

Federal Court



Cour fédérale

Date: 20220818

Docket: T-402-19

T-141-20

T-1120-21

Citation: 2022 FC 1212

Ottawa, Ontario, August 18, 2022

PRESENT: Madam Justice McDonald

CLASS PROCEEDINGS

Docket: T-402-19

BETWEEN:

**XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his
litigation guardian, Jonavon Joseph Meawasige),
JONAVON JOSEPH MEAWASIGE**

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-141-20

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

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-1120-21

BETWEEN:

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

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

INTERIM ORDER AND REASONS

[1] On this Motion, filed August 15, 2022, the Plaintiffs seek an interim Order against non-parties as follows:

- (i) an interim and interlocutory Order that no legal professionals, other than class counsel appointed by this Court, the Plaintiff Assembly of First Nations [AFN], or the Court-appointed administrator, Deloitte LLP, 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
- (ii) an interim and interlocutory Order that the websites of the Consumer Law Group [CLG] and any other such websites containing communications to class members relating to these class proceedings be removed upon service of the Court's Order herein, 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.

[2] In support of their Motion, the Plaintiffs filed the following Affidavits:

- a. Affidavit of Janice Ciavaglia affirmed on August 15, 2022;
- b. Affidavits of Wenxin Yu affirmed on August 15, 2022;
- c. Affidavit of Kenneth Dennis Brady Dixon sworn on August 11, 2022; and
- d. Affidavit of Kim Blanchette sworn on August 15, 2022.

[3] CLG was served with the Motion and filed an Affidavit of Andrea Grass sworn on August 16, 2022. CLG also filed a letter dated August 16, 2022, agreeing to the interim Order.

I. Background

[4] By way of brief background, the underlying class proceedings relate to harms caused by the discriminatory provision of child and family services and essential services to First Nations' children. The class members are children and young adults who have experienced homelessness, substance misuse, disabilities, and encounters with the criminal justice system. The First Nations class members are described by AFN as "some of the most vulnerable individuals in Canadian society".

[5] The parties reached a Final Settlement Agreement (FSA) on June 30, 2022, which, if approved by the Court, will provide \$20 billion in compensation to the class members. The Court approval hearing for the FSA is scheduled for September 19, 2022.

[6] In advance of the FSA approval hearing, the Court approved the Notice Plan developed by class counsel to provide class members with detailed information relating to the FSA. This Notice is expected to be published by August 19, 2022.

[7] In the meantime, and prior to the FSA receiving Court approval, CLG, who are not class counsel and who have had no involvement in these proceedings, put information on two websites about the "settlement" and invited class members to "Join this Class Action". Their websites offer contingency fee retainers and request that class members provide personal information - including information about "damages or symptoms experienced".

[8] The Plaintiffs assert the CLG website communications contain misleading information about the class action, the potential settlement agreement, and the prospective claims process. On the CLG websites, there is no reference to or identification of class counsel. Further, the Plaintiffs allege the solicitation of retainer agreements and the request for information about damages or symptoms from class members is exploitative, re-traumatizing, and contrary to the various safeguards built into the FSA and the Notice Plan.

[9] At the hearing of this Motion, legal counsel for CLG confirmed the information relating to these class proceedings has been removed from their websites. A hearing to determine the extent to which non-class counsel may communicate and engage with class members regarding the claims process is set for November 21, 2022. In advance of that hearing, CLG advised the Court that it does not object to the interim Order sought by the Plaintiffs.

II. Issue

[10] The only issue is whether the Court should exercise its discretion and grant the interim Order.

III. Analysis

[11] The relief sought by the Plaintiffs falls within the Court's plenary jurisdiction to manage its own proceedings (*Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 20).

[12] Furthermore, as noted in *Federal Courts Rules*, SOR/98-106, Rule 385(1)(a):

Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may	Sauf directives contraires de la Cour, le juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c) tranche toutes les questions qui sont soulevées avant l'instruction de l'instance à gestion spéciale et peut :
(a) give any directions or make any orders that are necessary for the just, most expeditious and least expensive outcome of the proceeding;	a) donner toute directive ou rendre toute ordonnance nécessaires pour permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;

[13] The Affidavit of Janice Ciavaglia, the Chief Executive Officer of the AFN, speaks to how First Nations individuals have been exploited and re-traumatized in other class action settlements, such as the Indian Residential Schools Settlement Agreement (IRSSA). She states as follows at paragraphs 15 and 17 of her Affidavit:

15. The AFN and its class counsel have gone to great lengths to ensure that the claims process for this proposed settlement will minimize the risk of re-traumatization to complainants, be as accessible as possible and will not require lawyers to successfully submit a claim. There is no individualized assessment that requires a narrative-form explanation of the claimant's circumstances or the harm suffered in order to establish an entitlement to compensation. Any additional compensation amounts are based upon objective factors. The settlement is designed in accordance with the lessons learned from the IRSSA compensation process, which were documented in a report from the National Centre for Truth and Reconciliation...

...

17. Thus, the Parties to the proposed settlement agreement negotiated a crucial component through the appointment of "navigators" which are to be funded by Canada. Navigators will offer community-based, culturally competent support in order to

assist claims members fill out the required documentation and submit a complete claim. This service will not cost anything to the Claimants and no portion of their compensation award will be affected. The involvement of lawyers foreign to the settlement and First Nations communities, acting as “form fillers” is unacceptable to the AFN and raises a serious risk of re-traumatization and revictimization. It may also dissuade some class members from engaging with the claims process at all, as a result of First Nations individuals’ past experiences and the legacy of the IRSSA implementation process.

[14] The issues that arose in other First Nations class action settlements are discussed in more detail in *Fontaine Estate v Canada*, [2014] MJ No 159 and *Fontaine v Canada (Attorney General)*, 2016 ONSC 5359.

[15] With respect to accuracy and reliability of the information on the CLG website, the Affidavit of Kenneth Dennis Brady Dixon is telling. Mr. Dixon is First Nations and states he was aware of the class proceedings and had contacted class counsel to discuss the case. However, when he saw the CLG advertisement, he believed this was how the compensation was being provided and that he needed to sign the CLG retainer in order to claim compensation. When his brother told him the retainer stated CLG would charge 25% of the compensation, he contacted class counsel again, only then learning that CLG was not associated with the class action.

[16] The Notice Plan provides as follows:

...The plan is designed to notify the class members of certification and the settlement approval hearing in a trauma-informed and culturally sensitive manner, and to provide them with the opportunity to see, read, or hear the notice of certification and settlement approval hearing, understand their rights, and respond if they so choose...

The notice plan seeks a proportionate, multi-faceted, culturally appropriate, relevant and trauma-informed approach to notice dissemination... [Footnotes omitted.]

[17] In keeping with the objectives of the Notice Plan, it is vital that the details of the proposed FSA are sensitively and accurately communicated to the members of the class. This will allow class members to make informed decisions about their rights and the claims process. Importantly, class members will be advised that they will not need to retain legal counsel in order to advance a claim.

[18] Therefore, until the Notice Plan has been communicated to class members, allowing non-class legal counsel to provide information on the proposed FSA in a manner that is outside the Court's purview poses a serious risk to the class proceedings.

[19] Based upon the foregoing and considering the applicable legal test from *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (as cited in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 25 [*Equustek*]), I am satisfied that:

- a. there is a serious issue to be tried considering the history of predatory activity on First Nations class action settlements;
- b. the class members will suffer irreparable harm if the Notice Plan is not communicated in a culturally sensitive and trauma-informed manner; and
- c. the balance of convenience favours granting the relief.

[20] Accordingly, in my view, it is just and equitable in the circumstances to exercise the Court's jurisdiction and grant the injunctive relief sought against non-parties (*Equustek* at para 28).

IV. Conclusion

[21] The Plaintiffs' Motion is granted.

INTERIM ORDER IN T-402-19, T-141-20, AND T-1120-21

THIS COURT ORDERS that:

1. no legal professionals, other than class counsel appointed by this Court, the Plaintiff, 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
2. 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 this 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.

"Ann Marie McDonald"

Judge

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

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

DOCKET: T-1120-21

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

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: AUGUST 17, 2022

ORDER AND REASONS: MCDONALD J.

DATED: AUGUST 18, 2022

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