

Federal Court



Cour fédérale

Date: 20161103

Docket: T-227-13

Citation: 2016 FC 1231

Ottawa, Ontario, November 3, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**JOANNE SCHNURR ON HER OWN BEHALF
AND AS A REPRESENTATIVE PLAINTIFF**

Plaintiff

and

**HER MAJESTY THE QUEEN IN RIGHT OF
CANADA**

Defendant

ORDER AND REASONS

I. Introduction

[1] The Plaintiff on her own behalf and as the Representative Plaintiff has, under R 369 of the *Federal Courts Rules*, SOR/98-106, moved for the following:

- a) A solicitor's lien against any rental refund in favour of any of Darryl Schneider and Joy Schneider, Thomas Link and Debra Link, Brian Reeve and Sandra Reeve, Glenn Kitsch, Adolph Kurtz and Louise Kurtz, Murray Forrest and Rose

Forrest, Norman Sens and Jane Sens (hereinafter the “Defaulting 1980 Tenants”) issued by Her Majesty the Queen in Right of Canada, or its agent, Sakimay First Nations, as a result of rent being set by this Honourable Court in this action;

- b) A charging order against any refund payable to the Defaulting 1980 Tenants, or their assignee, by Her Majesty the Queen in Right of Canada, or its agent, Sakimay First Nations, arising as a result of a decision following the trial of the within action;
- c) A solicitor’s lien and/or charging order against the leasehold interest of the Defaulting 1980 Tenants, or their assignee, along with an order that it be registered at the Indian Land Registry; and
- d) An order for costs against each Defaulting 1980 Tenant, or his/her assignee, in the sum of \$1,350.00, payable forthwith.

[2] The Plaintiff requests that Class Counsel be awarded a solicitor’s lien and charging order against any refund of overpayment of rent for those tenants under a 1980 form of lease [1980 Lease] who are in default of payment of their share of counsel fees and litigation expenses. These “defaulting members” are listed in Schedule A to these Reasons and are the Respondents on this motion.

II. Background

[3] The fees and expenses at issue arise from Class Counsel’s representation of the Class Members in a class action dispute with the Defendant regarding a substantial increase in rent for Class Members on their properties at Crooked Lake, Saskatchewan.

Each defaulting member has a leasehold interest in Sakimay First Nation [Sakimay] reserve land at Crooked Lake.

[4] Shesheep Cottage Owners Association [SCOA] and Grenfell Beach Cottage Owners Association [GBCOA] are unincorporated associations representing the interests of cottage owners at Crooked Lake (while the underlying land is leased, all cottages built on the land are owned by the tenants). SCOA represented the interests of the cottage owners on Shesheep Indian Reserve No 74A while GBCOA represented such owners in respect of lands on Sakimay Indian Reserve No 74.

[5] The Defendant, on behalf of Sakimay, delivered notices in late 2009/early 2010 to the tenants on these reserve lands, increasing rent approximately 700% per year.

[6] As a result, both Associations engaged Kevin J. Bell of Bell, Kreklewich & Chambers to act as counsel in the forthcoming rental dispute.

[7] All tenants subject to the 1980 Lease provided written authorization in the form of Letters of Direction to the SCOA, authorizing the directors to include them in negotiations and/or legal proceedings, authorizing the directors to provide instructions to legal counsel on their behalf, and agreeing to contribute to the costs of negotiations and/or litigation incurred by SCOA by paying their pro-rata share.

[8] There were similar circumstances in respect of a 1991 form of lease [1991 Lease] which resulted in an application by David Piot in late May 2010 to certify a class action. The result of that application was the recognition of two classes of tenants: those related to the 1991 Lease for

which Piot was the Representative Plaintiff, and those related to the 1980 Lease for which Schnurr was the Representative Plaintiff.

[9] The two Representative Plaintiffs agreed to take direction from the Associations before taking action or providing instructions to Class Counsel.

[10] Ultimately, after an appeal of the initial class certification order, Justice Mary Gleason (then of this Court) issued a Certification Order dated January 23, 2013. As in the past, the Certification Order, Notice of Certification, and Opt Out documents were sent to each cottage owner pursuant to the Order.

[11] No 1980 Lease tenants, including any of the defaulting members, opted out of the class proceedings.

[12] The Notice of Certification, which is part of the Certification Order, contained the following information on costs to class members:

HOW MUCH WILL IT COST ME TO TAKE PART IN THE CLASS ACTION?

Class Counsel has a retainer agreement with both Associations respecting fees and disbursements. Class Counsel will be reimbursed for fees and disbursements whether or not the lawsuit is successful. Class Counsel's fees and disbursements will be prorated between the Associations according to the Class Membership that they represent. As a Class Member, your [*sic*] will in turn be charged on a prorated basis by your Association for the Class Counsel's fees and disbursements.

The Class action assumes that you are also a member of one of either the Shesheep or Grenfell Beach Cottage Owner's Associations. You have agreed with your Association to pay your

Association for your prorated share of the legal fees and disbursements.

Any legal fees and disbursements paid by your Association to Mr. Bell covers the common issues of the lawsuit only. If you have individual issues that are not common to the Class Members, you will have to make your own financial arrangements with Kevin Bell or legal counsel of your choice.

[13] Justice Gleason provided that the counsel fees and costs of litigation be shared equally between lot holders. This was the same scheme as the previous certification order of Justice Near, which had been appealed.

[14] SCOA allocated the counsel fees and litigation costs equally between the lot holders, and the total assessment per lot was \$3,075 for the period of December 2009 to Spring 2016. The amount left outstanding as of the filing of this motion was \$58,267.38.

[15] This Court rendered judgment in September 2016 in favour of the 1980 Lease class. An appeal of that decision has been taken and work on this matter on behalf of the 1980 Class Members will continue.

[16] While some 1980 Class Members claimed that their default in payment was due to disagreement with the directions given in conducting the litigation, none have opted out of the class nor have any such Members sought relief from this Court for an order permitting them to retain their own counsel.

[17] Despite not opting out, nor seeking relief as described above, the defaulting Members have had the benefit of Class Counsel's representation in protecting their interests.

[18] The position of the defaulting Class Members is:

- that there is no direct contractual relationship between Class Counsel and the defaulting Class Members, and therefore no obligation to pay;
- that the motion is statute barred as being beyond the two-year limitation period in Saskatchewan; and
- that there is no basis for awarding costs of this motion in the amount of \$1,350 per defaulting Member.

[19] It is noteworthy that the defaulting members do not say that they will pay their share of these expenses to either the Associations or the Representative Plaintiff.

[20] It is also relevant to consider that the Defendant in the class proceeding never attempted to prove that their rent amount was the "appropriate" rent under the 1980 Lease. Instead, their defence was to advance a different calculation which would result in "rent" being an amount between what they had been charging and what the Plaintiff advocated.

The result thereof is that the Defendant owes some amount of money to the Class Members regardless of the results of any appeal (the individual amounts are to be determined).

III. Analysis

A. *Jurisdiction*

[21] The Respondents have not taken issue with the Court's jurisdiction to grant the relief requested except as above.

The Plaintiff has made detailed arguments.

[22] With respect, the Plaintiff's reliance on R 425 as the source of authority for the proposed charging order is not sound. The Certification Order which speaks to how litigation costs are to be paid does not constitute an "order for the payment of money" per R 425. That is not to say that, if necessary, this Court could not make such an order under its class proceedings jurisdiction. The Court's judgment on the class proceeding similarly does not constitute an order for the payment of specific money; rather, it confirms the method of calculation to be used to calculate rent and it should result in the payment of a refund judgment.

[23] However, I conclude that, by virtue of s 66 of Saskatchewan's *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1, and s 56(1) of the *Federal Courts Act*, RSC 1985, c F-7, this Court may grant a solicitor's lien and/or charging order. Those statutes state:

The Legal Profession Act, 1990

66(1) A member who is employed to prosecute or defend a proceeding in a court or tribunal may apply to the court for an order granting the member a lien or charge against any personal property not in the member's possession that is recovered or preserved as a result of the member's services for the proper fees and expenses of or in relation to the proceedings, including counsel fees.

(2) On an application pursuant to subsection (1) or for the enforcement of an order made pursuant to subsection (1), a judge may make any order that the judge considers appropriate for payment of the lien or charge out of the property recovered or preserved.

(3) A member has a lien or charge for the member's proper fees and expenses in relation to all legal services performed by the member for a client against any property owned by the client that is in the member's possession.

(4) Nothing in subsection (3) overrides the exceptions to a solicitor's lien at common law.

(5) On application by a client, the court may, on any terms and conditions that the court considers appropriate, order the delivery of any of the client's property in a member's possession that is held pursuant to subsection (3).

Federal Courts Act

56 (1) In addition to any writs of execution or other process that are prescribed by the Rules for enforcement of its judgments or orders, the Federal Court of Appeal or the Federal Court may issue process against the person or the property of any party, of the same tenor and effect as those that may be issued out of any of the superior courts of the province in which a judgment or an order is to be executed, and if, by the law of that province, an order of a judge is required for the issue of a process, a judge of that court may make a similar order with respect to like process to issue out of that court.

56 (1) Outre les brevets de saisie-exécution ou autres moyens de contrainte prescrits par les règles pour l'exécution de ses jugements ou ordonnances, la Cour d'appel fédérale ou la Cour fédérale peut délivrer des moyens de contrainte visant la personne ou les biens d'une partie et ayant la même teneur et le même effet que ceux émanant d'une cour supérieure de la province dans laquelle le jugement ou l'ordonnance doivent être exécutés. Si, selon le droit de la province, le moyen de contrainte que doit délivrer la Cour d'appel fédérale ou la Cour fédérale nécessite l'ordonnance d'un juge, un de ses juges peut rendre une telle ordonnance.

[24] In *Weight Watchers International, Inc v Burns et al*, [1976] 1 FC 237, 62 DLR (3d) 374 (TD), Justice Kerr of this Court concluded that the Court had jurisdiction to order a charge against the payment of taxable costs in favour of the solicitor for the defendant. The defendant's (the solicitor's client) whereabouts was unknown. Justice Kerr held that the matter should be dealt with by analogy to the applicable provincial superior court rules.

[25] Rule 56 adopts the process of the applicable superior court and makes that process the Federal Court process. This Rule of adoption of provincial law as federal law is a frequently used legislative technique of incorporation by reference.

[26] Therefore, this Court may issue the same process and orders in respect of payment of solicitor's fees and expenses in a Federal Court matter as would the Court of Queen's Bench in a provincial matter.

B. *Solicitor-Client Relationship*

[27] There are two points to be made:

- There is a solicitor-client relationship with Class Counsel of which the Respondents are a part and a beneficiary.
- It is not necessary that the Respondents be in a solicitor-client relationship for the creation of a solicitor's lien/charging order.

[28] The Certification Order confirms the solicitor-client relationship between counsel and the Representative Plaintiff. The Representative Plaintiff is the representative of the Class Members,

and acts and instructs on their behalf. As such, Class Counsel owes his or her professional obligations to all members of the Class. That is sufficient nexus to create a solicitor-client relationship between these Respondents and Class Counsel.

[29] In *Fantl v Transamerica Life Canada*, 2009 ONCA 377 at para 61, 95 OR (3d) 767, the Court emphasized the potentially “significant and prolonged” obligation of class counsel in a class action proceeding, stating that “after certification, class counsel will be in a solicitor-client relationship with the class members, with all of the responsibilities that entails, extending until the implementation of a settlement or final disposition of any individual issues”.

[30] In the instant case, the role of the Associations was to simplify administration and to act as a conduit between Class Members and Class Counsel. In respect of payment of fees, that is particularly apparent when on February 5, 2013, counsel wrote to the 1980 Lease Class Members to communicate that counsel did not wish to receive regular payments through his office because of the costs of accounting for these payments. That role of administration on behalf of the Class Members was left to the Associations.

[31] The role of the Associations in facilitating administration and assisting the Representative Plaintiff in acting in the interests of all Class Members, as she was required to do, does not lessen the existence of the obligations of Class Counsel to all Class Members including the Respondents, nor does it lessen the Respondents’ obligation to pay Class Counsel.

[32] The above is sufficient to answer the issue of a solicitor-client relationship. However, Class Counsel would, in these circumstances where the Respondents have benefitted from counsel's efforts, be entitled to a lien/charging order in any event.

[33] In *Bolton v Davies*, 2014 BCSC 182, 237 ACWS (3d) 1053, a solicitor was granted a charging order against a fund which was not the property of the solicitor's client on the basis that the fund had been recovered for the beneficial interest of the client and another.

[34] In *Budinsky v The Breakers East Inc* (1993), 15 OR (3d) 198, 106 DLR (4th) 370 (Ont Ct J (Gen Div)) [*Budinsky* cited to DLR], the Ontario Court of Justice (General Division) granted a charging order under s 34 of the *Solicitors Act*, RSO 1990, c S15, against deposits and proceeds on condominium sales. In that case, the applicant Solicitor had represented a condominium developer against condominium owners who were seeking rescission of their purchase agreements and the return of their deposits. The Solicitor was successful, and the Court granted the charging order and stated that the legislation "does not limit the property subject to the charge to that of the person who employed the solicitor" (*Budinsky* at 379). Similarly, the Saskatchewan legislation at issue in this case does not seem to place such a limitation.

[35] In *Bloomaert v Dunlop*, 24 Sask LR 261, [1930] 2 DLR 30 at 35 (CA), the Saskatchewan Court of Appeal stated: "Under its provisions, the Court has power, in any proceedings, to make a charging order in favour of the solicitor employed against any property recovered or preserved through the solicitor's instrumentality, in respect of his taxed costs; and it has been frequently held that a charge may be granted not only upon the interest in the preserved property of those by

whom the solicitor is employed, but upon the interests of others interested in the preserved property who get the benefit". Although this case was decided under previous (English) legislation, I do not find that such reasoning is barred under the current legislation.

[36] In this litigation, the rental refunds and the creation of the new rental rate were established for the benefit of the Class Members. I conclude that even if the solicitor-client relationship was with the Associations, Class Counsel is entitled to payment from these Respondents who benefitted from his professional services.

[37] I need not deal with the fact that the Association is unincorporated other than to note that in such circumstances, the members of the Association do not enjoy the shield of incorporation.

C. *Statute of Limitations*

[38] The Respondents argue that this matter is statute barred because the claim for payment is outside the usual two-year limitation period under Saskatchewan's *The Limitations Act*, SS 2004, c L-16-1.

[39] Even if the Respondents were correct that the solicitor-client relationship was between the Associations and Class Counsel, the Respondents have produced no evidence that the Associations have not made any payments in the last two years, and any payments received would restart the limitation period. The Respondents have not produced any evidence that they have made no payments, and in fact some Respondents have made partial payments even following service of the present Motion Record.

[40] As noted earlier, the Certification Order is not itself an order for the payment of money. Therefore, the Plaintiff's reliance on the 10-year limitation period in s 7.1 of the *The Limitations Act* is not well grounded.

[41] As noted in *Thomas Gold Pettinghill LLP v Ani-Wall Concrete Forming Inc*, 2012 ONSC 2182, 349 DLR (4th) 431, a solicitor's lien is not subject to a limitation period. The Ontario provision is similar to s 15 of Saskatchewan's *The Limitations Act*.

[42] As s 66 of *The Legal Professions Act, 1990* incorporates the common law, this Court has jurisdiction following from s 66 and s 56(1) of the *Federal Courts Act*, both in law and equity.

[43] The limitation on granting a solicitor's lien is that of the equitable jurisdiction of the Court to sanction counsel for unreasonable delay.

There are no facts on which to engage such equitable jurisdiction against Class Counsel.

[44] There is a further factor which influences the Court. Class Counsel has continued to act for the benefit of the Class and the Respondents have continued to benefit from those professional services, and yet they do not want to pay for those services. The Class Members cannot accept the benefits of such representation without accepting the burdens. Counsel's efforts have continued up to the present and therefore each act by counsel for the benefit of the Class revives any limitation period until the mandate under the Certification Order is discharged.

[45] There is no merit to the Respondents' limitation argument.

D. *Discretion to Grant Relief*

[46] The Respondents make no argument on the exercise of the Court's discretion. Given the facts, there are no good reasons for the Court not to exercise discretion in favour of the Plaintiff.

[47] It is unnecessary to look beyond the Saskatchewan law which is incorporated by reference into the *Federal Courts Act*. In *Troelstra v Vos*, 2005 SKQB 98, 264 Sask R 123, citing *Tkach, Duchin & Bayda v Wood* (1992), 88 DLR (4th) 304, 99 Sask R 256 (QB) [*Tkach, Duchin & Bayda* cited to DLR], the Court held that ss 66(1) and 66(3) of *The Legal Profession Act, 1990* codified the common law. Therefore, the solicitor's lien arises as an inchoate right amenable to enforcement through such mechanisms as a charging order and includes a lien over the clients' file.

[48] However, in Saskatchewan the requirements of a charging order were described in *Tkach, Duchin & Bayda*, which sets forth four requirements at 311:

- (1) the lawyer was employed to prosecute or defend a proceeding in a court or tribunal;
- (2) as a result of the lawyer's efforts there was personal property recovered or preserved as a result of those services;
- (3) the personal property recovered or preserved is not in the possession of the lawyer;
- (4) the proceedings have been concluded and a taxation, if required or necessary, of the solicitor's account for fees and expenses in relation to the proceedings has concluded so that the court might know that the claim is for "the proper fees and expenses."

[49] The first three requirements require little comment. Counsel prosecuted the litigation, as a result the interest of the Respondents in their leases was preserved, and the refunds of rent are not in counsel's possession.

[50] The fourth requirement requires some comment. The trial and judgment on the trial have been concluded, although the requirement for Class Members to pay counsel was not dependant on the conclusion of the litigation much less the successful conclusion.

[51] There has been no suggestion that taxation is necessary or required. The Respondents have not contended that the fees and expenses are not "proper", only that they are not owing to Class Counsel.

[52] Given the Respondents' position on this motion, the common law requirement for a charging order – that the solicitor is not likely to be paid – is met.

[53] The Plaintiff has claimed that substantial amounts of money have been paid into Court and that there are substantial refunds forthcoming regardless of the results of an appeal.

Under these circumstances, a charge on the Respondents' leasehold interests has not been shown to be necessary. The Court therefore will not make such a charging order without prejudice to reapply for a charging order on the leasehold interests.

[54] Therefore, I will exercise my discretion to grant a charging order over the refunds owing to the Respondents individually.

[55] The Plaintiff shall have its costs in the amount of \$5,000 for this motion, such costs to be paid forthwith shared equally by the Respondents and such amount to be added to the charging order granted herein.

ORDER

FOR THESE REASONS, THIS COURT GRANTS AND DECLARES that:

1. The Plaintiff, through its counsel, is entitled to a Charging Order against each of the Respondents;
2. The Charging Order shall be in the form of Form 459 of the *Federal Courts Rules*, with necessary modifications relevant to each Respondent;
3. The Charging Order shall be over any refunds paid to a Respondent for any overpayment of rent by such Respondent or assignee thereof arising as a result of the Court's decision in *Schnurr v Canada*, 2016 FC 1079, plus proportionate share of the costs of this motion; and
4. The Plaintiff is to serve and file the proposed individual Charging Orders to be signed by the Court.

"Michael L. Phelan"

Judge

SCHEDULE A

Darryl Schneider and Joy Schneider
Box 658, Melville, Saskatchewan. S0A 2P0

Thomas Link and Debra Link
Box 238, Grayson, Saskatchewan. S0A 1E0

Brian Reeve and Sandra Reeve
Box 1207, Grenfell, Saskatchewan. S0G 2B0

Glenn Kitsch
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Adolph Kurtz and Louise Kurtz
Box 1631, Melville, Saskatchewan. S0A 2P0

Murray Forrest and Rose Forrest
Box 273, Cowessess, Saskatchewan. S0G 5L0

Norman Sens and Jane Sens
Box 191, Grayson, Saskatchewan. S0A 1E0

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-227-13

STYLE OF CAUSE: JOANNE SCHNURR ON HER OWN BEHALF AND AS
A REPRESENTATIVE PLAINTIFF v HER MAJESTY
THE QUEEN IN RIGHT OF CANADA

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: PHELAN J.

DATED: NOVEMBER 3, 2016

WRITTEN REPRESENTATIONS:

Kevin J. Bell

FOR THE PLAINTIFF

Kenneth A. Ready, QC

FOR THE RESPONDENTS,
DARRYL SCHNEIDER AND JOY SCHNEIDER,
NORMAN SENS AND JANE SENS,
BRIAN REEVE AND SANDRA REEVE and
ADOLPH KURTZ AND LOUISE KURTZ

SOLICITORS OF RECORD:

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Barristers and Solicitors
Melville, Saskatchewan

FOR THE PLAINTIFF

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Barristers & Solicitors
Regina, Saskatchewan

FOR THE RESPONDENTS,
DARRYL SCHNEIDER AND JOY SCHNEIDER,
NORMAN SENS AND JANE SENS,
BRIAN REEVE AND SANDRA REEVE and
ADOLPH KURTZ AND LOUISE KURTZ