



**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE)
JUSTICE DEENA BALTMAN) TUESDAY, THE 4TH DAY
) OF OCTOBER, 2011.

B E T W E E N

DOROTHY ELLIOT as Estate Trustee of the Last Will and Testament of John MacDougall Elliot, deceased,
DOROTHY ELLIOT, GORDON RICHARDSON,
GORDON RICHARDSON as Estate Trustee of the Last Will and Testament of Mae Myrtle Hall, deceased,
ALICE KOTUBA as Estate Trustee of the Last Will and Testament of Charles Gibbs, deceased,
ALICE KOTUBA and PATRICIA O'SULLIVAN

Plaintiffs

And

JOSEPH BRANT MEMORIAL HOSPITAL

Defendant

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the plaintiffs for certification of this action as a class proceeding, was heard this day at Milton, Ontario.

ON READING the motion records, filed,

ON BEING advised of the consent of the defendant,

1. FOR THE PURPOSES OF THE ORDER, the following definitions apply:
 - (a) **“Alice”** means Alice Kotuba;
 - (b) **“Brant Hospital”** means Joseph Brant Memorial Hospital;
 - (c) **“Class”** or **“Class Member”** means all persons who were patients at Joseph Brant Memorial Hospital and contracted Clostridium difficile from and including May 1, 2006 to and including December 31, 2007, or if such person is deceased, the executor (with or without a will) of the estate of the deceased person;
 - (d) **“Class Counsel”** means Stanley M. Tick & Associates and Sutts, Strosberg LLP;
 - (e) **“C.difficile”** means Clostridium difficile;
 - (f) **“Charles”** means Charles Gibb, deceased, by his estate trustee, **Alice**;
 - (g) **“CJA”** means the *Courts of Justice Act*, R.S.O. 1990, c.C-43, as amended;
 - (h) **“Class Period”** means the period from and including May 1, 2006 to and including December 31, 2007, or such other period as this court may determine;
 - (i) **“Dorothy”** means Dorothy Elliot;
 - (j) **“Family Class”** or **“Family Class Member”** means the living partner, spouse, child, grandchild, parent, grandparent or sibling of a patient at Joseph Brant Memorial Hospital who contracted Clostridium difficile from and including May 1, 2006 to and including December 31, 2007;
 - (k) **“Gordon”** means Gordon Richardson;
 - (l) **“Jack”** means Jack MacDougall Elliot, deceased, represented by his estate trustee, **Dorothy**;
 - (m) **“Mae”** means Mae Myrtle Hall, deceased, represented by her estate trustee, **Gordon**;
 - (n) **“Notice”** means the notice of certification of this action as a class proceeding;
 - (o) **“OPGT”** means the Office of the Public Guardian and Trustee; and

(p) **“Patricia”** means Patricia O’Sullivan.

2. THIS COURT ORDERS that this action is certified as a class proceeding.

3. THIS COURT ORDERS that the Class is defined as:

all persons who were patients at Joseph Brant Memorial Hospital and contracted Clostridium difficile, from and including May 1, 2006 to and including December 31, 2007 , or if such person is deceased, the executor (with or without a will) of the estate of the deceased person.

4. THIS COURT ORDERS that the Family Class is defined as:

the living partner, spouse, child, grandchild, parent, grandparent or sibling of a patient at Joseph Brant Memorial Hospital who contracted Clostridium difficile from and including May 1, 2006 to and including December 31, 2007.

5. THIS COURT ORDERS that Jack, Mae, Charles and Patricia are hereby appointed as the representative plaintiffs of the Class.

6. THIS COURT ORDERS that Dorothy, Gordon and Alice are hereby appointed as the representative plaintiffs of the Family Class.

7. THIS COURT DECLARES that the nature of the claims asserted on behalf of the Class are various declarations, negligence and breach of contract, and the causes of action asserted on behalf of the Family Class are claims pursuant to s. 61 of the *Family Law Act*.

8. THIS COURT DECLARES that the relief sought by the Class and Family Class is as set out in paragraphs 2 and 3 of the amended statement of claim.

9. THIS COURT DECLARES that the common issues are:

1. Did the defendant owe a duty of care to the Class to ensure that the premises of Joseph Brant Memorial Hospital were disinfected and/or to the extent possible, to ensure that the premises were free of bacteria? If so, what was the standard of care? Did the defendant breach the standard of care? Was the defendant in breach of contract? If so, when and how?
2. Did the defendant owe a duty of care to the Class to implement control procedures at Joseph Brant Memorial Hospital to prevent an outbreak of C.difficile? If so, what was the standard of care? Did the defendant breach the standard of care? Was the defendant in breach of contract? If so, when and how?
3. Can the damages of the Class be determined, in part, on an aggregate basis? If yes, what amount should the defendant pay, to whom and why?
4. Should the defendant pay punitive damages to the Class? If yes, in what amount?
5. Should the defendant pay prejudgment and postjudgment interest, and at what annual interest rate?
6. Should the defendant pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If yes, what costs, why and in what amount?

10. THIS COURT ORDERS that the plaintiffs' litigation plan attached as Schedule 1 to this order is workable and may be varied by this Court.

11. THIS COURT ORDERS that:

- (a) Class Counsel and counsel for the defendant shall, on or before October 14, 2011, provide the OPGT with a list of all Class Members known to them;
- (b) upon request, Class Counsel and counsel for the defendant are permitted to disclose to the OPGT, further information about particular Class Members known to them, such as date of birth, to permit the OPGT to determine whether any such Class Members are listed in the Register of Guardians of mentally incapable persons maintained by the OPGT or is an estate of a deceased person under administration by the OPGT;

- (c) this information shall be used by the OPGT for the sole purpose of determining whether the individual is under guardianship or an estate for whom the OPGT is an estate trustee and shall not be disclosed to any third party;
- (d) the OPGT shall, within 60 days of the delivery of the information set out in subparagraph (a) above, advise Class Counsel and counsel for the defendant if any of the Class Members are under its guardianship or is an estate under its administration; and
- (e) the Class Member list shall be kept confidential by the OPGT and the list (including any copies) shall be destroyed after use.

12. THIS COURT ORDERS that a Class Member may only opt out of this action by sending an election to opt out, by ordinary mail, fax, email or courier on or before February 17, 2012, signed by the Class Member or such Class Members' authorized representative, stating that the Class Member opts out of this action and also stating the Class Member's full name, address, telephone number and birth date to:

BY REGULAR MAIL TO:
Howie & Partners LLP, Chartered Accountants
3063 Walker Road,
Windsor, ON N8W 3R4,
Attention: Brant Hospital Class Action

or BY FAX TO:
519.250.1929

or BY EMAIL TO:
classaction@howieandpartners.com
subject: Brant Hospital Class Action

13. THIS COURT ORDERS that Howie & Partners LLP shall:

- (a) keep all information about Class Members confidential save and except for the purpose of reporting to the Court and Class Counsel and counsel for the defendant on the opt outs in accordance with paragraph 16;
- (b) store all information about Class Members securely; and

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Balkin J.

- (c) destroy all information about Class Members in its possession, including information stored electronically, within 90 days after the filing of the affidavit of Sarkis Isaac with the Court in accordance with paragraph 16 of this order.

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Baltham J.

14. THIS COURT ORDERS that no Class Member may opt out of this action after 5:00 p.m. E.T. on February 17, 2012.

15. THIS COURT ORDERS that if a Class Member opts out of this action, that all of his or her Family Class members will also be deemed to have opted out.

16. THIS COURT ORDERS that no person may opt out a minor or a mentally incapable Class Member from this action without the permission of the court after notice to The Children's Lawyer and/or the Public Guardian and Trustee, as the case may be.

17. THIS COURT ORDERS that, after the expiration of the opt-out period, Sarkis Isaac of Howie & Partners LLP shall, on or before February 28, 2012, report to the Court and to the parties by affidavit to be filed under seal, providing the names and addresses of those persons, if any, who opted out, and attaching the opt out documents.

18. THIS COURT ORDERS that the parties shall submit the Notice to this Court for approval on or before October 21, 2011.

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Baltham J.

19. THIS COURT ORDERS that the Class shall be given notice, on or before November 15, 2011, of the certification of this action in the following manner (the “Notice Program”):

- (a) by Class Counsel:
 - (i) posting the Notice on the website at www.branthospitalclassaction.com; and
 - (ii) sending the Notice by email to any person who registered with Class Counsel and who provided a valid email address; and
- (b) by the defendant:
 - (i) publishing the Notice once in a half page advertisement in the *Hamilton Spectator* and the *Burlington Post*; and
 - (ii) mailing the Notice to the last known address (according to Brant Hospital’s records) for every Class Member known to it, or if the Notice which was mailed to the Class Member is returned, to the last known address (according to Brant Hospital’s records) for the Class Member’s next-of-kin as identified in the records of Brant Hospital.

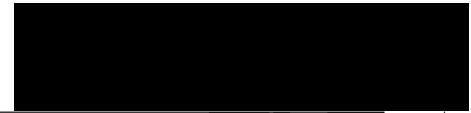
20. THIS COURT DECLARES that the Notice Program satisfies the requirements of section 17 of the *Class Proceedings Act* and that the Notice Program for the Class shall be deemed to be Notice to the Family Class.

21. THIS COURT ORDERS that before November 28, 2011, Class Counsel and the defendant shall report to the court and to the parties by affidavit confirming their compliance with their respective obligations under the Notice Program.

22. THIS COURT ORDERS that the defendant shall produce on or before March 9, 2012, to Class Counsel the following information for every Class Member

known to it, who did not opt out of this action: name, last known address (according to Brant Hospital's records), phone number, OHIP number, and the contact information on file for the Class Members' next-of-kin as identified in the records of Brant Hospital.

23. THIS COURT ORDERS that the cost of this motion shall be in the cause.



JUSTICE

#825959-v13

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OCT 16 2011
SUPERIOR COURT OF JUSTICE
MILTON

“Schedule 1”

**JOSEPH BRANT MEMORIAL HOSPITAL CLASS ACTION
LITIGATION PLAN**

DEFINITIONS

1. The following definitions apply for the purposes of this litigation plan:
 - (a) **“Brant Hospital”** means Joseph Brant Memorial Hospital;
 - (b) **“C. difficile”** means *Clostridium difficile*;
 - (c) **“CJA”** means the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;
 - (d) **“Class Counsel”** means the law firms of Stanley M. Tick & Associates and Sutts, Strosberg LLP;
 - (e) **“Class Period”** means the period from and including May 1, 2006 to and including December 31, 2007, or other such period as this court may determine;
 - (f) **“Class”** and **“Class Members”** means all persons who were patients at Joseph Brant Memorial Hospital and contracted *Clostridium difficile* from and including May 1, 2006 to and including December 31, 2007, or if such person is deceased, the executor (with or without a will) of the estate of the deceased person;
 - (g) **“CPA”** means the *Class Proceedings Act, 1992*, S.O. 1992, c.6, as amended;
 - (h) **“Family Class”** and **“Family Class Members”** means the living partner, spouse, child, grandchild, parent, grandparent or sibling of a patient at Joseph Brant Memorial Hospital who contracted *Clostridium difficile* from and including May 1, 2006 to and including December 31, 2007; and
 - (i) **“FLA”** means *Family Law Act*, R.S.O. 1990, c.F.3.

CLASS COUNSEL

2. Class Counsel consists of Stanley M. Tick & Associates and Sutts, Strosberg LLP who possess the requisite knowledge, skill, experience, personnel and financial resources to prosecute this action to conclusion.

3. Class Counsel anticipate that prosecuting this action will require:
 - (a) reading, organizing, profiling, scanning, managing and analyzing thousands of documents;
 - (b) the analysis of complex legal issues; and
 - (c) extensive expert evidence with respect to *C. difficile*, including its causes, identification, prevention, transmission, symptoms and prognosis.

THE COMPOSITION OF THE CLASS

4. The plaintiffs seek to represent the Class which is defined as:

all persons who were patients at Joseph Brant Memorial Hospital and contracted Clostridium difficile from and including May 1, 2006 to and including December 31, 2007, or if such person is deceased, the executor (with or without a will) of the estate of the deceased person.

5. The plaintiffs seek to represent the Family Class which is defined as:

the living partner, spouse, child, grandchild, parent, grandparent or sibling of a patient at Joseph Brant Memorial Hospital who contracted Clostridium difficile from and including May 1, 2006 to and including December 31, 2007.

REPORTING TO AND COMMUNICATING WITH PUTATIVE CLASS MEMBERS

6. There are approximately 224 patients who were diagnosed with C. difficile at Brant Hospital during the Class Period.
7. Class Counsel developed a website for this proposed class proceeding which is located at www.branthospitalclassaction.com. Current information on the status of the action is posted on the website and will be updated regularly. Copies of some of the Court decisions and other information relating to this action are or will be accessible on the website.
8. The website contains links to Class Counsels' email addresses, a feature that permits putative members of the Class to submit inquiries to Class Counsel. Inquiries are sent directly to Class Counsel who will promptly respond.
9. The website also includes the direct-dial local and toll free telephone numbers for a designated person within the Class Counsel group, permitting putative class members to make inquiries of a live person if they so desire.
10. Further, Class counsel will continue to communicate directly with the Class and Family Class Members who have identified themselves.

LITIGATION SCHEDULE

11. Class Counsel has been advised that Justice Baltman has been appointed as the case management judge to oversee the conduct of this action.

12. Class Counsel will ask Justice Baltman to set a litigation schedule for :
 - (a) the scheduling and conduct of the motion for certification;
 - (b) the completion of pleadings;
 - (c) the documentary production and delivery of affidavits of documents by the parties;
 - (d) the examinations for discovery;
 - (e) a motion for summary judgment;
 - (f) the delivery of experts' reports; and
 - (g) the trial of the common issues.

13. Class Counsel may also ask that the litigation schedule be amended from time to time, as required.

PRESERVATION OF EVIDENCE

14. The defendant has been asked to preserve and produce all relevant information and business documents, whether in electronic or paper form, including all existing maintenance logs for the hospital and all documents relating to the outbreak of *C. difficile* during the Class Period which are or

have been in their power, possession or control.

PRODUCTION FROM NON-PARTIES

15. Pursuant to a *Freedom of Information* request, the plaintiffs have secured the report of Dr. Michael Gardam of the Infection Prevention and Control Unit of the University Health Network (Toronto) which examined the circumstances surrounding the outbreak of *C. difficile* at Brant Hospital.

DOCUMENT EXCHANGE AND MANAGEMENT

16. The defendant possesses most, if not all, of the documents relating to the common issues. These documents will be produced to Class Counsel through the normal production, cross-examination and examination for discovery processes. The plaintiffs will produce all relevant documents in their possession, subject to privilege.

17. Class Counsel anticipate and are able to handle the intake and organization of the large number of documents that will likely be produced by the defendant. Class Counsel will use digital data management systems to organize, code and manage the documents.

18. If required, the documents may be maintained on a secure, password-protected internet website for the purposes of access by members of Class Counsel via the world wide web.

19. The same data management systems will be used to organize and manage all relevant documents in the possession of the plaintiffs, although the plaintiffs have virtually no documentation relating to the common issues other than the plaintiffs' hospital records, the records which were obtained from the Regional Municipality of Halton and what is available in the public domain.

PLAINTIFFS' EXPERTS

20. The plaintiffs have or will retain experts knowledgeable in the areas of infectious diseases and public health (Dr. Hammerberg) and nursing to provide assistance to Class Counsel and produce reports as required. The plaintiffs may retain further experts as deemed necessary and advisable in the future.

THE FOLLOWING TERMS OF THIS PLAN PRESUPPOSE THE COURT CERTIFIES THE ACTION AS A CLASS PROCEEDING

NOTICE OF CERTIFICATION OF THE ACTION AS A CLASS PROCEEDING AND THE OPT-OUT PROCEDURE

21. Class Counsel believe that the defendant, Brant Hospital, has a complete list of patients who contracted C. difficile during the class period. This list shall become the basis for the determination of individuals to whom direct notice shall be given.

22. If the action is certified as a class proceeding, the Court will be asked to:
- (a) set an opt-out date ninety (90) days after the date of the order certifying the action;
 - (b) settle the form and content of the notice (the “Notice of Certification”); and
 - (c) settle the method by which notice of the certification and the opt out period will be given the (“Notice Program”).
23. The plaintiffs propose that the Notice of Certification be disseminated in accordance with the following Notice Program:
- (a) the defendant shall:
 - (i) publish a half page advertisement in the Hamilton Spectator and the Burlington Post; and
 - (iii) mail the Notice of Certification to every person who contracted C.difficile at Brant Hospital during the Class Period;
 - (b) Class Counsel shall:
 - (i) post the Notice of Certification on the world wide web at <http://www.branthospitalclassaction.com>; and
 - (ii) deliver the Notice of Certification by email to any person who registered with Class Counsel and provided a valid email address.
24. The plaintiffs will ask the Court to order the defendant to pay the costs of the Notice Program.
25. The plaintiffs propose the following opt-out procedure:

- (a) a person may opt out of the class proceeding by sending a written election to opt-out to a person designated by the court before a date fixed by the Court;
- (b) no person may opt out a minor or a person who is mentally incapable without leave of the court after notice to the Children's Lawyer and/or the Public Guardian and Trustee, as appropriate; and
- (c) no member of the Class may opt out of the class proceeding after the expiration of the opt-out period set by the court except by court order.

26. The plaintiffs will ask the Court to appoint Sarkis Isaac, an accountant with Howie & Partners in Windsor, to receive the written elections from any class member opting out of the class action and, within thirty (30) days after the expiration of the opt-out period, to deliver to the Court and the parties an affidavit listing the names of all persons who have opted out of this class action. Mr. Isaac has previously been appointed by the Court to fulfill these tasks.

EXAMINATIONS FOR DISCOVERY

27. Class Counsel intend to examine for discovery at least one representative of the defendant and estimate that, subject to the volume of the defendant's productions, its undertakings and refusals, these examinations will take two (2) to five (5) days.

28. The plaintiffs may ask the Court for an order allowing them to examine multiple representatives of the defendant, if necessary.

CLARIFICATION OF COMMON ISSUES

29. Following the completion of the examinations for discovery and the exchange of expert reports and before the trial of the common issues, the plaintiffs may ask the court for an order to clarify and/or redefine the common issues.

MOTIONS

30. Although no motions other than those indicated in this plan are currently anticipated by the plaintiffs, additional motions may be required and will be scheduled as the class action progresses.

DISPUTE RESOLUTION DURING THE CURRENCY OF THE ACTION

31. The plaintiffs are willing to participate in mediation or non-binding alternative dispute resolution efforts if the defendant is prepared to do so.

THE TRIAL OF THE COMMON ISSUES

32. The plaintiffs will ask the court to hold the trial of the common issues within six (6) to twelve (12) months after the completion of the examinations for discovery, including the delivery of answers to the undertakings and argument of any refusal motions.

33. The findings of fact and conclusions on the common issues will permit the judge at the common issues trial to give directions, pursuant to s. 25(3) of the CPA, to deal with the remaining individual issues.

THE FOLLOWING TERMS OF THIS LITIGATION PLAN PRESUPPOSE THAT THE COURT DETERMINES THE COMMON ISSUES RELATING TO LIABILITY IN FAVOUR OF THE CLASS

34. Assuming that the common issues are resolved by judgment in favour of the Class, the representative plaintiffs will ask the judge at the common issues trial to make the necessary orders to allow the Class to proceed with the balance of the action in the manner set out below.

NOTICE OF RESOLUTION OF COMMON ISSUES

35. The representative plaintiffs will ask the Court to:
- (a) settle the form and content of a notice of resolution of the common issues (the “Notice of Resolution”); and
 - (b) order that the Notice of Resolution be distributed substantially in accordance with the Notice Program set out at paragraph 23, except that the Notice of Resolution shall not be mailed to any Class Member who validly opted out in accordance with the procedure set out herein.

SUPERVISION BY THE COURT

36. Pursuant to s. 25 of the CPA, the judge at the trial of the common issues will be asked to make orders as are necessary to determine all issues not determined at the common issue trial. Without limiting the generality of the foregoing, the Court will be asked to:

- (a) set a claims deadline by which date claimants will be required to file their claims (“Claims Bar Deadline”);
- (b) approve the “Claim Form”;
- (c) appoint an Administrator to hold any monies recovered at the common issues trial and to implement this plan by, among other things, receiving and evaluating Claim Forms in accordance with protocols approved by the Court; and
- (d) appoint a referee to decide any issues not decided at the common issues trial including any issues as to eligibility, causation and quantum of damages.

THE CLAIM FORM

37. The Claim Form shall be deemed to be a statement of claim and the claimant must deliver a completed Claim Form to the Administrator before the Claims Bar Date.

38. In and with the Claim Form, the claimant will, among other things:

- (a) assert the basis of his or her eligibility as a Class Member;
- (b) address any issues that are not determined at the common issues trial. For example, if the common issues trial judge decides that causation is an individual issue, then causation will be addressed in the Claim Form;

- (c) deliver with the Claim Form relevant documents in his or her possession and under his or her control;
- (d) specify whether the total claim of the claimant is:
 - (i) \$25,000 or less; or
 - (ii) between \$25,001 and \$100,000; or
 - (iii) more than \$100,000; and
- (e) provide details of all out-of-pocket expenses (special damages).

39. The Administrator shall deliver a copy of the Claim Form and accompanying material to the defendant.

40. The defendant shall have 30 days after receipt of the Claim Form to file with the Administrator a written opposition to the Claim Form. The written opposition shall be deemed to be a statement of defence. The Administrator will send a copy of the written opposition to the claimant.

THE ADMINISTRATOR'S DECISION ON ELIGIBILITY

41. The Administrator shall decide whether or not a claimant is a member of the Class who is entitled to claim under this plan. The Administrator's decision shall be in writing and the Administrator shall send a copy of the decision to the claimant and the defendant. This decision shall only decide whether or not the claimant is a member of the Class.

42. Within 15 days of receipt of the Administrator's Eligibility Decision, the claimant or the defendant may demand a review of the Administrator's decision by a Referee.

REVIEW OF ADMINISTRATOR'S ELIGIBILITY DECISION BY THE REFEREE

43. The eligibility review will be dealt with as a paper record review unless a Referee orders otherwise.

44. The review of the Administrator's eligibility decision shall proceed in such manner as the Referee direct and the Referee shall have the power to award costs of the review to the successful party.

45. The Referee's decision shall be deemed to be a report which will be confirmed on the expiration of 15 days after a copy is mailed or emailed or faxed to the claimant and the defendant unless a notice of motion to oppose confirmation was served within that time as required by rule 54.09(b).

46. For greater certainty, the eligibility decision described in paragraphs 38 to 42 only determined whether or not a person is a member of the Class.

DETERMINATION OF ALL INDIVIDUAL ISSUES INCLUDING THE ASSESSMENT OF DAMAGES

47. It may be possible to categorize and assign a minimum damage assessment in accordance with a grid depending on the nature and severity of the claimant's damages. If such a minimum grid was adopted, the claimant should be able to assert a right to be

paid additional damages in respect of serious personal injury or other losses. However, until a profile of the Class is available, it is not possible to provide particulars of such a grid and the following procedure assumes that all individual issues will be decided by the Referees.

48. Nevertheless, the Class counsel propose that a reasonable grid might divide the claimants into the following categories, subject to adjustment based on evidence as it becomes available:

- (a) illness with symptoms lasting up to seven days;
- (b) illness with symptoms lasting eight to fourteen days;
- (c) illness with symptoms lasting fifteen to thirty days;
- (d) illness resulting in a permanent impairment (to be assessed individually);
- (e) illness accompanied by surgery; and
- (f) death.

49. The Class counsel further propose that a minimum payment be made at each stage of the grid (with the exception of cases where permanent impairment resulted, which may have to be assessed individually) and that there be a right to elect a claim for additional amounts.

50. If a claimant is a member of the Class, he or she will be entitled to a hearing before a Referee to determine any individual issues not decided at the common issues

trial, including causation and the amount of damages, if any, that the defendant should be ordered to pay. The defendant may participate in the reference.

51. Each claimant under this plan may assert a subrogated claim for insured services and expenses.

52. The common issues trial judge will be asked for a s. 25 CPA order to allow subrogated claims by the Ontario Health Insurance Plan and other health insurers to be dealt with at the same time.

53. The Referees shall decide all individual issues including whether a Class Member contracted *C. difficile* at Brant Hospital, and whether the infection with *C. difficile* was the cause of the damage and injury the Class Member alleges he or she suffered.

54. After determining the common issues, the trial judge will be asked to give direction as to whether, and, if so, when the Referees' hearings may be in writing and when a hearing with oral evidence is necessary. The type of hearing will depend upon the nature and complexity of the claim and the amount of damages claimed by the member of the Class.

55. The Court will be asked to authorize the Referees, in their discretion, to hold a hearing or hearings to allow the Class Members and the defendant to adduce general and expert evidence which may be applicable to some or all individual hearings.

56. A claimant and the defendant may deal with and appear at a reference in person or with counsel or such other representative as he or she may designate in writing.

57. The Referees:

- (a) shall establish the procedures to be followed;
- (b) will only order delivery of affidavits of documents and examinations for discovery if the claim of the Class Member is more than \$100,000 exclusive of prejudgment interest;
- (c) should have the power to award prejudgment interest and costs of the hearing; and
- (d) should have the power to make any order to allow the fair determination of the hearing.

58. To the extent that the Referees intend to implement procedures which are generic in nature, the Referees' proposed procedures will be tendered to the Court for approval, on notice to the parties.

59. Following any hearing, the Referee shall prepare a written report setting out his/her reasons for decision. The Referee will send the decision by mail or fax or email to the Class Member, the defendant, the Administrator and file it with the Court. The Referee's report shall be deemed to be confirmed upon the expiration of 15 days after it is filed with the Court unless the defendant or the Class Member serves a notice of motion to oppose confirmation of the report within that 15 day period required by rule 54.09(b).

THE DISTRIBUTION PROCESS

60. As soon as practicable after each of the Referee's hearing is completed, the Administrator shall by motion, on notice to Class Counsel and the defendant, report to the Court the proposed distribution for each Class Member including his or her prorated share of any punitive damages award and/or prejudgment interest award that has been paid to the Administrator.

61. If there is no overall settlement with the defendant and each claim must be proven and assessed, then the defendant should be required to pay to the Administrator the amount of each judgment immediately after each report becomes final. The Administrator shall hold this money in trust and invest it as the Court directs.

62. If a lump sum is recovered from the defendant at the common issues trial, no distribution to eligible Class Members or persons asserting a subrogated interest shall be made until authorized by the Court. The Administrator may make an interim distribution if authorized by the Court.

63. Each eligible Class Member and persons asserting a subrogated interest shall sign such documents as the Administrator may require in accordance with any protocol approved by the Court as a condition precedent to receiving any distribution.

INSUFFICIENT RECOVERED MONIES

64. In the event that the defendant does not pay the judgments in full, the Court will be asked to give further directions to ensure that there are no priorities among eligible members of the Class.

CY-PRÈS DISTRIBUTION

65. If there is a residue from the recovered monies, (and any interest that has accrued thereon) after payment of all legal fees and expenses, administrative costs, personal injury and other awards, and any taxes, the Court will be asked to authorize that this residue be distributed cy-près for research projects in Ontario in the area of fecal implant therapy. The cy-près distribution shall be paid in such manner to such recipients and in such proportions as the Court may decide at a further motion. The defendant will be given notice of this motion.

CLASS COUNSEL FEES AND ADMINISTRATION EXPENSES

66. The Court will be asked to fix the amount of Class counsel fees, disbursements and applicable taxes (“Class Counsel Fees”). Class Counsel will ask the Court to direct the Administrator and defendant to pay the Class Counsel Fees out of the monies recovered or owing as a first charge.

67. The Court will be asked to fix the costs of the persons appointed to implement and oversee the Plan such as the Administrator and the Referees and to order payment of these costs as a second charge any monies paid by the defendant.

FINAL REPORT

68. After the Administrator makes the final distribution to Class Members, person asserting a subrogated interest and to any cy-près recipients, the Administrator shall make its final report to the Court in such manner as the Court directs and the Court will be asked to then discharge the Administrator.

REVIEW OF THE LITIGATION PLAN

69. This plan will be reconsidered and may be revised under the continuing case management authority of the Court, if required, both before and after the determination of the common issues.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT THE
CITY OF MILTON

ORDER

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