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Docket: CI 23-01-41054
(Winnipeg Centre)
Indexed as: LaFontaine et al. v. The Government of Manitoba
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

RENE LAFONTAINE, MARY DERENDORF, MÉTIS CHILD AND FAMILY SERVICES AUTHORITY, MÉTIS CHILD, FAMILY AND COMMUNITY SERVICES AGENCY INC., AND MICHIF CHILD & FAMILY SERVICES INC.,	)	Rahool Agarwal Amethyst Haighton Michael Currie Murray Trachtenberg Genevieve Benoit for the plaintiffs
plaintiffs,	)	
- and -	)	Ross McFadyen Jim Koch
THE GOVERNMENT OF MANITOBA,	)	Meghan Ross for the defendant
defendant.	)	
	)	Judgment Delivered: October 2, 2024

HUBERDEAU J.

A. INTRODUCTION

[1] The plaintiffs filed a motion to approve a settlement agreement entered into with the defendant pursuant to s. 35(1) of ***The Class Proceedings Act***, C.C.S.M. c. C130 ("***Act***") (the "LaFontaine Action").

[2] The LaFontaine Action was heard in conjunction with two analogous settlement approval motions relating to two separate class actions involving the plaintiffs, ***Flette et***

al. v. The Government of Manitoba (CI 18-01-18438) (the "Flette Action") and ***Lavallee et al. v. The Government of Manitoba*** (CI 23-01-41219) (the "Lavallee Action").

("LaFontaine Action", "Flette Action" and "Lavallee Action" collectively referred to as the "Actions")

[3] Despite all three motions being the subject of separate class actions, given they share the same common issues, history and background, it was agreed that all the Actions, including the settlement approval motions, would be heard together but subject to separate decisions and orders.

[4] Considering the above, the analysis undertaken in one Action shall apply to all the Actions, unless specifically stated otherwise.

[5] At the conclusion of the hearing, I provided oral reasons granting the relief sought in all the Actions with written reasons to follow. These are those reasons.

B. BACKGROUND

[6] These Actions relate to the defendant's decisions and policies involving the administration of the Children's Special Allowance Benefits (the "CSA Benefit(s)") between the period January 1, 2005 to March 31, 2019, inclusive (the "Class Period").

[7] The CSA Benefit is a federal benefit provided for in the ***Children's Special Allowance Act***, S.C. 1992, c. 48, Sch. ("***CSA Act***") that is paid to institutional caregivers to be used to the benefit of children in their care.

[8] Beginning in 2005, the defendant adopted a policy requiring all Child and Family Services Agencies ("CFS Agencies") to remit to the defendant all their CSA Benefits for

provincially funded children in care (the "CSA Policy"). If CFS Agencies refused to comply, the defendant would reduce the non-compliant agency's operational and/or maintenance funding.

[9] The defendant terminated the CSA Policy on April 1, 2019.

C. THE PROCEDURAL HISTORY

[10] On or about April 26, 2018, several Indigenous CFS Agencies commenced an application against the defendant seeking declaratory relief regarding the CSA Policy (the "2018 Application").

[11] On December 20, 2018, the Flette Action was commenced on behalf of all provincially funded Indigenous children in care. The Flette Action alleged that the CSA Policy was unlawful and claimed damages for the forced remittance of these benefits.

[12] In November 2020, the defendant enacted ***The Budget Implementation and Tax Statutes Amendment Act 2020***, SM 2020, c. 21 ("***BITSA***"). Section 231 of ***BITSA*** purported to retroactively provide authority to the defendant in relation to the CSA Policy while also dismissing the various CSA Benefit related lawsuits that had been initiated, including the 2018 Application and the Flette Action.

[13] On November 27, 2020, the applicants of the 2018 Application joined several other Indigenous CFS Agencies and Authorities, including the Assembly of Manitoba Chiefs, to commence two additional applications against the defendant regarding the CSA Policy (the "2020 Applications"). The 2020 Applications expanded upon the relief sought in the 2018 Application, including challenging the constitutionality of s. 231 of ***BITSA***.

[14] On April 20, 2021, Edmond J. (as he then was), ordered the consolidation of all the CSA Benefit proceedings in order determine the various constitutional issues that were common to all the proceedings.

[15] On May 18, 2022, Justice Edmond in ***Flette et al. v. The Government of Manitoba et al.***, 2022 MBQB 104, [2022] M.J. No. 444, held, among other things, that s. 231 of ***BITSA*** was of no force or effect and therefore invalid; that the CSA Policy and the enactment of s. 231 of ***BITSA*** was a violation of s. 15(1) of the ***Canadian Charter of Rights and Freedoms***, which could not be justified by s. 1; and that the CSA Policy discriminated against Indigenous children in care on the basis of race, national or ethnic origin, mental or physical disability.

[16] On August 14, 2022, the defendant announced that it would not appeal Edmond J.'s decision.

[17] On May 23, 2023, the LaFontaine Action was filed seeking monetary recovery from the defendant during the time the CSA Policy was in effect in relation to both indigenous and non-indigenous children in care of the Métis CFS Agencies.

[18] On May 30, 2023, the Lavallee Action was commenced. It also sought monetary recovery from the defendant during the time the CSA Policy was in effect but only in relation to non-indigenous children in care.

[19] On September 11, 2023, a carriage order was granted in relation to the LaFontaine Action which had the effect of carving out children in the care of the Métis Agencies from the Flette Action.

[20] On December 13, 2023, certification orders issued for all three Actions. Each order included the following class definition:

a) the Flette class definition included all Indigenous persons, and the estate of those persons, who are or were wards of Child and Family Services Agencies, other than Métis Child, Family and Community Services and Michif Child and Family Services, in the Province of Manitoba at any time between January 1, 2005 and March 31, 2019, and were deemed a provincial funding responsibility in accordance with the Child and Family Services Funding Guidelines for Child Maintenance, excluding any person who validly opts out of the Flette Action;

b) the Lavallee class definition included all non-Indigenous persons, and the estate of those persons, who are or were wards of Child and Family Services Agencies, other than Métis Child, Family and Community Services and Michif Child and Family Services, in the Province of Manitoba at any time between January 1, 2005 and March 31, 2019 and were deemed a provincial funding responsibility in accordance with the Child and Family Services Funding Guidelines for Child Maintenance, excluding any person who validly opts out of the Lavallee Action; and

c) the LaFontaine Class Definition included all indigenous and non-Indigenous persons who were in the care of the Métis Agencies at any time between January 1, 2005 and March 31, 2019 and for whom the Métis Agencies received Children's Special Allowances and other applicable benefits

pursuant to the ***CSA Act*** that were directly or indirectly taken by Manitoba, including through claw backs of provincial funding.

[21] On January 26, 2024, the parties participated in a Judicially Assisted Dispute Resolution Conference ("JADR Conference"), but were unable to agree on a settlement.

[22] On March 19, 2024, a further JADR Conference was held at which time an agreement in principle was reached. The settlement agreement for the Flette and Lavallee Actions was signed on June 18, 2024, while the settlement agreement for the LaFontaine Action was signed on June 19, 2024.

[23] The key provisions of the Flette and Lavallee settlement agreement included the following:

a) the establishment of a $445.2 million settlement fund (69 percent allocated to the Flette Action and 31 percent to the Lavallee Action), inclusive of compensation for all approved claims, honoraria, CFS legal costs, counsel fees and administration costs, including CFS parties, Peguis Child and Family Services and any non-party CFS Agencies;

b) a claims administration procedure ("CAP") with a simple two-phase payout formula;

c) individual compensation amounts ranging between $150 to $86,000, plus a prorated share of investment income;

d) a claims process that could be done in as many forms as possible; a reconsideration committee, along with a special advisory board to provide support services to claimants;

e) funds for minor class members would be held in trust;

f) a cy-près agreement dealing with any undistributed settlement funds, if any;

g) the reimbursement of legal costs incurred by the various CFS Agencies, who intervened to support the Flette and/or Lavallee Actions;

h) an honorarium payment to the Class representative(s);

i) the defendant's confirmation that the receipt of compensation pursuant to the settlement agreement will not impact a claimant's eligibility for social assistance benefits, or income assistance programs; and

j) the defendant's confirmation to issue a public apology to all class members.

[24] The key provisions of the LaFontaine settlement agreement are as follows:

a) the establishment of a $84.8 million settlement fund, inclusive of compensation for all approved claims, honoraria, legal costs, counsel fees and administration costs;

b) a claims administration procedure ("CAP") with a simple two-phase payout formula;

c) individual compensation amounts ranging between $200 to $60,000, plus a prorated share of investment income;

d) a simple claims process in that class members only need to identify themselves and provide their identification;

e) the fund would also include a support and service program;

f) funds for minor class members to be held in trust;

g) a cy-près agreement dealing with any undistributed settlement fund, if any;

h) an honorarium payment to the Class representative(s);

i) the defendant's confirmation that the receipt of compensation pursuant to the settlement agreement will not impact a claimant's eligibility for social assistance benefits, or income assistance programs; and

j) the defendant's confirmation to issue a public apology to all class members.

D. ANALYSIS

i. Are the Settlement Agreements Fair and Reasonable and in the Best Interests of the Class?

[25] Section 35(1) of the ***Act*** requires that class proceedings be subject to court approval.

[26] The relevant test for approving a settlement is whether it is fair and reasonable and in the best interests of the class as a whole (***McLean v. Canada***, 2019 FC 1075, [2019] F.C.J. No. 969, at para. 65, ***Tataskweyak Cree Nation v. Canada (Attorney General)***, 2021 MBQB 275, [2021] M.J. No. 382, and ***Weremy v. Manitoba***, 2023 MBKB 122, [2023] M.J. No. 220, at para. 8).

[27] A settlement agreement must fall within a zone of reasonableness, in short, it does not have to be perfect (***Tk'emlúps te Secwépemc First Nation v. Canada***, 2021 FC 988 (CanLII), at para. 37 and ***Quenneville v. Volkswagen Group Canada Inc.***, 2018 ONSC 2516, [2018] O.J. No. 2117, at para. 57 and ***Weremy*** at para. 10).

[28] The court only has the authority to approve or reject a settlement agreement. To reject a settlement, a court must conclude that a settlement does not fall within a zone or range of reasonable outcomes, recognizing that settlement agreements are the result of compromise on both sides (***Tataskweyak*** at paras. 64-65 and ***Weremy*** at para. 10).

[29] When assessing whether a settlement is fair and reasonable and in the best interest of a class the court should consider the following non-exhaustive list of factors:

a) the likelihood of recovery or likelihood of success;

b) the amount and nature of discovery, evidence or investigation;

c) the terms and conditions of the settlement;

d) the number of objectors and nature of objections;

e) the presence of arm's length bargaining and the absence of collusion;

f) the information conveying to the court the dynamics of, and the positions taken, by the parties during the negotiations;

g) communications with class members during litigation; and

h) the recommendation and experience of counsel.

(See ***Tk'emlúps*** at para. 38, ***McLean*** at para. 66, ***Tataskweyak*** at para. 66 and ***Weremy*** at para. 11)

[30] The proposed settlement must also be considered as a whole and is not open to the court to alter any of the substantive terms or assess the interests of individual class members in isolation from the whole class (***Tk'emlúps*** at para. 39).

[31] I will comment upon each of the factors.

ii. Likelihood of Recovery or Success

[32] This factor does not require an assessment of the legal merits of the case but rather the legal risks raised by this case. Not only did these three Actions engage novel and complex issues, it required significant fact finding investigation, the acceptance of these novel legal arguments, challenging provincial legislation as well as a number of legal defences advanced by the defendant. In short, litigating these Actions, especially the initial steps taken in the Flette Action, prior to Edmond J.'s decision of May 18, 2022, was a high-risk undertaking. Even after Edmond J.'s decision, there remained no certainty of success given the other defences raised by the defendant, which included but were not limited to matters related to legal standing and limitation issues.

[33] Furthermore, the proposed settlement amount in each of the Actions is substantially more than the principal amount of the CSA Benefits taken by the defendant, all without incurring the time, costs and risks of going to trial.

[34] This factor favours approval of the settlement agreements.

iii. The Amount and Nature of Discovery and Investigation

[35] All the parties agree that significant discovery, investigation, and court filings were undertaken in all three Actions and that the Flette Action carried the lions' share of this responsibility, at least in the early stages.

[36] Furthermore, no one disputed that thousands of documents were produced and exchanged throughout the various steps of litigating these Actions. I am also satisfied that if litigation were to resume further extensive discovery, research, investigation, court

filings, and expert opinions would be required resulting in even more lengthy and costly litigation.

[37] This factor favours approval of the settlement agreements.

iv. Terms and Conditions of Settlement

[38] Each of the settlement funds are more than the CSA Benefits taken by the defendant. In the case of the Flette and Lavallee Actions, the settlement funds exceeded the CSA Benefits taken by $147 million. I am satisfied that the settlement funds, in all of the Actions, based on the amount recovered from the defendant, how they are going to be distributed to the class members, the investment income that will be earned, will not only place the class members in as close as a position they would have been had their rights not been infringed, but will also achieve the overlapping and connected objectives of vindication and deterrence (***Manitoba Federation of Labour et al. v. The Government of Manitoba***, 2023 MBCA 65 paras. 15, 30 and 73).

[39] I am also satisfied the proposed claims administration procedure for each of the Actions is fair, efficient, reasonable and the product of lengthy discussions and negotiations between the parties.

[40] Also important is the fact that there is no reversion of undistributed funds. Each settlement agreement contains a cy-près fund which will use any undistributed funds to benefit organizations that provide services and/or support to children in or having left the care of CFS Agencies.

[41] This factor favours approval of the settlement agreements.

v. Number of Objectors and Nature of Objections

[42] Counsel for each of the Actions have reported not having received any objections by the deadline prescribed in the notice to class members. In the case of the Flette and Lavallee Actions, I also note support of the settlement agreement from the Grand Chief of the Southern Chiefs' Organization, Manitoba Keewatinowi Okimakanak and the Assembly of Manitoba Chiefs as contained in their affidavits filed with the court.

[43] This factor favours approval of the settlement agreements.

vi. The Presence of Arm's Length Bargaining and the Absence of Collusion

[44] The parties participated in two JADR Conferences. The first on January 24, 2024, and the second on March 19, 2024. I am advised by counsel, and accept, that those who attended the JADR Conferences all supported the general settlement terms. This included a lengthy list of highly respected and regarded indigenous leaders, agency counsel, and agency directors.

[45] This factor favours approval of the settlement agreements.

vii. The Information Conveying to the Court the Dynamics of, and the Positions Taken, by the Parties During the Negotiations

[46] I am satisfied that the parties undertook a lengthy process of negotiation including two JADR Conferences, which resulted in a settlement agreement. I am also satisfied that significant efforts and compromises were undertaken by all parties to achieve a settlement agreement.

[47] This factor favours approval of the settlement agreements.

viii. Communications with Class Members During Litigation

[48] Class counsel for the Flette and Lavallee Actions submitted having communicated with class members in several ways, including through CFS Agencies and the Indigenous community. They also confirm having complied with the notice requirements respecting certification and settlement.

[49] Class counsel for the LaFontaine Action also submitted having made significant efforts to communicate with class members, by mail, email, publication in regional, provincial and national newspapers, postings in Métis CFS and the Manitoba Métis Federation offices, as well as creating a web site and toll-free line and email centre.

[50] I accept that class counsel's communications with their respective class members was adequate.

[51] This factor favours approval of the settlement agreements.

ix. Recommendation and Experience of Counsel

[52] I am satisfied that Class counsel for each of the Actions are experienced class action and civil litigation lawyers. As such, their strong support respecting the approval of the proposed settlement is to be given significant weight.

[53] This factor favours approval of the settlement agreements.

x. Is the proposed Honoria Fair and Reasonable in all of the Circumstances

[54] The court has jurisdiction to grant a request for an honorarium payment paid out of the settlement fund to representative plaintiffs who provide active and necessary assistance which resulted in financial success to the class (***Windisman v. Toronto College Park Ltd.***, 1996 CarswellOnt 2970, [1996] O.J. No. 2897, at para. 28).

[55] The representative plaintiffs in the Flette Action have requested the following honoria:

a) Elsie Flette the sum of $50,000; and

b) Lee Malcolm Baptiste the sum of $15,000.

[56] The representative plaintiffs in the Lavallee Action have requested the following honoria:

a) Trudy Lavallee and Joshua Camplin the sum of $10,000 each.

[57] The representative plaintiffs in the LaFontaine Action have requested the following honoria:

a) Rene LaFontaine and Mary Derendorf the sums of $5,000 each.

[58] Honorariums of between $5,000 and $25,000 are well within the accepted range (see ***Redublo v. 8262900 Canada Inc. (c.o.b. CarePartners)***, 2022 ONSC 1398, [2022] O.J. No. 999 and ***Garland v. Enbridge Gas Distribution Inc.***, 2006 CanLII 41291 (Ont. S.C.J.)). In case where the representative plaintiff has provided a significant contribution, the court has granted up to the sum of $50,000 (***Manuge v. Canada***, 2013 FC 341, [2014] 4 F.C.R. 67).

[59] I accept that Ms. Flette has been integrally involved in almost every aspect of litigation in relation to the Flette Action. She brought a unique knowledge to the litigation in that she has spent her entire professional life working on behalf of Indigenous children in Indigenous CFS Agencies. Her involvement included regular communication with class counsel; preparing and executed five lengthy affidavits; was cross examined twice;

attended a JADR session; reviewed the settlement agreement; and worked with the proposed settlement fund administrator.

[60] I also accept that Mr. Baptiste, Ms. Lavallee, Mr. Camplin, Ms. LaFontaine and Ms. Derendorf have each played an integral part in their respective Actions. Their roles included assisting in the preparation of pleadings; affidavits; meetings with class counsel; attending hearings, including JADR conferences; reviewing the settlement agreement and its related schedules; and providing input.

[61] All the class representatives are truly exceptional people, who have done exceptional work, for an exceptional cause.

[62] I accept that the requested honorarium for each class representative is reasonable and recognizes their contributions to their respective Action and the time that they spent on behalf of the class.

E. CONCLUSION

[63] I am satisfied that:

a) the settlement agreement in the LaFontaine Action is:

(i) fair and reasonable and in the best interests of the class;

(ii) within the zone of reasonableness being mindful of the risks, costs, and unpredictability of proceeding to trial; and

b) the proposed honoraria in the LaFontaine Action are reasonable in the circumstances.

[64] The LaFontaine Action motion is granted.

_____ J.