Federal Court Cour fédérale

Date: 20200508

Docket: T-1499-16

Citation: 2020 FC 590

CLASS PROCEEDING

BETWEEN:

BRUCE WENHAM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER
(Fee Approval)

PHELAN J.

I. INTRODUCTION

[1] This is the decision concerning the approval of counsel fees. This matter proceeded separately from the consent motion to approve the Settlement. This fee approval motion is not consented to by the Government of Canada [Canada]. The Settlement Agreement provided specifically for the possibility of counsel bringing a motion regarding their proposed legal fees.

> **7.01 Legal fees and disbursements**
>
> Class Counsel may bring a motion to determine entitlement to and quantum of legal fees, disbursements and taxes payable by the Class Members, at the same time as the settlement approval motion, and Canada reserves the right to seek to make submissions to the Court on that motion. Nothing in this Settlement Agreement precludes the Applicant from bringing a motion for costs.

[2] Class Counsel brought a motion for an order:

a) approving fees and disbursements on the basis of a maximum of 15% of the "amounts paid by the CTSSP (Canadian Thalidomide Survivors Support Program) up to a maximum of $2,131,297.05 (being $1,850,000 in fees, HST of $240,500 and disbursements of $40,797.05").

b) directing the Respondent or the administrator of the CTSSP to hold back 15% of the lump sum and first 10 annual payments payable to Class Members and pay the amounts to Class Counsel until the said maximum is paid.

c) providing for consensual individual retainers with Class Members for post settlement work (reconsiderations, appeals or judicial review for Class Members whose applications to CTSSP were rejected) for which the fee will not exceed 10% of any recovery plus disbursements.

[3] Canada obtained leave of the Court to make submissions restricted to the issue of the "success" of the litigation in terms of bringing about the revised program to assist Thalidomide survivors (CTSSP). Canada expanded on its submissions without leave, to address the issue of how counsel was to be paid. It objected to the payment method on grounds that such an order would be a breach of Crown immunity against attachment of public funds. Canada also objected

to Class Counsel's proposed fee for post-settlement work. The Court allowed those submissions while reminding Canada that it ought to have obtained further leave for these new submissions.

[4] Rule 334.4 of the *Federal Courts Rules*, SOR/98-106 [Rules] provides that all payments to counsel flowing from a class proceeding must be approved by the Court. The overarching test applicable to fees is that they be "fair and reasonable in the circumstances" (*Manuge v Canada*, 2013 FC 341 at para 28 [*Manuge*]). There is no dispute either as to the test to be applied or the factors to be considered.

[5] This is an unusual dispute compared to a number of class actions against Canada where Canada either pays for or contributes to Class Counsel fees. The concession to pay the honorarium is a *de minimis* contribution. The suggestion that Canada might contribute $50,000 toward counsel's fees and $40,000 in disbursements is, in these circumstances, no substantive contribution worthy of serious consideration such as to limit approval of the fees requested.

II. BACKGROUND

[6] The nature of the litigation, its history and the risks and benefits of the Settlement are set out in the Settlement Approval decision (*Wenham v Canada (Attorney General)*, 2020 FC 588). However, in terms of the "risk factor", the focus here is on the risk at the time that the legal action is taken. This differs from the Settlement Approval context where the risk of continuing the litigation is contrasted against the benefits of a proposed settlement.

[7] In summary, Canada's first program to compensate Thalidomide survivors (the 1991 EAP) was criticized for its inadequate compensation. As a result, Canada established the Thalidomide Survivors Contribution Program [TSCP] in 2015 providing for a lump sum of $125,000 and annual support between $25,000 and $100,000 depending on the level of disability.

[8] The TSCP had onerous evidentiary criteria and imposed a standard of proof at a level of "near certainty".

[9] Wenham, whose mother took Thalidomide provided for by her doctor, was born with bilateral deformities to his arms, consistent with the effect of Thalidomide. He applied under the TSCP but his mother's physician was not available (believed to be deceased) and the mother's hospital records at Mount Sinai Hospital had been destroyed.

[10] As a result, Wenham filed affidavit evidence from himself, his brother, his wife, an expert opinion on the causal link between his deformities and Thalidomide exposure and an expert opinion corroborating the consistencies between his deformities and in utero Thalidomide exposure.

His TSCP application was denied because it did not satisfy the evidentiary requirements.

[11] On September 17, 2016, Wenham commenced his application for judicial review of the TSCP decision. Canada defended against the application, in particular on the grounds that the Court had no jurisdiction to review the *ex gratia* payment program (the "non-justiciable" issue).

[12] Having become aware that possibly 280 other individuals had been denied TSCP benefits for the same evidentiary standard reasons, Wenham converted his judicial review into a class action judicial review.

[13] Following the House of Commons Standing Committee on Health's recommendation that the TSCP evidentiary standard be reviewed – the relief sought in the judicial review as well – Canada refused to consult with Wenham on this subject citing that Health Canada could not be committed to a "hypothetical course of action".

[14] While the certification issue was being fought, the Federal Court issued the decision in *Fontaine v Canada (Attorney General)*, 2017 FC 431 [*Fontaine*], holding that a TSCP denied decision was non-justiciable.

[15] Following *Fontaine*, the Applicant's certification motion was denied – the decision was appealed.

[16] While the appeal decision was under reserve, a judge of this Court held in *Briand v Canada (Attorney General)*, 2018 FC 279 [*Briand*], and *Rodrigue v Canada (Attorney General)*, 2018 FC 280 [*Rodrigue*], that a TSCP denial decision was justiciable and that the evidentiary requirements are unreasonable.

[17] Despite these two decisions, Canada, who did not appeal those two decisions, continued with its position that such TSCP decisions were not justiciable and that a class proceeding was not warranted.

[18] On January 9, 2018 (the same day the certification issue was argued in the Court of Appeal), the Minister of Health announced that the TSCP would be replaced by the CTSSP. The announcement committed to addressing the concern that some Thalidomide survivors were excluded by the eligibility criteria. The increase in compensation was also announced.

There were no details of how the eligibility criteria would be changed.

[19] Approximately one month later, Canada tabled the 2018 Budget which again referred to the evidence issue in the TSCP and that Thalidomide survivors would receive the financial support needed. However, no details were provided but were promised for later in the Spring.

[20] Despite having been rebuffed from consultation in 2017, Wenham and Class Counsel attempted a second round of consultations on proposed changes to the TSCP. This was likewise rebuffed.

[21] Despite being rebuffed, the Applicant provided detailed submissions on the changes which should be made. Those submissions were evidently considered before the final design of the CTSSP, which design was similar to the Applicant’s position.

[22] Having received none of the promised details of changes to the TSCP, Wenham continued the class proceeding.

[23] Importantly, and as discussed later, Canada never took steps to assure the Applicant that what he sought would be forthcoming nor did it seek a stay of the litigation to allow time to develop and present the changes nor did it ever advise the Court (or the Court of Appeal) that the litigation might become academic.

[24] After the Court of Appeal on November 1, 2018, granted certification, Class Counsel made a third request for consultation on potential amendments failing which the now certified action would continue. No response to the request was given.

[25] Attempts by Class Counsel to expedite the Notice of Certification required under the Rules and to expedite a merits hearing were largely ignored.

[26] However, one year after announcing the replacement of the TSCP, on January 9, 2019, Canada announced it was “rolling out” the CTSSP but did not provide details of the administrative and adjudicative processes of this CTSSP.

[27] Despite the CTSSP announcement, the Applicant believed it needed to advance the litigation in the absence of any assurance that the proceeding would be redundant, and brought a motion approving (in the absence of consent) the notice of certification which was granted. A

Dispute Resolution Conference had to be ordered for June 17, 2019. The Respondent filed further supplementary evidence, and a refusals motion had to be scheduled.

[28] Lastly, the Respondent served a motion to dismiss the action prior to the hearing on the common issues on the basis that the CTSSP constituted an adequate alternative remedy which rendered the class proceeding moot. The notice of certification matter, the dismissal motion and the common issues hearing were set for October 23, 2019 – the respective application records having been served.

[29] Following the Dispute Resolution Conference of June 17, 2019, the parties engaged in the negotiations which led to the Settlement of October 22, 2019.

[30] Given that the parties have developed polar opposite narratives, the Court has set out these facts in detail to give an objective perspective of how and why the litigation was conducted and the role played by Class Counsel throughout.

III. ANALYSIS

A. *Legal Test*

[31] Class action judicial reviews, of which there are relatively few, pose a complexity not seen in the more traditional damage-type class action litigation. Rather than having a monetary award or settlement against which to consider “what is fair and reasonable”, successful judicial

reviews usually lead to a referral back to the decision maker and a new consideration. The class is usually given an opportunity to be heard again, but not a definitive final award.

[32] This feature can be further complicated by the notion of “anticipatory compliance” where the respondent simply agrees at some point before the Court decision with the remedy thereby rendering the litigation moot. Anticipatory compliance is discussed later in these Reasons.

[33] This Court, in such decisions as *McLean v Canada*, 2019 FC 1077, *Merlo v Canada*, 2017 FC 533 [*Merlo*], and *Manuge*, has laid out a non-exhaustive list of factors to assist in the determination of whether the fees are fair and reasonable. These include:

- risk undertaken;
- result achieved;
- time expended;
- complexity of issues;
- importance of litigation to the applicant/plaintiff;
- degree of responsibility assumed by counsel;
- quality and skill of counsel;
- ability of the Class to pay;
- expectation of the Class; and
- fees in similar cases.

[34] These factors weigh differently in different cases. However, risk and result remain critical factors in each case. The risk includes the risk of non-payment but also the risk of a contentious case and a difficult opposing party. Taking on a large government not necessarily disciplined by

finances as in a commercial enterprise is an added risk to be considered. The “results” reflect the monetary and non-monetary benefits to the Class particularly as seen by the Class.

[35] It is the role of the Court to protect the Class – to substitute its view for that of Class Counsel. The Court also must consider the role contingency fees play in the goal of “access to justice” – that fees are based on success and that the burden of litigation is spread among class members allowing for justice which might not otherwise be achieved except for the contingency fee arrangement.

[36] The basic fee sought – 15% (capped at $1.8 million) – is a significant difference from the original retainer of 25%, uncapped.

(1) Risk

[37] This was risky litigation to undertake without any guarantee of payment for litigants, who in many cases, were not only disabled but financially disadvantaged.

[38] The added risk was litigating against a national government with significant, if not almost limitless, resources often motivated by political/policy/administrative values not present in other litigation. That risk was compounded by the litigation posture of Canada to dispute at every turn this and similar claims, despite the acknowledged unfairness of the TSCP evidentiary standards and requirements.

[39] The risk factor is that risk which is undertaken when the class proceeding is commenced – not with the benefit of hindsight when the result looks inevitable. The risks faced include:

- the potential that the case would not be certified particularly on grounds such as lack of an identifiable class and individualized claims. That risk was a reality until the Federal Court of Appeal granted certification.
- the justiciability issue relied on heavily by Canada in this and in the cases of *Fontaine*, *Rodrigue* and *Briand*.
- the limitation period of 30 days was a risk which the Federal Court of Appeal recognized in its list of certified issues;
- the potential that the remedies which would be granted would not adequately address the Class' needs and expectations.
- the general risk of litigation compounded by the fact that this was a class proceeding and a judicial review for which there was little precedent.
- the uncertainty inherent in litigation which involves politics and bureaucratic priorities and potentially shifting priorities and policies.
- delay both by reason of prolonged litigation and individual assessments.

[40] This was not litigation for the "faint of heart". The time and expense was obvious from the start and increased as the case and other similar litigation progressed.

(2) Result

[41] The result achieved in the Settlement, both monetary and non-monetary, improved the situation for Class Members. The evidence from the Class – its broad support – confirmed that at least from their perspective, the results obtained were significant and satisfactory.

[42] On this issue of result, Canada disputes the role of the class proceeding in achieving the benefits of the CTSSP. Canada argues that the CTSSP was not caused by the litigation or the Settlement. It is their position that the CTSSP was created through the democratic processes of political and administrative action – that the class proceeding did not have the causal connection sufficient to say that it was the or a cause of the CTSSP. They further say that the other non-CTSSP aspects of the Settlement are not sufficient to justify a substantial award to counsel.

[43] Canada's position suggests an inevitability to the creation of the CTSSP that rested in the hands of government. It advances a chronology (filed with their argument) to establish the legislative record confirming this position.

[44] Whatever the motives of government may have been, the record of the litigation does not suggest that the litigation was an immaterial factor. To succeed with counsel's fees, they do not have to establish that counsel or the litigation was the cause of the CTSSP. Counsel recognize, as do Class Members, that there were a number of outside forces advancing the cause of improving the TSCP and modifying the monetary and evidentiary aspects of the program.

[45] The factor of other forces influencing government decisions does not undermine the role of Class Counsel or the entitlement to fair and reasonable fees.

[46] In other class actions involving government such as the Residential Schools (*Gottfriedson v Canada*, 2019 FC 462), 60's Scoop (*Riddle v Canada*, 2018 FC 641), and Indian Day Schools (*McLean v Canada*, 2019 FC 1075), there are non-litigation forces in play. The fact that a settlement is arrived at through multiple factors does not undermine the entitlement to fair and reasonable counsel fees.

[47] Canada's litigation posture belies its claim that the CTSSP would have resulted in any event and in the form and on the timelines which resulted. Canada resisted the Thalidomide survivors' court claims vigorously drawing matters out until a court decision or settlement on the "courthouse steps". This litigation would have eventually forced Canada to face court review on behalf of all Thalidomide survivors deprived unfairly of TSCP benefits.

[48] Given Canada's posture in the litigation, the Applicant had no alternative but to continue the litigation. Examining Canada's conduct of the litigation, it would have been unreasonable to assume that matters would resolve as they did. At points in the litigation where Canada could have sought a stay or given assurances of a favourable outcome, it failed to do so.

Its reliance on some unstated privilege to foreclose discussion of its intentions lacks detail of which privilege and how it operated. I put little weight on this excuse.

[49] The Class was faced with vague and uncertain statements about the 2018 Budget and the absence of any follow-up details. When changes to the TSCP were announced, the critical issues of eligibility and process were missing. The Class' efforts to obtain consultation were rebuffed.

[50] The alleged "inevitability" suggested in Canada's submissions was not apparent to a reasonable person. There was no substantial policy decision nor were there substantial program design and implementation approvals disclosed prior to certification on November 1, 2018.

[51] As Canada's chronology underlines, there was a substantial time gap of 13 months (from February 27, 2018 to April 5, 2019) between the 2018 Budget announcement and the formal establishment by Order in Council of the CTSSP. There was no assurance given the Class that their needs would be met and no inevitability about the result.

[52] Canada makes no specific denial nor presents any evidence that the class proceeding did not influence the announcement, designs or implementation of the CTSSP. In addition, the Settlement added further benefits, such matters as assurance of a balance of probabilities standard, use of the screening algorithm, input into the Health Disciplinary Committee, a requirement for reasons, an improved adjudicative process, priority of Class Members' applications, payments to estates and retroactivity of payments.

[53] In the course of the Applicant's cost motion, it raised the issue of "anticipatory compliance". This is a situation when a government holds off granting the relief requested in litigation only to initiate that relief at the last moment so as to render a case moot and to deprive

a party of costs. The Courts held that costs should be paid in any event. This issue was addressed in *Tetzlaff v Canada (Minister of the Environment)*, 1991 FCJ No 113 (FCTD); affirmed 1991 FCJ No 1277 (FCA).

[54] In my view, the issue has some application here in respect of counsel fees. Anticipatory compliance cannot be used as a means to deprive class counsel of their fees.

[55] If Canada's resistance to the class proceeding was *bona fide*, as the evidence suggests it was, then the Class had to continue its pursuit of the remedy for which counsel is entitled to compensation. If Canada's posture was simply to buy time until the inevitable CTSSP was ready for implementation, then it would have engaged in a form of "anticipatory compliance" for which it should be responsible to the Class.

In either event, Class Counsel had to engage in the litigation process and incur the time and expenses claimed.

[56] In light of all these circumstances, Class Counsel is entitled to claim credit for benefits of the Settlement including recognition of its and the Class Members' role (along with others) in the creation of the CTSSP.

(3) Time and Resources

[57] The history of the litigation, as well as the role of Class Counsel in other aspects of advocacy for the Class, was laid out in detail in the Ptak affidavit (Schedule C to that affidavit).

The details cover the usual or expected steps in a judicial review and certification process, all as set out in these Reasons and the Reasons for Settlement Approval.

[58] Importantly, the time value was over $800,000 plus $40,797.05 in disbursements. There is nothing unreasonable in the details examined by the Court and I accept the evidence as an accurate calculation of the time value of necessary professional services.

[59] While a multiplier as a basis for fees has been approached cautiously in recent jurisprudence in this Court (see *Condon v Canada*, 2018 FC 522; *Manuge*), it can be a useful "reasonableness" check – a factor for consideration, given such weight as is appropriate. In the context of a judicial review where there is no specific monetary award, it takes on some further consideration but it cannot be accepted as the sole or primary factor.

[60] In the present circumstances, the maximum fee represents a factor of approximately 2x. A doubling of time value is not necessarily unreasonable in contingency cases. It suggests that the proposed fees fall within the zone of reasonableness when considered with the other relevant factors.

(4) Complexity

[61] There is no question that these proceedings were complex and difficult. There is little guidance on the conduct of class judicial reviews particularly in this case. The issue of justiciability in the context of an *ex gratia* payment program was not a settled area of law. The

confluence of public policy, adequate compensation and fairness principles made this case even more difficult.

[62] The position taken by Canada – aggressive but not egregious – made conduct of the case and resolution challenging.

(5) Importance to Class

[63] This is a small class sharing the burden of being disadvantaged and vulnerable. They are in a situation for which they bear no responsibility – they neither made the drug, prescribed the drug nor took the drug, yet they bear the consequences. Many are of limited financial means.

[64] The litigation was initiated to improve their circumstances, to bring fairness into the compensation program, to afford them a proper opportunity for meaningful compensation and to bring some element of closure to a system created in 1991 (1991 EAP) which was revised over time.

[65] The proceeding by these Thalidomide survivors was important to secure proper recognition of their plight and fairness and equity in their treatment. That importance was brought home visibly in the public participation of a significant number of the Class in the hearing conducted in this Court.

(6) Counsel's Role

[66] The evidence, particularly of Wenham, spoke eloquently of the significant role counsel played throughout the litigation as not only an advocate but as a trusted advisor.

[67] The ability of counsel to navigate through the law, politics and policy of this case to a satisfactory resolution speaks to the quality and skill of Class Counsel.

(7) Ability to pay

[68] As Class Counsel argued, the Class is composed of individuals who have dealt with their physical malformations since birth. Many are of limited means; many are over 60 (retired or never worked).

[69] The prospect of each such individual mounting a court challenge, bearing the risks and costs, would be daunting. Few could afford to do so. Moreover, this is a small class, as compared to other class proceedings, where the economies of scale and scope present in most class proceedings do not exist. Only a contingency fee arrangement was feasible.

[70] The only practical way to pay the "fair and reasonable fee" is through the funds each member receives from the CTSSP.

(8) Fees in similar cases

[71] The initial retainer agreement provided for a 25% contingency fee. Class Counsel have revised the original fee arrangement to 15% with a cap of $1.8 million. Depending on the “up take” in claims, the effective percentage may be lower or using a multiplier, the multiplier would be less than 2x, but the maximum will never exceed $1.8 million.

[72] Comparisons with other cases must include consideration of the amounts involved (the mega funds), the size of the class, and the amount of work performed in the comparator cases. In some instances, the class action proceeded immediately from filing to consent certification to settlement. Contribution by a defendant/respondent is also an important factor.

[73] As such, the amounts of fees and the percentage of the awards varies significantly. For example, in *Merlo* where the fee was based on 27%, a contribution by Canada of $12 million effectively lowered the rate to 15% (or 21% when the contribution is bonded with the anticipated payments).

(9) Conclusion

[74] Taking all of these factors into account and considering that there was limited opposition to the proposed fee by Class Members, I conclude that Class Counsel’s fee is fair and reasonable.

B. *Method of Payment*

[75] The Applicant seeks two further orders. The first would require the CTSSP Administrator to hold back 15% from each payment to a Class Member deemed eligible to be paid under the program and to pay the holdback to Class Counsel. The second is for an order approving a 10% fee on any recovery by a Class Member who retains Class Counsel to assist with post settlement matters (except the CTSSP application filing).

[76] Canada has objected to both matters. On the first, it argues that the holdback creates a charge on public moneys for which Canada is entitled to immunity. On the second, Canada objects to pre-approval of a fee arrangement.

(1) 15% Holdback – Crown Immunity

[77] Class Counsel's proposal is consistent with other class proceeding settlements where an administrator under a settlement directs payments to class members and counsel in accordance with the fee approval order.

[78] The examples of these arrangements are on consent in whole or in part. In this case, Canada has objected to Class Counsel fees. Whether its position on the issue is consistent with its general position of obstructing the class proceeding or is a substantive concern about Crown immunity is a matter that the Court need not decide.

[79] Canada relies particularly on *Choken v Lake St. Martin Indian Band*, 2004 FCA 248 [*Choken*], where that Court held that moneys advanced by Canada to a manager under a Third Party Management Agreement [TPMA] retained their quality of "public funds" and as such could not be garnished.

[80] I find the *Choken* decision to be of limited application in this case. The decision does confirm the immunity on public funds but specifically refuses to decide the status of funds which leave the manager's account. At paragraph 27, the Court held that the funds in the manager's account retain their character as public funds at least until such time as they are used by the manager for purposes in the TPMA.

[81] The issue in this case is the character of any funds once it is determined by the Administrator to be owed to a Class Member. The unallocated funds in the Administrator's account are public funds as recognized by *Choken*. However, as per the CTSSP, when the Administrator determines that an amount from the funds is payable and initiates the payment process, those funds lose their public quality.

[82] Therefore, I reject Canada's reliance on immunity to thwart the efficient payment to and on behalf of a Class Member.

[83] However, that does not end the matter. There is a more significant impediment to Class Counsel's request. In my view, the Order in Council (s 4) precludes the type of split payment proposed and requires that the Class Member must "receive" the payments under the CTSSP.

> **Person referred to in paragraph 3(1)(a)**
>
> 4 Any person referred to in paragraph 3(1)(a) is to receive, from the date on which the Program begins,
>
> (a) a tax-free lump-sum payment of $125,000;
>
> (b) the annual payment amount set out in the schedule, which is based on the level of disability that was determined under the Thalidomide Survivors Contribution Program (2015) and which is tax-free; and
>
> (c) access to the extraordinary medical assistance fund.

[84] An order of this Court directing that funds be divided and that a portion is received by the Class Member and a portion is received by the law firm is contrary to the specific provision.

[85] Having said that, a payment to the Class Member in trust to Class Counsel in accordance with this Court's Fee Approval Order would not be contrary to the Order in Council. Once the funds are in trust, they can be dealt with as the Class Member's funds and distributed as this Court may permit.

[86] The Court will grant an Order consistent with the above.

(2) Post Settlement Payment

[87] With respect to counsel's request for approval of post settlement fee arrangements, I am of the view that the Court cannot or ought not to grant such a prior approval under Rule 334.4.

[88] As I held in *McLean v Canada (Attorney General)*, 2019 FC 1525, the Court must retain the ability to approve fees after the work has been performed. A fee of 10% may or may not be fair and reasonable depending on the circumstances. However, the Court cannot grant an open approval for unknown work and thereby fetter its discretion to approval of legal fees.

[89] Therefore, this portion of the motion is denied.

IV. CONCLUSION

[90] For all these reasons, the Fee Approval Motion will be granted substantially as requested subject to the denial of direct payment to Class Counsel and the post settlement retainer arrangement.

"Michael L. Phelan"
Judge

Ottawa, Ontario
May 8, 2020

FEDERAL COURT

SOLICITORS OF RECORD

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