

**Superior Court of Justice**

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FROM: Justice L. C. Leitch**PAGES:** 8 (including cover page)**DATE:** July 31, 2012**RE:** Heney v. Reebok
Court File No. 5608-11CP**MESSAGE:** Please find attached Reasons for Judgment of Justice
L. C. Leitch in relation to the above mentioned file.
Thank you.**ORIGINAL TO FOLLOW BY MAIL:** Yes () No(x)

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CITATION: Heney v. Reebok, 2012 ONSC 4449

COURT FILE NO.: 5608-11CP

DATE: 2012/07/31

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Chelsea Heney

Plaintiff

- and -

Reebok Canada

Respondent

Daniel E.H. Bach and Emilie E.M. Maxwell,
for the PlaintiffMichael Eizenga and Amanda McLachlan,
for the Respondent

HEARD: July 10, 2012

RE: CERTIFICATION AND SETTLEMENT APPROVALLEITCH J.

- [1] The plaintiff moves for an order certifying this action as a Class Proceeding for purposes of settlement only pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 and for an order approving the Settlement Agreement between the plaintiff and the defendant made as of May 7, 2012.
- [2] This motion was heard contemporaneously via teleconference with a motion in the Quebec Superior Court before L'Honorable Pierre-C. Gagnon, J.C.S. in a parallel proceeding commenced in the province of Quebec.¹
- [3] The Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions adopted by the Canadian Bar Association was applied and facilitated the co-ordination of the settlement approval hearings for this joint settlement.
- [4] The Settlement Agreement is subject to the approval of both this court and the Superior Court of Quebec.

¹ [REDACTED] v. Reebok Canada Inc., Reebok International Ltd., and Adidas Canada Limited, File No. 500-06-000582-110

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- [5] In this action, the plaintiff has alleged that the defendant made claims regarding the purported health and fitness benefits of "Easy Tone" line of shoes and apparel which were false and/or misleading in violation of various statutes, specifically the *Consumer Protection Act*, 2002, S.O. 2002, c. 30 and the *Competition Act*, R.S.C. 1985, c.C-34.
- [6] The defendant is resident in Ontario for purposes of s. 2 of the *Consumer Protection Act*, 2002. It is a manufacturer of athletic equipment and apparel and it made the Easy Tone line of shoes and apparel ("Eligible Shoes and Apparel") available beginning in December, 2008 and marketed these products on the basis they had particular toning and strengthening benefits.
- [7] The plaintiff gave notice of her claim against the defendant October 7, 2011 and issued the statement of claim November 7, 2011 (which was amended April 16, 2012).

The U.S. Settlement

- [8] An American company related to the defendant entered into a consent decree with the U.S. Federal Trade Commission in September, 2011 and agreed to return \$25,000,000.00 U.S. dollars (inclusive of administration expenses) to the U.S. purchasers of the Easy Tone line of shoes and apparel.

The Certification Requirements

- [9] The defendant has consented to certification in the context of the settlement before the court.
- [10] Pursuant to s. 5 (1) of the *Class Proceedings Act*, a court shall certify a Class Proceeding if the pleadings disclose a cause of action; there is an identifiable class of two or more persons that would be represented by the representative plaintiff; the claims of the Class Members raise common issues; a Class Proceeding would be the preferable procedure for the resolution of a common issue; and there is a representative plaintiff who would fairly and adequately represent the interest of the Class, has produced a workable plan to advance the proceeding on behalf of the Class and to notify Class Members; and, has no conflict of interest on the common issues with the other Class Members.
- [11] The case law in Ontario is clear that certification requirements prescribed by s. 5 of the *Class Proceedings Act*, 1992, need not be as rigorously applied when certification is sought for settlement purposes (see *Bonan Foods Ltd. v. Ajinomoto U.S.A. Inc.*, 2004, 2 C.P.C. 6 15 (Superior Court)).
- [12] I am satisfied that it is plain and obvious that the pleadings disclose a cause of action: contravention of Part III of the *Consumer Protection Act*, 2002 and/or s. 52 (1) of the *Competition Act* giving rise to a right of damages.
- [13] This action is advanced on behalf of a National Class (excluding the residents of Quebec who are represented in the parallel action). I am satisfied that the proposed definition of the National Class describes the class in objective terms, independent of the outcome of the litigation; it clearly identifies persons who have a potential claim against the

defendant; and, who should be bound by the results of the action, and thus are entitled to notice of certification. (See *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. 4172 (Superior Court).

[14] I approve of the following definition for the National Class:

All persons resident in Canada, excluding Quebec, who purchased any and all Eligible Shoes and/or Eligible Apparel from Reebok and/or its authorized retailers and wholesalers, including, without limitation, Reebok Canada Retailers, Reebok Concept Stores, Reebok.com, Reebok outlets, and/or third party retailers or wholesalers, during the period of December 5, 2008 through and including July 10, 2012 (the "Class Period").

[15] I also find the claim raises a common issue:

Did the defendant make statements about its Eligible Shoes and Eligible Apparel that violated Part III of the *Consumer Protection Act* and/or s. 52(1) of the *Competition Act*?

[16] It is clear that a Class Proceeding is a preferable procedure to implement the settlement reached with the defendant because it allows the goals of judicial economy, access to justice and behaviour modification to be fulfilled. As the plaintiff has deposed in her affidavit in support of this motion, the individual claims of the National Class Members are relatively modest and in the absence of this proceeding, it is unlikely that most of those claims would be advanced, as it would not be economical for the majority of the National Class Members to attempt to enforce their rights individually.

[17] Finally, there is no issue that the representative plaintiff would fairly and adequately represent the interests of the proposed Class. She does not have any interest in conflict with the interest of the other Class Members on the common issue described above and the proposed arrangements to deal with the settlement are a workable plan.

[18] The representative plaintiff has also outlined in her affidavit the extent of her involvement in the litigation thus far, and has confirmed that she has retained and instructed Class Counsel, been informed of her duties and responsibilities in connection with this proceeding, provided information and instructions to Class Counsel, reviewed the Statement of Claim, discussed the settlement with Class Counsel, reviewed and discussed with Class Counsel the terms of the settlement agreement and instructed them to execute the agreement on her behalf and to seek approval of the settlement in Ontario.

[19] I am satisfied that all of the requirements of s. 5(1) of the *Class Proceedings Act* are met and this proceeding shall be certified as a Class Proceeding for settlement purposes.

Summary of the Settlement

[20] Pursuant to the Settlement Agreement, the defendant has agreed to pay at least \$1,000,000.00 and up to \$2,200,000.00 to settle this action.

- [21] Class Members are entitled to make a claim in accordance with the claims process described in the Settlement Agreement by the claims deadline (90 days from the date notice of settlement approval is first disseminated). It is a significant feature of the settlement that Class Members need not provide proof of purchase other than in certain limited circumstances outlined in the agreement in order to be entitled to an initial amount of \$50.00 CAD for all Eligible Shoes and an initial amount of \$40.00 or \$25.00 for Eligible Apparel, depending on the item of apparel purchased.
- [22] If the total claims made, plus administration expenses are less than \$1,000,000.00 then claimants will receive a greater entitlement of up to \$100 CAD for Eligible Shoes and either \$80.00 CAD or \$50.00 CAD for Eligible Apparel. In the event that the total claims, plus expenses, is less than \$1,000,000.00, then the Settlement Agreement provides that there will be a cy-pres distribution of the balance to Special Olympics Canada.

The Right of Class Members to Opt-Out

- [23] Section 9 of the *Class Proceedings Act* allows Class Members to “opt-out of the proceeding in the manner and within the time specified within the certification order”. The settlement agreement allows Class Members to opt-out of the settlement and the proposed form of notices referred to further in these reasons clearly set out that the deadline for opting-out is 60 days prior to the claims deadline and the process for doing so.
- [24] The proposed Opt-Out Form is approved.

Assessment of the Settlement

- [25] In *Dabbs v. Sun Life Assurance Co. of Canada*, 1998 O.J. No. 1598 (General Division), Sharpe J. endorsed a number of factors for consideration in assessing a settlement, which have been applied and supplemented by many courts in Ontario (see *Parsons v. Canadian Red Cross Society*, 1999, 40 C.P.C. 4 151 (Superior Court) and *Ontario New Home Warranty Program v. Chevron Chemical Co.*, 1999, 37 C.P.C. 4 (175) Superior Court) and *Marcantonio v. TVI Pacific Inc.*, 2009, 82 C.P.C. 6 305 (Superior Court).
- [26] I conclude that the settlement with the defendant is fair, reasonable and in the best interest of the National Class for the following reasons.
- [27] The settlement was the result of arm’s length negotiation over several months. Good faith arm’s length bargaining and the absence of collusion is a factor favouring the approval of a settlement.
- [28] The settlement provides consumers with a cash payment not another type of benefit, such as a coupon or discount, which is more illusory. The settlement was achieved early in the litigation process and thus, as noted by Class counsel, it provides the additional advantage of delivering immediate benefits to National Class Members without the risks and delay inherent in protracted and expensive litigation.

- [29] The settlement is substantially similar to the quantum of settlement in the United States and the recovery offered per item pursuant to the Settlement Agreement is identical to that achieved in the U.S. proceeding (ignoring currency conversion).
- [30] Class Counsel is experienced in Class Proceedings generally and in consumer protection and product liability cases more particularly and they have recommended approval of the settlement. This recommendation from Class Counsel is therefore given considerable weight.
- [31] In considering the recommendation of Class Counsel, it is important that, as they deposed, they had access to the U.S. settlement materials and extensive confirmatory discovery, which was substantially similar to that utilized in the U.S. proceeding. They depose that they had more than adequate information available to them, from which to make the appropriate recommendation concerning the resolution of the proceeding.
- [32] As noted in the affidavit filed by Class Counsel in support of the motion at para. 56, "the settlement delivers a substantial, immediate benefit to the National Class Members on claims which, while we believe them to be meritorious, undoubtedly face significant risks". Therefore, while they held the view that the claims had merit, the proceeding faced a number of risks, which had to be taken into account and which weighed in favour of a fair compromise resulting in the settlement before the court.
- [33] The *Consumer Protection Act, 2002* is relatively new legislation and the law relating to the cause of action under Part III of the Act is not settled, particularly on the issue of whether there must be privity of contract between the consumer and the defendant. In other words, this is not an action free of uncertainty.
- [34] The U.S. settlement "benefitted from pressure brought to bear by The United States Federal Trade Commission". As previously noted, the per item recovery offered pursuant to the settlement agreement is identical to that achieved in the U.S. proceeding (ignoring currency conversion). As a result, the consumers in both countries are treated equally. Again this supports approval of the settlement.
- [35] The fact that there have been no objections to the settlement after notice was given of the settlement approval hearing pursuant to an order made June 8, 2012, is also a factor favouring approval of the settlement.
- [36] As previously noted, the representative plaintiff has deposed that she understands the rationale for the settlement and she believes it to be fair, reasonable and in the best interest of the National Class having regard to both the merits and the risks inherent in the litigation and in particular, knowing that the per item compensation is identical to that obtained in the U.S. proceeding (without currency conversion).
- [37] The claims process is clear and uncomplicated and the Settlement Agreement provides that the court shall retain jurisdiction over the parties, the National Class and the Claims Administrator for all matters relating to the proceeding.

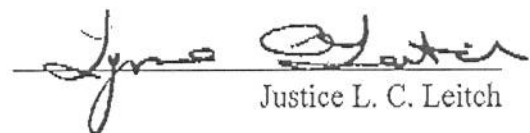
- [38] Therefore, the Settlement Agreement is approved pursuant to s. 29 of the *Class Proceedings Act*.

Notice Program and Appointment of Claims Administrator

- [39] As Class Counsel indicated, the goal of the proposed form of notice program is to ensure that as many Class Members as possible receive notice of the settlement.
- [40] It is proposed that an administrator with extensive experience be retained who has the ability to provide notice and respond to inquiries orally and in writing in both official languages. As outlined in the affidavit of Mr. Gilhula, Director of Operations of Garden City Group the proposed Claims Administrator, it is proposed that notice of settlement approval be decimated to the Class Members in four ways. Firstly, by publication (one quarter page or slightly smaller) on a weekday in the lifestyle or equivalent section of 15 newspapers across the country with a total circulation of more than 1.9 million. Secondly, by publication on a Saturday in the lifestyle or equivalent section of the Globe and Mail and La Presse (one quarter page or slightly smaller). Thirdly, by internet advertisements on Google searches and on various web properties over a 90 day period in response to 16 search terms related to the defendant, this class action and the Eligible Shoes and Apparel. Finally, during the final month of the Claims Period, a notice will be published in two National magazines, Flare and Best Health with a total circulation of more than 230,000.
- [41] In addition, there will be a news release in both official languages, a toll-free call centre will be established and made available in both official languages and a dedicated website will be created and maintained in both official languages.
- [42] Mr. Gilhula has deposed that he has been involved in the administration of 15 class action settlements in Canada over a period of 12 years, and based on his experience he is of the belief that the notice of settlement approval disseminated in accordance with the proposed notice plan, will reach the majority of Class Members and target audience and in addition, the extensive online advertising campaign will significantly enhance the reach of notice to Class Members.
- [43] As a result, the appointment of Garden City Group, as the Claims Administrator is approved; the form and content of the Short Form and Long Form Notice of Settlement Approval is approved and the Notice Program for both notices is approved.

Conclusion

- [44] Based on the foregoing reasons, the draft order presented by counsel, with the revisions discussed at the hearing, is approved and signed.


Justice L. C. Leitch

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Plaintiff

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REASONS FOR JUDGMENT

Leitch J.