Federal Court of Appeal

Cour d'appel fédérale

Date: 20210331

Docket: A-340-19

Citation: 2021 FCA 65

CORAM: **BOIVIN J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

JOAN JACK and LOUAY ALGHOUL

Appellants

and

GARRY LESLIE MCLEAN, ROGER AUGUSTINE, ANGELA ELIZABETH SIMONE SAMPSON, MARAGARET ANNE SWAN and MARIETTE LUCILLE BUCKSHOT

and

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

Respondents

Heard by online video conference hosted by the Registry on March 8, 2021.

Judgment delivered at Ottawa, Ontario, on March 31, 2021.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: LOCKE J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] On August 19, 2019, the Federal Court (*per* Phelan J.) issued two orders. The first Order approved a Settlement Agreement and associated schedules with regard to a class action (2019 FC 1074) (the Settlement Approval Order); the second Order approved class counsel fees, disbursements to Gowling WLG (Canada) LLP (Gowling) and the payment of honoraria provisions to each of the six (6) named plaintiffs to be paid from class counsel fees (2019 FC 1076) (the Fee Approval Order). However, in its Fee Approval Order, the Federal Court declined to adjudicate Joan Jack and Louay Alghoul's (the appellants) request for fees.

[2] In this appeal, the appellants challenge the Federal Court's Fee Approval Order.

I. Overview

[3] This case dates back to over a decade ago when, on July 31, 2009, a proposed class action was commenced by Joan Jack on behalf of Garry Leslie McLean, Margaret Anne Swan and others in the Court of Queen's Bench of Manitoba by way of a statement of claim and an amended statement of claim (Manitoba Action). The claim was a proposed class action proceeding against Canada on behalf of the survivors of Indian Day Schools. In 2012, Louay Alghoul joined Joan Jack and they both shared carriage of the Manitoba Action. From 2009 to 2016, the appellants worked to advance the proposed class action. However, no further litigation steps were taken and no motion for certification was filed. In May 2016, the plaintiffs terminated the retainer of the appellants and, a few weeks later, retained Gowling for the carriage of the Manitoba Action.

[4] In December 2016, following a review of the outstanding issues and having regard to the allegations being made, as well as to the legislation governing the Indian Day Schools and the fact that the defendant at issue was the Federal Government, a new action (*McLean et al v. HMTQ* (T-2169-16)) was filed by Gowling in the Federal Court (Federal Action). By Order dated June 21, 2018, the Federal Action was certified by the Federal Court as a class proceeding and Gowling was appointed as class counsel.

[5] On November 30, 2018, the parties to the Federal Action entered into an Agreement in Principle to the settle the action, and a Settlement Agreement was executed on March 12, 2019. In addition to settlement of the merits of the action, the Settlement Agreement settled the amount of legal fees and disbursements to be paid to Gowling. It also provided that approval of counsel fees was severable from approval of the settlement on the merits.

[6] On March 13, 2019, the Federal Court approved a Notice Plan that provided for notice to class members and to the public at large of the certification of the Federal Action as well as of a Settlement Approval Hearing scheduled for May 13, 14 and 15, 2019 in Winnipeg, Manitoba. This hearing would also address counsel fees (Fee Approval Hearing).

[7] In the meantime, the appellants and others brought motions to intervene in the Federal Action and to participate at the Settlement Approval Hearing. All motions for leave to intervene, including one filed by the appellants, were dismissed. Specifically, with respect to the appellants' motion, the Federal Court held that "to the extent that the proposed interveners have a claim for unpaid legal fees and some form of solicitor's lien, there is a reasonable and more appropriate

remedy in the courts" (Federal Court's Order, 2019 FC 636). The appellants appealed the dismissal of their motion to intervene. Their appeal was subsequently dismissed by our Court for mootness (June 15, 2020). Despite having denied intervener status to the appellants, the Federal Court nonetheless allowed the appellants' subsequent request, by way of a Direction dated May 10, 2019, to make submissions at the Fee Approval Hearing.

[8] On May 13 and 14, 2019, at the Settlement Approval Hearing, the Federal Court heard submissions from Joan Jack, one of the appellants, in her capacity as a class member.

[9] On May 15, 2019, pursuant to the Federal Court's Direction dated May 10, 2019, counsel for the appellants made oral submissions at the Fee Approval Hearing. Essentially, their position was that the aspect of the Settlement Agreement concerning counsel fees should be rejected because it failed to take into account the appellants' contribution.

[10] On August 19, 2019, the Federal Court, as indicated at the outset, issued two separate orders: the Settlement Agreement Order and the Fee Approval Order. Before this Court, the appellants appeal the Federal Court's Fee Approval Order and challenge the Federal Court's rejection of their argument .

[11] At the hearing before this Court, Gowling brought a motion to file further evidence. The appellants opposed the motion. Her Majesty the Queen, as represented by the Attorney General of Canada (AGC), did not oppose it. Upon hearing the parties and taking the motion under

reserve as part of the deliberation, I am of the view that it has no impact on the outcome of this case. As such, it does not need to be addressed as part of these reasons.

II. Issue

[12] Did the Federal Court commit a reviewable error in the exercise of its discretion?

III. Standard of Review

[13] The standard of review of a discretionary decision is reviewable against the *Housen* standard (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8, 10, 26, 36; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at paras. 69 and 74-79).

IV. Analysis

[14] The appellants submit that the Federal Court erred when it refused to adjudicate their alleged right to fees. In support of their contention, the appellants argue that the Federal Court has a supervisory role under Rule 334.4 of the *Federal Courts Rules*, SOR 98-106, pursuant to which it should have reviewed the work of the appellants. In the words of the appellants, the Federal Court had a statutory obligation to “tackle this issue [of the appellants’ fees] under the [*Federal Courts Rules*].” In further support of their position, the appellants rely heavily on *Bancroft-Snell v. Visa Canada Corporation.*, 2016 ONCA 896, 133 O.R. (3d) 241 [*Bancroft*].

[15] The *Bancroft* case involved a fee sharing agreement entered into between class counsel and the Merchant Law Group in settlement of a carriage dispute involving competing multi-jurisdictional class proceedings launched across Canada. The appellants contend that the issue at the core of the dispute between the parties is one of “fee-sharing”, akin to the issue at play in *Bancroft* (Appellants’ Memorandum of Fact and Law at para. 33), and they point to the fact that *Bancroft* is illustrative of the supervisory role of courts regarding counsel fees.

[16] In *Bancroft*, the Court of Appeal for Ontario observed that the underpinning supervisory role of the Ontario Superior Court in a class proceeding is to ensure that the best interests of the class are protected:

> [40] It is well-accepted that courts are charged with a broad supervisory role over the conduct of class proceedings, including the approval of settlements and the approval of fees and disbursements to be paid to class counsel. It is also well-accepted that the potential reward for class counsel must be sufficiently attractive to provide an incentive for counsel to take on such challenging cases, with their attendant risks. However, underpinning the court’s broad supervisory mandate is the need to ensure that the members of the class are protected and that outcomes are fair and reasonable and in their best interests in circumstances where the interests of class counsel and defendants may conflict with those of the class and there is no one to speak for the interests of the class. …

[17] Specifically, *Bancroft* stated that the Ontario Superior Court can thus review sharing and fee agreements in order to be satisfied that “the fees and disbursements paid by class members are fair and reasonable and that they reflect payments made for legal services that benefit the class members” (*Bancroft* at para. 59).

[18] Likewise, pursuant to Rule 334.4 of the *Federal Courts Rules*, the Federal Court has jurisdiction to review such agreements to ensure fairness, transparency and reasonableness of counsel fees. Rule 334.4 provides as follows:

334.4 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.	334.4 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.

[19] Yet, the *Bancroft* case cannot be relied upon by the appellants as authority for the relief they seek before our Court for a number of reasons, in particular, because (i) the Manitoba Action was never certified; (ii) the appellants' retainer was terminated by their client in the Manitoba Action; (iii) the Federal Action is not a multi-jurisdictional class proceeding and; (iv) most importantly, the Federal Court found that there was no fee sharing agreement before the Court to approve.

[20] Indeed, as part of its Fee Approval Order, the Federal Court, whilst acknowledging its supervisory role pursuant to its jurisdiction under Rule 334.4, clearly and correctly observed that, absent a fee agreement between counsel, the appellants' alleged right to fees was not a matter for adjudication before the Federal Court but was more properly a subject for the Court of Queen's Bench of Manitoba (Reasons for Fee Approval Order (2019 FC 1077) at para. 14):

> Neither Jack nor Alghoul took steps to preserve a solicitor's lien or claim against Gowling. If they have any such rights, they are not a proper matter for this Court to adjudicate. If there had been any fee sharing agreement regarding the class proceeding between Gowling and Jack or Alghoul, the Court would have likely had to approve it under Rule 334.4. <u>However, as no such fee sharing agreement exists, any other claim between Jack and Alghoul and Gowling is a matter under the Manitoba action and a matter within that province (see *Bancroft-Snell v Visa*</u>

> *Canada Corp*, 2016 ONCA 896 at paras 67, 111, 133 OR (3d) 241). The assessment of Gowling's position in this litigation takes into account the fact that they took over a case which had some initial work performed and was a case with considerable complexity, burden and risk. [Emphasis added.]

[21] The appellants nonetheless submit that the Federal Court erred in deciding as it did because, contrary to the Federal Court's finding, there was indeed in their view a fee sharing agreement between them and Gowling. In support of this contention, they refer to an email, dated June 20, 2016, sent by Mr. Robert Winogron of Gowling at the time of the transition of the file from the appellants to Gowling. In this email, Mr. Winogron offered to present for judicial approval any and all documentation that the appellants might provide to Gowling upon successful conclusion of the proceedings. The said email reads as follows:

> 1. Mr. Alghoul will provide the most current database containing approximately 11 thousand entries in memory stick format to both our office and to Ms. Jack immediately.
>
> 2. Mr. Alghoul will provide a final statement of account forthwith.
>
> 3. Ms. Jack will provide a final statement of account as soon as reasonably possible.
>
> 4. We undertake to present any and all documentation you make available to us respecting your fees and disbursements to the court for approval upon the successful conclusion of this proceeding. [Emphasis added.]

[22] The wording of the June 20, 2016 email is evidence of an undertaking on the part of Gowling. However, I cannot agree with the appellants that it rises, in and of itself, to the level of a fee sharing agreement whereby Gowling agrees to bring the appellants' claim for fees before the Federal Court simultaneously with its own application for fees (Appellants' Memorandum of Fact and Law at para. 31). Rather, it is clear from a reading of the June 20, 2016 email that

Gowling's undertaking depends on the documentation made available by the appellants. Yet, following the June 20, 2016 email, the appellants failed to provide any evidence that class members in the Federal Court Action benefitted from their work, nor did they advance any quantum or documents substantiating an estimate of the unpaid fees. Likewise, when the Federal Court, by way of a Direction, allowed counsel for the appellants to make submissions with respect to fees on May 15, 2019, they again failed to provide relevant material to the Federal Court regarding their fees and disbursements – *e.g.* dockets, disbursements, invoices and the like. The appellants' contention that they required more time to produce such evidence is unpersuasive. They had multiple opportunities prior to the Fee Approval Hearing to gather relevant information and demonstrate to the Federal Court that they were entitled to some sort of compensation under the Federal Action.

[23] Furthermore, as articulated, the appellants' contention seeks to broaden the interests protected under Rule 334.4. Although the appellants acknowledge, on the one hand, that the Court's involvement in the approval of counsel fees is to protect the interests of those parties who were not involved in the settlement agreement and that, "generally", this means the protection of the interests of the class members, they maintain, on the other hand, that the Federal Court was not limited to considering only the interests of the class members. The appellants' contention is tantamount to arguing that Rule 334.4 allows an individual to advance a private claim against class counsel. There is no authority, nor do the appellants point to any, supporting the view that a matter such as this one is reviewable by the Federal Court. Simply put, the dispute in this case amounts to a dispute between law firms and the Federal Court is not the appropriate forum to solve it in the context of a Fee Approval Hearing, absent a fee sharing

agreement. It is noteworthy that the appellants have since filed a Statement of Claim (September 10, 2020) against Gowling, Mr. Winogron and the AGC in the Court of Queen's Bench of Manitoba (File No. CI 20-01-28349), seeking notably judgment against the Defendants for the same amount as the amount awarded by the Federal Court in its Fee Approval Order – *i.e.* $50 Million.

[24] It follows that the Federal Court did not commit a reviewable error in finding that, absent a fee sharing agreement between the appellants and Gowling, the appellants have no interest in counsel fees in the Federal Action. The allegations of breach of procedural fairness or equitable rights must also be rejected for lack of evidentiary basis.

[25] The AGC did not file any submissions or written material with respect to the Fee Approval Hearing and took no position thereon. Furthermore, in this appeal, the AGC did not take a position regarding its disposition, but denied, as did Gowling, various allegations made by the appellants. For example, the appellants allege that "something untoward occurred in the settling of the terms of the agreement" and that Gowling, in this case, has a "history of taking inconsistent positions in various courts to avoid having to come to grips with the merits of these claims" (Appellants' Memorandum of Fact and Law at paras. 6 and 30). The appellants make these allegations despite the fact that the Federal Court appointed an experienced counsel as *Amicus Curiae* who made submissions at the Fee Approval Hearing. The *Amicus Curiae* also "confirmed the reliability of the expenses" and established that the fees agreed upon were "consistent with the applicable case law" (Reasons for Fee Approval Order (2019 FC 1077) at paras. 18-19). The Federal Court was thus satisfied that the negotiation of counsel fees was

conducted at "arm's length" and in "good faith" (*Ibid* at para. 4). Based on the record before this Court, the allegations made by the appellants are unsupported, unfounded and without merit.

[26] Finally, the parties debated the issue of whether the appellants have standing to appeal the Fee Approval Order. However, there is no need to address this issue given the findings above.

[27] For all of these reasons, I would dismiss the appeal. Although the parties have exceptionally requested costs in the context of a class proceeding, in the circumstances of this case, I would decline such request.

"Richard Boivin"

J.A.

"I agree.
George R. Locke J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-340-19
STYLE OF CAUSE:	JOAN JACK and LOUAY ALGHOUL v. GARRY LESLIE MCLEAN, ROGER AUGUSTINE, ANGELA ELIZABETH SIMONE SAMPSON, MARAGARET ANNE SWAN, MARIETTE LUCILLE BUCKSHOTAND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	MARCH 8, 2021
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	LOCKE J.A. LEBLANC J.A.
DATED:	MARCH 31, 2021

APPEARANCES:

Mathew Farrell Jonathan Denis	FOR THE APPELLANTS JOAN JACK AND LOUAY ALGHOUL
Mary M. Thomson Guy Régimbald Joshua Shoemaker	FOR THE RESPONDENTS GARRY LESLIE MCLEAN, ROGER AUGUSTINE, ANGELA ELIZABETH SIMONE SAMPSON, MARAGARET ANNE SWAN AND MARIETTE LUCILLE BUCKSHOT

Travis Henderson	FOR THE RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Guardian Law Group LLP Calgary, Alberta	FOR THE APPELLANTS JOAN JACK AND LOUAY ALGHOUL
Gowling WLG (Canada) LLP Toronto, Ontario	FOR THE RESPONDENTS GARRY LESLIE MCLEAN, ROGER AUGUSTINE, ANGELA ELIZABETH SIMONE SAMPSON, MARAGARET ANNE SWAN AND MARIETTE LUCILLE BUCKSHOT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENTS HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA