branch MacMaster, (4) Docken and Company, (5) Falconer Charney LLP, (6) Hotz Lawyers, (7) Stevensons LLP, (8) Sutts, Strosberg LLP, and (9) Sylvestre Fafard Painchaud.

[4] The defendants are represented by several law firms from across the country. For the Ontario action, the lawyers for Maple Leaf Foods are Stieber Berlach LLP.

[5] Now before this court are motions, among other things: (a) to certify this action as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6; (b) for approval of a settlement; (c) for the appointment of Bruneau Group Inc. as the Claims Administrator; (d) for approval of the notice plans; and (e) for approval of Class Counsel's fees.

[6] With the qualifications and on the terms identified below and for the reasons discussed below, I grant the motions.

[7] The approvals that follow, however, are contingent on concurrent approvals by the courts in Saskatchewan, and Québec, else the Ontario action will continue to a contested certification motion.

[8] My reasons for granting the relief being requested will be explained in eleven parts:

- First, there is this introduction.
- Second, I will discuss the general factual background to the various class actions across the country.
- Third, I will describe the Settlement Agreement.
- Fourth, I will discuss the matter of the certification of this action for settlement purposes. I will be brief; the motion for certification is unopposed, and this action is very suitable for certification for settlement purposes.
- Fifth, I will mention the criteria for settlement approval. Again, I will be brief; the circumstances of this case do not call for an extended treatment of the law associated with this topic, and the focus of attention can simply turn to a determination of whether the settlement is fair, reasonable, and in the best interests of those affected by it.
- Sixth, I will describe and discuss the objections to the settlement raised by four class members. As will appear in this part, one of the objectors, Mr. Samy Bishay, complains about the professional conduct of the Merchant Law Group and Mr. Bishay's complaints morph into an objection about the fees payable under the

Settlement Agreement, and thus his objection is relevant not only to the settlement approval but more particularly to Class Counsel's fee approval request.

- Seventh, having already described the background, the Settlement Agreement, the relevant law and the objections, I will determine whether the settlement is fair, reasonable, and in the best interests of class members.
- Eighth, I will discuss the matter of the approval of the Class Counsel fee. Here, there is the oddity that there is an internal dispute among the consortium of law firms about two items. A group of seven of the nine law firms join company with Mr. Bishay in two aspects of his objections to the fee approval: namely: (1) the Merchant Law Group's idiosyncratic proposal for a pre-approval of future counsel fees; and (2) the Merchant Law Group's and Rochon Genova LLP's claim for reimbursement of a disbursement paid by them to a law firm that is not part of the national consortium of Class Counsel. I foreshadow to say that I will enjoin the Merchant Law Group's pre-approval proposal and I do not approve the disputed disbursement.
- Ninth, I will discuss Mr. Bishay's request to be paid for his efforts to advance the class proceeding and his request for a payment to his lawyer for assisting Mr. Bishay as an objector. To foreshadow, I do not approve of these requests.
- Tenth, I will deal with other approvals including approval of the certification notice plan and the appointment of the Class Administrator.
- Eleventh, I will have a concluding comment.

Factual Background

[9] Maple Leaf Foods is a food manufacturer, and it distributes a variety of products including processed meat.

[10] In the summer of 2008, Maple Leaf Foods progressively announced a recall of meat products because of possible contamination with the bacteria *listeria monocytogenes*. The recall grew to include 220 different products that had been processed at a plant on Bartor Road in Toronto. The likely source of the contamination was two slicing machines at the plant.

[11] Listeriosis, the infection caused by the bacteria, is a potentially fatal disease and its symptoms include nausea, vomiting, cramps, diarrhea, headache, constipation, and fever, and during the summer of 2008, there was an outbreak of the disease across Canada that was connected to the foods processed at the Bartor Road plant.

[12] Later, in December 10, 2008, the Public Health Agency of Canada confirmed 56 cases of Listeriosis from the outbreak. Unfortunately, there were 20 deaths for which the disease was the underlying or contributing cause.

[13] Following the product recall, with exceptions for Prince Edward Island and Nova Scotia, national class actions were commenced in every province against Maple Leaf Foods. In all, fourteen proposed class actions were commenced. The action now before the court was commenced on August 27, 2008. Certification, settlement, and fee approvals are now concurrently being sought by Class Counsel in this action and in actions in Saskatchewan and Québec.

[14] A review of Class Counsel's several databases reveals that in response to the product recall and the commencement of the various class proceedings, approximately 5,000 communications were made to the law firms of the consortium. A large number of correspondents reported suffering from physical symptoms consistent with Listeriosis and from emotional upset from ingesting recalled products.

[15] Maple Leaf Foods has not admitted that the contamination of the recalled products is the cause of all injuries allegedly connected to the Listeriosis outbreak, including the 20 deaths, and it has not admitted liability in the actions now before the courts. Although not prepared to admit liability, Maple Leaf Foods quickly agreed to assume responsibility, and it entered into settlement negotiations during the late summer and early fall of 2008, although it was confronted with the problem that it was not clear with whom it should negotiate given the superabundance of proposed national class proceedings across the country and the initial absence of an agreement about who should have carriage of national or regional class actions.

[16] On November 10 and 11, 2008, the Honourable Roger Kerans, a retired judge of the Alberta Court of Appeal, conducted a mediation session for the purpose of resolving the carriage issues in the various class actions and for the purpose of mediating a settlement of the claims against Maple Leaf Foods. Progress was made on these matters, but a settlement was not reached and there was an on-going dispute about whether an agreement had been reached about the carriage issues.

[17] Intensive negotiations about the carriage issues and about the terms of a settlement agreement continued into December 2008. I note here - because it is the precise subject of the disputed disbursement mentioned in the introduction - that Earl Cherniak of Lerners LLP was hired to represent the Merchant Law Group and Rochon Genova LLP when there was a serious dispute about carriage issues. Mr. Cherniak's firm is not a member of the national consortium, and its account of \$52,792.56 is claimed as a disbursement in the motion for approval of counsel fees.

[18] By mid-December, the carriage issues were finally resolved, the national consortium of law firms emerged to constitute Class Counsel, and the lawyers of the consortium and the lawyers for Maple Leaf Foods and its insurer negotiated a settlement.

[19] On December 17, 2008, the parties executed a Settlement Agreement. The highlights of that agreement are set out below.

[20] After December 17, 2008 a great deal of legal work has been done to document the settlement and to arrange for the certification and approval motions now before the courts in Ontario, Saskatchewan, and Québec.

[21] Under the Settlement Agreement, the Defendants consent to the certification of three class actions for settlement purposes by the courts in Ontario, Saskatchewan, and Québec respectively. The Ontario court is being asked to certify the action for Ontario class members, which include residents of Ontario, Alberta, and British Columbia. The Québec court will be asked to grant authorization of the consolidated Québec action for Québec residents, and the Saskatchewan court will be asked to certify the Saskatchewan action for Saskatchewan class members, who include all other potential claimants.

[22] In the Ontario action, both Ronald Rose and David Morosky have reviewed the Settlement Agreement and they have provided their instructions to accept it.

[23] On January 14, 2009, I appointed the Bruneau Group as Administrator to implement a notice plan for the hearing for settlement approval and to receive objections to the settlement. This appointment was made without in any way passing on the reasonableness or otherwise of the settlement. With some adjustments, I also approved the notice plan that the Bruneau Group had prepared for the approval hearing, and on January 20, 2009, I approved the long form notice and the claim form. On January 29, 2009, I appointed the Bruneau Group as the Trustee to receive the settlement funds for the purpose of implementing the settlement.

[24] Concurring orders approving the notice plan, publication notice, long form notice, claim form and appointing the Bruneau Group as Administrator and Trustee were obtained from the courts in Saskatchewan and Québec.

[25] The notice program for the settlement approval hearing involved giving notice, among other things, of the proposed settlement and of the process for court approval of it and of counsel fees. The notices were disseminated on websites, by radio telecasts, and by newspaper publication. There was a direct mailing to 5,618 individuals. Several hundred residences for the elderly were also given written notice providing information about the settlement and of the settlement hearing dates.

[26] As of March 3, 2009, only four objections have been received by the Administrator. I will discuss the objections later in these Reasons for Decision.

[27] It should be observed that the package of mailed material giving notice of the approval hearing included a claims form that could be submitted in advance but subject to the court's decision whether or not to approve the settlement. As of February 25, 2009, 353 claim forms have been submitted to the Administrator. Later, I will discuss some aspects of the useful information now available to the court from the advance claims submitted to the Administrator.

Highlights of the Settlement Agreement

[28] The following is a list of some of the more important elements of the Settlement Agreement:

- The Settlement Agreement resolves the claims on behalf of all persons who consumed or purchased the listed food products manufactured by Maple Leaf Foods between January 1, 2008 and August 20, 2008 inclusive and their family members, excluding persons and corporations who purchased those food products for resale purposes.
- Maple Leaf Foods agrees to pay a minimum of \$25 million and, if necessary, an additional \$2 million from which expenses and eligible claims will be paid.
- For class members, the benefits include compensation for physical or psychological injuries, and there are also *Family Law Act* compensatory payments.
- Provincial and territorial health insurers are reimbursed for health care expenses.
- There is a *cy-près* distribution of any residue from the settlement fund to organizations whose purposes are children's causes, food and nutritional issues or food banks. The *cy-près* payment, if made, is for the notional benefit of class members with purchase claims, which claims would be prohibitive to administer.
- Eligible claimants are entitled to submit claims for compensation according to a compensation grid that sets out 8 levels of physical harm and 4 levels of psychological harm. The grid defines the criteria for each level of harm and an amount of compensation for each level. An abridged version of the compensation grid is set out below.
- The costs of administering the settlement and of disseminating the various notices required by the class proceedings legislation are paid for from the settlement funds.
- Subject to court approval, class counsel are to receive a counsel fee of \$3 million, plus disbursements (approximately \$166,000) and applicable taxes from the settlement funds, and they have the right to apply (as described below) for additional fees.
- The Bruneau Group Inc. is the Claims Administrator, and the Settlement Agreement provides for arbitration for some levels of claims submitted to the Claims Administrator.

- As a matter of process, a claimant submits a claim form, the Bruneau Group makes a decision about the level of compensation on the balance of probabilities and in accordance with the compensation grid, and in some cases, the claimant has the right to arbitration about the level of compensation. Arbitration is available as an option for claimants advancing claims at levels 4, 5, 6, 8, 11, and 12. Claimants also have a right to appeal the decision of the Claims Administrator to the Arbitrator.
- There is a Claims Protocol empowering the Claims Administrator: to determine questions of jurisdiction of the Claims Administrator or Arbitrator; to determine the admissibility, relevance and weight of evidence; to determine questions of law; to determine questions of fact; and to direct the procedure to be followed on an arbitration.
- An opt-out reserve fund, which is designed to make the settlement funds "revenue neutral" from Maple Leaf Foods' perspective, is created and managed by the Claims Administrator. This reserve fund comprises credits equal to the amount the persons who opt out would have been paid had they remained as class members. It is to be noted that the Settlement Agreement does not put a cap on Maple Leaf Foods' ultimate liability; rather, Maple Leaf Foods is given a resource for payments to persons opting out equal to the compensation payable had the person not opted out.
- The Claims Administrator is responsible for reviewing all Opt-Out Forms and allocating an Opt-Out Reserve Credit to each Opt-Out Claimant based on the information provided by the Opt-Out claimant.
- At the expiration of the Claims Period, the Administrator will report to the Courts, on notice to Class Counsel and Maple Leaf Foods, as to their preliminary calculation of the aggregate Opt-Out Reserve Credits.
- In the event that the \$25 million fund less the Opt-Out Reserve Credits, Class Counsel Fees and administrative expenses, other approved expenses, and payments to provincial health insurers are insufficient to pay all eligible claims, Maple Leaf Foods will pay the additional settlement fund of up to \$2 million.
- In the event that the total value of eligible claims, administrative and other court-approved expenses, the opt-out reserve credits, and initial counsel fee exceeds \$27 million, claims are subject to a *pro rata* reduction.
- The settlement includes "top up" payments. In the event that a balance remains in the opt-out reserve fund after 2 years from the latest of the approval orders where eligible claims had their claims reduced *pro rata*, further payments will be made to eligible claimants.
- The settlement includes "Enhanced Payments." In the event that there remains a residue following payment of all eligible claims, including top-up payments,

claims of provincial health insurers, initial payment of class counsel fees, administrative and other approved expenses, then Enhanced Payments on a *pro rata* basis will be made to claimants at levels 7 and 8 of the physical harm compensation grid in an amount equal to 15% of the compensation grid award.

- If Enhanced Payments are made and there remains a balance in residue, class counsel may apply for approval of further class counsel fees, and if there is still a balance then *cy-près* payments will be made as agreed upon and approved by the court.
- Maple Leaf Foods does not retain any interests in the Residue and it does not have any rights to contest individual claims for those that do not opt-out. Claims are decided by the Claims Administrator and the Arbitrator.
- The proposed claims period is proposed to terminate on July 31, 2009. However, the Settlement Agreement contemplates that the Court will set the deadline for the claims period, and I direct that the claims period be extended to November 1, 2009. The reason for this extension is that it was observed during the argument that Listeriosis might cause harm to a pregnant woman and birth defects. The extension of the deadline should permit the discovery of these latent claims.

[29] The following table summarizes the compensation available pursuant to the Compensation Grid:

| LEVEL AND INJURY DESCRIPTION | PAYMENT(S) | SPECIAL DAMAGES |
|--|--|---|
| Level 1- Class Members who sustained physical symptoms consistent with Listeriosis lasting for 24 to less than 48 hours subsequent to the ingestion of Recalled Product. | \$750.00 per Class Member (including FLA claims made in relation to the same Class Member), to a maximum cap of \$7.5 million for all claims in Physical Level 1. If more than 10,000 claimants fall into this category, the \$7.5 million will be evenly divided between all claimants. | NO |
| Level 2- Class Members who sustained physical symptoms consistent with Listeriosis lasting for 48 hours to less than 1 week subsequent to the ingestion of Recalled Product. | \$3,000.00 per Class Member (including FLA claims made in relation to the same Class Member) | YES; + Subrogated provincial insurer payments |
| Level 3- Class Members who sustained physical symptoms consistent with Listeriosis lasting for 1 week to less than 2 weeks | \$5,500.00 per Class Member (including FLA claims made in relation to the same Class Member); + \$750.00 per day of | YES; + Subrogated provincial insurer payments |

| | | |
|--|--|---|
| subsequent to the ingestion of Recalled Product. | hospitalization | |
| Level 4- Class Members who sustained physical symptoms consistent with Listeriosis lasting for 2 weeks to 1 month subsequent to the ingestion of Recalled Product. | \$8,000.00 per Class Member (including FLA claims made in relation to the same Class Member); + \$750.00 per day of hospitalization | YES; + Subrogated provincial insurer payments |
| Level 5- Class Members who sustained physical symptoms consistent with Listeriosis accompanied by secondary infection but without ongoing and/or permanent physical symptoms. | \$35,000.00 per Class Member (including FLA claims made in relation to the same Class Member); + \$750.00 per day of hospitalization | YES; + Subrogated provincial insurer payments |
| Level 6- Class Members who sustained physical symptoms consistent with Listeriosis with or without additional complications, with ongoing and/or permanent physical symptoms. | \$75,000.00 per Class Member (including FLA claims made in relation to the same Class Member); + \$750.00 per day of hospitalization | YES; + Subrogated provincial insurer payments |
| Level 7- Class Members who suffered physical symptoms consistent with Listeriosis accompanied by secondary complications involving the central nervous system, resulting in serious and permanent impairment of physical and/or mental function. | \$125,000.00; + \$10,000 to each FLA claimant(s) claiming in relation to the same Class Member; + \$750.00 per day of hospitalization | YES; +Special damages may include loss of income and cost of past and future care; + Subrogated provincial insurer payments |
| Level 8- Class Members who sustained physical symptoms consistent with Listeriosis resulting in death. | \$120,000.00 for the estate of the Class Member; + \$35,000.00 to FLA claimant, if spouse of deceased;+ \$30,000.00 to each FLA claimant(s), if children of the deceased; + \$20,000 to each FLA claimant(s), if parents of the deceased; + \$5,000.00 to each FLA claimant(s), if siblings or grandchildren of the deceased; + Funeral expenses up to \$13,500.00 | No, but for funeral expenses; + Subrogated provincial insurer payments |
| Level 9- Class Members who | \$2,000.00 per month of | YES; + Subrogated provincial |

| | | |
|---|---|---|
| sustained psychological injuries or trauma for up to 60 days, with an onset after August 17, 2008, with no accompanying bodily injury. | symptoms up to a maximum of \$4,000.00 | insurer payments |
| Level 10- Class Members sustained psychological injuries or trauma for up to 60 days, with an onset after August 17, 2008, with no accompanying bodily injury, if the class member falls within a group that is particularly at risk for contracting Listeriosis. | \$3,000.00 per month of symptoms to a total of \$6,000.00 | YES; + Subrogated provincial insurer payments |
| Level 11- Class Members who sustained psychological injuries or trauma for more than 60 days, with an onset after August 17, 2008, with no accompanying bodily injury. | \$13,500.00 | YES; + Subrogated provincial insurer payments |
| Level 12- Class Members who sustained psychological injuries or trauma more than 60 days, with an onset after August 17, 2008, with no accompanying bodily injury, if the class member falls within a group that is particularly at risk for contracting Listeriosis. Health Canada has identified at risk individuals as including pregnant women and their unborn/newborn children, the elderly (65 plus) and people with weakened immune systems. | \$17,500.00 | YES; + Subrogated provincial insurer payments |

[30] The following table sets out the qualifying criteria for each level and also whether arbitration is available for the claimant:

| Level | Qualifying Criteria and Required Documentation | Arbitration Available at the Request of the Claimant |
|-------|--|--|
|-------|--|--|

| | Declaration attesting to consumption of Recalled Product | Supporting contemporaneous medical documentation of physical illness showing illness was caused by or consistent with physical symptoms of Listeriosis | Supporting documentation showing that claimant is a member of a high risk group | If the claimant was the purchaser of the consumed Recalled Product, proof of purchase or retained packaging or proof of returned product OR declaration attesting to purchase if any of these documents are not available. | |
|---------|--|--|---|--|-----|
| Level 1 | Yes + Declaration attesting physical illness consistent with Listeriosis. | No | No | Yes | No |
| Level 2 | Yes | Yes | No | Yes | No |
| Level 3 | Yes | Yes | No | Yes | No |
| Level 4 | Yes | Yes | No | Yes | Yes |
| Level 5 | Yes | Yes | No | Yes | Yes |
| Level 6 | Yes | Yes | No | Yes | Yes |
| Level 7 | Yes | Yes | No | Yes | Yes |
| Level 8 | Yes. Declaration may also be on | Yes. Plus proof of | No | Yes | Yes |

| | | | | | |
|----------|---|--|---|---|-----|
| | information and belief if direct knowledge is not possible. | death and Plus confirming evidence indicating that death was caused by or consistent with physical symptoms of Listeriosis | | | |
| | Declaration attesting to consumption of Recalled Product | Supporting contemporaneous medical documentation of psychological injury or trauma related to the recall and consumption of Recalled Product | Supporting documentation showing that claimant is a member of a high risk group | If the claimant was the purchaser of the consumed Recalled Product, proof of purchase or retained packaging or proof of returned product OR declaration attesting to purchase if any of these documents are not available | |
| Level 9 | Yes | Yes | No | Yes | No |
| Level 10 | Yes | Yes | Yes | Yes | No |
| Level 11 | Yes | Yes | No | Yes | Yes |
| Level 12 | Yes | Yes | Yes | Yes | Yes |

[31] During argument at the approval hearing, the view was expressed that the compensation grid represents generous compensation having regard to the traditional ranges of recovery under Canadian personal injury tort law. It is the view of Class Counsel that the settlement constitutes an excellent result for individual claims and should provide sufficient funds to pay the anticipated claims in full as well as the claims of the provincial health insurers.

[32] In a variety of ways, Class Counsel has attempted to test their opinion that the settlement funds will be sufficient to cover all claims. They have reviewed and attempted to quantify the claims of known class members in accordance with the compensation grid. They have reviewed the advance claims already received by the Administrator.

[33] The Administrator advises that a total of 5,924 individuals have visited the settlement web site www.mapleleafclaim.com out of a total of 7,158 visits.

[34] The Administrator received the first advance claim on February 2, 2009 and it has been receiving approximately 30 new claims a day. The preliminary claims administration statistics as of February 25, 2009 are set out in the following table.

| Level of Compensation Claimed | Claims in French | Total Claims Rec'd | % |
|-------------------------------|------------------|--------------------|--------|
| 1 | 29 | 174 | 57% |
| 2 | 11 | 59 | 19.34% |
| 3 | 2 | 23 | 7.55% |
| 4 | 0 | 19 | 6.22% |
| 5 | 0 | 3 | 0.98% |
| 6 | 0 | 4 | 1.31% |
| 7 | 0 | 1 | 0.32% |
| 8 | 0 | 1 | 0.32% |
| 9 | 0 | 4 | 1.31% |
| 10 | 0 | 3 | 0.98% |
| 11 | 0 | 3 | 0.98% |
| 12 | 0 | 2 | 0.65% |
| Multiple Levels | 4 | 9 | 2.95% |

| | | | |
|---------------|--------------------|------------|-------------|
| TOTALS | 48 (15.73%) | 305 | 100% |
|---------------|--------------------|------------|-------------|

[35] The following table provides the results of Class Counsel's assessment of the likely general damage claims of class members following a preliminary review of the information so far provided. In making the assessment, Class Counsel allocated class members' claims to the highest grid level supported by the information provided, even in the absence of supporting medical documentation, so as to assess whether the settlement fund would be sufficient to satisfy the anticipated claims.

| LEVEL | Number of Identified individuals with injury claims | Value of Claims |
|---|--|------------------------|
| <u>Level 1</u> - \$750 | 2046 | \$1,534,500 |
| <u>Level 2</u> - \$3,000 | 537 | \$1,611,000 |
| <u>Level 3</u> - \$5,500 | 166 | \$923,550 |
| <u>Level 4</u> - \$8,000 | 19 | \$688,000 |
| <u>Level 5</u> - \$35,000 | 68 | \$2,380,000 |
| <u>Level 6</u> - \$75,000 | 7 | \$525,000 |
| <u>Level 7</u> - \$125,000 | 8 | \$1,060,000 |
| <u>Level 8</u> - \$120,000 | 40 | \$4,920,000 |
| <u>Level 9</u> - \$2,000 per month of symptoms up to a maximum of \$4,000 | 224 | \$450,000 |
| <u>Level 10</u> - \$3,000 per month of symptoms to a total of \$6,000 | 32 | \$105,000 |
| <u>Level 11</u> - \$13,500 per month of a total of \$6,000 | 2 | \$27,000 |
| <u>Level 12</u> - \$17,500 | 2 | \$35,000 |
| TOTAL | 3151 | \$14,259,050 |

[36] Class Counsel's assessment did not include special damages; however, Class Counsel do not anticipate that payments for special damages will exhaust the settlement fund because many of the serious injury and death claims involve the elderly with modest claims for special damages. Similarly, Class Counsel anticipates that the net amount of the settlement funds should be sufficient to pay all Family Class Member claims in full.

[37] In addition to compensation for eligible claims, the settlement funds are allocated for payment of counsel fees and for administrative expenses. The present estimate for these expenses total \$4,628,000.00, broken down as follows: (a) \$3,350,000.00 for initial counsel fees and disbursements and applicable taxes; (b) \$420,000.00 for the costs of the Claims Administrator; (c) \$11,000.00 for costs of the Trustee; and (d) \$847,000.00 for the costs of the notice programs.

Certification

[38] The criteria for certification are set out in s. 5 (1) of the *Class Proceedings Act, 1992*, which states:

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
 - (a) the pleadings or the notice of application discloses a cause of action;
 - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
 - (c) the claims or defences of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
 - (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[39] Where certification is sought for the purposes of settlement, all the criteria for certification still must be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22.

[40] In the action, the plaintiffs advance claims in strict liability, negligence, waiver of tort, and breach of the *Consumer Protection Act*, S.O. 2002, c. 30.

[41] The class definition for the purposes of the Ontario action is as follows:

All persons resident in Ontario, Alberta and British Columbia, excluding the defendants and their senior employees, who purchased or consumed products included in the Recall [food products set out in Schedule B of the Settlement Agreement manufactured, processed or packaged between January 1, 2008 and August 20, 2008] other than persons and corporations who purchased the products included in the Recall for resale purposes (the "Ontario Primary Class")

All persons who by reason of his or her relationship to a member of the Class are entitled to make claims under one of the following statutes as a result of the death or personal injury of a member of the Class: *Family Law Act*, R.S.O. 1990, c. F.3; *Family Compensation Act*, R.S.B.C. 1996, c. 126; *Fatal Accidents Act*, R.S.A., c. F.8, *Tort-Feasors Act*, R.S.A. 2000, c. T-5 (the "Ontario Family Class")

[42] The proposed common issue for the certification for settlement purposes is as follows:

What, if any, liability do the Defendants have to the Ontario Class arising from, or relating to, all claims in connection with the Recall?

[43] In the case at bar, I am satisfied that for settlement purposes, the criterion for certification have been satisfied. In particular: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons who will be represented by the representative plaintiffs; (c) the claims of the class raise common issues of fact or law; (d) a class proceeding is the preferable procedure; and (e) Ronald J. Rose and David Morosky are suitable Representative Plaintiffs with adequate Class Counsel.

[44] Put simply, it is desirable to employ the mechanism of a class proceeding to resolve the claims advanced in this action. The certification for settlement purposes of this class action provides prompt and efficient access to justice for thousands of claimants.

Criteria for Settlement Approval

[45] I turn now to the matter of settlement approval. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair,

reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[46] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[47] When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arm's length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

Objections to the Settlement

[48] Only four persons objected to the settlement; namely: Sue Bialy, Michel Bédard, Arlene Laughren, and Samy Bishay.

[49] Ms. Bialy and M. Bédard's objections are similar. In her objection letter, Ms. Bialy indicates that she was sick in the last week of July 2008 and she wanted to go to a doctor to find out if she had Listeriosis. She was advised by the doctor's staff that there is no meaningful test for the disease. Unfortunately, this advice may be true if a person is asymptomatic, but apparently it is not true if the disease has manifested itself with symptoms.

[50] Ms. Bialy objects to the settlement because she thought it was unfair to ask class members to provide contemporaneous medical documentation when they might not have been aware of the product recall.

[51] In a very short letter, M. Bédard objects to the requirement that supporting medical documentation is required for the compensation grid. He advises that he intends to appear before the Québec court to discuss his objection.

[52] In my opinion, Ms. Bialy's and M. Bédard's concerns are ameliorated by the fact that there is no requirement to provide contemporaneous medical documentation for level 1 claims. In this regard, the sampling from the advance claims received so far by the Administrator reveals that 57% of them fall into level 1, and this level of claim does not require contemporaneous medical information.

[53] For the more serious claims, and indeed for those with level 1 claims, it is likely that there may be medical documentation because the claimant would or may have sought medical assistance whether or not he or she was aware of the product recall. It is to be noted that where the compensation grid requires contemporaneous medical information, the information need not provide proof of Listeriosis; rather, it must show that the claimant's illness was caused by or was consistent with the physical symptoms of Listeriosis.

[54] The requirement of medical documentation is salutary because it is a safeguard against fraudulent claims, and, in any event, perfection in administering claims cannot and need not be achieved in a settlement, which rather must meet the standard of being in all the circumstances fair, reasonable, and in the best interests of those affected by it.

[55] The next objector is Arlene Laughren, whose lawyer Guy J. Collette wrote a letter of objection dated February 27, 2009 on Ms. Laughren's behalf.

[56] Ms. Laughren is the proposed representative plaintiff in another proposed class action in British Columbia. The letter reveals that unfortunately, Ms. Laughren has a substantial personal claim, her own case of Listeriosis having caused brain abscesses that left scar tissue now causing her neurological symptoms.

[57] Ms. Laughren's concern is that having regard to the fact that the full extent of her damages and the damages of other serious claimants may not now be known, there may be insufficient funds to fully compensate all of the claimants according to the compensation grid. It is her position that the settlement was entered into precipitously without adequate investigation into the number of claims and potential damages. She submits that approval of the settlement is premature.

[58] It is to be noted that Ms. Laughren does not submit that the compensation grid provides inadequate compensation; rather, her objection is that not enough is presently known to determine whether the settlement is adequately funded.

[59] In my assessment, however, her objection is met by the opinion of Class Counsel backed up by their experience, due diligence, and their analysis of the information available to them that the settlement fund is adequate for the class members who do not opt-out. In this regard, it should be noted that for level 1 claims, there is a cap of \$7.5 million and if more than 10,000 claimants fall into this category, the \$7.5 million will be evenly divided between all claimants. This feature protects the resources of the fund for

claimants with more substantial claims. There is also the \$2 million additional fund that becomes available if the initial \$25 million committed to the settlement proves insufficient; this resource provides some comfort about the adequacy of the settlement fund.

[60] The final objector is Samy Bishay. The estate of Mr. Bishay's late mother, Nadia Bishay is one of the plaintiffs in the Saskatchewan class action that is concurrently advancing to a certification hearing for settlement purposes. The executor of the estate is Mr. Bishay's 75 year-old father, but it appears that the Merchant Law Group has been taking instructions and reporting to Samy Bishay about the estate's involvement in the class proceedings. Without deciding the point, I regard Mr. Bishay as being, at least, a class member and, in any event, as having a lawyer and client relationship with the Merchant Law Group with respect to the proposed class proceedings against Maple Leaf Foods.

[61] Although Mr. Bishay has an interesting story to tell about his involvement in the class proceedings, his substantive objections to the Settlement Agreement are directed only at discrete aspects of the agreement about Class Counsel's fees. As noted earlier in these Reasons for Decision, Mr. Bishay objects to: (1) the Merchant Law Group's proposal for a pre-approval of future counsel fees; and (2) the Merchant Law Group's and Rochon Genova LLP's claim for reimbursement of a disbursement paid by them to Lerner, LLP. Mr. Bishay otherwise apparently approves of the Settlement Agreement, and he does not even oppose the initial payment of Class Counsel's fees other than with respect to the Lerner LLP disbursement.

[62] Mr. Bishay's two objections can therefore be better dealt with as part of the consideration of the fairness of the counsel fee. It is, however, convenient here to note that Mr. Bishay obtained legal advice from Joseph E. Murphy, Q.C. of Murphy Battista, Vancouver B.C., and to make his objection, Mr. Bishay swore an affidavit which was forwarded to the Administrator.

[63] In his affidavit, Mr. Bishay deposes as to the sorry history of his relationship with the Merchant Law Group, against whom he has numerous grievances. Mr. Bishay's account is challenged by Evatt Merchant of the Merchant Law Group. A reading of Mr. Merchant's affidavit reveals that the law firm has a list of grievances of its own against Mr. Bishay.

[64] For the purposes of the motions now before the court, mercifully, it is not necessary to discuss or explore these lawyer and client grievances, because the determination of the merits of Mr. Bishay's two objections and of his personal claim for compensation and for costs is a matter of principle and policy, and the determination of his objections and claims are independent of resolving the lawyer-client dispute.

[65] I, therefore, conclude that the objections raised by Sue Bialy; Michel Bédard Arlene Laughren; and Samy Bishay are insufficient to deny approval of the Settlement Agreement provided that the agreement otherwise satisfies the test for court approval, which is the topic next considered in these Reasons for Decision.

Settlement Approval

[66] As already noted above, Class Counsel submit that the \$25 million, accrued interest, plus the additional fund of up to \$2 million represents an excellent result and should provide sufficient funds to pay, in full, the claims of all eligible claimants as well as the claims of the provincial health insurers.

[67] Having regard to the evidence before the court and having regard to the list of criteria that the court may consider when assessing the fairness of a settlement, the Settlement Agreement does appear to be an excellent result, especially because it seems that the compensation grid in the Settlement Agreement aims to provide compensation commensurate with the genuine seriousness of the claimant's loss and with the scale of damages typically awarded under Canadian personal injury law.

[68] For claimants under the Settlement Agreement, the difficulties of causation that would attend a trial determination are avoided and there is little indication that their individual claims are being discounted for settlement purposes.

[69] Based on the record that I have reviewed, I find that the Settlement Agreement is fair, reasonable, adequate, and in the best interests of the class. In accordance with the *Class Proceedings Act, 1992*, I approve the settlement.

Approval of Counsel Fees

[70] I turn now to the matter of the approval of the counsel fees as requested by Class Counsel.

[71] Factors relevant in assessing the reasonableness of the fees of any class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at para. 67; *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Mura v. Archer Daniels Midland Co.*, [2003] B.C.J. No. 1751 (S.C.); *Lam v. Ajinomoto U.S.A., Inc.*, [2004] B.C.J. No. 985 (S.C.); *Ritchie-Smith Feed, Inc. v. Rhône-Poulenc Canada Inc.*, [2005] B.C.J. No. 857 (S.C.).

[72] To date, none of the Class Counsel has been paid for any of their work or disbursements, and none would be paid if the claims are unsuccessful because their retainers are on a contingency basis. Most of the original agreements with the

representative plaintiffs provide for percentage payments in the order of 30% (or 4x time).

[73] Under the Settlement Agreement, subject to court approval, Class Counsel receive from the settlement funds an initial counsel fee of \$3 million, plus disbursements and applicable taxes, and Class Counsel has the right to apply for additional fees. To be precise, if Enhanced Payments are made and there remains a balance in residue, Class Counsel may apply for approval of further fees.

[74] To date, disbursements total approximately \$166,000.00, including GST. Disbursements were largely in relation to the seven experts retained by Class Counsel, the costs of the mediator, and the costs of travel. Class Counsel funded all of the disbursements and did not receive assistance from the Class Proceedings Fund.

[75] Class Counsel distributed the various tasks associated with a class proceeding; visualize: (a) Sharon Strosberg, Colin Stevenson, Ted Charney and Luciana Brasil prepared the certification materials; (b) Colin Stevenson and Joel Rochon managed a request for proposal process that led to the selection of the Administrator; (c) Colin Stevenson and Ted Charney prepared consolidation materials and Evatt Merchant arranged for the transfer of files; (d) Ward Branch prepared the Distribution Protocol and met with Provincial Health Care Plan officials outside Ontario; (e) Joel Rochon and Ward Branch prepared affidavit and other materials for the settlement hearing; (f) Ted Charney met with OHIP, handled evidence retention issues, and prepared the mediation brief; (g) Harvey Strosberg, Joel Rochon, and Ward Branch negotiated the settlement terms; (h) Normand Painchaud, Tony Merchant, Evatt Merchant and Ted Charney communicated with class Members and dealt with class member management issues; (i) Tony Merchant handled media inquiries; and (j) Norman Painchaud and Own Falquero handled issues specific to Québec.

[76] To date, the nine law firms have incurred approximately \$2,173,000.00 in unbilled fees in prosecuting the class actions across the country.

[77] On the hearing for fee approval, it was submitted that if the value of Class Counsel's time was discounted by 15% because of some overlap or for work that might not have benefited the class; that is, reduce the total time to \$1,800,000.00, the proposed fee of \$3,000,000.00 represents a multiplier of about 1.67x on the reduced value of Class Counsel's time. By comparison, the proposed fee is 11.1% of the \$27,000,000.00 available to the claimants, or 12% of the guaranteed \$25 million.

[78] All Class Counsel submit that the court ought to approve the payment of the \$3 million fee and applicable taxes, and with one exceptional disbursement item, they unanimously claim payment of their disbursements.

[79] There are no objections by any class member about the initial \$3 million counsel fee payment.

- [80] In my opinion, the initial payment of \$3 million is fair and reasonable having regard to the various factors noted above for assessing the reasonableness of the counsel fee. Moreover, put simply, it is my opinion that this fee was earned in the case at bar.
- [81] However, as previously noted, there are two items of dispute where there is a divergence of position among the members of the consortium about the approval of Class Counsel's fee. The first matter of dispute is that Rochon Genova LLP and the Merchant Law Group seek reimbursement of a disbursement related to services provided by Earl Cherniak of Lerner LLP. This disbursement is in the amount of \$52,792.56.
- [82] Mr. Cherniak was retained to assist in carriage related matters, including matters of jurisdiction. Rochon Genova LLP and the Merchant Law Group take the position that Mr. Cherniak provided meaningful assistance to Class Counsel during a critical moment in the negotiation and the disbursement for the Lerner LLP account should be paid out of the settlement fund and reimbursed to the law firms that paid the account.
- [83] The payment to Lerner LLP of its account as a disbursement from the settlement fund is opposed by other Class Counsel and by Mr. Bishay.
- [84] Mr. Cherniak is one of Canada's pre-eminent lawyers and a superb advocate, and I have no doubt that he provided meaningful assistance, but the assistance he provided was to Rochon Genova LLP and the Merchant Law Group not to Class Counsel as that group has been constituted.
- [85] Mr. Cherniak's assistance was directed as serving the interests of his clients, Rochon Genova LLP and the Merchant Law Group, and in the attendances before me, my own observation of the matter was that the issues of jurisdiction were simply weapons in a carriage fight between several fine law firms.
- [86] I do not mean to disparage the interests of Rochon Genova LLP and the Merchant Law Group in seeking to be Class Counsel exclusively or with others, but their expenses in retaining outside counsel to assist them in achieving this appointment is not a disbursement that, in my opinion, should reduce the funds available for class members. Therefore, I do not approve of this disbursement.
- [87] The second matter of dispute arises because the Merchant Law Group intends to request at the Saskatchewan approval hearing that in addition to its request for payment of the initial counsel fee, the court pre-approve and hold in trust the legal fees payable in the event that there is a balance in residue including the Merchant Law Group's share of approximately \$1,650,000.00 plus applicable taxes.
- [88] With the exception of Rochon Genova LLP, all other members of Class Counsel oppose this request by the Merchant Law Group, and they take the position that all courts must approve such a request given its effect on the global settlement fund available to the entire class.
- [89] The subgroup of seven firms submit that any application for approval in excess of \$3,000,000.00 is inconsistent with the paragraph of the Settlement Agreement that states:

"If after full payment of all Enhanced Payments, there is an outstanding balance in the Residue, Counsel may apply for a further award of Counsel Fees." They ask for an order that there shall be no further application for approval of fees until the Claims Administrator has provided its report establishing that Enhanced Payments have been paid in full.

[90] I agree with the position taken by the seven law firms that oppose the Merchant Law Group's proposal, and I order that there shall be no further application for approval of fees until the Administrator has provided its report establishing that Enhanced Payments have been paid in full.

[91] A pre-approval and a holdback of settlement funds places the Merchant Law Group in a position that appears to conflict with the interests of class members, who the law firm might hope take up less of the settlement fund in order to leave something more for the lawyers. The optics are bad; under the Settlement Agreement, the right to additional counsel fees comes "after full payment of all Enhanced Payments." Full payment of Enhanced Payments has not yet occurred, and it is unnecessary to secure the position of one member of Class Counsel for this future contingency.

[92] Further, it is to be noted that the Settlement Agreement preserves only the right to apply for a further award. It remains for a future day, after full payment of Enhanced Payments have been made, for the courts in all of Ontario, Saskatchewan, and Québec to decide whether any further fee approval will be granted and the Ontario court is not prepared to make that determination now.

[93] With the above qualifications, I approve the counsel fee. It is fair and reasonable compensation in all the circumstances.

Mr. Bishay's Claims

[94] Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated on a *quantum meruit* basis for the time spent: *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.) at para. 28. However, the court should only rarely approve an award of compensation to the representative plaintiff: *McCarthy v. Canadian Red Cross Society* [2007] O.J. No. 2314 (S.C.J.) at para. 20; *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.); *Bellaire v. Daya* [2007] O.J. No. 4819 (S.C.J.) at para. 71.

[95] Mr. Bishay deposes that he spent considerable time, estimated at approximately 200 hours, carrying out his responsibilities as representative plaintiff, and he seeks payment for Mr. Murphy's \$18,000 account for legal services. However, the representative plaintiffs in this proceeding are Ronald J. Rose and David Morosky and Mr. Bishay has not been appointed representative plaintiff in any proceeding.

[96] I see no basis for making an award to Mr. Bishay. He is not being appointed a representative plaintiff. He remains perhaps a class member with a family law claim. As a class member, he is insulated from responsibility for costs, and there is no basis to award him remuneration or costs.

[97] On a policy level, the precedent of paying him on a *quantum meruit* and paying his legal fees would be an undesirable precedent because it might encourage the undesirable practice of objectors in class proceedings seeking remuneration as a means to recover more compensation than other class members and it would yield the undesirable side issue that the court would have to determine the value of an objector's contribution to the best interests of the class. The case at bar demonstrates the problems because, in effect, I am being asked whether Mr. Bishay should receive compensation for 200 hours of services. Without commenting about the value of Mr. Bishay's contribution, I decline to make that determination.

Other Approvals including the Certification Notice

[98] There are several incidental matters that require attention.

[99] I approve the Settlement Agreement on behalf of parties under a disability.

[100] I approve the appointment of Bruneau Group Inc. as Administrator under the Settlement Agreement and for the payment of its fees and disbursements as Administrator from the settlement funds.

[101] I approve the appointment of Reva Devins and Pierre Sébastien as arbitrators for the purpose of implementing the Settlement Agreement.

[102] I approve the Notice Plan and the Notice of Certification and Settlement Approval.

Concluding Comments

[103] The social utility of class proceedings in general is that this procedure of the administration of justice available in courts across Canada may provide the social goods of access to justice, judicial economy, or behaviour modification. The social utility of any particular class proceeding, however, is not a given, and this explains, in part, why proposed class proceedings must satisfy a test for certification and why courts are empowered to scrutinize and to approve or reject settlements and counsel fees.

[104] The Settlement Agreement in the case at bar has undergone the court's scrutiny, and it appears to me that in entering into the Settlement Agreement and in seeking certification on consent for settlement purposes, the plaintiffs and the defendants, with the assistance of their legal counsel, have provided the social good of access to justice

and adequate compensation in accordance with Canadian law for perhaps thousands of citizens who may have been harmed by the Listeriosis outbreak and who decide not to opt-out of the settlement, which remains the individual choice of class members.

[105] I thank the objectors and counsel for both sides for their assistance to the court.

[106] There will be a case conference to settle the details and the form and content of the Judgment.

[107] Orders accordingly.

Perell, J.

Perell, J.

Released: March 9, 2009

Court File No. CV-08-361464CP
Date: March 9, 2009

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**CEZANNE BILODEAU, OLGA
POUSTOVAR,
ELIZABETH MOROSKY by her
litigation guardian DAVID MOROSKY,
DAVID MOROSKY personally,
WILLIAM GRIMES,
ANNE GRIMES, RONALD J. ROSE,
HEATHER DOWLING,
SHIRLEY VANDAELE, DAVID
DOWLING, ARTHUR COLE
and DONNA HYLAND**

Plaintiffs

- and -

**MAPLE LEAF FOODS INC. and
MAPLE CONSUMER FOODS INC.**

Defendants

REASONS FOR DECISION

Released: March 9, 2009