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Docket: CI 18-01-17220
(Winnipeg Centre)
Indexed as: Weremy v.
The Government of Manitoba
Cited as: 2023 MBKB 122

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

DAVID WEREMY,	)	David Rosenfeld
plaintiff,	)	Adam Tanel
	)	Andrew N. McDonald
- and -	)	for the plaintiff
	)	
THE GOVERNMENT OF MANITOBA,	)	Bailey J. Harris
	)	Jarrod R. Sundmark
defendant.	)	for the defendant
	)	
	)	Judgment Delivered:
	)	August 15, 2023

GRAMMOND J.

INTRODUCTION

[1] The plaintiff filed a motion to approve a settlement agreement entered into with the defendant, pursuant to s. 35(1) of ***The Class Proceedings Act***, C.C.S.M. c. C130 ("***Act***"). The class action underlying the proposed settlement agreement relates to the Manitoba Developmental Centre ("MDC"), an institution operated by the defendant near Portage la Prairie, Manitoba since 1890, and in particular allegations of sexual, physical and mental harm to MDC residents over a period of many years.

[2] The motion was not contested by the defendant, and one objection was filed on behalf of a class member. The relief sought was as follows:

a) a declaration that the settlement agreement is fair, reasonable, and in the best interests of the class;

b) an order approving the settlement pursuant to s. 35 of the ***Act***;

c) a declaration that the settlement agreement is binding upon the parties and all class members;

d) and order approving the form, content and manner of distribution of the proposed notice of settlement approval;

e) an order approving the form of the proposed claim form;

f) an order appointing RicePoint Administration Inc. as the administrator of the claims processed pursuant to the settlement agreement;

g) an order appointing Irene Hamilton as the claims supervisor pursuant to the settlement agreement;

h) an order approving the retainer agreement between class counsel and the plaintiff, and class counsel fees of $4.2 million plus taxes, as well reimbursement for disbursements, to be paid out of the settlement fund;

i) an order approving a $15,000.00 honourarium payment to the representative plaintiff, to be paid out of the settlement fund; and

j) an order that the payments to class counsel and the representative plaintiff be paid out of the settlement fund within 30 days of court approval.

[3] At the hearing of the motion, after submissions by counsel on both sides, and comments by or on behalf of some class members, I granted the relief sought, with written reasons to follow. These are those reasons.

BACKGROUND

[4] I certified the class action in this matter on May 29, 2020[1], including the following class definition:

> All persons who resided at MDC between July 1, 1951 and the date of the certification order, and were alive as of October 31, 2016.

[5] I also appointed the plaintiff as the class representative and determined that the following common issues would be decided at trial:

a) is the negligence claim statute-barred under ***The Limitations of Actions Act***, C.C.S.M. c. L150, (the "***LAA***")?

b) by its operation or management of MDC, did the defendant breach a duty of care it owed to the class to protect them from actionable sexual, physical or mental harm?

c) by its operation or management of MDC, did the defendant breach a fiduciary duty owed to the class to protect them from actionable sexual, physical or mental harm?

[1] My reasons for decision are found at ***Weremy v. The Government of Manitoba***, 2020 MBQB 85.

d) if the answer to either common issue (b) or (c) is "yes", can the court make an aggregate assessment of the damages suffered by all class members as part of the common issues trial?

e) if the answer to either common issues (b) or (c) is "yes", was the defendant guilty of conduct that justifies an award of punitive damages? and

f) if the answer to common issue (e) is "yes", what amount of punitive damages ought to be awarded?

[6] In December 2022, the parties participated in a Judicially Assisted Dispute Resolution Conference ("JADR Conference") with Bock J. of this court, as a result of which a term sheet was agreed upon. Thereafter, counsel negotiated the finer points of the settlement, and on April 21, 2023, the motion to approve the settlement agreement was filed.

[7] The key provisions of the settlement agreement are as follows:

a) The establishment of a $17 million settlement fund;

b) Individual compensation amounts for class members who suffered physical and/or sexual assaults, to be paid from the settlement fund, ranging from $3,000.00 - $85,000.00. More particularly:

i) "A Claimants" are eligible for payment of $3,000.00, solely on the basis of an affirmation that they suffered harm while a resident at MDC. These individuals will not be required to specify what harms they suffered, or provide any details thereof; and

ii) "B Claimants", who suffered more serious harms, including physical or sexual assaults perpetrated by either staff or MDC residents, can apply for compensation of between $4,500.00 and $85,000.00, and their claims will be reviewed by the claims administrator;

c) The defendant has confirmed that the receipt of compensation pursuant to the settlement agreement will not impact a claimant's eligibility for social assistance benefits, and has committed to request the same of other governments;

d) The claims process will be paper-based, simple, non-adversarial, and user friendly, and will include a presumption that claimants are acting honestly and in good faith. All notice and administration costs will be borne by the defendant and will not diminish the settlement fund;

e) The cost of claims administration and notice to the class will be borne by the defendant and will not diminish the settlement fund;

f) The following reconciliation initiatives will be pursued:

i) an apology in the defendant's Legislative Assembly to the class who suffered harm;

ii) the defendant will establish a $1 million endowment fund (paid from the settlement fund) with the Winnipeg Foundation, that may be drawn upon annually by community organizations to fund various initiatives and projects that promote or support community

inclusion of Manitobans with intellectual and developmental disabilities;

iii) the defendant will allocate $50,000.00 for the creation of audiovisual productions concerning the stories of class members and the history of MDC, to be developed through consultation with class members;

iv) the defendant will allocate $150,000.00 to reimburse claimants for counselling, psychological, or psychiatric care arising from any re-traumatization that they experience as a result of making a claim;

v) the defendant will erect a memorial on the grounds of the MDC cemetery;

vi) class members will have reasonable access to attend the MDC grounds after its closure, on two dates to be determined;

vii) one researcher will have access for the purpose of selecting objects of historical significance and having those objects properly archived;

viii) the defendant will preserve the MDC cemetery and make reasonable efforts to designate it as a site of historical significance; and

ix) subject to applicable privacy and other legal requirements, all documents in this proceeding will be submitted to the archives of Manitoba, to be properly retained and accessed in the future.

ANALYSIS

Is the Settlement Agreement Fair and Reasonable and in the Best Interests of the Class?

[8] Section 35(1) of the ***Act*** reflects that class proceedings may be settled only with the approval of a judge. The relevant test for approving a settlement is whether it is fair and reasonable and in the best interests of the class as a whole (***McLean v. Canada***, 2019 FC 1075, at para. 65 and ***Tataskweyak Cree Nation et al. v. Canada (A.G.)***, 2021 MBQB 275).

[9] In ***Tk'emlúps te Secwépemc First Nation v. Canada***, 2021 FC 988, the court stated:

> [37] The Court considers whether the settlement is reasonable, not whether it is perfect (*Châteauneuf v Canada*, 2006 FC 286 at para 7; *Merlo*, at para 18). Likewise, the Court only has the power to approve or to reject the settlement; it cannot modify or alter the settlement (*Merlo*, at para 17; *Manuge v Canada*, 2013 FC 341 at para 5).
>
> …
>
> [39] … as noted in McLean (para 68), the proposed settlement must be considered as a whole and it is not open to the Court to rewrite the substantive terms of the settlement or assess the interests of individual class members in isolation from the whole class.

[10] To reject a settlement, a court must conclude that a settlement does not fall within a zone or range of reasonable outcomes, recognizing that settlement agreements are the result of compromise on both sides, and that rarely does any party come away with all that they desire.

[11] When assessing whether a settlement is fair and reasonable and in the best interest of a class the court should consider the following list of non-exhaustive factors:

a) the likelihood of recovery or likelihood of success;

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

c) the terms and conditions of the settlement;

d) the number of objectors and nature of objections;

e) the presence of arm's length bargaining and the absence of collusion;

f) the information conveying to the court the dynamics of, and the positions taken, by the parties during the negotiations;

g) communications with class members during litigation; and

h) the recommendation and experience of counsel.

(***Tk'emlúps*** at para. 38, ***McLean*** at para. 66 and ***Tataskweyak*** at para. 66)

[12] These factors are to be given varying weight depending upon the circumstances of the case. I will comment upon each of the factors in turn.

Likelihood of Recovery or Success

[13] As counsel submitted, there are risks to the class in this matter. Many of the events at issue took place decades ago, and witnesses may be unavailable or the details of events may have faded in their minds. In addition, there is a risk of delay associated with a lengthy litigation process, including a trial and possible appeals. Moreover, if individual assessment hearings are ordered, class members may face difficulties in connection with those hearings and may be unable to participate in them.

All of the class members are persons with disabilities, and many of them are elderly, such as the representative plaintiff who is presently 79 years of age[2].

[14] In addition, the defendant has raised a series of defences to the claim, including limitation defences pursuant to the ***LAA***, and Crown immunity defences that apply to core policy decisions. At trial, the plaintiff would be required to demonstrate what duties the defendant owed to the class, including whether the content of the duty changed over time, and to prove one or more breaches of duty with respect to each class member. The defendant has also raised evidentiary issues regarding the admissibility of certain documents that the plaintiff relied upon at the certification hearing and as such those documents may or may not be admitted into evidence at trial.

[15] I accept that a common issues trial in this matter would be lengthy, and that it would be followed by a decision-making process, a possible appeal, and a process for the assessment of individual claims. All of those steps could take a long time to complete, such that successful claimants would not receive any payment for years. In addition, each claim would be subject to full scrutiny, which could result in some class members recovering more funds than what the settlement agreement will provide. Having said that, the defences advanced, if successful, could pre-empt <u>any</u> recovery by some claimants.

[2] Unfortunately, approximately 200 class members have passed away since October 31, 2016.

[16] I also accept that the proposed settlement would avoid all litigation risks, uncertainties, and potential prejudice, and would allow each class member to be compensated for what happened to them, without having to prove specific causes of action, rebut limitation period arguments, or establish causation and damages. In addition, class members would receive payment much more quickly than if the trial went ahead. More particularly, the claims process is expected to take 12 months.

[17] I am satisfied that the proposed claims process provides a balance between compensating class members for their individual experiences, and ensuring that the claims process is both accessible and timely, having regard to the nature of the class.

The Amount and Nature of Discovery and Investigation

[18] Counsel advised, and I accept, that significant discovery and investigation has been done in this litigation. In particular, the defendant has produced approximately 68,000 documents over the course of 16 months, and I note that many of the issues surrounding that disclosure were discussed with me in the course of the case management process.

[19] In addition, examinations for discovery were conducted over six days, giving rise to some 400 answers to undertakings, many of which were multipart undertakings, followed by interrogatories, again containing multiple parts. As such, the completion of the discovery process was complicated and time-consuming for counsel and the parties, and I am satisfied that each side knew their case.

[20] I also accept that to proceed with the litigation, expert opinions would have to be obtained relative to the allegations of the breach of the standard of care in a number of areas, including staffing levels, facility standards, and operational policies. The completion of these steps would take additional time prior to the commencement of trial.

Terms and Conditions of Settlement

[21] There are approximately 1,362 class members, and as such the settlement fund of $17 million would provide gross settlement funds of $12,480.00 per person and net compensation of $8,039.00 per person, both of which are far in excess of similar cases cited by counsel[3]. In the event that the fund is inadequate, claims will be paid on a *pro rata* basis. This approach is both fair and reasonable, in my view.

[22] As set out above, there are also a number of reconciliation initiatives included in the settlement agreement. Certainly, these initiatives would not be achievable at a trial, and appear to be rare in other class action settlements. These initiatives will benefit all of the class members, whether or not they make a claim, and will help them to achieve some closure after the traumatizing events they endured at MDC. Counsel submitted, and I agree, that these initiatives are meaningful and of great value to the class.

[3] ***Slark (Litigation guardian of) v. Ontario***, 2013 ONSC 6686, ***McKillop and Bechard v. HMQ***, 2014 ONSC 1282, ***Clegg v. HMQ Ontario***, 2016 ONSC 2662 and ***Yeo v. Ontario***, 2021 ONSC 4534.

Number of Objectors and Nature of Objections

[23] Only one objection was received from the class, filed by the substitute decision maker for a class member.

[24] The objector (a lawyer) advised that they did not believe they had adequate information regarding the factors that led to the proposed settlement agreement, including the strength of the case, the anticipated number of class members, the number of class members who participated in the process, or the extent of the attempts to marshal evidence to assist in proving the common issues at trial.

[25] The objector also took the position that the Schedule "A" claim amount was "manifestly inadequate", and that the endowment fund amount was too modest. In addition, the objector opposed the term of settlement that any remaining settlement funds would revert to the defendant, rather than flow to the endowment fund. I am cognizant of the defendant's responsibility to the public regarding the expenditure of public funds, and I am satisfied that because of that responsibility, any surplus settlement funds should revert to the defendant.

[26] Certainly, the objection as filed was detailed and articulate, but I am not satisfied that any of the issues raised represented legitimate inadequacies in the information "conveyed" to the court, as referenced in paragraph 31 below. Having said that, I have considered the content of the objection in making my decision.

[27] I will add that the Public Guardian and Trustee of Manitoba acts as the substitute decision maker for 246 class members and did not object to the settlement agreement.

The Presence of Arm's Length Bargaining and the Absence of Collusion

[28] Counsel advised that settlement discussions began in September 2022, after which extensive mediation briefs were exchanged, setting out in detail the positions of the parties and the evidence that they expected to lead at trial.

[29] As set out above, in December 2022 a JADR Conference took place over three days before a member of this court, and I am confident that the bargaining was at all times at arms' length, and that there was no collusion between the parties.

[30] After the JADR conference, the parties continued settlement discussions and agreed upon the specific terms and details of the claims process. They executed a comprehensive settlement agreement on March 7, 2023.

The Information Conveying to the Court the Dynamics of, and the Positions Taken, by the Parties During the Negotiations

[31] I am satisfied that the parties undertook a lengthy process of negotiation from September 2022 to March 2023, including a JADR Conference, which resulted in a settlement agreement. I am also satisfied that the parties were of equal bargaining power and that significant efforts and compromises were undertaken on both sides to achieve a settlement agreement. Additionally, I have concluded that complete and comprehensive record has been put before me on this motion.

Communications with Class Members During Litigation

[32] Class counsel advised that they communicated with various class members and their representatives in a variety of ways. Counsel was contacted by and communicated directly with numerous class members, supportive decision makers, caregivers and family members of class members. Counsel also maintained an active website for this action, updated it regularly, and posted court and other documents for the class members to review. In addition, counsel communicated to class members through the media, including press releases and interviews. Counsel advised that approximately 165 hours of lawyer, student, and clerk time was spent communicating with class members, their family members, or other representatives.

[33] None of this evidence was contradicted, and I accept that class counsel's communications with class members were adequate.

Recommendation and Experience of Counsel

[34] Class counsel are experienced class action lawyers and have been appointed as class counsel in numerous other actions, including claims involving institutional abuse and Crown liability. Counsel has argued cases across Canada, and at many levels of court, including precedent setting cases in the Supreme Court of Canada and other courts.

[35] Class counsel advanced their view that the settlement is fair, reasonable and in the best interests of the class, given:

a) the specific risks of proving the case at trial;

b) the delays associated with proceeding with litigation;

c) the difficulty, uncertainty and length of individual assessment hearings, if ordered;

d) the advanced age of many class members; and

e) reconciliation initiatives included in the settlement terms.

I accept class counsel's submissions on all of these points.

Is Class Counsel's Proposed Fee Fair and Reasonable in all of the Circumstances

[36] The law is clear that in assessing class counsel's proposed fee, I must consider:

a) the legal and factual complexities of the action;

b) the risks undertaken by class counsel on both the merits and prospects of certification;

c) the degree of reasonability assumed by class counsel;

d) the monetary value of the matters at issue;

e) the importance of the issues to the class members;

f) the skill and competence demonstrated by class counsel throughout the action;

g) the results achieved;

h) the ability of the class to pay and the class' expectation of legal fees; and

i) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation.[4]

[4] ***Smith Estate v. National Money Mart Company***, 2011 ONCA 233.

[37] Section 38(2) of the ***Act*** requires the court to determine whether to approve the retainer agreement entered into between the representative plaintiff and class counsel, and to determine whether the fees and disbursements should be approved pursuant to section 38(7) of the ***Act***.

[38] In this case, a written retainer agreement was executed in October 2018. The representative plaintiff obtained independent legal advice before executing the agreement, and he understood that class counsel could seek up to 33% of the recovery in the action, if the claim succeeded. The retainer agreement provided for fees to be paid to class counsel only in the event of the success of the claim, of between 25% and 33% of the total recovery plus applicable taxes, depending at the stage at which success was achieved. The clause of the retainer agreement applicable to a settlement after certification, and before a common issues trial, provides for a contingency fee of 30%. I am satisfied that the retainer agreement was appropriate in all respects, and it is approved.

[39] As at April 15, 2023, class counsel had spent approximately 3,040 hours of lawyer, student, and clerk time prosecuting this action, with a time value of approximately $1.386 million. Class counsel expects to spend additional time assisting with the administration of the settlement, with a time value of between $750,000.00 and $1 million.

[40] Class counsel requested a fee of $4.2 million, plus applicable taxes and disbursements. The fee request of $4.2 million equates to approximately 25% of the settlement funds (of $17 million), not including the costs of notice and settlement

administration. Class counsel submitted that the appropriate approach is a percentage based fee of 25%, which is within the ordinary range, and is fair and reasonable in all of the circumstances.

[41] As at April 15, 2023, class counsel had incurred disbursements of $121,525.98 on behalf of the class, for which it sought to be reimbursed in addition to its fee. It anticipates incurring an additional $25,000.00 in disbursements relative to the approval and implementation of the settlement.

[42] I accept that class counsel has undertaken and completed substantial work on behalf of the class on a contingent basis for approximately five years, without any guarantee of compensation. Accordingly, I accept that class counsel undertook a significant risk in taking this matter on, and agreeing to be paid only if the action was successful. Moreover, I accept that the class members in this matter would have been unable to fund the litigation as it proceeded. As such, their access to justice would have been impeded without the assistance of class counsel. I will add that the nature of the claim was of great importance to class members, given the personal nature of the allegations and their vulnerable status throughout their respective residencies at MDC.

[43] I have concluded that the fee requested by class counsel is fair and reasonable in light of the risks undertaken by counsel at the time of their retainer, the significant defence mounted by the defendant throughout the process, the results achieved for the class members, the importance of the resolution to the class (which is a significantly

vulnerable group), and the inability of the class to financially support or prosecute this action other than on a contingency basis.

[44] I accept that the requested fee is consistent with fee awards in other class proceedings, and that class counsel requested a lesser fee than they could have sought pursuant to the terms of the retainer agreement.

Is the Proposed Honourarium for the Representative Plaintiff Fair and Reasonable in all of the Circumstances?

[45] I have also considered the honourarium proposed for Mr. Weremy. The case law provides that an honourarium is justified where a representative plaintiff can demonstrate a level of involvement and effort that goes beyond what is "normally expected" of a representative plaintiff[5].

[46] I accept that Mr. Weremy has acted as a champion of this cause. He retained class counsel and commenced this action. Thereafter, he swore an affidavit in support of certification, which contained details of the trauma that he suffered at MDC over the 15 years that he resided there, both with respect to events that he experienced and that he witnessed. He was examined for discovery over two days with respect to those events. Mr. Weremy also participated in settlement negotiations and discussed the proposed settlement with class counsel.

[5] ***Smith Estate***, ***Slark***, and ***Kalra v. Mercedes Benz***, 2022 ONSC 941.

[47] I accept that Mr. Weremy as the representative plaintiff undertook significant efforts on behalf of many class members who have benefited from his efforts. I accept that he devoted dozens of hours to this litigation on behalf of the class, without compensation. I accept that the requested honourarium of $15,000.00 recognizes his meaningful contributions to this action, and the time that he spent on behalf of the class.

CONCLUSION

[48] For decades, members of the class endured physical and sexual abuse, and other harm, at MDC.

[49] I am satisfied that the settlement is fair and reasonable and in the best interests of the class, including class counsel's proposed fees and disbursements and the proposed honourarium for Mr. Weremy. I also accept that both the proposed claims administrator and claims supervisor are experienced and well-positioned to fulfill their respective roles in the settlement process and should be appointed as proposed.

[50] In my view, the proposed settlement agreement falls within the zone of reasonableness in every aspect of its terms, having considered the risks, costs, and unpredictability of proceeding to trial and the rewards to the class afforded pursuant to the settlement agreement. The motion is granted.

_____

J.