

CITATION: Welsh v. Ontario, 2016 ONSC 5319
COURT FILE NO.: CV-15-534042CP
DATE: 20160823

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
CHRISTOPHER WELSH) *Celeste Poltak and Robert Gain for the*
) Plaintiff)
Plaintiff)
)
- and -)
)
HER MAJESTY THE QUEEN IN RIGHT) *Christopher Wayland and Lisa Brost for the*
OF THE PROVINCE OF ONTARIO) Defendant)
Defendant)
)
)
)
) HEARD: August 23, 2016

PERELL, J.

REASONS FOR DECISION

[1] This is a motion pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, for certification of this action as a class proceeding and for ancillary relief. The motion is on consent. For the reasons that follow, the motion is granted.

[2] The action arises out of the provincial Crown's operation, administration and management of three residential elementary and secondary schools for the deaf: (1) Ernest C. Drury School for the Deaf, Milton (opened 1963); (2) Sir James Whitney School for the Deaf, Belleville (opened 1870); and, (3) Robarts School for the Deaf, London (opened 1973).

[3] It is alleged that the Crown knew or ought to have known of physical, emotional, and sexual abuse being perpetrated against the students at the Schools and yet it took no steps to prevent, halt, eliminate, or report these abuses. It is alleged that the Crown acted negligently and in breach of its fiduciary duties in its operation and management of the Schools.

[4] Christopher Welsh is the Plaintiff and the proposed Representative Plaintiff. He attended the Ernest C. Drury School for the Deaf, where he lived in residence for seven years from 1964 to 1971 and the Robarts School for the Deaf for approximately five years, where he attended school from approximately 1972 to 1976. Mr. Welsh alleges that during his 12 years at Drury and Robarts, he suffered and saw others suffering abusive conduct perpetrated by teachers, residence counsellors and staff. He was sexually assaulted while living in residence at Drury.

[5] Mr. Welsh brings the action on behalf of the following class:

(a) all persons who have attended or resided at Ernest C. Drury School for the Deaf or its predecessor ("Drury") as students from September 1, 1963 to the date of this Order, who were alive as of August 10, 2013, and who have not otherwise released their claims (the "Drury Student Class");

(b) all persons who have attended or resided at the Sir James Whitney School for the Deaf or its predecessor ("Sir James Whitney") as students from September 1, 1938 to the date of this Order, who were alive as of August 10, 2013, and who have not otherwise released their claims (the "Sir James Whitney Student Class");

(c) all persons who have attended or resided at the Robarts School for the Deaf or its predecessor ("Robarts") as students from September 1, 1973 to the date of this Order, who were alive as of August 10, 2013, and who have not otherwise released their claims (the "Robarts Student Class"; together with the Drury Student Class and the Sir James Whitney Student Class, the "Student Class"); and,

(d) all spouses, children, grandchildren, parents, grandparents, and siblings of persons who are members of the Student Class and who attended or resided at Drury, Sir James Whitney, or Robarts as students from March 31, 1978 to the date of this Order (the "Family Class").

[6] Twenty-one putative Class Members from Ernest C. Drury School for the Deaf, Sir James Whitney School for the Deaf and Robarts School for the Deaf swore affidavits in support of the certification motion. The affiants describe instances of sexual, physical, and emotional abuse suffered at the hands of teachers, residence counsellors, and staff and the impact of these experiences on the affiants, who will be Class Members.

[7] The Statement of Claim pleads two primary causes of action: negligence and breach of fiduciary duty. There are also secondary claims on behalf of family members of former students for *Family Law Act*, R.S.O. 1990, c. F.3 derivative claims.

[8] Mr. Welsh pleads an operational negligence claim against the Crown for its operation and management of the Schools from the later of September 1, 1963 or the date on which the school was opened to the present. The decision to limit claims for negligence to the period after 1963 is based on the *Proceedings Against the Crown Act*, which bars claims in negligence against the Crown for conduct occurring before the statute came into force in September 1963.

[9] Similar types of claims have been certified in *Seed v. Ontario*, 2012 ONSC 2681; *Dolmage v. Ontario*, 2010 ONSC 1726, leave to appeal denied 2010 ONSC 6131; and *Johnston v. The Sheila Morrison Schools*, 2010 ONSC 3334.

[10] Mr. Welsh seeks to have the following common issues certified:

(a) By its operation or management of:

(i) Drury from September 1, 1963 to the date of this Order;

(ii) Sir James Whitney from September 1, 1938 to the date of this Order; and

(iii) Robarts from September 1, 1973 to the date of this Order,

did the defendant owe a fiduciary duty owed to the Student Class to protect them from actionable physical or mental harm and, if so, did the defendant breach such duty?

(b) By its operation or management of:

(i) Drury and Sir James Whitney from September 1, 1963 to the date of this Order; and

(ii) Robarts from September 1, 1973 to the date of this Order,

did the defendant owe a duty of care to the Student Class to protect them from actionable physical or mental harm and, if so, did the defendant breach such duty?

(c) If the answer to either of common issues (a) or (b) is "yes", can the court make an aggregate assessment of damages as part of the common issues trial?

(d) Are members of the Family Class entitled to recovery of their pecuniary losses resulting from injuries or damages to the members of the Student Class, pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 and/or the equivalent legislation in other provinces?

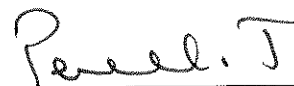
(e) If the answer to either of common issues (a) or (b) is "yes", does the defendant's conduct justify an award of punitive damages?

(f) If the answer to common issues (e) is "yes", what amount of punitive damages ought to be awarded against the defendant?

[11] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims or defences of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[12] In the present case, I am satisfied that all of the criteria for certification have been satisfied.

[13] Accordingly, I grant Mr. Welsh's motion.



Perell, J.

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CHRISTOPHER WELSH

Plaintiff

– and –

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Defendant

REASONS FOR DECISION

PERELL J.

Released: August 23, 2016