CITATION: Grann et al. v. HMQ in Right of the Province of Ontario, 2021 ONSC 3817
COURT FILE NO.: CV-14-0018-CP
DATE: 2021-05-26

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
TONI GRANN, ROBERT MITCHELL, DALE GYSELINCK and LORRAINE EVANS	)	*J. Ptak and A. Tanel*, for the Plaintiffs
Plaintiffs	)	
- and -	)	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO	)	*B. McPherson, L. Brost*, and *A. Sinnadurai* for the Defendant
	)	*A. Eckart*, for Four Class Members
Defendant	)	
	)	**HEARD:** Via Zoom May 12-14, 2021 at Thunder Bay, Ontario

Madam Justice H. M Pierce

Reasons on Motion to Approve a Settlement Under the *Class Proceedings Act*

Introduction

[1] In this action, the representative plaintiffs move for an order approving a proposed settlement, pursuant to s. 29 of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6. The class consists of all persons who were alive on January 22, 2012 who were Crown wards of Ontario at

any time from January 1, 1966 until March 30, 2017. Class Counsel moves for approval of its contingency fee agreement and its counsel fee pursuant to sections 32 and 33 of the *Act*.

[2] The defendant, Province of Ontario ("the Crown"), supports the proposed settlement.

[3] At the settlement hearing, sixty former Crown wards - Class Members - objected to approval of the settlement, while the four representative plaintiffs and one other former Crown ward supported it.

[4] For the reasons that follow, I dismiss the settlement approval motion. In these circumstances, I need not rule on Class Counsel's fee approval motion.

General Factual Background to the Class Proceeding

[5] The Class Members are former Crown wards. Each former Crown ward was apprehended from his or her parent by a child welfare agency, typically because of neglect or abuse or a parent's inability to care for the child. Ultimately, the Class Member was made a permanent ward of the Crown by court order. The court's Crown wardship order terminated the child's legal bond with his parent and placed the legal responsibility for his care with the Province.

[6] As Crown wards, the Class Members' day-to-day care was delegated by statute to the local child welfare agency, usually a Children's Aid Society. Upon apprehension, children were usually placed in foster homes or group homes; some were later placed for adoption. If a child was adopted, the adoptive parents became the legal guardians of the child by court order, supplanting the Crown wardship.

[7] In this case, the plaintiffs allege that the Crown was involved in province-wide systemic negligence and breach of fiduciary duty when it failed to consider or advance the children's claims for compensation for abuse in the civil courts or at the Criminal Injuries Compensation Board. The plaintiffs argue that this failure to seek compensation deprived them of redress that would have mitigated the harms they suffered as children. Further, the plaintiffs allege that the Crown failed to preserve evidence in support of their claims for compensation and failed to advise Crown wards that they could make such claims when they reached the age of majority. Finally, the plaintiffs contend that the Crown failed to exercise province-wide oversight of the child welfare agencies to ensure that the legal rights of the Crown wards were respected.

Legal Principles for Approval of a Class Proceeding Settlement

[8] Court approval is required for settlements in class proceedings. Subsections 29(1), (2) and (3) of the Act provide:

1. A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
2. A settlement of a class proceeding is not binding unless approved by the court.
3. A settlement of a class proceeding that is approved by the court binds all class members.

[9] The test for approval of the proposed settlement is whether it is fair, reasonable and in the best interests of the class as a whole. In *Dabbs v. Sun Life Assurance Co. of Canada,* [1998] O.J. No. 2811 (Gen. Div.) at para. 30, Mr. Justice Sharpe commented that no settlement is perfect. It must be considered in light of the risks and costs of litigation. However, he cautioned that

because the court's approval of a settlement will affect a large number of individuals who are not before the court, the court must scrutinize a proposed settlement closely.

[10] A settlement must fall within a range of reasonable outcomes: *Parsons v. Canada Red Cross Society,* [1999] O.J. No. 3572 (S.C.J.), para. 69. The courts recognize that each settlement is the product of compromise: *Baxter v. Canada (Attorney General),* [2006] O.J. No. 4968 at para. 21.

[11] The courts have long recognized the benefits of timely settlements. In *Seed v. Ontario,* 2017 ONSC 3534 at para. 13, Mr. Justice Gans approved a settlement for institutional abuse in a provincially operated school for the blind, made on the eve of a common issues trial. At para. 13, he observed:

> Furthermore…, 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 have 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.

[12] In *Sayers v. Shaw Cablesystems Ltd.,* 2011 ONSC 962 at para. 28, Mr. Justice Perell summarized factors the court may consider when approving settlements:

a. the likelihood of recovery or success;

b. the amount and nature of discovery, evidence or investigation;

c. settlement terms and conditions;

d. recommendation and experience of counsel;

e. future expenses and likely duration of litigation and risk;

f. recommendation of neutral parties;

g. if any, number of objectors and nature of objections;

h. the presence of good-faith, arms-length bargaining and the absence of collusion;

i. the degree and nature of communication by counsel and the representative parties with class members during the litigation; and

j. information conveying to the court the dynamics of and the positions taken by the parties during the negotiations. [Citations omitted].

[13] In *Serhan (Trustee of) v. Johnson & Johnson,* 2011 ONSC 128 at para.55, Madam Justice Horkins cautioned the court about inserting itself into the settlement process. She observed:

> … It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented… by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[14] While the vast majority of settlements in class proceedings receive court approval, the court is not merely a rubber stamp for settlements. During the settlement hearing, one of the former Crown wards objected to the settlement in these terms: "Why should I trust the court to decide this settlement? It is the same court that victimized me by making me a Crown ward in the first place."

The History of the Litigation

[15] This case began, with the support of the Class Proceedings Fund, in 2014 with the appointment of myself as case management judge. Scheduling orders were made in November 2014 and an order was made for production of the representative plaintiff's Children's Aid file.

[16] In May 2015, the court dismissed the defendant's summary judgment motion and held that the plaintiffs had satisfied the cause of action criterion for certification pursuant to s. 5(1)(a) of the *Class Proceedings Act.* Costs of $66,604.09 inclusive were awarded to the plaintiff in July 2015. A further order issued for production of the substitute plaintiffs' Children's Aid files in July. The defendant sought leave to appeal the s. 5(1)(a) ruling. Leave was refused by Mr. Justice Fregeau in January 2016.

[17] The parties exchanged certification records and cross-examinations proceeded in the fall of 2016. In October, the court heard a defence motion to compel the plaintiffs to answer questions refused in cross-examinations. In November, the plaintiffs were ordered to answer some, but not all of these questions. Directions for the certification motion were also given by court order.

[18] The certification hearing was argued January 23 and 24, 2017. Certification was granted on March 30, 2017. The plaintiffs were granted costs of $200,000 inclusive for their efforts.

[19] Class Counsel agreed on a plan to circulate notice of the certification and a discovery plan, as approved by the court in September 2017.

[20] Progress on the litigation track more or less paused in October 2017, when the parties agreed to enter into mediation with an experienced mediator; this process lasted two years and culminated in an agreement on January 28, 2021.

[21] In furtherance of seeking settlement approval, the parties developed a plan, including a notice plan, in preparation for a hearing to approve the settlement. The plan was approved by the court in January 2021, and two days of court time were scheduled for the hearing in May. As part of the notice process, the claims administrator established a website detailing the arrangements for a settlement hearing in English and French. Extensive notification of the settlement hearing was disseminated. Class Counsel put the cost of the notice program at $150,000.

[22] A press release was issued by Class Counsel in preparation for the settlement hearing. The press release states in part:

> If the proposed Settlement is approved, it will provide eligible class members up to $3,600.00. These payments are not compensation for any crime suffered by former Crown Wards. They are only compensation for the fact that the Crown Wards did not receive benefits available to victims of crime.

[23] Due to the number of objectors who wished to speak at the hearing, the motion extended into a third day.

The Proposed Settlement

[24] The defendant has offered the sum of $10 million to settle this class proceeding.

[25] Class Counsel, who has considerable experience in class proceedings, including cases involving institutional abuse, explained that the purpose of this class proceeding was to rectify the province's failure to advise the former Crown wards of their rights. Class Counsel described the key terms of the settlement as follows:

a. a lump sum settlement fund of $10 million;

b. honoraria for current and former representative class plaintiffs;

c. aggregate [or basic] compensation for each eligible Class Member of up to $3,600;

d. notification of the settlement to all Class Members;

e. the ability of Class Members to start individual actions for compensation from individuals or institutions that harmed them based on a limited release that allows Class Members to pursue tortfeasors or to make other claims;

f. a simplified, paper-based claims process that avoids cross-examination;

g. assurance from the Province that it will not claw back settlement funds from Class Members receiving provincial social assistance; and

h. payment of Class Counsel's fees, disbursements and payment of the costs of notice and administration of the settlement.

[26] Under the settlement, the Crown does not admit liability. Class Counsel highlighted the narrowness of the scope of the release, which would not preclude the Class Members from proceeding to advance individual claims against abusers or Children's Aid Societies. Class Counsel suggested that these individual proceedings could proceed quicker than a class action.

[27] Class Counsel described the claims process as confidential, in which claimants would not be interviewed and would not be subject to cross-examination as they would be in court. The

claims administration process was described as an expedited process, with the following features:

a. it is non-adversarial and meant to avoid re-traumatization;

b. it is simple and "user-friendly;"

c. claimants are presumed to be acting honestly and in good faith in completing their claims forms;

d. the window for submitting claims is nine months;

e. no supporting documentation is required;

f. the administrator will verify the eligibility of the claimant, the completeness of the application, and whether the claimant is still within the class (i.e. has not opted out);

g. the defendant will verify Crown wardship where electronic records are available;

h. the Crown is entitled to respond to a claim. If the Crown elects to do so, the claimant will be notified of the response and given a chance to reply;

i. the administrator and assessor(s) will review claims and information available and determine eligibility for compensation and the claimant will be advised;

j. if a claim is refused, the claimant may seek a reconsideration from the administrator and may submit new information. The claimant will be advised of the decision on reconsideration; and

k. decisions of the administrator are binding.

[28] Class Counsel cautioned that if the settlement is not approved, the process of taking this case to trial may take many years. He stated that it may require individual trials with Class Members testifying about the traumatic events of their childhood. He warned that there was no assurance of a recovery at the end of the process, and that a final outcome would be further delayed if appeals are taken by either side.

Experiences of the Crown Ward Objectors

[29] The former Crown wards who objected to the settlement ranged in age from 30 to 69 years of age.

[30] Each of the objectors expressed a profound sense of loss: of childhood, of self-esteem, of identity and security, of connection to their family members, and, in some instances, to culture and language. Some experienced racism at the hands of their caregivers. All felt insignificant, voiceless, angry.

[31] Many of the former Crown wards wept when they addressed the court. They recounted the humiliation and abuse they suffered as Crown wards. Some had been assaulted under the guise of discipline. Some foster children were locked outside for long periods during cold weather. Some were singled out for punitive treatment compared to the biological children of the foster parents. Some were denied privileges and pleasures afforded the biological children; for example, one former Crown ward was denied toys and not permitted to watch television. Some former Crown wards were used as free labour, in effect, slaves.

[32] Hunger was a common experience. Some former Crown wards were deprived of food as punishment. Some of them had to steal food because they were hungry.

[33] Some former Crown wards were confined to their rooms for long periods of time, without access to a washroom. Others were punished in humiliating ways for bed-wetting. One former Crown ward disclosed that she still wets the bed in middle age. She described feeling broken, defeated, and ashamed.

[34] Some former Crown wards recounted that they were groomed for sexual abuse by parents, foster family members or even friends of the foster parents. Still others were groomed by group home staff. Sexual assaults were a common experience, as these friendless children were preyed upon. Sometimes the perpetrators were other children. Some assaults resulted in pregnancy. The former Crown wards who objected to the settlement felt that there was no safe place.

[35] Some of the objectors recounted that when they reported instances of physical or sexual abuse to social workers or police, they were often disbelieved and returned to the care of the abuser. In reviewing their files, some former Crown wards noticed that their complaints were not documented. Still other children were punished for reporting abuse. When they ran away, they were often as described as “difficult,” a label that followed them at school and at home.

[36] When they were believed, the response was often to move the child to a new foster home, sometimes with the assurance that the abusive foster home would be closed. Rarely was the perpetrator prosecuted.

[37] The former Crown wards were often poorly dressed. One woman described not having hair ties or barrettes like other girls. They felt humiliated and picked on by other kids at school. Everyone knew who the foster kids were. They felt branded. To this day, the Class Members who were former Crown wards feel the stigma of having been foster children.

[38] The former Crown wards recounted that upon apprehension, siblings were often split up and placed in different homes, with little or no opportunity for visits. In some instances, Crown

wards lost contact with their siblings for long periods of time or even permanently. In other instances, the sibling bond became strained or broken.

[39] For most former Crown wards, multiple changes in foster homes and schools were a fact of life. This instability during their foundational years was hugely damaging to the children's emotional adjustment and to their educational achievement. It was not uncommon for a child's learning needs, such as dyslexia, to go undiagnosed. No one advocated for these children and for their part, the children did not know where they belonged.

[40] I heard from the former Crown Wards that many did not complete their basic education. Still fewer had the financial and practical help or encouragement they needed to attend post-secondary education or to obtain skills training when Crown wardship ceased.

[41] Many of these young people were discharged from care at 18, but I heard from the objectors that for some children, it was earlier than that. Many were left to make their own way in life without skills, financial or emotional support. Some lived on the streets. Consequently, many of the former Crown wards have lived lives of poverty, some with disabilities that prevented them from meaningful work because of their physical or emotional circumstances.

[42] Some former Crown wards described being deprived of appropriate medical care as children, with the result that they suffered unnecessarily into adulthood. Almost without exception, children received no counselling for emotional traumas, such as sexual assault.

[43] As adults, the former Crown wards experience anxiety, depression, post-traumatic stress disorder and anger management issues, all stemming from childhood. Some struggle with

addiction and failed relationships. They feel unwanted and unloved. Intimate relationships are threatening for some; many feel abandoned. Few have received any effective treatment for their mental health. As one former Crown ward put it, “We didn’t know what was normal.”

[44] Some former Crown wards have been lost to suicide. Others continue to have suicidal thoughts.

[45] Sadly, the former Crown wards who have, against the odds, succeeded in educating themselves feel undeserving of their success in life. Most lack self-esteem and struggle to trust others. Many, as parents, feel disconnected from their own children. Because they had no positive parenting models, they did not know how to raise their own children. An objector at the settlement hearing put it, “We never experienced love as children. How could we show love to our own children?” He spoke with profound sadness.

[46] Many former Crown wards who spoke at the settlement hearing are concerned that life continues to be difficult for the next generation of foster children. They seek systemic change, and they want the Crown to be held accountable for their suffering. They are offended that the terms of settlement don’t provide for an admission of liability or for an apology.

[47] The former Crown wards who object to the settlement believe that the amount of compensation they may receive in this settlement is wholly inadequate to compensate them for their suffering or to achieve accountability.

Discussion

[48] For the reasons that follow, I have concluded that, given how the action was framed, the proposed settlement does not fall within the range of reasonable outcomes; nor is it in the best interests of the class. Accordingly, the motion for approval of the settlement is dismissed.

[49] The Legislature introduced class proceedings to the administration of justice to make it feasible for a group of people who have suffered common wrongs to seek compensation. Class proceedings are particularly well-suited for advancing claims that are impractical for an individual to pursue, either because the damages are too small, or because the litigation process is too complex and costly to be borne by one person. The fundamental purpose of class proceedings is access to justice. The settlement proposed in the immediate case does not provide access to justice, nor is it fair, reasonable and in the best interests of the class members.

[50] To begin, the amount of compensation proposed for the former Crown wards in this case is not meaningful when compared to their experiences of abuse in the care of their biological families or in foster or group home placements following apprehension. It is not proportionate to the harms done.

[51] I do not doubt that the parties engaged in good-faith, arms- length bargaining in this case. Nevertheless, it is not comparable to other settlements for institutional abuse of vulnerable populations. See, for example, *Seed v. Ontario,* 2017 ONSC 3534; *McKillop and Bechard v. HMQ,* 2014 ONSC 1282; *Baxter v. Canada (Attorney General),* [2006] O.J. No. 4968; *Dolmage v. Ontario*, 2013 ONSC 6686.

[52] The merits of the proposed settlement cannot be appreciated without understanding the financial ramifications of the proposal, including Class Counsel's fees and the costs of administering the settlement.

[53] The retainer agreement signed by the representative plaintiffs agrees that plaintiffs' counsel is entitled to a contingency fee of 25% of the recovery at this stage of the litigation. Out of the settlement fund, Class Counsel seeks the following payments, in this order:

1. counsel fee of 20%, equivalent to $2,000,000.00 plus HST and disbursements on account of legal fees for work done or yet to be done, (When costs previously paid by the defendant of $265,000.00 in fees and $6,604.09 for disbursements paid by the defendant are included, the contingency recovery is about 22.6%);
2. honoraria totaling $57,500.00 payable to the four current and one previous representative plaintiffs;
3. administration costs to give notice of the settlement and implement the plan in an undetermined amount;
4. repayment of the Class Proceedings Levy for 10% of net recovery after payment of fees, disbursements, honoraria and administration costs;
5. compensation to approved claimants in the class; and
6. the return of any remaining funds not taken up by the class to the defendant.

[54] The basic payment to each class member is projected, but not guaranteed, at $3,000.00. However, if there are insufficient funds to pay eligible class members compensation of $3,000.00 each, the compensation will be decreased on a *pro rata* basis.

[55] No evidence was filed or disclosed to counsel for four objectors as to the anticipated size of the class or the expected "take-up" of the settlement by class members. Thus, it is not possible

to estimate the number of claims that may be filed or the individual compensation likely to be paid.

[56] With the Crown's reversionary interest in the settlement funds, it cannot be said that this settlement is worth $10 million. Based on the known charges against the settlement fund, remembering that the costs of administering the settlement are not known, the net fund available for distribution among the Crown wards is probably in the range of $6 million.

[57] In this case, after legal fees and costs of administration are deducted, the recovery is akin to a "nuisance value" payment.

[58] Many Crown wards described the proposed settlement as a "slap in the face." Many felt that the minimal amount of the proposed settlement confirmed their belief that Crown wards are insignificant. In its effect, the objectors felt the settlement renewed the trauma of being abused and marginalized as foster children. Some objectors said that they felt misled about the case because they believed that they would be compensated for actual harms suffered as children.

[59] It is not surprising that they should feel this way. The claim was framed and certified to recover damages that were not sought on their behalf as children. However, the proposed settlement re-frames the scope of the action and the amount of the recovery.

[60] Class Counsel submits that this proceeding was never about compensation for harms done to Crown wards. I do not agree. If that were so, why does the proposed settlement specifically exclude Crown wards who received compensation for harm from either the civil courts or the Criminal Injuries Compensation Board?

[61] The objectors recognize that this action was framed as a substitution for the Crown making timely claims for the children, so that they would not have to bring individual lawsuits. In my opinion, it is not fair and reasonable that a settlement should be approved when these major claims for compensation have been abandoned.

[62] The statement of claim seeks damages of $100 million plus punitive damages of a further $10 million. The action was framed as a substitution for the Crown making timely claims for the children. Paragraph 1(b) of the statement of claim alleges that the Crown breached its fiduciary, statutory and common law duties to the Crown wards by failing to consider and to take reasonable steps to protect: "*... and pursue Crown Wards' rights to recover compensation for damages sustained as a result of criminal or tortious acts to which Crown wards were victims."* Paragraph 1(c) of the statement of claim alleges that the Crown was negligent by failing to consider and to take reasonable care to protect "… *and pursue Crown Wards' rights to recover compensation for damages sustained as a result of criminal or tortious acts to which Crown Wards were victims.*"

[63] At the outset of the case, the plaintiffs filed a motion for a declaration that s. 5(1)(a) of the *Class Proceedings Act*, whether a cause of action is disclosed, had been satisfied. In that motion, Class Counsel's factum recited that Crown wards were the victims of criminal abuse, neglect and tortious acts while in the care of their original families, and also while in the care of the Crown. The factum argues, as the statement of claim alleged, that the Crown failed to protect and pursue damages for the Crown wards who were victimized by criminal and tortious acts (para. 2). Paragraph 3 of that factum continues:

> As a result of the Crown's systemic failure and inaction, the Class Members could not pursue claims for compensation that would otherwise have played a vital role in their recovery and development. They have endured pain and suffering for years of living without such compensation as well as therapeutic services which were available from the CICB [Criminal Injuries Compensation Board] which ought to have been sought as children when the crimes and torts against them were committed.

Paragraph 4 of the factum concludes:

> …The Crown created and administered the CICB, and was clearly aware of its existence, yet it took no steps to make claims on behalf of the Crown wards or even advise Class members of its existence.

[64] From the outset of this proceeding, the Crown also understood that the class action was about compensation for harm. It served an interlocutory motion before the certification motion to compel the plaintiffs to answer questions about whether they had been awarded damages in the civil courts or from the Criminal Injuries Compensation Board. The court ordered those questions to be answered.

[65] In the certification motion, the court recognized that the plaintiffs' claims encompassed compensation for their injuries they sustained as children, as well as for claims in negligence and breach of fiduciary duty. These latter claims were beyond the jurisdiction of the Criminal Injuries Compensation Board: *Papassay v. The Queen (Ontario),* 2017 ONSC 2023, at paras. 38 and 90.

[66] Class Counsel argued throughout the certification process that the Crown wards are entitled to damages arising from the Crown's failure to seek timely compensation for them. It is astonishing, now, to hear Class Counsel submit that Crown wards would have a faster recovery by proceeding with individual claims.

[67] At the time the action was certified, the cap on awards at the Criminal Injuries Compensation Board was $25,000.00; as well, compensation for expenses such as counselling was available. Historically, damages awarded in the civil courts were higher than those available at the Criminal Injuries Compensation Board. Now at the time of this settlement approval motion, the Board has ceased to function.

[68] Thus, despite previously arguing that the former Crown wards were entitled to compensation for their injuries as well as damages for failure to preserve evidence and advise them of their rights, Class Counsel now proposes to settle the case on the basis only that the Crown failed to advise Crown wards of their rights. In the hierarchy of claims, this is the least significant of the claims originally advanced and now being abandoned.

[69] The major claims for compensation for harms suffered have been abandoned in settlement negotiations. They are specifically excluded from the scope of the proposed settlement. What remains is a release that allows the Crown wards to pursue their own individual claims.

[70] Class Counsel argued that the limited release negotiated as part of the settlement proposal was of great value to the Crown wards. I do not agree. It is hard to believe that this limited release was a great concession on the part of the Province. In real terms, the class is comprised of vulnerable persons, who are aging, and have lost eight years to pursue their claims. Some no longer live in Ontario. Furthermore, with a $3,000.00 recovery, they have no war chest to retain counsel and start again.

[71] Further, it appears that individual proceedings have been hamstrung. Some objectors have attempted to obtain their records from the Children's Aid Societies who cared for them. Their experiences have not been encouraging. Some got files with names of perpetrators or potential witnesses redacted; some were provided only summaries of their files; others had their request for files bounced from agency to agency when their care was transferred from one jurisdiction to another. Some former Crown wards discovered, to their dismay, that their complaints of abuse were not documented in their files.

[72] These are on-going examples of the Crown's failure to preserve evidence, prejudicing the ability of Crown wards to make individual claims. Many former Crown wards suspect that their perpetrators are dead or cannot be located. If they do not receive compensation for harm in this class proceeding, it will likely be beyond their grasp.

[73] The Crown has agreed not to claw back settlement funds from the former Crown wards who receive provincial assistance. This, too, is a small concession, given at minimal cost to the Province since not all class members are receiving benefits. It is a trivial concession seen in other similar settlements.

[74] Class Counsel submits that the benefit of this class proceeding is to bring the former Crown wards together and to advise them of their rights, giving them information about their legal rights they should have had as children. Notice of certification and notice of settlement hearing and approval are inherent requirements of any class proceeding. They do not represent an achievement on settlement in this proceeding.

[75] The purpose of a class proceeding is to extinguish all claims on behalf of the class, not to leave major claims pending, as has been done here. Otherwise, what is the benefit of proceeding by way of class action? I acknowledge that proceeding to trial will be time-consuming and may require Crown wards to testify in individual trials. This has always been so. Class counsel argues that the effect of being cross-examined about claims of abuse will re-traumatize the class members.

[76] The fact is, that sixty objectors who spoke at the settlement approval hearing faced the trauma of describing their experiences in childhood and adulthood for the court. Their stories were hard to hear. I was moved by their bravery. I was moved by their support for one another. I was moved by their perseverance. As one person said, “We will not be silenced.”

[77] Class Counsel’s contention that the settlement claims process is not adversarial is debatable. Addressing the court with their objections was traumatic. One objector, in his submission, asked, “If everyone gets the same amount, why do I have to tell you about my trauma?”

[78] While a paper application does not equate with testifying in open court, it still requires a basic amount of disclosure of childhood trauma by the Crown wards. The proposed settlement specifically allows the Crown to respond to claims. The former Crown ward will be notified of the Crown’s response and afforded a right of reply, including the right to file further evidence or documents. Isn’t this, in effect, an adversarial process, albeit conducted in writing?

[79] Class Counsel stated that there is a presumption that the claimants are acting honestly and in good faith; however, claims still must be supported by a statutory declaration.

[80] Finally, I note that, unlike other institutional abuse settlements, there is no provision for the defendant to apologize. In my view, this is unfortunate. The cost is minimal but the returns for the dignity and healing of the Crown wards would be substantial.

[81] The proposed settlement in effect is a capitulation. I conclude that while Class Counsel seeks approval for a settlement, the settlement approval motion is in effect a motion for discontinuance, where the class will have a minimal recovery and Class Counsel will have its fees and expenses approved. The legal test for a discontinuance, however, is different than that for a settlement, and I shall not approve a discontinuance based on the evidentiary record presented. I shall not approve a discontinuance in the absence of an actual motion for approval to discontinue where the evidence would justify a discontinuance.

[82] For the above reasons, the settlement approval motion is dismissed.

The Hon. Madam Justice H. M. Pierce

Released: May 26, 2021

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Plaintiffs

- and –

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

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