

Federal Court



Cour fédérale

Date: 20231107

**Dockets: T-402-19
T-141-20
T-1120-21**

Citation: 2023 FC 1479

Ottawa, Ontario, November 7, 2023

PRESENT: The Honourable Madam Justice Aylen

CLASS PROCEEDING

Docket: T-402-19

BETWEEN:

**XAVIER MOUSHOOM, JEREMY
MEAWASIGE (BY HIS LITIGATION
GUARDIAN, JONAVON JOSEPH
MEAWASIGE) AND JONAVON JOSEPH
MEAWASIGE**

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-141-20

AND BETWEEN:

**ASSEMBLY OF FIRST NATIONS, ASHLEY
DAWN LOUISE BACH, KAREN
OSACHOFF, MELISSA WALTERSON,
NOAH BUFFALO-JACKSON (BY HIS**

**LITIGATION GUARDIAN, CAROLYN
BUFFALO), CAROLYN BUFFALO AND
DICK EUGENE JACKSON ALSO KNOWN
AS RICHARD JACKSON**

Plaintiffs

and

**HIS MAJESTY THE KING
AS REPRESENTED BY THE ATTORNEY
GENERAL OF CANADA**

Defendant

Docket: T-1120-21

AND BETWEEN:

**ASSEMBLY OF FIRST NATIONS AND
ZACHEUS JOSEPH TROUT**

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS
(Non-Class Counsel Motion)

[1] The underlying class proceedings relate to harms caused by the discriminatory provision of child and family services and essential services to First Nations' children and families over

several decades. The class members are described by the Assembly of First Nations as “some of the most vulnerable individuals in Canadian society”.

[2] These class proceedings were ultimately settled and this Court recently approved the parties’ Final Settlement Agreement dated April 19, 2023 and as amended by Addendum dated October 10, 2023 [Final Settlement Agreement].

[3] A central principle of the Final Settlement Agreement is that the claims process is accessible to claimants, user-friendly, culturally sensitive, trauma-informed and non-traumatizing. Under the Final Settlement Agreement, a claimant whose claim is grounded in the discrimination they experienced as a child cannot be required to submit to an interview, examination or other form of *viva voce* evidence taking.

[4] One of the goals of the Final Settlement Agreement is to ensure that class members receive the full amount of their settlement funds, without any reduction for legal services. In support of this goal, the Final Settlement Agreement: (a) was negotiated separately from the agreement regarding class counsel’s fees payable by the Defendant; (b) provides for a simplified, accessible claims process, the design and implementation of which is solely in the discretion of the Plaintiffs; (c) offers extensive supports and safeguards to ensure the process is navigable without the assistance of a lawyer, including assistance in filling out forms and submitting claims forms, obtaining supporting documentation and filing appeals; (d) provides extensive culturally-appropriate trauma and mental health supports free of charge; and (e) provides for ongoing legal support at no cost to claimants in case any claimant requires legal assistance.

[5] Moreover, the Final Settlement Agreement also seeks to prevent the usurpation of settlement funds from claimants under a “no assignment” clause (Article 19.04), which provides, *inter alia*, that “[u]nless the Court orders otherwise pursuant to a protocol to be approved, no person may collect a fee or disbursement from a Claimant for completing Claims Forms or providing Supporting Documentation”.

[6] In July of 2022, class counsel learned of communications by the Consumer Law Group (who are not class counsel and who have had no involvement in these proceedings) on their websites about the “settlement” of this class proceeding and inviting class members to “Join this Class Action”. The Consumer Law Group’s websites offered contingency fee retainers and requested that class members provide their personal information, including information about “damages or symptoms experienced”.

[7] The Plaintiffs brought an urgent motion before the Court to address the conduct of the Consumer Law Group, asserting that their website communications contained misleading information about the class action, the potential settlement agreement and the prospective claims process. The Plaintiffs further asserted that the solicitation of retainer agreements and the request for information about damages and symptoms from class members was exploitative, re-traumatizing and contrary to the various safeguards built into the then-existing settlement agreement and Notice Plan. On the motion, the Plaintiffs sought to restrain all communications to the class members from individuals not involved in the class proceedings.

[8] On August 18, 2022, Justice McDonald ordered that:

- A. No legal professional, other than class counsel appointed by this Court, the Plaintiff, the Assembly of First Nations, or the Court-appointed Administrator, Deloitte LLP, shall publish a communication to class members relating to these class proceedings without the Court's prior approval obtained on motion made on notice to the parties in these class proceedings; and
- B. The websites of the Consumer Law Group and any other such websites containing communications to class members relating to these class proceedings shall be removed upon service of the Court's order, pending the disposition by the Court of the Plaintiffs' motion for relief in the week of November 21, 2022, unless such communications are approved by the Court on motion made on notice to the parties in these class proceedings.

[9] Justice McDonald's August 18, 2022 Order was subsequently extended on September 21, 2022 to run to the date the Court approves the Distribution Protocol (which has not yet occurred).

[10] On this motion, the Plaintiffs move for relief on two interrelated matters aimed at protecting the class during implementation of the settlement. Specifically, the Plaintiffs seek:

- A. An order implementing a standardized Non-Class Counsel Legal Professionals Protocol [Protocol] for non-class counsel legal professionals who wish to provide services to class members for pay in submitting a claim in the settlement of these proceedings; and

B. The continuation of the protections put in place by the Court in its August 18, 2022 Order.

[11] The Consumer Law Group advised the Court that it did not contest the relief sought and they did not appear at the hearing of the motion.

[12] The Defendant supports the relief sought.

[13] As a case managed proceeding, this Court has broad discretionary powers to give any directions and make any orders that are necessary for the just, most expeditious and least expensive determination of the proceedings on its merits [see Rules 384.1 and 385(1)(a) of the *Federal Courts Rules*]. Moreover, this Court has supervisory jurisdiction in relation to class proceedings and, in particular, in relation to notices sent to class members and the approval of payments to solicitors from the proceeds recovered in a class proceeding [see Rules 334.32, 334.37 and 334.4 of the *Federal Courts Rules*].

[14] As such, I am satisfied that the Court has the jurisdiction to grant the relief sought on this motion and I would note that a similar protective protocol was instituted by this Court in *McLean v Canada (Attorney General)*, 2020 FC 701 and 2020 FC 702, in relation to the implementation of the Indian Day Schools Settlement.

[15] Article 19.04(2) of the Final Settlement Agreement contemplates the creation of the Protocol, which the parties assert has the following goals: (a) ensuring that legal services do not

unnecessarily usurp the compensation available to class members; (b) ensuring that class members are able to make informed decisions about whether to retain non-class counsel despite the supports available to them free of charge through the Final Settlement Agreement; (c) preventing misinformation or misleading communications to the class; (d) guiding legal professionals who are engaged to represent class members during the claims process; (e) minimizing the risk of re-traumatization of vulnerable individuals by ensuring that legal services, if necessary, are provided in a culturally competent manner; and (f) heeding the lessons learned from prior First Nations settlements and preventing harm to the class.

[16] Having reviewed the Protocol, I am satisfied that the Protocol strikes an appropriate balance between achieving the aforementioned goals and not restricting or limiting a claimant's right to retain counsel of their choice to assist with their claim (notwithstanding the supports available to them free of charge under the Final Settlement Agreement). As such, the Protocol shall be implemented in accordance with the terms set out in Schedule "A" hereto.

[17] Moreover, I am satisfied that the injunctive relief put in place by the August 18, 2022 Order should be made permanent for the same reasons given by Justice McDonald, as the risks to the class members underpinning the need for the interim relief remains and will not cease until the implementation of the settlement is concluded approximately 20 years from now.

THIS COURT ORDERS that:

1. The Non-Class Counsel Legal Professionals Protocol in the form attached hereto as Schedule “A” [Protocol] is hereby approved.
2. The Court-appointed Administrator shall only pay funds in trust to a lawyer, notary or other similar legal professional eligible to represent a Claimant in a province or territory [Legal Professional], if the Legal Professional has complied with all of the conditions specified in the Protocol and this Order.
3. Subject to any further Order of this Court, the Protocol shall apply to all Legal Professionals retained by a Claimant to assist with their First Nations Child and Family Services, Jordan’s Principle and Trout Class Settlement Claim and such Legal Professionals shall be subject to the Court’s jurisdiction over this Settlement and the provisions for payment to Legal Professionals. Any Legal Professional not prepared to be bound by this Protocol shall apply to the Court, on notice to the Settlement Implementation Committee, for such other relief as they deem necessary. Absent such motion and any relief granted by the Court, such Legal Professional shall remain bound by this Protocol.
4. Nothing in the Protocol shall interfere with the Court’s ongoing supervision of the Settlement.
5. Subject to any further Order of this Court, no Legal Professional, other than the Class Counsel appointed by this Court, the Plaintiff, Assembly of First Nations, the Settlement Implementation Committee appointed by this Court, or the Court-

appointed Administrator, shall publish any advertising, social media or other communication directed towards class members relating to these class proceedings without this Court's prior approval obtained on motion made on notice to the Settlement Implementation Committee.

6. The Administrator shall make this Order and the Protocol available on the Settlement website(s).
7. There shall be no costs of this motion.

"Mandy Ayles"

Judge

SCHEDULE “A”

Non-Class Counsel Legal Professionals Protocol

1. Any lawyer, notary or other similar legal professional eligible to represent a Claimant in a province or territory [Legal Professional] who is retained by a Claimant to assist with the Claimant’s First Nations Child and Family Services, Jordan’s Principle and Trout Class Settlement Claim shall be subject to the Court’s jurisdiction over this Settlement and the provisions for payment to Legal Professionals.

2. The Administrator shall only pay funds in trust to a Legal Professional where the Legal Professional has complied with all of the following conditions:

- (a) The Legal Professional has informed the Claimant in plain language and in the prescribed form attached as Appendix “A” hereto, before entering into any retainer or service agreement [Retainer Agreement], of the extensive supports available at no cost to all Claimants in making a claim.
- (b) Prior to entering into any Retainer Agreement, both the Legal Professional and the Claimant have separately initialed each of the paragraphs in the prescribed form attached as Appendix “A” hereto.
- (c) The Legal Professional has undertaken not to delay payment to the Claimant of any funds received from the Administrator in trust for the Claimant minus the Legal Professional’s proposed legal fees and/or disbursements, which proposed fees and/or disbursements the Legal Professional shall hold in trust until the Legal Professional has obtained approval of the Federal Court of such fees and/or disbursements pursuant to paragraph (f) of this Protocol. Upon approval by the Federal Court, the Legal Professional may pay themselves the approved amounts in fees and/or disbursements. If the Federal Court approves a lesser amount in fees and/or disbursements, the Legal Professional shall forthwith transfer the balance to the Claimant.
- (d) The Legal Professional has attested to having completed a professional development competency course on First Nations history and the cultural and trauma sensitivity required to assist class members, prior to entering into any retainer or service agreement with a class member. Such a course may include First Nations competency professional development courses mandated or provided by a provincial or territorial law society. Such a course may also include content specifically provided in relation to First Nations child-welfare and the history of this proceeding by the Settlement Implementation Committee.
- (e) The Legal Professional has attested to having complied with Article 19.04 of the Settlement Agreement, which states: “No compensation payable, in whole or in part, under this Agreement to a Class Member can be assigned, charged, pledged,

hypothecated and any such assignment, charge, pledge, or hypothecation is null and void except as expressly provided for in this Agreement.”

- (f) In order to obtain approval of fees and disbursements, the Legal Professional shall seek an order from the Federal Court, on notice to the Settlement Implementation Committee and pursuant to Rule 334.4 of the Federal Courts Rules, approving payment of their fees and/or disbursements from the proceeds recovered in the Settlement. In support of the motion, a Legal Professional shall provide, by way of affidavit, the following evidence: (a) their Retainer Agreement with the Claimant, showing compliance with the above terms in this Protocol; and (b) their detailed accounts setting out docket entries for fees incurred and the particulars of any claimed disbursements.

APPENDIX “A”

Prescribed Terms for Retainer or Service Agreements

The Federal Court has required Legal Professionals such as a lawyer or a notary (see Order) intending to assist individuals wishing to submit a claim for compensation under the Settlement Agreement to discuss the following essential information with their prospective clients and to obtain their initials. “You” or “Your” refers to the client:

Prescribed Terms for Client and Legal Professional	Client’s initials	Legal Professional’s initials
1. You do NOT NEED to hire a Legal Professional (like a lawyer, notary, paralegal, law clerk, etc.) to make a claim for compensation under the Settlement Agreement.	<hr/>	<hr/>
2. The Settlement Agreement and Claims Process have been designed so that you may submit a claim and receive compensation without hiring a Legal Professional.	<hr/>	<hr/>
3. You are entitled to receive assistance in filing a claim for compensation FREE OF CHARGE from the Administrator or from Navigational Support by calling 1-833-852-0755.	<hr/>	<hr/>
4. Before hiring a Legal Professional, you should consider first calling the Administrator to receive free assistance by calling 1-833-852-0755.	<hr/>	<hr/>
5. If you have legal questions about the claims process, the Administrator may direct your legal questions to the Court-appointed class counsel FREE OF CHARGE , so that <u>you do not need to hire a Legal Professional.</u>	<hr/>	<hr/>

<p>6. If you decide to hire a Legal Professional for assistance in filing a claim, you will have to pay the legal fees of the Legal Professional yourself. These fees will NOT be paid or reimbursed by Canada or anyone else.</p>	<hr/>	<hr/>
<p>7. Legal Professionals who are retained for assistance in submitting claims for compensation are required to keep accurate and timely records of all time devoted to the matter, broken down by timekeeper, in order to enable assessment by the client and the Federal Court.</p>	<hr/>	<hr/>
<p>8. Legal Professionals are ONLY entitled to be paid fees out of compensation received under this Settlement Agreement for their assistance in submitting a claim, and NOT for any other matter.</p>	<hr/>	<hr/>
<p>9. Legal Professionals cannot delay payment to you of any compensation received for you from the settlement, except their proposed fees.</p>	<hr/>	<hr/>
<p>10. Legal Professionals must get their fees approved by the Federal Court before their fees are paid out of compensation received under this Settlement Agreement.</p>	<hr/>	<hr/>
<p>11. Legal Professionals must provide services in a First Nations culturally-sensitive and trauma-informed manner.</p>	<hr/>	<hr/>
<p>12. Legal Professionals are required to have completed a professional development competency course on First Nations history and the cultural and trauma sensitivity required to assist</p>	<hr/>	<hr/>

class members, prior to signing the Retainer Agreement and this Appendix A.		
13. This Appendix A was initialed by client together with the Legal Professional before signing the Retainer Agreement.	_____	_____

Prescribed Terms for Legal Professional	Legal Professional's initials
<p>1. The Administrator shall not pay funds in trust to a Legal Professional representing a Class Member unless each of the above clauses in this Appendix A is initialed by the client and the Legal Professional in acknowledgement of their understanding and acceptance of it, and provided to the Administrator together with the signed Retainer Agreement and Direction to Pay.</p>	<p>_____</p>
<p>2. Legal Professionals are required to comply with Article 19.04 of the Settlement Agreement, which states: "No compensation payable, in whole or in part, under this Agreement to a Class Member can be assigned, charged, pledged, hypothecated and any such assignment, charge, pledge, or hypothecation is null and void except as expressly provided for in this Agreement."</p>	<p>_____</p>

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-402-19

STYLE OF CAUSE: XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE v THE ATTORNEY GENERAL OF CANADA

AND DOCKET: T-141-20

STYLE OF CAUSE: ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON, NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON v THE ATTORNEY GENERAL OF CANADA

AND DOCKET: T-1120-21

STYLE OF CAUSE: ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT v THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 23, 2023, OCTOBER 24, 2023

REASONS FOR ORDER AND ORDER: AYLEN J.

DATED: NOVEMBER 7, 2023

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