

Federal Court



Cour fédérale

Date: 20180306

Docket: T-1685-16

Citation: 2018 FC 255

Ottawa, Ontario, March 06, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

**JANET MERLO AND LINDA GILLIS
DAVIDSON**

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] The settlement of this class action was approved by Order of this Court on May 30, 2017.

[2] By paragraph 18 of that Order the Court retains continuing jurisdiction over the settlement and its implementation, interpretation, and enforcement.

[3] By this Motion, the Plaintiffs seek an Order “that payments made by the Assessor to a Claimant pursuant to the Settlement Agreement shall be made to the Claimant’s lawyer or law firm in trust where the Claimant has signed a direction to pay the Claimant’s lawyer or law firm.”

[4] The Defendant did not take a position on this Motion.

[5] This is not a motion to approve legal fees. Rather, it is a request for an Order to facilitate the payment of legal fees to both class counsel and non-class counsel who are retained by a member of the class. The Order, if granted, would allow the Assessor to issue payment of approved claims directly to legal counsel for the class member rather than directly to the class member.

[6] In support of this Motion, counsel relies upon the following cases as authority for the relief requested: *Harrington v Dow Corning Corp.*, 1999 CanLII 7032 (BCSC); *Knudsen v Consolidated Food Brands Inc.*, 2001 BCSC 1837; *Richard v British Columbia*, 2010 BCSC 773. The relevant portions of these cases relate to the approval of the payment of legal fees by way of contingency fee arrangements in the class action scenario.

[7] I do not take issue with the payment of legal fees by contingency fee arrangements in the class action context and would note that the May 30, 2017 Order approves payment of class counsel legal fees on a contingency fee basis as follows:

[75] Approval of legal fees in the amount of 15% is also sought.
Both Representative Plaintiffs signed contingency fee agreements

agreeing to pay 33.3%, however, because of the structure of the settlement, class members will only be paying 15% of recovery toward legal fees.

[...]

[99] I am satisfied in all of the circumstances that the fees meet the criteria for approval and I therefore approve the fees. In addition to being reasonable, the fees are less than those provided for by the contingency fee agreements signed by both Ms. Merlo and Ms. Davidson. I would also note that the fact that Class counsel was willing to act on a contingency fee basis for these claims, which faced a number of hurdles, achieves one of the policy objectives of class proceedings which is access to justice for those who might not otherwise be able to afford legal representation.

[8] The payment of legal fees on a contingency fee basis to class counsel is not the relief requested on this Motion. Rather what is sought is an order to facilitate the payment of legal fees to all legal counsel some of whom are not class counsel.

[9] There is no evidence on the particulars of the fee arrangements, contingent or otherwise, between legal counsel and members of the class. Nor is there evidence from any members of the class that a direction to pay would facilitate their efforts to submit a claim or to have their claim assessed.

[10] Finally there is no evidence from the Assessor that an Order of this nature would facilitate the processing of claims.

[11] Accordingly in the circumstances, I am not satisfied that the relief sought is necessary nor am I satisfied that it falls within the Court's continuing oversight jurisdiction respecting implementation, interpretation, and enforcement of the settlement.

[12] In any event, even if it is within the Court's jurisdiction, in the absence of evidence confirming the fee arrangements, I decline to grant the relief requested. Rule 334.4 of the *Federal Courts Rules* states:

No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.

Tout paiement direct ou indirect à un avocat, prélevé sur les sommes recouvrées à l'issue d'un recours collectif, doit être approuvé par un juge.

[13] In light of Rule 334.4, this Court does not have a factual basis upon which to approve an Order for a direction to pay since the Court has no evidence of the fees sought to be paid to non-class counsel through a contingency fee arrangement or otherwise. Accordingly in light of Rule 334.4 it would not be appropriate to order a direction to pay.

[14] The motion is therefore dismissed.

ORDER in T-1685-16

THIS COURT ORDERS that:

1. The Motion for a direction to pay Order is dismissed; and
2. No costs are awarded.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1685-16

STYLE OF CAUSE: JANET MERLO AND LINDA GILLIS DAVIDSON v
HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 26, 2018

ORDER AND REASONS: MCDONALD J.

DATED: MARCH 06, 2018

APPEARANCES:

David A. Klein
Megan B. McPhee

FOR THE PLAINTIFFS

Gina M. Scarcella

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Kim Orr Barristers P.C.
Barristers and Solicitors
Toronto, Ontario

FOR THE PLAINTIFFS

Klein Lawyer LLP
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada
Toronto, Ontario

FOR THE DEFENDANT