

CITATION: Kafai v. Nature's Touch Frozen Foods Inc., 2019 ONSC 167
COURT FILE NO.: 1085/16CP
DATE: 20190108

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Vivien Summer Kafai, a Minor by her Litigation Guardian, Soheil Kafai and Soheil Kafai, Plaintiffs

AND:

Nature's Touch Frozen Foods Inc., Costco Wholesale Canada Ltd., Costco Canada Holdings Inc., Gestion Costco Canada Inc., and Costco Western Holdings Ltd., Defendants

BEFORE: Justice R. Raikes

COUNSEL: Counsel, for the Plaintiffs – Daniel E. H. Bach

HEARD: December 10, 2018

ENDORSEMENT

- [1] Plaintiffs' counsel brought a motion seeking approval of its retainer agreement with the representative plaintiffs, approval of class counsel fees, disbursements and applicable taxes, and approval of an honorarium to Mr. Kafai as representative plaintiff. The motion was heard December 10, 2018 immediately following the motion to approve the settlement herein. No one appeared to object to relief sought by counsel. I approved the retainer, fees, disbursements and taxes, and honorarium with reasons to follow. These are those reasons.
- [2] Contingency agreements are expressly permitted in s. 33(1) of the *CPA Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").
- [3] Siskinds LLP entered into a contingency fee retainer agreement with Soheil Kafai on April 26, 2016. Pursuant to that agreement, legal fees, disbursements and applicable taxes are payable only in the event of "success", which is a defined term. The court approved settlement in this case meets that definition.
- [4] The agreement stipulates that legal fees are calculated as a percentage of the gross amount recovered. The percentage varies depending on the timing of the recovery. The percentage applicable to this settlement is 25%. The agreement clearly states that no fees or disbursements are payable if there is no success; moreover, Siskinds agrees to indemnify Mr. Soheil against any adverse costs awards.
- [5] The retainer agreement in the Ontario action meets the requirements in s. 32(1) of the *CPA* in that:
- a. It is in writing;
 - b. It states the terms under which fees and disbursements shall be paid;

- c. It provides an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- d. It states the method by which payment is to be made - a lump-sum percentage subject to approval of the court.

[6] Mr. Soheil swore an affidavit in support of this motion and the settlement approval motion. It is clear from that affidavit that he understood the essential terms of the retainer agreement when he entered into it. Accordingly, I approve the retainer agreement.

[7] In determining the reasonableness of class counsel fees, courts have traditionally considered the following factors:

- 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 fees; and
- j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

(See *Osmun*, para. 23; *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 8.)

[8] Counsel have paid all necessary disbursements in accordance with the terms of the retainer agreement. To date, Siskinds has incurred and carried approximately \$10,189 in disbursements.

[9] Having regard to the above factors, I find as follows:

- a. The factual and legal complexities engaged by this case are modest. The law in this area is well-settled. The factual issues strike me as relatively straightforward;
- b. There is risk in all litigation. The only certainty is uncertainty. In this case, there was risk that the action would not be certified, the action would be vigorously defended through trial, the defendants might prevail, and the recovery of damages could be thwarted by financial hardship of the defendants. The firm also bore the risk of adverse awards of costs;

- c. The degree of responsibility assumed by counsel was significant. They had carriage of the litigation;
- d. The amount in dispute was modest by class action standards but nevertheless significant to the class;
- e. The matter was important to class members who could not have afforded to pursue individual claims;
- f. Class counsel brought to bear its expertise in class proceedings to drive an early and beneficial settlement for the class.
- g. The results are addressed in my decision approving the settlement and I adopt them here;
- h. The amounts in issue for individual class members are such that without a class proceeding and without counsel willing to take on the expense and risk of that litigation, there would be no litigation and no recovery;
- i. Class members expect that lawyers will be reasonably rewarded for their efforts. The reasonable person does not expect counsel to donate their time, skill and financial resources;
- j. The settlement comes relatively early in the procedural life of this litigation. Counsel should not be punished for efficiency and effectiveness where the class benefits meaningfully; and
- k. The opportunity cost to the firm is present. The time spent on this matter could have been spent on other productive and profitable work.

[10] The total docketed time expended by the two affiliated firms is \$591,377. While hourly rates affect that total, the time spent strikes me as appropriate. The premium generated by the firm for the risk undertaken, the result achieved and the effort expended is reasonable in the circumstances.

[11] Accordingly, the fees, disbursements and applicable taxes requested are fair and reasonable, and are approved.

[12] Lastly, I turn to the honorarium. Mr. Soheil has never previously acted as a representative plaintiff. The amount sought is modest. He acted as the representative plaintiff for the benefit of others when he and his daughter stand to receive very little from this litigation. He dealt with counsel and was diligent in his duties as a representative plaintiff. I approve the honorarium of \$1,000 payable to Mr. Soheil.



Justice R. Raikes

Date: January 8, 2019