Class Action

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Over $900 Million: A 'Reluctant' Approval of Class Counsel Fees

In September, Chief Justice Morawetz of the Ontario Superior Court of Justice released his endorsement of class counsel fees in the Tobacco class actions: *Imperial Tobacco Company Limited*, 2025 ONSC 4497. The endorsement concerned motions to approve the payment of class counsel fees. Chief Justice Morawetz "reluctantly" approved the Quebec class counsel's' fee of over $900 million.

CASE HISTORY

Quebec class counsel was first retained to act on the case in October 1998.[1] The class action was filed against the defendants JTI-Macdonald Corp., Imperial Tobacco and Rothmans, Benson & Hedges Inc. Quebec class counsel spent 7 years working on class authorization. In 2001, they applied for funding from Quebec's public fund for supporting class action litigation. However, funding was rejected because the funder assessed the chances of success as too low.[2]

In 2005, the case was authorized in Quebec in *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2005 CanLII 4070 (Qc. C.S.).

Quebec class counsel spent the next ten years litigating the case. In June 2015, the Quebec Superior Court ruled against the defendants, awarding $100,000 to each Quebec class member who developed cancer and $30,000 to each Quebec class member who developed emphysema. Additionally, the court awarded $131 million in punitive damages: *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382

The next two years were spent dealing with an appeal of the trial decision. The Quebec Court of Appeal mostly upheld the trial decision: *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358.

Shortly after the decision from the Quebec Court of Appeal, the defendants filed for insolvency protections in the Ontario Superior Court of Justice, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). This led to a five-year mediation process to determine how the defendants would compensate claimants. The parties agreed that the defendants would pay a total of $32.5 billion in settlement of the claims.[3] Out of the $32.5 billion, $4.119 billion was allocated to Quebec class members. The CCAA plan was approved in *Imperial Tobacco Canada Limited*, 2025 ONSC 1358.

Overall, Quebec class counsel spent over 26 years working on the file, including over 20 years of litigation. The Quebec lawyers estimated they spent 211,849 hours on the litigation and another 8,000 hours on the CCAA plans.[4]

QUEBEC CLASS COUNSEL FEE REQUEST: 22% (OR $901 MILLION)

When the case first began in 1998, Quebec class counsel agreed to a 20% contingency fee for the amounts collected or realized in the litigation. In 2017, the retainer agreement was amended to include an additional 2% of the amounts recovered for counsel providing bankruptcy and insolvency services.[5]

Quebec class counsel sought a total fee of $901,177,915. This aligns with the retainer agreement: it is 22% of the $4.119 billion allocated to the Quebec class under the CCAA plan.

MOTION FOR FEE APPROVAL

Quebec class counsel sought approval of their fee under article 593 of the *Code of Civil Procedure*, C.Q.L.R., c. C-25.01. This section asks if the counsel fee is reasonable:

> In the interests of the class members, the court assesses whether the fee charged by the representative plaintiff's lawyer is reasonable; if the fee is not reasonable, the court may determine it.

The court appointed an *Amicus curae* ("*Amicus*") to provide unbiased arguments regarding the fee. Chief Justice Morawetz heavily relied on the *Amicus*' arguments – only disagreeing to a small degree.

According to the *Amicus*, Quebec law proceeds on a case-by-case analysis to determine whether a fee is fair and reasonable. While agreements enjoy a presumption of validity, courts in Québec should set aside the presumption of validity and determine what is reasonable.[6]

The *Amicus* suggested that mega-fund cases that settle before trial offer precedent to other, fully-litigated cases. This is because the time dedicated to the case and risk undertaken are factors considered for mega-fund settlements.[7] Moreover, as a result of the CCAA process, the resolution was a result of settlement.[8]

The fairness and reasonableness of the fee is guided by Section 102 of the *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1 which lays out the following factors:

(1) experience;

(2) the time and effort required and devoted to the matter;

(3) the difficulty of the matter;

(4) the importance of the matter to the client;

(5) the responsibility assumed;

(6) the performance of unusual professional services or professional services requiring special skills or exceptional speed;

(7) the result obtained;

(8) the fees prescribed by statute or regulation; and

(9) the disbursements, fees, commissions, rebates, costs or other benefits that are or will be paid by a third party with respect to the mandate the client gave him.

Under the lodestar analysis, the court analyzes counsel's hours expended to determine what they would have billed if they charged by the hour. This 'lodestar' is a multiple calculated by dividing (a) the fee sought by (b) the fees which would result under an hourly billing model. The lodestar multiplier is the premium for taking on the risk of a class action paid on a contingency basis.

The *Amicus* highlighted additional factors to consider in a class action:[9]

> 29. In addition to the factors outlined in Section 102 of the *Code of Professional Conduct of Lawyers*, Québec courts also consider the well-known objectives class actions aim to achieve as a procedural vehicle, namely, the benefits of judicial economy, access to justice and deterrence of misconduct.[22] Fulfilment of these objectives could justify higher fees.

Chief Justice Morawetz agreed that the "retainer agreement formed between class counsel and the representative plaintiff is the starting point for the analysis of counsel fees."[10] Still, the court must determine what is reasonable. The key factors are:

a. The risks assumed by counsel;

b. The scope of the retainer; and

c. The outcome achieved on behalf of the class.[11]

The court must consider these factors in additional to the optics of how the fee reflects on the integrity of the profession – to avoid a 'profit-seeking' character.[12]

Here, the factors favoured a high counsel fee:[13]

(a) [Quebec class] Counsel assumed great risk in accepting the retainer from the class.

(b) The 22% fee arrangement is at the low end of the scale and is fair and reasonable.

(c) The [Quebec class] succeeded at trial and the Québec Court of Appeal.

(d) Although the CCAA Plans reflected a mediated settlement, the CCAA Plans were only put forth to a creditor vote after five and a half years of mediation. This reflects hard fought negotiations.

(e) An exceptional outcome was obtained for the Class. The monetary award for each member of the Class is fixed. Even if the fee request of [Quebec class] Counsel is reduced, the reduction will not flow to the benefit of the Class.

(f) the [other Canadian claimants], as well as the provinces and territories obtained residual benefits as a result of the work of [Quebec class] Counsel.

(g) With the exception of Québec, the provinces and territories took no position on the appropriateness of the fees. This is significant as any reduction in the fees being awarded to the [Quebec class] would flow to the provinces and territories.

The *Amicus* also suggested using a lodestar approach as the best check for reasonableness. Under the lodestar analysis, the court analyzes counsel's hours expended to determine what they would have billed if they charged by the hour. This 'lodestar' is a multiple calculated by dividing (a) the fee sought by (b) the fees which would result under an hourly billing model.[14] The lodestar multiplier is the premium for taking on the risk of a class action paid on a contingency basis.[15] Typically, Quebec courts award a multiplier of between 1x – 7x.[16] Quebec class counsel sought a multiplier of 3.981x.[17]

Chief Justice Morawetz declined to review the time dockets of each lawyer; thus, rejecting the lodestar approach in these circumstances. Here, the lawyers worked for over 26 years. According to the Chief Justice, "there is no productive utility in conducting an in-depth review. The hours and related dollar value will be enormous even if there was a significant adjustment. Rather, when you take into account the foregoing, the real issue is whether the fee request is too high."[18]

Chief Justice Morawetz continued:

[69] To state the obvious, the fee request is astronomical. But is there any principled basis on which the fee can be or should be reduced? The work was done pursuant to a written agreement. The work was well done and produced an exceptional result. The risk assumed by [Quebec class] Counsel was significant and a premium, by way of a multiplier, is, in my view, justified.

[70] And, if there was a significant reduction, where would the money go? Subject to the proviso described below, it would not go to the benefit of the [Quebec class members]. The funds would not go to the benefit of other class action plaintiffs. It would go to the provinces and territories, all of whom, with the exception of Québec, took no position on this motion.

…

[72] This leads me to conclude that, from the standpoint of the class and the provinces and territories, the fee request of [Quebec class] counsel cannot be said to be unreasonable.

[73] The fee request of $909 million is unheard of in Canadian legal history. As previously stated, this is a unique case and this decision should never be considered to have any precedential value.

[74] Taking all the foregoing into account, I am unable to find a principled basis on which to reduce the fee request. Further, even if there was a significant reduction, the amount awarded will still be enormous.

…

[84] … in the absence of a principled basis on which to reduce the quantum sought, the requested fee of [Quebec class] Counsel is, reluctantly, approved in the amount requested.

Chief Justice Morawetz noted a possibility that Quebec class members are not paid their full fees out of the CCAA plan. Accordingly, he set up a $50 million reserve out of the counsel fee to ensure that class members receive their full amount under the CCAA plan.[19]

CONCLUSION

While Chief Justice Morawetz endorsed the $909 million legal fee, his reasons demonstrate his hesitancy. He uses dramatic language in approving the fee, noting it is 'astronomical'[20]; 'unheard of in Canadian legal history'[21]; and, "even if there was a significant reduction, the amount awarded will still be enormous."[22] He even added a postscript at the end of his endorsement, encouraging the individual lawyers to consider whether they have further and wider obligations to society – and if so – to make a "meaningful and significant contribution to a health-related charity of their choice."[23]

However, because the "decision should never be considered to have any precedential value,"[24] Chief Justice Morawetz reluctantly approved the legal fee – there was no principled basis not to.[25] ■

1. *Imperial Tobacco Company Limited*, 2025 ONSC 4497 ("Endorsement"), at para 16
2. Endorsement, at para 45
3. Endorsement, at para 11
4. Endorsement, at para 18
5. Endorsement, at para 16
6. Endorsement, at para 35
7. Endorsement, at para 36
8. Endorsement, at para 36
9. Endorsement, at para 34
10. Endorsement, at para 64
11. Endorsement, at para 64
12. Endorsement, at para 65
13. Endorsement, at para 67
14. Endorsement, at para 38
15. Endorsement, at para 38
16. Endorsement, at para 40
17. Endorsement, at para 39
18. Endorsement, at para 68
19. Endorsement, at paras 80-83
20. Endorsement, at para 69
21. Endorsement, at para 73
22. Endorsement, at para 74
23. Endorsement, at para 94
24. Endorsement, at para 73
25. Endorsement, at para 84