CITATION: Seed v. Ontario, 2017 ONSC 3534
COURT FILE NO.: CV-11-420734
DATE: 20170606

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ROBERT SEED Plaintiff	*Celeste Poltak* and *David Rosenfeld*, for the Plaintiff
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO Defendant	*Christopher Wayland* and *Jonathan Sydor*, for the Defendant
Proceeding under the *Class Proceedings Act, 1992*	
	HEARD: June 6, 2017

GANS J. **(Orally)**

Preface

[1] Ladies and Gentlemen, thank you for your patience. I appreciate the fact that you have provided me with an indulgence to retire to my chambers at 330 University Avenue to fashion these but brief Reasons for Judgment.

[2] I would like to take this opportunity to thank those members of the plaintiff class, and in particular, the representative plaintiff, Robert Seed, for taking the time and trouble to travel to Toronto to provide me their individual and collective input and experiences as part of the settlement approval process. I have no doubt that even the events of today are inordinately stressful for some of you. I will have more to say about Mr. Seed's involvement in this proceeding later in these Reasons.

[3] I would also like to take this opportunity to thank counsel for their assistance throughout the period of time with which I have been involved with this matter. Counsel on both sides of the aisle, the Crown and Class Counsel, provided me with a welter of material over the last six months which was not only informative and instructive, but, in my view went a long way in crystallizing the issues that would have been before the court had this matter proceeded to a full-

blown trial commencing on the 3rd of April last. No doubt, such assisted and facilitated the resolution of this matter before trial. Furthermore, the material I received from counsel was, as I would expect, first rate, right down to the material filed on this motion for approval. I am indebted to counsel in that regard.

[4] I was designated the common issues trial judge in this matter in early December last, a fact which I would observe, parenthetically, underscores the utility and necessity of having trial judges assigned to long complicated, dare I say, 'monster' trials sooner rather than later along the road to the trial. I would also observe, as plaintiff's counsel acknowledged in its written argument, that settlement approval motions of this nature are more probably better heard by the common issues trial judge assuming that he or she has been provided with sufficient 'joint' relevant information and material and extensive openings, as was I. In my respectful opinion, the administration of justice is better served if such a procedure is adopted in matters of this nature and complexity.

Background

[5] This action is the fifth in a series of actions mounted against the Province in respect of the operation and management of various institutions, facilities and schools (the "Institutional Cases"). The class members in the instant action, as in the other institutional cases, allege that they were historically abused, with the allegations of abuse reaching back in respect of the W. Ross MacDonald School for the Blind, the defendant institution, to 1951.

[6] I do not intend to repeat the factual and legal underpinnings for the approval of settlements of this nature. These were canvassed extensively by my colleagues, Justices Belobaba, Conway and Horkins in the cases cited in the footnotes to this Judgment below, upon which I cannot improve.[1] In addition, Justices Winkler and Strathy, as they were both then known, have provided settlement approval judges with detailed roadmaps of the general approval principles to be considered in matters of this nature.[2]

[7] Suffice it to say for the benefit of those class members who have attended today and for others to whom notice of these Reasons will come, my job today is not to cast blame upon or upbraid the Province for the manner in which the representative plaintiff alleges he and the class members were treated. My task is first to determine whether the proposed settlement is fair, reasonable and in the best interests of the class as a whole. Secondly, if not secondarily, I am obliged to determine whether the legal fees sought by class counsel are fair and reasonable in all of the circumstances.

---

[1] *Clegg v. HMQ Ontario*, 2016 ONSC 2662; *McKillop and Bechard v. HMQ*, 2014 ONSC 1282; *Dolmage v. HMQ*, 2013 ONSC 6686; *McKillop and Bechard v. HMQ*, 2014 ONSC 1282.
[2] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.); *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 (S.C.J.).

Settlement Agreement

[8] As everyone assembled here today is aware, a settlement agreement was concluded, virtually, on the eve of trial, after a series of failed mediation attempts before an experienced mediator in the months ramping up to trial, a failed motion to amend the pleadings and add 'new' party defendants shortly before trial and after a series of bi-monthly trial management conference calls with me as the common issues trial judge, which were probably of little moment in the global scheme of things.

[9] The key terms of the Settlement Agreement include:[3]

(a) an $8,000,000 settlement fund (the "Settlement Fund");

(b) that the cost of notice to the class and administration of the claims process will be paid from the Settlement Fund;

(c) that the compensation awards to be paid to class members will not be subject to tax or other government claw-backs;

(d) that the claims application process will be paper-based, will not require former residents to testify or appear in person and will be non-adversarial; and

(e) that the maximum potential compensation a claimant can receive will be $37,500 or more to a maximum of $45,000, if funds remain in the Settlement Fund after calculating all awards.

[10] The prevailing jurisprudence, distilled to its simplest, provides that on an approval motion, the presiding justice should consider some, if not all, of the following guiding principles:[4]

(a) the likelihood of recovery or success;

(b) the amount and nature of discovery, evidence and/or investigation;

(c) the terms of the settlement;

(d) the recommendation and experience of class counsel;

(e) future expense and likely duration of continued litigation, plus its attendant risks;

(f) the number of objectors and the nature of the objections;

---

[3] Written Submissions of Plaintiff, para. 19.
[4] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962.

(g) the presence of good faith, arms-length bargaining and the absence of collusion;

(h) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and

(i) the position and dynamics of the parties taken during the negotiations.

[11] As Belobaba J. said in *Clegg,* a determination of what is fair and reasonable in the circumstances for the class as a whole is at its base a determination of whether the proposed settlement 'falls within a zone of reasonableness',[5] which by definition does not require perfection on all levels.

[12] I cannot improve upon the detailed analysis set out in the moving party's written argument. In my view, it touches all the bases in 10 carefully crafted pages, which I hereby incorporate by reference. Without underscoring some but not all of the reasons why I think the settlement agreement strikes the appropriate cord—and at the risk of raising issues on my own motion without having heard all the evidence—suffice it to say that I found that the legal and factual issues impacting and informing this action to be anything but free of doubt. For example, and based upon the matters advanced in their respective - electronically provided - openings, I found the issue of 'aggregate damages' vexing and did not know how the plaintiff could avoid individual damage hearings after a finding of liability, if indeed there were to be one, based upon a finding of institutional or systemic abuse, a notion, the proof of which would have been tricky in and of itself.

[13] Furthermore, and of some moment, I was more than modestly concerned that if this matter were not resolved currently, but, continued or was dragged out by the normal effluxion of hearing time and appeals, many of the class members, particularly those who passed through the defendant institution in the 50's and 60's, would not either participate in any resolution or would not live long enough to realize some finality to this chapter of their respective lives.

[14] On a more practical level, any party-resolved litigation is in my experience as a trial lawyer and now a jurist of some 20 years, much preferred to a judge made determination with which neither or even one of the parties might not be pleased.

[15] Furthermore, on a human level, I echo the remarks of Class Counsel that this settlement and the manner in which it is proposed to be rolled out will avoid the shame and embarrassment that individual class members might experience if they were called upon or forced to disclose in a public forum the events which from their perspective was anything but pleasant.

[16] Finally, while not dispositive of the issue, this is a settlement agreement propounded by experienced counsel well down the litigation process, namely, as indicated, one concluded on the eve of trial. Virtually all the bumps and warts associated with each side's case were more than

---

[5] *Clegg v. HMQ Ontario, supra,* at para. 31.

known and then capable of evaluation. What then remained were the standard Achilles heels associated with the litigation proper; where lay witnesses self-destruct or alternatively and unexpectedly, flourish; where experts fail to deliver or prove to be more advocate than impartial; or where the trial judge fails to grasp the most basic or nuanced concepts of fact or law or both.

[17] In the final analysis, I am satisfied that the settlement is fair and reasonable and in the best interests of the class as a whole. I would further observe that I am as well more than satisfied that the compensation scheme will prove to be as 'user friendly' and efficient as is represented. The fact that the Class Administrator and Class Counsel are experienced with this format gives me more than a little comfort that problems experienced in *Richard v. British Columbia* will likely not occur as an aspect of the instant settlement.[6]

Honorarium

[18] The law is well settled that where a representative plaintiff can demonstrate that he or she has rendered active and necessary assistance in respect of the preparation of a case, which aided in the ultimate outcome, it may be appropriate to award compensation to the representative plaintiff in his or her own right.

[19] I have read the affidavit of Robert Seed and listened to him carefully at this hearing. I am satisfied that his degree of participation in this matter warrants recognition and separate compensation by way of an honorarium as that concept is explained in the cases.[7] Indeed, as Class Counsel said in its argument:

> The efforts of Mr. Seed provided access to justice and timely compensation to hundreds of vulnerable individuals. Mr. Seed could not have been more engaged or involved in the direction and prosecution of this action, at all times.[8]

[20] Had I not reviewed the cases, I would have been inclined to the view that the degree of recognition should be more than the $15,000 that is presently being sought, particularly in the circumstances of cases where abuse is alleged and the representative plaintiff had to all but lay bare his inner most secrets if not demons. That said, I believe I am bound by the upper limit set in other cases decided in this jurisdiction. Hence, the honorarium will be set at $15,000, as requested, to be paid out of the Settlement Fund.

---

[6] *Richard v. British Columbia*, 2012 BCSC 1464.
[7] *Garland v. Enbridge Bas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528.
[8] Written Submissions of the Plaintiff at para. 74.

Legal Fees

[21] The final question I am called upon to decide is whether the fees proposed in the circumstances of this case are fair and reasonable. The requisite factors to be taken into consideration are correctly set out in Class Counsel's written argument:

(a) the legal and factual complexities of the action;

(b) the risks undertaken, on both the merits and prospects of certification;

(c) the degree of responsibility assumed by Class Counsel;

(d) the importance of the issues to the class members;

(e) the monetary value of the matters at issue;

(f) the skill and competence demonstrated by Class Counsel throughout the action;

(g) the results achieved;

(h) the ability of the class to pay and the class' expectation of legal fees; and

(i) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation.[9]

[22] As indicated aforesaid, this action was not free of doubt. Interestingly enough, Class Counsel devoted almost 15 pages of its written argument to the perils associated with this action and the legal and factual problems with which they were beset almost from the get-go. I hazard to observe that I cannot imagine that Class Counsel were so open to make this disclosure during the course of the various mediation sessions as they are presently when trying to persuade the court to reward them for the risk of undertaking the subject case on spec, as it were.

[23] Be that as it may, I view these cost decisions in much the same manner as does Justice Belobaba. In the first place, I am not persuaded that dockets, *simpliciter*, tell the full story, without regard to the matters and criteria set out above. Put otherwise, even if I am told that the fee proposed does not parallel or match the time docketed, I am not persuaded that the fee thereby generated is not or is fair and reasonable in the circumstances. Dockets are, from my experience, more often than not indicative of unnecessary 'duplication', heavy hands and/or unnecessary double teaming—or worse. They simply do not tell the full story and should be taken as the starting and not the ending position.

---

[9] *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 at para. 80.

[24] That said, I too believe that the "judicial acceptance of the contingency fee agreement as presumptively valid" assists in the development of class actions for the reasons expressed by Belobaba J. in *Cannon v. Funds for Canada Foundation.*[10]

[25] Class Counsel will, therefore, be entitled to the fees sought on this motion for approval and particularized in the schedule handed me this morning. Fees will therefore be fixed at $2,520,000, less the portion of the costs awarded and received to date for a net amount of $2,412,534, plus H.S.T. and disbursements.

GANS J.

Date of Reasons for Judgment: June 6, 2017

Date of Release: June 7, 2017

[10] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

CITATION: Seed v. Ontario, 2017 ONSC 3534
COURT FILE NO.: CV-11-420734
DATE: 20170606

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ROBERT SEED

Plaintiff

– **and** –

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant

ORAL REASONS FOR JUDGMENT

GANS J.

Date of Reasons for Judgment: June 6, 2017

Date of Release: June 7, 2017