

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fontaine v. Attorney General of Canada*,
2010 BCSC 1208

Date: 20100827
Docket: L051875
Registry: Vancouver

Between:

Larry Philip Fontaine et al

Plaintiffs

And

The Attorney General of Canada et al

Defendants

Before: The Honourable Madam Justice B.J. Brown

Corrected Judgment: Sub-paragraph 17 in paragraph 16 of my Reasons is hereby amended,
December 8, 2010

Reasons for Judgment

Counsel for Canada:

C. Coughlan

Counsel for Independent Counsel:

P. Grant

Counsel for Merchant Law Group
Counsel for the Chief Adjudicator, IAP:
Heard via Written Submissions
Place and Date of Judgment:

E.F.A. Merchant, Q.C.
C.V. Hofley
Vancouver, B.C.
Vancouver, B.C.
August 27, 2010

INTRODUCTION

[1] The Chief Adjudicator seeks instructions with respect to review of legal fees pursuant to paragraphs 17, 18 and 19 of the Implementation Order; particularly how IAP (Independent Assessment Process) adjudicators should consider payments that have been made by Canada to Claimant Counsel for legal fees, pursuant to the provisions of Article 13 of the Indian Residential Schools Settlement Agreement. The Chief Adjudicator seeks direction from the court regarding treatment of legal fees incurred in pursuing claims in the IAP for time worked prior to November 20, 2005.

POSITION OF THE PARTIES

[2] The Chief Adjudicator says that counsel who performed work for claimants prior to November 20, 2005 were compensated for work in progress through to November 20, 2005 pursuant to Articles 13.06 through 13.09 of the Settlement Agreement. Article 13.06 provides that each lawyer who had a “retainer agreement” with an eligible CEP (Common Experience Payment) recipient as of May 30, 2005 will be paid a specific amount and will agree that no other or further fee will be charged with respect to the CEP.

[3] Article 13.05 of the Settlement Agreement provides that “no lawyer ... who accepts a payment for legal fees from Canada pursuant to sections 13.06 or 13.08 will charge an eligible CEP recipient any fees or disbursements in respect of the common experience payment.”

[4] By order of the Honourable Chief Justice Brenner of November 28, 2007, the cut-off date for WIP payments under Article 13 was set at the date of the agreement in principle, November 20, 2005.

[5] The Chief Adjudicator says:

There has been no clarification, however, in terms of precisely what ‘legal fees charged to an eligible CEP recipient in respect of common experience payment’ and ‘paid out to counsel pursuant to Articles 13.06 or 13.08’ ... were intended to cover. That is, were such fees intended to encompass work performed for IAP claimants through to November 20, 2005 as well?”

[6] The Chief Adjudicator says that by virtue of the overlapping definitions of eligible CEP recipient and eligible IAP claimant, it is possible that work done by counsel on behalf of eligible CEP recipients under the Settlement Agreement and which has been compensated for through to November 20, 2005 will or may be used in advancing an IAP claim for the same individual. If so, counsel would already have been compensated for such work through to November 20, 2005 pursuant to Articles 13.06, 13.08 or 13.09 of the Settlement Agreement.

[7] The Chief Adjudicator says that the Settlement Agreement does not specifically address the matter, that the cap on legal fees and the review of legal fees for fairness and reasonableness were provisions required by the courts in approving the Settlement Agreement. The Chief Adjudicator says that the Implementation Order imposes a 30% contingency fee as an upper maximum on legal fees to be charged by claimant counsel to IAP claimants, but does not address how fees previously paid are to be factored into the upper maximum.

[8] Accordingly, the Chief Adjudicator seeks directions as to whether:

- (a) fees paid to claimant counsel for work through to November 20, 2005 pursuant to Article 13.06 or 13.08 of the Settlement Agreement should be accounted for in IAP fee assessments done by IAP adjudicators when assessing fees under Articles 17 - 19 of the Implementation Order;
- (b) if the answer to question (a) is YES, are there any exceptions or special circumstances that should be considered in making such deductions?
- (c) if the answer to question (a) is NO, are there any exceptions or special circumstances in which such deductions should be made?

[9] The Chief Adjudicator seeks such direction in respect of the following classes of counsel:

- (a) counsel who are not members of either the National Consortium or Merchant Law Group and received payment under Article 13.06;
- (b) members of the National Consortium (Article 13.08);
- (c) Merchant Law Group (Article 13.08); and
- (d) counsel for the plaintiffs in the McLeod class action (Article 13.09).

[10] The Attorney General of Canada argues that adjudicators have an obligation to review legal fees, not only to ensure that fees do not exceed a 30% maximum, but also to assess the fairness and reasonableness of fees charged for work that was completed. The overarching concern appears to be that fees charged to a claimant are fair and reasonable in light of all the work done on their behalf and this may entail having adjudicators review fees paid for work prior to November 20, 2005.

[11] The National Consortium acknowledges that its members have been fully compensated

for all work performed prior to November 20, 2005 and only work performed on behalf of the client after November 20, 2005 may be relied upon in justifying IAP fees. The lump sum paid to National Consortium members pursuant to Article 13.08 relates to work performed prior to November 20, 2005 and to counsel's agreement not to charge for any further work done in connection with a CEP claim. It has no bearing on entitlement to fees for work on behalf of an IAP claimant performed after November 20, 2005 and the lump sum cannot be relied upon by adjudicators as a reason to lower fees for work performed on an IAP claim. The Chief Adjudicator's guidelines may require reference to events or circumstances which pre-date November 20, 2005. The appropriate course is to make reference to such events or circumstances as contextual information while making it clear that any related work performed and time docketed prior to November 20, 2005 should not be taken into account.

[12] The Merchant Law Group LLP argues that the issues relating to the Merchant Law Group are complicated and are already under reserve by Mr. Justice Gabrielson and should not be dealt with by multiple administrative judges; that the matter should not be decided on the basis of written submissions alone and request the right to make oral submissions; that it was never intended that the claimants in the IAP process should be precluded from going to the courts to have their accounts assessed and adjudicators may not interfere with the properly negotiated and executed contracts between lawyers and clients; IAP legal fees were negotiated at length between the parties and IAP legal fees are specifically excluded from the Settlement Agreement; the court's supervision over administration may not be stretched to the point of changing the agreement; and Article 18.06 is an entire agreement clause. The Merchant Law Group says that there are three aspects to its work:

1. payment of legal fees for class action work specifically related to the common experience payment;
2. payment for the fact that Merchant Law Group would not charge clients for work involved in helping them secure their CEP compensation; and
3. clients who suffered significant injury might proceed to the independent assessment process and Merchant Law Group is to be compensated for past and future work, independent of the CEP.

DISCUSSION

[13] Paragraphs 17 through 19 of the Implementation Order provide that IAP adjudicators are to review the fees charged by counsel to IAP claimants for pursuing their claims through the IAP process. Counsel who worked for claimants before November 20, 2005 were, as of the implementation date, September 19, 2007, compensated for work in progress to November

20, 2005 pursuant to Articles 13.06 through 13.09 of the Settlement Agreement.

[14] The Settlement Agreement contemplated a “CEP” and an “IAP”. CEP is common experience of payment and refers to compensation for the “common experience” of those who were sent to residential schools. IAP refers to the independent assessment process. The IAP addresses claims for sexual and physical assaults committed by adult employees or by other students and for other wrongful acts committed by adult employees. Of course, any individual may be entitled to both a common experience payment and compensation pursuant to the independent assessment process. The questions posed and directions sought by the Chief Adjudicator address the review of legal fees for those individuals with claims in both categories.

[15] The Settlement Agreement does not address the review of legal fees within the administrative structure of the IAP. That review is addressed in paragraphs 17 and 18 of the Implementation Order which set out a process for adjudicators to review legal fees charged by counsel to claimants pursuing claims under the IAP.

[16] Paragraphs 17 and 18 of the Order provide:

17. All legal fees charged by legal counsel to claimants pursuing claims through the IAP shall not exceed 30% of compensation awarded to the claimant. This 30% cap shall be inclusive of and not in addition to Canada’s 15% contribution to legal fees, but exclusive of GST and any other applicable taxes. The 30% cap shall also be exclusive of Canada’s contribution to disbursements. Upon the conclusion of an IAP hearing, legal counsel shall provide the presiding adjudicator (the adjudicator) with a copy of their retainer agreement and the adjudicator shall make such order or direction as may be required to ensure compliance with the said limit on legal fees.

18. Upon a claimant’s request, which request shall be made at the conclusion of the hearing, or within fourteen days (14) days thereof, or on the adjudicator’s own motion, legal counsel’s legal fees for conducting the IAP may be reviewed by the adjudicator for fairness and reasonableness. In the event of such review, legal counsel shall, in addition to submitting their retainer agreements, provide any other information pertinent to their legal fees. The adjudicator shall assess the fairness and reasonableness of the legal fees in accordance with the generally accepted principles and authority for the assessment of accounts including the following:

- (a) time expended by legal counsel;
- (b) the legal complexity of the matter;
- (c) the degree of responsibility assumed by legal counsel;
- (d) the monetary value of the matters at issue;
- (e) the importance of the matter to the claimant;
- (f) the degree of skill and competence demonstrated by legal counsel;
- (g) the results achieved and the contribution of legal counsel to the result;
- (h) the ability of the claimant to pay; and
- (i) the claimant’s expectations as to the amount of the legal fees,

and shall take into account the fact that Canada will contribute an amount equal to 15% of the compensation award towards legal fees. In all cases, the adjudicator shall inform the claimant of the right to have the account of their counsel reviewed. The adjudicator's decision on the fees will be issued at the same time, or following, the decision on the claim and a copy will be sent to the claimant personally together with an explanation of the right to a review.

[17] The IAP adjudicators are provided with the jurisdiction to assess the fairness and reasonableness of "all" legal fees charged by counsel to a claimant pursuing a claim under the IAP. Counsel are required to provide their retainer agreement and "any other information pertinent to their legal fees". In conducting the assessment, the adjudicator is required to assess, *inter alia*, the "time expended by legal counsel" as well as "the results achieved and the contribution of legal counsel to the result". The language of paragraphs 17 and 18 is not limited to work performed after November 20, 2005 and, indeed, it would be difficult, if not impossible, to assess the fees without the full picture, including work performed and fees paid prior to November 20, 2005.

[18] It may well be that the work done for which legal counsel was compensated prior to November 20, 2005 is not relevant to an IAP claim. However, it is also possible that some of the work done by counsel, and for which they were compensated is applicable to the IAP claim. In the first situation, the review would have no impact on the fees awarded by the adjudicator, while in the second scenario, a proper fee review would take into account the fact that counsel are not to be compensated twice for the same work. The adjudicator conducting a fee review is best able to determine this issue. There is no principled basis to exclude work prior to November 20, 2005 from the review.

[19] The fee assessment process ensures that the interests of claimants are protected and provides the effective mechanism for controlling and supervising legal fees charged to claimants under the IAP. IAP adjudicators should be able to review the entire history of the relationship between the lawyer/law firm and the IAP claimant as well as the time docketed.

[20] Turning specifically to the questions raised by the Chief Adjudicator:

Question a): Yes, in the manner discussed above.

Question b): No.

Question c): In light of the disposition of Question a), this question need not be answered.

[21] Addressing the concerns of the Merchant Law Group:

- (1) It is not necessary to have an oral hearing on this matter.
- (2) These are questions affecting claimants throughout the country and it is appropriate for the issue to be determined by the administrative judges, to apply to all counsel.

“B.J. Brown J.”

The Honourable Madam Justice B.J. Brown