Court of Queen's Bench of Alberta

Citation: Adrian v. Canada (Minister of Health), 2007 ABQB 376

Date:
Docket: 9903 19153
Registry: Edmonton

Between:

SHIRLEY ADRIAN, DEBBIE ANDERSON, RICHARD EDWARD AUTEN, JAMES EDGAR BAKER, CONSTANCE DOREEN BAKER, JEFF BEESTON, ISABELL BRESSE, JOHN BRESSE, HARRY CHICHAK, BRIAN EDWIN FERGUSON, RON GEORGE, JANICE PATRICIA HAMMOND, DELORES HICKMOTT, GARY HICKMOTT, JAMES MILTON JOBE, BRIAN W. JOHNSON, WENDY LEE RAMEY, MARLENE DOROTHY KEEP, DENNIS KEEP, CAROL DIANNE KNOTT, BYRON KNOTT, LAURA CATHERINE KRISTIANSON, RALPH SAMUEL KRISTIANSON, KIMBERLY ANN LEBEUF, ALEXANDER PATRICK NOWOSAD, ELENA RICIOPPO, DALVINO RICIOPPO, SHANNON RICKETTS, KEVIN ROE, KATHY ROMANIW, ELLEN SANDERSON, JEAN DARLENE SNIPES, RICHARD JOSEPH LIPSCOMBE, DEBORAH ANNE STABRYLA, ELIZABETH TREAU, GUISEPPE VOLPE, JUNE VOLPE, and JOHN DOEs I to 100 and JANE DOEs I TO 100

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA AS REPRESENTED BY THE MINISTER OF HEALTH FOR CANADA and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

Defendants

Memorandum of Decision
Relating to Approval of Compensation Settlement
of the
Honourable Mr. Justice Vital O. Ouellette

Introduction

[1] The Plaintiffs seek certification of a Class action for the purposes of obtaining Court approval of a settlement reached with the Defendant, Canada, and in a separate motion seeks approval of the Class counsel fees.

Facts

[2] In 1998, Canada and others agreed to compensate persons who had been infected with the Hepatitis C virus, as a result of tainted blood, between January 1st, 1986 and July 1st, 1990. The compensation did not include individuals infected before January 1st, 1986 or after July 1st, 1990.

[3] The Plaintiffs, who are persons not eligible for compensation from the settlement reached for persons infected between January 1st, 1986 and July 1st, 1990, sued Canada. After years of court proceedings and difficult and complex negotiations, the Plaintiffs reached a settlement agreement with Canada. The settlement agreement reached provides that compensation would be paid to those individuals who contacted Hepatitis C from the blood system before January 1st, 1986 and after July 1st, 1990. The settlement agreement was based on the general principle of parity with the 1986-1990 settlement agreement. The settlement agreement provides for the following sums of money:

a) $962 million to compensate Class members;
b) $20 million for administration;
c) $37.29 million for Class counsels' fees.

[4] The settlement is conditional upon the Courts in Alberta, British Columbia, Quebec and Ontario, all granting certification and approving the settlement. The four Courts must grant the applications without material differences; however, the approval of the settlement is not conditional on the approval of the Class counsel fees.

[5] Canada consents to the application for certification of the Plaintiffs' action as a class proceeding and approval of the pre-1986/post-1990 Hepatitis C settlement agreement for the purpose of settling all outstanding claims against Canada, including Charter claims, relating to or arising from the infection of persons with Hepatitis C through the blood system prior to January 1st, 1986 and after July 1st, 1990.

Issues

[6] There are three issues:

1. Whether or not this action should be certified as a Class proceeding;
2. Whether or not the proposed settlement should be approved as fair, reasonable and in the best interests of the Class as a whole; and
3. Whether the Class counsel fees should be approved.

Issue 1 -Whether or not this action should be certified as a class proceeding.

[7] Even though Canada consents to the certification of the Class proceedings, albeit conditional on the Court's approval of the settlement, the Court must still be satisfied that the requirements for certification as outlined in s. 5(1) of the *Class Proceedings Act*, c. C-16.5, Alberta Statutes, are met. In this case, the pleadings do disclose a cause of action and there is an identifiable class of two or more persons. The common issue for the Class members is being infected with the Hepatitis C virus through the receipt of blood.

[8] The Class proceedings are definitely the preferable procedure to ensure that there is a fair and efficient resolution of the common issues. It is fair and efficient because the settlement removes the difficulties of the manageability aspects of litigation.

[9] Further, since the cause of action raises a common issue to the Class members, it is clearly preferable to have one action as opposed to several thousands before the Court.

[10] Lastly, the proposed representative Plaintiffs meet all of the requirements of s. 5(1)(e) of the *Class Proceedings Act*.

[11] Accordingly, I am satisfied that the requirements of s. 5(1) of the *Class Proceedings Act* have been met and therefore the action against Canada is certified as a Class proceeding for the purposes of settlement approval.

Issue 2 - Whether or not the proposed settlement should be approved as fair, reasonable and in the best interests of the Class as a whole.

[12] Section 35 of the *Class Proceedings Act* requires that all settlements in Class proceedings be approved by the Court. Although the *Class Proceedings Act* does not provide any guidance or criteria to the Court when determining whether approval should be granted or not, it is accepted that the test for approval is whether the settlement is fair, reasonable, and in the best interests of the Class as a whole. (***Dabbs v. Sun Life Assurance Co. Of Canada***, [1998] O.J. No. 1598 (General Division) (para. 11 aff'd (1998) 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. referred in [1998] S.C.C.A. No. 372, which was ref.)

[13] The Court in ***Dabbs*** went on to suggest a list of factors which could be considered in determining if a settlement is fair, reasonable, and in the best interests of those who are affected by it. Several other Courts have since adopted or modified or added to the list of factors which were originally stated in the ***Dabbs*** decision.

[14] For the purposes of this proposed settlement, the following factors are considered:

a) The likelihood of success and the risk of loss;
b) The costs and likely duration of the litigation;
c) The terms of the settlement;
d) The presence of arms-length bargaining and the absence of collusion;

e) The number and nature of objections;
f) The recommendation and experience of counsel;
g) The recommendations of neutral parties; and
h) The personal circumstances of the Plaintiffs.

a) The likelihood of success and the risk of loss.

[15] There is a substantial risk that the Plaintiffs would be unable to prove that Canada is liable. Those legal risks which the Plaintiffs face include whether Canada owed them a fiduciary duty; whether Canada owed them a duty of care, and if so, what would be the appropriate duty of care; whether the Canadian Red Cross Society was an agent of Canada; whether restricting settlement benefits to persons infected between 1986 and 1990 contravened s. 15 of the Charter; and, lastly, whether the claims are statute-barred due to limitations issues.

b) The costs and likely duration of the litigation.

[16] The Plaintiffs' action was commenced in 1999, and examinations for discovery had not yet occurred even by 2004 when the negotiations began. If the past pace of the litigation were to continue, it would be several years into the future before this matter would ever reach the trial stage. Further, it can be reasonably expected that the court proceedings would not likely terminate at trial, as there would likely be appeals all the way to the Supreme Court of Canada.

[17] With respect to the issue of the costs, it should be noted that the evidence discloses that the actual legal fees, on an hourly rate only, for services rendered to date, are in the millions of dollars.

c) The terms of the settlement.

[18] The settlement is based on the principles of parity with the 1986-1990 settlement, the efficient delivery of the compensation to Class members and the minimization of administrative costs and delays. The settlement includes an extensive Class of individuals who will receive substantial benefits. The principle of parity with regard to the 1986-1990 settlement is very important having regard to the issue of fairness and reasonableness, not only to the present Plaintiffs but to those individuals who formed part of the 1986-1990 settlement, which includes one-time, lump sum payments. This will result in the delivery of the compensation on a much faster and more efficient basis.

[19] Further, the current settlement limits the administrative costs and further delay in the administration of the settlement due to the one-time, lump sum payments as opposed to payments on a progressive basis.

[20] Further, this settlement is clearly favourable to the Plaintiffs since Canada has agreed not to reduce the amounts payable to Class members as a result of any discount for legal risk.

[21] The compensation package to Class members will not be reduced by the legal fees which have been allocated separately.

d) The presence of arms-length bargaining and the absence of collusion.

[22] The parties in this case are clearly adverse in interest. However, as a result of negotiations and compromise, a settlement was reached. The settlement is a substantial one and in many ways an improvement on the 1986-1990 settlement.

[23] In all of the circumstances, the settlement is fair, reasonable, and in the best interests of the Class members and is approved in its entirety. The parties have refined the appeal process for Class members.

e) The number and nature of objections.

[24] There are very few objections to the settlement; however, there are a few concerns raised with the different amounts being paid for the different levels of illness.

f) The recommendation and experience of counsel.

[25] There is no doubt that the Plaintiffs' counsel are experienced, qualified and devoted to their clients. On that basis, their recommendation that the settlement is fair and reasonable is deserving of respect.

[26] Furthermore, the manner in which the settlement approval is sought, that is that the settlement is not conditional on the approval of counsel fees, negates any suggestion that the recommendation of counsel is self-serving.

g) The recommendations of neutral parties.

[27] Both the Plaintiffs and Canada presented several expert reports which provided the necessary checks and balances and ensured accuracy, transparency and objectivity in the negotiation process.

h) The personal circumstances of the Plaintiffs.

[28] There is a true value to the expedited and one-time, lump sum payments to the Class members. It is known that since the commencement of this action several of the Plaintiffs have died and many more have become seriously ill. Many of the Plaintiffs who are still alive are facing dire consequences, and compensation in a timely fashion will be of great assistance.

[29] Accordingly, I am satisfied that the compensation settlement is fair, reasonable, and in the best interests of the Class as a whole and therefore approved.

[30] I will deal separately with the issue of whether the Class counsel fees should be approved.

Heard on the 28th day of February and 1st day of March, 2007.
Dated at the City of Edmonton, Alberta this 7th day of June, 2007.

Vital O. Ouellette
J.C.Q.B.A.

Appearances:

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(Marshall Attorneys)
Mark Freeman
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for the Plaintiffs

Kirk Lambrecht, Rolinda Mack
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for the Defendant The Attorney General of Canada

David Kinloch and Ward K. Branch
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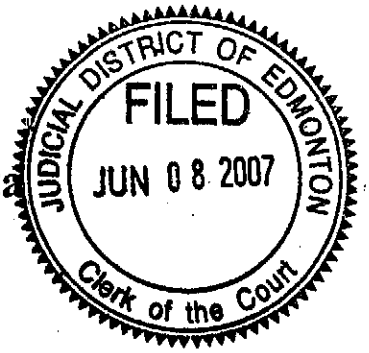
for H.M.Q. in Right of the Province of Alberta



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Plaintiffs

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THE ATTORNEY GENERAL OF CANADA AS REPRESENTED BY THE MINISTER OF HEALTH FOR CANADA and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

Defendants

Memorandum of Decision
Relating to Approval of Class Counsel Fees
of the
Honourable Mr. Justice Vital O. Ouellette

Introduction

[1] The Plaintiffs seek court approval of the Class counsel fees.

Facts

[2] In 1998, Canada and others agreed to compensate persons who had been infected with the Hepatitis C virus, as a result of tainted blood, between January 1st, 1986 and July 1st, 1990. The compensation did not include individuals infected before January 1st, 1986 or after July 1st, 1990.

[3] The Plaintiffs, who are persons not eligible for compensation from the settlement reached for persons infected between January 1st, 1986 and July 1st, 1990, sued Canada. After years of court proceedings and difficult and complex negotiations, the Plaintiffs reached a settlement agreement with Canada. The settlement agreement reached provides that compensation would be paid to those individuals who contacted Hepatitis C from the blood system before January 1st, 1986 and after July 1st, 1990. The settlement agreement was based on the general principle of parity with the 1986-1990 settlement agreement. The settlement agreement provides for the following sums of money:

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[4] The settlement is conditional upon the Courts in Alberta, British Columbia, Quebec and Ontario, all granting certification and approving the settlement. The four Courts must grant the applications without material differences; however, the approval of the settlement is not conditional on the approval of the Class counsel fees.

[5] Canada consents to the application for certification of the Plaintiffs' action as a class proceeding and approval of the pre-1986/post-1990 Hepatitis C settlement agreement for the purpose of settling all outstanding claims against Canada, including Charter claims, relating to or arising from the infection of persons with Hepatitis C through the blood system prior to January 1st, 1986 and after July 1st, 1990.

Issue

[6] The total Class counsel fees agreed upon in the settlement agreement are $37.29 million plus GST plus PST where applicable. The Class counsel in Alberta, Quebec, British Columbia and Ontario have reached an agreement regarding the division of the fees based on an assessment of each of the groups' docketed time, relative proportion of the Class represented, expertise and overall contribution to achieving the settlement. Class counsel have agreed to divide the $37.29 million on the following basis: $7.645 million to Alberta Class counsel, $7.645 million to Quebec Class counsel, $11 million to British Columbia Class counsel, and $11 million to Ontario Class counsel.

[7] Article 14.02 and 14.03 of the settlement agreement states that Class counsel and Canada have agreed that Class counsel fees are subject to the approval of the Courts. It is further agreed at Article 14.03(4) that each group of Class counsel will seek approval of its share of Class counsel fees before the Court in its jurisdiction.

[8] It is important to note that the amounts of $962 million to be paid for Class member compensation and the costs and $20 million for the costs of administration, were negotiated by Class counsel and Canada before any negotiations and discussions regarding Class counsel fees occurred. Further, that Class counsel agreed that no part of the Class counsel fees would be deducted from the funds payable for Class member compensation or settlement administration. Lastly, that the Court approval of the Class counsel fees is separate and distinct from the Court approval of the compensation to Class members. In other words, Class counsel fees and disbursements are being paid by Canada and not from funds that would otherwise compensate Class members.

[9] To summarize, the compensation fund for Class members was negotiated and established first. Then the compensation fund for Class counsel fees was negotiated and settled. Approval of the compensation settlement for Class members is not contingent on approval of the Class counsel fees compensation fund.

Under circumstances such as this case, what is the Court's duty and role in relation to approving Class counsel fees?

[10] Jurisprudence from Ontario and British Columbia provides guidance respecting the tests to ascertain the reasonableness of Class counsel fees. Without citing all of the cases which have been reported in Ontario and British Columbia, it is agreed that the test regarding the approval of legal fees is whether the fees sought are reasonable.

[11] To determine whether the counsel fees are reasonable, the case law has developed a list of factors which are relevant. The following is a list of the factors which could be considered, but this list is not exhaustive:

a) The results achieved;
b) The risks undertaken;
c) The time expended;
d) The complexity of the matter;
e) The degree of responsibility assumed by counsel;
f) The importance of the matter to the client;
g) The quality and skill of counsel;
h) The ability of the Class to pay;
i) The client and Class expectation;
j) Avoiding inconsistencies with awards made in similar cases in other jurisdictions;
k) Fees in similar cases.

[12] With respect to multi-jurisdictional settlements, it is now accepted that although, in principle, the Alberta court must be satisfied with the whole of the Class counsel fees, the Alberta court must approve the reasonableness of the fees as they relate to the Alberta counsel. (***Jeffery v. Nortel Networks***, [2007] B.C.J. No. 90.)

[13] The Court in Alberta was asked to approve Class counsel fees in the ***Northwest v. Canada (Attorney General)*** 2006 A.B.Q.B. at 902. In that case, the Alberta court was one of nine courts in a multi-jurisdictional settlement. In ***Northwest***, the Class counsel fees were also being paid by Canada and would not diminish the Class members compensation settlement. However, in ***Northwest***, all parties agreed that the settlement was subject to approval by the Court of both the Class members compensation and the Class counsel fees. In essence, the Class counsel fees were part of the overall settlement.

[14] Similar to the ***Northwest*** case, s. 39(1) of the *Class Proceedings Act* is also not applicable to this case. Section 39(1) is not applicable because there is no contingency fee agreement between the Class counsel and the Plaintiffs. The fees are being paid entirely by Canada and are not being paid out of the Class members compensation fund.

[15] Unfortunately, the legislation only gives specific direction to the Court as it relates to the approval of legal fees when those fees are part of a contingency fee agreement. The legislation does not provide direction as it relates to Court approval regarding legal fees being paid by a third party or the Defendant, or where the legal fees are not being paid out of the Class members compensation fund.

[16] Although the parties have agreed that the Class counsel fees require Court approval, I am satisfied that Court approval would be required pursuant to s. 35 of the *Class Proceedings Act* even if the parties had not agreed that Court approval was required. Section 35(1) states that a Class proceeding may only be settled, discontinued or abandoned with the approval of the Court. The Class proceedings not only claimed relief for Class members, but also costs. Therefore, the issue of costs (fees and disbursements) which form part of the Class proceeding cannot be settled without being approved by the Court. Therefore, Court approval of Class counsel fees is always required regardless of any agreement between the parties.

[17] The general test remains whether the fees sought are reasonable. However, are the factors to be considered to determine reasonableness as outlined earlier in para.35 applicable to this case. I do not believe they are. I agree with McMahon, J., in ***Northwest,*** who stated that the reason for having separate Court approvals for Class members compensation and Class counsel fees was the following:

> To ensure the independence of the advice the Class members receive as to their settlement, the Class settlement must be resolved first and not be made conditional upon the lawyers' fees being approved. (At para. 66)

[18] The facts of this case are that the advice of Class counsel regarding settlement occurred before the discussions regarding Class counsel fees. Furthermore, not only was a

settlement reached regarding Class members compensation before agreement was reached on Class counsel fees, the Class counsel fees were not made conditional upon approval of the Class members compensation.

[19] The amount of the Class counsel fee claim was arrived at after substantial negotiation between very experienced Plaintiffs' counsel from throughout Canada and also very experienced and capable counsel for Canada. Both Class counsel and Canada's counsel agreed that the fees were a reasonable percentage of the gross recovery, that the multiplier factor used fell within an acceptable range, and that the fees were sufficient economic incentive for lawyers to take on these very difficult Class proceeding cases. In addition, Canada took additional steps (Affidavit of Jason Brannen) to satisfy itself that the fees and disbursements of Class counsel were reasonable.

What is/are the factor(s) which should guide the Court in determining whether fees are reasonable in circumstances such as this case?

[20] That is to say:

(1) When the fees are negotiated after a settlement is reached for the Class members;

(2) The Class member settlement fund is distinct and separate from the Class counsel fees fund and not contingent on each other; and

(3) The funding for the Class counsel fees is the Defendant or a third party and not funded in any fashion by the Class members.

[21] I believe guidance can be drawn from both the civil general practice and criminal general practice.

[22] In most civil litigation the Courts will not interfere with negotiated settlements (including fees) if all the parties are represented by competent, experienced counsel. However, there are situations where the Court does play a role when it comes to payment of legal fees. Rule 623 of the Alberta Rules of Court provides that costs cannot be charged against a trust estate or trust fund without the Court fixing or approving the amount charged. This, of course, is because of the fiduciary and trust nature of the arrangement. Also, the *Minor's Property Act* of Alberta requires that a negotiated settlement of a minor's claim requires the approval of the court. Such approval is based on whether the settlement is in the minor's best interest.

[23] In the criminal context, the equivalent to the negotiated settlement for money would be a joint submission on sentence. The law is generally accepted that a judge should accept a joint submission unless it is unfit or contrary to the public interest. The Alberta Court of Appeal in ***C.(G.W.)*** 2000, 150 C.C.C. (3d) 513 at p. 519 to 20 stated the following as to why joint submissions should be accepted when made by experienced counsel:

> The bargaining process is undermined if the resulting compromise recommendation is too readily rejected by the sentencing judge. Joint submissions, however, should be accepted by a trial judge unless they are unfit or unreasonable.

[24] It is therefore clear that although the Courts should not interfere with negotiated settlements or compromise, they are required to be involved to determine the reasonableness of a settlement when it involves particular classes of individuals, such as minors or where a fiduciary trust relationship exists. This is not dissimilar from members of Class proceedings. In that regard, I agree with the statement of Winkler, J. (as he then was) in ***Baxter v. Canada (Attorney General)***, [2006] O.J. No. 4968, who stated that:

> The Court has an obligation under CPA to protect the interests of the absent class members . . . (At para. 12)

[25] In determining what the Court's role is in the approval of the legal fees, I am further assisted by comments made by McMahon, J. in ***Northwest*** when he stated the following:

> However, the court cannot take a "hands off" approach. The suit, having been certified as a class proceeding, the court is obliged to ensure the fairness and reasonableness of all fees. (At para. 82)

[26] In addition, I agree with the comments of Winkler, J. (as he then was) in ***Baxter*** that the function of the Court is not to be taken as a mere formality or rubber stamping of a settlement but that the Court "is not to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the Court's function to litigate the merits of the action." (Paras. 10 and 11)

[27] Therefore, I am satisfied that the test to determine the reasonableness of legal fees in a situation such as this case does not require an analysis of one or more of the factors as previously stated in the case law.

[28] I am of the view that the determination of the reasonableness of legal fees cannot be done in isolation of the proposed settlement for the Class members. I say this because it would appear to be contradictory to, on the one hand, be satisfied that the proposed settlement for Class members is fair, reasonable, and in the best interests of those affected by the settlement, yet reach a different conclusion as to the reasonableness of Class counsel fees who negotiated the fair, reasonable, and in the best interest of the Class members settlement.

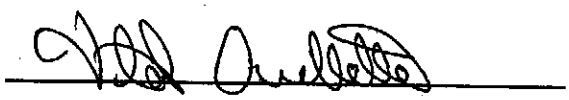
[29] Ultimately, where the Class counsel fees are not coming out of the Class members compensation fund, then the Court's role in the event of a negotiated settlement on fees should be limited to whether or not Class counsel truly got the best settlement available for the Class members. In situations where the Defendant is paying the legal fees, the Court should satisfy itself that Class counsel have not been bought off or have had their obligations to their clients affected by receiving a substantial amount of fees.

[30] The question of whether or not the Defendant possibly bought off the Class counsel by offering substantial fees can easily be answered by the facts of the particular case. In this case, the compensation package for the Class members was negotiated before fees were discussed, and subsequently the fees agreed upon were reviewed by a third party, who opined they were reasonable.

[31] The legal fees were negotiated between well represented parties who are at arms length to each other and in no way effects the interests of the absent Class members. The totality of the class settlement and legal fees settlement is reasonable.

[32] For all of the reasons stated above, I am satisfied that the Alberta Class counsel fees as negotiated with Canada, are reasonable and approved.

Heard on the 28th day of February and 1st day of March, 2007.
Dated at the City of Edmonton, Alberta this 7th day of June, 2007.



Vital O. Ouellette
J.C.Q.B.A.

Appearances:

C. Kenneth Kolthammer, D.W. Batchelor
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David Kinloch and Ward K. Branch
(Alberta Justice, Civil Law Branch)
for H.M.Q. in Right of the Province of Alberta