

**CITATION:** Quinton v. C.B. Fleet Holding Co. Inc., 2011 ONSC 2572  
**COURT FILE NO.:** 58675/08  
**DATE:** 2011/04/27

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

LYNDA QUINTON and FRED QUINTON

Plaintiffs

- and -

C.B. FLEET HOLDING COMPANY, INC.,  
C.B. FLEET COMPANY, INC. and  
JOHNSON & JOHNSON – MERCK  
CONSUMER PHARMACEUTICALS OF  
CANADA

Defendants

)  
)  
) Michael J. Peerless and Matthew D. Baer  
) for Lynda Quinton and Fred Quinton  
)  
)

)  
)  
) Robin Linley for Johnson & Johnson –  
) Merck Consumer Pharmaceuticals of  
) Canada  
)

) Barry Glaspell for C.B. Fleet Holding  
) Company, Inc. and C.B. Fleet Company  
) Inc.  
)

) **HEARD:** April 13, 2011  
)

**LEITCH J.:**

**CERTIFICATION AND SETTLEMENT APPROVAL**

[1] The plaintiffs move for an order certifying this action as a class proceeding for settlement purposes pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “CPA”) and for an order that the settlement agreement dated December 23, 2010 is fair, reasonable and in the best interests of the Class Members (“Settlement Agreement”).

[2] This action is in relation to the ingestion of Fleet Phospho-soda, an over-the-counter pharmaceutical product marketed by the defendants for use as part of a bowel

- 2 -

cleansing regimen in preparing for surgery, X-ray or endoscopic examination. Use of more than one full 45 ml dose of Fleet Phospho-soda in a 24-hour period has been linked to a very specific type of renal damage, "acute phosphate nephropathy" or "nephrocalcinosis."

[3] Dr. Andrew House, an expert retained by the plaintiffs, deposed that in certain rare circumstances, ingestion of two full doses of Fleet Phospho-soda in less than a 24-hour span was associated with serious kidney damage. He further deposed that he is familiar with the types of damage to the kidney associated with Fleet Phospho-soda use and has treated patients suffering from kidney damage following ingestion of that product. As he further deposed, levels of possible kidney damage range from chronic kidney disease to possible transplant, long-term dialysis and even death.

[4] It is alleged in the action that the defendants breached their duty of care to the plaintiffs and others who used Fleet Phospho-soda and that damages were caused by the defendants' negligence.

[5] In December 2005, Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada released a public advisory stating that there had been rare reports of patients who experienced a reduction in kidney function due to the formation of calcium deposits in their kidneys subsequent to their use of Fleet Phospho-soda for bowel cleansing.

[6] On December 11, 2008, Fleet Phospho-soda was voluntarily recalled in the United States and on December 24, 2008, the sale of Fleet Phospho-soda was discontinued in Canada. On March 5, 2009, Health Canada issued a release warning that Fleet Phospho-soda not be used as a bowel preparation.

[7] Similar actions have been commenced in Québec and Saskatchewan and the United States.

- 3 -

[8] Counsel for the plaintiffs in the Canadian actions have worked together in advancing the plaintiffs' claims and ultimately settling the actions.

[9] The defendants have consented to certification of this action solely for settlement purposes.

[10] Section 5(1) of the *CPA* provides that a court shall certify a class proceeding if the delineated criteria for certification are met.

[11] There is no issue that the pleadings disclose a cause of action and the requirement of s. 5(1)(a) is met. The plaintiffs allege that the defendants negligently breached their duty of care to individuals using Fleet Phospho-soda and that the plaintiffs' damages were caused by the defendants' negligence.

[12] The requirement of s. 5(1)(b) is met by virtue of the fact that the representative plaintiffs represent an identifiable class of persons who are objectively identified by the proposed class definition:

- (a) all persons resident in Canada, including their estates, who purchased, used or ingested Fleet Phospho-soda; and
- (b) all persons who by virtue of a personal relationship to one or more of such persons described in (a) above have standing in this action pursuant to 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 as amended (or equivalent derivative or direct claim by statute or common law in other provinces or territories).

[13] It will not be difficult for a potential Class Member to determine if they are in the class.

[14] Plaintiffs' counsel submitted that a national class is appropriate noting that as observed by Sharpe J.A. in *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] O.J. No. 506 (C.A.) "there are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation." As Mr. Peerless

- 4 -

deposed in his affidavit sworn in support of the original motion for certification, the certification of a national class in Ontario creates further efficiencies by obviating the need for multiple class proceedings in every province and territory in Canada relating to the same issue. It is significant that counsel in Québec and Saskatchewan who represent claimants in similar actions have worked cooperatively with plaintiffs' counsel to efficiently and economically pursue the claims.

[15] There is no issue taken that the subject matter of the action has a real and substantial connection to the Province of Ontario. The proposed representative plaintiffs are located in Corunna, Ontario and the defendant, Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada is an Ontario corporation with its headquarters in Guelph, Ontario. This defendant promoted, sold, supplied and distributed Fleet Phospho-soda in Canada.

[16] The plaintiffs propose the following common issue:

Were the defendants negligent in the manufacture, marketing or distribution of Fleet Phospho-soda in Canada?

[17] As the plaintiffs note, certification of this common issue will avoid duplication of the fact-finding and legal analysis that would be required if each Class Member was required to proceed with an individual action against the defendants. I am satisfied that the s. 5(1)(c) requirement of the *CPA* is met.

[18] In addition, I am satisfied that a class proceeding is the preferable procedure because as the plaintiffs' counsel points out, it provides a fair, efficient and manageable method of determining the common issue and it will advance the proceeding in accordance with the goals of judicial economy, access to justice and behavior modification.

- 5 -

[19] As Mr. Peerless observed in his affidavit in support of the motion for certification, the cost of pursuing this action on an individual basis would be prohibitive and uneconomic for the vast majority of Class Members thereby reducing access to justice. The documentary discovery alone is both extensive and time consuming. Additionally, numerous experts must be retained in the course of the proceedings. But for this action, the defendants would likely be insulated from the alleged damage caused by Fleet Phospho-soda because of the cost of litigation alone.

[20] Accordingly, the s. 5(1)(d) requirement is met.

[21] I am also satisfied that the representative plaintiffs do not have an interest in conflict with the interest of other Class Members in relation to the common issue and they fairly and adequately represented the interests of the class. The implementation of the settlement will be an effective and manageable conclusion of this action. Therefore, the s. 5(1)(e) requirement is met.

[22] As a result of these conclusions, this action is certified as a class proceeding for settlement purposes.

[23] I turn next to the issue of whether the proposed Settlement Agreement is fair, reasonable and in the best interests of the proposed class and ought to be approved.

[24] The total settlement amount is \$11,995,000 plus interest of 2% from the date of the settlement (December 23, 2010) and until the date the monies are paid to the claims administrator.

[25] The settlement amount is to be allocated as follows:

- (a) \$6,300,000 to eligible claimants to be distributed *pro rata* based on the number of eligible claims filed and the number of points each eligible claimant is awarded. Eligible spouses and children under the age of 18 advancing a derivative claim will receive 8% of the award paid to the eligible claimant. Eligible parents and children over the age of 18 advancing a

- 6 -

derivative claim will receive 2% of the award paid to the claimant provided that the total payments to the eligible derivative claimants will not exceed 20% of the amount awarded to the corresponding eligible claimant.

- (b) \$1,800,000 to provincial health insurers to be allocated based on the population of each province. Each of the provincial health insurers supports the settlement;
- (c) \$3,395,000 towards Class Counsel fees subject to approval of the court; and
- (d) \$500,000 for administration expenses (this amount has already been provided by the defendants and any balance remaining will be added to the fund payable to eligible claimants).

[26] If monies remain in the trust account as a result of returned or uncashed cheques or for any other reason, the balance will be paid to the Kidney Foundation of Canada.

[27] The settlement may be terminated at the option of the defendants and/or the participating insurers if five or more Class Members opt out and indicate an intention to pursue a claim against the defendants, either individually or collectively.

[28] Class Counsel has advised that they expect the average claim values to be between \$100,000 and \$200,000.

[29] The long form notice of settlement approval directs potential claimants to Schedules B and E of the Settlement Agreement. Those schedules require potential claimants to prove that they took the product and then prove that they have an injury. Specifically, in order to be eligible for compensation, a Class Member is obliged to submit threshold evidence regarding use of more than 45 ml of Fleet Phospho-soda in a 24-hour period as well as threshold evidence regarding a Fleet Phospho-soda related renal injury. Class Counsel advised that the threshold evidence requirements are designed to be inclusive. I agree that the requirements to overcome the threshold to become eligible for a claim are not onerous.

- 7 -

[30] It is also important to note that as set out in Schedule E (the outline of the claim administration procedures) if there are any technical deficiencies in relation to a claim, there is a 45-day period during which those deficiencies can be corrected. In addition, claimants have 45 days from the date of mailing of the final decision respecting their claim to appeal the classification or rejection of their claim to this court.

[31] The Settlement Agreement contemplates that settlement benefits will be paid to Class Members based on a point system. A settlement matrix has been developed to determine the amount of compensation payable to eligible benefits.

[32] Importantly, Dr. House has reviewed the Settlement Agreement and is of the opinion "that the threshold evidence of Fleet Phospho-soda related injury that must be shown in order for a Class Member to be eligible for compensation is reasonable and will not exclude a significant number of potential claimants who might otherwise have claimed compensation." His comments with respect to the proposed settlement matrix to be used to allocate funds to eligible claimants are also very helpful. As he deposed, the point system fairly and reasonably reflects the increasing degree of illness suffered by the Class Members. Overall he found that the terms of the Settlement Agreement made sense from a medical viewpoint.

[33] Equally important is the fact that Class Counsel advised that the Class Members can readily identify if they are eligible claimants. The kidney damage arises acutely and the health effects are immediately obvious to the patient. It is clear by this point in time what category each claimant is in because of the acute nature of the damage.

[34] The factors to be considered in assessing whether a settlement is fair, reasonable and in the best interest of the class as a whole have been established in a number of cases (see *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527 (S.C.J.), *Wilson v. Servier*,

- 8 -

[2005] O.J. No. 1039 (S.C.J.) at para. 42, *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.).

[35] After considering those factors, I am satisfied that the settlement should be approved.

[36] The settlement was reached after arm's-length negotiation by experienced counsel on both sides. The settlement was ultimately reached after months of negotiation. As set forth in the affidavit filed in support of this motion, the negotiations were adversarial, arm's-length and non-collusive. The defendants were ably represented by experienced counsel as well as counsel from U.S. law firms and counsel for the participating insurers.

[37] The settlement was reached after Class Counsel had the benefit of significant information to evaluate the merits of the settlement. In addition to the advice from two leading nephrologists specializing in kidney disease and an expert in pharmaceutical development and regulation, they also had information from the Ontario Ministry of Health, information from U.S. plaintiff's counsel, information provided by the defendants during the course of settlement discussion, information provided as part of the U.S. multi-district litigation proceeding and significant legal and medical research undertaken by Class Counsel.

[38] In addition, Class Counsel had numerous conversations with the representative plaintiffs and other Class Members about the impact of their injuries. This action has received considerable media attention, including a program on CTV National News in January 2009.

[39] Class Counsel considered what amount would be appropriate compensation for each claimant in Canada, the number of claimants that might be anticipated within the context of a ceiling imposed by the defendants.



- 9 -

[40] Counsel advise that based on a number of claims made in the United States where a settlement was also reached, Class Counsel are more confident than ever that the Canadian settlement amount is fair and reasonable.

[41] As previously noted, the threshold for eligibility, the evidence required to meet that threshold and the point system to determine the amount of compensation to be paid is reasonable, makes sense from a medical viewpoint and as Class Counsel indicated, they are comfortable that the system results in a fair categorization and can be understood by potential claimants.

[42] The threshold for participating in the settlement is much less onerous than the evidentiary threshold that would be required at trial. The requirements to overcome the threshold are not onerous, requiring neither a biopsy nor an expert report. The exclusionary scenarios are also reasonable.

[43] The Settlement Agreement provides an opportunity for Class Members to opt out if they do not wish to participate in the Settlement Agreement. The opt out period of 60 days following first publication of the notice of settlement approval is reasonable.

[44] It is significant also that notice of the certification and settlement approval hearing was published in the National edition of the Globe and Mail and various Québec publications, notice was posted on Class Counsel's website and both the Kidney Foundation of Canada and the Canadian Society of Nephrology distributed the notice to their membership in both French and English. Specifically, the Canadian Society of Nephrology disseminated the notice by sending an email with a direct link to the notice and accompanying information to each of its members and the Kidney Foundation of Canada posted the notice under the latest news section on the front page of their National website.

- 10 -

[45] Class Counsel have spoken to many Class Members and advised that there has been overwhelming support for the settlement. Class Counsel has not received any objections to the settlement, nor has any Class Member indicated an intention to opt out or in any other way express displeasure with the settlement.

[46] It is significant that the representative plaintiff, who has been actively involved in the proceeding and has been fully briefed as to the settlement, supports the settlement and has deposed in her affidavit sworn in support of this motion that she has reviewed the settlement matrix, and understands how it operates and the rationale for the point system.

[47] It is also significant that Class Counsel recommends approval of the Settlement Agreement. As more particularly set out in the affidavit sworn in support of this motion, Class Counsel considered a number of procedural and litigation risks. As they note, had this litigation proceeded it would have involved a contested certification hearing, likely appeals and after certification, a lengthy common issues trial with an uncertain result and a delayed conclusion. If the plaintiffs were successful on the common issues, individual assessments would have been necessary to determine eligibility and quantum.

[48] I am satisfied that the settlement should be administered as set out in the Settlement Agreement by the claims administrator proposed by Class Counsel. The claims administration was tendered and the proposed claims administrator was the lowest bidder. The proposed claims administrator has agreed to a fixed fee to cover their cost of developing the claim package, settlement website, call centre, training, reporting and tax services. Further claims administration fees will be based on the number of claims received. It is estimated that the total cost of claims administration will be in the range of \$60,000 to \$100,000. The class administrator will engage medical professionals to review claims as required.

- 11 -

[49] Lastly, I turn to the issue of notice. As Class Counsel submitted, the proposed notice of certification and settlement approval is an extensive but targeted notice plan, designed to ensure as many applicable Class Members as possible are informed about the certification of the action and approval of the settlement. The short form notice will be published twice in 24 newspapers across Canada. Class Counsel advised that they consulted experts with respect to the selection of newspapers where the notice should be published to effectively reach a wide-ranging readership. The short form notice will also be published in the Canadian Medical Association Journal, sent to the Kidney Foundation of Canada to be posted on their website and distributed to their membership, and sent to the Canadian Society of Nephrology to be distributed to their membership.

[50] The long form notice will be published on Class Counsel's websites and sent by direct mail to anyone requesting a copy.

[51] Class Counsel submits it is the targeted reach to the members of the Nephrology profession and those involved with the Kidney Foundation of Canada that makes this an excellent notice plan having the potential to be much more effective than typical notice plans in finding applicable Class Members.

[52] The short form of notice directs anyone who has ingested Fleet Phospho-soda and developed kidney damage that their legal rights may be affected and they may be eligible for compensation as a result of the settlement.

[53] The long form notice provides a summary of the Settlement Agreement directing claimants to the Settlement Agreement for information on qualification; clearly sets out that everyone within the class definition is automatically included in the class unless they opt out; and clearly outlines the procedure and the date by which they must opt out as well as the consequences of an untimely and improper opt out.

- 12 -

[54] For the foregoing reasons, the form of order presented by counsel is approved including orders appointing the proposed claims administrator and requiring the claims administrator to execute its obligations as laid out in the Settlement Agreement and Schedules; an order that the settlement matrix be approved and implemented in accordance with its terms; an order that the notices of settlement approval be approved and that the notices of settlement approval be disseminated in accordance with the plan attached to the Settlement Agreement, an order releasing the claims of each Class Member and the Provincial Health Insurers; and, an order that this proceeding be dismissed against the defendants.

"Justice L. C. Leitch"

Justice L. C. Leitch

**Released: April 27, 2011**

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**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

LYNDA QUINTON and FRED QUINTON

Plaintiff

- and -

C.B. FLEET HOLDING COMPANY, INC., C.B.  
LEET COMPANY, INC. and JOHNSON &  
JOHNSON – MERCK CONSUMER  
PHARMACEUTICALS OF CANADA

Defendants

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**REASONS FOR JUDGMENT**

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Leitch J.