Federal Court  Cour fédérale

Date: 20190819

Docket: T-2169-16

Citation: 2019 FC 1077

CLASS PROCEEDING

BETWEEN:

GARRY LESLIE MCLEAN,
ROGER AUGUSTINE,
CLAUDETTE COMMANDA,
ANGELA ELIZABETH SIMONE SAMPSON,
MARGARET ANNE SWAN and
MARIETTE LUCILLE BUCKSHOT

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR ORDER – COUNSEL FEES

PHELAN J.

I. Introduction

[1] This is the decision concerning the approval of counsel fees and the payment of honorariums to named plaintiffs in the Indian Day Schools Settlement Agreement [Settlement and/or Agreement]. The matter proceeded separately from the Settlement Approval Hearing but immediately after its conclusion. While this is a separate decision from the Settlement Approval, this decision should be read with the "Settlement Approval Decision".

[2] Under Rule 334.4 of the *Federal Courts Rules*, SOR/98-106, all payments to counsel flowing from a class proceeding must be approved by the Court. The Court must ensure that legal fees payable to Class Counsel are "fair and reasonable" in all of the circumstances (*Manuge v R*, 2013 FC 341 at para 28, 227 ACWS (3d) 637 [*Manuge*]).

[3] By operation of the Settlement, Class Counsel fee approval is severable from the approval of the Settlement and the Court can approve the Settlement separately from approval of Counsel Fees. The pertinent provisions are Sections 2.02 and 2.03 of the Settlement as set out below:

> **2.02 Effective in Entirety**
>
> Subject to 2.03, none of the provisions of this Agreement will become effective unless and until the Federal Court approves this Agreement.
>
> **2.03 Legal Fees are Severable**
>
> In the event that the Federal Court does not approve the legal fees set out in 13.01 and 13.02 but otherwise approves the Agreement,

> the provisions of the Agreement other than 13.01 and 13.02 will come into effect on the Implementation Date. 13.01 and 13.02 will not come into effect unless and until the Federal Court so orders.

[4] The Class Counsel fee arrangements were negotiated and concluded after the Settlement had been concluded. The evidence is that this was an arm's length, good faith negotiation separate from the Settlement.

[5] The fees at issue are $55 million inclusive of disbursements and applicable taxes payable after the Implementation Date plus a further $7 million in legal fees payable to Class Counsel for legal services rendered for a period of four (4) years after the Implementation Date.

[6] All fees are to be paid by the Defendant Canada and not by any of the members of the Survivor or Family Classes.

[7] The legal fees regime under the Settlement is captured in sections 13.01-13.05:

> **13.01 Class Counsel Fees**
>
> Canada agrees to pay Class Counsel in respect of their legal fees and disbursements the amount of fifty-five million dollars ($55,000,000.00) plus applicable taxes within thirty (30) days after the Implementation Date.
>
> **13.02 Post-Implementation Fees**
>
> Within thirty (30) days after the Implementation Date, Canada will pay to Class Counsel the additional sum of seven million dollars ($7,000,000.00) in trust for legal fees, applicable taxes and disbursements to be rendered by Class Counsel to Survivor Class Members for services rendered for a period of four (4) years after the Implementation Date. Fees and disbursements of Class Counsel incurred after the Implementation Date shall be approved by the Court on a quarterly basis. Any amount remaining in trust,

including interest, after all such legal services have been completed and fees and disbursements approved shall be transferred by Class Counsel to the McLean Day Schools Settlement Corporation, to be used for Legacy Projects or as may be ordered by the Court.

13.03 Scope of Ongoing Legal Services

(1) Class Counsel agrees that it will provide legal advice to Survivor Class Members on the implementation of this Settlement Agreement, including with respect to the payment of compensation, for a period of four (4) years after the Implementation Date.

(2) Class Counsel agrees that it will not charge any Survivor Class Member for fees or disbursements in respect of any matter related to the administration of the Federal Court Class Action or to the implementation of this Settlement, including the payment of compensation.

13.04 Pre-Approval of Fees Required

No legal fees or disbursements may be charged to Survivor Class Members or Family Class Members in respect of compensation under this Settlement or any other legal advice relating to this Settlement by legal counsel other than Class Counsel without the prior approval of such fees or disbursements by the Federal Court on a motion under Rule 334.4 of the Federal Courts Rules on notice to the Parties.

13.05 No Other Fees to be Charged

The Parties agree that it is their intention that all payments to Survivor Class Members under this Agreement are to be made without any deductions on account of legal fees or disbursements.

II. Background

[8] The nature of the litigation, the history of it, the risks of litigation and the benefit of the Settlement are set out in the Settlement Approval Decision.

[9] The initial claim against Canada regarding Indian Day Schools had been commenced by Joan Jack [Jack] in the Manitoba Court of Queen's Bench. She and her partner Louay Alghoul [Alghoul] were granted the opportunity to make submissions on this matter of fees.

[10] While there was no formal request by Jack and Alghoul, a fair reading of their submissions is a request that this Court not approve Counsel Fees unless they are compensated in some fashion for this initial work.

[11] Jack's evidence, also discussed in the Settlement Approval Decision, is that she took this matter on under a contingency arrangement in 2009. By 2012, the burden of the litigation caused the bankruptcy of her firm. No other firm was prepared to undertake the case or assist her due to the complexity and risk.

[12] Jack then joined up with Alghoul & Associates to continue the litigation. However, by 2016, the class plaintiffs (principally Garry McLean) were dissatisfied with the lack of progress and ended the retainer. Gowling WLG [Gowling] was then retained and after some initial trouble with the transfer of files and a complaint against Jack to the Law Society, the matter was transferred to Gowling.

[13] When Gowling took over the matter, they obtained a retainer agreement with a 15% contingency fee. That agreement has clearly been superseded by this current arrangement.

[14] Neither Jack nor Alghoul took steps to preserve a solicitor's lien or claim against Gowling. If they have any such rights, they are not a proper matter for this Court to adjudicate. If there had been any fee sharing agreement regarding the class proceeding between Gowling and Jack or Alghoul, the Court would have likely had to approve it under Rule 334.4. However, as no such fee sharing agreement exists, any other claim between Jack and Alghoul and Gowling is a matter under the Manitoba action and a matter within that province (see *Bancroft-Snell v Visa Canada Corp,* 2016 ONCA 896 at paras 67, 111, 133 OR (3d) 241). The assessment of Gowling's position in this litigation takes into account the fact that they took over a case which had some initial work performed and was a case with considerable complexity, burden and risk.

[15] The question before this Court is whether the fees are "fair and reasonable".

[16] Approval of counsel fees has become an increasingly more challenging matter. Class Counsel are caught in the unenviable position of being the "client" in the matter of fees.

[17] To assist the Court and Class Counsel and to ameliorate potential criticism of Class Counsel fees, the Court appointed W.A. Derry Millar, an experienced counsel and former Treasurer of the Law Society of Upper Canada, as *Amicus Curiae* [*Amicus*]. As said before, in doing so, the Court is not in any sense expressing or implying concern about the professional standards or ethical conduct of Gowling or the members of the firm responsible for this file.

[18] The *Amicus* filed a Brief and made submissions in Winnipeg. In carrying out his mandate, the *Amicus* attended at Gowling's offices to review relevant records. In his Brief, the

Amicus confirmed the factors identified by Gowling's counsel as the relevant factors for the Court in assessing the counsel fees. He also confirmed the reliability of the expenses.

[19] In summary, the *Amicus* agreed with Gowling's position on the relevant factors and the conclusions and confirmed that the fees agreed to are consistent with the applicable case law (including the honorarium of $7,500 to be paid to each of the named plaintiffs).

[20] Through the Settlement Approval Hearing process, some Class Members objected to the proposed fees based on the absolute quantum, often tied into their concerns with the "restrictions" on retaining other counsel in the Settlement. There was little, if any, guidance from the objections as to what a "fair and reasonable" fee should be.

III. Analysis

[21] Gowling advanced two propositions supporting fee approval. The first is that the process taken to negotiate the fee is sufficient assurance to justify approval. The second is the more traditional approach of examining a list of relevant factors to establish that the fees are "fair and reasonable".

[22] In respect of the first proposition - the process - counsel relied on *Adrian v Canada (Minister of Health)*, 2007 ABQB 377, 418 AR 215 [*Adrian*], in which the settlement was concluded and then the fees settled. That court concluded that because of the process of negotiating a reasonable settlement before the fees were discussed, it was not necessary to review the established factors. There are other cases of similar conclusions.

[23] With the greatest respect to those decisions, this approach is inconsistent with the "hands on" approach courts must exercise in fee approvals and it tends toward the "rubber stamping" so often rejected by courts (see e.g. *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481 at para 12, [2006] OJ No 4968 [*Baxter*]).

[24] The process is not determinative, but it is an important factor. However, it is still the Court's obligation to ensure that what comes out of a proper process is "fair and reasonable". Therefore, I accept that the process is a positive and important factor to be considered with other relevant factors.

[25] The Federal Court has an established body of non-exhaustive factors in determining what is "fair and reasonable". In *Condon v Canada*, 2018 FC 522 at para 82, 293 ACWS (3d) 697 [*Condon*]; *Merlo v Canada*, 2017 FC 533 at paras 78-98, 281 ACWS (3d) 702 [*Merlo*]; and *Manuge* at para 28, the factors included: results achieved, risk undertaken, time expended, complexity of the issue, importance of the litigation to the plaintiffs, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of the class to pay, the expectation of the class, and fees in similar cases. The Court's comments follow but it should be borne in mind that the factors weigh differently in different cases and that risk and result remain the critical factors (*Condon* at para 83).

A. *Results Achieved*

[26] This is a large class action settlement. The base amount of $1.47 billion to $1.6 billion includes only Level 1 compensation and the Legacy Fund, not Level 2-5 claims. Total

compensation is reasonably expected to exceed $2 billion. It also affects a substantial number of people - more than 120,000 Day School survivors. The $200 million Legacy Fund itself is also a significant achievement in amount and purpose that will affect families and communities of survivors, as well as the survivors.

[27] The benefits of the Settlement are set out in the Settlement Approval Decision. They are significant and the result of extensive time and effort in the negotiation of the Settlement.

B. *Risk*

[28] This was always a risky case. The extent of that risk is confirmed, in part, by the experience (and bankruptcy) of former counsel. The case lay dormant because of the risk and burden of prosecuting the case. Those risks included:

- Uncertainty as to class size;
- Uncertainty as to certification due to the multitude of individual issues;
- A class period that presented challenges of time, diversity and unavailability of witnesses and records;
- The extensive burden of evidence gathering, discoveries, and expert evidence;
- The range of defences available to the Defendant which could limit the class size and breadth of the proceedings;
- The complexity of legal and factual issues in the areas of constitutional and indigenous law including the lack of precedent in a rapidly developing area of law;
- The challenge of derivative claims of Family Class Members including in respect of some provincial laws; and
- The very real prospect of losing some or all of the action at trial.

[29] In *Manuge*, Justice Barnes emphasized the element of risk. He concluded at paragraph 37 that risk is to be assessed at the time it is assumed by counsel - not with the benefit of hindsight where many may be tempted to say “but this result was inevitable”. If it was, there would have been a number of firms who would have offered to assume carriage of the litigation.

[30] Justice Winkler in *Parsons v Canadian Red Cross Society*, 49 OR (3d) 281, [2000] OJ No 2374 [*Parsons*], discussed the risks inherent in these kinds of cases.

> [29] Moreover, class action litigation introduces additional complications. Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some consideration must also be given to the commitment of resources made by the class counsel and the impact that this will have in the event the litigation is unsuccessful. Winning one of two class actions may be a reasonable hallmark of success. However, for the lawyer who's [*sic*] first action turns out to be a loser, the complete exhaustion of resources may leave him or her unable to conduct another action. Thus the real risk undertaken by class counsel is not merely a simple reciprocal of the “judgmental probability of success” in the action, even if that calculation could be made with any degree of certitude. There is a point in complex class action litigation where, degree of risk notwithstanding, class counsel may truly be, as Mr. Strosberg put it in his submissions, “betting his or her law firm”. This must be considered in assessing the “risk” factor in regard of the appropriate fee for counsel.
>
> …
>
> [36] It is apparent from the record that even though this litigation was conducted from the middle of 1998 forward as a negotiation toward a settlement, the risks assumed by class counsel were no less real at any point than if that time had been devoted to a disposition through a trial process.
>
> [37] In addition, the legislation enabling class proceedings introduces several features that distinguish these actions from ordinary litigation. One aspect that bears on the risk inherent in class actions is the requirement of court approval of any settlement reached. Protracted negotiations involve a commitment of the time and resources of counsel and the litigants. However, in a class

proceeding, a court will not approve a settlement that it does not regard as being in the best interests of the class, regardless of whether class counsel take a different view. Thus, class counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement, that they believe is in the best interests of the class, only to find that the court will not approve the settlement achieved. While this creates a risk simpliciter, it also creates an advantage for a defendant who can successfully extend the negotiations to the point that class counsel's resources are exhausted before making a "final settlement offer" that may not ultimately receive court approval. In those cases, class counsel may have exhausted their resources attempting to obtain a reasonable settlement only to find themselves, as a consequence, unable to pursue the litigation. Accordingly, the risk in a class proceeding is not merely a function of whether or not litigation is anticipated and whether or not that litigation will be successful. Rather, there are risks inherent in the adoption of, and commitment to, any particular strategy for achieving a resolution.

[38] In view of the foregoing, I am unable to accept the contention that there was less risk in this proceeding merely because the parties chose to proceed down a negotiation route. Moreover, contrary to the submissions made by certain of the intervenors, it is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an insurmountable impasse increased rather than diminished. This made the negotiations more perilous as they progressed…

…

[42] … The expenditures of class counsel in terms of time and money were at risk of loss if any politician in authority decided as a matter of expediency or policy not to settle the class proceedings or decided to unilaterally institute a no-fault compensation program and thereby bypass class counsel and the litigation. There was always the inherent danger that the pan-Canadian settlement would be impossible to achieve, either because of a reluctance on the part of a particular government or a class in a particular action to approve an agreement.

[31] The last point in Justice Winkler's decision is particularly relevant. When Class Counsel took on the mandate, they accepted it without any assurance that politically the case would settle and certainly not achieve this result. Cases with public policy elements have their own unique risk of being caught up in the political debates. In the present case, it was not until October 2017 that the responsible minister received a mandate letter giving some comfort that resolution might be possible.

[32] As the dockets examined by the *Amicus* confirm, the Class Counsel team devoted substantial time and effort on the file. In addition to the risk of not being paid, those counsel would have put parts of their practice on hold, turning away work and putting the firm at risk of a significant loss.

[33] It is not a requirement of this factor that the firm "bet the farm" (as described in other cases, such as *Parsons*). That is an unrealistic threshold, but in this case one firm "lost the farm". The financial risk to the firm and to the lawyers is a real risk and a risk that should be rewarded.

C. *Time Expended*

[34] The record confirms that Class Counsel expended significant time and expense. As of the hearing, the firm had recorded fees of approximately $8 million and disbursements of approximately $470,000. As confirmed by the *Amicus*, the hourly rates of the six main lawyers were consistent with the year of call and experience of Toronto and Ottawa counsel.

[35] It is estimated that there is likely $2.0 to $2.5 million more in fees and disbursements through to implementation of the Settlement.

[36] Accepting that time docketed would ultimately be about $10.5 million, the agreed-upon fees represent a five times multiplier. However, the use of a multiplier as the basis for approving the fee is not appropriate. As commented upon in *Condon* and in *Manuge*, the multiplier may reward the inefficient and punish the efficient.

[37] Nevertheless, it serves as a useful check but nothing more - a factor but not a key one.

D. *Complexity*

[38] The Settlement Approval Decision discusses to some extent the complexity of the case. It has procedural, evidentiary and legal complexities that encompass a large number of claimants across the vastness of Canada. The administration of the Settlement will continue to require commitment and expenditures because of those complexities.

E. *Importance to the Plaintiffs*

[39] The affidavits of named plaintiffs like the late Garry McLean, Margaret Swan, Angela Sampson, Mariette Buckshot, Claudette Commanda and Roger Augustine all attest to the importance of the litigation to them and to members of their community.

[40] The thousands of objectors and supporters all confirm, if only by their participation, the importance of this litigation. One cannot ignore its historic importance.

F. *Degree of Responsibility assumed by Counsel*

[41] This case is somewhat unique in large class action settlements (those exceeding $500 million) because one firm had complete carriage of the case. The usual model has been a consortium of law firms on the plaintiffs' side.

[42] In this case, Gowling assumed complete responsibility for the case. It had to draw upon the expertise of multiple lawyers in a large number of areas of law but particularly in Indigenous law, constitutional law, public law, personal injury law, class action law and corporate/charities (not for profit) law.

G. *Quality and Skill of Counsel*

[43] There is no doubt as to Gowling's high standing in the legal community and in the areas of law relevant to this litigation. The firm and the Indigenous Law Group in particular have been involved in numerous landmark cases and transactions. It has a number of lawyers from Indigenous communities across the country.

[44] The Court has had an opportunity to observe many of the Gowling lawyers involved throughout this litigation process and has seen their dedication and expertise.

H. *Ability of Class Members to Pay*

[45] It is obvious that Class Members did not and do not have the ability to pay for the services of Class Counsel. That was clear from the context of the case, and the affidavits of such people as Angela Sampson.

I. *Expectation of the Class*

[46] It is fair to say that the representative plaintiffs expected to pay 15% of the proceeds obtained in the litigation as fees, and a separate amount for disbursements - all as contained in the Retainer Agreement.

[47] The agreed upon $55 million for fees and disbursements represent approximately 3% of the total Settlement.

[48] The agreed fees, as per the Settlement, are a substantial advantage to the Class Members as the Defendant is absorbing that cost. Nothing is deducted from the amounts going to Class Members.

[49] To this substantial advantage is the further $7 million for the provision of legal advice to individual Class Members. Class Members can obtain legal advice without any deduction from their compensation.

[50] The Retainer Agreement falls away with the approval of the Settlement resulting in a substantial benefit to the Class.

J. *Fees in Similar Cases*

[51] There is no question that the negotiated legal fee of $55 million is substantial but it must be considered in context.

[52] That fee, in the context of the minimum Level 1 settlement payment of $1.27 billion plus $200 million for the Legacy Fund, represents 3.74% of the value of the Settlement.

[53] That percentage is further reduced by the amounts which would be paid out for Level 2 to 5 claims with no additional amount for fees. It is estimated that the total payout could approach $2 billion for a fee percentage of approximately 2.75%.

[54] In summary, the legal fees will be in the 3% range.

[55] In my view, this range is consistent with other mega-fund type settlements such as "Hep C" (*Parsons* and related cases at $52.5 million on $1.5 billion settlement, approximately 3.5%), "Hep C – Pre/Post" (*Adrian* and related cases at $37.2 million on $1 billion settlement, approximately 3.7%), "IRRS" (*Baxter* and related cases at approximately 4.5%), "60's Scoop" (*Riddle v Canada*, 2018 FC 641, 296 ACWS (3d) 36, and *Brown v Canada (Attorney General)*, 2018 ONSC 5456, 298 ACWS (3d) 704, at $75 million on $625-875 million, at its lowest approximately 4.6%), and *Manuge* at 3.9% (paid by the Class).

[56] To this must be added the $7 million for future legal services. If the amount is not consumed, the remaining balance is paid over to the Legacy Fund.

K. *Honorarium*

[57] I agree with the proposal to award each of the named plaintiffs an honorarium of $7,500 to be paid out of the Class Counsel fees. Honorariums are given when the representative plaintiff(s) contribute more than the normal effort of such a position - for example, forfeiting their privacy to a high profile class litigation and participating in extensive community outreach (see *Merlo* at paras 68-74). Honorariums to representative plaintiffs are to be awarded sparingly, as representative plaintiffs are not to benefit from the class proceeding more than other class members (*Eidoo v Infineon Technologies AG*, 2015 ONSC 2675 at paras 13-22, 253 ACWS (3d) 35).

[58] In this case, there are three representative plaintiffs, Claudette Commanda, Roger Augustine, and Mariette Buckshot, and three additional named plaintiffs, Garry McLean (who was a representative plaintiff until he passed away), Angela Sampson, and Margaret Swan. The Plaintiffs seek honorariums for all six named plaintiffs. The case law cited before the Court only discussed awarding honorariums to representative plaintiffs, meaning those plaintiffs confirmed as representative plaintiffs in the certification order. However, this is a unique case where all named plaintiffs made that extra effort in advancing the claim and essentially took on the role of representative plaintiffs in their instructions to counsel and communication with Class Members. They took the risk of initiating the claim, pursued it to the extent of terminating original counsel,

seeking out new counsel, and instructing on the myriad of issues which arose as the case was recast and proceeded through litigation and negotiation.

[59] They put their personal histories out in public to advance the case and they participated in community outreach and countering misinformation about the case - sometimes in the face of personal repercussions.

[60] Further, the honorariums come from the fees Class Counsel have earned. If Class Counsel is content, it serves no useful purpose for the Court to interfere.

IV. Conclusion

[61] For all these reasons, the Court will approve the Class Counsel fee provisions of the Settlement and order Class Counsel to pay $7,500 to each of the six named plaintiffs from the Class Counsel fees when paid out.

"Michael L. Phelan"
Judge

Ottawa, Ontario
August 19, 2019

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	GARRY LESLIE MCLEAN, ROGER AUGUSTINE,, CLAUDETTE COMMANDA, ANGELA ELIZABETH SIMONE SAMPSON, MARGARET ANNE SWAN and MARIETTE LUCILLE BUCKSHOT v HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA
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