Class Action

BY **ADEN THOMPSON-KLEIN**
TLABC Member

Aden Thompson-Klein is a class action lawyer in the Vancouver office of Klein Lawyers LLP. Aden acts for plaintiffs in a variety of class actions, including cases involving anti-competitive behavior, privacy breaches, government negligence and defective medical products. Aden has a Bachelor of Commerce with Honors from the University of British Columbia and Juris Doctor from the University of Toronto.

Class Counsel Fees in Megafund Cases: Is $80M Too High a Legal Fee?

Class action lawyers made headlines recently in the First Nations child welfare settlement, which settled for approximately $23 billion.[1] Just after negotiating the largest class action settlement ever in Canada, class counsel stated they were requesting legal fees of $80 million.[2] Some of the claimants and lawyers questioned the reasonableness of this request. But, was it irregular to make such a request?

On the one hand, $80 million is an eye-popping amount, and if approved, would result in some lawyers being compensated at $4,580 per hour.[3] On the other hand, the fees sought are significantly below the standard 20–30% that class counsel typically request,[4] and below the 2–3% range typically awarded in megafund settlements.[5] Here, $80 million is approximately 0.35% of the total recovery.

After the media backlash, Canada and class counsel agreed to a fee of $50 million,[6] which is approximately 0.23% of the total recovery. Justice Aylen, of the Federal Court, was now faced with a question: is $50 million a reasonable class counsel fee on a settlement this large, in these circumstances? Is it out of line with the legal fees awarded in other high value class actions in the Federal Court?

> The Federal Court has cautioned against placing too much importance on docketed time and multipliers as a basis for determining class counsel fees.

Class Actions and Contingency Fees

Class actions are unique in that class counsel fees must be approved by the court.[7] Class action lawyers are typically paid contingency fees, rather than billing hourly rates. This is meant to promote the goal of access to justice for deserving litigants, as well as judicial economy. The Federal Court summarized this in *Condon v. Canada,* 2018 FC 522:

> [90] Contingency fees help to promote access to justice in that they allow counsel, rather than the client, to finance the litigation. Contingency fees also promote judicial economy, encourage efficiency in the litigation, discourage unnecessary work that might otherwise be done simply to increase the lawyer's fee based on time incurred, properly emphasize the quality of the representation and the results achieved, ensure that counsel are not penalized for efficiency, and reflect the considerable costs and risks undertaken by class counsel (*Osmun v. Cadbury Adams Canada Inc,* 2010 ONSC 2752 at para 21).
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> [91] This Court, and courts across Canada, have recognized that the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases, and that class counsel's compensation consequently must reflect this reality (*Manuge,* above at para 49; *Helm v. Toronto Hydro-Electric System Limited,* 2012 ONSC 2602 at para 26; *Griffin v. Dell Canada Inc,* 2011 ONSC 3292 at para 53). Compensation must be sufficiently rewarding to "provide a real economic incentive to lawyers to take on a class proceeding and to do it well" (*Sayers,* above at para 37).

What is A Reasonable Class Counsel Fee?

Canadian courts consider the following non-exhaustive list of factors to assess the fairness and reasonableness of class counsel fees:

(a) Results achieved;

(b) Risks undertaken;

(c) Time expended;

(d) Complexity of the matter;

(e) Degree of responsibility assumed by counsel;

(f) Importance of the matter to the client;

(g) Quality and skill of counsel;

(h) Ability of the class to pay;

(i) Expectations of class members; and

(j) Fees in similar cases.[8]

Of these, courts focus on two main factors: 1) the risk undertaken and 2) the result achieved. As Justice Gagné explained in *Condon v. Canada*, 2018 FC 522:

> [83] In particular, courts have focused on two main factors in assessing the fairness and reasonableness of a fee request: (1) the risk that class counsel undertook in conducting the litigation; and (2) the degree of success or result achieved (Parsons 2000, above at para 13; Sayers v. Shaw Cablesystems Limited, 2011 ONSC 962 at para 35). Risk in this context is measured from the commencement of the action (Gagne v. Silcorp Ltd (1998), 2000 CanLII 16799 (ON CA), 49 OR (3d) 417 (Ont CA) at para 16). These risks include all of the risks facing class counsel, such as the liability risk, recovery risk, and the risk that the action will not be certified as a class action (Gagne, above at para 17; Endean v. Canadian Red Cross Society, 2000 BCSC 971 (QL) at paras 28, 35).

In *Manuge v. Canada*, 2013 FC 341, Justice Barnes explained that the litigation risk taken by class counsel is measured by the risk assumed at the outset of the case:

> [37] … It is sufficient to observe that the litigation risk assumed by class counsel is primarily measured by the risk they assumed at the outset of the case. This point was made by Justice Warren Winkler in Parsons, above, in the following passages [at paragraphs 29, 36–38 and 42]:
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> > [29] …Winning one of two class actions may be a reasonable hallmark of success. However, for the lawyer who's first action turns out to be a loser, the complete exhaustion of resources may leave him or her unable to conduct another action. Thus the real risk undertaken by class counsel is not merely a simple reciprocal of the "judgmental probability of success" in the action, even if that calculation could be made with any degree of certitude. There is a point in complex class action litigation where, degree of risk notwithstanding, class counsel may truly be, as Mr. Strosberg put it in his submissions, "betting his or her law firm." This must be considered in assessing the "risk" factor in regard of the appropriate fee for counsel.

Because the focus is on risk, courts prefer a percentage-based approach to fees, instead of hourly rates. The Federal Court has cautioned against placing too much importance on docketed time and multipliers as a basis for determining class counsel fees.

In *Manuge v. Canada*, 2013 FC 341, Justice Barnes wrote: "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." (at para. 49)

In *Condon v. Canada*, 2018 FC 522, Justice Gagné noted:

> [87] Percentage-based fees, on the other hand, encourage a results-based approach to rewarding counsel. As noted by the British Columbia Supreme Court in Endean, percentage-based fees are common in class actions and properly reward class counsel for their effectiveness, rather than being based solely on the time incurred to achieve success (above at paras 74, 75).

Lastly, In *McLean v. Canada*, 2019 FC 1077, Justice Phelan wrote: "the use of a multiplier as the basis for approving the fee is not appropriate. As commented upon in *Condon* and in *Manuge*, the multiplier may reward the inefficient and punish the efficient." (at para. 36).

Class Counsel are Typically Awarded 2-3% of Megafund Settlements

The typical fee sought in class actions is about 20-30%,[9] as this amount reasonably compensates class counsel for the risks undertaken in litigation. When the value of the settlement is large, however, 20% may overcompensate counsel – it could create an "undeserved windfall".[10] Still, courts prefer to assess fees as a percentage of the settlement. In *Heyder v. Canada*, 2019 FC 1477, Justice Fothergill stated:

> [123] The most common method of determining whether legal fees in high-value class actions are fair and reasonable is to assess the fees as a percentage of the total amount payable to the class. As Justice Kenneth Smith observed in Endean v. CRCS; Mitchell v. CRCS, 2000 BCSC 971 at paragraph 38, the use of percentage fees in "common fund" cases shifts the emphasis from the fair value of the time expended by counsel, or what one would refer to as a quantum meruit fee, to a fair percentage of the recovery. This approach tends to reward success and promote early settlement (Manuge at para 47).

In "megafund" settlements - ie. settlements of over $100 million – courts are reluctant to award a high percentage legal fee. In *McLean v. Canada*, 2019 FC 1077, Justice Phelan reviewed the fees awarded in other megafund settlements and considered a fee in the range of 3% of the class recovery to be reasonable:

> [51] There is no question that the negotiated legal fee of $55 million is substantial but it must be considered in context.
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> [52] That fee, in the context of the minimum Level 1 settlement payment of $1.27 billion plus $200 million for the Legacy Fund, represents 3.74% of the value of the Settlement.
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> [53] That percentage is further reduced by the amounts which would be paid out for Level 2 to 5 claims with no additional amount for fees. It is estimated that the total payout could approach $2 billion for a fee percentage of approximately 2.75%.

> [54] In summary, the legal fees will be in the 3% range.
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> [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)."

Subsequent to *McLean*, the Federal Court has approved class counsel fees in megafund settlements in the 2-3% range. In *Heyder v. Canada*, 2019 FC 1477, class counsel was awarded a $26.56 million fee on $900 million settlement – i.e. 2.95%. In *Tataskweyak Cree Nation v. Canada*, 2021 FC 1442, class counsel was awarded a $53 million fee on $1.888 billion settlement – i.e. 2.8%.

There is at least one outlier. The counsel fee in the *Gottfriedson v. Canada*, 2021 FC 1020, was slightly over 5%.[11] This case was significantly different from other megafund cases in that class counsel were working on an hourly rate basis paid by the clients. In other words, there was little risk of non- recovery:

> [17] In considering these factors, it is important to highlight that unlike many other class proceedings, legal counsel in this matter were not retained on a contingency fee basis. Rather, legal counsel worked on an hourly fee-for-service basis and rendered legal accounts (at reduced rates) as the matter progressed. The absence of a contingency fee agreement is an important distinguishing feature in considering and weighing the factors noted above....
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> [18] Typically, the primary risk undertaken by Class Counsel acting on a contingency fee basis is the risk of non-payment if the claim fails. That risk was somewhat ameliorated in this case. However, Class Counsel nonetheless assumed the risk of only being paid the reduced rate portion of their legal fees if the matter was not successfully concluded. Class Counsel describes this as a risk-sharing arrangement.
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> [44] While this case would fall into the mega-fund category as defined in MacDonald, the fees sought to be approved are not based upon a contingency fee calculation because Class Counsel was not acting pursuant to a contingency fee agreement.

As a result, Justice McDonald reviewed the fees sought based on hourly rates instead of based on percentages. Counsel billed $4,055,765.66 of time and sought a premium $1,600,000.00 – i.e. a multiplier of approximately 1.39x.[12] In awarding the fees sought, Justice McDonald stated the premium is "modest" and "well-earned."[13]

First Nations Child Welfare Settlement: *Moushoom v. Canada*

The First Nations child welfare settlement is unique in both the results achieved and risks undertaken. Importantly, the class action piggy-backed on 2016 and 2019 Canadian Human Rights Tribunal rulings that class members and family members are owed $40,000 per person.[14] As Justice Aylen put it: "the work that was done in the context of the Tribunal proceedings enabled the success of the negotiations."[15] Cindy Blackstock, executive director of the First Nations Child and Family Caring Society of Canada, commented on the $50 million class counsel fee sought:

> I still think this is an imbalance between what victims receive and what the class action counsel receives, particularly when most of the work was done by the tribunal.[16]

After some revision,[17] the settlement as was approved as fair and reasonable in *Moushoom v. Canada*, 2023 FC 1533. The revised settlement makes some improvements to the tribunal rulings, including: "a trauma-informed, culturally sensitive and First Nations-led

claims process, extensive fully-funded supports to help Class Members navigate the claims process and to address mental health, cultural, administrative, legal and financial needs, the *cy-près* fund and the formal request for a public apology from the Office of the Prime Minister."[18]

Overall, the results achieved, and the risks undertaken are lower than most class actions, wherein counsel is retained *before* rulings on liability and quantum of damages. Class counsel seek a low 0.23% legal fee.

In mid-December, Justice Aylen released her decision on counsel fees in *Moushoom v. Canada,* 2023 FC 1739. Justice Aylen noted that the predominant considerations are the risks undertaken by counsel and results achieved.[19] She determined that counsel took on a moderate amount of risk[20] and achieved a result that was significant, but mostly driven by happenstance.[21] Justice Aylen reduced class counsel's fee from $50 million to $40 million.

1 CBC News, "Ottawa says lawyers don't deserve $80 million for First Nation child welfare settlement", Oct 29, 2023 <https://www.cbc.ca/news/politics/first-nations-child-welfare-settlement-human-rights-tribunal-1.7010805>

2 CBC News, "Ottawa says lawyers don't deserve $80 million for First Nation child welfare settlement", Oct 29, 2023 <https://www.cbc.ca/news/politics/first-nations-child-welfare-settlement-human-rights-tribunal-1.7010805>

3 Ibid

4 *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, para. 63: "a contingent fee retainer in the range of 20% to 30% is very common in class proceedings, as it has been in other kinds of litigation in this province for some years"

5 *McLean v. Canada,* 2019 FC 1077 at para 54-55

6 CBC News, "Ottawa, lawyers reach $55M deal on First Nations child welfare legal fees", November 10, 2023 <https://www.cbc.ca/news/politics/ottawa-50-million-legal-fees-first-nations-child-welfare-1.7025474>

7 See, for example, Rule 334.4 of the Federal Courts Rules, SOR/98-106

8 *Condon v. Canada,* 2018 FC 522, para. 82; Merlo v. Canada, 2017 FC 533, paras. 78-98; McLean v. Canada, 2019 FC 1077, para. 25

9 *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, para. 63: "a contingent fee retainer in the range of 20% to 30% is very common in class proceedings, as it has been in other kinds of litigation in this province for some years"

10 *Tk'emlúps te Secwepemc First Nation v. Canada,* 2021 FC 1020, para. 43

11 *Tk'emplúps te Secwepemc First Nation v. Canada,* 2021 FC 1020, para. 38

12 *Tataskweyak Cree Nation v. Canada (AG),* 2021 FC 1442, para. 38

13 *Tataskweyak Cree Nation v. Canada (AG),* 2021 FC 1442, paras. 39, 41

14 *First Nations Child and Family Caring Society of Canada* et al. v. Attorney General of Canada, 2016 CHRT 2; 2019 CHRT 39

15 Moushoom v. Canada (Attorney General), 2023 FC 1533, para. 67

16 CBC News, "Ottawa, lawyers reach $55M deal on First Nations child welfare legal fees", November 10, 2023 <https://www.cbc.ca/news/politics/ottawa-50-million-legal-fees-first-nations-child-welfare-1.7025474>

17 CTV News, "Canadian Human Rights Tribunal rejects Ottawa's child welfare cap", October 25, 2022 <https://www.ctvnews.ca/canada/canadian-human-rights-tribunal-rejects-ottawa-s-child-welfare-cap-1.6125168>

18 *Moushoom v. Canada (Attorney General)*, 2023 FC 1533, para. 66

19 *Moushoom v. Canada,* 2023 FC 1739, para. 108

20 *Moushoom v. Canada,* 2023 FC 1739, paras. 135-137

21 *Moushoom v. Canada,* 2023 FC 1739, paras. 142-146