Court File No: T-463-07

FEDERAL COURT

CERTIFIED CLASS ACTION

BETWEEN:

DENNIS MANUGE

PLAINTIFF

AND:

HER MAJESTY THE QUEEN

DEFENDANT

DEFENDANT'S WRITTEN SUBMISSIONS ON THE ISSUE OF REASONABLE LEGAL FEES

Introduction

1. Class counsel seek legal fees in the context of this class action settlement in the amount of $66,624,156[1]. It is the position of the Attorney General of Canada ("AGC") that this amount is excessive and unreasonable based on the relevant considerations and should be reduced to a more appropriate sum to be determined by the Court.

2. In particular, the amount sought by class counsel on account of legal fees is excessive and unreasonable when the following factors are taken into consideration:

   (1) The time expended by class counsel compared to the total fee sought;
   (2) The significant reduction in risk that occurred during the litigation;
   (3) Comparisons with other Canadian class action settlements of similar total value; and
   (4) The integrity of the legal profession and public policy concerns.

[1] Plaintiffs' Memorandum of Fact and Law ("MFL"), Schedule A.

3. The AGC does not oppose the fee structure or method of payment sought by class counsel and takes no position on how class counsel propose to spend any portion of the legal fees recovered, whether charitably or not.[2]

The Law

4. Class counsel have accurately but incompletely set out the test to determine whether or not legal fees are reasonable.

5. The leading case in the Federal Court is *Châteauneuf v. Canada*[3], which held that fees can only be approved if the Court is satisfied that they are reasonable in light of the circumstances and the efforts devoted to the case[4]. The Court also held that, due to a lack of Federal Court jurisprudence or guidance from the *Federal Courts Rules*[5], it is appropriate to look to precedents from other jurisdictions, including Ontario, Québec, and British Columbia, for guidance on what is reasonable.

6. At paragraph 200 of their Memorandum of Fact and Law ("MFL"), class counsel set out the factors to be considered as follows:

    1. the results achieved and the monetary value of the matter to the class;
    2. the importance of the matter to the class;
    3. the degree of risk and responsibility assumed by class counsel, including the risk that the matter might not be certified;
    4. the legal complexity of the matters to be dealt with and the degree and competence demonstrated by class counsel;

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[2] The AGC does not take a position on this issue but does refer the Court to the Ontario Court of Appeal case of *Smith Estate* v. *National Money Mart Co.* 2011 ONCA 233, which held that any compensation paid to a representative plaintiff should normally be paid out of the settlement fund and not out of class counsel's legal fees in order to avoid concerns with respect to fee-splitting.
[3] 2006 FC 446.
[4] *Ibid*, at para 14.
[5] SOR /98-106.

5. the time expended by class counsel and the opportunity cost, and the expenses incurred by class counsel;

6. the experience of class counsel;

7. the ability of the client to pay; and

8. the client's expectation as to the amount of the fee.

7. One of the factors considered by the Court in *Châteauneuf*, but not identified by class counsel in their MFL, is Ontario's use of the "base fee/multiplier" approach. Under this approach, counsel's usual hourly rate is multiplied by the hours worked to determine a base fee. A multiplier is then applied to the base fee to reflect the factors identified above. The Court stated that "[t]he case law recognizes that a multiplier of between 1.5 and 3.5 is appropriate."[6]

8. There has been some criticism of the base fee/multiplier approach, due to its lack of objectivity, potential for abuse by class counsel, and lack of predictability[7]; however, even in cases that have rejected the application of the base fee/multiplier approach, it has been held to be a useful tool for testing the reasonableness of fees.[8]

9. Another factor used to determine the reasonableness of counsel fees but not mentioned in class counsel's MFL relates to the degree of risk. Ward Branch, in *Class Actions* in Canada[9], states that:

> Factors that will be considered by the court in assessing the fee include: ... (2) the risks undertaken, including an assessment of the risk that the matter would not be certified, whether there was a significant reduction of the risk at some point in the litigation, and whether counsel agreed to indemnify the representative plaintiffs

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[6] *Châteauneuf*, supra at para 10.
[7] *Ibid*, at para 13.
[8] See for example, *Parsons* v. *Canadian Red Cross Society* 2000 CanLII 22386 at para 65; *Endean*, *supra* at para 19; and *Gagne* v. *Silcorp Ltd.* (1998), 41 O.R. (3d) 417, p. 425.
[9] (Toronto: Canada Law Book, looseleaf, updated January 2013).

against any adverse costs award and thereby saved the class from having to make a payment to the Class Proceedings Fund;[10] [emphasis added]

10. Finally, missing from class counsel's list are factors related to the integrity of the legal profession[11] and public policy concerns.[12]

Time Expended

11. Taking into account the time that class counsel assert they have spent on this file, the total amount of legal fees sought is excessive and unreasonable.

12. In his affidavit sworn on January 7, 2013, Peter Driscoll indicated that "twenty legal professionals" have worked "over 7,800 hours to date"[13] on this file. At the request of the AGC, class counsel provided a breakdown of this time, which encompassed 24 named individuals, including lawyers, paralegals, and a legal assistant. The breakdown also included time in respect of unnamed librarians, law clerks, students, paralegals, and researchers. Class counsel also provided hourly rates. This breakdown includes time spent up to January 31, 2013[14].

13. According to this information, the total time allocated to this file by the firms of McInnes Cooper LLP and Branch McMaster LLP is 8,591.5 hours at a total cost of $3,211,330.50[15].

14. In accordance with *Châteauneuf*, if the base fee/multiplier approach was followed, a multiplier in the range of 1.5 - 3.5 should be applied[16]. If the highest multiplier identified

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[10] *Ibid*, at ¶7.170, citing *Murphy* v. *Mutual of Omaha*, 2000 BCSC 1510, leave to appeal to CA refused 2001.
[11] See *Endean, supra* at paras 72 - 84, and *White* v. *Canada* 2006 BCSC 561 at para 27.
[12] See *Endean*, supra at paras 86 – 89.
[13] Affidavit of Peter Driscoll Sworn January 7, 2013 ("Driscoll Affidavit") at para 149.
[14] Exhibit A to Affidavit of Robin Nicol, sworn February 8, 2013 ("Nicol Affidavit").
[15] Nicol Affidavit at para 11.
[16] *Châteauneuf*, supra at para 10.

in Canadian case law were to be applied, then the multiplier would be 5.5[17]. Based on the information provided by class counsel, they are in effect seeking a multiplier of approximately **21** on their base fee and this is assuming that all of the time and hourly rates are appropriately included in determining their base fee. A multiplier of 21 would be nearly four times higher than any multiplier ever awarded in Canada and would equate to an hourly rate of $3,112.50 for paralegals and $13,487.50 for Mr. Branch.

15. While the AGC acknowledges that there are valid concerns with the use of the base fee/multiplier approach in determining reasonable legal fees and that a number of judicial decisions hold that other methods of determining fees are preferable, it is still a useful tool to measure and balance the reasonableness of legal fees being sought[18]. In this case, to seek legal fees at 21 times the amount of effort expended is excessive and simply not reasonable.

Reduction in Risk

16. As noted above, Ward Branch has identified "whether there was a significant reduction of the risk at some point in the litigation"[19] as a factor to be considered in establishing the reasonableness of legal fees. In this proposed settlement, the reduction of risk should be a consideration in determining a reasonable quantum of legal fees.

17. In the instant case, there was a significant reduction in risk after May 29, 2012 when the Minister of National Defence announced that the Government would not appeal the Federal Court ruling and would attempt to settle the remaining outstanding issues in the litigation.[20] There was a further reduction in risk after December 4, 2012, when an agreement in principle was reached between the parties. While some risk remained that

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[17] See *Endean supra*, at para 100 where a multiplier of 5.5 was applied on a subset of the legal fees approved.
[18] See note 9, *supra*.
[19] See note 11, *supra*.
[20] Driscoll affidavit at para 55.

negotiations might founder[21] and that the settlement in principle might not be approved by the Court, the overall level of risk was dramatically reduced after the May 29, 2012 announcement. As stated in *Murphy* v. *Mutual of Omaha*, "in determination of a fair and reasonable fee an early and significant reduction of the original risk contemplated which occurs during the course of the retainer cannot be ignored."[22]

18. In the second tainted blood settlement, the diminution of risk was a factor taken into account in the quantum of legal fees ultimately agreed to and approved by the Court. A multiplier of 4 was applied to the work up to the point that a settlement in principle was reached. After the settlement, the multiplier was reduced to 2.5.[23]

19. It should be noted that a significant amount of time has been expended by class counsel since the May 29, 2012 announcement not to appeal and since the agreement in principle was reached on December 4, 2012. Paragraphs 58 – 60 of the Driscoll affidavit detail some of the effort put forward by class counsel after May 29, 2012, which does not include time spent in communicating with the class during this period. It is also possible that significant time was docketed since the December 4, 2012 settlement in principle was reached.

20. Unfortunately, class counsel refused a request to provide a breakdown of their time by date,[24] so the only concrete information that the AGC has is the global number of hours spent up to January 31, 2012. This refusal to provide information should not be overlooked in determining the quantum of reasonable legal fees. As stated in *Murphy*, *supra*:

> Showing the proposed fee to be reasonable is upon the applicant and a failure of helpful detail will in the end result be to the disadvantage of the applicant who bears that onus of proof.[25]

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[21] *Endean supra*, at para 97.
[22] *Murphy*, *supra* at para 4.
[23] Nicol Affidavit at para 9.
[24] Nicol Affidavit at para 12.
[25] *Murphy*, *supra* at para 44.

Comparisons to Similar Settlements

21. Class counsel have made extensive comparisons to other class action legal fee precedents at paragraphs 298 – 314 of their MFL; however, there are only three class action settlements that approach the total dollar amount at issue in this case: the Indian Residential School ("IRS") settlement and the two tainted blood settlements. These are the only three appropriate comparators. In light of these three comparable class actions, the legal fees being sought are excessive and unreasonable.

22. Class counsel identify these comparable class actions at paragraph 310 of their MFL but attempt to distinguish the fee awards in those cases. Class counsel contend that none of the three cases had to contest certification to the Supreme Court of Canada and none succeeded on the merits after a contested hearing. This, however, is far from the entire story.

23. The IRS Settlement Agreement resolved over 15,000 individual actions[26] and 23 separate class actions[27] in ten jurisdictions. There were several certification hearings and appeals and there were a number of trials of individual actions, one of which was appealed to the Supreme Court of Canada on its merits.[28] In all, 72 separate law firms, many with multiple offices and numerous counsel, were involved in the proceedings and received legal fees as part of the IRS Settlement Agreement.[29]

24. Similarly, the two tainted blood settlements involved multiple class actions, multiple law firms, and multiple jurisdictions. In the present case, there was only one class action, in one jurisdiction, that was carried by "two firms and in large measure by three lawyers within those firms."[30]

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[26] *Baxter* v. *Attorney General of Canada* 2006 CanLII 41673 at para 13.
[27] Nicol Affidavit at para 5.
[28] *H.L.* v. *Canada* 2005 SCC 25; see also *Sparvier* v. *AGC* 2006 SKQB 533 at para 61.
[29] Nicol Affidavit at para 6.
[30] Driscoll Affidavit at para 147.

25. Quite apart from the factors noted above, the legal fees sought by class counsel in this action are excessive and unreasonable when measured against the other three comparable class action settlements on both a percentage of recovery and base fee/multiplier basis as demonstrated in the following chart:

Action	Total Amount of Settlement	Legal Fees Awarded (*Sought)	Legal Fees as a % of Recovery	Multipliers
IRS	$2.19 Billion[31]	$85 Million	3.88%	2.73 and 3 – 3.5[32]
Tainted Blood 1	$1.62 Billion[33]	$52.5 Million	3.25%	3 – 5.5[34]
Tainted Blood 2	$1.02 Billion[35]	$37.3 Million	3.64%	4 up to settlement 2.5 after settlement[36]
Manuge	$888 Million	$66.6 Million*	7.5%	21

26. In addition, although class counsel assert that the amount of legal fees they are seeking is relatively small on a percentage basis, they have failed to fully take into consideration the fact that, "the percentage fee should generally be lower where the recovery is higher."[37] The percentage fee sought by class counsel is in fact considerably higher than in the other three comparable class actions. In addition, "[t]he question 'what is the reasonable fee?' must be answered, not as a percentage, but in dollars."[38]

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[31] $1.9 Billion for Common Experience Payments; $205 Million for Truth and Reconciliation, Commemoration, and Healing; $85 Million for legal fees. A system for Individual Assessments was also created with separate funding and legal fee considerations: see *Northwest* v. *Canada (Attorney General)* 2006 ABQB 902 at para 15.

[32] The National Consortium was awarded a multiplier of 2.73 while the Merchant Law Group was awarded a multiplier of between 3 – 3.5. Additional fees for unaffiliated counsel were awarded on a flat rate basis: see *Baxter* v. *Attorney General of Canada* 2006 CanLII 41673 at paras 57, 63 and 66.

[33] $1.207 Billion payment; $357 Million in tax relief; $52.5 Million for legal fees: see *Parsons* v. *Canadian Red Cross Society* 1999 CarswellOnt 2932 at para 90.

[34] The multiplier varied by province and by action within the provinces. In Québec, a multiplier of 3 was applied: *Honhon* c. *Canada (Procureur général)* 2000 CarswellQue 2531 at para 97. In Ontario, a multiplier of 3.07 was applied for counsel in the transfusion action while a multiplier of 3.8 was applied in the haemophiliac action: *Parsons* v. *Canadian Red Cross Society* 2000 CanLII 22386 at para 66. In British Columbia, a multiplier of 3.75 was applied in the transfusion action while a multiplier of 5.5 was applied in the haemophiliac action: *Parsons*, *supra* at paras 74 and 100.

[35] $962 Million in compensation; $20 Million for administration; $37.29 Million for legal fees: see *Adrian* v. *Canada (Minister of Health)* 2007 ABQB 376 at para 3.

[36] Nicol Affidavit at para 9. For fee approval see: *McCarthy* v. *Canadian Red Cross Society*, 2007 CanLII 21606; *Adrian* v. *Canada (Minister of Health)*, 2007 ABQB 377; and *Killough* v. *The Canadian Red Cross Society*, 2007 BCSC 941.

[37] *Endean*, supra at para 80.

[38] *Richardson (Guardian ad litem of)* v. *Low* 1996 CanLII 571, cited in *Endean*, *supra* at para 75.

Integrity of the Legal Profession and Public Policy Concerns

27. Class counsel have not addressed the integrity of the legal profession and public policy concerns as factors relating to the reasonableness of class action legal fees. Applying these factors should result in lower legal fees being awarded as reasonable than those sought by class counsel.

28. The Court in *Endean* considered the integrity of the legal profession, stating that the concept encompassed "the decency, honour, and high-mindedness of the profession, both in substance and in public perception."[39] The AGC asks this Court to consider how the quantum of legal fees awarded in this case will affect the public's perception of the legal profession. It is a genuine concern that the decency and honour of the profession would be diminished if class counsel were awarded fees in an amount that is 21 times higher than the value of their work.

29. Public policy considerations also militate against the awarding of such a large quantum of legal fees. Generally speaking, public policy considerations usually favour increased legal fee awards to ensure that counsel will continue to act on behalf of classes in order to provide access to justice and fulfill the objectives of class action legislation.[40] However, legal fees of the magnitude being sought by class counsel are far above what is required to ensure that there are counsel willing to take on class actions. In fact, it is not unreasonable to expect that legal fees of this magnitude will encourage greater numbers of class actions, of varying validity and merit, in counsel's hope of obtaining a substantial windfall.

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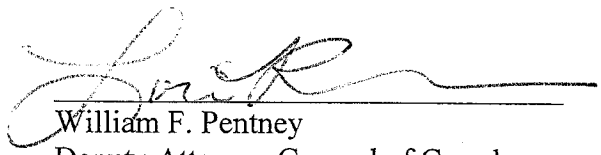
[39] *Endean*, *supra* at para 73.
[40] *Ibid*, at para 87.

Conclusion

30. The legal fees sought by class counsel are excessive and unreasonable. The AGC does not dispute the arguments put forward by class counsel in relation to many of the factors used to determine whether or not legal fees are reasonable. These include: the results achieved, the importance of the matter to the class, the complexity of the matters dealt with, the experience and competency of counsel, the class' expectation as to the legal fees, and the class' ability to pay. However, even when looking at just these factors and arguments, the total sum of legal fees sought fails to meet the standard of reasonableness. When additional considerations related to the actual amount of time expended, the reduction in risk that occurred during the litigation, comparisons to similar class action settlements, the integrity of the legal profession, and public policy concerns are examined, it becomes evident how excessive and unreasonable the legal fees sought are.

31. Class counsel are entitled to recover reasonable legal fees for their work; however, the legal fees sought, which equates to a multiplier of 21 and a corresponding top hourly rate of $13,487.50, are so far beyond what can be characterized as reasonable as to be grossly excessive. As such, this Court should determine an appropriate sum for legal fees that is substantially lower than the amount sought by class counsel.

All of which is respectfully submitted this 11th day of February, 2013.



William F. Pentney
Deputy Attorney General of Canada

Per: Paul Vickery
Lori Rasmussen
Travis Henderson
DEPARTMENT OF JUSTICE
1400-5251 Duke Street
Halifax, NS B3J 1P3
Tel: (902) 426-4472
Fax: (902) 426-2329

Solicitors for the Defendant

LIST OF AUTHORITIES

Adrian v. Canada (Minister of Health) 2007 ABQB 376

Baxter v. Attorney General of Canada 2006 (ONSC File No. 00-CV-192059)

Châteauneuf v. Canada, 2006 FC 446

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Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417

H.L. v. Canada 2005 SCC 25

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Killough v. The Canadian Red Cross Society, 2007 BCSC 941

McCarthy v. Canadian Red Cross Society, 2007 CanLII 21606

Murphy v. Mutual of Omaha, 2000 BCSC 1510; leave to appeal to CA refused 2001

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Richardson (Guardian ad litem of) v. Low 1996 CanLII 571

Smith Estate v. National Money Mart Co. 2011 ONCA 233

Sparvier v. AGC 2006 SKQB 533

White v. Canada 2006 BCSC 561