CITATION: Austin v Bell Canada, 2021 ONSC 5068
COURT FILE NOs: CV-18-603803-00CP
DATE: 20210720

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LESLIE AUSTIN, Plaintiff

– and –

BELL CANADA, BELL MEDIA INC., EXPERTECH NETWORK INSTALLATION INC., AND BELL MOBILITY, INC., Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Jonathan Ptak, Mark Zigler, James Harnum, Matthew Baer, Emily Assini, and Nathalie Gondek*, for the Plaintiff

Dana Peebles, for the Defendants

HEARD: July 9, 2021

CLASS ACTION IMPLEMENTATION AND RELATED MATTERS

[1] In this omnibus motion, the Plaintiff seeks to implement the judgment in favour of the class granted by the Court of Appeal: *Austin v. Bell Canada*, 2020 ONCA 142. The motion also seeks approval of class counsel fees, approval of an honorarium for the representative Plaintiff, approval of payment of the Class Action Fund levy, and, interestingly, an Order eliminating the right of class members to opt out of the action.

[2] The essence of the judgment being implemented is to increase the indexing of the payments to all of the Defendant's pensioners both retroactively and into the future. The proceeding was brought on behalf of a class of over 35,000 individual retirees and surviving spouses under the Bell Canada Pension Plan for the full cost-of-living increases that had not been properly calculated and paid by the Defendants.

[3] The action was successful, and the class members have achieved full recovery of the losses that they claimed. Ultimately, the judgment will provide recovery to the class members of an estimated $168 million over the course of their lifetimes, representing a present value of approximately $103 million.

I. Implementation of the Court of Appeal judgment

[4] The Plaintiff, with no objection from the Defendant, seeks an order to:

> (a) Make individual payments, calculated as of October 1, 2021, to each Class Member that provide the difference between the 1% inflation increase that was provided as of January 1, 2017 and the 2% inflation increase that should have been provided;
>
> (b) Pay pre-judgment and post-judgment interest on the above-described retroactive payments to the class members; and
>
> (c) Recalculate the pension benefits owed to the class members on the basis of the correct 2% indexation figure for 2017 and ensure that this amount is factored into all future monthly pension payments and all future indexation calculations.

[5] In addition, the Defendants have agreed to bear all costs of notice and payment distribution to the class members. The Defendants will also pay costs in the amount of $472,500 for the action and the appeal as a contribution to the Plaintiffs' legal fees and disbursements expense.

[6] The implementation methodology is highly efficient, with payments being made automatically to the class members by direct deposit or cheque. There is no requirement for them to take any steps to obtain their funds, or to participate in any claims process.

[7] In short, I have heard no argument and can think of no reason that the implementation Order ought not be granted. The result has been entirely successful for the class and the implementation mechanics are appropriate and efficient.

II. Fee approval

[8] The Plaintiff's retainer agreement with class counsel provides:

> In the event of success, class counsel shall be paid an amount equal to:
>
> > (a) any disbursements not already paid to class counsel by the Defendant as costs plus applicable taxes and interest thereon; plus
> >
> > (b) if the Action is settled before the certification of the action, twenty-five percent (25%) of the Recovery less the fee portion of any costs already paid to Class Counsel, plus taxes; or
> >
> > (c) if the Action is settled after the certification of the action, thirty percent (30%) of the Recovery less the fee portion of any costs already paid to class counsel, plus taxes; or

> (d) if the Action is settled after the commencement of oral discoveries, thirty-three and one-third percent (33.3%) of the recovery less the fee portion of any costs already paid to class counsel, plus taxes.

[9] In the case at bar, the matter proceeded all the way to the end of the action. Class counsel performed all of the investigations, obtained all of the factual and expert evidence, conducted all of the cross-examinations, and researched and presented all of the legal arguments necessary to achieve a judgment on the merits at the Court of Appeal. The case certainly reflects advancement beyond the "oral discoveries" stage. Accordingly, the maximum percentage of 33.3% under the retainer agreement should be applicable.

[10] Generally speaking, "the amount payable under the contract is the starting point for the application of the court's judgment": *Commonwealth Investors Syndicate Ltd. v. Laxton,* [1994] BCJ No 1690, at para 47 (BCCA). In *Cassano v. Toronto-Dominion Bank*, [2009] OJ No 2922, at para 63 (SCJ), the Court approved the contingency fee retainer because the representative Plaintiffs "had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial." All of those factors apply here as well.

[11] Awarding counsel a percentage of recovery on a contingency basis has generally been considered to reflect a fair allocation of risk and reward as between class counsel and the class. Strathy J. (as he then was) indicated in *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105, at para 64 (SCJ) that, "There should be nothing shocking about a fee in this range [of 20% to 30%] … It serves as an inducement to the lawyer the maximize the recovery for the client and it is regarded as fair to the client because it is based upon the 'no cure, no pay' principle."

[12] Courts have now come to perceive that awards in the order of 33.3% of the final settlement or award "should be accorded presumptive validity": *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at para 3. Accordingly, 'one-third' contingency fee arrangements have been determined to be "standard", and are "regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation": *Abdulrahim v. Air France*, 2011 ONSC 512, at para 13.

[13] As indicated, the action was determined by way of summary judgement, and the total estimated present value of the recovery is $103,000,000. Class counsel seeks a sum which is significantly less than the roughly $33 million that is provided for in the retainer agreement. It requests approval of legal fees in the amount of $10 million (including the costs awards), which reflects approximately 9.7 % of the present value of the overall award to the class.

[14] In *Smith Estate v. National Money Mart Co.,* 2011 ONCA 233, at para 80, Juriansz JA set out the general principles that apply to the assessment of class counsel fees:

> Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in

> issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[15] In short, class counsel fees are not only to reward counsel for meritorious efforts, but to "also encourage counsel to take on difficult and risky class action litigation": *Abdulrahim*, *supra*, at para 9. To put it another way, "Good counsel should not be penalized for their acuity and efficiency by basing their fees only on the amount of time it took them to accomplish their clients' objectives": *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, at para 74.

[16] In the present case, the factors set out by the Court of Appeal in *National Money Mart* are each met and collectively serve to justify the class counsel fee sought. Class counsel seeks 9.7% of the present value of the total estimated recovery in this case, which is well below the ordinary range, as described by Justice Strathy and others, of between 20-33%. Class counsel achieved a legal success worth a substantial amount to the class, and negotiated for a considerably larger than average costs award to be paid by the Defendants.

[17] The $10 million fee request is by any measure fair and reasonable and in keeping with the principles set out in prior contingency fee cases. This is particularly the case given the entirely successful result reached and the cost-effective manner of its implementation.

III. Objections

[18] A form of Notice to the Class was approved by the Court on May 7, 2021, and was distributed directly by mail to all 35,045 class members. It was also posted on class counsel's website.

[19] Class counsel report that there were only 7 objection forms which contained a reason for the objection. An additional individual sent an email with reasons for her objection but did not file an objection form. Another 12 individuals completed an objection form, but did not provide any objecting reasons. Additionally, 40 individuals sent in an objection form, but subsequently advised that they were withdrawing their objection. The vast majority of those individuals completed the form by mistake, many believing it was a claim form or a declaration of eligibility, and they were not objecting.

[20] Most of the objectors do not object to the quantum of fees, but rather object to the fact that the legal fees are payable by the class members instead of the Defendants. This objection misunderstands the distinction between the litigation costs awards by the Court that are payable by the unsuccessful side, and legal fees pursuant to a contingency retainer agreement that are payable by the successful client.

[21] The principles of costs recovery that govern court-awarded costs do not provide for full indemnity except in the rarest of cases involving egregious facts. That kind of award would require "a clear finding of reprehensible conduct on the part of the party against whom the cost award is

being made": *Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722, at para. 40. There is no such finding here.

[22] Out of the 35,045 class members, class counsel received only one objection which objects to the actual quantum of fees sought. That objector states in correspondence that the percentage of the legal fees should be 15% instead of 30%. The objector was apparently unaware that class counsel is seeking 9.7% of the present value of the recovery, not 15% or 30%. Presumably, this lower percentage would satisfy the objector since it is even lower than what the objector considered to be reasonable.

IV. Honorarium for the representative Plaintiff

[23] In *Brazeau v. Attorney General (Canada)*, 2019 ONSC 4721, at para 32, Perell J. summarized the factors to be considered in approving an honorarium payment to a representative Plaintiff:

> Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. In determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other Class Members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.

[24] In this case, the record before me demonstrates that the factors set out above are all satisfied. The representative Plaintiff's contributions to the case appear to have far exceeded his own individual interests. Class counsel has indicated that he rendered invaluable assistance and went through considerable hardship in doing so. In particular, he was responsible for having identified the issue, for having approached class counsel and working the issue through with them, for having instituted a Facebook page to keep class members apprised of the case, for having travelled to and presented himself for cross-examination, and for having spent hundreds of hours corresponding with and explaining matters to class members.

[25] As a result of his contribution and personal sacrifices, I have no hesitation in granting the representative Plaintiff the requested honorarium of $15,000. This award is not really an award at all, but rather is a token of recognition that the representative Plaintiff has made a substantial contribution to the class and its access to justice.

V. The Class Proceedings Fund levy

[26] Section 10 of the Class Proceedings regulation under the *Law Society Act* provides that a levy is payable to the Class Proceedings Fund in proceedings in which a party receives funding from the Fund. The regulation specifies that the amount of the levy is the sum of (a) the amount of any financial support paid by the Class Proceedings Fund, and (b) 10% of the amount of the

settlement funds to which class members are entitled, after the deduction of all amounts that the Court orders to be paid to persons other than class members. This includes fees, taxes, disbursements, notice and administration costs.

[27] In this case, the Class Proceedings Fund has reimbursed class counsel a total of $88.330.83 for disbursements. The Plaintiff's experts, whose evidence was central to the summary judgment motion, account for the majority of the disbursements.

[28] A levy in this amount is reasonable and is payable to the Class Proceedings Fund out of the award to the class.

VI. The opt-out question

[29] In the specific circumstances of this case, allowing class members the right to opt out of the action leads to a collective action and free rider problem that class counsel argue should be alleviated by order of the Court. As they explain it, the judgment of the Court of Appeal is of a declaratory nature, applicable to the whole class. The appeal judgment mandated a recalculation of the indexation increase in the amount of 2% (instead of 1%) and the payment of damages to every pensioner in the Defendant's plan.

[30] The implementation of that judgment, which I have authorized in this endorsement, provides that the retroactive losses, as well as increased future payments, are to be paid to all class members. Those payments will be made regardless of whether they chose to opt out. Given that judgment was obtained on behalf of all class members and provides for 100% recovery, there is no principled need for an opt out here. Class counsel submit, with justification, that permitting an opt out right in these circumstances would be contrary to the spirit and underlying principles of the class action regime.

[31] The principle behind allowing a class member to opt out is to permit an individual to not participate in the action and not be affected by its results. That individual foregoes any right to the benefits of an award or settlement and avoids being bound to any of the burdens of the case. Here, however, success was obtained on each individual class member's behalf and they will each inevitably share in the benefits of that success.

[32] Regardless of whether any individuals opt out, the Defendants are required under the *Pension Benefits Standards Act*, 1985, RSC 1985, c. 32 to administer the pension plan in accordance with its terms. The Court of Appeal has now issued a binding decision on how the pension plan must be interpreted and applied for all pensioners in the context of the cost-of-living adjustment. There are no exceptions to the Court of Appeal's decision, and so each class member will be paid the corrected amount.

[33] Class counsel submit that I have jurisdiction to eliminate the opt-out choice under section 12 of the *Class Proceedings Act, 1992*, SO 1992, c. 6, which provides that, "The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate." This gives me a broad discretion

as case management judge to fashion procedures and remedies to fit unique circumstances that may arise in class actions. It seems to me that the present circumstances require that that discretion be used in the perhaps novel, but logical way that class counsel suggests.

[34] As already discussed, the class members have been provided the opportunity to object or advise if they have any interest in opting out of this case, and none have done so. The Defendants have provided direct notice of the present motion to all class members by mail, as directed by my previous Order regarding Notice. In the Notice, class members were expressly advised that a motion was being brought for an Order that no class member may opt out of the action. That Notice has now been delivered to over 35,000 class members, and not a single one has filed an objection to this relief or indicated that they are interested in commencing their own individual action.

[35] I am satisfied that in the unique circumstances of this case, eliminating the opt-out right for class members will work no injustice overall or in any individual class member's case. Indeed, *not* granting the 'no opt-out' Order sought by class counsel may result in an injustice being worked on the class.

VII. Disposition

[36] The implementation Order as requested by the Plaintiff is granted.

[37] Class counsel's fees in the total amount of $10 million (including the costs awards payable by the Defendants) are approved. The representative Plaintiff's honorarium and Class Proceedings Fund levy as requested by class counsel are likewise approved.

[38] Class members will not be permitted to opt out of this action.

Morgan J.

Date: July 20, 2021