

Federal Court



Cour fédérale

Date: 20211110

Docket: T-1542-12

Citation: 2021 FC 1020

Vancouver, British Columbia, November 10, 2021

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

**CHIEF SHANE GOTTFRIEDSON, ON
HIS OWN BEHALF AND ON BEHALF OF
ALL THE MEMBERS OF THE
TK'EMLÚPS TE SECWÉPEMC INDIAN
BAND AND THE TK'EMLÚPS TE
SECWÉPEMC INDIAN BAND, CHIEF
GARRY FESCHUK, ON HIS OWN
BEHALF AND ON BEHALF OF ALL
MEMBERS OF THE SECHELT INDIAN
BAND AND THE SECHELT INDIAN
BAND, VIOLET CATHERINE
GOTTFRIEDSON, DOREEN LOUISE
SEYMOUR, CHARLOTTE ANNE
VICTORINE GILBERT, VICTOR
FRASER, DIENA MARIE JULES,
AMANDA DEANNE BIG SORREL
HORSE, DARLENE MATILDA BULPIT,
FREDERICK JOHNSON,
ABIGAIL MARGARET AUGUST,
SHELLY NADINE HOEHNE,
DAPHNE PAUL,
AARON JOE AND RITA POULSEN**

Plaintiffs

and

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

Defendant

PUBLIC ORDER AND REASONS

(The Confidential Order and Reasons were issued on October 1, 2021,
and no redactions are necessary)

[1] These are the Reasons for the Court approval of the Fee Agreement dated June 4, 2021, reached in relation to the partial settlement of this class proceeding.

[2] By separate Order and Reasons reported at 2021 FC 988 on September 24, 2021, the Court approved the Settlement Agreement for the settlement of the Survivor Class claims and the Descendant Class claims.

[3] The Fee Agreement is separate from the Settlement Agreement.

[4] This Motion was heard in Vancouver on September 8, 2021, following the Motion for approval of the Settlement Agreement.

[5] For the reasons that follow, the Fee Agreement is approved in the form submitted.

Sealing Order

[6] Portions of the information filed in support of this Motion were filed under seal as the Band Class portion of this class proceeding has not been settled and the litigation is ongoing. At

the request of the parties, on August 27, 2021, the Court issued a Sealing Order to protect the information related to the Plaintiffs' retainer agreements and funding agreements as they constitute solicitor-client information. Likewise, some of the Affidavits filed in support of this Motion have been redacted or sealed.

[7] To maintain the confidentiality of this information, the lawyers representing Canada who will continue to be involved in the band class litigation were not involved in negotiation of the Fee Agreement and did not participate in this Motion.

Background

[8] The factual background to this class proceeding and the details of the Settlement Agreement for the Survivor Class and Descendant Class are more fully outlined in the Order and Reasons approving the Settlement Agreement, 2021 FC 988.

[9] In support of this Motion for Court approval of the Fee Agreement, the following Affidavits were filed:

- Affidavit of Shane Gottfriedson, Representative Plaintiff and former elected Chief of Tk'emlúps te Secwépemc (also known as Kamloops Indian Band), sworn on August 23, 2021;
- Affidavit of Garry Feschuk, Representative Plaintiff and former elected Chief of shíshálh Nation (also known as Sechelt Indian Band), sworn on August 23, 2021;

- Affidavit of Peter Grant, co-counsel for the Plaintiffs, sworn on August 25, 2021;
- Affidavit of Jasmine Paul, Stewardship and Territorial Land Management Division Manager with shísháhl Nation sworn on August 26, 2021;
- Affidavit of Travis Anderson, a Certified Aboriginal Financial Manager, and Executive Director of Finance with Tk'emlúps te Secwépemc sworn on August 23, 2021;
- Affidavit of Bill Namagoose, Executive Director of the Cree Nation Government and the Grand Council of the Crees (Eeyou Istchee), sworn on August 23, 2021;
- Affidavit of Charlotte Anne Victorine Gilbert, Representative Plaintiff for the Survivor Class, sworn on August 23, 2021;
- Affidavit of Diena Marie Jules, Representative Plaintiff for the Survivor Class, sworn on August 23, 2021;
- Affidavit of Daphne Paul, Representative Plaintiff for the Survivor Class, sworn on August 23, 2021;
- Affidavit of Darlene Matilda Bulpit, Representative Plaintiff for the Survivor Class, sworn on August 23, 2021;
- Affidavit of Rita Poulsen, Representative Plaintiff for the Descendant Class, sworn on August 23, 2021; and,

- Affidavit of Amanda Deanne Big Sorrel Horse, Representative Plaintiff for the Descendant Class, sworn on August 23, 2021.

Key Terms of Fee Agreement

[10] The key terms of the Fee Agreement are as follows:

- section 3 provides that Canada will pay the sum of \$8,392,619.11 to Class Counsel in trust for legal fees, disbursements, and applicable taxes incurred in the initiation and prosecution of the class action from 2012 to February 28, 2021 (“Past Fees”);
- section 4 provides the amount of \$1,200,000.00 allocated for “Negotiation and Implementation Fees”, to be paid by Canada to Class Counsel in trust for legal fees, disbursements and applicable taxes incurred in the negotiation and implementation of the Settlement Agreement from March 1, 2021 until the Implementation Date. Court approval is required for these payments, and any amount paid by Canada to Class Counsel for Negotiation and Implementation Fees, including accrued interest, which remain in trust after these fees, disbursements and taxes have been paid will be transferred to the Day Scholars Revitalization Fund;
- section 5 provides the amount of \$2,500,000.000 allocated for “Reconsideration Fees”, to be paid by Canada to Class Counsel in trust for legal fees, disbursements, and applicable taxes incurred for the provision of legal services related to requests for reconsideration of denied claims for Day Scholar Compensation Payments. Court approval is required for

these payments, and any unused amounts remaining in trust will be transferred to the Day Scholars Revitalization Fund; and,

- section 6 provides Honoraria payments of \$15,000.00 each to the eight named Representative Plaintiffs for the Survivor and Descendant Class, to be paid by Canada in trust to Class Counsel. The payments to Violet Catherine Gottfriedson and Frederick Johnson, both of whom are deceased, will be distributed to their family members, on the advice of the related Representative Plaintiffs.

[11] The Fee Agreement also takes into account any amounts that have previously been paid by Canada during this class proceeding.

Issues

[12] The issues for determination on this Motion are as follows:

1. Approval of the Fee Agreement; and
2. Approval of Honoraria payments to the Representative Plaintiffs.

Analysis

1. *Approval of the Fee Agreement*

General Principles

[13] Rule 334.4 of the *Federal Courts Rules*, SOR/98-106 requires that all legal counsel fees in a class action be approved by the Court.

[14] The test applied by the Court on a motion to approve counsel fees is whether the legal fees are “fair and reasonable” in the circumstances (*McLean v Canada*, 2019 FC 1077 at para 2 [*McLean*]).

[15] A number of cases including *Manuge v Canada*, 2013 FC 341 at para 28; *Condon v Canada*, 2018 FC 522 at para 82; *Merlo v Canada*, 2017 FC 533 at para 78-98, have outlined the following considerations to be weighed in assessing the reasonableness of legal fees:

- a) Risk undertaken
- b) Results achieved
- c) Time expended
- d) Complexity of issues
- e) Importance of litigation to the plaintiffs
- f) Quality and skill of counsel
- g) Expectation or views of the Class
- h) The existence of a fee agreement
- i) Ability of the Class to pay
- j) Fees in similar cases.

[16] In this case, the Fee Agreement was negotiated independently from the Settlement Agreement. Isolating these agreements ensured that even if the Fee Agreement was not

approved, the Settlement Agreement (if approved) could still be implemented. The two agreements are also independently funded by Canada.

[17] In considering these factors, it is important to highlight that unlike many other class proceedings, legal counsel in this matter were not retained on a contingency fee basis. Rather, legal counsel worked on an hourly fee-for-service basis and rendered legal accounts (at reduced rates) as the matter progressed. The absence of a contingency fee agreement is an important distinguishing feature in considering and weighing the factors noted above. However, in my view, it is still necessary to consider these factors as against the fees sought to be approved.

a) Risk Undertaken

[18] Typically, the primary risk undertaken by Class Counsel acting on a contingency fee basis is the risk of non-payment if the claim fails. That risk was somewhat ameliorated in this case. However, Class Counsel nonetheless assumed the risk of only being paid the reduced rate portion of their legal fees if the matter was not successfully concluded. Class Counsel describes this as a risk-sharing arrangement.

[19] This was risky litigation and success was far from certain as it involved novel legal claims in seeking damages for loss of language and culture. Canada vigorously defended this class proceeding and raised a number of defenses including limitation defenses, the IRSSA releases, and denying any duty of care on the part of Canada.

[20] The fact that no other claims were initiated in Canada on behalf of Day Scholars and the fact that this group was excluded from the IRSSA, highlights the uncertainty that surrounded these claims and the risks undertaken by legal counsel in committing years of time and resources to pursue the action.

b) Results Achieved

[21] The Representative Plaintiffs' objectives for resolution of the class proceeding was that no day scholar would be left behind; that there be a simple, streamlined, and speedy claims process; that there would be no cap on the overall settlement; that IRSSA releases could not be relied upon; and that any settlement would not prejudice the ongoing Band Class litigation.

[22] The Settlement Agreement of the Survivor Class and Descendant Class met and exceeded these objectives. In addition to the individual \$10,000.00 Day Scholar Compensation Payment, the settlement also includes a \$50 million dollar Day Scholars Revitalization Fund. This fund provides for Indigenous-led initiatives to support healing, wellness, education, language, culture, heritage and commemoration activities for the Survivor Class members and Descendant Class members.

c) Time Expended

[23] This litigation has been ongoing for almost a decade. The legal issues were complex, and success was uncertain.

[24] The Settlement Agreement was reached a few months before the September 2021 common issues trial was scheduled to begin. A great deal of work had been undertaken to prepare this matter for trial, and the fees sought are based on the time spent on this litigation on a fee-for-service basis. Class Counsel has provided a detailed Affidavit outlining the work performed and has attached copies of time dockets providing a breakdown of the description of the work performed, by who, and the amount of time expended.

[25] To date, Class Counsel has expended thousands of hours on this claim. They will also continue to provide legal support in the implementation of the Settlement Agreement and in the reconsiderations of denied Day Scholar Compensation Payment claims.

[26] Based upon the time recorded, the fees sought to be approved represent the hours actually worked at non-discounted rates, plus the sum of \$1,600,000 representing a premium. In considering the risks and obligations undertaken by Class Counsel and the success achieved for the Survivor and Descendant classes, I agree that counsel has earned a premium in excess of the docketed time.

d) Complexity of Issues

[27] The complexity of this class action cannot be overstated and is discussed in more detail in the Order for the Settlement Approval. The claims advanced were novel and untested. The evidence was historic and voluminous.

[28] The case involved a number of interlocutory motions including Canada's motion to stay the action entirely and a contested Certification Motion. In the months prior to settlement, legal counsel was engaged in extensive preparations for a 74-day trial.

e) Importance of Litigation to the Plaintiffs

[29] The exclusion of the Day Scholars from the IRSSA settlement was hurtful and those who suffered harm in Residential Schools felt that their experiences were not recognized. The affidavits of the Representative Plaintiffs attest to the significance and the importance of this litigation. Even those who objected to the settlement spoke about the harm caused and the lack of recognition in the previous settlements.

[30] This litigation has come at a great personal cost to the Representative Plaintiffs, who, in the pursuit of this action, had to relive traumatic experiences in a public forum. The affidavits of the Representative Plaintiffs outline not only the effect their experiences as Day Scholars had on them and their families, but also the lasting, intergenerational trauma that has resulted.

[31] While no amount can ever compensate the Survivors or their Descendants for the harms they endured, and continue to endure, this settlement is a key step towards healing and reconciliation.

f) Quality and Skill of Counsel

[32] Class Counsel are a team of highly experienced lawyers combining their expertise in Aboriginal law and class action litigation. Three of the lead counsel were involved in the IRSSA settlement and were specifically sought out to act on this matter because of their expertise.

[33] Class Counsel was clearly committed to the class action and prosecuted the claim diligently in spite of significant procedural and legal hurdles. Ultimately, after many years, Class Counsel was able to achieve a settlement that met and exceeded the objectives of the Survivor and Descendants class members. Counsel will continue to be involved in providing legal services in the claims and reconsideration processes. As well, the Band Class claim is scheduled for trial in September 2022.

g) Expectation or Views of the Class

[34] The affidavits of the Representative Plaintiffs support the approval of the Fee Agreement and confirm that the Fee Agreement is in keeping with their understanding of how fees were to be paid on a successful resolution of the action. They also confirm that in their opinion the fees are fair and reasonable.

[35] There were no objections to the Fee Agreement voiced at the Motion. However, during the Settlement Approval Motion, one Class Member objecting to the settlement stated that the payment to class members was minimal compared to the lawyers “salaries”. This comment is of no assistance in assessing if the legal fees are fair and reasonable in these circumstances.

h) The Existence of a Fee Agreement

[36] As noted, Class Counsel was acting on a fee-for-services retainer and not a contingency fee agreement. Class Counsel's Affidavit and the Affidavits of the Representative Plaintiffs provide details on the Plaintiffs' retainer agreements and funding agreements. The Court is satisfied that this class action proceeding would not have been pursued without these agreements.

i) Ability of the Class to Pay

[37] The Representative Plaintiffs state in their Affidavits that they had no ability to fund this litigation on their own, and there is no evidence that any such individual claims have been filed.

j) Fees in Similar Cases

[38] The total value of this settlement is approximately \$154 million. The legal fees sought to be approved for past fees is the sum of \$8,392,619.11 broken down as follows:

a.	Legal fees billed by Class Counsel	\$4,055,765.66
b.	Class Counsel premium	\$1,600,000.00
c.	Legal disbursements of Class Counsel	\$ 973,729.67
d.	Plaintiffs' expenses	\$1,763,123.78

[39] The Class Counsel premium of \$ 1,600,000.00 is the only amount claimed for past legal fees which is over and above the docketed time. As stated above, this is a well-earned premium.

[40] The Fee Agreement provides that the legal fee amounts allocated for negotiation and implementation work (\$1,200,000) and for reconsideration fees (\$2,500,000) have not yet been incurred and will be subject to further approval by the Court.

[41] Accordingly considering the total value of the settlement of approximately \$154 million, legal fees of \$8.3 million is modest.

[42] By comparison, in *McLean* the settlement was approximately \$2 billion and the approved legal fees were \$55 million plus \$7 million for legal fees for services rendered for a period of four years afterward. In *Riddle v Canada*, 2018 FC 641 [*Riddle*], the settlement was \$750 million and a \$75 million legal fee agreement was approved.

[43] Recently in *MacDonald et al v BMO Trust Company et al*, 2021 ONSC 3726 [*MacDonald*] Justice Belobaba (paras 21-22) characterized class action settlement amounts of over \$100 million as being “mega fund” settlements for which legal fees required closer judicial scrutiny. This statement was made in the context of applying a straight-line calculation of an agreed upon contingency fee percentage to the settlement amount. This calculation, according to Justice Belobaba, can result in an “underserved windfall” in class action litigation. In *MacDonald* the settlement was \$100 million and class counsel was seeking \$25 million in legal fees.

[44] While this case would fall into the mega-fund category as defined in *MacDonald*, the fees sought to be approved are not based upon a contingency fee calculation because Class Counsel

was not acting pursuant to a contingency fee agreement. The legal fees sought to be approved here are based upon the actual time the lawyers worked on this action. Accordingly, the Court has the benefit of the details of the time docketed on this matter. This provides a useful benchmark against which to assess the reasonableness of the proposed legal fees. In addition, as noted above, my view is that the legal fee premium sought was well-earned and reasonable when considered against the results obtained.

[45] Overall, I am satisfied that this Fee Agreement is fair and reasonable.

2. *Approval of Honoraria payments to the Representative Class Plaintiffs*

[46] This Court has noted that compensation to representative plaintiffs is appropriate in situations where the plaintiff has provided services which are over and above the usual duties of a representative plaintiff (*Merlo* at para 73).

[47] The list of factors relevant for consideration on whether Representative Plaintiffs should receive an honorarium include: significant personal hardship; active involvement in the initiation of the litigation and retainer of counsel; time spent and activities undertaken in the litigation; communication and interaction with other class members; and participation at various stages of the litigation (*Merlo*-at para 72; *Toth v Canada*, 2019 FC 125 at para 96).

[48] The litigation required exceptional efforts on the part of the Representative Plaintiffs, who spent nine years reliving painful and personal details of their experiences at Residential Schools and the resulting lifelong harms that ensued. They have provided personal affidavits

detailing their experiences. They endured cross-examinations and were prepared to testify openly at trial. In doing so, they exposed themselves to re-traumatization at great personal cost, but done for the collective benefit of the class members. In fact, so painful and heavy was the burden that two of the proposed Representative Plaintiffs stepped away when they were unable to continue in their roles.

[49] The Representative Plaintiffs spent significant time travelling to meetings, gathering and reviewing documents, attending examinations and hearings, and reviewing materials to stay up-to-date and informed on the status of the litigation. The Representative Plaintiffs have met regularly with legal counsel to receive updates and provide instructions.

[50] They have also participated in media interviews and engaged in extensive outreach efforts to communicate with class members by telephone, email and various social media platforms.

[51] During the course of this class proceeding two Representative Plaintiffs, Frederick Johnson and Violet Gottfriedson, passed away, but not before demonstrating their commitment to this class action to ensure it was pursued.

[52] In the circumstances, I have no difficulty in finding that this is an appropriate case to recognize the extraordinary efforts of the Representative Plaintiffs and I approve the honoraria payments of \$15,000.00 to each.

Conclusion

[53] For the above reasons, the Fee Agreement, including the honoraria payments to the Representative Plaintiffs, is approved.

ORDER IN T-1542-12

THIS COURT ORDERS that:

1. The Fee Agreement is fair and reasonable and in the best interests of the Survivor and Descendant Classes, and is hereby approved pursuant to Rule 334.4 of the *Federal Courts Rules*, SOR/98-106, and shall be implemented in accordance with its terms;
2. The payment of the total and all-inclusive amount of \$8,392,619.11 by the Defendant to Class Counsel in trust for the legal fees, disbursements and taxes applicable thereon incurred in the initiation and prosecution of this action, from its commencement in 2012 to February 28, 2021, as set out in the Fee Agreement, is approved and shall be paid by the Defendant to Class Counsel in trust within 30 days of the Implementation Date (as defined in the Settlement Agreement dated June 4, 2021);
3. The payment of \$1,200,000.00 by the Defendant to Class Counsel in trust for legal fees, disbursements, and applicable taxes thereon incurred in the negotiation and implementation of the Settlement Agreement from March 1, 2021, until the Implementation Date as set out in the Fee Agreement (“Negotiation and Implementation Fees”) is approved and shall be paid by the Defendant to Class Counsel in trust within 30 days of the Implementation Date;
4. No amount paid by the Defendant to Class Counsel in trust for Negotiation and Implementation Fees may be paid out of trust until after Class Counsel has submitted accounts to Canada and sought and received approval of this Court;

5. Any amount remaining in trust, including interest, after all approved Negotiation and Implementation Fees have been paid, shall be transferred by Class Counsel to the Day Scholars Revitalization Society to be used in furtherance of that Society's objects;
6. The payment of \$2,500,000.00 by the Defendant to Class Counsel in trust for legal fees, disbursements, and applicable taxes thereon incurred in the provision of legal services related to requests for reconsideration of denied claims for Day Scholar Compensation Payments as set out in the Fee Agreement ("Reconsideration Fees") is approved and shall be paid by the Defendant to Class Counsel in trust within 30 days of the Implementation Date;
7. No amount paid by the Defendant to Class Counsel in trust for Reconsideration Fees may be paid out of trust until after Class Counsel has submitted accounts to Canada and sought and received approval of this Court;
8. Any amount remaining in trust, including interest, after all after all approved Reconsideration Fees have been paid, shall be transferred by Class Counsel to the Day Scholars Revitalization Society to be used in furtherance of that Society's objects;
9. Honoraria payments of \$15,000.00 each by the Defendant to the eight named Representative Plaintiffs for the Survivor and Descendant Classes are approved and shall be paid by Canada to Class Counsel in trust within 30 days after the Implementation Date;
10. In the case of Violet Catherine Gottfriedson and Frederick Johnson, Class Counsel shall distribute their honoraria to the family members of the deceased Representative Plaintiffs

on the advice of the Representative Plaintiffs related to the two deceased Representative Plaintiffs;

11. There will be no costs of this motion.

“Ann Marie McDonald”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1542-12

STYLE OF CAUSE: CHIEF SHANE GOTTFRIEDSON ET AL v HER
MAJESTY THE QUEEN IN RIGHT OF CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: SEPTEMBER 8, 2021

ORDER AND REASONS: MCDONALD J.

**CONFIDENTIAL ORDER
AND REASONS ISSUED:** OCTOBER 1, 2021

**PUBLIC ORDER AND
REASONS ISSUED:** NOVEMBER 10, 2021

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