Federal Court of Appeal | Cour d'appel fédérale

Date: 20181109

Docket: 18-A-40

Citation: 2018 FCA 204

Present: **LASKIN J.A.**

BETWEEN:

JOAN FRAME, PETER CHRISTOPHER VAN NAME, PRISCILLA MEECHES, NOELINE VILLEBRUN, ROSE SICCAMA, GUNARGIE O'SULLIVAN, COLLEEN RIJOTT, MARK HANDLEY, SARAH RAIN, VIOLET CHRISTINE DAVID, MELANIE MORRISSEAU, JOSEPHINE DENIS

Applicants

and

JESSICA RIDDLE, WENDY LEE WHITE, CATRIONA CHARLIE and HER MAJESTY THE QUEEN

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 9, 2018.

REASONS FOR ORDER BY: LASKIN J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20181109

Docket: 18-A-40

Citation: 2018 FCA 204

Present: **LASKIN J.A.**

BETWEEN:

JOAN FRAME, PETER CHRISTOPHER VAN NAME, PRISCILLA MEECHES, NOELINE VILLEBRUN, ROSE SICCAMA, GUNARGIE O'SULLIVAN, COLLEEN RIJOTT, MARK HANDLEY, SARAH RAIN, VIOLET CHRISTINE DAVID, MELANIE MORRISSEAU, JOSEPHINE DENIS

Applicants

and

JESSICA RIDDLE, WENDY LEE WHITE, CATRIONA CHARLIE and HER MAJESTY THE QUEEN

Respondents

REASONS FOR ORDER

LASKIN J.A.

[1] This motion arises out of the settlement of the "Sixties Scoop" class proceedings – litigation seeking redress for the practice by Canadian child welfare authorities for many years of

taking Indigenous children into care and placing them with non-Indigenous parents, where they were not raised in accordance with their cultural traditions or taught their traditional languages.

[2] Some background is necessary to put the motion in context.

[3] In total, 23 proposed class proceedings were commenced in relation to the Sixties Scoop. The first of these was commenced in Ontario in 2009. Other proposed class actions followed in four other provinces. The first Federal Court proceeding was commenced in 2016. Two further proceedings were commenced in 2017. The proposed class was said to comprise approximately 22,000 individuals.

[4] In February 2017, the federal Minister of Indigenous and Northern Affairs publicly announced the federal government's interest in settling the Sixties Scoop litigation. Following this announcement, further proposed class proceedings were commenced in two provinces and the Federal Court.

[5] In November 2017, after lengthy negotiations and a dispute resolution process overseen by the Federal Court, counsel in the first Ontario proceeding and the first Federal Court proceedings concluded a final settlement agreement covering all of the pending actions. The settlement agreement was conditional on the approval of both the Ontario Superior Court of Justice and the Federal Court. It provided for, among other things, the establishment and initial funding by the federal government of a foundation for the purpose of continuing efforts towards change and reconciliation, and a claims-based compensation scheme. The agreement included a

right to opt out. It called for the payment of legal fees to class counsel of $75 million. It specified an implementation date for the settlement, ending with the date of final determination of any appeal in relation to the approval orders.

[6] Notice of the settlement approval hearings was given to class members in January 2018. They were provided with an opportunity to object to the terms of settlement, the proposed counsel fees, or both. The approval hearing in the Federal Court was held before Justice Shore over two days in May 2018. Some 373 objections were received and filed with the Court. Oral submissions by objectors were also heard. The objectors included four of the 12 applicants in this motion. Many objectors expressed concerns about the amount of class counsel fees.

[7] At the conclusion of the hearing, Justice Shore announced his approval of the settlement. The formal approval order was issued a few days later, followed in turn by lengthy reasons. The order stated that the settlement agreement was fair, reasonable and in the best interests of the class. It set fees payable to class counsel in the Federal Court of $37.5 million, and allocated $12.5 million to each of three law firms. It stated that the order would be null and void if the settlement agreement was not approved by the Ontario court in substantially the same terms.

[8] Later in May 2018, the Ontario settlement approval hearing proceeded before Justice Belobaba. He released his reasons in June. He stated that he would approve the settlement, with the exception of the legal fees, which he regarded as excessive and unreasonable. He advised that counsel in the Ontario proceeding had agreed to de-link the legal fees provision from the other settlement provisions, and in effect asked Federal Court class counsel to do the same.

[9] After further negotiations, an agreement was reached to provide separately for fees for Ontario class counsel and for Federal Court class counsel, in an amount not to exceed $37.5 million each, on the basis that each court would approve only payment of the fees of counsel before it. The settlement agreement was amended accordingly. Justice Belobaba approved the amended settlement agreement in July 2018. His order has not been appealed.

[10] In the meantime Justice Phelan had been assigned as case management judge in the Federal Court proceeding. Federal Court class counsel made him aware of the amendment and provided a draft approval order, which was in substance the same as the order of Justice Shore, with the exception of provisions reflecting the amendment. Justice Phelan granted the order on August 2, 2018. Like Justice Shore's approval order, it approved fees payable to class counsel in the Federal Court of $37.5 million, and allocated $12.5 million each to the three law firms.

[11] On August 8, 2018, Justice Phelan issued a direction requesting submissions on what he described as "the current motion for the payment of fees." He asked in particular, "[i]n light of Justice Shore's decision approving fees, what jurisdiction does the Court have to reconsider the issue and specifically is the matter res judicata or otherwise subject to any estoppel principles?" In response, class counsel submitted that both Justice Shore and Justice Phelan had approved the fees, and there was no motion for fee approval outstanding.

[12] On September 10, 2018, after a case conference and further submissions, Justice Phelan issued reasons in which he concluded that, "in accordance with the principles of issue estoppel, [the] Court does not have jurisdiction to review, let alone reverse, Justice Shore's decision." He

stated that "[i]n hindsight, it might have been preferable to title the August 2 Order '1st Amended Order of Justice Shore's Order of May 11, 2018'." He ordered that Justice Shore's May 2018 order and June 2018 order (accompanying his reasons and reproducing the May 2018 order), and his own August 2, 2018 order, "remain in full force and effect and Federal class counsel fees are to be paid accordingly."

[13] The applicants now wish to appeal both Justice Phelan's August 2, 2018 order and his order of September 10, 2018. They move for an order under rule 334.31(2) of the *Federal Courts Rules*, SOR/98-106, by which a class member may seek leave to exercise the right of appeal of a representative plaintiff. It reads as follows:

(2) If a representative plaintiff or applicant does not appeal an order, or does appeal and later files a notice of discontinuance of the appeal, any member of the class for which the representative plaintiff or applicant had been appointed may apply for leave to exercise the right of appeal of that representative within 30 days after	(2) Si le représentant demandeur n'a pas interjeté appel ou s'en est désisté, un membre du groupe peut demander l'autorisation d'exercer le droit d'appel du représentant demandeur dans les trente jours suivant :
(a) the expiry of the appeal period available to the representative, if the representative does not appeal; or	a) l'expiration du délai d'appel ouvert au représentant demandeur, si celui-ci n'a pas interjeté appel;
(b) the day on which the notice of discontinuance is filed, if the representative appeals and later files a notice of discontinuance of the appeal.	b) le dépôt de l'avis de désistement, si le représentant demandeur s'est désisté de l'appel.

[14] In their notice of motion, the applicants assert that they are all members of the class. They allege, among other things, that

- they were not given notice of the amendment to the settlement agreement;
- court files relating to it were improperly sealed, depriving them of access, without a confidentiality motion or order;
- they became aware of the amendment and its approval only through a newspaper article;
- approval required a new notice and a new fairness hearing;
- Justice Phelan's August 2, 2018 order rendered Justice Shore's approval order null and void;
- Justice Phelan's September 10, 2018 order was made without jurisdiction;
- some of the applicants wrote to Justice Phelan seeking permission to participate in the case conference that led to his September 10, 2018 order, but this request was denied;
- this denial was despite their direct interest in the issue of payment of legal fees, since if fees were reduced the amount of the reduction could be used to the benefit of the class;
- Justice Phelan erred by reviving Justice Shore's order without due process;

- Federal Court class counsel breached procedural fairness rules in amending the settlement agreement to remove Justice Belobaba's oversight of their fees;

- alternatively, Justice Phelan was not *functus officio* because what Justice Shore ruled on was significantly different from what Justice Phelan ruled on in his August 2, 2018 order;

- the amendment to the settlement agreement, and the provision for separate approval of fees, makes it impossible now to determine that the counsel fees payable to Federal Court class counsel are fair and reasonable; and

- the actions of Federal Court class counsel have been motivated by their interest in maximizing their fees, and their actions have brought the administration of justice into disrepute.

[15] The evidence filed by the applicants in support of their motion consists only of Justice Phelan's August 2 and September 10, 2018 orders and the affidavit of a legal assistant. Her affidavit merely exhibits five documents. There is no affidavit of any of the applicants.

[16] Despite the want of evidence, both the applicants' memorandum and their reply memorandum purport to recount in detail the relevant facts, including facts said to substantiate the allegations referred to above. They elaborate on their allegations against class counsel, stating, among other things, that class counsel "deceived" Justice Belobaba, acted without instructions, breached court rules, circumvented due process, and sought deliberately to work an injustice.

[17] The applicants also rely on the test applied by this Court in motions for leave to appeal under rule 352. That test requires that the applicant for leave to appeal establish some arguable ground upon which the proposed appeal might succeed: see, for example, *Kurniewicz v. Canada (Minister of Manpower and Immigration)*, 6 N.R. 225 at para. 9, [1974] F.C.J. No. 922 (QL) (C.A.).

[18] The respondents have filed an extensive evidentiary record supported by affidavit. They too rely on the leave to appeal test under rule 352. They also submit, among other things, that the motion was brought out of time, that the applicants have no standing to bring it, and that there is no right to appeal a consent settlement approval order. They also point to the absence of evidence to support the proposition that, if leave were granted, the applicants would fairly or adequately represent the interests of the class.

[19] Since the material on the motion was filed, counsel for the applicant Colleen Rijotte (whose last name is apparently misspelled in the style of cause) have filed a motion to be removed from the record based on a breakdown in the solicitor-client relationship, and advised that they have withdrawn from the motion. Counsel for the applicant Priscilla Meeches have advised the Court that they have been instructed to withdraw from participation in the motion, because their client does not wish there to be any delay in implementing the settlement.

[20] This appears to be the first motion brought under rule 334.31(2). Only a very few motions have been brought under the similar provisions in the class proceedings statutes of other Canadian jurisdictions: see *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 36(3); *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 36(2); *The Class Proceedings Act*, S.M. 2002, c. 14, s. 36(5); *Class Actions Act*, S.N. 2001, c. C-18.1, s. 36(4); *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 38(4); *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 39(4); *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 30(5); *Code of Civil Procedure*, C.Q.L.R. c. C-25.01, art. 602; *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 39(4).

[21] However, though the language of the Ontario provision differs somewhat from that of rule 334.31(2), the decisions of the Ontario Court of Appeal in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97, 165 D.L.R. (4th) 482 (C.A.), and *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONCA 456, leave to appeal refused, [2013] S.C.C.A. No. 395 (QL) , are helpful in considering how the discretion granted by the rule should be exercised.

[22] In *Dabbs*, a class member sought leave to act as a representative party for purposes of appealing a judgment that certified a class proceeding and approved its settlement. In refusing leave, the Court stated (at 103) that "[its] discretion to grant leave under [the Ontario provision] is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class." It noted that there was "nothing in the record which indicates that [the class member] would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement

agreement." It added that courts in three jurisdictions had approved the agreement, and that the class member was the only one, in a class of some 400,000, who was seeking to set it aside. "The wishes of one class member," it stated, "ought not to govern the interests of the entire class." If he was dissatisfied with the settlement, his recourse was to opt out and pursue his individual claim.

[23] In the same vein, in *Sino-Forest* the Court dismissed a motion for leave to represent prospective class members in appealing an approved settlement where there was no basis on which to interfere with the approval order (at paras. 14-15).

[24] In my view, similar considerations should govern the exercise of discretion under rule 334.31(2). To obtain leave to exercise the appeal right of a representative plaintiff, a class member must show that he or she will fairly and adequately represent the class on appeal, and that the appeal is itself in the best interests of the class. A focus on the best interests of the class is entirely consistent with the nature of the courts' supervisory role in class proceedings, particularly in relation to settlements: see *Bancroft-Snell v. Visa Canada Corp*., 2016 ONCA 896 at para. 40, 133 O.R. (3d) 241.

[25] The parties have described a rule 334.31(2) motion as a motion for leave to appeal. That is not quite correct. Rather, as the text of the rule makes clear, it is a motion "for leave to exercise the right of appeal" of the representative plaintiff. The availability of an order under the rule therefore depends on whether the representative plaintiff (or applicant) has a right of appeal:

see The Rules Committee, *Class Proceedings in the Federal Court of Canada: a discussion paper* (Ottawa: Federal Court of Canada, 2000) at 91-92.

[26] The respondents submit that a representative plaintiff has no right to appeal an order approving a settlement of a class proceeding. They argue that an order of that kind is a consent order, and a party has no right to appeal an order to which it consented.

[27] It is true that in other Canadian jurisdictions, appealing a consent order requires leave of the court: see, for example, *Alberta Rules of Court*, Alta. Reg. 124/2010, rule 14.5(1)(d); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 133(a); *Ruffudeen-Coutts v. Coutts*, 2012 ONCA 65 at paras. 59-66, 348 D.L.R. (4th) 64. Whether this is so for an order of the Federal Court may be questionable in light of subsection 27(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides for appeals to this Court as of right from final and interlocutory judgments of the Federal Court (though it does not address who has standing to appeal).

[28] In any event it is not at all clear that an order approving the settlement of a class proceeding is a consent order. The basis for a consent order is the parties' agreement, not a judge's determination of the merits or what is fair and reasonable in the circumstances. It therefore seems wrong to characterize a settlement approval order, which requires a judicial determination that the settlement is fair and reasonable and in the best interests of the class, as an order made on consent: *Bodnar v. The Cash Store Inc.*, 2011 BCCA 384 at paras. 37-38, 23 B.C.L.R. (5th) 93. That characterization could also foreclose a class member's ability to seek

leave to challenge an approval order on appeal, even when an appeal might be in the best interests of the class.

[29] However, I need not decide this issue. Nor need I consider whether the motion has been brought out of time, as the respondents submit. That is because the motion fails in any event for another, basic reason: the applicants have not adduced sufficient evidence on which an order granting leave could justifiably be made.

[30] It is fundamental that, with very limited exceptions, a motion must be supported by evidence. Rule 363 requires that "[a] party to a motion […] set out in an affidavit any facts to be relied on by that party that do not appear on the Court file." This is no mere technicality: see *Kurniewicz* at paras. 9-10.

[31] Here the evidence filed by the applicants is inadequate in the extreme. First, in circumstances in which the applicants are seeking to step into the shoes of the representative plaintiffs, the Court would expect to see evidence of the kind typically submitted on a certification motion, going to, among other things, the applicants' interest, their understanding of the position they seek to advance, their role in the proceeding, and their competence to instruct counsel: see *Horseman v. Canada*, 2016 FCA 238, affirming 2015 FC 1149 and citing *Sullivan v. Golden Intercapital (GIC) Investments Corp*., 2014 ABQB 212 at paras. 54-57. Otherwise, as stated in *Sullivan*, the applicants "cannot be anything more than an empty vessel controlled by the litigation lawyer." And otherwise, there is no basis for exercising the discretion whether to grant leave in a manner that takes into account the first set of factors identified in *Dabbs*.

[32] But here there is, as in *Dabbs* "nothing in the record which indicates that [the class member] would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement." There is, indeed, nothing to establish that the applicants are even members of the class (though this is conceded in relation to one of the applicants). In the absence of evidence going to the applicants' ability to adequately represent the class on appeal, their motion must fail.

[33] Nor have the applicants adduced evidence to show that an appeal of Justice Phelan's orders would be in the best interests of the class, on the bases that they assert. There is a virtual absence of evidence to substantiate the various allegations made by the applicants against class counsel and in relation to the events that preceded Justice Phelan's orders. Although the applicants need not necessarily prove their allegations at this stage in order to be granted leave, it is not sufficient, for example, to make assertions about the applicants' state of knowledge, or to impugn class counsel's conduct, without any evidence in support.

[34] For these reasons, the motion is dismissed.

[35] On the basis that the applicants' memorandum contains serious and unsupported allegations of misconduct against class counsel and the representative plaintiffs, the respondents ask the Court to order costs against the applicants' counsel personally. The applicants did not respond to this request in their reply memorandum.

[36] Rule 404(2) requires that no costs order may be made against a solicitor unless the solicitor has been given an opportunity to be heard. To ensure compliance with rule 404, I will give applicants' solicitors until November 19, 2018 to file submissions in response to this request. If they do so, the respondents will have until November 26, 2018 to file brief submissions in reply. Both submissions should address the applicability of rule 334.39. Costs of the motion are reserved pending receipt and consideration of these submissions.

"J.B. Laskin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	18-A-40
STYLE OF CAUSE:	JOAN FRAME, PETER CHRISTOPHER VAN NAME, PRISCILLA MEECHES, NOELINE VILLEBRUN, ROSE SICCAMA, GUNARGIE O'SULLIVAN, COLLEEN RIJOTT, MARK HANDLEY, SARAH RAIN, VIOLET CHRISTINE DAVID, MELANIE MORRISSEAU, JOSEPHINE DENIS v. JESSICA RIDDLE, WENDY LEE WHITE, CATRIONA CHARLIE and HER MAJESTY THE QUEEN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LASKIN J.A.
DATED:	NOVEMBER 9, 2018

WRITTEN REPRESENTATIONS BY:

Jai Singh Sheikhupura	FOR THE APPLICANTS
Celeste Poltak Kirk Baert Garth Myers David A. Klein Douglas Lennox Angela Bespflug E.F. Anthony Merchant, Q.C. Evatt Merchant, Q.C.	FOR THE RESPONDENTS JESSICA RIDDLE, WENDY LEE WHITE AND CATRIONA CHARLIE

SOLICITORS OF RECORD:

Watson Goepel LLP Vancouver, British Columbia	FOR THE APPLICANTS
DD West LLP Winnipeg, Manitoba	
Aboriginal Law Group Saskatoon, Saskatchewan	
Koskie Minsky LLP Toronto, Ontario	FOR THE RESPONDENTS JESSICA RIDDLE, WENDY LEE WHITE AND CATRIONA CHARLIE
Klein Lawyers LLP Vancouver, British Columbia	
Merchant Law Group LLP Regina Saskatchewan	
The Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT HER MAJESTY THE QUEEN