Federal Court  Cour fédérale

Date: 20130404

Docket: T-463-07

Citation: 2013 FC 341

Ottawa, Ontario, April 4, 2013

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

DENNIS MANUGE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This proceeding was initiated by Statement of Claim filed on March 15, 2007. In mid-February 2008 a motion to certify the proceeding as a class action was argued before me at Halifax, Nova Scotia and by a decision rendered on May 20, 2008 I certified the proceeding as a class action: see *Manuge v Canada*, 2008 FC 624, [2008] FCJ no 787. That decision was appealed by the Defendant and on February 3, 2009 the Federal Court of Appeal set aside my certification Order: see *Canada v Manuge*, 2009 FCA 29, [2009] FCJ no 73. That decision was further appealed by the Plaintiff, Dennis Manuge, to the Supreme Court of Canada and on December 23, 2010 that Court,

by unanimous decision, restored my Order thereby allowing the action to proceed as a class action: see *Manuge v Canada*, 2010 SCC 67, [2010] 3 SCR 672.

[2] To their credit the parties then jointly proposed to bring an issue of law before the Court for summary determination. That matter was argued before me at Halifax and by decision rendered on May 1, 2012, I determined that the Defendant's interpretation of the applicable Service Income Security Insurance Plan Long Term Disability (SISIP LTD) policy and that, in particular, the practice of deducting monthly *Pension Act*, RSC, 1985, c P-6, disability benefits from the LTD income payable to disabled class members was unlawful: see *Manuge v Canada*, 2012 FC 499, [2012] FCJ no 512. That determination was not appealed and the parties undertook extensive negotiations with a view to working out the financial implications of my judgment.

[3] These Reasons are issued in connection with a motion by the parties under rule 334.29 of the *Federal Courts Rules*, SOR/98-106 (Rules) seeking Court approval for their negotiated settlement of this class action. Counsel for the class also seek Court approval for their claim to legal fees under Federal Courts Rule 334.4 payable from the proceeds of the proposed settlement. That claim is opposed by counsel for the Defendant on the ground that the proposed amount of legal fees is excessive.

General Principles Applicable to Class Action Settlements

[4] Court approval of a class action settlement is appropriate where, in the overall circumstances, it is deemed to be fair and reasonable and in the best interests of the class as a whole: see *Bodnar v The Cash Store Inc.*, 2010 BCSC 145 at para 17, [2010] BCJ no 192. In *Chateauneuf*

v Canada, 2006 FC 286 at para 7, [2006] FCJ no 363, Justice Danièle Tremblay-Lamer, described the general approach to the approval of a class settlement in this Court:

> 7 The Court with a class action settlement before it does not expect perfection, but rather that the settlement be reasonable, a good compromise between the two parties. The purpose of a settlement is to avoid the risks of a trial. Even if it is not perfect, the settlement may be in the best interests of those affected by it, particularly when the risks and the costs of a trial are considered. It is always necessary to consider that a proposed settlement represents the parties' desire to settle the matter out of court without any admission by either party regarding the facts or regarding the law.

[5] It is not open to the reviewing Court to rewrite the substantive terms of a proposed settlement nor should the interests of individual class members be assessed in isolation from the interests of the entire class: see *Dabbs v Sun Life Assurance Co. of Canada*, [1998] OJ no 1598 at paras 10-11, (available on QL).

[6] It will always be a particular concern of the Court that an arms-length settlement negotiated in good faith not be too readily rejected. The parties are, after all, best placed to assess the risks and costs (financial and human) associated with taking complex class litigation to its conclusion. The rejection of a multi-faceted settlement like the one negotiated here also carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost.

The Terms of the Proposed Settlement

[7] The settlement proposed by the parties includes a number of advantageous financial and administrative terms. The value of the financial settlement has been estimated at more than $887 million which includes the net present value of monies payable in the future to disabled class

members. The financial effect of the settlement has also been extended voluntarily by the Defendant by the removal of similar offsets of *Pension Act* benefits from a number of other federal financial support programs.

[8] The central component of the proposed settlement is the full recovery by approximately 7,500 class members or their families of all amounts unlawfully deducted or which would otherwise have been deducted in the future from their SISIP LTD income. The agreed retroactive recovery of benefits dates back to June 1, 1976, that being the date the *Pension Act* offset began. This part of the settlement resulted from a concession by the Defendant to abandon its limitations defences and to expand the class to include disabled Canadian Forces (CF) members who would otherwise have been left out. The agreement also provides for the recovery of offsets by the spouses and minor children of deceased members in lieu of the cumbersome and complex process of recognizing estate claims.

[9] In addition, the parties have negotiated reasonable rates for pre and post-judgment interest dating back to 1992 totalling more than $80 million as of February 14, 2013. Interest continues to accrue at $1.3 million per month.

[10] It is acknowledged by the parties that the payment of LTD benefits to members of the class will attract income tax. Because SISIP LTD benefits constitute taxable income, the payment of income tax is essentially unavoidable. In order to mitigate the impact of tax on lump sum recoveries, disabled recipients will be permitted to spread their retroactive refunds over the years it would have been payable if that option reduces their tax exposure. Further tax mitigation measures

include a cash top up of 3.27% on retroactive LTD benefits payable to members and the right to deduct legal fees as an expense incurred in the recovery of taxable income.

[11] In recognition of the hardships experienced by some members of the class, the parties have agreed to establish a $10 million bursary fund to be administered over a period of 15 years by the Association of Universities and Colleges of Canada. This fund can be accessed by class members and their families for part-time or full-time study and is expected to generate bursaries of up to $1,300.00 for each eligible applicant.

[12] The parties have also negotiated a streamlined process for administrating the payment of refunds and for resolving future claim disagreements. Specifically, a number of members of the class were subjected to *Pension Act* offsets that exceeded the value of their SISIP LTD benefits. These members came to be identified as "zero sum" members. Because the SISIP administrator had not maintained medical and financial information for zero sum members, it was not possible to readily determine their ongoing eligibility for LTD benefits. This barrier to recovery was resolved, in part, by allowing the SISIP administrator to access medical data from other government sources and by establishing proxy indicators for determining a person's ongoing level of disability. A proxy would include the recognition of "total disability" under other disability programs such as the Canada Pension Plan. For members released after November 30, 1989, the Defendant has agreed unconditionally to treat all zero sum members as disabled during the initial 24 month own-occupation disability period.

[13] For class members who disagree with the Defendant's assessment of disability or with the amount payable a simple and binding appeal process has been established. Class counsel have undertaken to represent those members on any appeal brought before an agreed and experienced arbitrator who will be paid by the Defendant.

[14] The proposed settlement also provides for the appointment of a Monitor who will be responsible for assessing the Defendant's compliance with its terms. The Monitor will report quarterly and will be paid by the Defendant.

[15] Finally, save for a remaining issue between the parties concerning the calculation of Consumer Price Index (CPI) benefits payable under the SISIP policy (to be resolved later by the Court), the settlement provides for a release of the Defendant from further liability in connection with claims arising, or which could have been raised, in this litigation.

The Views of Class Members

[16] The Preliminary Notice of Settlement invited class members to write to counsel either supporting or opposing the terms of settlement. Two hundred and sixty-nine responses were received by counsel and submitted by affidavit to the Court. A small number of class members wrote directly to the Court. At the hearing of the motion to approve the proposed settlement, a number of class members appeared and, of those, several addressed the Court. The vast majority of those submissions expressed strong approval of the terms of settlement including the claim to legal costs. Only 15 of the written submissions expressed general disagreement with the settlement and

another 18 opposed only the claim to legal fees. A further 30 class members advocated for the Defendant to satisfy the claim to legal fees advanced by class counsel.

[17] The overwhelming tone of the submissions to the Court was complimentary to Mr. Manuge and to his legal team and strongly supportive of the settlement. A few examples will be sufficient to illustrate this general view. George Hrynewich wrote the following:

> As for the settlement, I will get back what was clawed back by SISIP. The interest amounts are fine as far as I am concerned, because honestly, I probably would have spent the money and not made any interest on it. Lawyer fees—of course everyone would like to see things like this lower, but I was expecting them to be higher, so I feel that they are fair. They did a lot of work for us and put up with a lot. It would be nice to see them give Mr. Manuge a little bit more for his work in starting the suit and carrying on with it. We cannot escape income tax, and I would rather see them hold back too much now and have the Canada Revenue Agency (CRA) give me a refund later, than have to scramble to pay money back to CRA next year. In summary, I have to say that I am satisfied that we accomplished the main goals that I wanted to see accomplished when I joined this lawsuit. I did not join this expecting to get rich and I think the settlement is reasonable and fair.
>
> Perhaps most of all I would like to see this end, and end while we are ahead. If someone could promise me that I would definitely get more money, but that it would take several more years and might cause us to lose some of the other things we have gained, I would say no thanks. You would have to be able to guarantee that I would get hundreds of thousands of dollars, if not a million, before I would say that I would even think about it. But this is just my opinion and I will respect the opinion of the majority of the suit members, as well as the judgment and decisions of the court.

Marcel Pellerin wrote:

> Hello my name is Marcel Pellerin and I vote YES to accept this settlement proposal.

> I would have liked more tax relief, however I am very pleased that this whole thing is almost over.
>
> The stress anxiety and physical illness that this has caused me over the last 10 years is more than I could continue to bare.
>
> Thank you so very much to our legal team and Mr. Manuge. You have achieved a wonderful thing for the class [i]ncluding me and my teenage daughter.

Dana Morris wrote:

> I would like to thank you and your staff for the work you have done on our behalf with this Class Action. This was a monumental task that clearly was not for the weak. Your diligence and professionalism should set a standard for all to emulate.
>
> I still find it difficult, no, impossible to guess-estimate the amount that would come our way however at this point it is a mute point! Had it not been for the courage of Dennis Manuge and Peter Driscoll, as well as their determination to see it through, we (the class members) would have absolutely nothing to look forward or dream about.
>
> I, as a class member and disabled Veteran, with my family, support the Agreement and the proposed legal fee percentage as outlined by McInnes Cooper in the email dated 9 January 2013 sent to all Class Members.
>
> I can't say this enough, "THANK YOU so very much" for giving us hope and "a little piece of ourselves back".

[18] Given the strong support for the settlement expressed by the vast majority of class members who made submissions and the general notoriety of this case and its outcome within the community of disabled veterans, I am satisfied that the settlement is viewed very favourably by almost all class beneficiaries. Certainly, if there was general dissatisfaction with the settlement, I would have

expected that more than a few members of the class would have expressed their concerns to the Court.

[19] It is apparent from the submissions received from class members that some of the opponents to the proposed settlement mistakenly believe that the Court has the authority to unilaterally amend its terms. With the exception of the approval of legal fees under Federal Courts Rule 334.4, the Court has no authority to alter a settlement reached by the parties or to impose its own terms upon them. The Court is limited to either approving or rejecting a settlement in its entirety.

[20] Three recurring issues of concern to some class members had to do with the payment of income tax on retroactive payments of LTD income, the unwillingness of the government to contribute to the legal costs incurred by the class and the absence of an award for general or punitive damages. A few individuals had specific concerns including the mother of a deceased veteran who objected to the exclusion of extended family from the class.

[21] The concern expressed by a few members of the class about the failure to incorporate a recovery for general damages is not persuasive. This was a breach of contract claim where such recoveries are infrequently recognized and certainly not in substantial amounts. Counsel also point out with some justification that the agreed $10 million bursary fund represents a form of surrogate recovery for the personal hardships experienced by some members of the class over the years. Protecting claims to general damages would also have required class members to produce individual medical evidence and presumably to testify about the hardships they had experienced. In my view

such an approach would have been more time-consuming, expensive and complex than warranted by the benefits that would likely have been generated.

[22] The criticism that the settlement ought to have imposed upon the government an indemnity obligation for legal costs fails to recognize that in this Court legal costs are not, except in exceptional circumstances, payable by either party to a class proceeding regardless of the outcome: see Federal Courts Rule 334.39. This provision was adopted to eliminate a practical barrier to the commencement of a class proceeding by a representative plaintiff who might otherwise be exposed to a substantial costs award if the case was ultimately unsuccessful. In the absence of any provision in our Rules for the separate payment of costs, it was not unreasonable for the parties to negotiate a settlement that provided for legal costs to be borne out of the settlement proceeds.

[23] A few members of the class complain that income tax will be payable on their retroactive LTD payments. Taxes are, however, the inevitable consequence of the application of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp.), and the manner in which SISIP LTD premiums were paid over the years. Under the proposed settlement, class members are entitled to a 3.27% gross up for taxes and will be able to elect to receive benefits over time if that creates a more favourable tax outcome. These measures will mitigate the impact of income tax on taxable recoveries. It must also be kept in mind that had class members received their full LTD benefits in accordance with the SISIP policy that income would have been taxable at the time of receipt.

[24] No class action settlement will ever be perfect. Recovery is always limited to those who meet the definition of a class member under the terms of certification. In cases like this involving

thousands of unique individual claims, it is impossible and undesirable to treat every beneficiary equally in either financial or administrative terms. It is inevitable that a settlement like this one will leave a few people behind or benefit some ahead of others. In this case those distinctions are of insufficient weight to reject the proposed settlement.

[25] Notwithstanding the concerns expressed by a few members of the class, I have no hesitation in approving the proposed settlement of this action. It is a generous, complete and thoughtful resolution of the issues that were raised in the litigation and it will provide substantial financial assistance to thousands of disabled CF veterans and their families. The terms of settlement are also the product of extensive negotiations between the parties. It would not serve the interests of the vast majority of class members – many of who are suffering financially – to send the parties back into further discussions to address the concerns of a handful of those who oppose the arrangement. It is also a settlement that is supported by the vast majority of class members who took the opportunity to make their views known to the Court. In short, it represents a fair and reasonable compromise that is in the best interests of the class as a whole and it is, accordingly, approved.

[26] I would be remiss if I failed to recognize legal counsel, Mr. Manuge and the Government of Canada for the generosity of spirit and compromise that so obviously motivated their negotiations and which led to the resolution of the long-standing grievance that was at the heart of this case. Without the tenacity of Mr. Manuge, the essential goodwill of the parties and the hard work of all legal counsel involved, this settlement would not have been possible.

[27] The claim by class counsel to legal costs is a different matter. The parties do not agree on that issue and, in any event, it is left to the Court under Rule 334.4 to determine the appropriate amount for those costs.

[28] At the heart of the application of Rule 334.4 is the requirement that legal fees payable to class counsel be fair and reasonable: see *Parsons et al v Canadian Red Cross Society et al*, 49 OR (3d) 281, [2000] OJ no 2374 [*Parsons et al*]. In determining what is fair and reasonable the Court must look at a number of factors including the results achieved, the extent of the risk assumed by class counsel, the amount of professional time actually incurred, the causal link between the legal effort and the results obtained, the quality of the representation, the complexity of the issues raised by the litigation, the character and importance of the litigation, the likelihood that individual claims would have been litigated in any event, the views expressed by the class, the existence of a fee agreement and the fees approved in comparable cases. Some authorities have also recognized a broader public interest in controlling the fees payable to the legal profession: see *Endean v Canadian Red Cross Society*, 2000 BCSC 971, at para 73, 2000 BCJ no 1254 [*Endean*].

The Quality of Legal Representation and the Results Achieved

[29] The certification and liability determinations that provided the impetus for this settlement resulted from the skillful and tenacious advocacy of class counsel in the context of an adversarial contest involving equally skilled and tenacious opposing counsel. The issues were thoroughly briefed and persuasively argued and there is no question that the high quality of the legal work performed by class counsel led to the favourable liability outcome.

[30] The terms of settlement are equally impressive. Every dollar deducted will be returned to class members or their families with appropriate interest. Notwithstanding the impact of legal fees, the amounts recovered by class members will provide meaningful and, in many cases, badly needed compensation. The Defendant's withdrawal of its limitation defences will add many more claimants to the class and will allow for recoveries dating back to 1976. A $10 million bursary program will be put in place as a surrogate for potential claims to general damages. As discussed above, general damages are notoriously difficult to prove in breach of contract cases. That is particularly true for cases where claimants are medically disabled and the psychological impacts arising from financial deprivation are often hard to isolate from other underlying conditions. The solution adopted by the parties to resolve this issue was novel and creative. The same can be said for the inclusion of surviving spouses and dependant children in lieu of the immense difficulties that would arise from involving the estates of deceased members. Simple and cost effective measures have been put in place to resolve any ongoing disputes about entitlements and it is anticipated that the take-up rate for beneficiaries will approach 100%. These are results that would not have been reasonably contemplated by anyone at the outset of this litigation. Indeed, if settlement negotiations had been undertaken before my judgment was rendered, a reasonable outcome would have been substantially less favourable to the class than this one. The excellence of the legal representation provided by class counsel and the success that was achieved in the settlement negotiations are factors that favour a significant premium in the assessment of costs.

Litigation Risk

[31] There can be no doubt that legal counsel for the class exposed themselves to a significant level of risk in taking on this case. Once the case was finally certified as a class action, counsel

were committed to bringing it to a final conclusion on behalf of all of the members of the class: see *Slater Vecchio LLP v Cashman*, 2013 BCSC 134, [2013] BCJ no 151.

[32] In the ordinary course of this type of litigation, counsel could expect to be engaged for many years. In this case tens of thousands of pages of documents were expected to be discoverable and extensive witness examinations and other pre-trial work was contemplated. When class counsel accepted the retainer there was no expectation that the determinative legal issue would be resolved in a summary way and that no appeal would be taken from that decision. Given the Defendant's adversarial approach to the motion to certify, counsel would have assumed that they were exposing themselves to a financial risk measured in the potential loss of professional time and disbursements of probably tens of millions of dollars. This was also not a case where the Defendant's liability approached a level of certainty. The claim to Charter relief was doubtful at best and the point of contractual interpretation that ultimately drove the settlement was neither a sure thing nor invulnerable to appeal. While there was likely a political dimension to the ultimate settlement, it is doubtful that much, if anything, would have been recovered if my liability ruling had been unfavourable to the class and had then withstood an appeal.

[33] Even the motion to certify this action exposed counsel to considerable risk. Although my decision to certify was reinstated by the Supreme Court of Canada, the likelihood of obtaining leave to that Court was only about one in ten. Furthermore, that decision turned on a contentious issue of jurisdictional law that had long been unresolved in the national jurisprudence. Counsel for Mr. Manuge undertook a three-year process to achieve certification. They also assumed tens of

thousands of dollars of out-of-pocket expenses and agreed to indemnify Mr. Manuge for his potential exposure to legal costs before the Supreme Court of Canada.

[34] The litigation risk that class counsel assumed is also illustrated by the fact that the grievance that was at the centre of the case had been well-known for more than 30 years and had attracted no litigation either individually or as a class proceeding until Mr. Manuge's claim was taken up by Mr. Peter Driscoll in 2007.

[35] Counsel for the Defendant point out that the litigation risk decreased significantly once a decision was taken not to appeal my judgment. In the result, it is argued that the value of professional time incurred by class counsel after that point ought to be discounted.

[36] Counsel for the class argues that the Defendant's initial opposition to the proceeding was the cause of much of the legal work that was incurred. According to this view, the Defendant's initial conduct in the defence of the claim diminishes the weight of its current argument that the claim to legal fees is excessive.

[37] At this stage, I am not particularly concerned about the positions taken by the parties before the settlement was achieved. It is sufficient to observe that the litigation risk assumed by class counsel is primarily measured by the risk they assumed at the outset of the case. This point was made by Justice Warren Winkler in *Parsons et al*, above, in the following passages:

> [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 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…
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> …
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> [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.

[38] In my view the litigation risk assumed by class counsel was substantial and almost certainly exceeded the tolerance level of others. This is a factor favouring a premium costs recovery, in part, to motivate counsel to take on difficult class litigation involving potentially deserving claims that might not otherwise be pursued.

Time and Effort Expended

[39] The affidavit of lead counsel, Mr. Driscoll, discloses that the two firms retained on behalf of the class worked for more than 6 years (involving 20 legal professionals) and amassed more than 8500 hours of unbilled time. Considerable further work remains including the direct supervision of the refund process and monitoring and assisting with individual appeals. The efforts undertaken to

date to respond to enquiries from hundreds of highly engaged class members have been considerable and will undoubtedly continue. Out-of-pocket expenses are now approaching $200,000.00 and are estimated to exceed $260,000.00 before the case is concluded. All of the file expenses have been borne by counsel and were, in considerable measure, at risk. Class counsel value their current unbilled time at more than $3.2 million. This seems to me to be a reasonably fair valuation. However, it is important to recognize that much of the billable time expended and all of the file disbursements have been carried by these law firms for several years and that considerable work remains to monitor and manage the individual claims of class members.

The Importance of the Litigation to the Class

[40] This was important litigation dealing with a long-standing, contractual grievance involving thousands of disabled CF veterans. Since 1976 the practice of deducting *Pension Act* disability payments from SISIP LTD benefits had been the source of hardship drawing considerable third-party criticism. Until my liability judgment was delivered, the Government of Canada forcefully defended its position. The settlement of this class action will provide meaningful compensation for several thousand deserving CF veterans and will likely represent the fourth highest financial payout in Canadian class action history. These are factors that favour the award of a costs premium to class counsel.

The Public Interest

[41] If there is a public interest that pertains to matters such as this, it is more properly situate around the interests of the class than the supposed interest of the general public in controlling compensation for lawyers engaged in class litigation. In my view it is relevant in assessing the

reasonableness and fairness of class action legal fees to consider the impact of those fees on the individual recoveries of class members. This, I think, is what was of concern in *Killough v Canadian Red Cross Society*, 2007 BCSC 941, [2007] BCJ no 1486 [*Killough*], where at para 8 the Court referred to the impact of the agreed fee on the fund that would otherwise be available to the class.

[42] For someone like Mr. Manuge whose claim to retroactive LTD benefits is estimated at less than $10,000.00, the deduction of legal fees of about $1,500.00 could not be considered to be unfair or unreasonable. However, for a CF veteran suffering from a major, work-limiting disability, the deduction of more than $37,000.00 from an award of $250,000.00 will result in a meaningful financial deprivation. In short, those who are arguably the most in need of their retroactive recoveries are the ones carrying most of the burden of legal costs. This is a factor that supports a reduction in the award of costs to class counsel.

The Contingency Fee Agreement, the Claim to a Percentage Recovery and the Use of a Multiplier

[43] I accept that a contingency fee agreement entered into between legal counsel and a representative plaintiff in a proposed class proceeding may be a relevant and, sometimes, a compelling consideration in the final assessment of legal fees. It strikes me, nonetheless, that such a fee agreement will not necessarily be a primary consideration because it is most often executed at an early point in time when very little is known about how the litigation will unfold. I made essentially

the same point in my decision to certify this proceeding in *Manuge v Canada*, 2008 FC 624 at para 34, [2008] FCJ no 787:

> [34] One other concern raised by the Crown involves the magnitude of the contingency fee that would be payable under the terms of the Retainer Agreement entered into between Mr. Manuge and his legal counsel. That Agreement provides for a fee of 30% of any favourable financial judgment plus disbursements. The Agreement also duly notes that the fee payable "shall be subject to approval by the Court". There is certainly nothing inappropriate about a contingency fee arrangement in a case like this one where the outcome is unpredictable and where the amounts individually in issue appear insufficient to support litigation. The amount of fee payable at the end of a class proceeding is, of course, subject to assessment by the trial court and must bear some reasonable relationship to the effort actually expended and to the degree of risk assumed by counsel. I have no reservations about the ability of the Court to deal with this issue, if necessary, in the exercise of its supervisory jurisdiction.[1]

[44] When Mr. Manuge entered into the fee agreement with his legal counsel, no one knew that the issue of certification would ultimately reach the Supreme Court of Canada or that the determinative liability issue would be finally resolved after a short hearing on agreed evidence and without extensive discovery or a trial. Similarly, no one could have accurately predicted the outcome of the negotiations that led to the settlement now before the Court including the willingness of the Respondent to abandon what was likely a viable, if partial, limitations defence.

[45] The contingency fee agreement that was executed by Mr. Manuge and which purported to award legal fees of 30% of amounts recovered on behalf of members of the class is of no particular

[1] Also see *Parsons et al v Canadian Red Cross Society et al*, 49 OR (3d) 281 at para 58, [2000] OJ no 2374.

significance to this assessment. That is so because Mr. Manuge and class counsel have essentially walked away from the agreement. What they are now seeking is the approval of legal fees representing approximately 7.5% of the gross value of the settlement inclusive of past and future benefits. It is also proposed that the fees be payable wholly from the past amounts due to class members which would represent about 15.7% of the total value of the retroactive entitlements of class members.

[46] Apart from the obvious fact that the fees now claimed represent about one-quarter of the amount provided for in the initial contingency fee agreement, I was not provided with a clear explanation for how the figure of $65 million was reached beyond the observation that the figure was set at less than the amount of accrued interest included within the settlement. The figure claimed for legal fees is thus not much more than a number and a very large number at that.

[47] The use of percentages and multipliers to assess class action legal fees is appropriate, but mainly to test their reasonableness and not to determine absolute entitlement. Each approach has its place. The multiplier appears to be a tool better suited to cases where the social benefits achieved may be greater than the amounts recovered and where a percentage approach would likely under-compensate counsel. In the so-called common-fund cases the use of a percentage appears to be preferred because it tends to reward success and to promote early settlement.

[48] In my view there is a danger in placing undue emphasis on either a multiplier or a percentage recovery in a case like this. My concern is the same as that expressed by Justice Ian Pitfield in *Killough*, above, in the following passages:

> 45 With respect, other factors do not elevate the contribution of counsel in this action to the level of contribution of counsel in relation to the earlier settlement. While time accumulated on the matter and comparative multipliers are relevant and useful, caution must be exercised when using them as benchmarks for the assessment of the reasonableness of any fee. The principal concern is that there is no means of assessing whether the accumulated time was necessary and represented a reasonable and productive use of counsel's time. Class actions must not represent an open-ended invitation to accumulate time without regard to productivity.
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> 46 The accumulation of substantial time charges in relation to a legal matter does not always justify compensation at base rates or multiples thereof. Conversely, low time endeavours may justify fees that are many multiples of the book value of accumulated time.
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> 47 Multipliers and percentage of recovery comparisons are completely arbitrary. The efficacy of multipliers is affected by the reasonableness, which cannot be assessed with any confidence, of the base of accumulated time and hourly rates from which the multiplier is derived. The percentage of recovery comparison is reduced and therefore made to appear more favourable by comparing the total fee to a global settlement amount that included the benefit pool, the administration fund, goods and services tax and provincial sales tax where applicable, and the aggregate of legal fees. Legal fees were included notwithstanding the repeated assertion in affidavits and submissions that legal fees were independent of any other settlement consideration.
>
> 48 In sum, while counsel must be fairly and reasonably compensated for the risk assumed by and the work done on behalf of any class, the assessment of fairness and reasonableness is ultimately more subjective than it is objective.

[49] The Defendant places considerable emphasis on the relatively low value of professional time expended by class counsel and then argues for the use of typical multiplier of 1.5 to 3.5. This seems to me to be overly simplistic and largely insensitive to the factors favouring a premium recovery. The efficiency of counsel in getting to an excellent result is something to be rewarded and not discouraged by the rigid application of a multiplier to the time expended. Here I agree with the

views expressed by Justice George Strathy in *Helm v Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at paras 25-27, [2012] OJ no 2081:

> 25 The proposed fee represents a significant premium over what the fee would be based on time multiplied by standard hourly rates. Is that a reason to disallow it? If the settlement had only been achieved four years later, on the eve of trial, when over a million dollars in time had been expended, would the fee be any more or less appropriate? Should counsel not be rewarded for bringing this litigation to a timely and meritorious conclusion? Should counsel not be commended for taking an aggressive and innovative approach to summary judgment, ultimately causing the plaintiff to enter into serious and ultimately productive settlement discussions?
>
> 26 Plaintiff's counsel are serious, responsible, committed and effective class action counsel. They are entrepreneurial. They will likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here.
>
> 27 For those reasons, I approve the counsel fee.

Also see *Vitapharm Canada Ltd. v F. Hoffmann-La Roche Ltd.*, [2005] OJ no 1117 at para 107, [2005] OTC 208.

[50] It can be equally unhelpful to look for guidance from authorities where legal fees have been approved as a percentage of the amounts recovered. A reasonable fee should bear an appropriate relationship to the amount recovered: see *Endean*, above, at para 80. Cases that generate a recovery of a few million dollars may well justify a 25% to 30% costs award. It is more difficult to support such an approach where the award is in the hundreds of millions of dollars. Presumably that is the reason why class counsel are not relying on the initial contingency fee allowance of 30%. That is also the reason that the three authorities that represent the strongest comparators to this case in terms

of amounts recovered fall at the bottom of the scale of costs awarded in percentage terms: see *Baxter v Canada (Attorney General)*, [2006] OJ no 4968, 83 OR (3d) 481; *Endean*, above, and *Killough*, above.[2] These comparable decisions do not support an award of costs in this case of approximately 7.5% or, in financial terms, $65 million.

Conclusion

[51] Having regard to all of the considerations outlined above, I will approve legal fees in an amount equal to 8% of the retroactive refunds payable to class beneficiaries (including the cancellation of debts owing by class members to Manulife Financial). This figure is approximately 4% of the total value of the settlement. In addition I will approve the deduction of an amount equal to 0.079% of refunds payable to class beneficiaries (including the cancellation of debts by class members to Manulife Financial) as an indemnity for out-of-pocket expenses. Class counsel are also authorized to deduct required goods and services tax, harmonized sales tax and/or provincial sales tax from refunds payable to class beneficiaries and to remit those amounts to the Canada Revenue Agency or to the appropriate provincial agency.

[52] I am satisfied that the above recovery of legal costs is in keeping with the fees approved in the comparable cases. More importantly it represents a sufficient incentive to counsel to take on

[2] In *Baxter*, above, a costs award representing 4.87% of a projected payout of almost $2 billion was approved. This resulted in legal fees of between $85 and $100 million. In *Endean*, above, legal fees of $52,500,000 were approved representing 4.26% of the total amount recovered. In *Killough*, above, legal fees of $37,290,000 were agreed between the parties and were not to be deducted from the settlement proceeds. This figure was approved by the Court – albeit with reservations - and it represented 3.64% of the total award.

high-risk class litigation without, at the same time, unduly impacting on the much-needed recoveries of disabled CF veterans. I am grateful to counsel for their thorough briefing of the relevant jurisprudence and, in particular, to counsel for the Minister who brought the required adversarial balance to the process.

Discretionary Payments

[53] Class counsel have undertaken to create a fund for veterans in need of legal assistance with the allocation of $1,003,420.00 from their costs award. In addition they propose to pay to Mr. Manuge an honorarium of $50,000.00 in recognition of his significant contribution to the prosecution of this action. Several members of the class argued that Mr. Manuge ought to receive more than $50,000.00. However, to the extent that the Court has any control over the use of costs awarded to counsel, I do not think it appropriate that Mr. Manuge receive more than the amount described in the Preliminary Notice of Settlement sent to class members. That was the basis on which the proposal would have been considered by class members and it is not desirable that a unilateral and *ex post facto* alteration be made at this stage. The proposal to establish a legal assistance fund for veterans is laudable and, if Court approval is required, it, too, is given.

[54] No award of costs is made in connection with this motion.

[55] I will leave it to counsel to make the required changes to the proposed settlement Order to be submitted to the Court for execution and issuance.

ORDER

THIS COURT ORDERS that the settlement of this action is approved on the terms proposed by the parties.

THIS COURT FURTHER ORDERS that the legal costs payable to class counsel are approved on the following terms:

(a) for legal fees, by the deduction of an amount equal to 8% of the refund and the cancellation of debts, if any, owing to Manulife Financial payable to each eligible class beneficiary;

(b) for disbursements, by the deduction of an amount equal to 0.079% of the refund and the cancellation of debts, if any, owing to Manulife Financial payable to each eligible class beneficiary; and

(c) by the deduction from refunds payable to class beneficiaries and the remission of all required goods and services tax, harmonized sales tax and/or provincial sales tax.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-463-07
STYLE OF CAUSE:	MANUGE v HMTQ
PLACE OF HEARING:	HALIFAX, NS
DATE OF HEARING:	February 14, 2013
REASONS FOR JUDGMENT:	BARNES J.
DATED:	April 4, 2013

APPEARANCES:

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