

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

PETER ANDREWS and PHYLLIS ANDREWS

Plaintiffs

and

TIFFANY GATE FOODS CORPORATION, LOBLAWS SUPERMARKETS
LIMITED, HARTMAN FOODLINER INC., 1437716 ONTARIO LIMITED
and 1179132 ONTARIO LIMITED, THE GREAT ATLANTIC &
PACIFIC COMPANY OF CANADA LIMITED and LOEB CANADA INC.

Defendants

Court File No. 02-CV-230368CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

NICKIE TOURLOS

Plaintiff

and

TIFFANY GATE FOODS CORPORATION

Defendant

Proceeding under the Class Proceedings Act, 1992

A F F I D A V I T

I, **PETER J. E. CRONYN**, of the City of Ottawa, in the Regional Municipality of Ottawa-Carleton, MAKE OATH AND SAY AS FOLLOWS:

1. I am a partner with the law firm of Nelligan O'Brien Payne, co-counsel for the Plaintiff herein and as such have knowledge of the matters to which deposition was made. Where I make statements in the context of this Affidavit which are not within my personal knowledge, I have identified the source of that information and belief. I verily believe all that I have deposed to.

Background

2. This action involves 564 class members in the Ottawa and Toronto areas who became ill with shigella sonnei bacteria as a result of consuming a Greek style pasta salad manufactured by the Defendant between May 1, 2002 and May 31, 2002. The tainted pasta salad was sold through various points of sale in Ottawa, Toronto, Pickering, Bolton, Woodstock and Windsor.

3. There was a high degree of media attention with respect to the matter at the time, leading to class members contacting both law firms. The number in the class became known to both firms in the summer of 2002 and has not changed markedly since that time. Class members have been in regular communication with both law firms.

4. The Andrews' action was issued in Ottawa on May 28, 2002. In addition to Tiffany Gate Foods Corporation, the intermediary points of sale were added as party Defendants in the Ottawa action. The Tourlos action was issued on May 31, 2002 in Toronto.

5. McPhadden Samac Merner Barry and Nelligan O'Brien Payne entered into a consortium agreement on November 18, 2002 in which it was agreed that both firms would function collectively as co-counsel in respect of the two class proceedings.

6. In order to simplify matters, the Ottawa action was dismissed on a without cost basis on March 1, 2004 and the claims of the entire class are being brought by way of the Tourlos action.

7. During the course of the litigation, the Defendant agreed to regard the sale of the tainted salad as a sale of goods claim, to be governed by the provisions of the *Sale of Goods Act* provided that the Plaintiffs were able to establish that they purchased the Greek pasta salad from a retailer who purchased from Tiffany Gate. In that manner, the necessity of having the individual retailers as Defendants was eliminated. Meaningful settlement discussions began to take place approximately one year subsequent to the service of the Statement of Claim.

8. Subject to the approval of this Honourable Court, the parties reached a settlement on February 15, 2006 which will resolve the claims of the classes as defined herein. The settlement was reached with the assistance of Winkler J. as mediator. The maximum value of the settlement is impossible to determine in advance of the claims administration process, and in fact there is no aggregate "cap" to the value of the settlement. Annexed hereto and marked as Exhibit "A" to this my Affidavit is a true copy of the settlement agreement (hereinafter "the settlement"). In this Affidavit, terms will have the meanings given to them pursuant to the definitions in the settlement.

Class Certification

9. This proceeding is suitable for class certification:

- a) The Statement of Claim discloses a cause of action. The Plaintiff alleges that damages exist as a result of the consumption of the pasta salad negligently prepared, manufactured and distributed by the Defendant. The claim is brought both in negligence and based upon a breach of the implied warranties set out in the *Sale of Goods Act*. It is alleged that the Defendant was negligent regarding the cleanliness of the food products used in the preparation of the salad and the cleanliness of its food preparation personnel and the equipment used to prepare the pasta salad;
- b) There is an identifiable class.

- c) The parties propose that the class be defined as:

All persons in Canada who consumed the Greek style pasta salad manufactured by the Defendant, Tiffany Gate Foods Corporation between the 1st of May, 2002 and the 31st of May 2002 and who, as a consequence of the contamination of this salad with shigella sonnei bacteria, became ill and such other persons as are described in Section 61 of the *Family Law Act* who suffered compensable loss by reason of that relationship to a person falling within the above defined class.

10. The Statement of Claim raises common issues. The common issues proposed for the purposes of this settlement are:

- a) Did the Defendant, Tiffany Food Gates Corporation, prepare and distribute the subject Greek style pasta salad;
- b) Were the class members infected with the shigella germ as a consequence of either consuming the pasta salad themselves or coming into contact with someone who had consumed the salad;
- c) Is the Defendant strictly liable for any damages and losses suffered by the class members;
- d) If not, did the Defendant owe duty of care to the Plaintiff and class members in regard to the preparation and distribution of the pasta salad and did the Defendant breach the standard of care;
- e) Was the Greek pasta salad of merchantable quality and fit for the purpose for which it was intended within the meaning of the warranties set out in the *Sale of Goods Act*;

- f) If the answer is “yes” to common issue 2 and “yes” to either of common issues 3 or 4 and/or “no” to common issue 5, then did the class members suffer compensatory damages;

- g) Are the class members entitled to punitive damages.

Settlement Negotiations

11. Significant research and investigation has taken place in respect of similar litigation, both in Canada and the United States. The analysis indicated that the shigella bacteria is more severe than other forms of gastro-enteritis. This is because when shigella bacteria multiply, they invade cells and result in tissue destruction. Many strains also produce a toxin called “shiga toxin”, which is very potent and extremely destructive. Although research indicates that in the United States approximately 700 persons die annually from shigellosis, small children and the elderly are at greatest risk for mortality in the circumstances. We are fortunate, however, with this group that there have been no deaths.

12. In general terms, the shigella infection typically manifests itself with the course of diarrhea, fever and stomach cramps starting a day or two after exposure to the bacteria. Although in most cases the virus resolves itself in 5 to 7 days, in many cases the diarrhea can become so severe that the patient needs to be hospitalized. This was the experience of many of the class members. Young children and the elderly are particularly sensitive to the symptoms that develop with the shigella bacteria.

13. In addition to the general symptoms, there are also long term consequences that are associated with the infection, which differentiate it from other types of infection. Although many people with diarrhea recover completely, it may be several months before their bowel movements are entirely normal. Approximately 3% of the persons who become infected will later develop pain in their joints, irritation of the eyes and painful urination. The particular complication is known as

Reiters Syndrome. It can last for months or years and can lead to chronic arthritis, which is difficult to treat.

14. Settlement class counsel have spoken and interviewed hundreds of members of the proposed class in order to reach a determination as to how the class should be properly broken down. In the final analysis, the class were divided into five categories, as follows:

Category	Number of members
1. Illness of 1 to 3 days	28
2. Illness of 3 to 9 days	231
3. Illness of 9 to 15 days	183
4. Illness of 16 to 22 days	74
5. Illness transpiring over a period in excess of 22 days	33

15. Settlement negotiations between counsel for the Plaintiff and counsel for the Defendants have been ongoing since 2003. Settlement negotiations were guided by the outcome of previous class proceedings in respect of food poisoning, particularly in relation to cases litigated in the Province of Ontario. The damages agreed to represent the midpoint in the cases reviewed.

16. All settlement discussions were guided by an analysis of the facts and the law applicable to the claims of the settlement class, taking into the account the burdens and expenses of litigation, including the risks and uncertainties associated with protracted trials and appeals, as well as a fair, cost effective and assured method of resolving claims of the settlement class. On the facts of this case, the expenses of litigation are all the more problematic as awards in food poisoning cases are notoriously small were these claims to have proceeded individually through the Court system.

17. In addition, there was some risk to the Plaintiff in proceeding with the litigation as the Defendant was of the view that it could make a viable argument on the issue of causation.

Terms of the Settlement

18. This settlement provides benefits for all members of the class. The settlement of the action and the settlement agreement are made without admission of liability by any party.

19. The settlement agreement provides that class members and family class members will be paid in accordance with the following grid:

Category	Amount	FLA Claim	Out of pocket and income loss expense
1. Illness of 1 to 3 days	\$1,000.00	\$ 250.00	To be assessed
2. Illness of 4 to 9 days	\$2,000.00	\$ 500.00	To be assessed
3. Illness of 10 to 15 days	\$4,000.00	\$ 750.00	To be assessed
4. Illness of 16 to 22 days	\$6,000.00	\$1,200.00	To be assessed
5. Illness transpiring over a period in excess of 22 days	\$8,000.00	\$1,500.00	To be assessed

20. Class members and family class members will apply to the Administrator of the plan (Crawford and Company) in the manner and form required by it.

21. Class members will provide evidence satisfactory to the Administrator in support of their claims. Class members have already been asked to identify and prove their claims for special damages for loss of income and out of pocket expenses. Details were provided to the Defendant in individual data sheets submitted for each class member. Where no actual loss of income has been suffered but instead class members have used sick leave and or vacation to cover missed days of work, a per diem rate has been suggested which reflects the daily earnings of an average Ontario

worker. The data submitted to date indicates that 343 members of the class suffered an income loss, which has been quantified and is supported, while 211 members reported days missed from work but no actual loss of income.

22. In addition, OHIP has been consulted and has indicated that it is prepared to settle the ministry's subrogated claims for the class members. OHIP's total claim of \$50,000.00 has been taken into account in the settlement.

23. The settlement agreement provides that the Administrator will determine the amount of compensation to be paid to any claimant, and upon finalization of the claim, the Defendant will pay this compensation.

24. Two mediators/arbitrators will be appointed by the Court to decide any and every appeal from the decision of the Administrator, which appeals will proceed in the manner and form that the mediator/arbitrator will decide, having regard to all of the circumstances of the case, in order that the appeal proceed in an expeditious and as inexpensive manner as is consistent with fairness and equity. In order to deal with the two areas, it is agreed that Paul Torrey will act as Mediator/Arbitrator for the Toronto area, while Anne Mullins will act as Mediator/Arbitrator for the Ottawa area.

Certification and Settlement Approval

25. The parties have consented in the form attached as Schedule "B" to the settlement agreement to an Order certifying that the action is a class proceeding and approving the settlement of the action.

Notice of the Certification and Approval Hearing

26. It has further been agreed that the parties shall execute a Consent, in the form attached as Schedule "C" to the settlement agreement, to an Order providing for notice of the settlement and of the hearing of the motion to certify the action as a class proceeding and approve the settlement.

27. Given the early media attention and the continuing contact with the class members, class counsel believe that most of the class members are known. However, notice will be provided by mail, e-mail and advertised on both firm websites. It has also been agreed that publication of the notice will be through the Ottawa Citizen and the Toronto Star.

Payment of Fees and Expenses

28. It has been agreed that the Defendant shall pay full costs, disbursements and expenses of the Administrator and the Mediator/Arbitrator.

29. The Defendant as well has agreed to pay all costs, disbursements and expenses associated with the publication of notices to the class.

30. It is further agreed that the Defendant will pay settlement class counsel the sum of SEVEN HUNDRED THOUSAND (\$700,000.00) DOLLARS in fees and disbursements. In addition, the Defendant will pay GST on the aforementioned sum. Payment shall be made within thirty days of the Court approval of the within settlement.

31. The class counsel fee was mediated before Winkler, J. and was agreed to with his assistance. The quantum was agreed to by class counsel in full and final satisfaction in relation to the development of the class action through certification.

32. It is also agreed that nothing in the settlement agreement shall preclude class counsel, or either of them, from representing or acting on an individual basis on behalf of any individual claimant for purposes of preparing and submitting an individual claim under the settlement agreement and entering into a separate fee agreement for that purpose. In those circumstances, where a case has not been settled in mediation, each party is entitled to serve upon the other a formal offer to settle and the Arbitrator following his or her award shall treat the offer as a formal offer made under the *Rules of Civil Procedure*.

33. In all of the circumstances, the settlement agreement, which has no ceiling on the total possible relief, is comprehensive, flexible, claimant friendly, easy to access and ultimately fair. The amount of compensation received will be based on the evidence provided in each case. In addition, the settlement provides a fair and orderly mechanism for resolving class members claims, which will reduce administrative and legal costs as far as practical in the circumstances. The administration scheme will not be a burden to the Court system.

34. Settlement class members will benefit from the provisions in this agreement which eliminate what could have been obstacles in proving their claims on a case by case basis in the courtroom.

35. No settlement class member shall be considered ineligible to receive compensation under the terms of the settlement on the basis of any statute of limitation, prescription period or any other limitation or prescription defence. Throughout the course of this litigation, we have been contacted by a number of members of the class who are anxious to bring this litigation to an end.

36. I recommend approval of this settlement to this Honourable Court as being fair, reasonable and in the best interests of the class.

37. I make this Affidavit in support of a motion for an Order that the within proceeding be certified as the class proceeding, and that the settlement be approved and for no other or improper purpose.

SWORN before me at the City of)
)
Ottawa, in the Province of Ontario)
)
this 30th day of May, 2008.)



PETER J. E. CRONYN



A Commissioner, etc.

**Anne Frances Marshall, a Commissioner, etc.,
Province of Ontario, for Malligan O'Brien
Payne LLP, Barristers and Solicitors.
Expires July 3, 2008.**