

Federal Court



Cour fédérale

Date: 20200617

Docket: T-2169-16

Citation: 2020 FC 702

CLASS PROCEEDING

BETWEEN:

**GARRY LESLIE MCLEAN,
ROGER AUGUSTINE,
CLAUDETTE COMMANDA,
ANGELA ELIZABETH SIMONE SAMPSON,
MARGARET ANNE SWAN AND
MARIETTE LUCILLE BUCKSHOT**

Plaintiffs

and

**HER MAJESTY THE QUEEN IN RIGHT OF
CANADA as represented by
THE ATTORNEY GENERAL OF CANADA**

Defendant

and

MARY ROSE NAYTOWHOW

Moving Party

REASONS FOR ORDER

PHELAN J.

[1] These are the Court’s Reasons for granting the specific motion and approving the “Payment Protocol” to regulate the process for payments and communications to non-Class Counsel [Individual Counsel] retained by claimants in respect of the Indian Day School Settlement [Settlement].

[2] The Moving Party had brought a motion for approval of a contingency payment of Individual Counsel. The parties developed a Payment Protocol to address a number of issues raised in this Court’s decision in *McLean v Canada (Attorney General)*, 2019 FC 1525, and to settle the Moving Party’s motion. The motion is on consent and the Payment Protocol reasonably deals with the specific circumstances of the Moving Party.

[3] The process established in the Settlement was, in part, an acknowledgement and an effort to avoid the well-recognized problems encountered under the Indian Residential Schools Settlement Agreement.

[4] As a result, the parties adopted Clause 13.04, a more specific provision but one consistent with Rule 334.4. As a result, both payments to a solicitor (Rule 334.4) and the charging of fees and disbursements by Individual Counsel require prior approval of the Court.

[5] However, the Settlement does not restrict or limit a Class Member's right to retain counsel of their choice to assist with the Class Member's claim even though Class Counsel is committed to doing such work for free. Class Counsel also have other ongoing obligations to Class Members post-Settlement.

[6] In 2019, three law firms (including Bergerman Smith LLP, counsel on this motion) attempted to secure Court approval for a proposed pre-approved contingency fee arrangement for potential claimants. In dismissing that motion, the Court expressed a number of concerns with the motion including the assurance that an arrangement with Individual Counsel be compliant with law society regulations, that Claimants understood that the legal services being contracted with Individual Counsel were available for free from Class Counsel and that in retaining Individual Counsel a Claimant had to release Class Counsel from obligations which it owed the Claimant as a member of the Class.

[7] The Moving Party brought a motion on May 11, 2020, seeking an Order directing the Claims Administrator to communicate with Individual Counsel and to pay any amounts owing to the Claimant to the Individual Counsel in trust. That motion has been superseded by the consent motion granted.

[8] The parties subsequently resolved the motion in accordance with the Payment Protocol (as modified by the Court).

[9] In my view, the Payment Protocol reasonably addresses the right of a Class Member to retain counsel of their choosing with the intent and purpose of the Settlement, the obligations and commitments of Class Counsel, and the rights of the Class as a whole.

[10] The Payment Protocol does not undermine the rights of the Class and seeks a balance between avoiding the problems of the Residential Schools Settlement and according Class Members their choice of counsel. The release of Class Counsel's obligations addresses their concern.

[11] Finally, the payment into trust provides Individual Counsel with assured payment, and the requirement for Court approval of payment to Individual Counsel and the Court's ongoing supervision provides the protections necessary for the Class.

[12] The Payment Protocol gives the Claims Administrator useful guidance and protection in the due administration of the Settlement.

[13] In my view, the provision requiring documentation to the Defendant and Class Counsel gives a measure of information ultimately to the Court. The documentation itself should give the Class Member sufficient information to make an informed decision to forego free legal services. Ultimately, the responsibility for that choice must rest with the Class Member/Claimant.

[14] The Payment Protocol is consistent with this Court's decision in *Wenham v Canada (Attorney General)*, 2020 FC 590, without the complexity as "assignments" or terms of an Order in Council.

[15] In the final analysis, the ultimate protection to Class Members is that Individual Counsel must have the fees and disbursements approved by the Court before those funds may be released from trust.

[16] The Court recognizes that this Payment Protocol may be used by others in similar situations. With the requirement that the Claims Administrator and Class Counsel receive the stipulated documents, issues arising in any specific situation can and should be brought to the Court's attention.

[17] The motion is granted without costs in the form issued.

"Michael L. Phelan"

Judge

Ottawa, Ontario
June 17, 2020

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2169-16

STYLE OF CAUSE: GARRY LESLIE MCLEAN, ROGER AUGUSTINE,
CLAUDETTE COMMANDA, ANGELA ELIZABETH
SIMONE SAMPSON, MARGARET ANNE SWAN AND
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THE QUEEN IN RIGHT OF CANADA as represented by
THE ATTORNEY GENERAL OF CANADA AND
MARY ROSE NAYTOWHOW

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

REASONS FOR ORDER: PHELAN J.

DATED: JUNE 17, 2020

WRITTEN REPRESENTATIONS BY:

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FOR THE DEFENDANT

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FOR THE MOVING PARTY

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