

Federal Court of Appeal



Cour d'appel fédérale

Date: 20191211

Docket: 19-A-64

Citation: 2019 FCA 309

[ENGLISH TRANSLATION]

Present: RIVOALEN J.A.

BETWEEN:

CHIEF PAUL-ÉMILE OTTAWA

Applicant

and

**GARRY LESLIE MCLEAN, ROGER AUGUSTINE,
CLAUDETTE COMMANDA, ANGELA ELIZABETH SIMONE
SAMPSON, MARGARET ANNE SWAN
AND MARIETTE BUCKSHOT**

and

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS
REPRESENTED BY THE ATTORNEY GENERAL OF CANADA**

Respondents

Motion dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 11, 2019.

REASONS FOR ORDER BY:

RIVOALEN J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20191211

Docket: 19-A-64

Citation: 2019 FCA XXX

Present: RIVOALEN J.A.

BETWEEN:

CHIEF PAUL-ÉMILE OTTAWA

Applicant

and

GARRY LESLIE MCLEAN, ROGER AUGUSTINE,
CLAUDETTE COMMANDA, ANGELA ELIZABETH SIMONE
SAMPSON, MARGARET ANNE SWAN
AND MARIETTE BUCKSHOT

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY THE ATTORNEY GENERAL OF
CANADA

Respondents

REASONS FOR ORDER

RIVOALEN J.A.

I. Introduction

[1] The class action (the McLean Action) was commenced in the Federal Court on December 15, 2016, and certified on June 21, 2018. The McLean Action is a national class

action that includes two classes of people: Survivor Class Members and Family Class Members. The Survivor Class has approximately 120,000 members; they attended the specified Federal Indian Day Schools during the period in which they were under Canada's management and control. The McLean Action is based in tort and seeks damages for personal injury in the context of a class proceeding.

[2] On December 6, 2018, an Agreement-in-Principle was announced as part of the McLean Action. On March 12, 2019, the parties to the McLean Action signed a proposed settlement agreement (the Settlement Agreement), with the list of day schools and relevant periods set out in Schedule K of the Agreement.

[3] On March 13, 2019, Justice Phelan of the Federal Court ordered a hearing to approve the Settlement Agreement. The hearing took place in Winnipeg on May 13, 14 and 15, 2019. On August 19, 2019, Justice Phelan made an order approving the Settlement Agreement (Approval Order).

II. Chief Paul-Émile Ottawa's motion for leave to exercise the right of appeal

[4] On October 31, 2019, Chief Paul-Émile Ottawa (Chief Ottawa) filed a motion under rule 334.31(2) of the *Federal Courts Rules*, S.O.R./98-106 for leave to exercise the right of appeal of the representative plaintiff, Garry Leslie McLean, from the Approval Order made on August 19, 2019, by Justice Phelan of the Federal Court in docket T-2169-16.

[5] Chief Ottawa is not the representative plaintiff in the McLean Action but is a member of the Survivor Class. He is the chief of the Atikamekw of Manawan band council (the Band), a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. Nearly all 2,955 members of the Band are also members of either class in the McLean Action. The vast majority of Band members speak Atikamekw as their first language and French as their second.

[6] Chief Ottawa indicates in his affidavit that it was not until counsel for the representative plaintiff, Garry Leslie McLean, sent them information about the Settlement Agreement, around April 1, 2019, that the Band began to grasp the magnitude of the issue for their community; they had been unable to read the Settlement Agreement, as it was not available in French. On April 23, 2019, counsel for the Band filed a motion for leave to intervene, but the Federal Court dismissed the motion. Chief Ottawa also filed a form to object to the Settlement Agreement and spoke at the approval hearing.

[7] Chief Ottawa's main concerns can be summarized as follows: i) the Claims Deadline of two and a half years is too short considering the volume of documents required from members; ii) he questions the lack of a budget similar to the one provided for under the Indian Residential School Settlement; iii) he questions the quality of the legal services available to members; and iv) he raises a language issue. On this last point, Chief Ottawa is concerned that the survivors in his band are not being properly supported or represented since they did not obtain information in French on the Settlement Agreement until just before the Settlement Approval Hearing and since no translation of the entire settlement was available. Moreover, Chief Ottawa raises the lack of French-speaking lawyers among those leading the McLean Action. He also notes the poor

quality of translations and the ambiguity regarding the choice of certain terms in French, such as “externat indien”.

III. Issues

[8] The following issues were raised in this motion and by the respondents:

A. Was the motion filed in accordance with the time limits set out in subsection 27(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and rule 334.31(2)(a)?

B. Should the motion be heard orally pursuant to rule 369?

C. What is the test on an application under rule 334.31(2), and should the moving party have leave to exercise a right of appeal?

A. *Was the motion filed in accordance with the time limits set out in subsection 27(2) of the Federal Courts Act and rule 334.31(2)(a)?*

[9] Counsel for the Attorney General of Canada submits that Chief Ottawa’s motion was filed one day late. The Approval Order in respect of which Chief Ottawa seeks leave to exercise a right of appeal was made on August 19, 2019. Therefore, the 30-day time limit set out in paragraph 27(2)(b) of the *Federal Courts Act* for the representative plaintiff, Garry Leslie McLean, began on September 1, 2019. The 30-day time limit provided for in rule 334.31(2)(a) for the other Class Members began on October 1, 2019. This motion was filed on October 31, 2019.

[10] Even if I accept the time limit calculation presented by the respondents, I allow an extension of one day. I am satisfied that Chief Ottawa had a continuing intention to pursue his

motion, that his application had some merit, that no prejudice to the respondents arises from the delay of one day, and that a reasonable explanation for the delay exists (*Canada (Attorney General) v. Hennelly*, 1999 CanLII 8190 at paragraph 3).

[11] I would like to say a word about the nature of this motion. As in the decision of this Court in *Frame v. Riddle*, 2018 FCA 204 [*Frame*], this is an application to grant a Class Member leave to exercise the right of appeal of the representative plaintiff from an approval order of the Federal Court in a class action. This application under rule 334.31(2) must be brought before this Court because, if it is allowed, it is the Federal Court of Appeal that will hear the arguments on the merits. An approval order made in a class action is the equivalent of a final judgment as described in paragraph 27(1)(a) of the *Federal Courts Act*.

B. *Should the motion be heard orally pursuant to rule 369?*

[12] I am of the view that a hearing is not necessary to dispose of this motion. The parties' written representations and Chief Ottawa's motion record are sufficient. In addition, it is not in the best interests of the Survivor Class to delay the settlement process even further.

C. *What is the test on an application under rule 334.31(2), and should the moving party have leave to exercise a right of appeal?*

[13] To obtain leave to exercise the appeal right of a representative plaintiff, Chief Ottawa must show that he will fairly and adequately represent the interests of all Class Members. 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 (*Frame* at paragraph 24).

[14] The evidence adduced by Chief Ottawa in this case is not detailed enough for this Court to properly determine whether Chief Ottawa can act as a representative plaintiff in the McLean Action. His affidavit provides no details on his personal interest in the proceedings as a Class Member, or on his ability to represent the Class. The only relevant evidence he provides is a general comment that he is confident that he can represent the Class fairly and adequately, as well as a general comment that his position in the Assembly of First Nations of Quebec and Labrador gives him access to resources and staff that can support him in his efforts. This evidence is insufficient.

[15] I also note that all the concerns raised by Chief Ottawa and mentioned above at paragraph 7 were considered by Justice Phelan. Moreover, in this case, the respondents presented the issues to the Court adequately, informed it of all the specifics of the Settlement Agreement, and provided all the clarifications required for the Court to be able to exercise its role as guardian of the interests of Class Members when the Settlement Agreement was approved.

[16] Using Quebec law as an example, Justice Phelan addressed the issues concerning the application of the *Civil Code of Québec* in his Reasons for Approval Order dated August 19, 2019 (Volume 1, p. 257, paragraph 130). Members of the McLean Action who disagree with the terms of the Settlement Agreement on the ground that they violate the provisions of the *Civil Code of Québec* are not forced to go along with it; they can opt out. On this point, I adopt the following remarks by Justice Phelan at paragraph 122 of his Reasons: “[Objectors to the Settlement Agreement] have the right to opt out and take their own risks, but they cannot impose

that risk on the Class as a whole if the Settlement is otherwise fair, reasonable and in the best interests of the Class.”

[17] Concerning the language issue, I am satisfied that the translation of documents into French is an ongoing exercise as documents are approved (Reasons at paragraph 131). Also, I note that the French version of the relevant terms of the Settlement Agreement allowing members of the McLean Action to understand the specifics of the Settlement and make an informed decision as to whether to opt out of the Settlement Agreement was available when the Approval Order was made on August 19, 2019 (Volume 1, pages 1 to 12). As of that date, members of the McLean Action had 90 days, that is, until November 18, 2019, to decide whether they wanted to opt out of the Settlement Agreement.

[18] Even if Chief Ottawa had the right to represent the Class, there are other factors to consider. Chief Ottawa must establish the existence of special or extraordinary circumstances surrounding the Approval Order made by Justice Phelan that constitute a denial of justice. The evidence here does not establish such circumstances.

[19] In a recent Ontario Court of Appeal decision in *Bancroft-Snell v. Visa Canada Corporation*, 2019 ONCA 822 [*Bancroft-Snell*], the five-judge panel rendered a unanimous decision on the sound policy considerations that support dismissing a motion filed by a class member seeking leave to appeal a settlement approval order. While that case involved the provisions of the Ontario *Class Proceedings Act*, 1992, S.O. 1992, c. 6, which provide for appeal

rights that are more limited than those under rule 334.31, the reasoning remains applicable, as indicated at paragraph 22 of *Bancroft-Snell*:

I respectfully disagree. There are sound policy reasons why class members should not be entitled to appeal a settlement order where the representative plaintiff declines to do so. The Court of Appeal for British Columbia identified some of these reasons in *Coburn*, at paragraphs 14 and 15. To permit a class member to appeal a settlement proposed by the representative plaintiff, recommended by class counsel, and approved by the class proceedings judge, would be problematic in several ways. It would introduce uncertainty into the negotiation and approval of class action settlements, undermine the authority of the representative plaintiff and class counsel, and impede settlement. As the moving parties note, abuses have been experienced in the United States where appeals by objecting class members have been permitted. See: *Abihira v. Johnston*, 2019 QCCA 657, [2019] J.Q. No. 2785, at paragraph 85; B. D. Greenberg, “Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements” (2010) 84 St. John’s L. Rev. 949 at 951.

[20] I agree with this reasoning.

[21] Class actions offer many advantages. Among other things, they improve access to justice, serve judicial economy, and alter conduct (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paragraphs 27 to 29). The option to opt out of a class action provides a “complete remedy for those class members who might dissent from the proceeding being certified as a class action” (*Romeo v. Ford Motor Co.*, 2017 ONSC 6674 (CanLII) at paragraph 18). In the McLean Action, Chief Ottawa had the option to opt out of the action and not be bound by the terms of the order.

IV. Conclusion

[22] I conclude that Chief Ottawa's motion should be dismissed, because the evidence is insufficient to show that Chief Ottawa can fairly and adequately represent the Class on appeal. Also, I am not satisfied that the appeal is itself in the best interests of the Class.

[23] Dismissing this motion would allow the Settlement Agreement to be implemented for the benefit of over 120,000 Class Members who want the Settlement to go ahead.

[24] For these reasons, the motion brought by Chief Paul-Émile Ottawa for leave to exercise the right of appeal of the representative plaintiff is dismissed, without costs.

“Marianne Rivoalen”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: 19-A-64

STYLE OF CAUSE: CHIEF PAUL-ÉMILE OTTAWA v.
GARRY LESLIE MCLEAN,
ROGER AUGUSTINE,
CLAUDETTE COMMANDA,
ANGELA ELIZABETH SIMONE
SAMPSON, MARGARET ANNE
SWAN AND MARIETTE
BUCKSHOT and HER MAJESTY
THE QUEEN IN RIGHT OF
CANADA AS REPRESENTED BY
THE ATTORNEY GENERAL OF
CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: RIVOALEN J.A.

DATED: DECEMBER 11, 2019

WRITTEN REPRESENTATIONS BY:

David Schulze
Marie-Eve Dumont

FOR THE APPLICANT
CHIEF PAUL-ÉMILE OTTAWA

Mary M. Thomson
Robert Winogron
Jeremy Bouchard
Brian A. Crane
Guy Régimbald
John J. Wilson
Joshua Shoemaker

FOR THE RESPONDENTS
GARRY LESLIE MCLEAN,
ROGER AUGUSTINE,
CLAUDETTE COMMANDA,
ANGELA ELIZABETH SIMONE
SAMPSON, MARGARET ANNE
SWAN AND MARIETTE
BUCKSHOT

Catharine Moore
Travis Henderson
Sarah-Dawn Norris
Nancy Bonsaint

FOR THE RESPONDENT
HER MAJESTY THE QUEEN IN
RIGHT OF CANADA AS
REPRESENTED BY THE

Mireille-Anne Rainville

ATTORNEY GENERAL OF
CANADA

SOLICITORS OF RECORD:

DIONNE SCHULZE
Montreal, Quebec

GOWLING WLG (Canada) LLP
Ottawa, Ontario

Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE APPLICANT
CHIEF PAUL-ÉMILE OTTAWA

FOR THE RESPONDENTS
GARRY LESLIE MCLEAN,
ROGER AUGUSTINE,
CLAUDETTE COMMANDA,
ANGELA ELIZABETH SIMONE
SAMPSON, MARGARET ANNE
SWAN AND MARIETTE
BUCKSHOT

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