

COURT FILE NO. N/C/41/08

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MIRAMICHI

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



ORDER

UPON HEARING Raymond F. Wagner, Q.C. and C. Chesley Crosbie, Q.C., Counsel
for the Plaintiffs herein;

AND UPON HEARING David Hashey, Q.C., and Catherine Bowlen, Counsel for the
First Defendant herein;

AND UPON HEARING Catherine Fawcett, Counsel for the Second Defendant herein;

THIS MOTION made by the Plaintiffs for an Order, *inter alia*, certifying the action
as a Class Proceeding heard on the 6th and 7th days of September, 2011 at Miramichi,
New Brunswick;

ON READING the materials filed by all parties, and on hearing the submissions of Counsel for the Plaintiffs and Defendants.

AND WHEREAS this Honourable Court released its decision on the 8th day of March, 2012, denying the Plaintiffs' Motion for Certification;

AND WHEREAS the Plaintiffs filed a Notice of Motion for Leave to Appeal on the 14th day of March, 2012, seeking leave to appeal this Honourable Court's decision dated the 8th day of March, 2012;

AND WHEREAS the New Brunswick Court of Appeal released its decision on the 5th day of June, 2012, granting the Plaintiffs leave to appeal;

AND WHEREAS the Plaintiffs filed a Notice of Appeal on the 11th day of June, 2012, seeking to reverse this Honourable Court's decision dated the 8th day of March, 2012;

AND WHEREAS the New Brunswick Court of Appeal released its decision on the 27th day of February, 2014, reversing this Honourable Court's decision dated the 8th day of March, 2012;

AND WHEREAS the New Brunswick Court of Appeal in its Order dated the 27th day of February, 2014, certified the within action as a class proceeding pursuant to the *Class Proceedings Act*, S.N.B. 2006, c. C-5.15;

AND WHEREAS the Plaintiffs satisfied the New Brunswick Court of Appeal that their proposed Litigation Plan was satisfactory for the purposes of certification but whereas certain amendments are required;

1. **THIS COURT HEREBY ORDERS that:**

- i) The Class is defined as:
 - a) Patients whose tissue samples underwent pathology testing for potential cancer or potential cancer-related disease, and were reported by Dr. Menon at the Regional Hospital between January 1, 1995 and February 7, 2007, and whose tissue samples the 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.
- ii) Albert John Gay, James Bliss Wilson and Kimberley Ann Doyle be appointed as the Representative Plaintiffs of the Class for the within Class Proceeding;
- iii) The nature of the claims asserted on behalf of the Class is described in the Amended Statement of Claim;
- iv) The relief sought by the Class is set out in the Amended Statement of Claim;
- v) The Common Issues are:
 - 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?
 - g) Are the defendants jointly and severally liable for the remedies sought in the Amended Statement of Claim?

NOTICE

2. **THIS COURT ORDERS** that the Class Members shall be given notice of the certification of this action as a class proceeding, in accordance with the form of the Notice of Certification, attached as Schedule "A", in the following manner:
- (a) posted by Class Counsel on its website: <http://wagners.co>;
 - (b) causing notice to be published twice in the Miramichi Leader and once in the Provincial edition of the Telegraph Journal in a size no less than 1/8th of a page;
 - (c) directly mailed by Class Counsel to the last known address of any Class Members who have contacted Class Counsel; and
 - (b) provided by Class Counsel to any person who requests it.
3. **THIS COURT ORDERS** that the costs associated with the Notice of Certification will be paid in equal share by the Defendants. Any such costs shall be considered a taxable disbursement and are recoverable against the Plaintiffs should the Defendants be successful in their defence of the action and the Plaintiffs' action dismissed.

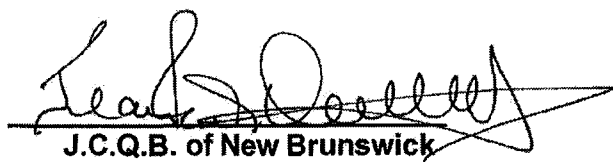
OPT -OUTS

THIS COURT ORDERS that the members of the class may opt out of the Action by mailing a copy of the completed Opt-Out Form, attached as Schedule "B" to this Order, to Class Counsel before the Opt-Out Date of July 1, 2016.

OPT -INS

4. **THIS COURT ORDERS** that members of the class who reside outside of the Province of New Brunswick may opt into the Action by mailing a copy of the completed Opt-In Form, attached as Schedule "C" to this Order, to Class Counsel before the Opt-In Date of July 1, 2016.

DATED at Miramichi, in the Province of New Brunswick, this 22 day of March, 2016.


J.C.Q.B. of New Brunswick

NOTICE OF CERTIFICATION OF THE
MIRAMICHI PATHOLOGY CLASS ACTION

To: Individuals Affected by the Pathology Retesting at the Miramichi Regional Hospital

Notice Of Certification:

Class Members are advised of certification of a class action lawsuit regarding testing of pathology samples that occurred at the Miramichi Regional Hospital and which the Miramichi Regional Hospital caused to be retested.

Who is included?

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

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

What is the Class Period?

The Class Period is January 1, 1995 to February 7, 2007.

What is the nature of the claims?

Compensation and/or damages for negligence, breach of contract and breach of fiduciary duty.

Representative Plaintiffs:

John Albert Gay (Tabusintac, NB), James Bliss Wilson (Napan, NB) and Kimberley Doyle (Miramichi, NB)

Class Counsel Compensation:

The Representative Plaintiffs have entered into a Contingency Fee Agreement. Should settlement or judgment be awarded in favor of the Class, the Class Counsel will receive a percentage of the net award, subject to Court approval.

Costs

If you are a Class Member who is not a Representative Plaintiff, you will not be liable for any legal costs of the Defendants should the trial be unsuccessful. However, if you are unsuccessful in your own individual claim, you may be liable for legal costs incurred by the Defendant in relation to that portion of the litigation.

What options do Class Members have?

Class Members who reside in New Brunswick ("Resident Class Members") can do nothing and will be part of the Class Action. The lawsuit will proceed and Resident Class Members may obtain compensation at some future date. A judgment on the common issues, whether favourable or not for the Class, will bind all Resident Class Members who do not opt-out.

Alternatively Resident Class Members may choose to be excluded from the Class and may opt-out of the class action. Those who opt out are not bound by any judgment on the common issues. To opt out, those who meet the definition above (see "Who is included?") must send an "Opt-out Form," signed by the Resident Class Member, to Class Counsel on or before July 1, 2016.

Class Members who reside outside of New Brunswick may opt into the proceeding by delivering a completed "Opt-In Form" to Class Counsel on or before July 1, 2016.

For more information, or to access an Opt-Out or Opt-In Form, visit <http://www.wagners.co> or contact Class Counsel at the addresses below:

Wagners
1869 Upper Water Street
Suite PH 301, Pontac House
Historic Properties
Halifax NS B3J 1S9
Office: 902-425-7330
Toll Free: 1-800-465-8794
Fax: 902-422-1233

Ches Crosbie Barristers
169 Water Street
St. John's, NL A1C 1B1
Office: 866-645-3190
Fax: 709-579-9671

Schedule "B"

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First Defendant

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**THE ESTATE OF DR. RAJGOPAL S.
MENON** as represented by Dr. Sanjay
Siddhartha as Litigation Administrator
Second Defendant

**OPT OUT FORM
DEADLINE – July 1, 2016**

I, _____, do not want to be included in the class action against Regional Health Authority 7 (now RHA B) and The Estate of Dr. Rajgopal Menon, as represented by Dr. Sanjay Siddhartha as Litigation Administrator, with respect to the testing of pathology samples which occurred at the Miramichi Regional Hospital, and which the Miramichi Regional Hospital subsequently caused to be retested.

I want to opt-out (be excluded from) this class action. My information is as follows:

Print Name: _____
(Required)

Date of Birth: _____
(Optional)

Address: _____
(Optional)

Email Address: _____
(Optional)

City/Prov./Code: _____
(Optional)

Telephone: _____
(Optional)

Signature: _____
(Required)

Date: _____
(Required)

PLEASE NOTE THAT THE BOLDLED PORTIONS ARE OPTIONAL.

ONLY NAME, SIGNATURE AND DATE ARE REQUIRED.

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Print Name: _____
(Required)

Date of Birth: _____
(Required)

Address: _____
(Required)

Email Address: _____
(Optional)

City/Prov./Code: _____
(Required)

Telephone: _____
(Required)

Signature: _____
(Required)

Date: _____
(Required)