

CITATION: M.M. v. FCSLLG, 2021 ONSC 3310
COURT FILE NO.: 18-78827-CP
DATE: 2021/05/03

SUPERIOR COURT OF JUSTICE – ONTARIO
In the matter of the Class Proceedings Act, 1992, S.O. 1992, c. 6, as amended

RE: M.M.

AND:

Family and Children’s Services of Lanark, Leeds and Grenville

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: Sean A. Brown, Todd J. McCarthy, Candace Mak, and Christopher Lupis for the plaintiff

Sarah Armstrong, Alex Cameron, Zohar Levy and Pavel Sergoyev, for the defendant

HEARD: May 3, 2021

DECISION AND REASONS

[1] A hearing was held today by Zoom videoconference for the purpose of considering the proposed settlement of this Class Proceeding, to approve the distribution plan and to approve the compensation of Class Counsel.

[2] The hearing took place in the (virtual) presence of counsel noted above. A large number of class members and interested members of the public were also in attendance by Zoom.

[3] Given the privacy issues at the heart of this proceeding and the need to preserve anonymity of the class members, I will not detail the names of any of the class members. No record was maintained by the court of the names of those in attendance to watch the hearing.

[4] I am satisfied that the proposed settlement is fair and reasonable and is in the best interests of the class. I am also satisfied that in the circumstances the contingency fee agreement and the proposed bill of Class Counsel should also be approved. I gave a brief oral summary of my reasons during the videoconference, but I wish to provide written reasons for the court record.

Background

[5] The defendant is the Children’s Aid Society for the County of Lanark and the United Counties of Leeds & Grenville. In 2015, the Society had prepared a report for its Board of Directors which included personal information of 285 clients and subjects of Society investigations. The report was to have been posted to a private electronic portal accessible only to

members of the Board, but it appears it was not secure. As a consequence, a client of the Society was able to access the report and make it public by posting it to a publicly accessible website linked to a Facebook page. The names of the 285 individuals and their personal details were therefore made public.

[6] This proceeding was originally commenced in Toronto on behalf of the representative plaintiff, all others (except the individual responsible for publicizing the records) who were identified by name in the leaked report and their family members. The action was certified as a Class Proceeding and also transferred to Ottawa by order of the Honourable Mr. Justice Paul Perell on December 21, 2017.

[7] The classes were defined by the Certification Order as follows:

1. The 284 persons (including their estates or personal representatives, as may be permitted by applicable law) other than identified by name in a confidential Family and Children's Services of Lanark, Leeds and Grenville ("FCSLLG") document ("the Document") (the "Identified Class"); or

2. For the period of April 1, 2015 to April 18, 2016:

(a) the children, stepchildren, spouse or common law partner of the Identified Class Member and

(b) all persons who otherwise stood in loco parentis to the children or stepchildren of the Identified Class Member ("the Identifiable Class") (including through their estates or personal representatives, as may be permitted by applicable law).

History of the Litigation and the Settlement

[8] I am the Class Proceedings Judge assigned to this matter in Ottawa. I was responsible for case managing the action and also for hearing any motions.

[9] The action proceeded through a number of stages with extensive documentary production and discovery. There were several attempts to resolve it. The action was discontinued against all of the individual named defendants and continued only against the Society. Ultimately, on the eve of a summary judgment motion and following extensive mediation a settlement was reached between the Representative Plaintiff and the Defendant.

[10] On March 16th, 2021, I made an order fixing today as the date for the Court to consider the settlement and to hear any objections. The March 16th Order provided for notice of this hearing to be given, informed class members of their right to opt out or object to the settlement and provided the Zoom coordinates for those who wished to observe the hearing.

[11] I am advised that two members of the class opted out of the class proceeding, leaving approximately 282 members of the Identified Class whose names appeared in the report. The other class of family members of identified individuals is divided under the proposed settlement into adult class members and child class members.

[12] The court also received two notices of objection. One of those was from one of the class members who had opted out and so that individual would technically not have had standing to voice an objection at the settlement hearing.

[13] An individual who opts out of a class proceeding is not bound by the settlement and may pursue a private remedy, but they are not entitled to share in the distribution of the settlement or judgment.

[14] Counsel advised the court that in the case of the second objection, he had been advised by the objector that that individual was just expressing frustration and had indicated they did not wish to make a formal objection. It does not appear that the objector attended the hearing although I called upon them and provided an opportunity to come forward if he or she wished. I therefore treated the objection as withdrawn but, in any event, it was simply drawing to the attention of the court the limitations of a monetary award.

The Settlement

[15] The proposed settlement is a significant amount of money. As with most settlements, it is made without admission of liability. The Society maintains that was not negligent and was the victim of computer hacking. It has nevertheless agreed to pay the sum of \$5,000,000.00 plus an additional amount for costs relating to the administration of the settlement.

[16] Subject to the amount to be deducted from the settlement to pay the fees of counsel, which I will address in a moment, the settlement funds are to be paid into an escrow account and distributed by the fund administrator. The fund will provide for each individual in each of the classes to obtain an award upon registering with the fund administrator and supplying appropriate identification. The amount to be distributed for each class is identified in the settlement document and is also capped. The precise amount to be received by each class member will depend upon the percentage of the class which registers and elects to receive compensation within the specified time, but I am satisfied that the size of the class is a finite one and the fund is sufficient to provide each class member with a reasonable amount.

[17] The benefit to the class members is that they will each be entitled to compensation without further litigation and without proof of damages. The settlement acknowledges the significant public interest in protecting privacy of those over whose lives public authorities such as Children's Aid Societies exercise responsibility. The proposed amounts appear reasonable under the circumstances.

Compensation for Class Counsel

[18] This litigation was commenced in 2017 and has been pursued diligently. It was subject to a number of complications and it was vigorously defended. Class Counsel acted pursuant to a contingency agreement, funded all disbursements and took all of the risks including the risk of costs since Class Counsel had agreed to indemnify the representative plaintiff.

[19] In this case, Class Counsel asks that the contingency agreement be approved and the fee to be charged be in accordance with that agreement. This works out to roughly \$1.6 million plus

HST and the \$40,000.00 in disbursements. It is also proposed to pay an honorarium of \$5,000.00 to the representative plaintiff out of these fees.

[20] In *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 and in subsequent cases, the Ontario Court of Appeal has identified various factors which should be considered when analyzing whether the proposed fees of Class Counsel are appropriate. Those factors include:

(a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[21] I note that those factors have now largely been incorporated into s. 32 of the *Class Proceedings Act, 1992, S.O. 1992, c. 6* although those amendments do not apply to this proceeding. I also note that even where the Court has previously approved a contingency agreement, the full amount of the contingency will not always be approved when the matter comes on for a final determination. The fees must be reasonable and appropriately measured against all of the applicable factors.

[22] In this case, the proposed fees are the full amount of the contingency. If the fees were calculated on an hourly basis, however, it appears to me they would represent a multiplier of approximately two times a regular hourly rate. Given all of the factors I have touched upon above, and in particular the net benefit which will be available for each of the class members as the result of the work done by counsel in this case, I have approved the proposed fees.

[23] I have no issue with counsel agreeing to pay an honorarium to the representative plaintiff out of counsel's compensation. I discussed the issue of honoraria in *Forbes v. Toyota Canada Inc.*, 2018 ONSC 5369. There are good policy reasons not to encourage a category of plaintiffs for hire by routinely approving honoraria to representative plaintiffs. On the other hand, approving a nominal payment does encourage representative plaintiffs to engage in the litigation in a meaningful way. M.M. is a real plaintiff who was briefly the target of an investigation by the Society in circumstances where the Society's file was subsequently closed. By engaging in this litigation on behalf of the class, M.M. ran the risk of further publicity and exposure and took on significant responsibilities. Had I been asked to approve an honorarium in addition to the fees and expenses of counsel, I might have approved a different amount, but in this case, the honorarium is not being borne by the class but rather by counsel.

Summary

[24] In summary the proposed settlement is approved along with the proposed compensation of class counsel. I will sign a formal order in the form set out in the notice of motion subject to minor editorial changes if necessary. Counsel may arrange to send the order directly to me for signature.

Regional Senior Justice C. MacLeod

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Mr. Justice C. MacLeod

Released: May 3, 2021