

**CITATION:** Kafai v. Nature's Touch Frozen Foods Inc., 2019 ONSC 160  
**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:** Daniel E. H. Bach Counsel, for the Plaintiffs

Eric Block and Katherine Booth Counsel, for the Costco Defendants

Paul Tushinski and Stephen Libin Counsel, for the Defendant, Nature's Touch

**HEARD:** December 10, 2018

**ENDORSEMENT**

[1] The plaintiffs sought an order approving the settlement of this action and the plan for allocation, together with related relief consequent on such approval. I approved the settlement and plan of allocation on December 10, 2018 with reasons to follow. These are those reasons.

**Nature of Claim**

[2] On April 15, 2016, the Canadian Food Inspection Agency issued a recall of Nature's Choice brand Organic Cherry Blend with best before dates up to and including March 15, 2018. The recall was made due to possible Hepatitis A contamination. The recalled product was sold by Costco at locations in Ontario, Quebec, New Brunswick, Nova Scotia, and Newfoundland and Labrador.

[3] Nature's Touch is a Canadian company based in Quebec. It carries on business as a wholesaler of frozen and packaged food. The Costco defendants operate a grocery/merchandise business at various locations in Canada. They stocked the product and sold same to customers prior to the recall.

## **Litigation**

- [4] This action was commenced by Notice of Action issued April 26, 2016. The Statement of Claim is dated May 26, 2016. The plaintiff, Vivien, was 21 months old when she consumed the product which was purchased by her father who is also her Litigation Guardian. Following the recall, Vivien had an urgent vaccination and attended two doctor appointments.
- [5] This action is brought on behalf of Canadian residents, except residents of Quebec, who purchased and/or consumed the recalled product, and on behalf of persons with claims under the *Family Law Act*, R.S.O. 1990, c. F3, s. 61 and applicable analogous legislation in other provinces, except residents of Quebec.
- [6] There is a companion action in Quebec: *Gaudette v. Nature's Touch et al.* That action was commenced May 4, 2016. The class in that action is represented by an affiliate law firm of Siskinds LLP who act for the plaintiffs in this action.
- [7] The settlement for which approval is sought encompasses both actions and is contingent on approval of both courts.

## **Settlement Negotiations**

- [8] The negotiations to arrive at the settlement took place between counsel for the parties over the course of several months. The negotiations began after delivery of the plaintiffs' motion to certify this action as a class proceeding. The parties reached a tentative settlement in November 2017. As a result, the certification motion was deferred to allow time for the parties to craft the formal agreement and resolve any remaining issues.
- [9] On August 21, 2018, the settlement agreement was finalized and executed. No mediator or third party was used for the negotiations. Counsel on both sides of this litigation have considerable class actions experience.
- [10] On September 21, 2018, motions were filed seeking certification for settlement purposes and for notice approval. The required orders were granted October 3, 2018. Notices were published as ordered and only one objection received. The concern raised by that objector has been addressed through a modification to the plan of allocation devised by plaintiffs' counsel. No objectors were present for the approval hearing on December 10, 2018.
- [11] Further, no one opted out of the litigation following publication of the notices.

## **Settlement Terms**

- [12] Pursuant to the Settlement Agreement, the defendants will pay \$3,000,000 to the plaintiffs. This amount is inclusive of interest, costs, administration expenses and class counsel fees and disbursements. In return, the defendants receive a comprehensive full and final release and dismissal of the litigation. They have no role in or responsibility for administration of the settlement funds.

## Plan of Allocation

- [13] After deduction of administration expenses and legal fees, disbursements and applicable taxes as approved by me, the net settlement funds will be allocated and paid to four categories of claimant:
- a. Category 1: Purchasers – class members who purchased the product and suffered an economic loss; *viz.* claims for refunds of the purchase price.
  - b. Category 2: Immunized Members - class members who consumed the product and underwent a Hepatitis A vaccination as a result.
  - c. Category 3: Bodily Injury Members – class members who consumed the product and contracted Hepatitis A as a result.
  - d. Category 4: Family Members – family members of class members who have a claim under the *Family Law Act* and analogous legislation in other provinces, as well as provincial health insurers who incurred treatment expenses for those who consumed the product and contracted Hepatitis A as a result.
- [14] Plaintiff's counsel estimates that the net amount available for distribution will be approximately \$2,015,000. Of that amount, \$100,000 has been allocated for the economic loss claims (see Category 1). The purpose of this fund is to compensate consumers who purchased but did not receive a refund earlier. Purchasers with a proof of purchase will be entitled to a refund in the amount stated on their receipt. Purchasers without proof of purchase are entitled to a maximum of \$25. The Costco defendants have already separately processed refunds for more than 35,000 units of product.
- [15] If there are any settlement funds remaining in this category after all approved claims are paid, the excess is to be applied to the bodily injury claims (see Category 3).
- [16] Immunization claims are capped at \$1,380,000 in aggregate. Claimants in this category receive a payment of \$150. If there are any settlement funds remaining in this category after all approved claims are paid in full, the excess will be applied to the bodily injury claims. This category relates to those who were vaccinated but did not suffer a bodily injury claim (Category 3).
- [17] There is no limit to the bodily injury claims category; however, there is a damages chart found in Schedule A of the Plan of Allocation that provides for compensation based on the duration and severity of illness. Damages range from \$1,500-\$30,000. Medical documentation substantiating a diagnosis of Hepatitis A contemporaneous with the recall is required. Those who did not have a confirmed diagnosis but who experienced symptoms while residing with an individual who received a confirmed diagnosis are entitled to a single payment of \$250 unless it would be more advantageous for them to claim as a Family Law claimant. Such individuals cannot double dip.
- [18] Category 4 claims fall within the bodily injury compensation silo. Family Law claims are fixed at 2% of an approved bodily injury claim for a relative living at the same residence

as the individual with a confirmed diagnosis of Hepatitis A attributable to the product. These claims may be made by a spouse, child, grandchild, parent, grandparent or sibling of the person with a bodily injury claim. There is no limit to the number of Family Law claims that can be made in respect of a person with a bodily injury claim.

- [19] Health care costs are deemed to be 10% of each approved bodily injury claim and are paid to the provincial health care insurers in addition to the amount allocated to the eligible bodily injury claim.
- [20] If the total value of approved claims exceeds the available funds in any category, then the value of each claim for that claim category will be reduced on a proportional basis. This proportional reduction applies independently for each category of claim.
- [21] If eight months after issuance of final payments, there is a balance equal to or less than \$50,000 in the account, the funds will be distributed *cy pres* to Food Banks Canada. On the other hand, if over \$50,000 remains after all approved Category 3 claims have been paid, inclusive of the Family Law claims and health care costs, those funds will be distributed to the bodily injury claimants on a *pro rata* basis.
- [22] Generally, monies payable to a minor are paid into court. In this case, however, the vast majority of claims by minors will relate to vaccinations for which the minor would be entitled to compensation of \$150. It is proposed that a requirement to pay the monies into court should be dispensed of, as has been done in other class actions. Parents and/or guardians will be required to swear an acknowledgement of responsibility with proof of guardianship.

### **Claims Administrator**

- [23] Garden City Group, LLC was appointed claims administrator in accordance with the certification and notice approval order made October 3, 2008. Garden City Group will establish a website with information about the settlement agreement and claims process in both English and French. It will include an online claims portal that members can use to file a claim, although members will also have the option to file a paper claim. All claims must be submitted on or before the claim deadline, which is six months from the date of first publication of the notice of settlement approval.
- [24] In order to efficiently carry out the settlement, the Costco defendants have agreed to provide certain data which would otherwise not be available. The settlement agreement contains enhanced measures to protect the security of class member data and the privacy of claimants. The draft order provided to me included those terms which strike me as both reasonable and appropriate.

### **Law- Settlement Approval**

- [25] Class action settlements require court approval: *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 29.

[26] In *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, Strathy J. (as he then was) adopted the summary of principles applicable to a motion for settlement approval from the decision of the Cullity J. in *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527 at para. 7:

- a) to approve a settlement, the court must find that it is fair, reasonable and in the best interests of the class;
- b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
- c) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval;
- d) to reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
- e) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give-and-take. Settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when considered in light of the risks and obligations associated with continued litigation;
- f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or simply rubber stamp a proposed settlement; and
- g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

[27] In assessing the reasonableness of a proposed settlement, the following factors are useful:

- a) the presence of arm's length bargaining and the absence of collusion;
- b) the proposed settlement terms and conditions;
- c) the number of objectors and nature of objections;
- d) the likelihood of recovery or likelihood of success;
- e) the recommendations and experience of counsel;

- f) the future expense and likely duration of litigation;
- g) information conveying to the courts the dynamics of, and positions taken by the parties during the negotiations;
- h) the recommendation of neutral parties, if any; and
- i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

(See *Osmun*, para. 32).

### **Analysis**

- [28] I am satisfied that the settlement in this case provides direct and meaningful benefit to class members. It is consistent with settlements approved in similar cases both in Canada and the United States. Counsel drew to my attention a California class action settlement where vaccinated class members received a lower amount by way of compensation.
- [29] I am also satisfied that the negotiations were conducted in good faith and at arm's length. There are no procedural irregularities in the manner in which the negotiations took place. There is no reason to conclude that there is any concern as to the procedural fairness of the negotiating process. As mentioned, there was no third-party assistance provided such as a mediator; however, not every case requires that assistance especially when, as here, there are experienced counsel involved.
- [30] The settlement agreement and plan of allocation strike me as falling well within the range of reasonable outcomes. They are recommended by experienced counsel. The settlement negotiations took place over several months. The plan of allocation developed by plaintiffs' counsel strikes a reasonable balance between the interests of the various types of claimants. The number of individuals who actually suffered Hepatitis A appears to be modest on the information available at this point.
- [31] The only objection is one which has been addressed through modification of the discretion given to the administrator. The absence of opt outs together with the lack of objections signals at least some measure of satisfaction with the settlement as negotiated.
- [32] If not approved, and the litigation proceeded, there are significant risks inherent in such litigation. The defendants do not admit liability and one would reasonably expect that they would vigorously defend the litigation if it proceeded. I do not have the defendants' certification materials and therefore cannot comment on the degree of risk associated with certification. I note, however, that certification is often hard-fought and carries with it a measure of risk. Suffice to say that this litigation would likely last many more years with attendant cost and risk.
- [33] If not certified, individual class members would have to pursue compensation through individual actions, most of which would not engage in such litigation given the economics involved. Even those who did suffer hepatitis A would find their claims to be modest in

relation to the cost to pursue same. This settlement provides meaningful access to justice to class members.

[34] Therefore, I am satisfied as to the procedural and substantive fairness of the settlement agreement, plan of allocation, plan for administration and notice plan. For that reason, I approved same on December 10, 2018. I find the settlement reached to be fair, reasonable and in the best interests of the class.



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Justice R. Raikes

**Date:** January 8, 2019