COURT FILE NO.: 96-CU-110595CP
DATE: 20090624

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Heather Robertson (Plaintiff) - **and** - Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Globemedia Publishing Inc. - - Defendants

BEFORE: Justice Cullity

COUNSEL: ***Kirk Baert,*** and ***Celeste Poltak*** - - for the plaintiff,

Wendy Matheson and ***Andrew Bernstein*** - - for the defendants

Barbara L. Grossman - - for class counsel

DATE HEARD: June 16, 2009

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

[1] After 13 years of litigation, the parties agreed to a settlement of this action. They have now moved jointly for its approval by the court pursuant to section 29 of the *Class Proceedings Act, 1992,* S.O. 1992, c. C. 6 ("CPA"). In the same notice of motion, class counsel seek approval of their fees.

[2] In the statement of claim, the plaintiff alleged that the defendants had infringed the rights of freelance creators, or assignees, of original literary or artistic works ("Works") published in print media in Canada by disseminating or authorizing the dissemination of copies of the Works through electronic media such as databases, contrary to the Canadian *Copyright Act,* R.S.C. 1985, c. C-42. The plaintiff sought compensatory, punitive and exemplary damages, as well as injunctive relief, on behalf of writers, artists and photographers who created the Works, their estates and assigns. The defendants contested the plaintiff's claims on the ground of rights they had acquired through implied licences, their own rights under the *Copyright Act*, the common law principles of acquiescence and waiver, and the doctrine of fair dealing. They also argued that much of the claim, which goes back to 1979, is time barred.

[3] The action was certified under the CPA by Sharpe J. in *Robertson v. Thomson* (1999), 43 O.R. (3d) 161 (G.D.). Following certification, the plaintiff brought a motion for summary judgment in respect of two of her Works, and for certain declarations of law. The motion raised the main issues of copyright law in the action.

[4] On October 3, 2001, the motion for summary judgment was dismissed on the ground that there were genuine issues to be tried with respect to the customs and practice in the publishing industry that were relevant to the defences pleaded. A declaration under section 3 of the *Copyright Act* was made affirming the right of publishers of print media to make microfilm, microfiche and daily electronic editions available notwithstanding their inclusion of Works produced by freelancers. On the other hand, it was declared that this right did not extend to freelance Works in electronic databases comprising a compilation of articles printed from different published sources, or in CD Roms. Other declarations affirmed the right of the defendants to rely on oral licences from the authors, and the exclusion of employees from the authors copyright attaching to articles in electronic databases or CD Roms.

[5] Appeals to the Court of Appeal from these findings were dismissed for reasons delivered on October 6, 2004 with Blair J.A. dissenting in favour of a newspaper's statutory right to make freelance articles available in electronic databases and on CD Roms. Further appeals were made to the Supreme Court of Canada which, on October 12, 2006 held unanimously that the newspapers' rights of publication extended to Works on CD Roms and, by a majority (after a rehearing) of five judges to four, that they did not extend to Works available in the electronic databases.

[6] In view of the finding of the majority of the Supreme Court of Canada, the class action continued and, after extensive discussions between the parties, common issues were settled by an order of this court dated November 20, 2007.

[7] In 2008 the parties agreed to mediation. This was conducted over two days in July, 2008 with the Honourable George Adams QC as mediator. After further intensive negotiations, a settlement agreement was executed by the parties on May 1, 2009. Notice of the fairness hearing was then provided to class members and any who had objections to the proposed settlement were requested to contact class counsel. No objections were received as of the date of their hearing.

The Settlement

[8] For the purpose of the settlement, the Works are those reproduced electronically between April 24, 1979 and the date of the settlement agreement. They include articles in CD Roms. Class members are the authors or creators of the Works other than those who had assigned their copyrights, or granted a licence to publish, to the defendants, or their predecessors in interest.

[9] Under the terms of the settlement, the defendants will provide an amount of $11 million that, after payment of administration expenses - including the expense of giving notice - legal fees and the levy of the Class Proceedings Fund, is to be applied for the benefit of the class members. This is to be accomplished by payments of $25,000 to each of three associations established to advance the interests of class members, and - after payment of administration expenses, counsel fees and the Class Proceedings Fund levy - by placing the balance in a compensation fund that will be divided among members who submit timely claims.

[10] The schedules to the settlement agreement contain an elaborate system for determining the amounts payable to members who make claims. This requires a claims administrator to allocate payments in respect of the claims according to a points system that will take into account the paid circulation of the relevant publication of the defendants and the opinion of a points classification committee of the relative influence - regionally or nationally - of the publication of the particular work.

[11] There is a limit of one per cent of the net contents of the compensation fund on the amount payable to any particular claimant.

[12] In view of the fact that 10 years have passed since the proceeding was certified, the parties have considered it appropriate that class members should be given a further opportunity to opt out. This provision is accompanied by a unilateral right of the defendants to withdraw from the settlement and terminate it if more than 300 members have opted out. I was informed that the number of persons who did so in accordance with the previous notice of certification was negligible.

[13] Customary releases are to be provided by the class members and the defendants are to have licences to reproduce, distribute and use the Works in the future. As alternative to granting the licences and receiving payments under the distributions process, class members may elect to have their Works removed from commercially-available electronic databases.

Settlement approval

[14] In determining whether to approve a settlement of a class proceeding, the court is exercising a supervisory jurisdiction for the purpose of ensuring that it is in the best interests of the class members. The jurisdiction exists because of a possibility that the agreement may have been motivated, or influenced, by other extraneous considerations. The drafters of the CPA, as well as the Ontario Law Reform Commission in its Report on Class Actions (1982), were sensitive to the potential conflict between the interests of the class members and class counsel's desire to secure their fees, as well as the likelihood that, in many cases, a representative plaintiff will not be well-equipped to evaluate and - if appropriate - to resist, class counsel's recommendation that a settlement should be accepted.

[15] In my opinion, no weight should be attributed to either of these considerations in the circumstances of this case. The settlement agreement was negotiated at arm's-length by experienced class counsel after lengthy negotiations following mediation by a similarly experienced mediator. The plaintiff, Ms Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an MA from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms Robertson has been in communication with class members about the litigation since its inception, and has obtained

funds from them to defray disbursements. She has clearly been a driving force behind the litigation.

[16] In providing her strong support for the settlement, Ms Robertson stated in an affidavit sworn on June 8, 2009:

> ... I believe that the proposed settlement of this case will have important implications for practice in the publishing industry, particularly as it relates to freelance writers and artists. This proposed settlement will assist in normalizing relationships between publishers and freelance creators, as well as to delineating the respective rights and obligations of the parties in relation to copyright ownership and the right to reproduce works in electronic media. Briefly stated, I believe the settlement will ultimately lead to behaviour modification on the part of larger publishers in Canada.

[17] Ms Robertson referred to the endorsement that the settlement has received from the Professional Writers Association of Canada and the Writers Union who have referred to it as "historic and a great achievement for the freelance writing industry" and as a "major victory on behalf of Canadian writers".

[18] This is obviously a case in which the court must give considerable weight to Ms Robertson's opinion that the settlement and its terms are in the best interests of the class. Although the majority decision in the Supreme Court of Canada was a breakthrough in the copyright law affecting class members, and a significant achievement by itself, the common issues that remained raised difficult and important questions of law and fact that were essential to the validity of the class members' claims and that, if decided against them, could undercut their success in the appeal. It seems likely that individual issues would have remained to be determined even if common issues were decided in favour of the class at the end of what was predicted to be a very lengthy trial. The expense of claiming damages on an individual basis - if this was necessary - would almost certainly have been a serious obstacle to attempts by many class members to enforce their claims.

[19] I believe counsel for the plaintiff were correct in characterising the action as being high-risk litigation at its outset, and if it proceeded to trial.

[20] Ms Robertson's best estimate is that there may be 5000 to 10,000 members of the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in US litigation and, given the risks and likely expense attached to a continuation of the proceeding, it does not appear to be out of line. On this question, I would, in any event, be very reluctant to second-guess the recommendation of experienced class counsel, and their well-informed client, who have been involved through all stages of the lengthy litigation.

[21] I do have some concerns on points of detail arising under the settlement agreement and, in particular, with respect to the likely efficiency and expense of the claims process. I anticipate that it should be possible to resolve these matters at a case conference to be arranged in the near

future. Apart from these concerns, the settlement is, in my judgment, well within the required zone of reasonableness and will be approved provisionally.

Class counsel fees

[22] Class counsel have requested a fee of $4 million to be paid out of the settlement amount of $11 million. Although a fee representing 36 per cent of the gross settlement proceeds would not be unprecedented in this jurisdiction, it is greater than those most commonly approved.

[23] My initial reaction to this request was that the fee requested was probably too large and particularly so when it is measured against the likely net amount available to class members after the levy of the Class Proceedings Fund and the expenses of administration are paid.

[24] For the purpose of the fee approval motion, class counsel were represented at the hearing by Ms Barbara Grossman who provided several grounds for her submissions that, in the circumstances, a fee of $4 million should be approved.

[25] Ms Grossman referred, in the first place, to a retainer agreement executed by Ms Robertson and Koskie Minsky LLP on March 5, 2007. Paragraph 6 of that agreement provides, in part:

> The legal fees shall be the Base Fee (consisting of the value of the docketed time of Lead Counsel, Assistant Counsel and the other firms which previously acted for the Client in the Litigation ...) multiplied by a Multiplier determined by the court. In setting the Multiplier the court shall consider all relevant factors including, without limitation, the amount of money obtained under any settlement or judgment, any future revenue to class members obtained under, or as a result of, any settlement or judgment, and the modification of behaviour by the defendants as a result of the Litigation.

[26] The agreement of March 52007 was expressed to supersede all previous retainer agreements in the litigation. It was entered into after Mr Baert who was then, and is now, a member of the firm of Koskie Minsky LLP became lead counsel for the plaintiff and the class. Mr Baert had previously been involved in the litigation at times when Mr Michael McGowan had been lead counsel.

[27] Two previous retainer agreements had been executed in 1996 between Ms Robertson and McGowan & Associates. The second, dated September 9, 1996, replaced the multiplier approach previously adopted, with provision for a fee of 20 per cent of the amount recovered for the class under any judgment or settlement. This agreement remained in place until the execution of that of March 5, 2007 on which counsel now rely.

[28] The timing of the change to a formula that would produce a significantly higher fee requires some comment.

[29] Justification for the large contingency fees commonly approved in class actions is to be found in the risks counsel had assumed and the unpredictability that they would eventuate. The degree of risk reflects not only the possibility that the action would be unsuccessful so that counsel would not be compensated for their work but, also, that, because of the amount of time expended, a fee approved when success has been achieved may not compensate counsel for agreeing to a fee contingent on success. This risk is probably most likely to arise when a retainer agreement provides for a fee based on a percentage of recovery.

[30] A question that arises in this case is whether, having agreed to a percentage fee, counsel can subsequently seek approval of an amendment that increases the fee after many years of litigation and a considerable expenditure of time.

[31] If counsel were adhering to the formula in the 1996 agreement they would be seeking approval of a fee of approximately $2.2 million rather than one of $4 million. The amendment of 2007 was made at a time when more than 3100 hours had been expended - this representing approximately 78 per cent of counsel's time up to June 9, 2009. Essentially the issue is whether counsel are to be held to agreements they made at the outset of the litigation, and approval withheld from amending agreements made when the course of the litigation may have changed counsel's assessment of the fee they are likely to receive under the initial agreement. While it would seem unlikely that approval would be given when a fee contingent on success in the litigation is negotiated for the first time after a settlement has been reached or is imminent, it does not follow that hindsight should not be allowed to influence amendments that affect the amount of a contingency fee previously negotiated at the inception, or in the early stages, of the proceeding.

[32] The CPA does not in its express terms require that fee agreements be made at the inception of, or at an early stage of, the litigation. (In this respect, there is a contrast with section 39 of the Class Proceedings Act of Alberta). Amendments to contingent fee agreements have been approved in this jurisdiction even though they were made in the course of ultimately successful settlement negotiations when the contingency that would result in no fee had virtually disappeared. In consequence, in this case, while I believe a degree of judicial vigilance is required in order to be satisfied that the representative plaintiff provided her free and informed consent to the amendment - and that the formula it provides is fair and reasonable from the standpoint of the class - I do not consider that it is objectionable *per se*.

[33] For the purpose of determining the fee of $4 million requested, Ms Grossman submitted that, based on the time summaries of the lawyers who had acted for Ms Robertson in the litigation, I should determine that $1,661,777.67 would represent a reasonable base fee, so that the fee would reflect a multiplier of approximately 2.4. When compared with multipliers approved in other cases, this, she submitted, was on the low side.

[34] Ms Grossman submitted further that, given the results achieved in the Supreme Court of Canada, and by virtue of the settlement, a fee equivalent to 36 per cent of the gross recovery was not unreasonable. In this connection, as well as in respect of the multiplier requested, she referred to an agreement made by one of the defendants in December 1996, to make additional payments to freelance writers in respect of electronic rights. The amendment to the defendant's

standard form of contract was offered approximately three months after the action was commenced. In Ms Grossman's submission, I should infer that this was no coincidence and that it represented not only behavioural modification - one of the objectives of the CPA - but also a significant financial benefit that should have a bearing on the size of a reasonable fee.

[35] Finally, Ms Grossman referred to suggestions in the Report of the Law Reform Commission that fees representing as high as 50 per cent of the gross recovery might be acceptable in cases of "individually non-recoverable claims" - where the expense of an individual action would exceed the value of the claim asserted.

[36] I believe weight should be attributed to each of the factors relied on by Ms Grossman. In my judgment, this is not a case where the change in the fee calculation made in the retainer agreement of March 2007 is a cause of any serious concern.

[37] Nor do I believe there are problems with the calculation of the base fee proposed by Ms Grossman. Given the length and history of the litigation, the time expended does not appear unreasonable and the docket summaries are generally informative and lack the familiar indicia that suggest over-lawyering, duplication of work and a prodigal expenditure of time. Repeated daily entries of seven or more hours devoted to research or reviewing documents are notable by their absence.

[38] Overall, and possibly of more weight than the previous considerations, this is a case where the views of the representative plaintiff with respect to the degree of success achieved, and its importance for, the members of the class should, again, be given considerable respect and deference. Ms Robinson's background and the extent of her involvement with the class members during the litigation have made her unusually well-qualified to represent their interests before the court. She and another freelance writer, Ms Elaine Dewar, attended the hearing and informed me of their support both for the settlement and the fee request of class counsel. Ms Dewar, as well as Ms Robertson and the late Ms June Callwood, were involved in the initial decision to retain McGowan & Associates for the purpose of the litigation. Ms Robertson and Ms Dewar were complimentary about the manner in which class counsel had performed their responsibilities, and Ms Robertson stated that she was confident that the class members would endorse her support of the fee requested.

[39] In these circumstances, I see no sufficient reason to withhold approval of the fee agreement with the suggested multiplier of approximately 2.4 and, in consequence, I will approve the fee of $4 million that counsel have requested. The disbursements claimed are also approved.

[40] This approval, like that of the settlement, is provisional pending further submissions of counsel on the matters to which I will now refer.

Outstanding questions

[41] I have given provisional approval to the settlement because, in principle, it represents a fair and reasonable compromise of the rights of class members and it is in their best interests that it should be implemented in the manner intended, if this is likely to occur. As I have indicated, for the most part my residual concerns relate to the efficiency and expense of the claims distribution process. Included in these concerns are questions with respect to the role of the court and of class counsel. I believe it will be appropriate for these points of detail to be discussed at a case conference at which I would want to receive counsel's views on the following questions in particular:

1. What is the estimated time for completion of the claims administrator's responsibilities? Am I correct in my understanding that no distributions will be made until all appeals to the court - and any further appeals - have been disposed of? Is it possible, for example, that all distributions would be withheld for a period of years while a single appeal was making its way up the judicial hierarchy?

2. What are the estimated costs of administration and what, if any, provision for their review is contemplated?

3. Will the claims administrator's fees be subject to review, or approval, by anyone? In his affidavit, the claims administrator refers to a supervisory role of class counsel. Where is this role defined and will counsel be entitled to charge further fees for their services?

4. Is it contemplated that there will be a report to class counsel, or the court, after administration has been completed?

5. Given that the object of the settlement is to terminate the litigation, why is it thought appropriate to give rights of appeal (or review?) to the court from all disallowed claims? Can this imposition of jurisdiction on the court be justified? Who are to be the parties to the hearings by the court and what standard of appeal (or review?) is to be applied? Is it intended that class counsel are to participate and, if so, is this to be done without further compensation? Is it intended that the claims administrator should be entitled to be represented? How is section 25 of the CPA considered to be relevant?

6. Is there to be a possibility of appeals from designations by the publication classification committee, or from a disallowance of late-filed claims?

7. Is it possible to justify the existence of a right to a hearing if all claims of a class member are disallowed but not if just one of several claims is accepted?

8. The draft judgment refers to Crawford Class Actions' services. Where is its role spelled out and why is it necessary?

9. How are para 16 of the settlement agreement and para 15 of the draft judgment reconcilable?

[42] My attempts to find answers to the above and other questions have not been assisted by the numbering of the paragraphs of Schedule B and the references to other paragraph numbers in paragraphs 50 and 51 of the schedule.

[43] Although the points system that is an integral part of the claims process is, at least in my experience, original as well as creative, the settlement will not be effective unless the claims distribution process will work efficiently. Unless there is a reasonable likelihood that this will occur, neither the settlement, nor counsel's fee will merit final approval. At present I am not satisfied that sufficient attention has been given to this consideration and to the details of the process.

[44] Counsel are to arrange a case conference to discuss the concerns I have mentioned and, if they are resolved, to settle the terms of the appropriate orders and the notice to class members.

CULLITY J.

DATE: June 24, 2009