Federal Court  Cour fédérale

Date: 20191129

Docket: T-2169-16

Citation: 2019 FC 1525

CLASS PROCEEDING

BETWEEN:

GARRY LESLIE MCLEAN,
ROGER AUGUSTINE,
CLAUDETTE COMMANDA,
ANGELA ELIZABETH SIMONE SAMPSON,
MARGARET ANNE SWAN AND
MARIETTE LUCILLE BUCKSHOT

Respondents/Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

Respondent/Defendant

and

LISA ABBOTT OF ABBOTT LAW OFFICE

and

NICHOLAS W.K. RACINE OF BERGERMAN SMITH LLP

and

CARL H. SWENSON OF CHS LAW

Moving Parties

REASONS FOR ORDER

PHELAN J.

I. Introduction

[1] Three motions were brought to obtain Court approval for the respective law firms [non Class Counsel] to charge fees and disbursements under a standard contingency fee retainer agreement to those Survivor Class Members who wish assistance with the claims process.

[2] The three motions were heard together and these reasons are applicable to each motion except where noted. The respective applicants for the Orders are legal counsel Lisa Abbott [Abbott], Nicholas Racine [Racine] and Carl Swenson [Swenson] collectively referred to as the Moving Parties.

[3] The root of these motions is Clause 13.04 of the Settlement Agreement governing the Indian Day School settlement and approved by the Court on August 19, 2019.

> **13.04 Pre-Approval of Fees Required**
>
> No legal fees or disbursements may be charged to Survivor Class Members or Family Class Members in respect of compensation under this Settlement or any other legal advice relating to this Settlement by legal counsel other than Class Counsel without the prior approval of such fees or disbursements by the Federal Court on a motion under Rule 334.4 of the Federal Courts Rules on notice to the Parties.

II. Background

[4] The Settlement Agreement provided for a sum of moneys to be paid to Class Members, a claims process and in addition to Class Counsel's fees and disbursements for the litigation – which fees were Court approved – a further payment by Canada to Class Counsel for post-settlement implementation including free legal assistance for Class Members for a period of four years.

[5] The payment of legal fees is governed by Rule 334.4 of the *Federal Courts Rules*, SOR/98-106:

Approval of payments	**Approbation des paiements**
334.4 No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.	**334.4** Tout paiement direct ou indirect à un avocat, prélevé sur les sommes recouvrées à l'issue d'un recours collectif, doit être approuvé par un juge.

[6] Clause 13.04 is a more specific and nuanced provision consistent with Rule 334.4. While the Rule regulates payments to a solicitor, the clause regulates the charging of fees and disbursements by non Class Counsel. Both require prior approval of the Court.

[7] The matter of legal fees was a constant theme through the settlement approval process. At paragraphs 135 to 141 (*McLean v Canada*, 2019 FC 1075 [*McLean*]), the Court addressed some of the matters being raised in respect of legal fees:

[135] Legal Counsel: This issue was a recurring theme particularly from objectors who supported or were inspired by legal counsel and who argued that they should be able to choose their own counsel. The role of Class Counsel (indeed counsel generally) is not to provide psychological help. This is left to other health and cultural resources identified in the affidavits of Chief Roger Augustine and Chief Norman Yakelaya.

[136] The Settlement attempted to avoid the problems of the Independent Assessment Process in IRSS and its trial-like proceeding. This is intended to avoid over lawyering of the claims process.

[137] Again, what is seen as a problem in having Class Counsel assume the post-settlement role is seen by many as a benefit. Free legal assistance is on balance a positive thing. Class Counsel will be able to help with document collection and other processing which was of concern to some objectors.

[138] Gowling is a large multi-jurisdictional firm. The Settlement can be said to put under one firm that which would have been done under the consortium model of several smaller firms usually present in this type of litigation. Gowling also has contacted and developed a list of six firms that can act as allied counsel in other parts of the country where it may need assistance. The plea by some of the law firms who are themselves excluded from the settlement process that they should be paid to help individuals apply for compensation or otherwise be Gowling's representative is untenable and not within the Court's jurisdiction.

[139] In the course of the hearing and the pleadings filed, issues arose with respect to some of the "excluded law firms" and their efforts to have Class Members sign retainers. There were issues as well as to whether some of the misinformation which seemed present for some Class Members may have emanated by erroneous communications from these firms.

[140] The Court record (Canada's motion record) contains correspondence with the profession's provincial regulators. It is not for this Court to deal with these issues but the Court file is public and is available to the regulators if deemed by them necessary.

[141] Relevant to this Court's function is that, contrary to some opposition, Class Members can have their own counsel. However, they are likely to have to pay for that which is free from Gowling. The necessity of Court approval before retaining other counsel is

> designed not to limit choice but to ensure that some of the past problems with such retainers do not occur again.

[8] The Court's reference to provincial regulators included a letter from the Law Society of Manitoba on behalf of itself, Alberta, Yukon, Saskatchewan, Ontario and Manitoba.

[9] In discussing these law societies' views on the Indian Day School settlement, Manitoba made the following pertinent comments:

> My understanding of the claims process leads to the conclusion that, when completing the application form for compensation, most claimants would not require legal advice. However, if a claimant wishes to obtain assistance in completing the application form, class action counsel is to provide that assistance at no cost to the claimant.
>
> Finally, if the claimant chooses to use a different lawyer, he or she may do so at his or her own cost. However, no legal fee can be charged to a claimant without the prior approval of the court.
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> …
>
> In our view, any lawyer that was approached to assist an individual in making a claim under the proposed settlement would be required to advise the individual that he/she can obtain the services to complete the application form at no cost. The lawyer also would be obliged to disclose to the individual the names of the lawyers that will provide that service at no charge. If a lawyer were to fail to make such disclosure, the lawyer would be breaching the obligation to act with integrity, the obligation of honesty and candour that is owed to the client and would be preferring his/her own interest over the interests of the client.
>
> …
>
> Where a lawyer's only involvement is to assist in the completion of an application form, there is no real risk of loss to the lawyer. Extensive legal services are not contemplated or required. In that type of scenario, it would be difficult to justify the charging of fees on a contingent basis. In the event that a lawyer is retained to advance a more complicated and challenging claim, he/she is not

> prevented from charging fees on that basis. However, it is appropriate that the fee arrangement be reviewed and approved by the court as contemplated in the settlement.

[10] The Moving Parties now seek to act and charge for assisting Survivor Class Members (not Family Class Members) in a claims process that is intended and is designed to be easy. The standard retainer agreement contains a grid for fees dependent on the Claim Level based on $350 per hour plus disbursements and taxes with a maximum fee amount of $500 to $10,000. The fee is contingent upon success in the claim process, and the rate is a flat fee no matter who performs the work or how much effort is involved.

Claim Level	**Compensation**	**Legal Fees Charged**	**Maximum Amount**
Level 1	$10,000	$350/hour	$500
Level 2	$50,000	$350/hour	$2,500
Level 3	$100,000	$350/hour	$5,000
Level 4	$150,000	$350/hour	$7,500
Level 5	$200,000	$350/hour	$10,000

[11] In the Abbott motion, the Moving Party relied on an affidavit of Louie Mercredi who attested to his favourable impression of Abbott, uncertainty as to the level of service to be provided by Class Counsel and concern for the challenging nature of the claims form. He did not say he would retain Abbott.

[12] In the Swenson motion, Sandra Bighead attested to her knowledge of Swenson, some alleged difficulty in communicating with Class Counsel and that she would retain Swenson.

Bighead was and is a contract bookkeeper with the Swenson firm, a fact which colours her comments of support.

[13] In the Racine motion, Sandra Bighead was again the affiant and aside from her positive impression of Racine, she had little to add.

[14] The Plaintiffs opposed these motions principally on grounds of prematurity, lack of evidence and concern for the Class Members. The Defendant opposed the motions for essentially the same grounds.

III. Analysis

[15] There is a dearth of authority on this type of situation. In regards to the Sixties Scoop litigation, Justice Mosley in *Riddle v Canada* (July 26, 2019), Ottawa, T-2212-16 (Federal Court), and I in *Riddle v Canada*, 2019 FC 1494 [*Riddle*], dismissed a motion for fee approval for work which had actually been performed. In the latter decision, counsel was given the opportunity to refile his motion on a better record.

A. *Prematurity*

[16] I concur with the Plaintiffs and the Defendant that this motion is premature. No work has been performed and the Court has no factual basis upon which to approve the proposed fees.

[17] What the Moving Parties seek is the Court's "seal of approval" on a fee quote to unspecified Survivor Class Members. Approval of this marketing effort by the Moving Parties is not something that a court should endorse. It would amount to an advance determination of the appropriateness of the fees without having any factual basis.

[18] Rule 334.4 and Clause 13.04 respectively provide that before a payment can be made or can be charged for services by non Class Counsel, the payment/charge must be approved by the Federal Court. This suggests an approval process after the services have been performed.

[19] *Manuge v Canada*, 2013 FC 341, established that fees are to be "fair and reasonable". This was said in the context of Class Counsel fees after the legal services have been provided. A different and lower standard for non Class Counsel cannot be justified on this record.

[20] In coming to a conclusion on "fair and reasonable", this Court's jurisprudence establishes a single analysis of multiple factors dependent on the particular facts of a case. The factors were summarized in *McCrea v Canada*, 2019 FC 122 at para 98:

> [98] The factors to be considered in assessing the reasonableness of Class Counsel's fees have been set out in recent jurisprudence (e.g. *Condon* at paras 82-83, *Merlo* at paras 78-98, *Manuge* at para 28) and include: the results achieved, the risks taken, the time expended, the complexity of the issues, the importance of the litigation or issue to the plaintiff, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of Class Members to pay for the litigation, the expectations of the class, and fees in similar cases.

[21] As I held in *McLean*, the factors are not exhaustive but result achieved and risk undertaken are critical in a contingency fee analysis. They would be factors in even a more traditional billing arrangement.

[22] As noted earlier, the Moving Parties' retainer is a contingency fee arrangement where nothing is paid if a claimant is unsuccessful but a substantial hourly fee is charged regardless of who in the law firm provides the services.

[23] In this regard, the cautionary note of the Law Society of Manitoba is pertinent:

> Where a lawyer's only involvement is to assist in the completion of an application form, there is no real risk of loss to the lawyer. Extensive legal services are not contemplated or required. In that type of scenario, it would be difficult to justify the charging of fees on a contingent basis. In the event that a lawyer is retained to advance a more complicated and challenging claim, he/she is not prevented from charging fees on that basis. However, it is appropriate that the fee arrangement be reviewed and approved by the court as contemplated in the settlement.

[24] While there are outstanding matters holding up implementation and thus the commencement of the claims process, the Court's concern about prematurity is centred on the principle that the assessment of the fairness and reasonableness of the proposed fees can only be made after completion of the legal work.

[25] As noted earlier, the Court cannot give an advanced ruling on the legal fees. There is no factual basis upon which the Court can make the required determination.

It may be that there are appropriate cases for an exception to the requirement that the work be performed before court approval but these motions have not been advanced on this basis.

[26] Fee approval post-work is the norm. The cases relied on by the Moving Parties do not assist on the facts here. Post-work approval is imposed on Class Counsel for its post-implementation fees and disbursements on a quarterly basis. The Moving Parties have not advanced any reason why a similar regime should not be applicable to non Class Counsel.

B. *Insufficiency of the Evidence*

[27] This motion can be disposed of on the grounds of prematurity. What can be said about the evidence is that it did not address the factors which the Court must consider. The affiant's belief that the fees are "fair and reasonable" is opinion evidence which does not assist the Court.

[28] While objection was taken to the hearsay nature of much of the evidence, hearsay is generally permitted on motions under Rule 81(1).

[29] I do not find that a class member needs to establish that Class Counsel is failing in their duties to Class Members to justify motions under Rule 334.4 or Clause 13.04. The right to seek one's own counsel is clearly contemplated in Clause 13.04. However, any suggestion of such a failure has not been made out.

C. *Concerns for the Class*

[30] Class Counsel raised concerns that having non Class Counsel injected into the administration of the claims process so early in that process could lead to confusion within the Class, particularly with regard to respective responsibilities, communications and interpretation.

[31] While there may be benefits to unity of counsel post-approval, it is not a requirement of the Settlement Agreement. Insofar as the ongoing responsibilities of Class Counsel are concerned, any one retaining non Class Counsel would be effectively releasing Class Counsel of any ongoing responsibilities to them. This is a matter not addressed by the Moving Parties but any retainer of non Class Counsel would have to outline the consequences of such a retainer on the usual duties owed by Class Counsel to the respective Class Member.

[32] In *Riddle*, the Court referred to the desirability of proof that a fee arrangement complies with the legal profession's standards. Addressing issues of Class Counsel's ongoing responsibilities should be considered in any future such motion. No evidence of such compliance was established on these motions.

IV. Conclusion

[33] For these reasons, the motions will be dismissed. As neither the Plaintiffs nor the Defendant asked for costs, none will be ordered. Separate orders will be issued.

"Michael L. Phelan"
Judge

Ottawa, Ontario
November 29, 2019

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2169-16
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PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
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REASONS FOR ORDER:	PHELAN J.
DATED:	NOVEMBER 29, 2019

APPEARANCES:

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Lisa Abbott Nicholas W.K. Racine Carl H. Swenson	FOR THE MOVING PARTIES

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