

Courtesy translation

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SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. 500-06-000074-985

DATE: January 7, 2008

PRESENT: THE HONOURABLE PIERRE JOURNET J.S.C.

HARRY DIKRANIAN
Plaintiff

v.

ATTORNEY GENERAL OF QUÉBEC
Defendant

and

STERNTHAL KATZNELSON MONTIGNY, S.E.N.C.R.L.
Attorneys/Petitioners

and

FONDS D'AIDE AUX RECOURS COLLECTIFS
Impleaded party

JUDGMENT

[1] Attorneys Sternthal, Katznelson, Montigny, s.e.n.c.r.l., acted and represented the plaintiff, Harry Dikranian (“Dikranian”) against the Attorney General of Québec from the motion for authorization of the class action to the judgement on the merits of the dispute.

[2] Throughout the lengthy proceedings that lasted nearly 10 years, the plaintiff represented the students who received loans and bursaries before June 30, 1997 and completed or abandoned their studies after that date, as well as students who, as at April 30, 1998, obtained one or more student loans and abandoned their studies or completed them after April 30, 1998.

[3] Further to the class action, the defendant was ordered to reimburse the interest on the loans contemplated by a legislative amendment aimed at changing the interest payment exemption period.

J.J. 0312

[4] Dikranian was a student who received one of the loans. The court recognized him as the representative of the students when authorization was granted to institute the class action.

[5] During the period preceding the authorization to institute the class action, granted by Judge Denis Lévesque, the plaintiff was employed by the petitioner attorneys as a student or intern.

[6] Since then, he has been admitted to the Barreau and has practiced as an employee of that law firm.

[7] On October 6, 1998, Dikranian, as representative of the Members of the group, signed a fee and professional mandate agreement with the petitioners, his employer.

[8] That agreement provided for the remuneration of the petitioner attorneys on the basis of the possible success of the class action to be brought. The agreement provided for the payment of extrajudicial fees as a proportion, i.e. 20%, of the amounts received as a result of the class action.

[9] On December 13, 2001, further to the signing of the agreement, the court dismissed the class action on the merits.

[10] That judgment was appealed from and a June 24, 2004 ruling of the Court of Appeal upheld the Superior Court's decision.

[11] On July 21, 2004, the petitioner attorneys received a mandate from Dikranian to prepare a motion for leave to appeal the case before the Supreme Court of Canada.

[12] Leave was granted and the hearing took place before the Supreme Court of Canada. The ruling was handed down on December 2, 2005.¹

[13] The highest court in the land remanded the case to the Superior Court so that it could establish the amounts owed the students and the terms of payment.

[14] The court issued an order in that regard on December 7, 2007.

1 [2005] 3 S.C.R. 530.

[15] The petitioner attorneys now seek to establish their method of remuneration and particularly seek approval of the terms of the fee agreement amended on February 14, 2005 by Dikranian and the petitioner attorneys that increased the original 20% of the amounts received to 30%.

[16] The petitioner attorneys contended in their motion that the usual rate of 20% for class actions must be increased to 30%, given the complexity of the action, the very lengthy proceedings and arguments that became necessary and the financial risk they took by supporting monetarily the entire debate over many years.

[17] They emphasized that, in November 1999, the plaintiff received financial assistance from the Fonds d'aide aux recours collectifs, and additional assistance in 2001 and 2004 totaling \$102 856.86, which must, however, be repaid according to the *Act respecting the class action*.²

[18] The attorneys alleged that the financial risk they agreed to take in pursuing the case required the contribution of significant human resources totaling 4236 hours to date. They point out that the time they must still devote to finalizing the claim process could take 500 more hours.

[19] They added that, at the hourly rate of the attorneys working on the case, the total reached \$1 075 000, in addition to \$48 000 in miscellaneous disbursements, the whole as it appears from a copy of the various charges filed with the court at the hearing of the motion.

[20] The court notes that about 80 000 students may benefit from the judgment ordering the reimbursement of the capitalized interest that the defendant must pay those claiming it. According to RSM Richter's August 7, 2006 report, \$25 704 720, plus interest and the additional indemnity, may thereby be paid for 130 000 students.

[21] However, at the hearing of the motion, the parties agreed that 80 000 students were contemplated, i.e. 38% fewer than the plaintiff anticipated. A simple calculation implies a rounded-off potential refund of \$16 000 000 in principal, plus interest and the additional indemnity.

[22] A study of the billing by the petitioners demonstrates that Dikranian played two roles, namely, as representative of the members and, at the same time, as attorney working for the petitioner attorneys' law firm.

[23] Called to testify regarding his involvement in the two situations, Dikranian indicated that, over the years, he found himself in a situation that was ambiguous at times, since he was working very actively as an attorney in the case.

2 R.S.Q., c. R-2.1, s. 32.

[24] The petitioners' billing shows that, some years, Dikranian billed more time on the case than the partner or partners in charge of the class action.

[25] The evidence also shows that Dikranian even billed as an attorney for the period of time spent directly in his role as representative. Witness, for example, his billing of the time spent preparing his examination by the Attorney General's attorney, as well as the time of the examination itself, the time devoted to meeting with the Members he represented and the time devoted to meeting with journalists.

[26] Dikranian manifestly did not discriminate between his two duties, as attorney and as representative of the Members, in billing for certain events or activities related to the class action. The same is true of the mandate given to the petitioners, as Dikranian acted as representative in authorizing the increase in collection expenses and as attorney of the law firm, by convincing his partners to continue the proceedings before the Supreme Court of Canada.

[27] That situation was pointed out by the defendant's attorney, who was acknowledged by the court to have a particular right at the hearing of this motion and was authorized to act as *amicus curiae* in order to raise any argument against the motion for homologation of the amended agreement. That authorization was granted even though, generally speaking, the question of extrajudicial fees does not concern the defendant, if he is not called upon to pay them.

[28] In general, the court is of the opinion that it need not interfere in the amount of fees agreed upon between the representative and his attorneys, barring special circumstances requiring its intervention as guardian of the Members' rights. That is what the Court of Appeal, under the pen of Rochon J.A., teaches us:³

[TRANSLATION]

[31] The situation is not new. It is proper to class actions. The attorney devotes his or her efforts and energy in order to obtain the best compensation for the members of the class action. Subsequently, the same attorney seeks compensation for his or her services out of the funds obtained for the members. First, the attorney acts in the best interests of the members, then applies to the court in his personal interest, which is in opposition to that of the members. Thus, the justice of the Superior Court has the role of guardian and protector of the members in the proceeding for approval of the transaction.

3 *Association de protection des épargnants et investisseurs du Québec (A.P.E.I.Q.) v. Corporation Nortel Networks*, [2007] QCCA 1208 (12-09-07), Rochon J.A., EYB 2007-124196.

[29] The situation in which Dikranian found himself shows the potential conflict of interest in his roles as representative and attorney, particularly in regard to fees.

[30] In fact, authors and courts of common law provinces have pointed out a possible conflict of interest giving rise to the intervention of the court as the protector and guardian of the interests of the Members:

Relationship with the class lawyers. Where a representative plaintiff is a member of the law firm seeking to act as class lawyers, a potential conflict arises. The argument that the representative has a stake in the legal fees and that appearances must be preserved has been upheld in Ontario.⁴

In most case, the financial benefit to counsel far exceeds the individual benefit of class member. Therefore, independence from counsel is imperative since "an obvious function of the class action representative is to act as a check on the attorneys, as an additional assurance that in any settlement or other disposition the interests of the members of the class will take precedence over those of attorneys. This would seem to require that the class representative shall have some measure of independence from the attorneys, or at least not be the alter ego of the attorneys". ... The most obvious example of a lack of independence between plaintiff and class counsel is when the two are one and the same. The conflict inherent in this "dual relationship" is obvious, since, in such a case, plaintiff, as a class member, stands little to gain in his representative capacity, but stands to gain a great deal as counsel.⁵

[30] The judge's role as protector of the Members was, in fact, discussed in a paper and lecture by Ginette Piché J.,⁶ who demonstrated its great importance:

[TRANSLATION]

Hence, it can still be seen that the representatives cannot go it alone. They must count on the presence of the judge, who is responsible for seeing that the interests of the absent members are protected. It is as if there were an attorney opposite the representatives.

...

The judge must, without bias, supervise and control the action in order to protect the rights of the absent members. The judge must always keep in mind and seek the interests of the absent members beyond that of the

4 Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004) at 283, referring to *Kerr v. Danier Leather Inc.*, (2001) 14 C.P.C. (5th) 293, (Ontario Superior Court of Justice).

5 *Meachum v. Outdoor World Corp.*, 654 N.Y.S. 2d 240 (supp. 1996) (Supreme Court, Queens County) at paras. 21 and 22.

6 The Honourable Ginette Piché, "Un premier rôle pour juge" in *Les recours collectifs en Ontario et au Québec; Actes de la Première Conférence Yves Pratte – Class Actions in Ontario and Quebec: Proceedings of the First Yves Pratte Conference*, Alain Prujiner and Jacqueline Roy (ed.), (Montréal: Wilson & Lafleur, 1992) at 141 and 148-150.

representatives. Remember that the representative is arguing for another, not only for himself or herself. The judge must, in fact, always insure that [TRANSLATION] “those absent are protected”.

[31] Jean-Claude Lafond pointed out the role of the Court in controlling the activities of the representative so that the interests of the absent Members are protected:⁷

[TRANSLATION]

The representative's adequate representation is not gauged solely at the stage of the examination of the conditions of authorization of the action. As one author put it: [TRANSLATION] "The final judgment must stem from a process in which there is the assurance that the interests of those absent have been submitted to and assessed by the court". The mission of the court is to provide on-going control over the representative's activities throughout the proceedings, in order to guarantee that the representation of the members of the group is adequate, and compensate for it, if it is not.

See also *Carruthers v. Paquette*.

[32] The court points out that section 32 of the *Act respecting the class action*⁸ provides for the mandatory approval, by the judge seized of the case, of any transaction concerning costs, disbursements or fees.

[33] That legislative provision enables the court to exercise discretionary power that can go as far as refusing authorization or approval of an agreement concluded between a representative and a defendant regarding fees.

[34] In the exercise of that discretionary power, not only the interests of the Members but also the image of the profession must be considered.⁹

[35] As Rouseau-Houle pointed out, the role of the court is unambiguous:¹⁰

[36]

[TRANSLATION]

An attorney who concludes such an agreement [indicating a percentage] must nevertheless continue to abide by the duties and obligations dictated in the *Code of ethics of advocates*. Hence, the agreement must not be likely to give the profession a profit-seeking or commercial character, the fees charged must be fair and reasonable, and the client must be well informed of the cost of the services.

7 *Carruthers v. Paquette*, [1993] R.J.Q. 1467 (S.C.); Pierre Claude Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (Montréal: Thémis, 1996) at 448.

8 R.S.Q., c. R-2.1, s. 32.

9 *Nault v. Jarmark*, [1985] R.D.J. 180 (S.C.).

10 *Francoeur v. Belzil*, J.E. 2004-1252 (C.A.) at para. 33.

[37] The code of ethics provides for the following in sections 3.09.03 and 3.08.04:

3.08.03. The advocate must avoid all methods and attitudes likely to give to his profession a profit-seeking or commercial character.

3.08.04. An advocate shall, before agreeing with the client to provide professional services, ensure that the latter has all useful information regarding the nature and financial terms of the services and obtain his consent thereto, except where he may reasonably assume that the client is already informed thereof.

[38] The entire record shows that Dikranian was in a potential conflict of interest when he acted as an attorney while remaining the representative of the student Members. The jurisprudence has stressed that danger:¹¹

As a general principle, it is best that there is no appearance of impropriety. In this situation, there is the perception of a potential for abuse by class counsel through acting in their own self-interest rather than in the interests of the class. See generally *Epstein v. First Marathon Inc. / Société First Marathon Inc.* (2000), 2 B.L.R. (3d) 30, 41 C.P.C. (4th) 159 (Ont. S.C.J.). In my view, the better practice is that class counsel be unrelated to a representative plaintiff so that there is not even the possible appearance of impropriety.

[39] The court recognizes the considerable work that the petitioners did in this case, as well as the eloquent success they obtained before the Supreme Court of Canada.

[40] There is no doubt that they deserve to be fairly and adequately remunerated for their efforts and in consideration of the advances and investments they made in the case.

[41] The court must ensure, in keeping with its duty, that the Members will receive the money owed them. This implies that the attorneys not receive more than their due as fair remuneration for services rendered.

[42] The tribunal cannot disregard Dikranian's inappropriate billing, as pointed out earlier. That conduct inflated the hours billed and the investments made by the petitioners. They cannot now claim full compensation, given Dikranian's flagrant conflict of interest.

[43] As Morneau J. pointed out:¹²

11 *Kerr v. Danier Leather Inc.*, Carswell's Practice Cases, 14 C.P.C. 5th 292 at 310.

12 *Page v. Canada (Procureur général)*, S.C. Montréal, No. 500-06-000068-987, August 30, 2000, Morneau J., AZ-00021983.

[TRANSLATION]

In the context of class actions, the tribunal's particular responsibility cannot be taken lightly. The settlement belongs to the members of the group, not to their attorneys or the court.

Any sympathy one may have for the attorneys who assumed they had carte blanche to [TRANSLATION] "work" on a case and be paid for their hours subsequently, with no control by anyone, has no place in class actions.

[44] Hence, the parties could not conclude a fee agreement as they pleased, without the court exercising its duty of control.

[45] Given the variety of inappropriate billing by Dikranian and the conflict of interest in which he placed himself, the court cannot and must not approve the fee amending agreement he signed with the petitioners in February 2005.

[46] The court finds that the initial fee agreement is fully justified and covers the fees and extrajudicial disbursements of the petitioner attorneys.

[47] **THEREFORE, THE COURT:**

[48] **ALLOWS** the motion for approval of the agreement on the fees and disbursements of the plaintiff's attorneys;

[49] **ORDERS** the defendant to withhold 20% of all amounts payable to each member of the group in principal, interest and additional indemnities, plus applicable taxes;

[50] **CANCELS** the February 14, 2005 agreement aimed at amending the percentage to be withheld from the amounts payable to each member of the group in principal, interest and additional indemnities, plus applicable taxes;

[51] **ORDERS** that the amounts withheld up to the proportion (20%) agreed upon in the October 6, 1998 agreement be paid monthly to the petitioner attorneys;

[52] **ORDERS** the petitioner attorneys to repay the Fonds d'aide aux recours collectifs one hundred one thousand, one hundred and thirty dollars and five cents (\$101 130.05) out of the amounts received from the defendant;

[53] **ORDERS** the defendant to withhold from any amount payable to each member of the group in principal, interest and the additional indemnity, the percentage owed the Fonds d'aide aux recours collectifs pursuant to the *Regulation respecting the percentage withheld by the Fonds d'aide aux recours collectifs* according to Order in Council 1996-85 of September 25, 1985;

[54] **WITHOUT OTHER COSTS.**

(s)

PIERRE JOURNET J.S.C.

Mtre. Leon Greenberg and Mtre. Guy St-Germain
Sternthal Katznelson Montigny
Counsel for the plaintiff

Mtre. Pierre Sylvestre – consulting counsel
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Date of hearing: December 7, 2007