CITATION: MacBrayne v. LifeLabs Inc., 2020 ONSC 2674
COURT FILES: CV-19-633029-CP
CV-19-633194-CP
CV-20-636642-CP
DATE: 20200506

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL MACBRAYNE, CYNTHIA CHARLES and JOCELYNE LEHTO

Plaintiffs

and

LIFELABS BC INC., LIFELABS INC., LIFELABS BC LP, and LIFELABS LP

Defendants

AND BETWEEN:

MICHAEL FELDBERG and DANIEL FELDBERG

Plaintiffs

and

LIFELABS INC., LIFELABS LP, LIFELABS BC INC. and EXCELLERIS TECHNOLOGIES INC.

Defendants

AND BETWEEN:

ALITA MARIE CARTER

Plaintiff

and

LIFELABS INC., LIFELABS BC INC., LIFELABS LP, and EXCELLERIS TECHNOLOGIES INC.

Defendants

Proceedings under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

COUNSEL: *Theodore P. Charney and Devra Charney* for the plaintiffs in the MacBrayne Action, CV-19-633029-CP

Margaret L. Waddell, W. Cory Wanless, Tina Q. Yang, Jean-Marc Leclerc, Tassia Poynter and David Fogel for the plaintiffs in the Feldberg Action, CV-19-633194-CP

Bryan C. McPhadden, Peter L. Waldmann and Andrew Stein for the plaintiff in the Carter Action CV-20-636642-CP

HEARD: May 1, 2020

LIFELABS CARRIAGE DECISION

[1] On December 17, 2019 LifeLabs announced that hackers had breached their data systems. The personal information of about 15 million patients - their contact information, health numbers and passwords - may have been compromised. Included was a subset of 85,000 patients whose actual lab test results were also hacked.

[2] At least thirteen proposed class actions materialized almost immediately – four in Ontario and nine in British Columbia. In Ontario, the law firms quickly organized themselves into three rival camps, each of them keen to be exclusively appointed class counsel for the Ontario proceeding.

[3] These are the competing groups, their senior class action lawyers and their proposed Ontario proceeding:

(i) Charney Lawyers (Ted Charney) – *MacBrayne* action;

(ii) The Waddell/Klein/Sotos Group (Marg Waddell and Jean-Marc Leclerc) – *Feldberg* action;

(iii) The McPhadden/Waldman/Stein Group (Bryan McPhadden) – *Carter* action.

[4] Each of Charney Lawyers ("CL"), the Waddell Group ("WG") and the McPhadden Group ("McG") are also working with one or more B.C. firms.

[5] During my case conference with counsel and again when the carriage motion was heard, I urged the three competing groups to work together in the best interests of the class – form a national consortium, appoint a steering committee, obtain judicial pre-clearance of the contingent fee and inter-group compensation agreements and avoid this carriage motion. For reasons best understood by the three competing groups, no such agreement was reached.[1]

[6] This court must now decide whether CL, WG or McG should be awarded carriage in Ontario.

Decision

[7] For the reasons set out below, I find on the basis of overall approach that CL and McG must be preferred over WG. As between CL and McG, I find on the basis of overall cost effectiveness that McG must be preferred over CL. Carriage is therefore awarded to McG. The *Carter* action shall proceed and the other Ontario actions are stayed.

Analysis

[8] The applicable law is not in dispute. As I noted in *Mancinelli v Barrick Gold*,[2] the court's objective in deciding carriage of competing class proceedings is to make the selection that is in the best interests of the class, while being fair to the defendants and consistent with the overall objectives of the *Class Proceedings Act, 1992*.[3] The objectives

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[1] In my discussion with counsel, I suggested two reasons why competing class action firms are typically unwilling to work together in the best interests of the class - ego and greed. Counsel did not disagree but offered a third reason, a less pejorative, more business-based reason: that sometimes "the pie is just too small to share." I agree that in some class actions, the expected settlement amount is not enough to support a multi-firm consortium. However, this is not necessarily that case. For example, assuming that (i) liability can be established (the 13 lawsuits reflect some measure of confidence in this regard); (ii) the case settles just after certification (when most settlements occur); and (iii) McG's suggestion of a $235 million settlement amount is not completely unrealistic [15 million patients times $10 plus 85,000 patients times $1000] - then even a settlement at less than half that amount or say $100 million, given a conventional 25% contingency fee, would still yield $25 million in legal fees or about $8 million per group. This is not a "too small to share" case.

[2] *Mancinelli v. Barrick Gold,* 2014 ONSC 6516, affirmed, 2015 ONSC 2717 (Div. Ct.) and 2016 ONCA 571.

[3] *Class Proceedings Act, 1992,* S.O. 1992, c. 6; *Smith v. Sino-Forest,* 2012 ONSC 24, at para. 16, citing *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.,* (2000) 4 C.P.C. (5th) 169 at para. 48; *Setterington v. Merck Frosst Canada Ltd.,* (2006) 26 C.P.C. (6th) 173 at para. 13; *Sharma v. Timminco Ltd.,* (2009) 99 O.R. (3d) 260 at para. 14; affirmed in *Mancinelli* (C.A.) *supra,* note 2, at paras. 13-16.

of a class proceeding are access to justice, behaviour modification and judicial economy for the parties and for the administration of justice.[4]

[9] The case law has generated a long and non-exhaustive list of factors that may been considered by judges when deciding carriage motions.[5] The factors can be summarized under six heads:

(i) Experience and resources of the competing firms;

(ii) Proposed plaintiffs and defendants;

(iii) Causes of action;

(iv) State of preparation;

(v) Overall approach and theory of the case; and

(vi) Proposed fee arrangement.

[10] The Court of Appeal made an important point in *Mancinelli*: the issue is not which law firm "wins" on the most factors - it is not a "tick the boxes" approach. Rather, the court must search for the factor or factors that are *determinative* and in doing so, decide which carriage decision is in the best interests of the class.[6]

[11] Here, I find that the first four factors are not determinative. Each of them attracted detailed submissions by the competing groups but in the end none of these factors can fairly be described as determinative. CL, WG and McG all have senior and experienced, indeed outstanding class action lawyers, any one of whom would do an excellent job as class counsel in this case. There are not decisive differences in the competing groups'

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[4] *Smith*, *supra*, note 2, at para. 16.

[5] In *Mancinelli* (C.A.), *supra*, note 2, at paras. 14-16, the Court of Appeal listed 13 factors: (i) the nature and scope of the causes of action advanced; (ii) the theories advanced by counsel as being supportive of the claims advanced; (iii) the state of each class action, including preparation; (iv) the number, size and extent of involvement of the proposed representative plaintiffs; (v) the relative priority of commencing the class actions; (vi) the resources and experience of counsel; (vii) the presence of any conflicts of interest; (viii) funding; (ix) definition of class membership; (x) definition of class period; (xi) joinder of defendants; (xii) the plaintiff and defendant correlation; and (xiii) prospects of certification. Some 17 factors were listed by this court in *Rogers v. Aphria Inc.* 2019 ONSC 3698.

[6] *Mancinelli* (C.A.), *supra*, note 2, at paras. 17 and 22.

choice of plaintiffs or defendants, causes of action, or states of preparation. Again, much ink was spilled by each group in the effort to differentiate themselves on each of these factors, but the differences, although detailed, are not determinative.

[12] Only the last two factors as listed above, overall approach and the proposed fee arrangement, provide the basis for genuine comparison and differentiation.

[13] ***Overall approach.*** WG intends to file two parallel class actions, one in Ontario for the Eastern Provinces and the other in B.C. for the Western Provinces. CL and McG, on the other hand, believe that a single national class action makes more sense, would be much less complicated and would ultimately be in the best interests of the national class.

[14] *Prima facie*, a single national class action on the facts herein is the more sensible approach. I acknowledge WG's submissions in support of two parallel actions but I am not persuaded. One problem stands out. There is every likelihood that in the parallel Western portion WG will be challenged in yet another carriage fight either by Camp Fiorante Matthews Mogerman, an equally respected class action firm that is advancing the *Gogolek v. LifeLabs* action in B.C. or by another B.C. firm that is advancing one of the other B.C. actions. A second carriage fight and a potentially duplicative parallel action with the same core issues is obviously not in the best interests of the national class.

[15] Therefore, in terms of overall approach (one action versus two actions) CL and McG must be preferred over WG. And, as I explain further below, when one considers the fee arrangements, McG must be preferred over CL (and WG).

[16] ***The proposed fee arrangement and overall cost-effectiveness.*** In *Mancinelli*, the Court of Appeal approved the fees arrangement as a legitimate factor for comparison purposes:

> The proposed fee arrangement between class counsel and the representative plaintiff is a factor that vitally affects the interests of the class. While the fee is ultimately subject to the approval of the court, significant differences between the fee arrangements may be considered on a carriage motion.[7]

[7] *Mancinelli* (C.A.), *supra* note 2, at para. 18.

[17] The Court's approval of fees as a potentially determinative factor is echoed in Bill 161's reform of the *Class Proceedings Act.*[8] Bill 161 will add a new s. 13.1 to the CPA that begins with the following admonition: "On a carriage motion, the court shall determine which proceeding would best advance the claims of the class members in an efficient and *cost-effective manner*, and shall, for the purpose consider [four listed factors]." In other words, on a carriage motion, the court must consider which fee arrangement is the most cost-effective (least expensive) for the members of the class.

[18] Here the differences in the contingent fee agreements are clear and readily measurable. CL and WG will charge the following fees: 20% if the matter settles before service of the certification motion; 22.5 and 20%, respectively, if it settles after service but before the certification hearing; and 25% if the matter settles after the certification hearing but before trial. McG, on the other hand, will charge only 5% if the matter settles before service; 10% if it settles before the certification hearing; and 15% if it settles after the certification hearing but before the trial. If the matter proceeds to trial, CL asks for 30% and WG for one-third, while McG is content with 20%.

[19] These are determinative differences. Assuming (for purposes of illustration only) a post-certification $100 million settlement amount as already discussed,[9] McG's fee arrangement would save the class a full 10 percent or about $10 million. This is a significant saving. The fees factor gives McG a determinative advantage over both CL and WG.

[20] I also note that McG (not CL or WG) was prepared to work together in a single national consortium. I hasten to add that I do not rely on McG's generous overture as a factor in the analysis. It simply underscores what, in the end, is the just result.

Disposition

[21] Carriage is awarded to McG on the basis of overall approach and fees. I am satisfied that the appointment of McG is in the best interests of the class. The *Carter* action shall proceed and the *MacBrayne* and *Feldberg* actions are stayed.

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[8] Bill 161, *"An Act to enact the Legal Aid Services Act, 2019 and to make various amendments to other Acts dealing with the courts and other justice matters"* (First Reading: December 9, 2019) [Passage is expected when the provincial legislature returns to normal sitting.]

[9] *Supra*, note 1.

[22] Costs are normally not awarded on carriage motions and none are awarded here.

[23] I note that Bill 161 will add a new s. 13(5) to the *Class Proceedings Act* – that "the decision of the court on a carriage motion is final and not subject to appeal." Unfortunately, this provision is not yet law.

Signed: *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment is effective from the date it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Order need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment may nonetheless submit a formal Judgment for original signing, entry and filing when the Court returns to regular operations.

Date: May 6, 2020