CITATION: Yeo v Ontario, 2021 ONSC 4534
COURT FILE NO.: CV-16-547155-CP
DATE: 20210721

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JAMES YEO

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

COUNSEL: *David Rosenfeld, Adam Tanel and James Shilton* for the Plaintiff

Sonal Gandhi, Connie Vernon, Lisa Brost, Nadia Laeeque and James Shields for the Defendant

Andrew Eckart and Jasminka Kalajdzic for Objector Matthew Tuck

HEARD: June 23, 2021 via Zoom video

Settlement and Legal Fees Approval

[1] The physical and sexual abuse of children and young people in the care of provincial institutions in Ontario has generated at least seven class actions — six of which have ended in

judicially approved settlements. Four of the actions — *Slark*,[1] *McKillop*,[2] *Bechard* [3] and *Clegg*[4] — targeted provincially-run "Schedule 1" facilities for persons with developmental disabilities and mental health issues.[5] Two other actions focused on similar allegations of physical and sexual abuse in provincially-run schools for blind and deaf students: *Seed* [6] and *Welsh*.[7]

[2] This is the seventh and, according to class counsel, "likely the last" in this series.

[3] The class action alleges negligence and breach of fiduciary duty in the provincial government's operation of the Child and Parent Resource Institute, formerly known as the Children's Psychiatric Research Institute, and commonly referred to as CPRI.

CPRI

[4] CPRI was a government-run "Schedule 1" facility for the care of children and youth with complex mental health and developmental impairments located in London, Ontario. Over the course of its 50 years of operation — from 1961 to 2011 — CPRI housed and treated children with developmental disabilities and serious psychiatric conditions. In all, about 5300 young people passed through its gates, some staying for one month, others for up to five years.

[5] This class action alleged that the provincial government, in breach of its common law and fiduciary obligations, created conditions that resulted in the physical and sexual abuse of class members by both staff and residents. The action was filed and then certified on consent in 2016 as *Templin v Ontario*.[8] In 2018, Mr. Templin was replaced by Mr. Yeo, the current representative plaintiff.

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[1] *Slark v. Ontario*, 2013 ONSC 6686.

[2] *McKillop and Bechard v. Ontario*, 2014 ONSC 1282.

[3] *Ibid.*

[4] *Clegg v. Ontario*, 2016 ONSC 2662.

[5] Designated as such under the *Developmental Services Act*, R.S.O. 1990, c. D.11.

[6] *Seed v. Ontario*, 2017 ONSC 3534.

[7] *Welsh v. Ontario*, 2019 ONSC 4204.

[8] *Templin v. HMQ Ontario*, 2016 ONSC 7853.

[6] A 12-week trial was scheduled to begin in March 2021. After an intensive mediation conducted by Justice Archibald, the parties executed a settlement agreement in February 2021. The parties agreed to settle this action for $12 million in total with a paper-based claims process that will most likely result in individual compensation payments ranging from $3500 to $45,000.

The settlement agreement

[7] The key components of the settlement are:

- A $12 million total settlement amount - made up of a core $10 million settlement fund and a $2 million contingency fund that will be made available if the settlement fund is insufficient to pay the claims;
- The compensation payments will range from $3,500 to $45,000;
- The compensation payments will not be subject to tax or government claw-backs of social assistance benefits; and
- The claims process is paper-based and does not require that the claimant testify or appear in person.

[8] The "compensation plan" sets out three levels of "sexual assault" with payments of $3500, $15,000 or $30,000 depending on the nature and extent of the violation and one level of "physical assault", namely "serious physical assault" (i.e. requiring some hospitalization) that can result in a payment of $15,000. The victim of a serious assault that falls within both categories may be entitled to the highest compensation payment of $45,000.

[9] The proposed settlement, claims process and compensation chart is modeled after the court-approved settlements in the six previous actions. Each of the previous "Schedule 1" settlements in *Slark*,[9] *McKillop*,[10] *Bechard*[11] and *Clegg*[12] resulted in individual compensation

[9] *Slark v. Ontario*, 2013 ONSC 6686.

[10] *McKillop and Bechard v. Ontario*, 2014 ONSC 1282

[11] *Ibid.*

[12] *Clegg*, *supra*, note 4.

amounts of up to $42,000 per person. The settlements in *Seed*[13] and *Welsh*[14] provided a maximum $45,000. Here, as already noted, the maximum is also $45,000.

[10] The main difference between this settlement and the previous six settlements is the absence of any compensation for lower-level physical assaults.[15] Class counsel did not press for lower-level compensation amounts for purely physical assaults mainly because of the absence of evidence supporting such claims. As class counsel further explained in their factum:

> [T]he plaintiff made the informed decision to prioritize compensation for individuals who had suffered more extensive harm. Risking that compensation in order to "roll the dice" on lower-level harms would not have been in the best interests of the class as a whole.

[11] Apart from compensation, class members also demanded a formal acknowledgement and apology from the provincial government. The following apology was delivered by Premier Wynne on December 9, 2013: "I offer an apology to the men, women and children of Ontario who were failed by a model of institutional care for people with developmental disabilities." Although the Premier did not mention CPRI directly (the class action wasn't yet a reality), class counsel says the apology can be understood as applying to all former residents of CPRI as well.

[12] Class counsel ask that the settlement and their requested legal fees be approved as well as the payment of an honorarium to the representative plaintiffs. I will deal with each of these matters in turn.

Settlement approval

[13] Section 29(2) of the *Class Proceedings Act,*[16] provides that a class action may only be settled with the approval of the court. The caselaw is clear that a settlement will be approved if the court is satisfied that it is fair, reasonable, and in the best interests of the class members.[17]

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[13] *Seed, supra,* note 5.

[14] *Welsh, supra,* note 7.

[15] Physical Assaults Level 1 and 2 are not compensated in this settlement. Level 1 assaults (one or more physical assaults with no observable injury or repeated, persistent and excessive wrongful acts constituting demeaning behaviour or excessive physical punishment) and Level 2 assaults (one or more physical assaults not causing serious physical injury but causing an observable injury such as black eye, bruise or laceration) are both excluded.

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

[17] *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.) at para. 30, aff'd [1998] O.J. No. 3622 (C.A.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 9.

The overarching question is whether the settlement falls within a range or zone of reasonableness.[18]

[14] This was a late-stage or 'eve of trial' settlement — the parties were about to embark on a 12-week common issues trial when the matter settled. This means that class counsel were in the best possible position to assess the risks of further litigation. As I noted in *Clegg*:

> [T]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.[19]

[15] Class counsel, supported by counsel for the defendant, set out the risks of further litigation in their filed material. The gist of their submission was that proving legal liability against CPRI and the provincial government would have been difficult at best, for a number of reasons. Each of the reasons were explained in detail by class counsel — CPRI's superior reputation supported by credible expert evidence; the fact that most of the abuse was at the hands of other residents, not staff; the changing standards of care over the almost 50 years of the class period; the significant limitation issues; the impact of the recently enacted Crown immunity statute;[20] and more fundamentally, the difficulties in actually proving (i) systemic deficiencies given the positive compliance reviews that suggested otherwise and (ii) even the incidents of alleged abuse given the passage of time and failing or fallible memories.

[16] Class counsel also pointed out the following additional differences between CPRI and the other Schedule 1 institutions. These differences supported the defendant's position that CPRI was operated differently than, and in many ways superior to, other Schedule 1 Institutions:

- the average length of stay – much shorter at CPRI leading to class members having less exposure to any harmful environment;
- the accommodations at CPRI - no large dorms or overcrowding, which are conditions that can often lead to more resident-on-resident violence;
- the supervision models – CPRI had individual supervision plans that arguably limited harmful interactions;

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[18] *Parsons, supra,* note 17, at para. 69; *Di Filippo and Caron v. Bank of Nova Scotia et al.*, 2019 ONSC 3282 at para. 8; *Clegg, supra,* note 4, at paras. 31, 33 and 37; and *Sheridan Chevrolet v. Valeo S.A.*, 2021 ONSC 3555 at para. 4.

[19] *Clegg, supra,* note 4, at paras. 32-35.

[20] *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17.

- the superior staffing levels and training at CPRI as compared to the other Schedule 1 institutions.

[17] I accept class counsel's evidence that the challenges facing class counsel in the class action against CPRI were more formidable than in the four previous settlements. Nonetheless, class counsel achieved a settlement agreement that resulted in a compensation range that is several thousand dollars higher than in the previous Schedule 1 settlements (here $45,000 not $42,000) and equal to what was achieved in *Seed* and *Welsh* ($45,000).

[18] As I have already noted, the overarching determinant is whether the settlement falls within a zone of reasonableness. In the previous six settlements, this court approved individual compensation amounts of up to a maximum of $42,000 to $45,000. In other words, this court, in very similar settlements, has already determined the applicable 'zone of reasonableness'. And this settlement clearly falls within this zone. To rule otherwise would be unfair to the claimants in the earlier cases and contrary to the law of settlement approval.

[19] ***The objections.*** About a dozen class members objected to the settlement in writing and about 20 more did so in person via Zoom video. When compared to the class as a whole, the number of objectors represent less than one per cent. When compared to the expected ten per cent "take up" (the number of anticipated actual claimants), the number of objectors represent about five per cent.[21] I pause here to note that many class members were pleased with the settlement. After the settlement was announced, class counsel received numerous unsolicited expressions of approval from grateful class members. One former class member, who had opted out to pursue his own individual action wanted to opt back in, in order to participate in the proposed settlement.

[20] Nonetheless, the views of the objectors must be taken seriously. And here, the recollections of the class members who bravely told their stories in writing and on screen were, frankly, shocking and upsetting. There is no doubt that the sexual and physical assaults experienced by these former residents of CPRI were not only devastating when they occurred but resulted in debilitating and often life-long trauma. Each of these objectors has every right to believe that justice is not being achieved with this proposed settlement.

[21] Their core message is two-fold: (i) the defendant government should acknowledge and apologize for the wrongs committed and the harm that was done; and (ii) the compensation amounts provided in the settlement are so inadequate as to be insulting.

[22] I have already noted the apology that was offered by Premier Wynne in 2013 to all former residents in "Schedule 1" facilities. It is true that this apology pre-dated this class action and was not directed specifically at CPRI and so I appreciate the concern. But I cannot in good

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[21] Based on a class size of 5300 and 530 expected claimants.

conscience deny the monetary benefits of this settlement to hundreds of other affected class members because a tiny minority understandably insist on a more direct apology.

[23] I also understand why the objectors opposed what they believe are "inadequate" compensation payments. When I approved the settlement in *Welsh,* I considered similar complaints. What I said in *Welsh* also applies here:

> I agree with the objectors that the compensation amounts, given the nature and extent of harm sustained by many of the class members over many years of institutional abuse, are modest, almost insulting. I understand the disappointment and even anger that was undoubtedly felt by many of the class members when the … settlement was approved. But the range of average payout [up to $45,000] although meagre in terms of the abuse that was sustained, is decidedly more than would have been achieved had the case gone to trial.
>
> The many legal obstacles that the class would have faced at trial — the limitation periods, the unavailability of aggregate damages, the need for individual assessments, and then only for those who could establish physical or sexual assaults, and the difficulties of proving decades-old injuries — would most likely have resulted in … even lower monetary awards to even fewer class members.[22]

[24] Here, as I have already noted, the legal obstacles facing the class members were even more significant than in the four previous cases. This was a class action alleging systemic institutional failings over some five decades of operation. Any class action alleging system-wide failings (of policy or practices, staffing or training etc.) must first establish these systemic deficiencies. Individual instances of physical or sexual assault that cannot be connected to system-wide failings do not advance the class proceeding.

[25] The defendant was ready to go to trial with several expert reports refuting the allegations of systemic negligence. They were also prepared with an array of evidentiary attacks and legal submissions that in a court of law would have made it increasingly difficult for class counsel to establish the defendant's liability — particularly when the vast majority of the incidents in question involved other young residents and not CPRI staff. As already noted, the litigation risks that confronted class counsel when this settlement was achieved were, to say the least, formidable. While success was certainly possible, it was equally possible, perhaps even likely in the context of a class action alleging "systemic" negligence, that the entire litigation could collapse with no compensation for anyone.

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[22] *Welsh*, *supra,* note 7, at paras. 14-15.

[26] One of the objectors, Andrew Tuck, was represented by counsel from the Windsor Law School's Class Action Clinic.[23] Mr. Tuck was an inpatient at CPRI for just under two years, when he was 7 to 9 years old. Over the course of these two years, he endured multiple incidents of physical, sexual and emotional abuse that resulted in life-long pain and trauma, an inability to work, and a complete dependency on his elderly mother. By any measure, what Mr. Tuck experienced at CPRI was, as he put it, "horrific". And it may well be that for him the better option is to opt-out of the settlement and commence an individual claim — I will say more about this shortly.

[27] Counsel for Mr. Tuck argued that class counsel should have pressed for more compensation and failing that, should have continued to trial. He pointed to other cases where higher compensation amounts were awarded to victims of sexual assault. Class counsel, in turn, responded with a list of cases where the compensation awards were much lower than the $45,000 herein. However, in my view, neither of these approaches are helpful because none of the cases (typically individual claims, many with default judgments) are comparable to class actions alleging system-wide deficiencies.

[28] At the risk of repeating what has already been said, class counsel was advancing a class proceeding against a Schedule 1 facility, alleging systemic negligence over a 50-year period. The only actions that are genuinely and directly comparable are the four previous "Schedule 1" class actions — *Slark*, *McKillop*, *Bechard* and *Clegg* — and this court's reasons why the settlements in each of these cases were judicially approved.

[29] To his credit, counsel for Mr. Tuck considered these cases and suggested the following deficiencies in the settlement herein:

- Unlike the other Schedule 1 settlements, the CPRI settlement does not compensate all physical assaults, only instances of "serious" physical injury;

- Unlike the other Schedule 1 settlements, Level 1 sexual assaults are compensable only if they are committed by staff members and not by other residents;

- Unlike the other Schedule 1 settlements that required sworn affidavits with supporting documentation for only the most serious physical and sexual assaults (Level 3), the CPRI settlement requires commissioned affidavits with supporting documentation for *all* claims, with the exception of Level 1 Sexual Assault Claims;

[23] This is the second time that counsel from the Class Action Clinic have appeared before me — I welcome and appreciate their contribution.

- Unlike the other Schedule 1 settlements where expenses related to administration and notice were paid for directly by the defendant, here these expenses are deducted from the settlement fund.

[30] Counsel for Mr. Tuck describes these as "significant compromises on the part of the class." I do not disagree. And class counsel openly concede that compromises were made to achieve the proposed settlement. However, as this court noted in *Slark*, a settlement by its very nature is "a compromise that reflects the risks, delays and expense of continuing litigation."[24] Here, as class counsel explained in some detail, the risks of litigation were not only fully understood when the settlement was achieved but, unlike the other Schedule 1 actions, the litigation risks in proving systemic negligence at CPRI were more in number and more serious. I note that counsel for Mr. Tuck did not address any of the litigation risks that were facing class counsel when the settlement was achieved.

[31] In my view, it is a credit to class counsel that with the relatively modest compromises noted by Mr. Tuck and set out above, affected class members stand to receive as much and, potentially, even more than was achieved in *Slark, McKillop, Bechard* and *Clegg*.

[32] Again, if one of the determining legal standards for settlement approval is "zone of reasonableness", and if the zone of reasonableness that applies herein has been explicitly established and approved by this court in the four (and arguably six) previous and analogous class action settlements, then it must follow that this settlement should be approved as well.

[33] If Mr. Tuck, or indeed any objectors, wishes to opt-out of the settlement and pursue an individualized claim in the hope of attaining a larger recovery, they will need this court's approval to do so. While I cannot guarantee the outcome of any such motion, it will certainly be given serious consideration.

[34] In sum, the proposed settlement is approved. I am satisfied on balance that it is fair and reasonable and in the best interests of the class. I am also satisfied that it falls within the zone of reasonableness as established by this court in the four previous "Schedule 1" settlements.

Legal fees approval

[35] Class counsel's legal fees are also approved.

[36] The contingency fee agreement provides for a 30 per cent recovery. However, class counsel are content with 27.5 per cent, plus disbursements and taxes. As discussed in *Cannon*,[25]

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[24] *Slark, supra,* note 1, at para. 36.

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

and as further refined in *Brown*,[26] this contingency fee amount is presumptively valid on the facts herein and is approved.

[37] I note that the requested $2.75 million for legal fees (based on the $10 million portion of the settlement fund) is close to the $2.16 million in legal work that class counsel have docketed over the five years of litigation.

[38] There is nothing unreasonable about the legal fees request.

Honoraria approval

[39] Class counsel also seek approval for the payment of honoraria to the two successive representative plaintiffs, James Templin and James Yeo, in the amounts of $5,000 and $10,000, respectively.

[40] I have no doubt that both Mr. Templin and Mr. Yeo expended much time and effort in the prosecution of this class action. But, as class counsel understand, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives.[27]

[41] It is only where the representative plaintiff can demonstrate a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary or where there is evidence of some level of personal or financial sacrifice that the payment of a significant honorarium can be justified.[28]

[42] The work of the representative plaintiffs herein was commendable but does not fall within the "truly extraordinary" category. However, there is another factor. Representative plaintiffs in institutional abuse class actions are exposed to a more personal level of scrutiny than their counterparts in other types of class actions: their private affairs, including their personal experiences of abuse and other trauma, become matters of public record.

[43] Mr. Templin and Mr. Yeo volunteered to speak openly about deeply private experiences. They agreed to describe the abuse they sustained and witnessed in the statement of claim; swear affidavit evidence in this regard; endure cross-examinations on their affidavits; and be examined for discovery, all with respect to the deeply traumatic events they experienced as children. By publicly sharing these experiences, they significantly contributed to a proposed resolution in which many more victims of abuse will be able to claim compensation without having to make their personal experiences matters of public record.

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[26] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429.

[27] *Aps v. Flight Centre Travel Group*, 2020 ONSC 6779, at para. 43.

[28] *Ibid.*

[44] Moreover, when Mr. Templin stepped down as the representative plaintiff in the summer of 2018, Mr. Yeo bravely stepped forward and assumed this role. I accept class counsel's submission that "without him, this case could not have continued."

[45] I therefore have no difficulty approving the requested honoraria for Messrs. Templin and Yeo.

Disposition

[46] The proposed settlement is approved. As are class counsel's legal fees and the requested honoraria for the representative plaintiffs.

[47] Orders to go accordingly.

Signed: *Justice Edward Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: July 21, 2021