



**SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE**

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FAX COVER SHEET

Date: July 28, 2009

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FROM: The Honourable Madam Justice Lax

TOTAL PAGES (INCLUDING COVER PAGE): 9

MESSAGE:

Bill Sauer v. The Attorney General of Canada et al.

Please see Endorsement of today's date in the above noted matter attached.

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COURT FILE NO.: 05-CV-287428CP[Toronto]

DATE: 20090728

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BILL SAUER

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA on behalf of
HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by
THE MINISTER OF AGRICULTURE, JOHN DOE, JANE ROE
and RIDLEY INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

Cameron Pallett, for the Plaintiff

Dale Yurka, for the Defendant, The Attorney General of Canada

Tim Buckley, for the Defendant, Ridley Inc.

HEARING DATE: November 27, 2008, July 23, 2009

ENDORSEMENT

[1] This is a motion by the defendant Ridley Inc. for an order that the action against it be dismissed without costs. The plaintiff and the defendant The Attorney General of Canada on

behalf of Her Majesty the Queen in Right of Canada, as represented by the Minister of Agriculture (“AGC”) consent to the order. This endorsement also provides reasons for an order granted *ex parte* on November 27, 2008 approving partial compensation to class counsel. The procedural history of this action and the chronology of events that led to these orders are described below.

[2] This action and companion actions in Alberta, Saskatchewan and Quebec were commenced on behalf of Canadian cattle farmers against the defendants after the closure of international borders to Canadian cattle and beef products following the May 20, 2003 diagnosis of a single case of “BSE” or ‘madcow disease’ in Alberta. On June 15, 2007, Mr. Justice Wagner of the Quebec Superior Court authorized the Quebec action to proceed as a class action.

[3] On February 5, 2008, the plaintiffs in the four BSE actions and the defendant Ridley entered into a settlement agreement. The statement of claim in this action was amended to include the Alberta and Saskatchewan class members and those actions were postponed pending hearings in Ontario and Quebec. On May 28, 2008, Justice Wagner of the Quebec Superior Court approved the settlement on behalf of the Quebec class. On September 3, 2008, the Ontario action was certified as a class action on behalf of a national class (except Quebec) against AGC. On January 22, 2009, the Ontario certification order against AGC became final following the dismissal of AGC’s motion for leave to appeal. Orders for stay were obtained in the Alberta and Saskatchewan actions as against AGC and an amended certification order was issued on February 20, 2009. The action against AGC is proceeding to trial.

[4] On June 9, 2008, the plaintiff and Ridley moved jointly for certification for the purposes of settlement against Ridley and approval of the settlement agreement. On September 3, 2008, I released Reasons for Decision provisionally approving the settlement. The settlement is a modified form of ‘Mary Carter’ agreement which provides that Ridley will pay \$6 million Canadian dollars into a trust fund which will be used to fund the ongoing litigation against AGC. In consideration of this payment and release of the claims against it, Ridley agreed to remain in the action to defend claims against it for contribution and indemnity or any claim to apportion liability against Ridley on the grounds that AGC was wholly responsible for the BSE crisis. The Settlement Fund Trust Instrument (the “trust instrument”) identifies Royal Trust Corporation of

Canada as the Trustee. The Settlement Administrator is Crawford Class Action Services. The trust funds are to be used to reimburse counsel for time (at significantly reduced rates of \$135.00 per hour for primary counsel and \$100.00 per hour for all other counsel) and disbursements expended in the prosecution of the BSE class actions against AGC.

[5] In Reasons for Decision released September 3, 2008, I explained why I considered the settlement to be fair, reasonable and in the best interest of the class. However, settlement approval was subject to my also being satisfied that the terms of the trust instrument did not usurp the court's supervisory role in approving class counsel fees and disbursements paid from the trust. The trust instrument annexed to the settlement agreement that was submitted for approval at the hearing provided that counsel would submit accounts to the Administrator for payment. The Trustee would then send payment directly to the counsel rendering the accounts. The court did not appear to have any role in the fees approval process or any ability to review material supporting the request for fees. As my reasons discuss, I was concerned that the distributions from the trust fund be consistent with the court's oversight role with respect to the approval of class counsel fees without placing an intolerable burden on the court to review and approve accounts submitted for payment as the litigation against AGC proceeds.

[6] On September 12, 2008, counsel attended at a case conference to address the concerns that I had raised and plaintiff's counsel provided me with an amended trust instrument. This document contemplated a complete monthly report on hours and disbursements expended with the court retaining the right to approve, or not, the distribution of funds from the trust on a monthly basis. It assumed that a dedicated law clerk is available to assist the case management judge review the monthly accounts of counsel, but sadly, such resources are not available to the judges of this court. I rejected this proposal. In my view, it placed an unrealistic and undesirable burden on the court.

[7] Following discussions with counsel, a middle ground was reached. Further amendments were made to the trust instrument and the settlement agreement. The settlement agreement now provides that the settlement fund shall be managed and paid out subject to the direction of the court. Articles 6.4 and 6.5 were added to the trust instrument. Article 6.4 provides that class counsel would seek joint approval from the Ontario and Quebec courts to be paid from the

settlement fund for the period up to September 30, 2008 an amount not to exceed \$1.2 million for class counsel fees, including taxes, and an amount not to exceed \$300,000 for disbursements, including taxes. Article 6.5 provides that when \$3 million has been distributed from the trust fund, a hearing will be convened, the purpose of which will be to provide a full report to the court as to the usage of the trust funds and the status of the actions. At that time, the court will issue such orders as are deemed necessary concerning the future administration, management or use of the trust funds. The onus will be on class counsel to demonstrate that the results achieved are commensurate with the funds expended.

[8] These amendments satisfied me that the trust instrument now provides a reasonable process that will ensure that the court maintains control over the trust fund in order to meet its obligations to class members as to the expenditure of the settlement funds that were approved for their benefit. At the same time, it is a manageable process that will avoid an unwarranted expenditure of scarce judicial resources.

[9] On September 22, 2008, the certification order was settled at a case conference and the action against Ridley was certified as a class action for settlement purposes on behalf of a national class (except Quebec). The Amended and Restated Agreement, the Notice and Notice plan were approved. The Notice informed class members of class counsel's intention to seek joint approval from the courts in Ontario and Quebec for the fees and disbursements described above as provided in article 6.4 of the trust instrument. The Notice plan was robust and targeted to publications read by farmers in general and cattle farmers in particular.

[10] On September 25, 2008, Justice Wagner gave his approval to the settlement on behalf of the Quebec class. I was later informed that Justice Wagner was content that the Ontario Superior Court take on the sole ongoing role in the oversight and distribution of funds from the BSE Class Action Fund after the Ontario and Quebec courts jointly fixed the first distribution from the trust fund as discussed below.

[11] On October 20, 2008, counsel for the plaintiff attended before me to seek directions with regard to a hearing that the plaintiff proposed to hold *ex parte* on November 27, 2008 in order to determine what funds, if any, were to be paid from the BSE Class Action Fund pursuant to

Article 6.4 of the trust instrument for the period up to September 30, 2008. The court directed counsel to obtain consent in writing from counsel for AGC and Ridley as to both the *ex parte* nature of the hearing as well as the sealing order that was to be requested in connection with the materials that would be used in support of the motion. Both defendants consented to the hearing being held *ex parte*. Ridley consented to the sealing order. AGC took no position with respect to the sealing order.

[12] A hearing was held *ex parte* on November 27, 2008. The court was provided with detailed dockets covering the period July 2004 to September 30, 2008 for class counsel Cameron Pallett, Robertson Stromberg Pedersen LLP, Adams Gareau (Quebec counsel), and Woods LLP. Approval was sought for payment from the trust fund for fees, including taxes, in the total amount of \$1,198,661.09 and for disbursements, including taxes, in the total amount of \$210,709.38. The fees requested represent a discount of 33.39% from the trust rates of \$135.00 and \$100.00 per hour and are significantly less than the amount of compensation that is otherwise provided for in the retainer agreement that the court has approved. An order was granted authorizing payments from the trust fund to class counsel in the amounts specified in the order. A sealing order, supported by an opinion from Laura Legge O.Ont.Q.C., was granted. On December 15, 2008, Justice Wagner approved the payments from the trust fund on behalf of the Quebec class.

[13] Under the trust instrument, both the Trustee and the Administrator have ongoing reporting obligations. In accordance with articles 3.5 and 3.6, the Administrator's First Report was delivered on April 17, 2009. It shows that the closing balance in the BSE Class Action Trust Fund for the period ending March 31, 2009 is in the amount of \$4,403,526.78. The Administrator's Second Report will be delivered in September and will permit the court to continue to monitor activity in the trust fund pending the hearing that will take place in accordance with article 6.5.

[14] After the release of the reasons of the Divisional Court denying AGC's motion for leave to appeal, the parties attended at a case conference on February 20, 2009 to settle the certification order against AGC, to obtain approval for the Notice and Notice plan with respect to the action against AGC and to fix the opt out deadline. The Notice plan was identical to the one that was

approved for notice of the settlement with Ridley. Through an oversight, the Administrator's affidavit confirming that Notice was disseminated in accordance with the Notice Plan was not before the court on February 20, but was provided subsequently. I am satisfied that notice was given in accordance with the Notice Plan approved by order dated September 22, 2008. The period for opting out of the Ridley settlement expired on December 12, 2008. The Administrator's affidavit documenting opt out requests was before the court and disclosed the names of those class members who had asked to be excluded from the settlement. Of the 104 requests for exclusion, 101 were from Old Order Mennonites resident in Ontario.

[15] I was provided with a copy of a letter dated December 17, 2008 signed by five Ontario Old Order Mennonite Bishops that was sent to the Minister of Agriculture and Agri-Food after the Bishops became aware of the BSE class action. It explains that Old Order Mennonites consider lawsuits in general and lawsuits against the government in particular to be contrary to their religious principles. Plaintiff's counsel informed me that those Old Order Mennonites who have opted out of the Ridley settlement prefer that their names not be made public. I granted an order deeming the 104 persons named in the affidavit to have opted out of the settlement and at the plaintiff's request, the order provides for the sealing of the affidavit to respect the privacy of these individuals.

[16] The period for opting out of the class proceeding expired on June 12, 2009. I have reviewed the affidavit of the Administrator sworn May 28, 2009 and am satisfied that Notice was disseminated in accordance with the Notice plan approved by the court on February 20, 2009. By affidavit sworn June 26, 2009, the Administrator provided evidence of a complete list of requests for opt outs, which shows that 362 of the 368 requests for exclusion are from Old Order Mennonites. I granted an order deeming the 368 persons named in the affidavit to have opted out of the class proceeding and I again agreed to the plaintiff's request to seal the affidavit for reasons already given.

[17] This brings me to Ridley's motion for dismissal of the action against it which was heard on consent on July 23, 2009.

[18] Under section 4.2 of the settlement agreement dated February 5, 2008 as amended September 22, 2008, Ridley agreed to remain actively involved in the Ontario and Quebec actions as a party until the rights of the remaining parties to make crossclaims or to seek to apportion any fault expired or all remaining parties agreed to judicially bind themselves not to make these claims.

[19] On May 26, 2009, The Attorney General of Canada through counsel gave the following undertaking:

The Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada, as represented by the Minister of Agriculture undertakes that, based on the allegations made in the Amended Fresh as Amended Statement of Claim amended January 29, 2009, not to commence crossclaims or third party claims against Ridley Inc. for contribution or indemnity with respect to the losses and damages claimed in the above noted action by the Class Members described in the Order of the Honourable Justice Joan Lax dated September 3, 2008, and the Attorney General of Canada undertakes not to seek to apportion any negligence, fault, liability or wrongdoing against Ridley Inc. with respect to the losses and damages claimed in the above noted action by class members.

[20] Section 4.6 of the settlement agreement provides that the plaintiff will consent to the dismissal of the action against Ridley after the Remaining Parties (defined as AGC, John Doe and Jane Roe and any defendant or third and subsequent party added to the actions) judicially bind themselves not to make crossclaims, third party or subsequent party claims or to seek to apportion any negligence, fault, liability, responsibility or wrongdoing against Ridley with respect to the Settlement Class Members' losses and damages.

[21] Ridley has fulfilled its obligations under the settlement agreement. The only known remaining party is AGC. As the undertaking of AGC is based on the current pleading, the order that I have been asked to grant dismissing the action as against Ridley provides that should AGC, John Doe or Jane Roe seek to apportion any negligence against Ridley, then Ridley will defend any such claim pursuant to the September 22, 2008 order. The certification order against AGC is amended to delete Common issue Number 4: "What is the appropriate apportionment of fault, if any, between the defendants?"

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[22] I accept Ridley's submission that notice to class members is not required. Class members were provided with notice of certification for settlement purposes against Ridley and settlement approval in accordance with the court's September 22, 2008 order. Class members had the opportunity to exercise rights to submit requests for exclusion. The notice clearly informed class members that any class member who elected to opt out would be deemed to have opted out of the ongoing class actions against the non-settling defendants and especially the government of Canada. The court's order of February 20, 2009 deems the 104 persons who submitted requests for exclusion to have opted out of the settlement agreement and the class proceeding. I am satisfied that there is no prejudice to class members. The motion is therefore granted.



LAX J.

DATE: July 28, 2009