IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Plimmer v. Google, Inc.,*
2013 BCSC 681

Date: 20130418
Docket: S126986
Registry: Vancouver

Between:

Wayne Plimmer

Plaintiff

And

Google, Inc.

Defendant

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment - *Ex-Parte* Application for Preliminary Fee Approval

In Chambers

Counsel for the Plaintiff:	Robert S. Anderson, Q.C. Michael J. Wagner
Place and Date of Hearing:	Vancouver, B.C. March 26, 2013
Plaintiff's Supplementary Written Submissions:	filed April 2, 2013
Place and Date of Judgment:	Vancouver, B.C. April 18, 2013

Introduction

[1] The plaintiff and his counsel have applied for the court's preliminary but not final approval of the plaintiff's retainer agreement with his legal counsel. The application was brought on an *ex parte* basis. An interim sealing order and publication ban are also requested.

[2] This application gives rise to the following issues:

(a) Should the application be heard on an *ex parte* basis?

(b) Is the timing of the application appropriate, and if so, what, if any, should be the scope of this Court's review?

(c) Should this Court issue a temporary sealing order and publication ban in respect of this application?

Analysis

(a) Should the application be heard on an *ex parte* basis?

[3] I will start with the question of whether or not the application should be heard on an *ex parte* basis.

[4] This proceeding is a proposed class action. The application to certify the action as a class action has not yet been heard.

[5] The *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] provides in s. 38 that an agreement between a lawyer and the representative plaintiff regarding legal fees and disbursements must be in writing and is not enforceable unless approved by the court.

[6] Section 38 reads in part:

> 38(1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must
>
> (a) state the terms under which fees and disbursements are to be paid,
>
> (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and

> (c) state the method by which payment is to be made, whether by lump sum or otherwise.
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.
>
> (3) An application under subsection (2) may,
>
> (a) unless the court otherwise orders, be brought without notice to the defendants, or
>
> (b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.

[7] The *CPA* clearly contemplates in s. 38(3)(a) that an application to approve a lawyer's fee agreement may be brought without notice to the defendants.

[8] This is a different situation than in Ontario, where no similar provision for an *ex parte* fee approval hearing is found in that province's class proceedings legislation.

[9] In Ontario, costs are normally awarded in class proceedings, unlike British Columbia's no-costs regime. There, some plaintiffs in class proceedings have sought court approval of third party funding arrangements, whereby a third party in effect insures the plaintiff against a possible costs award. The courts in Ontario have held that notice to the defendant is required on such an application. The courts in Ontario note that the defendant has an interest in such an application because it may be affected by the third party funder's ability to pay costs: see *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785 [*Dugal*]; and *Fehr v. Sun Life Assurance Company of Canada*, 2012 ONSC 2715 [*Fehr*].

[10] A practically identical provision to the B.C. provision for *ex parte* fee approval hearings exists in the Alberta *Class Proceedings Act*, S.A. 2003, c. C-16.5 [*Alberta Act*]: s. 39(2). The plaintiff has pointed me to authorities from that province which have approved an *ex parte* process for motions for approval of fees in class proceedings, such as *Roth v. Alberta (Minister of Human Resources and Employment),* 2005 ABQB 505 [*Roth*]; and *L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)*, 2012 ABQB 394 [*L.C.*] The legislative rationale for

such a process has been interpreted in Alberta as based on the protection of solicitor-client privilege: see *Roth,* at para. 5; *L.C.,* at para. 9.

[11] I will have more to say about solicitor-client privilege shortly. However, I interpret the B.C. legislation's provision for *ex parte* fee approval applications as recognition of the fact that the defendant typically has no direct interest in the plaintiff's fee agreement with his or her lawyers.

[12] This was made clear in the case of *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, aff'd 2000 BCCA 638, leave to appeal dismissed, [2001] S.C.C.A. No. 27 [*Endean*]. In that case, the chambers judge approved class counsel fees after certification. The chambers judge had invited submissions from the defendants, rather than proceeding on an *ex parte* basis, and so the question of whether or not the matter should have been *ex parte* was not squarely in issue. But one group of defendants appealed the fee approval decision. The British Columbia Court of Appeal dismissed the appeal, holding that the defendants did not have standing in the matter of the fee agreement between a representative plaintiff and plaintiff's counsel.

[13] The legislation in B.C., as in Alberta, does leave the court with discretion to make an order that notice of the plaintiff's application for fee approval be given to the defendant: s. 38(3), *CPA*. Where the plaintiff argues notice should not be given, the legislation leaves it up to the court to determine if the defendant has an interest in the fee approval hearing or may assist the court in the hearing.

[14] As pointed out in the Ontario cases, the presence of a defendant at a fee approval hearing may help fill the adversarial void, assisting the court in presenting a point of view different than that of the plaintiff, and thus can be in the interests of the administration of justice: *Fehr* at paras. 77, 110. The presence of the defendant may also assist the court in commenting on the litigation risks run by the plaintiff, which was the reason for the trial court's request that the defendants participate in the fee approval hearing in *Endean*.

[15] Given that the certification application has not yet taken place, there is as of yet no class and so no opportunity for anyone else to take a position that challenges the plaintiff on this application. Class members have not yet had the opportunity to see the fee agreement and therefore have been unable to comment on it or raise objections to it.

[16] Nevertheless, I conclude that the fact that other class members do not yet have notice is not a reason to give notice to the defendant, given the timing of this application, which is early in the litigation and prior to any certification application, and given the fact that it will not result in any final order. I accept the plaintiff's submission that the application can be heard and determined on an *ex parte* basis.

[17] I turn now to the timing issue. This is what makes this application unusual.

(b) Given the timing of the application, what, if any, should be the scope of this Court's review?

[18] The *CPA* does not specify when an application to approve a lawyer's fee agreement should be brought.

[19] The legislature has also left to the common law the factors to be considered by the court in approving a fee agreement.

[20] It is usually the case in British Columbia that fee approval applications in class proceedings are brought after certification and after a settlement or judgment.

[21] This is because the approach of the courts to approving a fee agreement in a class proceeding is to assess the fairness and reasonableness of the fee, in context of a whole host of factors, including those known at the commencement of the retainer and those known up to the conclusion of the retainer: *Murphy v. Mutual of Omaha Insurance Co.*, 2000 BCSC 1510; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG,* 2013 BCSC 316.

[22] The common law in British Columbia relating to court approval of a lawyer's fee agreement in class proceedings is to a large extent built on the foundation of

Yule v. City of Saskatoon (1955), 17 W.W.R. 296 (Sask. C.A.). There, the Saskatchewan Court of Appeal approved the trial judge's approach to approval of a lawyer's account as follows at para. 11:

> After an exhaustive review of the authorities the learned trial judge stated that all factors essential to justice and fair play must be taken into account referring to the words of Middleton, J. in *Re Solicitor* (1920) 47 O.L.R. 522, *supra*. He then proceeded to enumerate the matters to be considered in arriving at a proper amount on the basis of a quantum meruit; among these matters he enumerated the extent and character of the services rendered, the labour, time and trouble involved, the character and importance of the litigation in which the services were rendered, the amount of money or the value of the property involved, the professional skill and experience called for, the character and standing in his profession of the counsel and the results achieved.
>
> [Emphasis added.]

[23] For example, these factors were relied on in *Endean*; *Smith v. Vancouver,* 2012 BCSC 990; and *Parsons v. Coast Capital Savings Credit Union*, 2009 BCSC 330.

[24] The relevant factors in reviewing class action fee agreements also include the risks undertaken by counsel, the expectations of counsel, the client and the class, and the integrity of the legal profession: *Endean*.

[25] In my view it would be premature to approve the fee agreement now, at least as a final determination. The many factors to be considered are best argued and weighed at the conclusion of the proceeding.

[26] In contrast to the *CPA*, in the *Alberta Act* the application for approval of a lawyer's fee agreement is required twice: first, before or at the time of the application for class certification, and second, after the common issues have been resolved or a settlement has been reached.

[27] In this regard, s. 39(1) of the *Alberta Act* provides:

> 39(1) A contingency fee agreement respecting fees and disbursements between a lawyer and a representative plaintiff is not enforceable unless,

> (a) on the application of the lawyer made prior to or at the time of applying for certification of the proceeding, the agreement was approved by the Court, and
>
> (b) after
>
> (i) the common issues have been resolved, in the case of a trial of the common issues, or
>
> (ii) a settlement agreement has been approved, in the case of a class proceeding being settled,
>
> the judge who presided over the trial of the common issues or approved the settlement agreement has, on the application of the representative plaintiff or, if the representative plaintiff fails to apply, on the application of the lawyer, reviewed the contingency fee agreement for the purposes of ensuring that the fees and disbursements payable under the agreement are fair and reasonable in the circumstances.

[28] The plaintiff in the present case states that the two-stage approach followed in Alberta has much to recommend it. The plaintiff agrees that final approval of the fee agreement must await another day, after certification and upon conclusion of the litigation. The plaintiff submits in its application that the approval sought now is "preliminary" and that "[t]he quantum of any eventual fee, and the method of calculation, will remain up to the court to decide at the appropriate time".

[29] This application begs the question: what exactly is to be gained by the court giving preliminary approval to the fee agreement at this stage?

[30] The plaintiff submits that early approval of the fee agreement will give the plaintiff and his counsel some reassurance, encouraging legal representation in these matters, and thus as a practice will serve to increase access to justice.

[31] In Alberta the purpose of early approval was set out in *Roth* at para. 12:

> From a review of the Act, it would appear that the purposes of early approval are as follows:
>
> (a) It gives counsel some idea of the type of fee that the Court might approve, so that counsel can decide whether he or she is prepared to continue with the retainer;
>
> (b) It provides class members with some idea of the fee that would be payable, to allow them to decide whether they should opt in or out of the class proceedings; and

> (c) It allows the Court to make some preliminary assessment of what would be a fair and reasonable fee for the class members to pay if the action is successful.

[32] I do not see the above three stated Alberta legislative objectives as served by incorporating a preliminary fee approval process into the case at bar or into British Columbia practice generally.

[33] Addressing the first stated objective in *Roth,* there is no evidence that current counsel would be unprepared to continue with the retainer if they did not receive preliminary fee approval. In any event, I have not heard any evidence that other counsel would not be willing to take the place of present counsel if they did not want to continue without preliminary approval of the fee agreement.

[34] It is clear to me that the first stated Alberta legislative objective cannot really be served here, as any preliminary fee approval would be premature without substantially more evidence, which is why it is preferred to address final fee agreement approval at the end of a case.

[35] Given the request to approve the fee agreement on an *ex parte* basis, it would not be appropriate for the court to hear argument as to the merits or risks of the action, in the absence of the defendant. Indeed, counsel for the plaintiff here were quite careful in their submissions to avoid any discussion of the merits of the plaintiff's claim, in order not to prejudice the absent defendant.

[36] If the preliminary fee approval could serve to give some reassurance to plaintiff's counsel about the type of fee that might eventually be approved, then I would wonder whether it should be accompanied by a downward adjustment to the final legal fee in recognition of the reduction in the overall risk of counsel in the case.

[37] Dealing with the second stated objective of the Alberta legislation identified in *Roth*, namely, providing class members with some idea of the fee payable, that objective is already served by the notice requirements in the *CPA* following certification.

[38] Section 19(6) of the *CPA* requires that the notice to class members, following certification, must, unless the court otherwise orders:

> ...
>
> (d) describe the possible financial consequences of the proceeding to class members and subclass members,
>
> (e) summarize any agreements respecting fees and disbursements
>
> (i) between the representative plaintiff and the representative plaintiff's solicitors, and
>
> (ii) if the recipient of the notice is a member of a subclass, between the representative plaintiff for that subclass and that representative plaintiff's solicitors,
>
> ...

[39] In order for the s. 19(6) notice to be meaningful, it is clear that all material terms of the fee agreement, including any potential costs consequences for class members, have to be publicly disclosed after certification.

[40] On the plaintiff's present application, class members would not receive any earlier notice of the fee agreement because the plaintiff proposes that all of the application materials, including the fee agreement and the results of this hearing, be sealed and subject to a publication ban. The first notice the class members would have of the fee arrangements would be after certification, which is no different than what the *CPA* already provides in s. 19(6).

[41] As for the third Alberta legislative objective of preliminary fee approval stated in *Roth*, that is, that it allows the court to make a preliminary assessment of what would be a fair and reasonable fee if the class action is successful, I do not see that as an objective but rather it as a re-statement of what the Alberta legislation requires.

[42] Any such a preliminary assessment is clearly non-binding in Alberta, as the Courts in *Roth* and *L.C.* go on to emphasize.

[43] In *L.C.* the Alberta Court of Queen's Bench made it clear that preliminary approval would not necessarily dictate the ultimate fee approval, depending on the circumstances, noting at para. 12 :

> ... Obviously if the case concludes differently than anticipated, the final fee might depart significantly from that which received primary approval. For example, if the procedures were much longer or shorter than anticipated, or if the final result was much higher or lower than anticipated, the fee might change substantially. In that respect the actual results and course of the litigation will be much more important than any preliminary assessment of the reasonableness of the fee, and the preliminary approval given by the court likely will receive little weight.

[44] In *L.C.* the court engaged in the exercise of analyzing the fairness of the agreement, from the perspective of when it was entered into. Theoretically a preliminary approval hearing could engage in a similar review in British Columbia.

[45] But since I am placed in the role of devil's advocate on this hearing, I can think of several arguments against adopting a two-stage fee approval process as a general procedure in British Columbia:

(a) it is slicing up an issue in the litigation into smaller pieces, namely, the approval of the legal fee, which issue would be better heard only once, when all the relevant facts are known;

(b) given that a preliminary ruling could not bind the court in respect of the final fee approval, a preliminary fee approval hearing is a waste of judicial resources and contrary to one of the goals of the *CPA*, namely, judicial economy;

(c) at this early stage there has been no opportunity for other class members to voice any concerns. In contrast, at the time of final fee approval, class members will have received notice of the fee agreement and will have the ability to raise issues with it with the court if they see fit; and,

(d) the applicant plaintiff seeks to have the interim fee approval application materials and result sealed and subject to a publication ban in order to

> preserve solicitor-client privilege. This has significant ramifications as it is contrary to the open court principle. There is less concern about solicitor-client privilege involving the fee agreement at the conclusion of the litigation.

[46] In addition, while not necessarily binding, the plaintiff's counsel surely intends the interim approval decision to have some influence on the subsequent fee approval decision. It will usually be the case that the same judge will hear both applications, although a new judge could be involved if an issue such as illness removes the first judge from the case. Regardless of who hears the final matter, the court is sure to be told that at the initial fee approval stage the court saw no problem with the fee agreement. Part of the final fee approval process will then likely be devoted to the question of whether or not there is anything new which should change the result from the preliminary approval.

[47] I do not consider this to be the best perspective from which to approach the final fee approval hearing given that the judge on the interim application will have known virtually nothing about the litigation and the judge at the conclusion of the case will know much more. Furthermore, the perspective of the plaintiff may have changed during that time, and it will be the first opportunity for other class members to make their views known.

[48] In my view a two-stage fee approval process will negatively impact the dynamic and the focus of the final fee approval hearing and will impede a holistic look at all of the factors that should be considered at the time of fee approval.

[49] While the legislature in Alberta obviously saw some merit in a two-stage fee approval process, the legislature in British Columbia did not. I am not persuaded that the common law of civil procedure in British Columbia ought to develop a two-stage fee approval process as a general practice in class proceedings.

[50] Having reached that conclusion, I nevertheless acknowledge that a court has a special supervisory role in class proceedings. This was in part the basis for the

Ontario authorities that have reviewed third party funding agreements, such as *Dugal* and *Fehr*.

[51] In *Dugal* the court was asked to approve a funding agreement under which a third party would indemnify the plaintiffs against their exposure to the defendant's costs in return for a percentage share in any recovery in the litigation.

[52] In *Dugal*, the court questioned whether or not it had jurisdiction to approve a fee agreement even before certification, given that there was, as of yet, no class. Strathy J. concluded that the court did have such jurisdiction. He held, at para. 12:

> The question is this - in a class proceeding, can the court make an order binding the class before the proceeding has been certified and therefore before there is a class? In *Fantl v. Transamerica Life Canada* (2008), 60 C.P.C. (6th) 326, [2008] O.J. No. 1536 (S.C.J.), aff'd (2008), 66 C.P.C. (6th) 203, [2008] O.J. No. 4928 (Div Ct.), aff'd 2009 ONCA 377, 95 O.R. (3d) 767 ("*Fantl*"), Perell J. answered the question in the affirmative. He held, at para. 58, that "while the circumstance of the action being or not being certified may be a factor in how the Court exercises its jurisdiction, certification is not a pre-requisite to that jurisdiction." He held that the jurisdiction included the authority to make orders to protect putative class members as potential parties to the litigation, to supervise the procedural conduct of the defendant and to supervise the relationship between class counsel, the representative plaintiff and the class.

[53] Further, in *Dugal*, Strathy J. concluded at para. 16:

> In this case, I am being asked to approve an agreement made between the representative plaintiff and a third party. That agreement has implications for the defendants, for proposed class counsel and for potential class members. It is an agreement that could affect the integrity of the litigation process and the due administration of justice. I am satisfied that I have jurisdiction to approve the agreement as part of the court's inherent jurisdiction to control its process. The question is whether I should exercise that jurisdiction at this time.

[54] I have already explained that part of the reasoning in *Dugal* was based on the context that defendants in Ontario may be seeking recovery of their costs on an unsuccessful certification application, and so have an interest in agreements which might otherwise fund plaintiffs. The plaintiffs in the case at bar correctly argue that the defendants have no similar interest here. This is consistent with the B.C. Court of Appeal decision in *Endean*. Further, as I have also already noted, the Ontario

class proceedings legislation does not expressly provide that fee approval applications may be brought *ex parte*, unlike in B.C.

[55] I conclude that preliminary approval of fee arrangements in class proceedings in B.C. should only be sought in exceptional circumstances, such as where there is a novel and potentially controversial form of agreement of which the court should be apprised in its supervisory role, to address and avoid the potential that the agreement could later be seen as affecting the integrity of the legal process or the proper administration of justice. Over time as case law develops and gives guidance to counsel and representative plaintiffs, there will be less occasion for these exceptional circumstances to arise.

[56] Those exceptional circumstances do not exist here with respect to the fairness and reasonableness of the fee agreement in general. I consider it inappropriate to address the approval of the fee agreement in slices, and I conclude that it is premature to consider these general issues at this early stage.

[57] The role of the court is not to give preliminary legal advice to the plaintiff or plaintiff's counsel, and the court ought not to be put in the position of making what are essentially moot rulings without all of the facts before it.

[58] For the most part, the court's assessment of the fee agreement in this case should await another day when the court will have heard all of the relevant evidence including as to the risks, merits and complexities of the case, and when other class members will have received notice of the fee agreement.

[59] I make the above general observations subject to one aspect of the fee agreement which warrants judicial consideration now. That aspect concerns the plaintiff lawyers' arrangements to fee-split with assisting lawyers who are based in the United States.

[60] The case law regarding Canadian counsel cooperating in class proceedings with lawyers based in the United States is evolving. I recognize that the plaintiff's B.C. counsel are being prudent by advising the court of the fee-splitting

arrangements they have entered into precisely because the case law is developing and such arrangements could affect the administration of justice.

[61] I have concluded that the novelty and potentially controversial nature of these types of arrangements are exceptional circumstances which justify the court embarking on the supervisory task of reviewing the fee agreement in respect of its arrangements to split the plaintiff's counsel fees with lawyers based in the United States.

Review of fee-splitting arrangements

[62] I turn now to review the fee agreement's terms in relation to fee-splitting.

[63] The fee agreement provides that the plaintiff's solicitors will be working with other lawyers described as "Assisting Lawyers", and named in a schedule to the agreement. I would observe that it would likely be of benefit if the fee agreement disclosed that the Assisting Lawyers are based in the United States, although I accept the evidence that the plaintiff has been advised of this fact.

[64] The fee agreement provides that the plaintiff agrees that the Assisting Lawyers will receive at least 15% of the fees awarded to the plaintiff's counsel. The fee agreement provides that this percentage may be increased and also that it is subject to court order to compensate the Assisting Lawyers on some other basis.

[65] The fee agreement makes clear that the involvement of the Assisting Lawyers will not increase the total percentage legal fee charged to the class.

[66] Furthermore, the fee agreement makes it clear that the plaintiff's B.C. counsel of record in this proceeding will retain control over all decisions and steps in this matter. The Assisting Lawyers will have no proprietary interest in the lawsuit, no right of veto, nor any control over the plaintiff's relationship with his B.C. counsel or the conduct of this proceeding.

[67] The fee-splitting arrangements as presented to me are drafted to accord with British Columbia law.

[68] In British Columbia, the Law Society of British Columbia governs the professional conduct of lawyers. In Chapter 3 of the *Code of Professional Conduct for British Columbia*, the Law Society expressly provides that lawyers may divide fees with lawyers who are not in the same firm, including lawyers in another jurisdiction. This is subject to the client's consent and the proviso that the fees are divided "in proportion to the work done and the responsibilities assumed": see Rules 3.6-5, 3.6-6, 3.6-6.1, and 3.6-7.

[69] I observe that the fee agreement before me does not expressly provide that the fees are going to be divided with the Assisting Lawyers "in proportion to the work done and the responsibilities assumed". If the agreed fee split turns out to be disproportionate, the court might not approve of the fee split proposed and might conclude that another fee split is more appropriate.

[70] In other words, while the fee agreement provides that the share going to the Assisting Lawyers may be increased, it is also the case that the share of the Assisting Lawyers may be decreased by the court. Perhaps this is addressed by the term in the fee agreement that provides that if the court so orders the Assisting Lawyers may be compensated on some other basis.

[71] I am advised that the plaintiff's counsel, as well as the Assisting Lawyers, will be tracking their hours worked in relation to this matter. This may assist the court at the end of the day in reviewing the fee split.

[72] The rules governing Ontario lawyers are different than in B.C., in that lawyers from outside of Canada cannot share in fees generated by lawyers in Ontario. However, U.S. counsel are able to lend their assistance to Canadian class action litigation with their fees recoverable as a disbursement: see *Wilson v. Servier Canada Inc.*, [2005] O.J. No. 1039 (S.C.J.).

[73] The plaintiff has helpfully drawn to my attention the Ontario case of *Sharma v. Timminco Ltd.*, [2009] O.J. No. 4511 (S.C.J.) [*Sharma*] in which Perell J. held, at paras. 78-80:

> In my opinion, it would be grounds to disqualify an Ontario firm seeking carriage if it purported to partner with an American law firm so that the American firm had a proprietary interest in the Ontario law suit, because this would take the foreign firm's involvement into the territory of champerty and maintenance and impermissible fee splitting, but I do not understand this to be the case at bar.
>
> At this juncture, it would appear that some of Milberg LLP's services might be chargeable as disbursements to be paid by the representative plaintiff and some of its services might be chargeable exclusively to Kim Orr, which would not be able to pass on the charges to the representative plaintiff no more than it could charge the class members for attendances at continuing legal education conferences.
>
> During argument, Mr. Orr for Kim Orr pointed out that American law firms are frequently the instructing solicitors for the Canadian lawyers who are on the record for defendants in class proceedings and that the American firms provide services for the Canadian defendants that are similar to the services proposed to be provided by Milberg LLP to the plaintiffs in this class action. This may be true, but the situations are not comparable because the Canadian defendants have a pre-existing lawyer and client relationship with their American lawyers and there are no comparable problems of unauthorized practice of law in Ontario, of champerty and maintenance, or of fee-splitting. That said, there is nothing inherently wrong with Ontario class counsel who are acting for plaintiffs in obtaining services from foreign law firms so long as there is no interference with or usurpation of the lawyer and client relationship between the Ontario lawyer of record and his or her clients.

[74] Although the remarks in *Sharma* were in part based on Ontario's different rules relating to legal fee-splitting, the plaintiff and his lawyers here have taken pains in the fee agreement to make clear that the Assisting Lawyers will not be usurping the role of B.C. counsel, nor will they be engaging in the unauthorized practice of law in B.C. Furthermore, the fee agreement makes it clear that the Assisting Lawyers will not have a proprietary interest in the lawsuit.

[75] Unlike the situation in *Chartrand v. General Motors Corp.*, 2008 BCSC 1781 [*Chartrand*], where the representative plaintiff did not know anything about the financial agreements between her B.C. lawyers and American lawyers, here, the fee agreement expressly sets out the nature of those arrangements.

[76] The court in *Chartrand* expressed the concern that it would not be in a position to supervise the actions of or participation of counsel from other jurisdictions, at para. 106. This is a legitimate concern but is addressed in the

present case by the fact that the only lawyers who will have conduct of the action are the B.C. counsel of record. The role of the Assisting Lawyers is expressly quite limited.

[77] The plaintiff's B.C. counsel are experienced and reputable. By disclosing their fee-splitting arrangements to this court, they are acting prudently and cautiously. I fully expect that they do and will continue to appreciate their professional obligations to this court, the plaintiff, and class members, and will not have those professional obligations adversely influenced by the assistance from the Assisting Lawyers. I am not concerned that the arrangements between the plaintiff's B.C. counsel and the Assisting Lawyers will negatively impact the integrity of this proceeding.

[78] In conclusion, leaving aside the percentage split which is not for this Court to approve at this time, I declare as an interim order that this Court approves in principle of the fee-splitting arrangement between the plaintiff's B.C. counsel of record, and the Assisting Lawyers, in substantially the terms as described to this Court.

[79] I considered stating this declaration in the negative, namely, that this Court does not disapprove of the fee-splitting arrangement, to reinforce the limitations in the supervisory discretion I have exercised. The point I wish to emphasize is that the application for final approval of the fee agreement should proceed as a hearing *de novo* when it comes to the end of the case.

(c) Should this Court issue a temporary sealing order and publication ban in respect of this application?

[80] The plaintiff seeks a temporary sealing order and publication ban over all of the application materials, the hearing of the application, and this court's order. The plaintiff argues that this is necessary to preserve solicitor-client confidentiality in respect of the details of its fee agreement with counsel until further court order.

[81] Counsel have not addressed when the sealing order and publication ban would expire but have stated that whether or not it would need to be disclosed will await the outcome of the certification hearing.

[82] If successful in the plaintiff's application for certification of the proceeding as a class proceeding, the material terms of the fee retainer would have to be disclosed shortly afterwards, at the time of notice to class members of certification pursuant to s. 19(6)(d) and (e) of the *CPA*. I have not heard any arguments that a sealing order or publication ban in respect of the present application should extend past such notice.

[83] In Canada the principle of open courts is fundamental to the justice system and our democracy. What takes place in court is subject to the protection of the guarantee of freedom of expression in the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. Any restriction on the openness of the courts must meet a rigorous test.

[84] The authority for making some part of these civil court proceedings confidential, even temporarily, is the court's inherent jurisdiction. The analytical approach to the exercise of that jurisdiction has been established by the Supreme Court of Canada in a series of three leading decisions: *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. In summary, the test established by the Supreme Court of Canada is that a confidentiality order will only be made where:

> (a) such an order is necessary in order to prevent a serious risk to an important interest in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this

> context includes the public interest in open and accessible court proceedings.

[85] The plaintiff and his counsel argue that the important interest to be protected by the sealing order and publication ban is solicitor-client privilege.

[86] It is clear that solicitor-client privilege in general is important to the administration of justice and the protection of this important privilege can at times justify sealing part of a court file. As articulated by Madam Justice Steele of the Manitoba Court of Appeal in *Histed v. Law Society of Manitoba*, 2005 MBCA 106 at paras. 22-24:

> Exceptions to the open court principle, where the possibility of serious harm or injustice to a person justifies a departure, include situations where courts have identified social values of superordinate importance to society that justify curtailment of public accessibility. Solicitor-client privilege is one of those exceptions.
>
> The importance of solicitor-client privilege to the administration of justice cannot be doubted. See *R. v. Gruenke*, [1991] 3 S.C.R. 263 at 289. Although it was originally a rule of evidence protecting communications only to the extent that a lawyer could not be forced to testify, it has now evolved into a substantive rule of law. See *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 836.
>
> In *Smith v. Jones*, [1999] 1 S.C.R. 455, Cory J. wrote that solicitor-client privilege is "the highest privilege recognized by the courts" (at para. 44) and that "[q]uite simply it is a principle of fundamental importance to the administration of justice" (at para. 50). Indeed, the court indicated that disclosure of privileged communications should occur only where there was a clear, serious and imminent danger.

[87] Our Court of Appeal also recently reviewed the law of solicitor-client privilege and reaffirmed its fundamental importance in *Donnell v. GJB Enterprisees Inc.*, 2012 BCCA 135. This included a review of the Supreme Court of Canada case of *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193, and the finding at para. 59 that lawyers' bills, in the context of criminal law proceedings, are presumptively subject to solicitor-client privilege.

[88] In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 the Supreme Court of Canada confirmed that communications between a lawyer and client or potential client about terms of the legal retainer are communications made in order to obtain

legal advice. These communications are subject to solicitor-client privilege, even before the retainer is perfected, so long as the communications are intended to be confidential.

[89] Key to the plaintiff's position that a sealing order and publication ban should be granted is the assertion that the plaintiff intended to keep the plaintiff's fee agreement with his counsel, and the other material filed in support of this application, confidential.

[90] The plaintiff states that since there is a statutory requirement that it obtain approval of the fee agreement, providing evidence relating to the fee agreement to the court on this application did not waive the solicitor-client privilege. The plaintiff did not file an affidavit containing details of that agreement within the court registry but instead handed all supporting affidavits up to the court.

[91] In the Alberta decision of *L.C.*, the court considered that it was appropriate to seal the court file in relation to the application for preliminary fee approval, in order to preserve solicitor client privilege. There the court interpreted the sealing order as consistent with the ability to bring the application on an *ex parte* basis. It noted that:

> 65 This is a process that will normally be conducted in the absence of the defendant, and without notice to the defendant. It will normally be subject to solicitor client privilege, and I expect that the affidavits in support of the approval application and the agreement (whether approved or not) will remain confidential and likely sealed on the court file.
>
> 66 As seen in *Fehr*, confidentiality and solicitor client privilege may not be absolute, and there is a risk that an interested party may be able to obtain access to the information provided. In that regard, counsel should be careful about the contents of any affidavits and other materials they put before the court. As held by Slatter J. in *Roth*, the approval process at this stage has little to do with the merits of the action. It would appear unnecessary to disclose matters of a strategic or sensitive matter in the litigation itself.
>
> 67 I recognize that the contingency agreement may be widely distributed in the event the certification application is successful, and it may be difficult to preserve its privileged status (as also recognized by Slatter J.) That is a matter for counsel to manage and control when and if the contingency agreement is disseminated to potential class members (and thus new clients) if certification is successful.

[92] I consider the approach in *L.C.* distinguishable on the basis that the Alberta class proceedings legislation mandates preliminary approval of the fee agreement prior to certification. Here, the *CPA* does not require preliminary approval, but the plaintiff made a choice to apply for it.

[93] The logic of the plaintiff's position in relation to preliminary approval would extend to final approval of the fee agreement, if I was to accept the plaintiff's argument that applying for approval is not a waiver of privilege. Considering the plaintiff's argument in context of final fee approval illustrates the flaw in its premise that solicitor-client privilege is not waived in respect of materials presented to the court on such an application.

[94] The plaintiff submits that the provisions of the *CPA* that allow for *ex parte* fee approval hearings implicitly mean that such fee approval hearings will be subject to confidentiality orders. But the statute does not read this way nor is it the practice.

[95] Subsection 38(2) of the *CPA* suggests that either (a) the hearing will be *ex parte* or (b) notice will be required with the court's direction as to which part of the fee agreement must be disclosed. That subsection does not contemplate both an *ex parte* application and a sealing order over what takes place in the *ex parte* application.

[96] If the legislature intended *ex parte* fee approval hearings in class proceedings to be *in camera* and confidential, it could have clearly said so. Indeed, the plaintiff points out that the legislature has provided for this in a non-class proceedings context, by way of s. 66(8) of the British Columbia *Legal Profession Act,* S.B.C. 1998, c. 9, [*LPA*] which applies when a lawyer seeks prior court approval of a contingency fee agreement that has a higher fee than the rules allow:

> The following rules apply to an application under subsection (6) to preserve solicitor client privilege:
>
> (a) the hearing must be held in private;
>
> (b) the style of proceeding must not disclose the identity of the lawyer or the client;

> (c) if the lawyer or the client requests that the court records relating to the application be kept confidential,
>
> (i) the records must be kept confidential, and
>
> (ii) no person other than the lawyer or the client or a person authorized by either of them may search the records unless the court otherwise orders.

[97] The above provision expressly does not apply to a class proceeding by virtue of s. 64(2) of the *LPA*. No similar provisions exist in the *CPA*.

[98] The ordinary practice in British Columbia is to interpret the provisions of the *CPA* requiring court approval of any fee agreement as applicable only once the case is concluded. As I have already noted, only then will the court be in a position to fully assess the fee agreement in context. By then, public notice of the material terms of the fee agreement will have already taken place after certification as part of the s. 19 notice requirements.

[99] Typically the same information as was put before me on this hearing, setting out the terms of the fee agreement and the process for entering into it, will be part of the information put before the court on a hearing to obtain final fee approval.

[100] Clearly it is in the public interest to know what goes on in court in class action fee approval hearings, including the details of fee arrangements between class counsel and a representative plaintiff. It is significant that I have not been pointed to any case that would suggest such an application should generally be subject to some kind of confidentiality order.

[101] I consider that a plaintiff who chooses to embark on a class action must be taken to be aware that one of the requirements of such a proceeding is eventual disclosure of the fee agreement with his counsel. Knowing that other potential class members are affected by the legal fee agreement, a plaintiff trades-off the solicitor-client privilege that normally applies to such agreements for the procedural benefits of a class proceeding.

[102] This case is different from those cases where solicitor-client information involuntarily ends up before the court, perhaps as a result of a document seizure. Here, the plaintiff voluntarily chose to seek the benefits of the *CPA* and chose to put the information before the court and to ask the court to make a ruling based on it.

[103] This is not a case where the plaintiff could be said not to appreciate the consequences of the steps taken by him, given his representation by able counsel. For example, I note that some of the evidence presented to me on this application has been redacted for solicitor-client privilege. I have to presume that the plaintiff's counsel anticipated that it was possible that they would not succeed in obtaining a sealing order and governed themselves accordingly in deciding what to place before the court.

[104] I have concluded that by placing materials before the court and asking for the court's ruling on those materials in the context of the plaintiff's application for preliminary approval of its fee agreement in the context of a proposed class action, the plaintiff has voluntarily waived solicitor-client privilege over those materials.

[105] I find some support in my approach to this issue in the analysis of Perrell J. in *Fehr,* which refused a request to depart from the open court principle on a plaintiff motion to approve a fee agreement involving third party funding. It is true that Perrell J. found that there was no solicitor-client privilege in the third party funding agreement, however he also observed that if there was any solicitor-client privilege, it was waived by the process of seeking approval of it. The different statutory regime in Ontario does not distinguish the approach to the open court principle as applied in *Fehr*.

[106] Given that I have concluded that solicitor-client privilege has been waived over the materials presented to the court in support of the fee approval application, it is clear that there is no important interest worth protecting by way of confidentiality orders.

[107] Furthermore, even if I was wrong and the materials filed with the court retain some solicitor-client privilege, I do not consider that disclosing the materials filed on this application will do any significant harm to the plaintiff or to the administration of justice itself.

[108] As I read the materials presented to the court on this application, other than setting out the fee arrangements themselves and the approach of the plaintiff and his counsel to ensuring fairness of those arrangements, there is nothing in them that might indirectly give away legal advice or strategy. If there was any such give away relating to the merits of the proceeding, it would put this court in a difficult dilemma, as it could be unfair to have the court know about it but not the defendant.

[109] This brings me back to the timing of the plaintiff's application for approval of the fee agreement. The plaintiff chose to bring the application at this time, before certification, and therefore before the plaintiff was required to disclose the terms of the agreement to other class members or the court.

[110] The plaintiff has not directed any submissions or evidence to what possible harm might occur if the plaintiff's arrangements with his counsel were known before certification, as opposed to afterwards.

[111] The certification application is only a procedural step in the proceeding. Proving the actual merits of a claim follows certification. Any strategic disadvantage to the plaintiff caused by disclosure of the fee agreement now, if there is any, would appear to be quite narrow and quite fleeting during what is only a preliminary procedural phase of the case.

[112] The possible benefits of a confidentiality order are far outweighed in these circumstances by the deleterious effects such an order would have on the public interest in open court proceedings.

[113] I conclude that there should be no sealing order or publication ban in respect of this application and judgment.

[114] Based on the plaintiff's submissions that it was necessary to protect solicitor-client privilege, I granted an interim sealing order and publication ban pending this judgment. The interim sealing order and publication ban are now cancelled.

"S.A. Griffin, J."
The Honourable Madam Justice Susan A. Griffin