

Welsh v Ontario – "Provincial Schools for the Deaf" class action

Statement from the lawyers for the Plaintiff

This is a statement from the lawyers for the Plaintiff in the class action for the Schools for the Deaf in Ontario.

The lawyers for the Plaintiff have been advised of some questions and concerns about the Settlement in this case, their law firm and the fees they have requested.

The lawyers for the Plaintiff are concerned that there are class members being misinformed or left with questions about these topics.

The lawyers for the Plaintiff wanted to provide the class with more information on the following statements or concerns that seem to have been raised:

1. the Settlement was not enough;
2. language deprivation and poor education;
3. the fees requested are too high; and
4. The law firm has not been honest.

Before the lawyers for the Plaintiff discuss these issues, they want to assure all class members that the Settlement has been approved by the Court as being fair, reasonable and in the best interest of the class and the claims process is ongoing.

Now to provide more information on the topics outlined:

1. The Settlement was not enough

There have been suggestions that the \$15 million Settlement is not enough as compared to the \$325 million claimed in this case.

The figure of \$325 million is a number that was included in the claim when it was started. The court requires the Plaintiff to identify what amounts it is seeking from the Defendant. That is the most the Plaintiff and the class can ask the Defendant to pay. The Plaintiff and the class cannot ask for more.

Therefore when these cases are started the lawyers for the Plaintiff try to provide a figure that would include any possible amount of money that the class could claim in this case if the case went perfectly. If the Plaintiff and the class don't ask for that amount, it can't be awarded at trial.

However, when the case is started not all the information is known such as:

- (1) how many people are in the class;
- (2) how many people were abused;
- (3) the severity of their abuse;
- (4) the amount of damages that could be claimed for each individual; or
- (5) the likelihood of success of proving each class member's harm.

Therefore the lawyers for the Plaintiff make estimates on all of those components to try to come up with a maximum figure. We err on the side of caution. That is why the number is so big.

When the Settlement was reached for a total fund of \$15 million, the lawyers for the Plaintiff had better information. The total number of students was known and we had a better assessment of the risk of losing at trial. The lawyers for the Plaintiff did not have complete information on the number of people who were abused, the severity of that abuse or the amount of money that could be claimed for each. The lawyers for the Plaintiff made an estimate based on their experience in other institutional abuse cases, including the one related to the W. Ross McDonald School for the Blind. The lawyers for the Plaintiff estimated that the \$15 million Settlement would be enough to satisfy the claims of class members in this case.

The Settlement structure and the amounts available for each level of harm were the same as that in the class action relating to the W. Ross McDonald School for the Blind. That case was basically the same as this case. That case dealt with the same issues and the same policies as in this case as the same department ran the "Schools for the Deaf". That case settled on the eve of trial. That settlement was approved by the court as being a good result for the class. This settlement was negotiated based on that settlement so as to provide consistency among the students in the Provincial schools. The amount of this Settlement is proportional to that amount received in that case.

In addition, \$15 million was the most that the government was willing to pay to compensate the class members. The lawyers for the Plaintiff asked for more. This was the most the government was willing to provide. There were a number of defences that the government felt they could raise that would increase the risk of the class losing.

The alternative was to proceed to trial and potentially lose. Even if the Plaintiff was successful at a trial, there would likely have had to be individual hearings for all the class members who would have to come forward to testify about what happened to them and how that was caused by the government. Those hearings would require

1. each class member to come in person to say what happened to them;
2. each class member to likely be cross-examined on what they said;
3. each class member to prove that they should be believed in what they say;
4. each class member to prove how the actions of the government harmed them; and
5. each class member to prove how much money they should receive.

Class members may not have been successful in those hearings or not as successful as they might want. That process could also take years to complete.

What the Settlement provides is a claims process

1. that is a private process;
2. that permits people to submit their claim in writing and not in person;
3. that would not permit claimants to be cross-examined on their statements;
4. that results in claimants being fully believed in what they claim;
5. that results in claimants not being required to prove how their harm was caused by the government's failures; and
6. that results in compensation far quicker than a court process.

There is a trade-off between the amount that might be available in court process (with individual hearings, potential cross-examinations, uncertain recovery, long delay and risk of losing) and that which is available through the Settlement process (private process, paper-based, not testifying, no cross-examinations, claims are fully accepted, certain compensation and quick results). This must be considered when assessing the amount of the settlement as we did and as the Court did when it approved the Settlement.

In the Plaintiff and lawyers for the Plaintiff's view the Settlement process and the \$15 million settlement fund were more beneficial to the class than continuing with the litigation, forcing individual class member to go through individual hearings, the time required for those hearings, and the associated risks of losing any or all of their claims.

In the lawyers for the Plaintiff's view and in the Court's view, this Settlement was fair, reasonable and in the best interests of all class members.

2. **Language deprivation and poor education**

This class proceeding has always primarily been about the failures at the schools that led to actionable physical and sexual abuse suffered by students at the schools – by staff and/or by other residents. The compensation in the Settlement is directed accordingly.

There is some compensation for other harms such as demeaning behaviour. Those amounts are not as much as those available for physical and sexual abuse. That is, in part, a reflection of the risk of proceeding to a trial on the types of harms that seem to be described as language deprivation and poor education.

Those harms may not be compensated by courts or difficult to prove at a trial. For instance, at a trial, the Schools would not be judged by the standards of today, they would be judge by the standards in place over the years in which the school operated. It is possible that the government might be able prove that they acted in accordance with the standard in place during various periods of the class.

As a result a determination was made to provide the greatest proportion of compensation to those claimants who suffered direct physical and sexual abuse. Some class members may have suffered such abuse and some may not, or not as severe.

The lawyers for the Plaintiff understand that this might result in some class members not receiving as much compensation as others or feeling like the harms they suffered were not properly compensated. When assessing the benefits of the Settlement it must be assessed on behalf of all class members.

When the Settlement was approved, the Court considered these issues and determined that the settlement was fair, reasonable and in the best interests of the class.

3. **The fees are too high**

When the lawyers for the Plaintiff agreed to prosecute this case on behalf of the class, they did so on a contingent basis. Meaning, the lawyers for the Plaintiff would only be paid fees in the event of success to the class. If the case was lost, the lawyers for the Plaintiff would get nothing for

the time they devoted or the expenses they paid for on behalf of the class. In consideration for that, the lawyers for the Plaintiff asked for a fee of 25% (plus HST) of the amounts recovered in a settlement or a trial plus recovery of the expenses they paid for. The Plaintiff nor any class member were required to pay any fees up front to bring this case.

A contingent fee of 25% is typical and has generally been approved by the courts in class actions as, among other things, it aligns the interests of the lawyers and the class – the more recovered for the class the more the lawyers might receive.

In this case the Settlement was structured in the same way as that involving the W. Ross McDonald School for the Blind. That case was settled on the eve of trial. The amount of this Settlement is proportional to that amount received in that case. The Court in that case found the Settlement to be a good result. The Court in that case approved a greater fee of 31.5% to the lawyers as compared to the 25% sought by the lawyers for the Plaintiff in this case.

The lawyers for the Plaintiff can only be paid fees for their work in the case if the Court approves the payment. A Court will consider the success achieved and the risk undertaken, among other factors.

The Plaintiff and his lawyers tried to get more money for the Class but this was the best that they could negotiate with the government. The alternative was to proceed to trial and potentially lose. Even if successful, there would have to be individual hearings for all the class members who would have to come forward to testify about what happened to them and how that was caused by the government, in which they may not be successful. This claims process in this Settlement provides for a private process that permits people to submit their claim in writing, not personally attend, not be cross-examined and be fully believed in what they claim. If a claim meets the requirements it will be compensated – there is no risk of not being successful.

In the lawyers for the Plaintiff's view the Settlement is a very good result given the claims process as compared to a court process. The lawyers for the Plaintiff undertook significant risk on behalf of the class throughout the case. When the lawyers for the Plaintiff started the case they did not know if a Settlement could be achieved or if they could ever be paid. The lawyers for the Plaintiff should be paid for their work. In accordance with other class action decisions, a fee of 25% of the Settlement is fair and reasonable. The Court will decide how much the lawyers get.

4. **The law firm has not been honest**

There appears to be some suggestion spreading that the lawyers for the Plaintiff have not been honest. The lawyers for the Plaintiff are concerned about such statements as they are not provided an opportunity to respond.

The lawyers for the Plaintiff unreservedly state that they have at all times acted in an honest and forthright manner.

We welcome an opportunity to speak directly with anyone who thinks otherwise.

In addition, should any class member wish to speak to Class Counsel directly about these issues they can contact us at:

schoolabuse@kmlaw.ca

or through the Bell Relay Service by dialing 711 and then our toll-free hotline number 1-877-309-9111

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