

CANADA / JUDGMENT

Fontaine v. Canada (Attorney General)

2015 BCSC 1969

COURT

Supreme Court of British Columbia

DECIDED

28 October 2015

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2015 BCSC 1969 Fontaine v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fontaine v. Canada (Attorney General),

2015 BCSC 1969

Date: 20151028

Docket: L051875

Registry: Vancouver

Between:

Larry Philip Fontaine et al

Plaintiffs

And

The Attorney General of Canada et al

Defendants

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice B.J. Brown

Direction Re: Monitor's Authority to Settle Costs

Counsel for the Attorney General of Canada:

C. Coughlan &

B. Thompson

Counsel for Crawford Class Action Services Inc. in its capacity as Court Monitor:

L. Zivot &

H. Drabinsky

Place and Date of Judgment:

Vancouver, B.C.

October 28, 2015

Nature of Application

- [1] This application relates to whether Crawford Class Action Services, the Court Monitor (the "Monitor") appointed to oversee the implementation of the Indian Residential Schools Settlement Agreement (the "IRSSA" or the "Settlement Agreement"), may unilaterally enter into settlements regarding the costs of court-ordered investigations it conducts in its capacity as Monitor. This issue arises in the context of the Monitor's investigation into the conduct of Mr. Stephen Bronstein and his law firm, Bronstein & Company (collectively, "Bronstein").
- [2] Over the course of a two-year long investigation commencing in February 2013, the Monitor reviewed the activities of Bronstein in relation to its handling of claims made under the Independent Assessment Process (the "IAP") created under the IRSSA. In my decision of May 1, 2015 (2015 BCSC 717), I found that Bronstein's unacceptable conduct did not warrant prohibiting Mr. Bronstein from participating in the IAP at that time, but that Bronstein would be liable to pay the reasonable costs of the Monitor's investigation. Counsel made written submissions regarding the appropriate level of costs and a hearing was held on this matter (the "Costs Matter") consecutively with the present application.
- [3] On August 12, 2015, following the exchange of written submissions in the Costs Matter, the Monitor submitted to this court the Request for Directions ("RFD") that is the subject of this application. In the RFD, the Monitor seeks directions that it has the authority to make all decisions regarding the relief sought in any court-ordered investigation that it undertakes; that it has, subject to court approval if necessary, the ability to "compromise" any aspect of a court-ordered investigation; that it has the specific ability to settle the costs of the Bronstein investigation and provide a release of all claims arising out of any obligations of Bronstein to pay court-ordered expenses; and, alternatively, that Canada be ordered to provide such a release, if necessary, upon the terms to which the Monitor and Mr. Bronstein agree.
- [4] In my view, and in light of the analysis below, the live issues in this application can be summarized as follows:
- a) What is the scope of the Monitor's authority to make independent decisions regarding relief and costs settlement in relation to its investigations?

- b) Should the court order Canada to provide a release in relation to any settlement agreement reached between the Monitor and the subject of an investigation or approve an agreement submitted by the Monitor to the court that proposes to provide such a release?
- [5] For the reasons that follow, I conclude that while the Monitor has the authority to make decisions on relief and settlement of costs in relation to its investigations, its decisions on these issues, including whether and to what extent it seeks recovery of its investigation-related costs, must be approved by this court, with Canada being provided the opportunity to make submissions. The court will not order Canada to provide a release in relation to a settlement agreement, including any reached in the Bronstein matter, nor will it approve an agreement submitted to it that proposes to provide such a release without Canada's consent, absent exceptional circumstances and where the law so permits.

Background and Overview

(a) Administration of the Settlement Agreement

- [6] This court, along with eight other provincial and territorial superior courts across Canada (collectively, the "Courts"), supervises the administration of the Settlement Agreement. After approving the IRSSA, the Courts issued orders on March 8, 2007 incorporating the terms of the Settlement Agreement and addressing its implementation and administration (the "Implementation Orders"). The following provisions are relevant to these reasons:
 - a) paragraphs 1 to 4 appoint the Monitor and give it authority to move before the Courts for orders providing it with access to information as well as to provide reports to the Courts as directed;
 - b) paragraph 6 provides that the Monitor's fees and costs shall be paid by Canada, upon court approval; and
 - c) paragraph 23 gives the Courts jurisdiction to issue such further orders "as are necessary to implement and enforce" the Settlement Agreement.

(b) Compensation under the Settlement Agreement

- [7] There are two types of compensation available to class members under the Settlement Agreement:
 - a) a "Common Experience Payment" for those who resided at an Indian Residential School ("IRS"), as that term is defined in the IRSSA; and
 - b) compensation pursuant to the IAP.
- [8] The IAP allows class members to advance claims for physical or sexual abuse (referred to as "continuing claims") suffered while at any of the IRSs recognized in the IRSSA. (See Schedule D, Part I at p. 2). As discussed above, the Monitor investigated Bronstein in relation to his handling of these types of claims.

(c) Investigation of complaints

- [9] In the course of administering the IAP, complaints began to surface in relation to the conduct of some counsel representing claimants. On occasion, including in relation to the Bronstein matter, the Monitor has sought and received an order from this Court to conduct an investigation into potential misconduct that undermines the integrity of the IAP.
- [10] In order to clearly define roles and responsibilities in relation to complaints of this nature and any resulting investigations, this court issued a joint direction in combination with the Eastern Administrative Judge, Perell J. of the ONSC. The joint direction ordered the implementation of an Administrative Protocol for Addressing and Managing Complaints Related to the Integrity of the Independent Assessment Process (the "Complaints Protocol"), which was issued on November 25, 2014. Pursuant to section 23 of that protocol, the Monitor has "sole responsibility for the investigation of, and response to, all Complaints to which the Complaints Protocol applies."

(d) Facts relevant to these reasons

- [11] On November 27, 2012, the Monitor requested, by way of an RFD, that the court order an investigation of Bronstein and a person whom Bronstein involved in representation of clients pursuing claims in the IAP (the "2012 RFD"). Although immaterial to the present application, I ultimately ordered that the person (a parolee named Ivon Johnny) be barred from participating in the IAP.
- [12] The Monitor completed its review in the fall of 2014 and filed an RFD seeking to remove Bronstein from the IAP and to recover from Bronstein the costs of the investigation. In reasons dated May 5, 2015 (2015 BCSC 717), I declined to remove Bronstein from the IAP, although his conduct fell below the acceptable standards for a legal professional. However, I ordered that he continue to participate in the IAP under the supervision of a Practice Advisor and that he is liable for the reasonable costs of the Monitor's investigation on a "special costs" scale, due to his unacceptable conduct.
- [13] As I found the costs claimed by the Monitor "may be disproportionate", I ordered the parties to follow a procedure and provide submissions to allow me to determine the appropriate amount of costs Bronstein would be liable to pay.
- [14] In my decision on the Costs Matter, released with this decision, I determined that the costs claimed by the Monitor were in excess of what was reasonable and proportionate in the circumstances. I found that Bronstein was liable to pay \$1,250,000, inclusive of tax.

Positions of the Parties

(a) Monitor

- [15] On August 12, 2015, the Monitor filed the RFD that is the subject of the present decision. The Monitor perceives that Canada has claimed for itself a more active role than is appropriate in approving settlement of costs related to investigations (RFD at (mm)), with the potential that the Monitor might be personally liable for certain costs (RFD at (ll)).
- [16] Canada has now raised - for the first time, in the Monitor's submission - concerns about the Monitor's level of spending in relation to its investigations. The Monitor's written and oral submissions addressed past practices regarding Canada's reimbursement of the Monitor's expenses, with the Monitor emphasizing that Canada had never required the Monitor to have its investigation expenses approved by the court and that the Monitor had never agreed to absorb any "shortfall" between expenses incurred in an investigation and the costs recovered from the subject of the investigation. To the extent that Canada takes issue with the expenses incurred in the Bronstein investigation and seeks recovery of costs from the Monitor, it is not appropriate to deal with these issues in the present application.
- [17] Against this backdrop, the Monitor seeks a direction that it has the autonomous authority to resolve issues arising out of investigations it has conducted, in particular, the authority to decide and resolve the issue of costs payable by Bronstein. Permitting Canada to interfere with the Monitor's decisions on relief and settlement of costs, including finding that Canada is a necessary party to the resolution of a costs matter, would severely compromise the Monitor's independence and its ability to negotiate a resolution.
- [18] In support of its position, the Monitor submits that the Courts have repeatedly recognized the importance of the Monitor's independence; that the Implementation Orders do not provide any authority for Canada to play a role in investigations; and that the Complaints Protocol makes clear that the Monitor has the authority to resolve or compromise matters that are the subject of complaints. Canada, the Monitor says, does not have the authority to independently seek recovery of costs from the subject of an investigation or from the Monitor.
- [19] Further, the Monitor asks this Court to direct that its authority includes the ability to provide a release of all claims arising out of obligations of Bronstein to pay the court-ordered expenses. Alternatively, it submits Canada must be ordered to release Bronstein of all claims upon the terms to which the Monitor and Bronstein agree.
- (b) Canada
- [20] Canada submits that the RFD must be dismissed, as it raises no live issues related to the independence or authority of the Monitor, which is circumscribed by Court oversight. The Monitor cannot determine the quantum of costs to which Canada is entitled. Where Canada is entitled to the reasonable costs of an investigation, Canada must agree to the amount properly payable, failing which only the court may fix the quantum.

- [21] The Monitor's duty to seek directions from the court applies to any prospect of engaging in settlement discussions. Compromises in relation to the costs of the Monitor's investigations must only be made with court direction. To the extent the Monitor's use of public funds in an investigation is found to be unreasonable, it falls within the plenary jurisdiction of a supervising court to order the Monitor to reimburse Canada for those expenses. In Canada's submission, this court's May 1, 2015 decision entitles it to the recovery of its costs in the Bronstein matter and recognizes Canada's right to participate in the procedure outlined in the decision and to seek recovery, as appropriate. The Monitor does not have the authority to unilaterally determine the reasonableness of its own costs, to bind Canada to that determination, or to insulate itself from any duty to reimburse Canada for the shortfall. This application amounts to an attempt by the Monitor to avoid taxation of its own accounts.
- [22] Canada notes that the Implementation Order requires the Monitor to obtain court authorization for its expenses, although there is no evidence the Monitor has ever done so. Canada has also regularly raised concerns regarding the funding of the Monitor's activities and submits that the Monitor actually agreed in the context of a previous investigation that any difference between expenses incurred and those recovered from the subject of the investigation would be dealt with by the Monitor and Canada at a later date.
- [23] Finally, in Canada's view, this court does not have the authority to grant the relief the Monitor seeks concerning providing Bronstein a release with respect to any claims Canada might have a right to pursue. The court cannot grant Canada's legal and equitable rights to a third party.

Analysis

- [24] The Monitor and Canada frame the issues arising from this application in different ways. As discussed above, I believe the live issues before me can be stated as follows:
- a) What is the scope of the Monitor's authority to make independent decisions regarding relief and costs settlement in relation to its investigations?
 - b) Should the court order Canada to provide a release in relation to any settlement agreement reached between the Monitor and the subject of an investigation or approve an agreement submitted by the Monitor to the court that proposes to provide such a release?
 - (a) Preliminary comments on approval of Monitor's expenses
- [25] This RFD arises in the context of concerns on Canada's part about the reasonableness and proportionality of the Monitor's investigation-related expenses and Canada's responsibility to fund the Monitor's activities. To the extent that Canada takes issue with the expenses incurred in the Bronstein investigation and wishes to seek recovery of costs from the Monitor personally, these are not matters appropriately dealt with in the present application.

- [26] Article 6 of the Implementation Orders provides that "[t]he Monitor's fees and costs shall be paid monthly by Canada, pursuant to the Monitor Funding Agreement, upon approval by order of Mr. Justice McMahon of the Court of Queen's Bench of Alberta or his designate." The Monitor takes the position in its submissions that the Implementation Orders and Monitor Funding Agreement did not contemplate that investigations would be required to maintain the integrity of the IAP. It also notes that Canada has regularly accepted to pay the Monitor's investigations accounts without requiring prior Court authorization of the accounts, suggesting an understanding that the funding agreement would not cover these types of investigations. The Monitor says Canada's failure to seek to replace Justice McMahon following his retirement with another supervising judge is further evidence of this understanding.
- [27] Insofar as either party believes that the Implementation Orders do not apply to the Monitor's investigations, they are, in my respectful view, mistaken. The Monitor owes its existence to the Implementation Orders (through paragraph 1, in which each of the Courts appointed Crawford Class Action Services, Inc. "as its monitor"). The Implementation Orders do not qualify the Monitor's costs and fees to which it applies. A joint direction issued in combination with Perell J. on July 30, 2015 brought clarity to this issue. That Direction implemented the Administrative Protocol for Addressing the Court Monitor's Obligations under the Implementation Orders (the "Obligations Protocol"), which was negotiated between the representatives of Canada and the Monitor, facilitated by Court Counsel. The Obligations Protocol provides clear procedures for the submission and approval of the Monitor's investigations expenses by this court or Court Counsel. It is my expectation that moving forward these procedures will assist in addressing concerns about the Monitor's expenses, enhancing accountability for the use of public funds and ensuring the administration of the IRSSA for the benefit of the residential school survivors who are entitled to compensation under the Settlement Agreement.
- [28] That is not to say that hindsight will be rigorously applied when approval is sought in relation to the Monitor's investigative expenses. The court recognizes that facts are largely unknown at the outset of investigations, and that by their nature, fair investigations will not always yield expected results. It is therefore appropriate to employ a reasonable measure of deference when reviewing the Monitor's expenses, as I did in my reasons in relation to the Costs Matter.
- [29] I will conclude my preliminary comments by reminding the parties it is incumbent upon all those to whom the Implementation Orders apply to ensure compliance with the Orders. Neither the Monitor, being an officer of the court, nor Canada may rely on the acquiescence or inaction of the other to justify their own non-compliance with the terms of the Orders. Where any party considers that there is uncertainty about the scope of a term, it is open to them to request clarification or amendment from this court, as necessary.
- (b) What is the Monitor's authority to make decisions on relief?

- [30] There is no dispute in this matter over the Monitor's independent authority to make decisions with respect to the general conduct of investigations, subject to the restrictions set out in the Orders and Protocols. The crux of the issue before me is the extent to which the Monitor is able to independently make decisions regarding the relief it seeks in relation to an investigation once it has been completed.
- [31] In my view, there are three important considerations that bear on the resolution of this question: the independence of the Monitor, the court's supervisory jurisdiction in relation to the Monitor's activities, and the use of public monies to fund the Monitor's operations.
- [32] The Courts have repeatedly recognized the importance of having an autonomous supervisor overseeing the implementation and administration of the Settlement Agreement: see, e.g., *Quatell v. Canada*, 2006 BCSC 1840, *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481. This is reaffirmed in various court orders made in the course of supervising the implementation and administration of the Settlement Agreement, including the Scope of Work document appended to the September 5, 2007 Order of Chief Justice Winkler, stating that the Monitor must discharge its duties "in good faith, even-handedly, and independently while avoiding any real or perceived conflicts." It is also reflected in paragraph 23 of the Complaints protocol, which provides "[t]he Court Monitor shall have sole responsibility for the investigation of, and response to, all Complaints to which this Protocol applies."
- [33] The Monitor's independence, however, is subject to the Courts' supervisory jurisdiction. For example, paragraph 4 of the Implementation Orders provides "[t]he Monitor shall take directions from the Courts upon the implementation and administration of the Agreement in such manner and at such times as the Courts direct." This oversight plays a role in ensuring the fair and impartial administration of the Settlement Agreement.
- [34] As briefly discussed above, the Implementation Orders also provide that the Monitor's fees and costs - including those arising from an investigation - are to be paid by Canada, implicating public monies. Importantly, these expenses are generally subject to approval by the Courts, pursuant to the Orders and various protocols. Where spent public funds are at issue, there is an imperative to ensure steps are taken to recover those costs that were incurred reasonably and proportionately. In this sense, Canada's concerns about pursuing the subject of an investigation for such costs are understandable.
- [35] The scope of the Monitor's authority to make decisions on relief must strike a balance between these three considerations. In my view, the balance is appropriately struck by directing that the Monitor has the authority to make decisions on relief and settlement of costs in relation to its investigations, including with respect to the Bronstein review. However, its decisions on these issues, including whether and to what extent it seeks recovery of its investigation-related costs from the subject of an investigation, must be approved by this court, with Canada being provided the opportunity to make submissions on the Monitor's proposed course of action. This conclusion is consistent with paragraph 23 of the Complaints Protocol, which must be read in light of the fact that the Monitor's

expenditures are generally subject to court review.

- (c) Should the court order Canada to provide a release or approve an agreement that proposes to provide such a release?

[36] The RFD requests directions regarding a release of Canada's claims only with respect to the Bronstein matter. It follows from the foregoing that the Monitor does not have the independent authority to provide to the subject of an investigation, including Bronstein, a release of all claims arising out of any obligations it has to pay expenses related to the investigation. However, given my conclusion on the Monitor's authority to make decisions on relief, and in light of my jurisdiction under paragraph 23 of the Implementation Orders to make "such further and ancillary orders as are necessary to implement" the Agreement, I will address the issue of whether the court should order Canada to provide a release in relation to any settlement agreement reached between the Monitor and the subject of an investigation or approve an agreement submitted by the Monitor to the court that proposes to provide such a release without Canada's consent.

[37] I see no foundation based in the Implementation Orders or associated protocols that would justify this court, either through a discrete order or through approval of a settlement reached between the Monitor and the target of an investigation, to compel Canada to release a claim. I would leave open the possibility that the Court could derogate from this general rule in exceptional circumstances and where the law so permits.

[38] To be clear, I decline to order Canada to provide a release to Bronstein.

Disposition

[39] For the reasons set out above, I direct that the Monitor has the authority to make decisions on relief and settlement of costs in relation to its investigations. However, its decisions on these issues, including whether and to what extent it seeks recovery of its investigation-related costs, must be approved by this court, with Canada being provided the opportunity to make submissions. I further direct that, absent exceptional circumstances and where the law so permits, the court will not order Canada to provide a release in relation to a settlement agreement, including any reached in the Bronstein matter, nor will it approve an agreement submitted to it that proposes to provide such a release without Canada's consent.

"B. J. Brown, J."

The Honourable Madam Justice B.J. Brown

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