Federal Court  Cour fédérale

Date: 20200310

Docket: T-1673-17

Citation: 2020 FC 323

CLASS PROCEEDING

BETWEEN:

CHERYL TILLER, MARY-ELLEN COPLAND AND DAYNA ROACH

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER
(Counsel Fees)

PHELAN J.

I. Introduction

[1] This is the motion by Class Counsel for the approval of fees to be paid pursuant to Rule 334.4 of the *Federal Courts Rules*, SOR/98-106. The fees at issue are $6 million (plus applicable taxes) which the Defendant has agreed to pay for Class Counsel fees and a further 15% (plus applicable taxes) of the individual compensation awarded to each eligible Class Member under the Settlement Agreement.

[2] Pursuant to Rule 334.4, 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 (see *Manuge v Canada*, 2013 FC 341 at para 28 [*Manuge*]).

II. Background

[3] The details of the class action and the Settlement Agreement are set forth in the Reasons for Order approving the Settlement Agreement.

[4] Class Counsel fees in this action were negotiated separately after the essential terms of the Settlement had been agreed. An initial fee agreement between the parties was replaced by the June 24, 2019 Fee Agreement [Fee Agreement] which is the subject of this motion.

[5] The Fee Agreement sets forth a contribution towards Class Counsel fees from the Defendant of $6 million (plus taxes). It also requires that each Class Member pay 15% (plus taxes) of their individual compensation award, excluding any amounts paid under the Settlement Agreement for reimbursement of the cost to obtain medical documents and travel expenses to attend an in-person interview with the Assessor.

[6] The Fee Agreement covers up to the Settlement Agreement approval. Class Counsel are not obligated to provide any post-approval services but if any Class Member retains either Klein Lawyers or Higgerty Law to assist in the preparation of a claim, the fee will be 18% of the Class Members' recovery – there would be no fee or charge for discovery if there is no recovery.

[7] The parties point out that with a contribution of $6 million and a fee of 15% of each award and assuming a settlement total payment of $100 million, the Class Counsel fees are effectively 21% of the assumed payment.

[8] Pursuant to the Fee Agreement, 70% of the fees will be payable to Klein Lawyers and 30% to Higgerty Law. The firms are content that this division fairly represents the work performed by each firm.

[9] Provision has been made for the Defendant's contribution, the holdback of distribution thereof pending appeals and the usual administrative details of moneys in trust pending final resolution. Importantly, it is the Administrator who calculates the 15% fee in each case, and pays out the above proportions.

[10] The Court notes that there has been no evidence of opposition to the Fee Agreement.

III. Analysis

[11] As outlined in *McLean v Canada*, 2019 FC 1077, in respect of fees, notwithstanding any agreement between Class Counsel and the Defendant, it is the Court's duty to determine what is "fair and reasonable", a task made more difficult when there is not some other "voice" to be heard on the issue, such as an amicus or an opposition.

[12] The Federal Court has set an established body of non-exhaustive factors in determining what is "fair and reasonable". In *Condon v Canada*, 2018 FC 522 at para 82 [*Condon*]; *Merlo v*

Canada, 2017 FC 533 at paras 78-98 [*Merlo-Davidson*]; 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.

[13] 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 critical factors in any analysis (*Condon* at para 83).

A. *Result Achieved*

[14] Class Counsel carried the matter for two years and engaged in substantive settlement negotiations. The class covered is diverse encompassing those women who worked or volunteered with the RCMP – but were not employed by the RCMP – and who were subjected to gender or sexual orientation based harassment or discrimination in a RCMP controlled workplace.

[15] The settlement is significantly similar in structure and amounts to that found in *Merlo-Davidson*. The merits of the Settlement Agreement have previously been addressed. It provides significant benefits without the burden of litigation.

B. *Risk*

[16] Without meaning to diminish the efforts of Class Counsel, the risk claimed, while present, is overstated. It is not reasonable to have expected that the RCMP would not recognize the wrongful conduct of its Members toward non-Members, particularly after *Merlo-Davidson* and the Commissioner's statement expressing regret and a change in the organization's culture.

[17] Justice Barnes in *Manuge* emphasized that risk must be assessed at the time the case is taken on by counsel – not with the benefit of hindsight. The risk at the time *Merlo-Davidson* was initiated was substantially different than the risk taken on in this litigation.

[18] While some form of settlement was reasonably foreseeable in one or more court system, the Court recognized that there is risk inherent in the settlement process itself including the need for Court approval. As said in *Parsons v Canadian Red Cross Society*, 49 OR (3d) 281 at para 37, [2000] OJ No 2374 [*Parsons*]:

> [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. …

[19] The negotiation risk discussed in *Parsons* of a defendant stretching out negotiations and driving up the costs being absorbed by class counsel, did not arise here – nor was it likely. In fact, this matter went into a *bona fide* negotiation phase shortly after the claim was initiated.

[20] There is no question that there were complexities to taking on this case including but not limited to gathering information, the diversity of relationships with the RCMP, the timeframe of the claim, and the potential time bars on claims. Given experience in *Merlo-Davidson*, Klein Lawyers were well positioned to handle these issues which are common to much of this type of litigation.

[21] Therefore, it is not surprising that no other firm tried to initiate a claim. There is no evidence that any of the potential Class Members approached other counsel to initiate a claim. The absence of competing firms is not evidence of risk but of preferred market position of Class Counsel.

[22] However, on the other hand, the risk assumed, most particularly the burden of carrying the case, was not light given the size of both law firms. As the docket evidence shows, the firms committed considerable resources to the case. Members of the legal teams put their practices on hold for other cases but that is a risk that all counsel accept when they accept a retainer.

[23] Morever, it is not necessary for Class Counsel to "bet the farm" (as described in *Parsons*). It is appropriate to recognize that counsel took on some risks which must be recognized even if at a lower threshold than that advanced by Class Counsel.

C. *Time Expended*

[24] The Court is satisfied that Class Counsel has devoted significant time and resources in finalizing this matter. The type of work engaged in is set out in the affidavit of Tanjuatco and consists of the usual activities of counsel negotiating and concluding a settlement.

[25] As a result of the experience Class Counsel had in the *Merlo-Davidson* settlement, they enjoyed certain efficiencies which a new counsel would not necessarily possess.

[26] In respect of time expended, it is a factor to be considered but not a determinative one necessarily. This Court has rejected the automatic application of a multiplier upon which to base the fee. The issue is well canvassed by Justice Barnes in *Manuge*, in particular at para 49:

> [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.

[27] Class Counsel say that they do not keep contemporaneous time records (“dockets”). It has been suggested, from time to time by members of the plaintiffs’ class counsel bar, that this failure tends to under record work. Since time expended is one factor in the reasonable fee determination, plaintiffs’ class counsel bar may have to re-think their management approach to class action file docketing.

Under recording may be the case but a court must nevertheless take account for the evidence presented.

[28] Class Counsel claim approximately $4.2 million in time expended. Despite the Federal Court’s caution on the use of multipliers, Class Counsel effectively ask for a 5x multiplier.

[29] More germane, in my view, is that the Defendant's contribution represents approximately 150% of the time expendable value. A 50% surplus over recorded time is a significant premium in most any litigation.

D. *Complexity of the Matter*

[30] There were complexities in this claim as there are for almost all class actions – the procedural, substantive law, defences, diverse scope of the claim in geography, work conditions and timeframe are major factors. Because of the diversity of the claimants' relationship with the RCMP, this aspect of the litigation would have been more difficult than *Merlo-Davidson*.

[31] Some of those complexities or risks either disappeared or were substantially ameliorated with both the *Merlo-Davidson* settlement and the RCMP Commissioner's acknowledgement of responsibility for the discriminatory acts that are the foundation of this claim.

E. *Importance of the Litigation to the Plaintiffs*

[32] There is no question of the importance of the litigation to the Representative Plaintiffs and to many of the Class Members. The affidavit evidence and the expert reports speak to the psychological, emotional and physical harm caused to Primary Class Members.

[33] While compensation is generally well received and important to Class Members, the public recognition of the abuse and the acceptance of responsibility by the RCMP may, in many cases, far outweigh the financial gain. Therefore, importance is both emotional and tangible.

F. *Degree of Responsibility assumed by Counsel*

[34] The action was filed in 2017 and flowed directly from the *Merlo-Davidson* settlement. Given Class Counsel's (Klein Lawyers) prominence in *Merlo-Davidson*, as said earlier, it is perhaps not surprising that no other firm filed a class action. The firm enjoyed the benefits of "first to market".

[35] However, Class Counsel took on full responsibility for the case, managed by two small firms – not the often seen consortium of class counsel firms. They therefore accepted substantial responsibility, if not at the level of risk asserted. They have exhibited that sense of responsibility throughout these proceedings.

G. *Quality and Skill of Counsel*

[36] Klein Lawyers is a leading class action firm and Angela Bespflug is a leading practitioner in this field. Patrick Higgerty has 32 years' experience in the relevant areas, and has been involved in a number of class actions.

[37] As this Court also case managed these proceedings, it was able to observe and confirm the high quality of professionalism of Class Counsel – and Defendant's counsel.

H. *Ability of Class Members to Pay*

[38] There is little direct evidence on this point but given the compensation levels and the absence of individual actions for these damages, it is reasonable to conclude that either Class Members cannot afford the cost of a significant challenge to the RCMP or the cost-benefit analysis on an individual level generally did not justify taking action.

I. *Class Expectations*

[39] The retainer agreements with Class Counsel provided for legal fees equivalent of 33% of the amount awarded. That percentage might be easily justified for contested litigation – it is not justified in this case nor does Class Counsel propose to charge it.

[40] Class Counsel propose a 15% fee plus the $6 million contribution from the Defendant. The fee is modelled on *Merlo-Davidson* where there was a $12 million contribution and a 15% fee.

[41] The Defendant supports the 15% fee on the basis of some form of parity with the class members in *Merlo-Davidson*. However, the Defendant is content to contribute only 50% of what it did in *Merlo-Davidson*.

[42] The combined contribution in *Merlo-Davidson* ($12 million plus 15%) gave an effective fee of 27%. Applying the same factors in this case, the effective fee is 21%.

[43] Whatever the merits of the *Merlo-Davidson* fee may be, each case must be examined on its own circumstances. That a class may have paid too much (or too little) does not justify the same result in another case.

[44] The notion of real parity could only arise if Class Counsel were to refund some unspecified but appropriate amount to the *Merlo-Davidson* class. No such suggestion has been advanced.

[45] In establishing the percentage fee, there is no settled or perfect fee – it must be fair and reasonable. There is no reason why the 15% fee basis in *Merlo-Davidson* should be applied to this case where the difficulties, work and risk were considerably different. The Defendant appeared to recognize that its responsibility should only be 50% of *Merlo-Davidson*. Arguably Class Counsel should only be able to claim 50% of that fee percentage.

J. *Fees in Comparable Cases*

[46] A retainer stipulating contingency fees of 33⅓% is not unusual. In the settlement context, the fee has tended to be less and in many cases considerably less.

[47] In the Hep C (*Parsons*) case, fees were 3.5%; in *Adrian v Canada (Minister of Health)*, 2007 ABQB 377 (Pre and Post Hep C), 3.7%; Indian Residential Schools (*Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481 at para 12, [2006] OJ No 4968), 4.5%; 60's Scoop (*Riddle v Canada*, 2018 FC 641, and *Brown v Canada (Attorney General)*, 2018 ONSC 5456) 4.6% and *Manuge* 3.9%.

[48] These cases suggest that 15% is unfair and unreasonable. However, there is a distinction in some of these precedents because they were mega-settlements. This might suggest a slight upward adjustment in this more modest settlement where there is not the anticipated volume of claim amounts.

[49] I note that unlike some of the above cases, Class Counsel have no commitment to include post-settlement work in their fees.

IV. Conclusion

[50] Class Counsel are receiving a premium on their time expended; they are not required to perform post-settlement work as part of the fees. Taking account of all of the factors discussed above and recognizing a more limited contribution by the Defendant, a contingency fee of 7% is fair and reasonable compensation in all the circumstances.

[51] An order to that effect will issue.

"Michael L. Phelan"
Judge

Ottawa, Ontario
March 10, 2020

FEDERAL COURT

SOLICITORS OF RECORD

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