

Federal Court



Cour fédérale

Date: 20250625

Docket: T-143-18

Citation: 2025 FC 1142

Ottawa, Ontario, June 25, 2025

PRESENT: The Honourable Mr. Justice Favel

CERTIFIED CLASS PROCEEDING

BETWEEN:

ANN CECILE HARDY AND CECIL HARDY

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Overview

[1] This matter involves a motion to approve Class Counsel’s legal fees and disbursements [Class Counsel Fees] and the payment of honoraria to the Representative Plaintiffs and certain named Plaintiffs in related provincial actions.

[2] This Order should be read together with 2025 FC 1140, the Settlement Approval Order. All definitions and descriptions in this Order are also derived from the Settlement Approval Order.

[3] Under Rule 334.4 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], all payments to counsel flowing from a class proceeding must be approved by the Court. The Court must ensure that legal fees payable to Class Counsel are “fair and reasonable” in all the circumstances (*Manuge v Canada*, 2013 FC 341 [*Manuge*] at para 28; *McLean v Canada*, 2019 FC 1077 [*McLean*] at para 2).

[4] At the outset, I wish to emphasize that a very important feature of the Settlement Agreement is that the Class is not responsible for paying legal fees for any work leading to the Settlement Agreement or for advice provided to the Class regarding the Settlement Agreement and its acceptance by the Class. In addition, the Settlement Agreement provides that the Class will not be responsible for paying Class Counsel’s legal fees for ongoing future legal services. In short, no legal fees will be deducted from any damages received by an Approved Claimant pursuant to the Settlement Agreement. The specific provisions addressing Class Counsel Fees are discussed below.

[5] Section 10.01(3) of the Settlement Agreement explicitly states that approval of Class Counsel’s legal fees is separate from the approval of the Settlement Agreement:

10.01 Class Counsel Fees

(1) The Parties will enter into a separate agreement for the legal fees, disbursements, and related taxes payable to Class Counsel by Canada for their past and future work in relation to the common issues on behalf of the class as a whole (“Class Counsel Fees”), and honoraria for the Representative Plaintiffs and the named

Plaintiffs in the proceedings listed in Section 9.05 of the Settlement Agreement.

(2) The Class Counsel will bring a motion to the Court for approval of Class Counsel Fees.

(3) Approval of the Settlement Agreement is not contingent on approval of Class Counsel Fees. If the Court approves this Agreement, the provisions of this Agreement will come into effect on the Implementation Date regardless of the date on which an order is made or appeal determined regarding Class Counsel Fees.

[6] The Settlement Agreement also provides that during the claims process an Approved Claimant's individual legal fees will be paid by Canada an amount up to 5% of the Approved Claimant's award. Those provisions state as follows:

10.02 Individual Legal Fees

(1) If an Approved Claimant has been assisted by a practising lawyer in good standing in any Canadian province or territory, Canada will pay the Approved Claimant's lawyer an amount of up to 5% of the Approved Claimant's award, inclusive of disbursements, plus applicable taxes, without additional Court approval beyond the approval of the Settlement Agreement.

(2) The legal fees payable shall be determined by the Claims Administrator in accordance with an Individual Legal Fees Protocol, which will be negotiated by the Parties in consultation with the Claims Administrator and approved by the Court. The Individual Legal Fees Protocol will include provisions for the Claims Administrator to conduct appropriate due diligence prior to issuing any payment to the Approved Claimant's lawyer.

(3) In exceptional circumstances, Canada will pay up to an additional 5% of the Approved Claimant's award, inclusive of disbursements, plus applicable taxes for legal fees and/or disbursements provided such amount is approved by the Federal Court in accordance with Rule 334.4 of the *Federal Court Rules*, SOR/98-106 and the Individual Legal Fees Protocol to be developed by the Parties in consultation with the Claims Administrator and approved by the Court.

[7] The motion record demonstrates that the Parties negotiated and reached an agreement on Class Counsel's Fees [Class Counsel Fee Agreement] after the Parties concluded the Settlement Agreement. The evidence on the record and the submissions at the hearing also confirm that these negotiations were at an arms' length and in good faith.

II. Background

[8] The Settlement Approval Order provides an overview of the litigation, the risks of the litigation, the negotiations leading to the Settlement Agreement, the engagement with the Class, and the benefits of the Settlement Agreement. It is not necessary to repeat the scope of the proceedings and the terms of the Settlement Agreement. I will only do so where it is necessary to determine whether Class Counsel's legal fees are fair and reasonable and in the best interests of the Class.

[9] No one objected to the Settlement Agreement and, similarly, no one objected to the Class Counsel Fee Agreement reached between Canada and Class Counsel.

[10] The evidence on this motion came in the form of an affidavit from Mr. Jamie Shilton of Koskie Minsky. Mr. Shilton outlined the Class Counsel Fees and his evidence set out the number of billable hours expended up to May 2025.

III. Issue

[11] The sole issue is whether Class Counsel's Fees of \$40 million dollars plus applicable taxes and disbursements are fair and reasonable and in the best interests of the Class.

IV. Analysis

[12] A non-exhaustive list of factors in determining whether the fees sought by Class Counsel are fair and reasonable was set out by now retired Justice Michael Phelan in *McLean*:

[25] The Federal Court has an established body of non-exhaustive factors in determining what is “fair and reasonable”. In *Condon v Canada*, 2018 FC 522 at para 82, 293 ACWS (3d) 697 [*Condon*]; *Merlo v Canada*, 2017 FC 533 at paras 78-98, 281 ACWS (3d) 702 [*Merlo*]; and *Manuge* at para 28, the factors included: results achieved, risk undertaken, time expended, complexity of the issue, importance of the litigation to the plaintiffs, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of the class to pay, the expectation of the class, and fees in similar cases. The Court’s comments follow but it should be borne in mind that the factors weigh differently in different cases and that risk and result remain the critical factors (Emphasis added; *Condon* at para 83).

[Emphasis added.]

(See also *Tataskweyak Cree Nation v Canada (Attorney General)*, 2021 FC 1442 [*Tataskweyak*] at paras 14-15).

[13] The assessment of the various factors is set out below.

A. *Results Achieved*

[14] The Settlement Agreement is a significant and historic class action settlement. The Settlement Approval Order sets out the results contained within the Settlement Agreement. It bears repeating that some of the key features include:

(1) Retrospective Relief

- Compensation ranging from \$10,000 to \$200,000 for Class Members, estimated to number up to 167,100, based on a Compensation Grid. The direct compensatory aspect of the Settlement is between \$3 billion and \$5.3 billion;

- A 150-million-dollar Healing Trust Fund;
- A 235.5-million-dollar Research and Commemoration Trust Fund;

(2) Prospective Relief

- Canada will commit to providing Indigenous Services Canada [ISC] with \$150 million dollars, under existing programming, to support Class Members' health and wellness throughout the implementation of the Settlement Agreement [the Commitment].

[15] Under the Commitment, Canada must make reasonable efforts to ensure that Class Members will have access to existing ISC culturally sensitive health programming, information, and other supports including for trauma for the duration of the Claims Process.

[16] Ann Cecile Hardy [Ms. Hardy] and Cecil Hardy [Mr. Hardy] [collectively, Representative Plaintiffs] submitted affidavits indicating their satisfaction with Class Counsel and the amount of work that Class Counsel performed. As such it is their belief that the Class Counsel Fees Agreement is fair and reasonable.

B. *Risk Undertaken*

[17] The Action is novel. There was no jurisprudence on the merits of a class action proceeding that advanced claims by former patients of Indian Hospitals. Furthermore, there was no jurisprudence on the scope and extent of Canada's liability in tort prior to its legislation by Parliament on May 14, 1953.

[18] Class Counsel also submitted that *Manuge* confirms that the litigation risk taken by Class Counsel is not diminished by an eventual negotiated settlement. Further, *Varley v Canada (Attorney General)*, 2025 FC 753 confirms that class actions between Indigenous plaintiffs and Canada are not always resolved by way of settlement.

[19] Class Counsel also pointed to the following risks:

- the uncertainty of certification due to the number of individual issues and a factual matrix that extends back 90 years;
- the risk that the trial would be unmanageable because of the extensive Class Period and geographically diverse Class membership;
- the challenges of shifting standards and evolving government priorities over a long Class Period;
- the defences available to Canada; and
- the risk of potential limitation issues, the loss of evidence and the lack of reporting generally associate with the abuse suffered by class members.

[20] It is fair to state that the success of the Action was far from certain and that there was risk involved.

C. *Time Expended*

[21] Mr. Shilton's affidavit explains the pertinent information about the legal team, their expertise and the extent of the work undertaken by Class Counsel. Class Counsel has provided the Court with sufficient background on the time and legal fees spent at each stage.

[22] As of February 18, 2025, Class Counsel had docketed their billable hours at a combined value of \$6,674,047 before tax. The legal fees were estimated to exceed \$7,500,000 by the end of May, 2025. Another \$2,500,000, in legal fees will be required to implement the Settlement. The

motion materials also set forth that Class Counsel had incurred hundreds of thousands of dollars in disbursements including over \$227,000 in expert fees.

[23] The Class Counsel Fee Agreement provides that Canada will pay reasonable disbursements to Class Counsel up to the date of the Class Counsel Fee Approval Hearing in amounts yet to be agreed to by the parties.

D. *Complexity of Issues*

[24] The Settlement Approval Order provided a more in-depth assessment of the nature and complexity of the claims. It set out an overview of the claims, the procedural history, and the historical, legal and evidentiary complexities given the novel nature of the litigation, and the cause(s) of action alleged. It also confirms the novelty of the Settlement Agreement.

[25] The Settlement Agreement itself illustrates the complexity of settling retrospective claims and prospective commitments. As set out above and in the Settlement Approval Order, there were several complex issues in the Action, including determining the Class size, determining the number of Indian Hospitals, as well as the lack of readily available documentation related to both issues.

[26] A first attempt at mediation before retired Ontario Court of Appeal Justice Stephen T. Goudge did not bear fruit. A renewed attempt at mediation, which lasted three years, was undertaken before retired Federal Court Justice Michael Phelan. This demonstrates the complexity of the matter.

E. *Importance to the Plaintiffs*

[27] The affidavits of the Representative Plaintiffs clearly set out how important this Action was to them, their families, their communities, and future generations. Both spoke very favourably about the nature of the Settlement Agreement and the results achieved by Class Counsel.

F. *Degree of Responsibility Assumed by Counsel*

[28] Due to the complexity of this case, Class Counsel assembled a large legal team of four law firms, all of which bring substantial class action and Aboriginal law expertise. The evidence in the record confirms that Class Counsel has demonstrated expertise and skill.

[29] The record also confirms that Class Counsel, along with Canada, engaged in extensive discussions and mediation throughout the Action, leading to the Settlement Agreement. Class Counsel assumed complete responsibility for the prosecution of this Action and for the negotiations leading to the Settlement Agreement.

G. *Quality and Skill of Counsel*

[30] Class Counsel possess decades of class action and Aboriginal law experience. Throughout the proceeding, Class Counsel advanced parallel tracks of litigation and negotiations. The quality and skill of Class Counsel was key to reaching the Settlement Agreement and the approval stage. Class Counsel has demonstrated how they engaged with the Defendant to ensure that the litigation was advanced in a timely manner while also ensuring that any negotiations proceeded quickly. Class Counsel also demonstrated how they engaged

regularly with the Representative Plaintiffs and Class Members who had questions about the state of the litigation and negotiations.

H. *Ability of Class Members to Pay*

[31] As already mentioned, Class Members are not paying Class Counsel's Fees. Class Counsel's Fees are separate and will be entirely paid by Canada.

[32] Both Representative Plaintiffs indicated that, without Canada's agreement to pay for Class Counsel's Fees, Class Members could not have afforded to retain counsel in this matter, except through a contingency fee agreement. A contingency fee agreement signed by the Representative Plaintiffs would have provided for a 33% contingency fee.

[33] As stated by Ms. Hardy in paragraphs 10-14 of her affidavit:

10. When I retained Class Counsel to advance claims on behalf of survivors of Federal Indian Hospitals, I understood that Class Counsel was acting on a contingency basis, and that they would not be paid for any work unless they succeeded in obtaining money for the Class Members. I understood that Class Counsel would be fully funding this class action without any promise of payment.

11. Without this contingency arrangement, I could not have afforded to retain Class Counsel to advance a lawsuit of this scale and complexity by paying their hourly rates. I considered this arrangement to be fair and reasonable.

13. ... I also understand that Class Counsel's fee request is consistent with the legal fees awarded in other similar class action settlements.

14. In light of the risk and substantial commitment of time, money, and resources by my counsel, as well as the results achieved, I support Class Counsel's fee request.

[34] If Canada had not agreed to pay for Class Counsel's Fees, a significant portion of the compensation covered by the Class would have gone toward paying their lawyers. Canada's commitment to pay Class Counsel's Fees is a significant and positive factor going toward approval of the Class Counsel Fees Agreement.

I. *Expectation of the Class*

[35] The Representative Plaintiffs' affidavits state how pleased they are with the performance of Class Counsel and that the Settlement realized their litigation goals. They knew the Action was complicated and that there were many issues to overcome.

J. *Fees in Similar Class Actions*

[36] The Court acknowledges that Class Counsel's Fees as set out in the Class Counsel Fees Agreement, totalling 40 million dollars, are significant. That said, these fees must be considered in the proper context.

[37] In *McLean*, Justice Phelan noted that the legal fees in that case, totalling \$55 million dollars plus an additional \$7 million dollars for future work, were within the 3% range. He stated (at para 55):

[55] In my view, this range is consistent with other mega-fund type settlements such as "Hep C" (*Parsons* and related cases at \$52.5 million on \$1.5 billion settlement, approximately 3.5%), "Hep C – Pre/Post" (*Adrian* and related cases at \$37.2 million on \$1 billion settlement, approximately 3.7%), "IRRS" (*Baxter* and related cases at approximately 4.5%), "60's Scoop" (*Riddle v Canada*, 2018 FC 641, 296 ACWS (3d) 36, and *Brown v Canada (Attorney General)*, 2018 ONSC 5456, 298 ACWS (3d) 704, at \$75 million on \$625-875 million, at its lowest approximately 4.6%), and *Manuge* at 3.9% (paid by the Class).

[38] I agree with Class Counsel that *McLean* is a good comparator. While multipliers are not determinative, they can assist in assessing the reasonableness of counsel fees. The Class Counsel Fees in this case translate to a multiplier of less than 1% of the Settlement value. More importantly, the Class Counsel Fees are severable from the Settlement and Canada is paying those fees, not the Class.

[39] Class Counsel also referred to six cases in which this Court has approved class counsel fees where the settlements were valued at more than \$500 million. These are *Tataskweyak; Heyder v Canada (Attorney General)*, 2019 FC 1477; *Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 357; *Percival v Canada*, 2024 FC 2098; *Moushoom v Canada (Attorney General)*, 2023 FC 1739; and *Manuge v Canada*, 2024 FC 68.

[40] I am satisfied that Class Counsel's Fees are reasonable in the circumstances.

K. *Honoraria for Representative Plaintiffs*

[41] Approval is sought for the payment of honoraria of \$10,000 for Ms. Hardy and \$5,000 each for Cecil Hardy, Jean John Baptiste Pambrun, and Deborah Azak.

[42] I agree with Class Counsel that each of the people gave up their privacy and told their stories through legal process. They also instructed counsel throughout the proceeding. The honoraria sought is within the range approved by this Court on other matters.

V. Conclusion

[43] For the above reasons, the Court concludes that Class Counsel's Fees are fair and reasonable. The honoraria sought is within the range approved by the Court on other matters. The provisions of the Class Counsel Fee Agreement are approved.

ORDER in T-143-18

THIS COURT ORDERS that:

1. Class Counsel's Fees in the amount of \$40,000,000.00 (forty million dollars) plus applicable taxes along with reasonable disbursements as agreed by the parties or as fixed by the Court are fair and reasonable;
2. The Defendant shall pay Class Counsel fees, taxes and disbursements in accordance with the terms of the Class Counsel Fee Agreement; and
3. An honorarium of \$10,000 is approved for the Representative Plaintiff, Ann Cecil Hardy. Honoraria of \$5,000 each are approved for the Representative Plaintiff, Cecil Hardy, and for the following named plaintiffs in certain related provincial actions, Jean John Baptiste Pambrun, and Deborah Azak. These honoraria are to be paid by the Defendant to these individuals in accordance with the Class Counsel Fee Agreement.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS: T-143-18

STYLE OF CAUSE: ANN CECILE HARDY v THE ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JUNE 11, 2025

ORDER AND REASONS: FAVEL J.

DATED: JUNE 25, 2025

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