Federal Court  Cour fédérale

Date: 20201029

Docket: T-620-20

Citation: 2020 FC 1012

PROPOSED CLASS PROCEEDING

BETWEEN:

CHEYENNE WALTERS AND LORI-LYNN DAVID

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER

PHELAN J.

I. Introduction

[1] This is a motion, in an uncertified class action, for a *Heyder* Order providing that a) Murphy Battista LLP be counsel on the proposed class proceeding and b) no other class action be permitted in the Federal Court in respect of the facts pleaded in *Walters v Her Majesty the Queen* (Court file no. T-620-20) without leave of the Court.

The Defendant, Attorney General of Canada, takes no position on this motion.

II. Background

[2] The class action filed concerns the removal of First Nations (Status and Non Status), Inuit and Métis persons [the proposed Class] who were removed form their homes in Canada between January 1, 1992, and December 31, 2019, and placed in the care of individuals who were not part of the Indigenous group, community or people to which they belonged [the Primary Class]. There is also a claim on behalf of parents and grandparents of Primacy Class Members.

[3] The proposed Class specifically excludes putative class members in *Moushoom and Meawasige (by his litigation guardian, Beadle) v The Attorney General of Canada* (Court file number T-402-19).

[4] The proposed Class Counsel rely on their experience and their work to develop the case to ground this motion.

[5] Having read the original motion materials, the Court provided counsel with an opportunity to make submissions on the question of the necessity or benefit of a *Heyder* Order. Such material was recently filed.

[6] The issue for the Court is whether this type of Order should be granted.

III. Analysis

A. *Factors*

[7] Contrary to what some counsel (not necessarily the present counsel) have concluded, the unopposed filing for a *Heyder* Order is not automatically approved. Such is not the case.

[8] A *Heyder* Order at the pre-certification stage gives proposed Class Counsel an advantage by being designated as class counsel before any real consideration is given to the merits of that proposition. In seeking such an Order, counsel is in the awkward position of having a personal self-interest in the designation – similar to the position of counsel seeking approval of their fees.

[9] As in the fee approval process, the Court has a duty to carefully consider the interests of the proposed Class members as well as the interests of those excluded from membership, particularly those who at least arguably should or could be included.

[10] The Court's task is further complicated by the Attorney General's non-position on this motion. On its face a defendant has a real interest, and potential benefit, in knowing with which counsel they are to deal and in not being faced with competing claims without leave of the Court.

[11] To take no position is to suggest that there is no real benefit or necessity in issuing a *Heyder* Order. I too, as Justice Fothergill in *Heyder v Canada (Attorney General)*, 2018 FC 432 [*Heyder*], commented, regret the absence of the Attorney General's input on a case which has

direct impact on the Government of Canada and its obligations to both the Indigenous population and the more general public in Canada.

[12] The issue of a *Heyder* Order in a pre-certification case raises concerns that such a court order would be seen as "tilting the playing field" in favour of a counsel and an, as yet, unapproved class. The Court could well be deprived of alternative or competing positions on the nature and description of the class and the myriad other aspects of certification. A *Heyder* Order is often an effort to avoid a "carriage motion" contest.

[13] A Court must be mindful of the potential negative impact of a *Heyder* Order discussed above even where all parties to the proposed action agree.

[14] In *Heyder*, Justice Fothergill provided a non-exhaustive list of considerations for such an order:

- whether the order is in the best interests of the plaintiffs, the class members and the defendants;
- whether the order furthers the Federal Court's commitment to robust case management;
- whether the order reflects the Federal Court's unique jurisdiction; and
- whether the order promotes the objectives of judicial economy and avoiding a multiplicity of proceedings.

[15] To this list, particularly in the pre-certification phase but not exclusively pre-certification, must be added the potential impact of such an order on others and the possible negative effects of such an exclusionary order.

B. *Application*

[16] In the present case, it cannot necessarily be said that the *Heyder* Order is in the best interests of the Defendant – it did not say so.

[17] The Plaintiffs put forward very little in the way of evidence of best interests of the plaintiffs/putative class although some negotiations have begun and preliminary research commenced.

[18] However, this Court can take cognizance of the circumstances sometimes encountered in multiplicity of proceedings, of intersecting counsel and of varying interest particularly in the range of Scoop-type litigation as well as other similar class actions, including residential schools, Indian Day schools and other indigenous class litigation.

[19] In the present case, the simplicity of a single counsel and the removal of potential confusion caused by other proceedings would be of benefit in addressing certification issues. However, the benefit of this type of Order begins to dissipate over time, if nothing is done. The Court will preserve its jurisdiction and its obligation to review the proposed Order as may be necessary.

[20] The potential negative effects of such an Order can be addressed, if necessary, upon a certification motion or upon a review by the Court as referred to above.

[21] The proposed Order, particularly with a review feature, is an example of robust case management which the Federal Court fosters.

[22] The Order and this case reflects the Federal Court's unique jurisdiction as a national trial court and its experience, commitment and expertise in complex matters affecting First Nations, Métis and Inuit. It is consistent with national dimensions of the proposed class itself, the claims asserted and provides a single forum for resolution.

[23] Consistent with the above, this type of order promotes judicial economy at all stages of the litigation by providing a single court resolution mechanism, reduces costs, avoiding multiple and overlapping proceedings and avoids inconsistent decisions throughout the litigation process.

IV. Conclusion

[24] The motion is granted with the additional provisions of review contained in the Order.

"Michael L. Phelan"
Judge

Ottawa, Ontario
October 29, 2020

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-620-20
STYLE OF CAUSE:	CHEYENNE WALTERS AND LORI-LYNN DAVID v HER MAJESTY THE QUEEN
PLACE OF HEARING:	MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*
REASONS FOR ORDER:	PHELAN J.
DATED:	OCTOBER 29, 2020

WRITTEN REPRESENTATIONS BY:

Angela Buspflug Janelle O'Connor	FOR THE PLAINTIFFS

SOLICITORS OF RECORD:

Murphy Battista LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE PLAINTIFFS
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT