COURT FILE NO.: 98-CV-158832
DATE: 20050405

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
SHEILA WILSON	*Joel Rochon, Vincent Genova* and *Sakie Tambakos* for the National Class
Plaintiff	
	David Klein and *Gary Smith* for the B.C. Sub Class
- and -	
SERVIER CANADA INC., LES LABORATOIRES SERVIER, SERVIER AMERIQUE, INSTITUT DE RECHERCHES INTERNATIONALES SERVIER ("I.R.I.S."), SCIENCE UNION ET CIE, ORIL S.A., SERVIER S.A.S., ARTS ET TECHNIQUES DU PROGRES, BIOLOGIE SERVIER INSTITUT DE DEVELOPEMENT ET DE RECHERCHE SERVIER, ORIL INDUSTRIE, BIO RECHERCHE SERVIER, INSTITUTO DI RICERCA, IDUX, BIOPHARMA ARTEM, SCIENCE UNION S.A.R.L., LABORATOIRES SERVIER INDUSTRIE, I.R.I.S. ET CIE DEVELOPEMENT, INFORMATION SERVIER, SERVIER MONDE, SERVIER INTERNATIONAL, I.R.I.S. SERVICES S.A.R.L., ADIR, SERVIER R&D BENELUX, DR. JACQUES SERVIER and BIOFARMA S.A.	*William W. McNamara, Stephen A. Scholtz,* and *Seana Carson* for the Defendants
Defendants	

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

SUPPLEMENTARY REASONS FOR DECISION

CUMMING J.

[1] Reasons for Decision in this class action dealing with, *inter alia*, the determination of class counsel fees, were released March 21, 2005: see [2005] O.J. No. 1039 (S.C.J.).

[2] The purpose for these Supplementary Reasons for Decision is simply to bring greater clarity to my views in dealing with one issue. This is the matter of the proper, normative treatment in the determination and approval of class counsel fees in respect of non-class counsel (generally this will be American legal advisors) for legal services provided to class counsel.

[3] This elucidation serves the sole purpose of being for the benefit of any reader of my Reasons for Decision in considering the possible value thereof as a precedent for other class actions.

[4] Paragraph 98 of my concluding disposition in my Reasons for Decision states:

> In my view, and I so find, class counsel fees in the amount of $10 million plus applicable G.S.T. of $700,000 plus $2,619,536 (inclusive of any taxes on disbursements) are approved and to be paid at this time. (The disbursement calculation includes $619,699 allocated for Rochon Genova, $203,566 for Klein Lyons and $1,796,271 to Rochon Genova on account of Lieff Cabraser.) (The party and party costs awarded throughout the litigation process, about $700,000, are apart from, and over and above, the $10 million in fees awarded. However, the $4 million in partial indemnity costs paid as part of the settlement are credited to the global Fund (or considered otherwise, are credits against the $10 million in fees and $2,619,536 for disbursements hereby awarded.)

[5] As paragraphs 56, 57 and 58 of my Reasons state, the U.S. law firm is properly to be paid its fees from the counsel fees awarded to class counsel. Any amount payable to American law firm advisors in respect of their fees should not normally be treated as a simple disbursement by Canadian class counsel outside the determination of the quantum of class counsel fees.

[6] The services provided by the U.S. law firm through advice and assistance to class counsel are indirectly for the benefit of the class. Any amount for fees payable to American legal firm advisors is notionally for services being provided to the class as a part of the overall legal services being provided to the class by class counsel. Such amount is properly payable by class counsel out of the class counsel fees after the determination of the quantum of class counsel fees.

Such amount is not properly treated as a disbursement by class counsel outside of the determined quantum of class counsel fees. In my view, this is the preferable normative approach.

[7] Turning to the situation at hand, however, I am exceptionally treating the amount of $1,349,732 payable by national class counsel to the American legal firm for fees (see paras. 85 and 87) as a disbursement. I do so simply because it is an appropriate approach to dealing with the idiosyncratic aspects of the case at hand as seen in the course of submissions in respect of the issue of class counsel fees.

[8] During submissions at the hearing to approve class counsel fees, I was advised there was a dispute as to the allocation of fees as between national class counsel and counsel for the B.C. sub-class.

[9] This dispute between counsel would require mediation. I would determine the class counsel fees and Mr. Justice Winkler would mediate the dispute as to the sharing of those fees.

[10] There was no dispute amongst counsel that the American legal advisor had provided services resulting in fees of at least $1,349,732.

[11] I refused the initial request of national class counsel to treat the American legal advisor, in effect, as a co-class counsel. However, given all the circumstances, including the fact of the dispute as to fees sharing, I was prepared to allow the notional base fee of $1,349,732 of the American legal advisor to be treated as a discrete item to be paid by national class counsel as a reimbursable disbursement outside of, and apart from, the amount set for class counsel fees (to be the subject of the mediated dispute as to sharing). This was made clear to counsel.

[12] The expectation of all counsel at the conclusion of the hearing would be that my judgment would treat the $1,349,732 as a reimbursable disbursement by national class counsel. There was no disagreement amongst counsel as to this approach. The only reasonable inference would be that this would also implicitly reduce the otherwise determined quantum of class counsel fees by $1,349,732.

[13] I was advised, before releasing my Reasons for Decision dated March 21, 2005, that an agreement had been reached between counsel to settle the dispute as to the sharing of class counsel fees. I was not advised as to the terms of that agreement.

[14] Hence, paragraph 98 of my Reasons deals with the $1,349,732 as a disbursement. No counsel has raised any issue with me about my Reasons for Decision since their release March 21, 2005.

[15] I return again to my purpose (paragraph 3 above) in providing these Supplementary Reasons for Decision.

[16] In terms of the underlying reality, the approach to the situation at hand is not exceptional to what I have stated as being the preferred norm. I say this because I have implicitly taken into account this amount of $1,349,732 being paid to the American law firm advisor for fees in the

determination of the fair and reasonable overall quantum of class counsel fees at this time. Put simply, the notional overall quantum of class counsel fees that otherwise would have been payable at this time has been subject to an implicit deduction of $1,349,732, to arrive at a net figure of $10 million.

[17] This analysis is appropriate if one looks at the situation from the standpoint of the class members and not from the viewpoint of counsel in pursuing their fees. From the standpoint of the class members, the total amount of $11,349,732 is payable at this time on account of legal services from the total amount receivable for the benefit of the class under the settlement, being $43 million.

Peter A. Cumming J.

Cumming J.

Released: April 5, 2005

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B E T W E E N:

SHEILA WILSON

Plaintiff

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Defendants

REASONS FOR DECISION

Cumming J.

Released: April 5, 2005