CITATION: Dolmage v. HMQ, 2013 ONSC 6686
COURT FILE NO.: CV-09-376927CP00
DATE: 20131205

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Marilyn Dolmage as Litigation Guardian of Marie Slark and Jim Dolmage as Litigation Guardian of Patricia Seth,** Plaintiffs

AND:

Her Majesty The Queen in Right of the Province of Ontario, Defendant

BEFORE: Conway J.

COUNSEL: *Kirk M. Baert, Celeste Poltak* and *David Rosenfeld*, for the Plaintiffs

Robert Ratcliffe, John Kelly and *Sonal Gandhi*, for the Defendant

HEARD: December 3, 2013

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION
(re: Settlement Approval)

Conway J.

[1] The plaintiffs move for approval of a settlement pursuant to s. 29(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "**Act**").

[2] At the conclusion of the hearing, I approved the settlement and signed the settlement approval order (the "**Settlement Approval Order**"). I gave brief oral reasons, with written ones to follow. These are those written reasons.

The Action

[3] This action was commenced in 2009 on behalf of residents of the Huronia Regional Centre ("**Huronia**").

[4] Huronia was a provincially operated residential facility for individuals with developmental disabilities. It was intended to provide a residential program of hospital care, activity, educational programs and adult training to individuals of all ages labeled mildly,

moderately, severely and profoundly disabled. Most residents were admitted to Huronia as children. Huronia was founded in 1876 and closed its doors in 2009.[1]

[5] The plaintiffs allege that the defendant (the "**Crown**") was negligent and breached fiduciary duties in its funding, operation, management, administration, supervision and control of Huronia. They claim that the Crown breached standards of care by knowing of and condoning overcrowding and understaffing; failing to implement abuse prevention policies; and deliberately exploiting residents for the Crown's own benefit. They allege that despite receiving reports and recommendations, the Crown failed to take adequate steps to improve the quality of care or living at Huronia or, even if some of the recommendations were followed, those measures were inadequate and failed to meet the standard of care.

[6] The action was certified as a class proceeding by Cullity J. in July 2010. The class is defined as:

(a) All persons who resided at Huronia between January 1, 1945 and March 31, 2009 who were alive as of April 21, 2007 (the "**Resident Class**"); and

(b) All parents, spouses, children and siblings of persons who resided at Huronia between March 31, 1978 and March 31, 2009, who were alive as of April 21, 2007 (the "**Family Class**").

[7] It is estimated that there were 4337 to 4876 class members alive as of April 21, 2007 and 3470 to 4308 class members alive as of 2013.[2]

[8] Leave to appeal the certification order was denied. The Crown defended the action. It denied that it owed any duty of care to the class, that any abuses occurred or that it was responsible for any abuses that did occur.

[9] The plaintiffs moved to have the action placed on the long trial list in Toronto, on an expedited basis, given the advanced age of the majority of the class members. Moore J. granted the plaintiffs' request and fixed a trial date of September 30, 2013.

[10] The case progressed through the various steps leading up to trial, including significant productions, discoveries, numerous interlocutory motions and case conferences, extensive trial preparation, and mediation/settlement discussions.

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[1] Huronia operated under various names over the years including the Orillia Asylum for Idiots, Ontario Hospital for Idiots, Hospital for the Feeble-Minded, Ontario Hospital School, Orillia, and Huronia. Over time, Huronia's catchment admission area covered the regions of Halton, Peel, York, Simcoe, Muskoka and Parry Sound.

[2] The Crown originally identified 8751 individuals who attended Huronia during the period 1945 to 2009. It noted that 2210 of those individuals had died before April 21, 2007. The Crown retained Mr. Daniel Doyle as an expert in actuarial analysis to estimate the size of the class. Mr. Doyle's estimate of class members alive as of April 21, 2007 was 4337 to 4876 class members. The Crown had prepared an earlier report in which the estimated number of class members still alive as of 2013 was 3470 to 4308.

[11] The trial was set to commence on September 16, 2013 and last for approximately four months. The week prior to the start of trial, the parties attended mediation and on September 17, 2013, executed a settlement agreement dated the same day (the "**Settlement Agreement**"). Prior to agreeing to the terms of the Settlement Agreement, the plaintiffs and their litigation guardians received independent legal advice.

[12] The parties now seek the court's approval of the Settlement Agreement.

The Settlement Agreement

Key Terms

[13] The key terms of the Settlement Agreement include:

- an apology to former residents of Huronia from the Crown. Crown counsel advised the court that if the settlement is approved, the plan is for the apology to be made by the Premier of Ontario;
- a $35 million settlement fund (the "**Settlement Fund**");
- the Crown will pay for the cost of notice to the class and administration of the claims process, in addition to the Settlement Fund;
- the compensation awards will not be subject to tax or government claw-backs;
- the application process is paper-based and does not require former residents to testify or appear in person;
- the maximum compensation that a claimant can receive is $42,000;
- the documents produced in this case will be accessible for scholarly research; and
- commemorative initiatives, including:
    - a commemorative plaque on the grounds of Huronia that will state: "From 1876 to 2009 many thousands of children and adults with developmental disabilities and other conditions resided in the wards, called 'cottages", of this institution. In 2013, the Government of Ontario issued an apology to the former residents for the conditions over time."
    - an opportunity to access the grounds of Huronia up to 6 times over a period of 12 months after the execution of the Settlement Agreement;
    - to create a registry, build a permanent wrought iron boundary fence, erect signage and reasonably maintain the cemetery located at Huronia; and

- an opportunity for scholars to attend and archive artifacts from Huronia.

[14] Class counsel's legal fees, disbursements and taxes (in an amount to be approved by the court) will be deducted from the Settlement Fund before any amounts are paid to the class.[3]

The Compensation Scheme

[15] The Settlement Agreement provides a claims-based compensation scheme with two streams – Section A and Section B claims.

[16] Section A claims only require a claimant to solemnly declare that he or she was harmed at Huronia without providing any further details. Section A claims are eligible to receive up to $2000 in compensation. Section A claims in the aggregate are limited to 20% of the net Settlement Fund.

[17] Section B claims require the claimant to provide details of the harm or abuse suffered while at Huronia. The parties have agreed that the Honourable Ian Binnie will oversee the claims administration process. Mr. Binnie and Crawford Class Action Services ("**Crawford**") will create protocols and procedures for reviewing and evaluating all claims and assigning points to the claims in accordance with the "Points Allocation System" in the Settlement Agreement.[4] Compensation will be based on the number of points allocated to the claim. Claims with the highest number of points will receive $35,000.

[18] If the Section B claims do not exhaust the net Settlement Fund, each claimant will receive an increase of up to 20% of his or her allotted compensation, or until the Settlement Fund is exhausted. The maximum that a claimant can receive is $42,000.

The Claims Process

[19] The claims process is entirely paper-based, so that claimants will not have to testify in order to receive compensation. A claim form can be completed by a class member's personal representative or family member if the class member is unable to do so.

[20] The claim forms are intended to be simple and easy to complete. To that end, class counsel has received input from Kinsella Media LLC (with expertise in plain language communication) and ARCH Disability Law Centre (a legal clinic for persons with disabilities) in preparing these forms.

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[3] The levy owing to the Law Foundation of Ontario, to be determined by the court, will further be deducted from the Settlement Fund.

[4] The Points Allocation System has 6 categories of abuse – Levels 1, 2 and 3 physical assault and Levels 1, 2 and 3 sexual assault.

Remaining Amount in the Settlement Fund

[21] If there are any funds remaining in the Settlement Fund after payment of legal fees and expenses and Section A and B claims, the Crown will make an investment of up to $5 million (Schedule D funding) into programs that will benefit individuals with a developmental disability and their families. The parties have mutually agreed on the types of organizations that will receive this investment.

[22] If there are further amounts remaining in the Settlement Fund after the Schedule D funding is made, those amounts will revert to the Crown.

Non-Monetary Benefits

[23] In addition to the compensation scheme, the Settlement Agreement contains several non-monetary benefits for the class, including an apology pursuant to the *Apology Act*, preservation of the voluminous documents in this action for scholarly research, the waiver of taxes and claw-backs on funds received, and commemorative initiatives.

Law on Settlement Approval

[24] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it.[5]

[25] The test is whether the settlement is fair, reasonable, and in the best interests of the class as a whole, not whether it meets the demands of a particular member. The settlement must fall within the range of reasonableness in order to obtain court approval – it need not be perfect.[6] The "range of reasonableness" test permits that a number of settlement possibilities may be in the best interests of a class when compared to the unpredictable alternative of costly protracted litigation. Compromises are to be expected.[7]

[26] There is a "strong initial presumption of fairness" when the settlement is negotiated at arm's-length and recommended by experienced class counsel.[8]

[27] The "zone or range of reasonableness" is not a static valuation test but one that permits for a whole host of variations depending upon the subject matter of the litigation and the nature of damages for which the settlement is intended to provide compensation.[9]

[28] In determining whether to approve a settlement, courts may consider, among other factors:

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[5] *Dabbs v. Sun Life Assurance Co. of Canada*, (1998) O.J. No. 1598 (Gen. Div.), at para. 30, aff'd (1998), 41 O.R. (3d) 97 (C.A.).
[6] *Dabbs*, at para. 30; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572, at paras. 69, 70 (S.C.J.).
[7] *Dabbs*, at para. 30; *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968, at para. 21 (S.C.J.).
[8] *Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128, at paras. 55 and 56.
[9] *Parsons*, at para. 70.

- The likelihood of recovery or success;
- the amount and nature of discovery, evidence or investigation;
- the terms of the settlement;
- the recommendation and experience of class counsel;
- future expenses and likely duration of litigation and its attendant risks;
- the recommendations of neutral parties;
- the number of objections or objectors, if any;
- the presence of good faith, arms-length bargaining and the absence of collusion;
- the degree and nature of communications by counsel and the representative parties with class members during the litigation; and
- information conveying to the court the dynamics of and positions taken by parties during the negotiations.[10]

Analysis

[29] Considering the above factors, I approve the proposed settlement, on the terms set out in the Settlement Agreement.

[30] The Settlement Agreement is multi-dimensional. Its terms reflect the sensitive nature of this litigation and the unique circumstances of the class members in the following ways:

- It provides both financial compensation and non-monetary benefits to class members.
- It recognizes that some class members may not wish to provide details of the harm suffered (Section A claims). For those members who do provide details (Section B claims), the structure reflects the varying levels of harm claimed through the Points Allocation System.
- Importantly, the claims process is a simplified and paper-based one that avoids class members having to provide oral accounts and re-live their experiences.

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[10] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962, at para. 28.

- The apology from the Crown is a vital and extraordinary component of this settlement. The commemorative plaque at the Huronia site will constitute an enduring public record of that apology.

- The numerous other non-monetary benefits recognize the dignity of the Huronia residents and enable the history of Huronia to be recorded and preserved.

[31] The settlement reflects the very real litigation risks the plaintiffs face if this matter proceeds to trial.[11] Class counsel acknowledges that the legal issues are numerous and complex and include (i) whether the Crown owed a duty of care to class members and whether any *prima facie* duty was negated by policy considerations; (ii) what the standard of care was at varying times over a period of 65 years; (iii) whether the Crown breached the standard of care during this period; (iv) whether the Crown owed a fiduciary duty to class members; (v) whether the Crown breached that duty; (vi) whether claims are barred by limitation periods; and (vii) whether damages can be assessed on an aggregate basis (failing which damages would have to be assessed at individual hearings after trial). Class counsel further acknowledges the legal frailties of the Family Class members' monetary claims.

[32] There is no doubt that without a settlement, the proceedings will be protracted, the outcome uncertain and (even if successful) the class members will not receive compensation for years. Given the advanced age of class members and the historical nature of this litigation, the benefits of an immediate and certain settlement cannot be overstated.

[33] The settlement is supported by the plaintiffs, as well as experienced class counsel. The settlement has further received the support of People First of Ontario (a self-advocacy group for persons with intellectual disabilities) and Community Living Ontario (a non-profit, province-wide federation that promotes and facilitates the full participation and inclusion of people who have an intellectual disability).

[34] The process leading to the settlement was adversarial and hard-fought. The parties engaged in over nine days of mediation/settlement discussions with four different mediators/facilitators, including three sitting judges.

[35] I have carefully considered all of the written and oral objections to the settlement.[12] The primary objections are with the amount of the Settlement Fund, the deduction of legal fees from the Settlement Fund and the lack of monetary compensation for Family Class members.[13]

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[11] I note that this settlement occurred at the doorstep of trial, so class counsel had a meaningful opportunity to assess these risks after productions and discovery had been completed.

[12] 19 written objections were filed with the court. 8 objectors (2 of whom had filed written objections) spoke at the hearing.

[13] Three of the written objections were that compensation will not be provided to anyone who was not alive as at April 21, 2007. Cullity J. found that the claims of those who died before that date were statute barred and they were therefore not included in the class: see *Dolmage v. Ontario*, 2010 ONSC 1726, at para. 153. There was also an objection from one class member who lived at Huronia until 1943 and does not come within the class definition

[36] A settlement is a compromise that reflects the risks, delays and expense of continuing litigation: see *Stewart v. General Motors of Canada Ltd.*, 2008 CarswellOnt 6590 (S.C.J.), at para. 23.

[37] In my view, this settlement, viewed as a whole, fairly achieves that compromise. It recognizes that class members are entitled to financial compensation but that a discount is appropriate to reflect the realities of continued litigation. At the same time, the significant non-monetary terms will benefit the residents of Huronia and their families. Considering the context in which it was reached, and the interests of those affected by it, the settlement falls within the "zone of reasonableness".

[38] I have concluded that the settlement is fair, reasonable and in the best interests of the class members and I approve it.

Next Steps

[39] The amount of class counsel's legal fees is subject to court approval pursuant to the Act. Class counsel has brought a motion for approval of its legal fees.[14] That motion will be heard on February 24, 2014. Any class member who wishes to object to the amount of legal fees may attend and object at that hearing.[15]

[40] Class counsel suggested to the Crown at the settlement approval hearing that the Crown consider waiving all or any part of the taxes on the legal fees in this proceeding. Crown counsel said that he would have to review this matter. He submitted that the February 24, 2014 hearing would be the appropriate time to address this issue. I agree.

[41] With respect to the implementation of the Settlement Agreement, there are three preliminary, key matters that must be addressed: (a) notice of approval of the settlement; (b) dissemination of that notice to class members; and (c) content of the claim forms.

[42] It is imperative that class members receive notice of their right to make a claim and that the claim forms be understandable and easy to complete. The Settlement Approval Order addresses these issues in two ways:

- The form and content of the notice of approval of settlement, its method of dissemination and the form and content of the claim forms are to be determined by further order of this court in or about January 2014 (paragraph 9).

(starting in 1945). Class counsel suggested that the Crown consider options for including this individual in the settlement as if she was a class member. Counsel can address this issue with me at the next case conference.

[14] It seeks $8.5 million in legal fees, plus disbursements and taxes. Class counsel originally sought approval of both the settlement and legal fees on December 3, 2013, as reflected in the notice of hearing. It subsequently proposed (and the Crown agreed) to deal with these matters on two separate dates and I approved this procedure.

[15] The settlement approval order states that class members who have an objection in respect of legal fees may re-attend on that date to be heard. That was also communicated in court at the settlement approval hearing.

- under the Settlement Agreement all claims must be filed no later than 120 days from the "Court Approval Date".[16] The Settlement Approval Order has re-defined the Court Approval Date (paragraph 1(a)).[17] The effect of this change is that the 120 day claim period will not start to run until this court is satisfied with the form and content of notice to class members, the plan for disseminating that notice and the form and content of the claim forms.[18]

[43] There is a recognized need for class members to receive support and assistance in making claims. The claims administration process (to be overseen by Mr. Binnie) will be conducted by Crawford, a settlement administrator with specific experience in institutional abuse claims. Crawford has provided an affidavit describing the measures it will be taking to assist class members in completing their claims forms at its 40 plus offices throughout Ontario. It will provide additional support including 24-hour telephone assistance, full day workshops and an instructional video on its website.

[44] In addition, class counsel filed affidavits from representatives of Community Living Ontario, ARCH Disability Law Centre and People First Ontario, in which they describe the support that they will be providing to notify class members and assist them in making their claims.

[45] Finally, these and any other issues that arise in implementing the settlement will be subject to the supervision of the court. Under the Settlement Approval Order, the court will retain jurisdiction over the parties and all class members for purposes of implementing, enforcing and administering the Settlement Agreement. The order also requires the plaintiffs and Crawford to report regularly to the court until administration of the Settlement Agreement has been completed.

Honorarium to Representative Plaintiffs

[46] Class counsel sought approval of honorarium payments of $25,000 for each of the representative plaintiffs, to recognize "the significance and difficulty for Ms. Seth and Ms. Slark who have suffered abuse, to come forward on behalf of all other residents, to tell their stories and to confront a painful past".

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[16] The Court Approval Date in the Settlement Agreement is the later of 31 days after the date on which the court issues the order approving the settlement and the disposition of any appeals from that approval order.

[17] The Court Approval Date now means "the later of 31 days after the of the order approving Notice of Approval of the Settlement referred to *infra* in paragraph 9 or the disposition of any appeals from the Notice of Approval of Settlement order".

[18] Counsel recognized that the Crown's lists of class members required updating and cross-referencing to its databases, as many addresses were incomplete or incorrect. I am satisfied that the steps taken to update these lists, combined with the other steps taken by the parties, were adequate to provide notice of the settlement approval hearing to class members so that they could attend or file an objection. However, further updating and cross-referencing will be required to ensure that class members receive notice of when and how to make a claim. This is an ongoing process. The claims period will therefore not start until all notice issues have been addressed and approved by the court.

[47] Ms. Seth and Ms. Slark addressed the court at the settlement approval hearing. They made it clear that they had not asked for the honorarium, that they did not want to take anything away from class members and that they would not accept any payment unless there is money left over after the claims of class members have been satisfied.

[48] On a settlement approval motion, the court has jurisdiction to award honorarium payments to the representative plaintiffs out of the settlement fund.[19] However, honorarium payments are infrequently made. They are reserved to those cases where, considering all of the circumstances, the contribution of the plaintiff has been exceptional.[20]

[49] In the case of Ms. Seth and Ms. Slark, their efforts in advancing this litigation, bringing this case to court, publicizing the story of Huronia and speaking in court at the settlement approval hearing have been exceptional indeed.[21] They have gone well beyond what could ever be expected of representative plaintiffs, in a particularly difficult case.

[50] In particular, Ms. Seth and Ms. Slark have participated in and provided innumerable interviews to raise awareness of this class proceeding. The honorarium to Ms. Seth and Ms. Slark is, in the words of Perell J.,[22] "not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice".

[51] I provided in the Settlement Approval Order that each of Ms. Seth and Ms. Slark are to receive the sum of $15,000 as an honorarium, to come from the Settlement Fund remaining after all claims of class members have been paid.

Order

[52] Order accordingly.

[53] I will meet with counsel at a case conference in early January 2014 to address the issues of notice of settlement approval, dissemination of notice, and claim forms. I direct counsel to address these issues in advance with one another, prepare draft materials for me to address at the case conference and send the draft materials to me three days before the case conference.

Conway J.

Date: December 5, 2013

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[19] *Wilson v. Servier Canada Inc.*, [2005] O.J. No. 1039, at para. 95 (S.C.J.); *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, at paras. 133–136.

[20] *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911, at paras. 26-43.

[21] They described the abuse they alleged in the statement of claim, swore affidavit evidence in support of certification, were cross-examined on those affidavits, attended mediations, motions and strategy meetings with class counsel, and prepared to give oral testimony at the common issues trial.

[22] See *Johnston v. The Sheila Morrison Schools,* [2013] O.J. No. 1126, at para. 43.