CITATION: Clegg v. HMQ Ontario, 2016 ONSC 2662
COURT FILE NO.: CV-14-506423-CP
DATE: 20160428

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sharon Clegg as Litigation Guardian of Marlene McIntyre, Representative Plaintiff of Certified Class Action

AND:

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

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Kirk Baert, Celeste Poltak and David Rosenfeld* for the Plaintiff

Robert Ratcliffe and Sonal Gandhi for the Defendant

HEARD: April 25, 2016

Proceeding under the *Class Proceedings Act, 1992*

SETTLEMENT AND LEGAL FEES APPROVAL

[1] This is the fourth in a series of class actions, dealing with abuses in provincial "Schedule 1" facilities,[1] that has settled before trial. In each of the other three cases, *Huronia, Rideau* and *Southwestern*, Conway J. found the settlements to be fair and reasonable and in the best interests of the class.[2]

[2] I certified this fourth class action on consent in August, 2015.

[3] The proposed settlement before me implements the same structure and compensation template as in the other three. Given that this settlement, in essence, has

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[1] That is, the provincially owned and operated facilities set out in Schedule 1 of the *Developmental Services Act, 1974*, S.O. 1974, c.2.

[2] *Stark v. HMQ Ontario*, 2013 ONSC 6686 (Huronia); *McKillop and Bechard v HMQ Ontario*, 2014 ONSC 1282. (Rideau and Southwestern).

already been judicially approved three times, this court could have simply approved this fourth iteration without any further discussion or explanation.

[4] However, as was the case in the first three settlements, the victims in this particular class action deserve to have their story told. As Conway J. noted in the *Huronia* settlement:

> [T[hese were important cases. To the class members the issues were enormous and immensely personal. These class actions provided a means for them to bring their claims before the court and to create public awareness of the history of these institutions and the alleged experiences of the residents there.[3]

[5] The background facts as set out by the representative plaintiff in her factum are as follows.

Background

[6] The claims advanced in this omnibus action pertain to the defendant's alleged negligence and breach of fiduciary duty in the funding, operation, management, administration, supervision and control of twelve named "Schedule 1" facilities that are now closed but at one time housed persons (many were children) labelled as developmentally challenged or developmentally delayed. The facilities were intended to provide a residential program of hospital care, activity, education and adult training to these individuals. Many of the facilities housed such individuals for their entire life.

[7] The 12 facilities and the applicable class periods are set out below:

St. Lawrence Regional Centre April 1, 1975 – June 30, 1983	**L.S. Penrose Centre** April 1, 1974 – March 31, 1977	**D'Arcy Place** Sept. 1, 1963 – Dec. 31, 1996
Oxford Regional Centre April 1, 1974 – March 31, 1996; and the "Mental Retardation Unit" or "MR Unit" between Jan, 1, 1969 – March 31, 1974	**Midwestern Regional Centre** Sept. 1, 1963 – March 31, 1998	**Adult Occupational Centre (Edgar)** Jan. 1, 1966 – March 31, 1999
Durham Centre for Developmentally Handicapped April 1, 1974 – Sept. 28, 1986	**Muskoka Centre** Aug. 28, 1973 – June 30, 1993	**Prince Edward Heights** Jan. 1, 1971 – Dec. 31, 1999
Northwestern Regional Centre April 1, 1974 – March 31, 1994	**Bluewater Centre** April 1, 1976 – Dec. 20, 1983	**Pine Ridge** Sept. 1, 1963 – Aug. 31, 1984

[3] *Dolmage, McKillop and Bechard v. HMQ Ontario*, 2014 ONSC 1283 at para. 10.

[8] The plaintiff says that the defendant breached the standards of care in the operation of these facilities by (a) knowing of and condoning overcrowding; (b) knowing of and condoning understaffing or unqualified staffing; (c) failing to implement abuse prevention policies; and (d) deliberately exploiting residents for the defendant's own benefit.

[9] The plaintiff further alleges that, notwithstanding numerous reports and recommendations over many years relating to these very issues, no steps were taken to improve the quality of care or living at these facilities. Even if some of the recommendations were followed, the measures proved to be inadequate and failed to meet the standards of care which were applicable in the circumstances. According to the plaintiff, these 12 facilities suffered from the same systemic failings as in *Huronia, Rideau* and *Southwestern.*

Mediation and settlement

[10] The settlement in this action was achieved after two days of mediation before the same mediator who had successfully mediated the settlement discussions in *Huronia, Rideau* and *Southwestern.* The terms of the settlement agreement in this action generally mirror the terms of the other three settlements and, as class counsel point out, achieve overall parity and virtually identical compensation schemes.

Overview of the settlement

[11] The key terms of the settlement agreement are these:

- a $35.9 million settlement fund;
- the claims application process is paper-based and does not require former residents to testify or appear in person;
- the minimum amount that a claimant can receive is $2000 and the maximum is $42,000;
- the defendant will pay for the cost of notice to the class and administration of the claims process; and
- the compensation awards will not be subject to tax or government claw-backs.

[12] As in *Huronia, Rideau* and *Southwestern,* the settlement agreement provides a claims-based compensation scheme with two streams for compensation – Section A and Section B claims. Section A claims only require a claimant to solemnly declare that he or she was harmed without providing any further details. Section A claims are eligible to

receive $2,000 in compensation (and Section A claims in the aggregate can receive up to a maximum of 25% of the settlement fund after fees and disbursements are deducted).

[13] Section B claims require the claimant to provide details of the harm or abuse suffered while at the Schedule 1 institution(s). The description of harm can come from resident files, the class member, or from a personal representative. Compensation for a Section B claim will be awarded based on the severity of the harm.

[14] As was the case in *Huronia*, *Rideau* and *Southwestern*, the Hon. Ian Binnie will serve as the appointed overseer of the claims administration process. Mr. Binnie, together with Crawfords Class Action Services acting as the administrator, will create protocols and procedures for reviewing and evaluating all claims and assigning points pursuant to the Settlement Agreement. The fact that both Mr. Binnie and Crawfords were involved in administering the claims process in *Huronia*, *Rideau* and *Southwestern* will obviously be a significant benefit in the administration of this settlement.

[15] Claims will be accepted at face value and claimants will not be required to testify or appear in person in any manner. The only response permitted from the defendant is a submission of documents from the resident's file, without argument. The administrator will then calculate the amount of compensation to be provided to each claimant based on the points associated with their claims.

[16] If the compensation calculated for all Section B claims does not exhaust the settlement fund (after legal fees, disbursements, the CPF Levy and all taxes are deducted), then each claimant will receive an increase of up to 20% of their allotted compensation, or until the settlement fund is exhausted. The maximum that a claimant can receive is $42,000.

Non-monetary benefits

[17] Because of the settlements in *Huronia, Rideau* and *Southwestern*, the class in this action has benefited from two important non-monetary aspects. The first is the apology from the Premier of Ontario that was delivered in the provincial legislature on December 9, 2013. That apology, although given before the action herein was commenced, extended beyond the *Huronia, Rideau* and *Southwestern* class actions and included an apology for the Schedule 1 system as a whole. Premier Wynne offered "an apology to the men, women and children of Ontario who were failed by a model of institutional care for people with developmental disabilities."

[18] The second non-monetary benefit is the resulting public access to approximately 63,000 documents from the *Huronia* litigation. According to class counsel, a significant proportion of the documents included ministerial level documents that applied to the entire Schedule 1 system, including the 12 facilities in this action.

Assistance with claims

[19] The administrator is an experienced settlement administrator, particularly in institutional abuse claims and has undertaken to run workshops in various locations to answer questions or assist class members in completing their claim forms. The administrator and class counsel will also operate websites, telephone hotlines and email accounts to help class members make their claims. Both the administrator and class counsel will remain available after the claims deadline to provide whatever further assistance is required.

[20] Class members will also be able to receive assistance from ARCH Disability Law Centre and Community Living Ontario, as was the case in the *Huronia*, *Rideau* and *Southwestern* settlements.

Results of the Huronia, Rideau, and Southwestern settlements

[21] The claims process in *Huronia, Rideau* and *Southwestern* has been concluded. In all, the administrator assessed about 3500 claims and approved over 3,400. A total of 3,427 cheques were mailed totaling just over $37.5 million.

[22] Here the settlement amount is $35,989,646. After the deduction of class counsel fees and the CPF levy, the funds available to the class will be approximately $28,916,951. The total class size and compensation paid out in the *Huronia, Rideau and Southwestern* class actions is exactly comparable to this action on a pro rata basis. The per capita average in all four settlements is $3711 with actual payments ranging from $2000 to a maximum of $42,000.

[23] In other words, the settlement in this action will provide class members with the same level of compensation as did the settlements in the previous three actions. Not surprisingly, the plaintiff submits that the settlement agreement is fair and reasonable and very much in the best interests of the class.

[24] I agree.

Approval of the settlement agreement

[25] Section 29(2) of the *Class Proceedings Act*[4] requires court approval of every class action settlement before it can take effect. Judges must be satisfied that the proposed settlement is fair and reasonable and in the best interests of the class.[5]

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[4] *Class Proceedings Act, 1992,* S.O. 1992, c. 6.

[26] Most class action settlements materialize just before or just after certification. In most of the cases, documents have not been exchanged, discoveries have not taken place and class counsels' information or knowledge about the risks and rewards of going further is, to say the least, at a minimum. Add to this the fact that most class counsel draft retainer agreements that provide for a generous contingency recovery (of 20 or 30 per cent) whether the action is settled quickly or decided after a prolonged trial. The contingency fee recovery (which I actually favour[6]) creates a significant conflict of interest for class counsel. Should class counsel continue to press for more compensation for class members even if it means losing at trial and getting no contingency, or settle for a less than optimal amount but pocket a guaranteed contingency?

[27] A major American class action study published in 2000 concluded that class action attorneys were often more interested "in finding a settlement price that defendants would agree to – rather than finding out … how likely it was that the defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement against that background."[7]

[28] It has long been understood that class action settlements, and especially early stage settlements, should be viewed with suspicion and "seriously scrutinized by judges."[8] The problems of "sweetheart" and "blackmail" settlements are well-known and have been the subject of study in the legal literature.[9]

[29] In the vast majority of early stage class action settlements, the court hears "a one-sided presentation about how wonderful the settlement is and how aggressively class counsel championed the absent class's cause."[10] Class counsel generally set out a list of self-serving "boiler-plate" reasons why the settlement should be approved - the litigation

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[5] *Dobbs v. Sun Life Assurance,* (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998.

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

[7] Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain,* (Rand Report, 2000) at 424.

[8] *Dobbs, supra,* note 5, at para. 30 (Gen. Div.).

[9] See, for example, Hay and Rosenberg, *"Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy"* (2000) 75 Notre Dame L. Rev. 1377; Erichson, *"The Problem of Settlement Class Actions"* (2014) 82 Geo. Wash. L.Rev. 951; and Koniak, *"How like a Winter – The Plight of Absent Class Members Denied Adequate Representation"* (2004) 79 Notre Dame L. Rev. 1787.

[10] Koniak, *supra,* note 9, at 1798.

risks; the hard-fought negotiation; the arm's length settlement and, of course, class counsel's vast experience.

[30] This boiler-plate, as I concluded in two recent settlement approval decisions,[11] reduced to its essence is this: *"We're experienced class counsel; we negotiated the best possible deal for the class members; trust us."*

[31] In early stage settlements, judges must continue to encourage class counsel to actually explain why the settlement falls within a zone of reasonableness[12] and is in the best interests of the class. It is no longer correct or appropriate for judges to succumb to the aforementioned "boiler-plate" or blithely assume in the class action context that there is a "strong initial presumption of fairness" when the settlement is negotiated at arm's length and is recommended by experienced class counsel.[13] That may work for conventional two-party settlements but it is an unwarranted assumption in the class action context.

[32] Happily, this was not an early stage class action settlement. I will explain. The settlement herein mirrors the structure and compensation amounts that were approved in the *Rideau* and *Southwestern* settlements, which in turn mirrored the structure and compensation amounts that were approved in *Huronia*. The settlement herein is fair and reasonable and in the best interests of the class only if the settlement in *Huronia* was fair and reasonable and in the best interests of the class.

[33] What is it about the *Huronia* settlement that persuades me that the mediated settlement in that case fell within a zone of reasonable settlements? The answer is this: *Huronia* was not an early stage class settlement. The settlement in *Huronia* was achieved just a few days before the start of the common issues trial. At that point, both class and defence counsel had reviewed literally thousands of documents, had completed days of discovery, and had fully researched and understood the many issues of law (duty of care, limitation periods etc.) that would be litigated in the upcoming trial.

[34] When the parties agreed to mediation just before the start of the *Huronia* trial, their counsel were as informed as they ever could be about the "risks of going to trial." Their knowledge base going into the mediation was as high as it ever would be, short of completing the trial and reading the reasons of the trial judge. In short, the mediation that

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[11] *Sheridan Chevrolet v. Furakawa Electric*, 2016 ONSC 729 and *Leslie v. Agnico-Eagle Mines*, 2016 ONSC 532.

[12] *Dobbs, supra*, note 5, at para. 30 (Gen. Div.)

[13] *Slark, supra*, note 2, at para. 26.

led to this settlement was based on layers and layers of actual, and not just imagined, information about the risks and rewards of further litigation.

[35] Class counsel negotiated the *Huronia* settlement (which became the template for the three actions that followed) from a significant knowledge base that is simply not available when class actions are settled before certification or shortly thereafter. Put bluntly, the closer that class counsel is to trial, the more credible are their assertions about risk and reward. The closer the trial, the more likely that the class action settlement is fair and reasonable and in the best interests of the class.

[36] I am therefore persuaded that *Huronia* settlement is a settlement that was not only in the best interests of that class but is a settlement that could be used as a legitimate template for *Rideau* and *Southwestern,* and more importantly, for the class action settlement herein.

[37] Only two written objections were received by class counsel - one from an individual who was not a class member - who criticized the fact that the class action was even brought and the other from a class member who would have preferred a larger settlement amount. My response to the latter is the same response that Conway J. provided in *Huronia:* a settlement is a compromise that reflects the risks, delays and expense of continuing litigation.[14] I am satisfied that the settlement amount herein is within the zone of reasonableness and is very much in the best interests of the class. [15]

[38] I am pleased to approve the proposed settlement.

Approval of class counsels' legal fees

[39] Class counsel also seek approval from this court of their legal fees in the amount of $3.7 million (plus HST). This amounts to a contingency fee of 9.67 per cent of the total settlement value (including notice and administration). In my view, this request is fair and reasonable.

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[14] *Slark, supra,* note 2, at para. 36.

[15] A third objector, Marilyn Dolmage, voiced her concerns both orally at the hearing and later in an email that was forwarded to me by class counsel. Although not a class member, she is nonetheless an informed observer because she was the litigation guardian for the representative plaintiff in *Huronia.* Ms. Dolmage's main criticism, based on certain perceived discrepancies in class counsels' affidavit material, was that parity had in fact not been maintained; and that class member compensation in *Huronia* was on average almost $2000 more than the per capita $3711 amount herein. Class counsel responded in writing to each of her points, corrected many of them, and confirmed the accuracy of the $3711 "parity" assertion. Ms. Dolmage also noted that the provincial apology and the commemorative plaques that were part of the *Huronia* settlement were not included in the settlement herein. This is true. But these differences were not mentioned by any of the class members and, in my view, do not amount to a good enough reason to deny settlement approval.

[40] Based on the retainer agreement, class counsel were entitled to a 30 per cent recovery for legal fees. They have wisely reduced their request to about 10 per cent, no doubt because of the legal fee payments already received from the *Huronia*, *Rideau* and *Southwestern* settlements.

[41] The total amount recovered for class members in the first three settlements was about $67.7 million. The overall total, when one adds the settlement herein, is about $103.7 million. When the 10 per cent being sought herein is added to the 20 per cent that was approved in the first three settlements, the overall recovery for legal fees is about $17.7 million or about 17 per cent.

[42] As I noted in *Cannon*,[16] the contingency fee approach to class counsel compensation is much more principled than the "multiplier" approach and should be the preferred method for class counsel compensation.

[43] I have no difficulty approving class counsels' request for legal fees.

Disposition

[44] The proposed settlement is fair and reasonable and in the best interests of the class. As is class counsels' request for legal fees.

[45] Both the settlement and the legal fees are approved.

Belobaba J.

Date: April 28, 2016

[16] *Cannon, supra,* note 6.