

CANADA / JUDGMENT

Kirk v. Executive Flight Centre Fuel Services Ltd.

2025 BCSC 448

COURT

Supreme Court of British Columbia

DECIDED

14 March 2025

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2025 BCSC 448 Kirk v. Executive Flight Centre Fuel Services Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Kirk v. Executive Flight Centre Fuel Services Ltd. , 2025 BCSC 448 Date: 20250314 Docket: S135927 Registry: Vancouver Between: Robert George Kirk, as Representative Plaintiff Plaintiff And Executive Flight Centre Fuel Services Ltd. and His Majesty the King in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure and the Minister of Forests , Lands and Natural Resource Operations, Dany LaSante and Transwest Helicopters Ltd. Defendants And Danny LaSante, Executive Flight Centre Fuel Services Ltd. and His Majesty the King in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure and the Minister of Forests, Lands and Natural Resource Operations, and Transwest Helicopters Ltd. Third Parties -And- Docket: S155993 Registry: Vancouver Between: James Andrew Ross Plaintiff And Executive Flight Centre Fuel Services Ltd. and His Majesty the King in Right of the Province of British Columbia as represented by the Minister of Transportation and Infrastructure and the Minister of Forests , Lands and Natural Resource Operations, Dany LaSante and Transwest Helicopters Ltd. Defendants Before: The Honourable Mr. Justice David M. Masuhara Reasons for Judgment Counsel for the Plaintiff, Robert George Kirk: D.M. Rosenberg, KC D.M. Aaron D. Jones No other appearances Place and Date of Hearing: Vancouver, B.C. January 15 and February 18, 2025 Place and Date of Judgment: Vancouver, B.C. March 14, 2025

Introduction

- [1] These two-class proceedings have resulted in a settlement in the amount of \$4,525,061.67, which I approved in principle on January 15, 2025. The settlement agreement is dated October 9, 2024. The trial of this matter had been scheduled for January 2025.
- [2] The actions arise from a spill of approximately 35,000 litres of Jet A1 fuel into Lemon Creek, located in the Slocan Valley of the West Kootenay region of British Columbia, on July 26, 2013. The spill occurred as a result of a forty-foot fuel tanker truck overturning into the watercourse. The tanker truck, driven by the defendant Mr. LaSante, was travelling down a forest service road which ran alongside Lemon Creek. He was in search of a staging area for

refueling helicopters involved in fighting a forest fire in the area. As a result of the spill, the Interior Health Authority issued an evacuation order requiring people to vacate an area within a three-kilometre radius of the spill site, and an area of three kilometres within either side of the affected waterways from a point upstream of the spill site to the confluence of the Slocan and Kootenay Rivers. The order affected approximately 2,776 properties. A "do not use water" order was also issued by the Interior Health Authority for residents who drew water from Lemon Creek, Slocan River, and Kootenay River.

- [3] The Kirk action sought compensation for damage to property. The Ross action sought compensation for personal injuries and has been inactive pending developments in the Kirk action.
- [4] This decision primarily deals with class counsel's application for approval of fees which by agreement with the representative plaintiffs was for 40% of the total settlement amount. The other matter relates to the approval of a clause in the settlement agreement confirming that the court retains supervisory jurisdiction over the process, a provision made at my request. I approve this latter amendment.
- [5] In respect to fees, only plaintiffs' counsel made submissions.
- [6] At the January 15, 2025 hearing regarding approval of the settlement, I requested plaintiffs' counsel to provide further submissions regarding their application for fee approval as I was of the view that the range of contingency fees was normally 15% to 33%, but was dependent on the circumstances of a case. See for example, *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2013 BCSC 316 at para. 42 and *Jastram Properties Ltd. v. HSBC Bank Canada*, 2024 BCSC 1833 [Jastram] at para. 44.
- [7] On February 18, 2025, class counsel returned to address the matter of fees.

Applicable Principles

- [8] There is no issue on the applicable principles and factors to be considered. The court has jurisdiction over the approval of fees. Each case is to be considered on their own circumstances. Fees must be fair and reasonable. Factors to be considered include: the results achieved; the risks undertaken; the time expended; the complexity of the matter; the degree of responsibility assumed by counsel; the importance of the matter to the class; the quality and skill of counsel; the ability of the class to pay; the clients and the class's expectation; and fees in similar cases: see, e.g., *Jastram*, at para. 44, which recently reiterated these factors. Counsel's Position
- [9] Plaintiffs' counsel acknowledged that their review of the authorities indicates that percentage fees typically fall within the range of 15% to 33%. However, they submitted that on close analysis, the range of 35% to 50% may be appropriate in circumstances where there are exceptional facts and reasons.

[10] Counsel submitted that each of the above-mentioned factors have been met. The basis for the exceptional facts and reasons put forth by counsel are summarized as follows:

- a) the representative plaintiffs agreed in advance to the contingency fee of 40%;
- b) despite the wide publication of the settlement agreement, including the requested 40% contingency fee, no objectors have arisen;
- c) being an environmental class action, this matter was very high risk and few agree to take such cases on;
- d) the multiplier in this case is a fraction of the actual time spent: 40% does not come close to recovering the value of the time spent, and the materials indicate recorded time exceeded \$3.3 million;
- e) the lawyers engaged in litigation and carried the disbursements in this case for over 11 years; and
- f) environmental class actions are notoriously difficult to prosecute and to date, largely unsuccessful, and considering access to justice and the result obtained, this factor weighs in favour of the 40% contingency fee.

[11] Counsel handed up several cases where a contingency fee of 35% to 50% were approved. Counsel submitted that some of these decisions were similar in how the docketed time is greater than the fee sought. These decisions are as follows:

- a) *Ari v. Insurance Corporation of British Columbia*, 2024 BCSC 964 (35% contingency fee; \$510,000 settlement);
- b) *Cronk v. LinkedIn Corporation*, 2023 BCSC 2165 (35% contingency fee);
- c) *Bodnar v. Community Savings Credit Union*, 2023 BCSC 934 (35% contingency fee);
- d) *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2015 BCSC 2138 (35% contingency fee; \$800,000 settlement);
- e) *Robertson v. Thomson Canada Limited*, 2009 CanLII 32703 (O.N.S.C.) (36% contingency fee; \$11 million settlement);
- f) *Cardoso v. Canada Dry Mott's Inc.*, 2020 BCSC 1569 (38% contingency fee; \$218,607 settlement);
- g) *Lamontagne v. Compagnie d'aviation Cubana*, 2023 QCCS 4822 (39.9% contingency fee; \$87,719 settlement);
- h) *Rose v. Pettle*, 2006 CanLII 12726 (O.N.S.C.) (44% contingency fee);
- i) *Therrien v. Sony Interactive Entertainment*, 2021 QCCS 2823 (45% contingency fee; \$110,000 settlement);

- j) Romita v. Intellipharma International Inc., 2021 ONSC 6760 (49% contingency fee; \$266,000 settlement);
- k) Calhoun v. Barkerville Gold Mines Ltd., 2018 ONSC 1055 (50% contingency fee; \$250,000 settlement); and
- l) K. Field Resources Ltd. v. Bell Canada International Inc., 2005 CanLII 33035 (O.N.S.C.) (\$3 million fee but no costs). The case had been dismissed. Discussion

[12] While the cases are helpful guides, each case is to be decided on their own merits.

[13] In this case, there were four successive fee agreements. The details of the first three, including the contingency percentage, were only revealed during the course of the hearing upon my questioning. The first was made on August 7, 2013, and the second was on September 25, 2013. In both, the applicable contingency fee was 25% if a settlement occurred after an examination for discovery. Should the case have gone to trial or settled 30 days prior to the start of trial, then both agreements stipulated that a 30% contingency fee on the total award or settlement would be in effect. The third agreement was on February 8, 2021. The contingency fee was set at 33% of a total settlement "regardless of what stage the action is in at the time at which such judgment or settlement is forthcoming". Counsel advised their client in a letter that the plaintiff could hold counsel to the earlier lower fee agreements. The fourth retainer agreement, which is relied upon by counsel, is dated August 14, 2024, and has a contingency fee of 40%. I will return to this below.

[14] It is common in many class proceedings that time expended on a case exceeds the amount that would arise from the fee sought. In relation to fee approval, recovery of time invested is usually one measure in assessing the reasonableness of a contingency fee. Time invested is not determinative unless the agreement specifies it. Further, short of some type of review validating the reasonableness and prudence of the time recorded and level of counsel involved, it is difficult to determine the level of reliance that can be placed on this information, except in a general sense.

[15] In terms of the length of time and the intensity this case has been litigated, I agree that the case has been hard fought. However, again, this is not uncommon and would have been anticipated from the outset. I also take no issue with the quality and experience of counsel for the class. Mr. Rosenberg in particular is esteemed senior litigation counsel and has extensive experience in the environmental law area.

[16] Regarding the Ontario cases handed up, as I mentioned during the hearing, the risk profile is higher for cases in Ontario in that it is a "cost" jurisdiction, whereas BC is a "no cost" jurisdiction (with exceptions in special circumstances), all other things being equal. Cases that fail at the certification point can involve significant cost implications for plaintiff's counsel. I also note that the more recent legislative changes to class proceedings in Ontario suggests that the test for certification is higher as well. Additionally, there are third party arrangements available to mitigate this exposure to risk. Counsel advised that this route was

not pursued.

- [17] The aspect that this case involves an environmental claim settlement adds some weight; however, as discussed during the hearing, such claims fit well within the ambit of class actions. Further, from the outset of this litigation the nature and complexity of the case would have been apparent.
- [18] I also note that the Ross action was not litigated but was on hold pending developments in the Kirk action. Thus, the special aspects of that case as argued by counsel do not attract the weight that it might have had that proceeding been contested.
- [19] I also observe that the approved percentage fees for class actions, as detailed in Class Actions in Canada, 2nd Edition, Ward Branch, Section 8:2, particularly, Appendix E, have ranged from 3.64% to 50%, with an average around 24%.
- [20] In reviewing the cases handed up by counsel (above), except for one, a fee greater than 35% relates to settlements that are below \$270,000. The settlement here is well above that level. I also note that Appendix E, also indicates the same.
- [21] In a recent case before me, Seidel v. Telus, Vancouver Registry No. L050143, I approved a settlement involving the payment of vouchers by Telus to a maximum of \$3.825 million. That case has been litigated since 2005 and involved an appearance before the Supreme Court of Canada, with a further appeal pending. Despite the retainer agreement specifying a 30% contingency fee, plaintiff's counsel sought approval of a fee of 13%.
- [22] Without diminishing the considerable effort and result obtained by counsel, I am not persuaded that the present circumstances establish the facts and circumstances as argued by counsel to be at the exceptional level that would take this case to the 40% contingency level. The essence of the claim throughout has been an environmental "mass tort" claim involving several well-resourced defendants. From the outset, plaintiffs' counsel had a clear awareness the case would be seriously defended and complicated by the dynamics between the defendants respecting any apportionment of responsibility between them. The litigation steps, taken or encountered since the February 2021 retainer agreement, would have been within the reasonable contemplation of counsel from the outset, given that a trial was always a recognized potential outcome. The submissions did not identify events or circumstances that departed from the reasonably contemplated trajectory of the case or risk to justify the late increase in fee. Moreover, given the significant increase in the contingency fee from 33% to 40%, notwithstanding the support of the representative plaintiffs who represent an engaged community, some consideration should have been given to obtaining independent advice for the representative plaintiffs. That did not happen here.

[23] I also recognize that the bar should be encouraged to take on difficult cases in the class action arena. Access to justice is a key focus of class action legislation. In my view, holding plaintiffs' counsel to the earlier agreed retainer agreement percentages of 25% or the 33%, in circumstances as in the present, would not dampen the spirit nor inhibit the bar from taking on similar cases.

Conclusion

[24] Considering all of the foregoing, a fair and reasonable fee is 33%. The disbursements applied for are approved.

[25] The other matter regarding the additional wording to the Settlement Agreements confirming the court's jurisdiction over the administrator's decisions is approved.
"Masuhara J."

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