

CANADA / JUDGMENT

Cardoso v. Canada Dry Mott's Inc.

2020 BCSC 1569

COURT

Supreme Court of British Columbia

DECIDED

23 October 2020

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2020 BCSC 1569 Cardoso v. Canada Dry Mott's Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cardoso v. Canada Dry Mott's Inc., 2020 BCSC 1569 Date: 20201023 Docket: S190672 Registry: Vancouver Between: Victor Cardoso Plaintiff And Canada Dry Mott's Inc. Defendant Before: The Honourable Madam Justice Douglas Correction notice: This judgment was corrected on October 30, 2020 Reasons for Judgment re: Costs Counsel for Plaintiff: M.C. Canofari Counsel for Defendant: C.E. Hunter, Q.C. J.E. Roos Place and Date of Hearing: Vancouver, B.C. August 19, 2020 Place and Date of Judgment: Vancouver, B.C. October 23, 2020 Table of Contents THE APPLICATION. 3 LITIGATION HISTORY. 3 THE SETTLEMENT AGREEMENT. 5 LEGAL FEES AND DISBURSEMENTS. 5 PROPOSED FEES, DISBURSEMENTS, AND HONORARIA. 6 LAW AND ANALYSIS. 6 Class Counsel Fees and Disbursements. 6 Factual and legal complexities. 8 Risks undertaken. 9 Degree of responsibility assumed by counsel 9 Monetary value of the matters in issue. 9 Importance of the matter to the class. 9 Degree of skill and competence demonstrated by counsel 9 Results achieved by the Settlement 9 Ability of the class to pay. 10 Expectations of the client and the class regarding the fee. 10 Opportunity cost 11 Analysis and Conclusion. 11 Plaintiff's Honoraria. 13 SUMMARY. 16 THE APPLICATION

- [1] On March 25, 2020, I approved the consent certification of this class action for settlement purposes and the parties' proposed settlement. Plaintiff's counsel now applies for court approval of proposed legal fees, disbursements, and representative plaintiffs' honoraria. While the defendant took no position on this application, its counsel participated to ensure that the relevant authorities were before the Court. LITIGATION HISTORY
- [2] On January 21, 2019, plaintiff, Victor Cardoso, commenced this action pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50 (the "CPA"). The plaintiff alleged that the defendant's marketing of Canada Dry Ginger Ale as "Made from Real Ginger" was false as this product contained no ginger. The plaintiff claimed he had purchased Canada Dry Ginger Ale on the basis it was "Made from Real Ginger" and had medicinal benefits. On March 27, 2019, the defendant filed a response to civil claim denying liability and the plaintiff's allegations.
- [3] By order dated May 7, 2019, Mr. Cardoso was directed to file an amended notice of civil claim pleading a national class by May 10, 2019. Schedules for the defendant's planned summary judgment application and the plaintiff's application for certification were set.

- [4] On May 8, 2019, the plaintiff filed an amended notice of civil claim, alleging in the alternative that, if Canada Dry Ginger Ale did contain any real ginger, the amount was negligible and did not support the representation that the product was "Made from Real Ginger". The proposed class, as defined in the amended notice of civil claim, included the plaintiff and all Canadian resident persons who purchased any Canada Dry Ginger Ale product marketed as "Made from Real Ginger".
- [5] On May 10, 2019, the defendant filed a notice of application pursuant to Rule 9-6 for an order dismissing the plaintiff's action as disclosing no genuine issue for trial because Canada Dry Ginger Ale contains real ginger and, accordingly, there was no basis for the plaintiff's claim.
- [6] Parallel class actions were filed in Alberta and Quebec. By consent order dated June 5, 2019, the Alberta class action was stayed pending the outcome of this proceeding.
- [7] On September 4, 2019, the plaintiff's expert advised that Canada Dry Ginger Ale contains ginger derivatives. By order dated September 9, 2019, schedules for the summary judgment application and the certification application were re-set and the Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions and the Provision of Class Action Notice was adopted for the purposes of this proceeding. On September 27, 2019, the plaintiff filed a notice of application seeking further amendments to the amended notice of civil claim to concede that Canada Dry Ginger Ale contains small amounts of ginger derivatives and to allege that the defendant's representations regarding this product were false.
- [8] On November 22, 2019, consent orders were made:
- a) Declaring the label "Made from Real Ginger" in respect of Canada Dry Ginger Ale products to be literally true and that Canada Dry Ginger Ale is literally made in part "from" real ginger using ginger oleoresin, which is made from ginger root; and
 - b) Adjourning the plaintiff's application to file a further amended notice of civil claim and the defendant's summary judgment application.
- [9] By order dated December 13, 2019, an April 20, 2020 hearing date for the plaintiff's certification application was set. On January 10, 2020, the parties reached a settlement on behalf of all Canadians outside Quebec (the "Settlement Agreement"). THE SETTLEMENT AGREEMENT
- [10] The Settlement Agreement provides as follows:
- a) The defendant will pay the sum of \$200,000, inclusive of all expenses and fees, plus disbursements of \$18,607.61 (collectively, the "Settlement Amount") to the class to resolve this litigation, in exchange for a full release of all claims;
 - b) The Settlement Agreement is subject to the discontinuance or dismissal of the Alberta Court of Queen's Bench in *Ravvin v. Canada Dry Mott's Inc.*, action 1901-02378; and

- c) The defendant expressly denies liability and is not required to change its product labelling or advertising for products marketed in Canada.
- [11] The parties proposed that the Settlement Amount be distributed to the class members by way of cy-près donation to the Law Foundation, as contemplated by s. 36.2 of the CPA, after deduction for expenses, fees, and disbursements. **LEGAL FEES AND DISBURSEMENTS**
- [12] The retainer agreement signed by Mr. Cardoso, provided, in part, as follows:
- a) Plaintiff's counsel, Boughton Law Corporation ("BLC"), accepted all the financial risk for time and disbursements incurred in prosecuting this claim;
- b) BLC had two options regarding the payment of its legal fees and could, at its discretion, be compensated:
- i. After the preparation of an account itemising the time spent in the prosecution of this claim, which would be deducted from the recovery; or ii. By receiving 38% of the total recovery.
- [13] Mr. Cardoso deposes that he was aware BLC counsel's hourly fee for class actions was \$950, a rate he accepted as reasonable. He understood the total value of time spent by BLC on this matter to February 7, 2020 was \$224,491.02, including taxes. **PROPOSED FEES, DISBURSEMENTS, AND HONORARIA**
- [14] Plaintiff's counsel seeks court approval of honoraria and legal fees as follows:
- a) An honorarium in favour of Mr. Cardoso of \$10,000;
- b) An honorarium in favour of Alberta representative plaintiff, Lionel Ravvin, of \$10,000;
- c) Legal fees of \$110,000, plus applicable taxes, payable to BLC;
- d) Disbursements of \$18,607.61 payable to BLC; and
- e) The remainder payable to the Law Foundation of British Columbia.
- [15] This proposal contemplates legal fees of 50.3% of the Settlement Amount or 55% of the \$200,000 recovery (excluding disbursements). **LAW AND ANALYSIS Class Counsel Fees and Disbursements**
- [16] Section 38(2) of the CPA requires court approval of class counsel fees and disbursements. Plaintiff's counsel argues that, provided the proposed legal fees, disbursements, and costs are reasonable, the Court ought to approve their payment. If proposed fees are to be reduced, a principled basis for the reduction must be identified: *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 85-88; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2018 BCSC 2091 at para. 49.

- [17] When the court assesses the reasonableness of a proposed fee, the amount payable pursuant to the retainer agreement is the starting point for analysis; the issue for determination is whether the agreement operates reasonably in the context, given the fee proposed: *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 at para. 26.
- [18] Canadian courts have recognised contingency fees in the range of 15% to 33% as reasonable: *Wilson v. Depuy International Ltd.*, 2018 BCSC 1192 at para. 123, *aff'd* 2019 BCCA 440; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936 at para. 56; *Fairhurst v. De Beers Canada Inc.*, 2018 BCSC 59 at para. 42; *Parsons v. Canadian Red Cross Society*, [2000] OJ No. 2374 at para. 69 (O.N.S.C.), *aff'd* [2001] O.J. No. 214 (O.N.C.A.).
- [19] The retainer agreement provides two options for the recovery of legal fees; plaintiff's counsel have selected the one that best suits them. Plaintiff's counsel advise that, in seeking to enforce the hourly rate option within the retainer agreement, they have substantially reduced their asserted class action hourly rate from \$950 to \$500, resulting in a corresponding decrease in their fee from about \$240,000 to \$126,000. They propose a further \$16,000 reduction in their fee to \$110,000 (plus applicable taxes). BLC would then pay Merchant Law Group ("MLG"), Alberta class counsel, from those funds. BLC counsel say they worked closely with Alberta counsel for the benefit of the class but that doing so came at a cost, resulting in their commitment to pay MLG 18.5% of any court approved fee. I note that the "carriage risk" is properly viewed as already embedded in any retainer agreement: *Bancroft-Snell v. Visa Canada Corporation*, 2016 ONCA 896 at para. 50. Plaintiff's counsel note they made eight appearances in this matter and that their reduced fees do not include their applications to obtain court approval of the Settlement Agreement or their proposed legal fees, disbursements, and honoraria.
- [20] The factors relevant to a court's assessment of whether proposed fees and disbursements are fair and reasonable are not controversial. They are set out in *McKay v. Air Canada*, 2015 BCSC 1874 at para. 16, and include the following:
- a) The factual and legal complexity of the matters dealt with;
 - b) The risks undertaken, including the risk of failure to certify the class;
 - 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. I have considered each of these factors. Factual and legal complexities
- [21] Plaintiff's counsel characterises this class action as complex and high-risk litigation involving substantial time and effort to prosecute and resolve. Mr. Canofari concedes it was capably defended and procedurally more complicated than he had initially anticipated. It was necessary for the plaintiff to amend pleadings, obtain an expert report, and respond to a demand for particulars and an application for summary judgment. Liability was denied and the plaintiff faced a risk that the action would not be certified. Plaintiff's counsel consolidated all related Canadian class litigation in this action (except for Quebec) in an effort to minimise judicial resources and to avoid inconsistent findings.
- [22] Defence counsel suggests that, if plaintiff's counsel had reviewed the U.S. Canada Dry class action settlement, they might have pleaded this action differently, avoided various procedural steps, and potentially not commenced proceedings at all. Risks undertaken
- [23] BLC assumed all financial risks associated with this litigation, including total fees said to be about \$240,000, over \$18,000 in disbursements, and a possible adverse cost award if the claim did not succeed. Degree of responsibility assumed by counsel
- [24] Plaintiff's counsel assumed sole responsibility for the management and carriage of this class action, including the funding of all disbursements. Monetary value of the matters in issue
- [25] The Settlement Amount is objectively modest, which is a key factor in this case. Importance of the matter to the class
- [26] Plaintiff's counsel contends this claim was a matter of importance to the class. Mr. Ravin deposed that he was "offended on behalf of consumers" by his perception of the defendant's conduct. Mr. Cardoso's affidavit is silent on this point. Defence counsel notes there is no evidence of outrage on behalf of the class. Degree of skill and competence demonstrated by counsel
- [27] I accept that BLC counsel, Mr. Canofari and Mr. Rafter, are capable class action lawyers. Results achieved by the Settlement
- [28] This action was commenced by notice of civil claim filed January 21, 2019; the Settlement Agreement was approved on March 25, 2020, just over one year later and before the completion of any examinations for discovery.
- [29] While admitting that the Settlement Amount is "very modest", Mr. Canofari argues the Settlement Agreement represents a positive outcome because:
- a) The action was certified (by consent for settlement purposes) and resulted in a court-approved settlement that compares favourably to the analogous U.S. class action settlement (based on the size of their respective populations). The U.S. class action resulted in direct benefit to class members who received modest payments;

- b) It resulted in substantial benefit to the Law Foundation, without it incurring any of the financial risks associated with prosecuting this claim; and
 - c) It fulfills the fundamental goal of class actions: namely, ensuring access to justice. Ability of the class to pay
- [30] Plaintiff's counsel describes the Settlement Agreement as a "home run" for the class that was exposed to no risk in this litigation. Expectations of the client and the class regarding the fee
- [31] At the time the Settlement Agreement was reached, Mr. Cardoso agreed BLC would be remunerated based on an hourly rate of \$950 or 38% of the benefits awarded to the class, at BLC's discretion, subject to court approval. Notably, none of the class members opted out of the Settlement Agreement. However, the notice to the class setting out the terms of the approved Settlement Agreement included no reference to the amount plaintiff's counsel were seeking to recover for legal fees and disbursements. Plaintiff's counsel advised that substantial time and effort was invested in the prosecution of this litigation and that their proposed discounted fee is substantially less than the value of the services rendered.
- [32] Defence counsel notes the amounts sought for legal fees and honoraria in this case are outliers compared to other decisions. Opportunity cost
- [33] Mr. Canofari confirmed there was an opportunity cost to pursuing this litigation as BLC could have invested its time elsewhere. Analysis and Conclusion
- [34] The overarching question on applications for fee approval is whether the fee charged "is fair and reasonable and class counsel is appropriately compensated": Bodnar, at para. 23. A reasonable fee should bear an appropriate relationship to the amount recovered: Endean, at para. 60. "[T]he court should ensure that counsel have not commenced an action that uses the class action legislation and judicial system to obtain a result in which they are the only or major beneficiaries": Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2018 BCSC 2091 at para. 53. Ultimately, each case turns on its own facts: Bodnar, at para. 45.
- [35] The retainer agreement provides for compensation based on an hourly rate of \$950 or a percentage fee of 38%. The proposed hourly fees amount to \$224,491.02, which is more than 50% of the total Settlement Amount. Viewed on a percentage basis, the amount significantly exceeds the typical range for approved contingency fees of 15 to 33%: Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2014 BCSC 1936 at para. 56. Neither party provided any Canadian authorities where the fee awarded exceeded 50% of the settlement amount approved. The highest court-approved contingency fee I am aware of in a BC class action is 35%: see e.g., Kidd v. Venue Financial Ltd., 2017 BCSC 1612 at paras. 23-28; Tracy v. Instaloes Financial Solutions Centres (B.C.) Ltd., 2015 BCSC 2138 at paras. 23-28, 32. Plaintiff's counsel argues by analogy that a fee of up to 40% is permissible under the Law Society Rules for complex personal injury lawsuits in BC.

- [36] I accept that substantial time and resources were incurred by plaintiff's counsel in this case, that the action was vigorously and capably defended, and that more court appearances and procedural steps were required than plaintiff's counsel initially anticipated. I acknowledge that plaintiff's counsel voluntarily reduced their regular class action hourly rate and their proposed fee. I conclude this case involved issues of moderate complexity, was litigated by competent plaintiff's counsel who assumed all the financial risks of the proceedings, and who will recover less than the value of the services they provided as a consequence of realising a modest recovery.
- [37] However, I am not persuaded that a fee in excess of 50% of the Settlement Amount is warranted. As acknowledged by plaintiff's counsel, class proceedings are a highly entrepreneurial area of practice. By extension, not all actions are successful and some inevitably result in non-recoverable fees; others may be comparatively very lucrative. Compared to other cases where the court approved a relatively high contingency fee, this class action was not unduly complex or protracted. I conclude that some of the procedural steps taken by plaintiff's counsel might have been avoided in this case. I accept that it is appropriate to consider the integrity of the profession and the precedential value of a decision when approving legal fees in this context: *Plimmer v. Google, Inc.*, 2013 BCSC 681 at para. 24, citing *Endean*. I am concerned that an award whereby counsel receives more than the amount being paid *cy-près* on behalf of their collective client class could be viewed adversely by the public. The ultimate purpose of the class action vehicle is to benefit the class, not their lawyers. The payment to the lawyers is simply a way to achieve the benefits for the class, not the other way around.
- [38] Legal fees equivalent to a contingency fee of 38% of the Settlement Amount would be \$83,071, before taxes. If legal fees of 33% were approved (i.e., at the high end of the generally accepted range for court-approved contingency fees), plaintiff's counsel would recover \$72,141, before taxes. A contingency fee of 35%, as approved in *Kidd*, would be \$76,513, before taxes. In other words, given the modest recovery in this case, the difference between an approved fee of 33% and 38% is relatively small and does not significantly affect the amount payable to the class (represented by the Law Foundation).
- [39] I have considered the retainer agreement, the fact there are no objectors, and the substantial time and effort invested by plaintiff's counsel in these proceedings relative to the modest Settlement Amount. The relevant authorities indicate there is usually an inverse relationship between the amount recovered and the approved percentage contingency fee: the higher the recovery, the lower the percentage fee. Logically, the reverse would also generally apply: namely, the lower the recovery, the more likely it is that a higher percentage fee will be fair and reasonable, particularly given that there is a base amount of work that will need to be done by counsel even in the smallest cases.

- [40] Having regard to the above-noted factors, the relevant authorities, and the parties' submissions, I conclude that legal fees equivalent to 38% of the Settlement Amount would be fair and reasonable in the unique circumstances of this case. I approve legal fees fixed at \$83,071, excluding disbursements. I conclude that fees in this amount are reasonable in all the circumstances and are commensurate with the modest Settlement Amount.
- [41] I approve disbursements of \$18,607.61. Plaintiff's Honoraria
- [42] Courts in common law jurisdictions have awarded discretionary honoraria to representative plaintiffs in class actions. Such an award is more likely if the representative plaintiff does more work than what one would normally expect of a plaintiff, particularly if the representative plaintiff keeps track of it.
- [43] Where the representative plaintiff has fulfilled his duties, which will include attendance for any cross-examinations or examinations for discovery, providing instructions on all steps taken in the litigation and on the settlement (which necessarily requires immersion in the substance of the case), and where a monetary settlement in favour of the class members is achieved, a modest award in recognition of the effort expended on behalf of class members is consistent with restitutionary principles and recognition of the principle of quantum meruit: *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311 at para. 20 [*Parsons v. Coast Capital*].
- [44] Mr. Cardoso seeks an honorarium of \$10,000.
- [45] I am satisfied based on his affidavit sworn February 8, 2020 that:
- a) It was his intention from the outset that he would be an active participant in this litigation; and
 - b) He spent time researching, reviewing Canada Dry commercials and various documents (including a demand for particulars, application materials, the plaintiff's expert report, and documents related to the related U.S. class action settlement), assisting with the drafting of the notice of civil claim, and instructing class counsel.
- [46] Mr. Ravvin, the representative plaintiff in the Alberta class action, also seeks a \$10,000 honorarium, payable from the Settlement Amount. I am satisfied based on my review of his affidavit sworn February 19, 2020 that he:
- a) Approached MLG about commencing the Alberta class action; and
 - b) Spent time researching, providing information, instructing, and communicating with Alberta class counsel.
- [47] Counsel for the defendant is aware of no other British Columbia authority where a court approved an honorarium above \$7,000, noting that in *MacKinnon v. National Money Mart Company*, 2010 BCSC 1008 at paras. 10 and 59, the action settled after certification and a "considerable amount of skirmishing in legal proceedings" over seven years of litigation. She

says honoraria awarded have typically been in the range of \$3,000-\$4,000: *Steele v. Toyota Canada Inc.*, 2015 BCSC 1014 at paras. 37-39 (pre-certification); *Cantlie v. Canadian Heating Products Inc.*, 2015 BCSC 1225 at paras. 4, 49-53 (post-certification).

- [48] I am satisfied that there is authority supporting the award of an honorarium to a representative plaintiff in a parallel class action outside BC: *Quenneville v. Volkswagen*, 2017 ONSC 2448 at para. 31. However, I am not persuaded that the payment of a \$10,000 honorarium to the two representative plaintiffs is justified in this case. This figure is substantially higher than typical honorarium awards, particularly where, as here, the Settlement Amount is modest.
- [49] Modest compensation is appropriate where the representative plaintiff has provided necessary and active assistance leading to success on behalf of all class members. Such a payment is not automatic: *Parsons v. Coast Capital*. The court must ensure that the amount of any separate payment to the representative plaintiff is not disproportionate to the benefit derived by the class members, the effort of the representative plaintiff, and the risks assumed by the representative plaintiff: *Parsons v. Coast Capital*, at para. 19.
- [50] Having regard to the modest Settlement Amount, the relevant authorities, and the evidence before me, I approve honoraria of \$1,500 for Mr. Cardoso and Mr. Ravvin. I conclude this figure is more commensurate with the Settlement Amount than the \$10,000 award sought. While I am satisfied that both fulfilled their duties as representative plaintiffs, on the evidence, neither provided any special expertise nor was required to attend examinations for discovery or cross-examinations on their affidavits.
- [51] These amounts are to be paid as disbursements from the Settlement Amount: *Parsons v. Coast Capital*, at para. 26. SUMMARY
- [52] For the reasons set out above, I have not approved the fees or honoraria proposed by plaintiff's counsel. I approve legal fees and honoraria as follows:
- a) Legal fees of \$83,071, plus applicable taxes;
 - b) Total disbursements of \$18,607.61;
 - c) An honorarium in favour of representative plaintiff, Victor Cardoso, of \$1,500; and
 - d) An honorarium in favour of representative plaintiff, Lionel Ravvin, of \$1,500. "Douglas J."

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