COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MIRAMICHI

Date : July 4, 2019 **NC-041-2008**

BETWEEN :

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

Plaintiffs,

- and -

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

First Defendant,

- and -

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

Second Defendant.

ORAL DECISION (SETTLEMENT APPROVAL)

BEFORE:	The Honourable Justice Jean-Paul Ouellette
AT:	Miramichi, New Brunswick
DATE OF HEARING:	July 4, 2019
DATE OF DECISION:	July 4, 2019

APPEARANCES:

OUELLETTE, J.

Overview

[1] This motion seeks an order approving the Settlement Agreement as fair, reasonable and in the best interests of the Class, approving the appointment of Epiq Class Action Services Canada Inc. as claims administrator, and approving the Representative Plaintiff honoraria.

[2] The parties have negotiated a settlement agreement executed on April 15, 2019 (the "Settlement Agreement"). Its implementation is subject to the approval of this Honourable Court.

[3] The legal test for approval of a proposed class action settlement is whether it is fair, reasonable and in the best interests of the class as a whole. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions.

[4] In Class Counsel's opinion, the Settlement Agreement is fair, reasonable and in the best interests of the Class, and ought to be approved pursuant to section 37(1) of the *Class Proceedings Act*. The Settlement Agreement provides for a quantum and process that are within the zone of reasonableness. The quantum is reflective of the strengths and weaknesses of the case. The Settlement Agreement also outlines a fair and efficient process for assessing claims of eligible Class Members and distributing compensation to them.

Background

A. Procedural History

[5] The initial Notice of Action with statement attached was filed on July 22, 2008 by Albert John Gay. Subsequently, Kimberley Ann Doyle and James Bliss Wilson were added as class representative.

[6] Dr. Rajgopal S. Menon (hereinafter "Dr. Menon"), was hired by the Regional Health Authority 7 (hereinafter "RHA7"), in or about January 1994 and initially worked out of the Chatham Hospital until the opening of the Miramichi Regional Hospital in December 1995. Dr. Menon was later promoted to Chief of the Pathology Department at the Miramichi Regional Hospital. On or about April 21, 2004, Dr. Menon was removed from his role as Chief of the Pathology Department.

[7] On or about February 6, 2007, Dr. Menon's license to practice medicine was suspended by the College of Physicians and Surgeons of New Brunswick and he did not practice pathology after that date.

[8] In or about March 2008, the Miramichi Regional Hospital provided approximately 23,000 patient specimens to Gamma Dynacare, a reviewing laboratory in Ottawa, to review the diagnoses originally made by Dr. Menon. In December 2008, the results were made public, showing that nearly 23% of the specimens originally tested by Dr. Menon had a discrepancy in findings – either a complete or partial change in Dr. Menon's finding – after the review of the patient specimens had been completed by Gamma Dynacare. An earlier review by Dr. Rosemary Henderson, retained by RHA7, of about 227 cases of breast and prostate biopsies performed by Dr. Menon had led to this full review by Gamma Dynacare.

[9] The allegations in this case concern the conduct of Dr. Rajgopal S. Menon (hereinafter "Dr. Menon"), and the alleged failures of the RHA7 in hiring, credentialing and supervising Dr. Menon throughout his tenure.

[10] On February 6, 2014, the Court of Appeal of New Brunswick rendered its judgment and overturned the decision denying the Plaintiff's motion to certify the proceeding as a class action.

[11] On March 29, 2016, this Honourable Court issued an order certifying the Plaintiffs' action as a class action. Later, the Certification Order was subject to a further amendment and an amended order was issued on July 11, 2017, discussed below.

[12] The Amended Certification Order certified the following common issues:

a) Did the defendants owe a duty in tort or contract or as fiduciaries to implement suitable safeguards against the systemic failures described in the Amended Statement of Claim? If so,

b) Did the defendants breach the duty and, if so, when? And without limiting the generality of the foregoing:

c) Did the Regional Hospital owe a duty, in tort or contract or as a fiduciary, to select and credential competent medical staff? If so,

d) Did the Regional Hospital breach the duty and, if so, when?

e) Did Dr. Menon owe a "duty of competence", as particularized in the Amended Statement of Claim, in tort or contract or as a fiduciary? If so,

f) Did Dr. Menon breach that duty and, if so, when?

[13] On September 29, 2017, the Plaintiffs served on both Defendants three Notices of Expert Witness. One of these expert witnesses was Ms. Chris Rokosh. For the

purposes of this litigation the Plaintiffs retained the expertise of a team of nurses, led by an evaluator, Ms. Chris Rokosh. Ms. Rokosh holds an Oncology Nursing Certification and has worked as a clinical educator of medical inpatient services at a tertiary care center. Ms. Rokosh's team systematically reviewed the pathology reports determined by Gamma Dynacare to have had a discrepancy in its findings; that is, 5271 pathology reports. The report of Ms. Chris Rokosh (the "Rokosh Report") indicates hat 5111 (97%) of the 5271 reports reviewed by her team were determined to have undergone tissue sampling in order to confirm or disprove a potential cancer or cancer related condition. The reports in this category represent an estimated 3475 patients.

[14] Furthermore, 1435 of these reports, representing an estimated 979 patients, were assessed by Mr. Rokosh as having the potential to result in medical harm to the patient. These reports include cases where a cancer or cancer related condition was underdiagnosed (missed malignancy or missed premalignancy), over diagnosed, or wrongly diagnosed with potential to result in improper or inadequate medical treatment.

[15] In her report, Ms. Rokosh categorized the 1435 reports with potential to result in medical harm to the patient as follows:

a) Missed Malignancy : 321 (22.4%)

b) Missed Pre-Malignancy : 458 (31.9%)

c) Over Diagnosis : 631 (44.0%)

d) Wrong Diagnosis : 21 (1.5%)

e) No Change : 368 (17.8%)

f) Inadequate Biopsy : 4 (0.3%)

B. The Plaintiff's Claim

[16] The Plaintiffs' allegations against RHA 7 centre on its alleged negligent hiring and retention of the Second Defendant, Dr. Rajgopal S. Menon.

[17] The Plaintiff's allegations against Dr. Menon centered on his alleged lack of competence, resulting in a failure to satisfy his duties to the class.

[18] The Plaintiff's asserted negligence, breach of contract and breach of fiduciary duty as causes of action, as demonstrated in the certified common issues.

C. Settlement

[19] There is a lengthy history of resolution discussions between the parties, consisting of informal settlement meetings, formal mediations and formal settlement conferences. This history is reviewed here in chronological order.

[20] The initial settlement discussions to resolve the matter commenced in or about June 2010.

[21] On June 15 and July 5, 2010 the parties attended mediation which was presided over by the Honourable Justice David H. Russell, Q.C. Subsequent meetings with Justice Russell and counsel occurred on November 2, 3 and 18, 2010. Discussions between the parties continued into 2011.63This occurred before certification, of course.

[22] On December 8, 2014, after after the Court of Appeal had certified the matter, the parties again met in Moncton to explore the potential to settle this matter. This was unsuccessful.

[23] On November 26 and 27, 2018, pursuant to Rule 50.07 of the New Brunswick *Rules of Court*, a mandatory settlement conference was held at the Law Courts in

Miramichi. The settlement conference resumed in Saint John on January 17, 2019. The Honourable Justice Peter S. Glennie presided over the conference.

[24] With his able assistance and guidance, the parties agreed upon a term sheet including the quantum of the settlement and the Plaintiffs instructed Class Counsel to accept the offer.

[25] Despite the Settlement Agreement, the Defendants continue to deny all of the claims made by the Plaintiffs and the parties agree that the Settlement Agreement shall not be deemed or construed to be an admission of evidence of liability or wrongdoing, or of the truth of any of the allegations against them.

[26] Pursuant to the Settlement Agreement, "Eligible Class Members" are defined as Class Members (as defined in the Amended Certification Order issued on July 11, 2017) who are still living as of the Effective Date (being the date on which the Settlement Approval Order is issued by the Court) and who have not previously opted out of the Action, but excluding family members (for reasons discussed later in this brief).

[27] An Eligible Class Member who submits a claim form on or before the claim deadline and is approved for compensation under the Settlement Agreement becomes a Qualified Class Member. Payments are then sent by cheque from the Claims Administrator to Qualified Class Members after the claims process has been adjudicated.

[28] The Defendants are paying a total of CAD $2,500,000.00 in full and final settlement of the Action, inclusive of all compensation to Qualified Class Members, Class Counsel Fees, notice and Claims Administration Costs, and applicable taxes (the "Settlement Payment"). The respective contributions made by the First and Second

Defendants to comprise the Settlement Payment are outlined in section 5.1 of the Settlement Agreement. The balance of the Settlement Payment, to be distributed to Qualified Class Members after payment of all costs associated with fees, notices and claims administration, is defined as the "Settlement Fund".

[29] If the number of claims received from Qualified Class members exceeds the capacity of the Settlement Fund to pay out claims in the amounts stated in the Compensation Grid, all Qualified Class Member Payments will be subject to a *pro rata* reduction.

D. Settlement Compensation Grid

[30] The eligibility requirements for Category 1A and 1B are:

Category 1A – Psychiatric or Psychological Disturbance Arising from Change in Diagnosis		
Eligibility/Verification	Proof	Award
Who is eligible to apply: Class Members who had a partial or complete change, as determined by Gamma Dynacare/Dr. Henderson Clas		$2,500

Category 1B – Physical and/or Psychological Injury Caused by Discrepancy That Has Potential to Result in Medical Harm		
Eligibility/Verification	Categories	Award
Who is eligible to apply: Class Members who received a change in diagnosis from Dr. Henderson or Gamma Dynacare and the change had potential to result in medical harm, as determined in the Rokosh Report (estimated maximum 972 Class Members)	Mild Harm Medium Harm Severe Harm	$10,000 $25,000 $50,000

[31] The eligibility requirement for Category 2 are:

Category 2 – Payment for Partial or Complete Change	
Eligibility/Verification	Award
Who is eligible to apply: Class Members who had a partial or complete change, as determined by Gamma Dynacare/Dr. Henderson, but do not receive compensation under Category 1. If compensation is received under Category 1, no Category 2 award is payable.	Maximum of $750 per person (net of legal fees/notice/claims administration costs)

[32] Qualified Class Member Payments must be deposited within six months of the date the cheques are sent by the Claims Administrator, after which time the cheques will be void.

[33] Four Class Member(s) provided a valid opt-out form by the opt-out deadline of July 1, 2016.

[34] To date, Class Counsel has received 2 objections to the settlement. One objection is from a Mr. Cormier who has lost his wife to cancer who does not agree to be excluded as a claimant and the other is Mrs. Wage who lost her husband, who also claims that the exclusion is unfair and unjust.

[35] As referenced above, spouses and relatives are not eligible for compensation under the Settlement Agreement. Although from the Plaintiffs' perspective ideally the Settlement Agreement would offer compensation to this group, it was not a feasible option in the face of the conversations occurring among the parties and the offers being presented to the Plaintiffs. Settlements are a product of compromise, and in constructing the fairest, most reasonable way to compensate Class Members, the parties took into account the viability of fatality claims under the law in New Brunswick

and generally in the circumstances of this case, involving individuals who either had or were being investigated for cancer. The ability to mount a successful fatality claim had to be taken into account in the parties' minds in structuring the settlement and allocating the negotiated funds. Funds have been allocated to the claimants who would, if the case had continued to be litigated, have had the greatest chances of success in the experience of counsel.

[36] If the Settlement Agreement is approved in accordance with its terms, the Claim Forms will be designed, with the assistance of the Claims Administrator to be easy to understand and user-friendly, in order to encourage take-up by Eligible Class Members of the benefits of the settlement.

[37] The two different claims processes for Category 1A and 1B and Category 2 are intended to be proportionate to the amount of compensation to be awarded, while keeping both as simple and straightforward as possible.

[38] Through the Hearing Notice and execution of the Hearing Notice Plan, Class Counsel have encouraged Class Members to contact Wagners to provide their updated mailing address. This information will be used to update the list of individuals entitled to receive direct Settlement Approval Notice if and when the settlement is approved, a measure that is intended to increase the number of Eligible Class Members who ultimately may submit claims for compensation.

[39] In the event that there remains any portion of the Menon Funds after distribution in accordance with the Settlement Agreement, such residue will be subject to a cy-prés distribution to the Miramichi Regional Hospital Foundation to be utilized for pathology-related purposes.

[40] In the event there remains any portion of the Hospital Funds after distribution in accordance with the Settlement Agreement, such residue will be subject to a cy-prés reversion to the Province of New Brunswick.

The Issues

[41] The issues before this Honorouable Court are:

a) whether to approve the Settlement Agreement pursuant to section 37(1) of the *Act*;

b) whether to approve the appointment of Epiq Class Action Services Canada Inc. as Claims Administrator; and

c) whether to approve the payment of honoraria to the Representative Plaintiffs.

Law and Analysis

A. Settlement Approval

a. Legislative Requirement for Court Approval of Settlement

[42] The requirement for court approval of a proposed class action settlement is set out in subsections 37(1) and (3) of the *Act* as follows:

> **37(1) A class proceeding may be settled or discontinued only**
>
> **(a) with approval of the court; and**
>
> **(b) on the terms or conditions the court considers appropriate.**
>
> **[...]**
>
> **(3) A settlement under this section is not binding unless approved by the court.**

[43] The egal test for approval of a class action settlement is whether it is fair and reasonable and in the best interests of the class as a whole. A court, without making findings of fact on the merits of the litigation, must examine the proposed settlement with the interests of class members in mind, while having regard to the claims and defences in the litigation and any objections raised to the settlement. The benefits to the class must be weighed against the risks, delays and expense of continuing litigation.

[44] Settlements are a product of compromise. The standard is one of reasonableness, not perfection. As Justice Sharpe stated in *Dabbs v. Sun Life Assurance Co. of Canada*, he court must also recognize that:

> **[A]ll settlements are the product of compromise and a process of give and take and 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 compared to the alternative of the risks and costs of litigation.**

[45] In *Nunes v. Air Transat A.T. Inc.*, Justice Cullity of the Ontario Superior Court of Justice summarized the following principles to be applied on a motion for settlement approval:

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 class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;

d) to reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

e) 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, on the other hand, to simply rubber-stamp a proposal; and

f) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

[46] In determining whether to approve a settlement, a court takes into account factors such as the following:

a) likelihood of recovery or likelihood of success;

b) amount and nature of discovery evidence;

c) proposed settlement terms and conditions;

d) recommendation and experience of counsel;

e) future expense and likely duration of litigation;

f) recommendation of neutral parties, if any;

g) number of objectors and nature of objections;

h) the presence of arms-length bargaining and the absence of collusion;

i) degree and nature of communication by counsel and the plaintiffs with class members during the litigation;

j) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation; and

k) the risk of not unconditionally approving the settlement.

[47] These factors are to guide the process. Invariably some factors will hold greater significance than others, depending on the case at hand. Weight should be attributed accordingly.

[48] Plaintiffs have an obligation to provide sufficient information to permit a court to exercise its function of independent approval. However, while a court requires sufficient information to exercise an objective, impartial and independent assessment of the fairness of the settlement in the circumstances, a court considering a settlement "need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. At minimum, a court must possess sufficient information to raise its decision above mere conjecture."

[49] Moreover, in situations where the litigation may continue if the settlement is not approved, a court must be mindful that there are constraints on the extent to which parties may fully disclose the strengths and weaknesses of their cases.

b. Analysis

[50] In negotiating the Settlement Agreement, Class Counsel was attuned to certain litigation risks. The litigation risks described herein also relate to other relevant factors in assessing the settlement, such as likelihood of success, the risk of the settlement not being approved, the likely duration of litigation and the likelihood of recovery.

[51] The common issues trial was to determine the following certified common issues:

a) Did the defendants owe a duty in tort or contract or as fiduciaries to implement suitable safeguards against the systemic failures described in the Amended Statement of Claim? If so,

b) Did the defendants breach the duty and, if so, when? And without limiting the generality of the foregoing:

c) Did the Regional Hospital owe a duty, in tort or contract or as a fiduciary, to select and credential competent medical staff? If so,

d) Did the Regional Hospital breach the duty and, if so, when?

e) Did Dr. Menon owe a "duty of competence", as particularized in the Amended Statement of Claim, in tort or contract or as a fiduciary? If so,

f) Did Dr. Menon breach that duty and, if so, when?

[52] In support of the common issues, the Plaintiffs filed the evidence of:

a) Dr. Douglas Sinclair, Executive Vice President and Chief Medical Officer, St. Michael's Hospital, Toronto ON. Dr. Sinclair has operational responsibility for the Department of Pathology and Laboratory Medicine. He opined on the duties of a regional health authority with respect to hiring and retention of medical staff, and whether the Regional Health Authority breached these duties.

b) Dr. David Owen, Consultant Surgical Pathologist, Vancouver General Hospital, Professor of Pathology, University of British Columbia and registered medical practitioner and specialist in Anatomical Pathology in the Province of British Columbia. Dr. Owen opined on whether the First Defendant failed to exercise due care and diligence with respect to hiring Dr. Menon and to ensuring that he carried out his duties as Chief of Pathology in an appropriate manner.

c) Chris Rokosh, Registered Nurse, Legal Nurse Consultant and President of CanLNC Experts in Calgary. Ms. Rokosh summarized findings from the review of 5271 of the pathology reports involved in the Miramichi Regional Health Authority investigation of Pathologist Dr. Rajgopal Menon. The reports were initially prepared by Dr. Menon and subsequently reviewed by Ottawa based Gamma Dynacare Laboratories. Ms. Rokosh concluded that after a review of the 5271 pathology reports that were reviewed by Gamma Dynacare and found to have had a discrepancy in its findings, that 1435 reports, representing an estimated 979 patients, had the potential to result in medical harm to the patient. These reports include 779 cases where a cancer or cancer related condition was underdiagnosed (missed malignancy or missed premalignancy), 631 that were over diagnosed and 21 wrongly diagnosed with potential to result in improper or inadequate medical treatment.

[53] Although Class Counsel is confident in the strength of their expert evidence with respect to these common issues, nevertheless there was a risk that the Court may decline to answer the common issues in the Plaintiffs' favour. The experts advanced on behalf of the Defendants were:

a) Donald eters, who had approximately 30 years of experience as a CEO of hospitals/health authorities. Mr. Peters was the CEO of the Defendant Health Authority from September 2008 to 2013. Mr. Peters was retained by the First Defendant to review governance issues with respect to the

initial hiring and credentialing of Dr. Menon and the mid-term review of Dr. Menon's privileges. His opinion, in summary, was that:

i. There was a Mid-Term Review undertaken that seemed appropriate given the growing number of concerns that were being expressed and that the formal steps included in a Mid-Term Review are well documented in the Medical Staff By Laws;

ii. The review results were received by Medical Advisory Committee and the MAC found no merit to the concerns being expressed and chose not to alter Dr. Menon's privileges; and

iii. There were no red flags that would have signaled a problem as Dr. Menon's CV was acceptable; he was given a license to practise by the College of Physicians and Surgeons of NB; he had experience at other hospitals in the Province as well as Europe and his reference checks were acceptable.

b) Dr. Jonathan Epstein who is a Professor in the Department of Pathology, Urology, & Oncology and the Reinhard Professor of Urologic Pathology at the Johns Hopkins University School of Medicine. He is also the Director of Surgical Pathology and an active staff pathologist at the Department of Pathology at the Johns Hopkins Hospital. His opinion, in summary, was that:

i. The vast majority of cases at issue were cases of 'substantial agreement' and, after reviewing the particulars of those cases, they

should not be considered as evidence of in any regard to impugn the professional reputation of Dr. Menon;

ii. Dr. Menon's overall diagnostic accuracy is well within the range of a competent pathologist;

iii. Dr. Menon was in a very small Department of Pathology where he was not provided with the resources to be able to practice as efficiently as possible;

iv. The department was short-staffed and not given transcriptionists who were adept at typing the very specialized terminology of Pathology;

v. While there were occasional problems with turn around times there was no documentation of a consistent problem and issues that contributed to isolated problems with TAT were problems with transcription and the valid need to send cases out for external consultation;

vi. Criticisms relating to Dr. Menon's lack of attending meetings, not being in the hospital at all times, delegating work to administrators, and issues with QA programs had no validity and should not be used as evidence of a lack of competency; and

vii. Dr. Menon was well within the level of competency for a general pathologist in a small hospital.

c) Dr. Robert Boutilier who is a medical doctor, practicing the specialty of anatomic pathology in the Province of Nova Scotia since 2002. His

affidavit of January 2011 provides a summary of the subjective and complex practice of pathology, including:

i. As pathology plays a vital role in the diagnosis, treatment and prognosis of each individual patient, each case is unique and involves a multitude of considerations that may affect a particular patient's outcome;

ii. A pathology report is but one piece of information for the treating physician to consider next steps for the individual patient. It is one element that affects the "likelihood ratio" of a given disease process and help the clinician determine a treatment course;

iii. It is not the role of the pathologist to make the determinative diagnosis, it is the job of the treating clinician;

iv. It is sometimes difficult to find an external consultant who has the time and expertise to take on this consultation work, and this adds delay at the consultation level;

v. Subtle differences in the interpretation of pathology slides may not change the appropriate treatment, or change it very little; and

vi. With very limited exceptions such as an outbreak of an infectious disease, it is not possible nor proper to extrapolate the findings in one case to form a conclusion in any other case which would be contrary to his knowledge and understanding about the role of pathology in medicine.

[54] With respect to Class Members who alleged they had suffered physical harm due to Dr. Menon's misdiagnosis, the Defendants cited the Plaintiffs' limited ability to prove causation and damages. Each of the class members who allege such harm would need to demonstrate that the diagnostic error was both factually and legally causative of their adverse outcome. Citing the "but for" test, wherein the plaintiff must prove on the balance of probabilities that his or her injury would not have occurred but for the negligence of the defendant, it was argued that Class Members may not establish causation.

[55] With respect to Class Members who did not allege they had suffered physical harm, but alleged they had suffered mental harm as a result of the change in diagnosis, they would have to prove, in the context of litigation, that they had suffered "some recognizable psychiatric or psychosomatic condition attributable to the defendant's negligence" as outlined in *Mustapha v. Culligan of Canada*, 2008 SCC 27. The Defendants had argued that proof of damage was an essential element of a negligence claim and that this group of Class Members may not be able to satisfy this test.

[56] The settlement was reached with the extensive assistance of an experienced judge, Justice Peter Glennie. It was arrived at following the completion of the discovery stage of the litigation – both document production and discovery examinations (and exchange of written interrogatories) had been conducted – enabling the parties to make an informed evaluation of the strengths and weaknesses of their respective cases, and therefore informing the reasonableness of the settlement.

[57] The Settlement Agreement was negotiated by experienced counsel.

[58] As Justice Strathy stated in *Ainslie v. Afexa Life Sciences Inc.*:

> **It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented - as they clearly are in this case - by highly reputable counsel with expertise in class action securities litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.**

[59] The Settlement Agreement does not compensate family members or the estate of deceased Class Members. In the opinion of counsel, the quantum of the Settlement Payment required prioritization of compensation to living Class Members, rather than family members of living or deceased Class Members. In the case of deceased Class Members, this is justified on the basis of the challenges and limitations surviving family members would have faced in bringing an action for recovery of damages. There is no action in common law and no statutory action by an estate to recover damages for family members other than pecuniary losses which might have been recoverable at the suit of the deceased. The *Survival of Actions Act*, R.S.N.B. 2011, c. 227, expressly includes recovery only for damages that have resulted in actual pecuniary loss to the deceased person or the estate and expressly excludes damages for loss of expectation of life, pain and suffering or physical disfigurement. The *Fatal Accidents Act*, R.S.N.B. 2012, c. 104 provides for a right of recovery in situations where the death of a person is caused by the wrongful act, neglect or default of another. The action is available in circumstances where the deceased would have been entitled to maintain an action if the claimant was alive. As a result, fatal accident actions are subject to the requirement that the spouse, parent, child or sibling prove a causal connection between the conduct of

the defendant and the death of the deceased. That is a challenge presented by the facts of this case. Moreover, recovery under the legislation is limited to pecuniary losses.

[60] These legal considerations, together with the quantum of the settlement, were considered in determining that family members of living or deceased Class Members would not recover under the Settlement Agreement.

[61] This is not a novelty where a sub-class as in this case received no compensation under the settlement but subject to the class release. One recent decision is Walsh v. Ontario 2018 O.N.S.C. 3217 whereas Purell J. expressed concerns with the settlement that only 10% of the class would receive compensation and none be awarded for the multiple of pleaded injuries and grievances including discrimination and indignity (para 80)

[62] In his decision Purell J. wrote at paragraph 8-14:

> **"The heads of compensatory damage were limited, the compensation was capped, the compensation was not generous, there was a reversion to Ontario, and the Plan of distribution envisioned that 90% of the Student Class and 100% of the Family Class would get no compensation, no apology, nor anything at all even indirectly for releasing their claims against Ontario (para.12)."**

[63] However, notwithstanding his concerns, he approved the settlement, stating at paragraph 15:

> **15 However, upon reflection, I nevertheless decided that the Settlement Agreement met the test for approval and that while a disappointing outcome, it could be inimical to the best interests of the Class Members to reject the settlement. Upon reflection, I concluded that for the small portion of the Class that benefited from the Settlement Agreement, there was adequate compensation that should not be lost to them. I concluded that Class Counsel's argument for the rest of the class that the combination of the litigation risks, the aging population of Class Members, and the weakness in the Class Proceedings Act, 1992 itself, ie, the court's limited jurisdiction to aggregate damages and the inevitability of individual issues trials made the proposed settlement preferable to the alternative of further litigation.**

[64] The Settlement Agreement provides compensation to a potential total of 3,475 eligible class members.

[65] Examples of previous class action settlements are of some utility in assessing the reasonableness of the quantum of the present settlement, while bearing in mind distinguishing facts and circumstances at play in each negotiated settlement. The parties are unaware of a Canadian class action settlement that contends with a matrix of facts that includes alleged systemic errors by a medical practitioner with respect to patients being investigated for cancer or cancer-related conditions. And, more generally, a class action for a medical malpractice claim that names as defendants both the medical practitioner and the governing health authority.

[66] Numerous case law were submitted in support of this Settlement. These foregoing consideration of approved settlements supports the conclusion that the Settlement Agreement provides a fair and reasonable settlement in the best interests of the class as a whole.

[67] In Class Counsel's view, any additional value to an award that might result from a trial on the merits would not only be speculative and uncertain, but it would come with added delay and costs.

[68] For the record, both counsel for the Defendants support this Settlement.

B. Claims Administrator Approval

[69] The Plaintiffs seek the Court's approval of Epiq Class Action Services Canada Inc. as the Claims Administrator.

[70] Epiq lass Action Services Canada Inc. is a leader in the class action claims administration industry. Epiq Class Action Services Canada Inc. combines the

experience of Bruneau Group Inc. and Crawford Class Action Services Inc. with the global expertise and technologies of Epiq.

[71] Epiq has been appointed to administer some of the largest and most complex claim administration mandates in Canadian history.

[72] Epiq Class Action Services Canada Inc. has offices in Ottawa, Toronto and Waterloo and its staff includes lawyers, paralegals, insurance claims adjusters, certified project and risk managers, adjudicators, and call centre staff. Many of the employees of Epiq are fluently bilingual.

C. Representative Plaintiff Honoraria

[73] Representative plaintiffs may be compensated for their efforts and involvement in class proceedings. Courts have recognized that where the representative plaintiff has participated in the litigation, providing necessary and active assistance, and the assistance results in success for the class, it may be appropriate to compensate the representative plaintiff for the time spent on a *quantum meruit* basis.

[74] Class Counsel requests Court approval of a $12,500.00 honorarium to Mr. Gay and a $10,000.00 honorarium each to Ms. Doyle and Mr. Wilson, to be paid out of the Settlement Fund.

[75] While all three Representative Plaintiffs have actively participated in this litigation for over a decade – with all providing certification affidavits, responding to extensive written interrogatories, and being available in person and by phone when needed to provide instructions – Mr. Gay also participated in a two day discovery examination on June 27 and 28, 2017.

]76] While some Courts have required an exceptional contribution,106others have held it is not necessary for a representative plaintiff to provide services "of special significance beyond the usual responsibilities of the Act," and that a modest award may be made where the representative plaintiff had simply fulfilled his or her duties.

[77] Regardless of the Court's partiality to any one of the above approaches, the Representative Plaintiffs in the within matter should be entitled to the reasonable honoraria proposed on the lengthy efforts expended. The Representative Plaintiffs have fulfilled the duties imposed upon them, and in working with Class Counsel, have achieved success for the Class and a Settlement that is in the best interests of the Class as a whole.

[78] The Representative Plaintiffs played an active role in the litigation over an eleven-year period. They swore affidavits in support of certification, were cross-examined on their affidavits, were committed and engaged in the litigation, and Mr. Gay underwent discovery examination in preparation for trial. wo of the Representative Plaintiffs attended the mandatory settlement conference. All the Representative Plaintiffs made themselves available on multiple occasions to instruct Class Counsel and to participate in the settlement process.

[79] The payment of a $12,500.00 honorarium to Mr. Gay and $10,000.00 each to Ms. Doyle and Mr. Wilson, in Class Counsel's submission, are reasonable and proportionate, considering the benefit received by the Class and the significant efforts and engagement of the Representative Plaintiffs over the long duration of this litigation.

ON HEARING the submissions of counsel for the Plaintiffs, counsel for the First Defendant, and counsel for the Second Defendant;

AND ON READING the materials filed in support of this motion:

1. **THIS COURT ORDERS** that the definitions in the Settlement Agreement are incorporated into and shall be applied in interpreting this Order.

Approval of Settlement Agreement

2. **THIS COURT FURTHER ORDERS** that the Settlement Agreement is fair and reasonable and in the best interests of the Class, and is hereby approved pursuant to section 37(1) of the *Class Proceedings Act*, and shall be implemented in accordance with its terms.

Appointment of Claims Administrator

3. **THIS COURT ORDERS** that Epiq Class Action Services Canada Inc. be appointed as the Claims Administrator.

4. **THIS COURT ORDERS** that the Claims Administrator is authorized to obtain and/or have access to relevant personal health information of Class Members who submit a Claim Form and/or a Release of Medical Records Authorization Form, in order to assess eligibility for a Qualified Class Member Payment and otherwise administer the Settlement Agreement pursuant to its terms. This includes, without limitation, authorization to receive, from the Miramichi Regional Hospital, confirmation about whether a Class Member is eligible to submit a Claim Form.

5. **THIS COURT ODERS** that the Miramichi Regional Hospital is authorized to release to the Claims Administrator the name, specimen number and date of birth of patients who had a complete or partial change in findings in their pathology report(s) for the sole purpose of enabling the Claims Administrator to confirm whether a Class Member submitting a Claim Form is eligible for compensation.

Approval of Settlement Approval Notice

6. **THIS COURT ODERS** that the form and content of the Settlement Approval Notice substantially in the form attached as Schedule "A" is approved.

Approval of Representative Plaintiff's Honoraria

7. **THIS COURT ORDERS** that the Representative Plaintiff Albert John Gay shall receive an honorarium in the amount of $12,500.00, payable from the Settlement Fund, which monies shall not be deemed to be taxable income and that the Representative Plaintiffs Kimberley Ann Doyle and James Bliss Wilson shall each receive honoraria in the amount of $10,000.00, payable from the Settlement Fund, which monies shall not be deemed to be taxable income.

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

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

SCHEDULE "A"

NOTICE OF SETTLEMENT APPROVAL OF THE MIRAMICHI PATHOLOGY CLASS ACTION

[INSERT DATE OF MAILING HERE]

PLEASE READ CAREFULLY. IGNORING THIS NOTICE WILL AFFECT YOUR LEGAL RIGHTS

A settlement ("Settlement") has been reached in the Miramichi Regional Hospital pathology class action. In order to receive payment under the Settlement, you must obtain a Claim Form from the Claims Administrator and send the completed Claim Form to the address provided below **by [X] (the "Claim Deadline")**. Additional documents may be required, as outlined below.

WHO IS INCLUDED?

In February 2008, notice was given to the public that all pathological tests analyzed by a former pathologist at the Miramichi Regional Hospital, Dr. Rajgopal Menon, during the period from 1995 to 2007, would be subject to an external review.

The Settlement applies to all "Class Members", defined as follows:

a) Patients whose tissue samples underwent pathology testing for potential cancer or potential cancer-related disease, and were reported by Dr. Menon at the Miramichi Regional Hospital between January 1, 1995 and February 7, 2007, and whose tissue samples the Miramichi Regional Hospital subsequently caused to be retested; and

b) The estates, children, parents and spouses (as defined by the *Fatal Accidents Act*) of deceased patients.

For clarity, not all Class Members as described above will be eligible for compensation under this Settlement. To be eligible for payment, a Class Member must be living at the date of approval of the Settlement and must not have opted out of this action. Matrimonial and common law spouses will receive no monetary reward under the Settlement.

Wagners Law Firm is class counsel. You can review the Settlement Agreement at Wagners' website: www.wagners.co, or you can contact Wagners at the contact information listed later in this Notice.

HOW MUCH WILL I RECEIVE UNDER THE SETTLEMENT?

The Settlement provides for a **$2,500,000.00 (CDN)** settlement payment, which will be used to pay each Eligible Class Member who meets certain criteria and **who submits a Claim Form and, where required, supporting medical records within the deadlines provided.** To obtain relevant medical records to support a claim at no cost the Release of Medical Records Authorization Form must be received within the deadline provided. The Settlement will also be used to pay **legal fees, the costs of notifying Class Members about the Settlement, the costs of administering the Settlement and of distributing the payments.**

The Settlement provides for two categories of awards. You are eligible for compensation under the Settlement if you fall within one of the two categories. Category 1 Class Members are those who suffered harm as a result of a change in Dr. Menon's diagnosis with respect to a cancer or cancer-related disease; Category 2 Class Members are those who had a partial or complete change in Dr. Menon's diagnosis with respect to a cancer or cancer-related disease who do not qualify for an award under Category 1. Category 1 Class Members who submit a completed Release of Medical Records Authorization

Form by [DATE], and a completed Category 1 Claim Form and any necessary supporting documentation by [DATE] (the **"Claim Deadline"**) may be entitled to an award ranging from **CAD $2,500.00 to a maximum of CAD $50,000.00**. Category 2 Class Members who submit a Category 2 Claim Form within the Claim Deadline may be entitled **to an award of a maximum of CAD $750.00**. Awards may be subject to a pro rata reduction depending on the number of claims received by the Claims Administrator.

HOW DO I RECEIVE MY PAYMENT?

If you believe you are a Category 1 Class Member who suffered harm as a result of a change in Dr. Menon's diagnosis with respect to a cancer or cancer-related disease, **in order to receive your payment you must:** (1) submit your completed Release of Medical Records Authorization Form to the Claims Administrator **on or before [DATE] (if you wish to obtain your records at no cost)**; (2) on receipt of a copy of your relevant medical records (which will be provided at no charge to you if the Release of Medical Records Authorization Form is received on or before [DATE]), you must submit the documents you believe support your entitlement to compensation **and** a completed Category 1 Claim Form to the Claims Administrator at the address provided below **on or before the expiry of the Claim Deadline of [DATE].**

If you believe you are a Category 2 Class Member who had a partial or complete change in diagnosis with respect to a cancer or cancer-related disease, and you do not qualify for an award under Category 1, **in order to receive your payment you must** submit a completed Category 2 Claim Form to the Claims Administrator at the address provided below **on or before the expiry of the Claim Deadline of [DATE].**

Payments will be mailed out by regular mail as soon as possible after the Claim Deadline. Cheques must be deposited within six (6) months from the time they are sent out.

LEGAL FEES

Class Counsel pursued this lawsuit on a contingency basis and sought approval from the Court for such payment in accordance with the terms of its retainer agreement with the Representative Plaintiffs, which provides for a fee of 25% of the first $10 million of a settlement or any part thereof, plus applicable taxes, and recovery of disbursements. The legal fees for which court approval will be sought total $625,000 plus applicable taxes.

Class Counsel's legal fees, disbursements and applicable taxes will be paid out of the Settlement. At the Settlement Approval Hearing, Class Counsel requested and received the Court's approval for payment of their fees, disbursements and applicable taxes in the total amount of $X.

FOR MORE INFORMATION

The Settlement Agreement is available on our website at **www.wagners.co**.

The Court has appointed _____ as the Claims Administrator for the Settlement. **To receive compensation, you must mail your completed documents to the Claims Administrator at the following address:**

[Address]

If you are a Category 1 Class Member, the Release of Medical Records Authorization Form must be postmarked no later than [DATE], or if there is no legible postmark, the Release of Medical Records Authorization Form must be received by the Claims Administrator no later than [DATE]. Otherwise you will not receive your relevant medical records at no charge.

The Claim Form and, for Category 1 Class Members, the relevant medical records, must be postmarked no later than the Claim Deadline of [X], or if there is no legible postmark, the Claim Form must be received by the Claims Administrator no later than the Claim Deadline of [X].

You may contact the Claims Administrator for further details at:

[email / phone]

If you have questions about the Settlement and/or would like to obtain more information, please contact Wagners by email at **classaction@wagners.co** or by telephone at **1-800-465-8794 / 902-425-7330**.

This Notice contains a summary of some of the terms of the Settlement. If there is a conflict between this Notice and the Settlement, the terms of the Settlement shall prevail.

This Notice has been approved by the New Brunswick Court of Queen's Bench