Federal Court Cour fédérale

Date: 20180910

Docket: T-2212-16

Citation: 2018 FC 900

Ottawa, Ontario, September 10, 2018

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JESSICA RIDDLE, WENDY LEE WHITE, and CATRIONA CHARLIE

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Introduction

[1] This decision deals with the status of the fees approved by Justice Shore as described in his Order of May 11, 2018, and his Order and Reasons of June 21, 2018, approving the settlement [Settlement] of this matter including approval of the legal fees to counsel in this Federal Court action [Federal class counsel fees].

[2] The central question is whether in light of the Ontario Superior Court (Belobaba J.) decision in *Brown v Canada (Attorney General)*, 2018 ONSC 3429 [*Brown*] of June 20, 2018, in which counsel fees were not approved, the Federal Court's decision on fees can and/or should be reviewed.

[3] For the reasons which follow, I have concluded that, in accordance with the principles of issue estoppel, this Court does not have jurisdiction to review, let alone, reverse Justice Shore's decision.

II. Background

[4] It is useful to set this issue in context and to clarify some matters surrounding this issue. It is necessary to clarify this Court's Order of August 2, 2018.

[5] The Settlement Agreement had provided that both the Federal Court and the Superior Court were required to approve the settlement which included the legal fees to be paid. Failure to approve resulted in the settlement being terminated.

[6] Canada had set aside $75 million in legal fees to be paid by it without any deduction from the amount to be paid to claimants.

[7] There has been no explanation for Canada's willingness to pay this amount. The Court does observe that the fees are approximately $5,000 for every $50,000 paid under the Settlement.

On an individual claim basis, such a fee is consistent with commercial claims for claims of approximately $50,000. However, Canada's rationale is not clear.

[8] As between counsel in *Brown* and in this case, and pursuant to their agreement, the legal fees were divided in half between Ontario counsel and Federal class counsel and under the Federal Court's fee process that half was divided evenly between the three firms having carriage of this Federal Court action.

[9] Pursuant to the Settlement Agreement both Courts had to approve the total fees and the fees in their respective case. Justice Shore approved the total counsel fees and the breakdown thereof. Justice Belobaba refused to approve the counsel fees and, in the course of which that decision commented on the approval decision of Justice Shore.

[10] Following Justice Belobaba's decision which approved the other terms and conditions of the settlement [the core settlement] but rejected the legal fees portion, there was some uncertainty as to the status of the settlement and particularly the legal fees provision.

[11] Federal class counsel and Canada counsel requested a case management conference with this Court which was held in Fredericton on July 19, 2018. At that conference, counsel discussed an amendment to Article 11.01 of the Settlement Agreement to "de-link" the fee approval process such that each court would approve only the counsel fees which related to their action.

[12] This Court indicated that such de-linking was reasonable. The Court understood that Federal class counsel would be filing submissions on the status of the Federal Court's fee approval order.

[13] Following the case management conference, counsel provided the Court with copies of the amendment to Article 11.01 de-linking the fee approval process and a draft order which was virtually identical to Justice Shore's Order of May 11, 2018, with the de-linking amendment provision.

[14] As was made clear in the recital to this Court's August 2, 2018 Order, the purpose of the Order was to give effect to de-linking. It never was, nor was it intended to be, a review or endorsement of the Settlement or of the counsel fee provisions. The format, a virtual repeat of Justice Shore's Order, was to ensure that even with amendments, there would be but one operative order encompassing the then current terms and conditions. In a case involving multiple claimants dispersed across the country and dealing with complex provisions, it is the Court's view that a single operative order is preferable to an original order with various amendments attached.

In hindsight, it might have been preferable to title the August 2 Order "1st Amended Order of Justice Shore's Order of May 11, 2018".

[15] The Federal class counsel's submission that this Court approved the legal fees in the August 2, 2018 Order is incorrect and their reliance on it in submissions on jurisdiction is

misplaced. The issue of jurisdiction and the operation of issue estoppel turns on Justice Shore's approval order.

[16] In anticipation of such cost submissions, the Court issued a Direction on August 3, 2018, indicating that pending the fee issue, there was no reason to prevent implementation of the core settlement. The Court had earlier indicated that it would approve the appointment of a monitor pursuant to the Settlement Agreement as part of the implementation process.

[17] Having received only additional copies of the counsel fee record which had been before Justice Shore and which this Court had, this Court, on August 8, 2018, asked that in the anticipated fee submissions, the parties address the issue of this Court's jurisdiction to consider the matter of fees and specifically raising the principles of *res judicata* and estoppel.

[18] Having received Federal class counsel's letter of August 15, 2018, asserting that the Court had no jurisdiction, the Court, in a case management conference, offered counsel a choice of resting on this brief letter or filing further and better submissions, as the Court had earlier anticipated. Counsel took the opportunity to assist the Court with more fulsome submissions.

[19] This Order and Reasons are in respect of those submissions.

III. Analysis

[20] The matter before the Court is the Order of Justice Shore of May 11, 2018 and his Order and Reasons of June 21, 2018, as amended by my Order of August 2, 2018.

[21] It is not appropriate for this Court to comment on the merits of the *Brown* decision. Firstly, the matter of counsel fees is still a live issue before the Ontario Superior Court. Secondly, neither of the two courts sit in supervision or review of the other – their respective judgments stand on their own.

[22] Furthermore, the *Brown* decision does not raise a circumstance under the *Federal Courts Rules*, SOR/98-106, which permit opening a judgment or order. Decisions by other courts are not that type of situation. The *Brown* decision related to a different "class", significantly smaller than in *Riddle*; it involved different parties and counsel where Federal class counsel were not involved; it was decided on a different record than that which was before Justice Shore.

It is not surprising that different court records yield different court decisions. Both are valid and subsisting decisions.

[23] The Order of May 11, 2018, as amended by the August 2, 2018 Order, are final orders from which there has been no appeal nor any legal process to re-open the matter. The appeal periods have expired and the parties have been acting upon and implementing the scheme of the settlement to the benefit of the claimants. No one treated the Settlement Agreement as terminated after the *Brown* decision. In fact, all parties did everything possible to keep the settlement alive recognizing that only counsel fees in *Brown* remained tentative. It is not in the interests of the claimants or the administration of justice to add further uncertainty by re-opening the issue of counsel fees further.

[24] Counsel are free to reconsider (but are not legally obliged to do so) whether their fees should be reduced and the differential added to the core settlement amount but they are entitled to the fees as ordered by Justice Shore.

[25] The principle underlining the rule of the finality of orders and of *functus officio* is described in *R v Litchfield*, [1993] 4 SCR 333 at 349:

> … the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. … Further, the "orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal. …

[26] In my view, this Court is as bound by the principle of issue estoppel in respect of Federal class counsel's fees as it is in respect to the core settlement.

[27] The Supreme Court in *Angle v M.N.R.*, [1975] 2 SCR 248 at 254, described the elements of issue estoppel as:

- the question has been decided;
- the judicial decision which is said to create the estoppel was final;
- the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[28] These elements have all been established here:

- Justice Shore's Order approved Federal class counsel fees on May 11, 2018;
- that Order effectively disposed of the counsel fee issue in respect to the Federal Court action;

- the Order has not been appealed, the time to do so has passed and the Order is final; and
- the parties here in this Court are the same as the parties covered by the May 11, 2018 Order.

[29] The law has adopted a number of principles to prevent relitigation. The reasons for so doing were described in *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 28, [2013] 2 SCR 125:

> Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, …

[30] Virtually all the reasons for preventing relitigation exist in the present circumstances.

[31] The Federal Court is *functus officio* in respect to Federal class counsel fees. It retains jurisdiction and supervision over the implementation of the settlement but that does not give it the jurisdiction to re-open the prior Order.

[32] This is particularly the case where the judge deciding the matter was so clearly and directly focused on the issue of fees and the reasonableness thereof.

[33] That issue was discussed in depth at Section B of Justice Shore's Order and Reasons of June 21, 2018. In the nine paragraphs of that section on Legal Framework on Fees and Analysis,

he addressed the legal principles and facts at issue. On that basis, he found counsel fees to be fair and reasonable. Therefore, he directly decided the issue of fees in the manner he thought appropriate. That matter has been conclusively determined.

[34] Justice Shore enjoyed a unique perspective from which to assess the pertinent facts – a position not shared with the various judges such as myself who have been involved in this matter. He was intimately involved in the mediation process and in the creation of the settlement. He had an opportunity to appreciate the role of counsel and he was cognizant of Federal class counsel's ongoing role in the implementation of the settlement and the issues which may arise for which further Federal class counsel will not be paid.

IV. Conclusion

[35] In any event, Justice Shore's Order is final and therefore this Court has no jurisdiction to deal with the matter of Federal class counsel fees.

[36] There is no formal motion before the Court and therefore there is nothing to order other to confirm that the Orders of May 11, 2018, June 21, 2018 and August 2, 2018 remain in full force and effect and fees are to be paid accordingly.

ORDER in T-2212-16

FOR THE REASONS GIVEN, the Orders of May 11, 2018, June 21, 2018 and August 2, 2018 remain in full force and effect and Federal class counsel fees are to be paid accordingly.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2212-16
STYLE OF CAUSE:	JESSICA RIDDLE, WENDY LEE WHITE, AND CATRIONA CHARLIE v HER MAJESTY THE QUEEN

WRITTEN SUPPLEMENTARY SUBMISSIONS CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO THE DIRECTION OF PHELAN J.

ORDER AND REASONS:	PHELAN J.
DATED:	SEPTEMBER 10, 2018

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