

Federal Court



Cour fédérale

Date: 20191220

Docket: T-1499-16

Citation: 2019 FC 1653

Ottawa, Ontario, December 20, 2019

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

BRUCE WENHAM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Introduction

[1] This is a motion by the Attorney General of Canada [AGC] seeking confirmation from the Court that it is entitled to make submissions on Class Counsel's motion for approval of its legal fees.

[2] In this case, the AGC is not contributing or offering to contribute to the Applicant's [the Class Members] legal fees. The AGC puts its case for the exercise of its "right to participate" on a number of policy grounds; not on the basis that the AGC has a financial interest in the settling of legal fees.

II. Background

[3] The Government of Canada in 1990 established a compensation program for Canadian Thalidomide victims. This 1991 program was considered by many to be inadequate. As a result of this and other factors in 2015, a new program with attendant funds was established – the Thalidomide Survivors Compensation Program [TSCP]. It was alleged to be unfair due to restrictive eligibility criteria and burdensome evidence requirements.

[4] The underlying judicial review was brought as a class proceeding on behalf of those TSCP applicants who were rejected by the program.

[5] The representative Applicant entered into a contingency fee retainer with Class Counsel - Koskie Minsky LLP - on behalf of the Class which provided for a 25% contingency fee.

[6] The judicial review challenging the TSCP was certified as a class proceeding by the Federal Court of Appeal on November 1, 2018.

[7] In January 2019, the Respondent announced that it would be implementing revisions to the TSCP in the form of the Canadian Thalidomide Survivors Support Program [CTSSP]. Those revisions were designed to address concerns raised by these class proceedings.

[8] In April 2019, Notice of Certification was posted to the public and more specifically, to Class Members.

[9] On October 22, 2019, the parties executed a Settlement Agreement. On the issue of legal fees, the parties did not agree. The Settlement Agreement simply reserved the right to the AGC to seek leave to make submissions.

[10] The AGC has not agreed to pay legal fees or to contribute to payment nor has it indicated what fees should be paid.

[11] Finally, the Applicant intends to seek costs against the AGC as part of the Settlement approval process.

[12] In summary, the AGC says that it has a right to make submissions on the Class Counsel fee approval motion or alternatively, that the Court should exercise its discretion to permit such submissions. As expected, the Applicant opposes the AGC's motion.

III. Analysis

[13] The issues therefore are:

- whether the Respondent has the right to make submissions on Class Counsel fees regardless of the financial interest or lack thereof in those fees;
- whether, in the absence of such a right, the Court has a discretion to permit the making of submissions; and
- if the Court has that discretion, should it be exercised in these circumstances and on what terms?

A. *The right to make submissions*

[14] While the *Federal Courts Rules*, SOR/98-106, do not exclude a defendant's or respondent's participation in fee approval motions, the Rules do not authorize it explicitly or implicitly.

[15] It is difficult to envisage that in a contested class action proceedings in which the defendant/respondent is the losing party, they would nevertheless have the right to influence the remuneration to be paid to successful opposing counsel.

[16] The AGC's reliance on *Manuge v R*, 2013 FC 341, as evidence of its right is misplaced. The AGC's involvement in the setting of counsel fees resulted from the Court's exercise of discretion to have an opposing view advanced.

[17] The right to participate would have to flow from either the Rules – which are silent; the Settlement Agreement – which does not recognize even a legal interest in the AGC’s involvement; or from a legally recognized interest such as payment or contribution to the legal fees – of which there is none.

[18] The AGC asserts that it has a role because it is charged with the administration of justice including class action – a form of omnibus supervision.

[19] However, in this case, the AGC is simply a party and one who vigorously contested the Class’ rights to exist and to seek redress. It is not the objective overseer of justice generally as it has argued. In fact, in other cases, the AGC has taken the position that fees are a matter between Class Members and Class Counsel.

[149] The Defendant submits that the Fee Agreement is a matter between the Class Members and Class Counsel. The Defendant does not take any position with respect to the approval of fees, except to note that the fees at 17 % of the total settlement are within the range based on the jurisprudence and reflect the complexity of the litigation and the risks taken by Class Counsel.

Toth v Canada, 2019 FC 125

[20] Even in a case where the defendant has an “interest” in the case, it has been held that it does not have a “right” to participate in the legal fee approval motion.

[21] In *Wilson v Servier Canada Inc*, [2005] OJ No 1039 (SC), Servier (the defendant) had a residual interest in the settlement funds. On that basis it was allowed to make submissions on

legal fees. The Ontario Superior Court summarized the “rights” issue as follows – and I adopt that reasoning:

23 While the Court welcomes the submission of the defendants on this matter as a positive, constructively critical aid, this Court does not view the intervention of the defendants as a "right." The defendants have a clear "interest" in the outcome of the motion for the approval of class counsel fees. They are permitted to make submissions for that reason. But, in my view, they do not have the "right" to intervene in the determination of class counsel fees.

[22] The only people with a right to make submissions on legal fees are the Class Members as contemplated by the Settlement Agreement and by the Notices approved by the Court. At this time the position of Class Members is not known.

[23] Therefore, I have concluded that the AGC does not have a right to make submissions on the motion for approval of Class Counsel’s fees and disbursements.

B. Court Discretion

[24] Absent such a right, the question is whether the AGC ought to participate and if so, how.

[25] In class action settlements, the Court has a unique role to oversee a settlement and the attendant motions. The Supreme Court of Canada has recently recognized this obligation on the courts; see *J.W. v Canada (Attorney General)*, 2019 SCC 20.

[26] In the legal fee approval process, Class Counsel is in the difficult position of advancing its own interest over that of the client. Without the usual tension between parties, the Court has

the difficult position of having to adjudicate but also be actively involved in the inquiry aspect of the motion.

[27] Courts have wide discretion in how they carry out that function including appointing *amicus* counsel to provide that balance in the competing interests. Not all cases are amenable to such a process of appointing an *amicus* or appointing a counsel to argue all or specific points. Economy and efficiency are factors in considering what tools the Court should use.

[28] In the present case, the size of the Class is small, the amount of money at issue is uncertain but it is not one of the “mega class actions”. As such, the assistance the Court may need must be tailored to the realities of the case.

[29] This Court does not need submissions on the general importance of judicial review, its unique character and remedies – points which the AGC says justify its involvement.

[30] However, the AGC does have a perspective on the programs and on the way in which they came about that goes to the issue of “success” or “results of the litigation”.

[31] At this stage and before Class Members file their objections, the Court can foresee that this perspective may be helpful to it in finding what legal fee is “fair and reasonable” and in the best interests of the Class.

[32] Therefore, the AGC will be granted status to make submissions on this issue alone. It shall file its submissions within 10 days of the filing of Class Counsel's motion for fee approval.

ORDER in T-1499-16

THIS COURT ORDERS that the Attorney General of Canada is granted leave to make submissions in accordance with these Reasons.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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