CITATION: Johnson et al. v. Ontario, 2023 ONSC 5250
COURT FILE NO.: 2291/13CP
DATE: 20230918

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Glenn Johnson, Michael Smith and Timothy Hayne, Plaintiffs/Moving Parties

AND:

His Majesty the King in Right of Ontario, Defendant/Responding Party

AND:

COURT FILE NO.: 1406/CP

Eric Sabourin, Plaintiff/Moving Party

AND:

His Majesty the King in Right of Ontario, Defendant/Responding Party

BEFORE: Justice A.D. Grace

COUNSEL: *Michael J. Peerless, Chelsea Smith and Kevin A. Egan*, for the Plaintiffs/Moving Parties

Victoria Yankou, Alexandra Clark, Calie Adamson, Court Peterson and Karlson Leung, for the Defendant/Responding Party

HEARD: September 13, 2023

ENDORSEMENT
(Amended)

[1] On September 13, 2023, I heard and for brief reasons to follow, granted the plaintiffs' motions for approval of the parties' negotiated settlement and Class Counsel's fees.

[2] On September 14, 2023, I signed orders containing the terms the moving parties proposed. They accorded with drafts Ontario had approved as to form and content.

[3] These are my reasons for doing so. At the outset, I will say that I cannot think of a point set forth in the factum filed on behalf of the plaintiffs with which I take significant issue.

[4] Underlying the actions are allegations that persons confined in the Elgin-Middlesex Detention Centre ("EMDC") were subjected to deplorable conditions that included, overcrowding, a lack of even basic sanitation, violence and more.

[5] Certification of the *Johnson et al. v. Ontario* action by the court occurred years ago and followed a vigorous, hard-fought contest. Certification of what is now *Sabourin v. Ontario* occurred consensually sometime later.

[6] Between them, the actions cover the period from January 1, 2010 to November 10, 2021. Thousands are affected because the proceedings involve those held at EMDC for any reason.

[7] Certification of a class proceeding is a critical step. However, if achieved, failing resolution, an even longer journey lies ahead.

[8] These proceedings are no exceptions. Factual and legal issues abounded. The stakes were high. The risks – for both sides – were too.

[9] These cases have already been mammoth undertakings involving the expenditure of thousands of hours of professional time. Another eye-catching statistic involves the scope of the documentary discovery. More than 221,000 documents were produced by Ontario and reviewed by Class Counsel. More were still to come.

[10] Even if pursued to the exclusion of all other cases through trial, the EMDC class proceedings would have taken many more years. The time needed for the common issues trial, had the matters gone that far, would have been measured in months, not weeks.

[11] In my current role and with the benefit of the knowledge gained from the one that preceded it, I can say sadly but with absolute conviction, that trial could not possibly have commenced before 2026, even if the actions were trial ready now.

[12] However, they are not. Class counsel estimated a need for another three years to complete the document production process alone in the *Sabourin v. Ontario* action.

[13] Crucially, success at a common issues trial was not assured. I will not reproduce Class Counsel's long, helpful list of risks. Suffice to say that liability, whether in negligence or under the *Canadian Charter of Rights and Freedoms*, was not assured.

[14] Could the plaintiffs have succeeded at trial? Absolutely. Could they have lost? The answer is precisely the same, despite the legions of Class Members who have shuddering, tear inducing experiences to share.

[15] Furthermore, success at an initial trial would not have ended the process. An appeal in a case of this kind is almost a given. Its filing would have created another delay and further uncertainty.

[16] Even further and as the moving parties noted in their factum:

> Even after a judicial determination of the common issues, individual assessments of the Class Members' damages, including the process for those assessments, could take years given the size of the Class and the claims being made.[1]

[17] Aside from changing the word "could" to "would", I agree.

[18] None of that means, of course, that the actions should be settled abruptly, for an inconsequential sum or on unequal terms. However, the desirability of a negotiated end to these important but complicated actions cannot be overstated.

[19] That brings me to another important point made by Class Counsel. At para. 51(h) of their factum, they noted:

> … the risk that because many of the Class Members are socioeconomically disadvantaged, marginalized, and/or suffering from mental illness, many … would pass away before the final determination of their awards (sadly, several Class Members have already passed away) …

[20] Conceptually, then, settlement was a desired objective. Clearly it was on the part of Ontario too. I have no doubt that Ontario fully appreciated all that I have attempted to highlight so far.

[21] The representative plaintiffs provided affidavits in support of these motions. Portions detailed the conditions and experiences they endured in EMDC.

[22] I was pleased to hear informally from some Class Members when asked to do so during the settlement approval hearing.

[23] The stories told were deeply troubling; individually and collectively. It is important to say here, that I appreciated and was affected by their bravery and apparent candour. Stories of physical and emotional harm abounded.

[24] Although a few of the Class Members reported being in a good place in their lives, the scars of remembrance are borne by all. Sadly, a larger number continue to struggle, despite the passage of time.

[25] For years, these actions edged forward in a hostile environment. The adversarial process was fully engaged.

[26] Once skirmishing was complete, the theory and factual basis for the actions was well in hand. At that time, the parties retained the services of a highly respected former jurist to help them with their negotiations.

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[1] At para. 66.

[27] The parties reached an agreement in principle after two-days with the Honourable Thomas Cromwell CC. The terms of the Settlement Agreement were not finalized until several months later.

[28] It was effective October 26, 2022 and recognizes that the *Class Proceedings Act, 1992* requires court approval.[2] The following aspects of the proposed settlement bear mention:

(a) The settlement amount is $32,795,400. I should quickly add that Ontario's agreement to pay that sum did *not* include an admission of liability.[3]

(b) In addition, Ontario will satisfy the fees, including H.S.T. and disbursements, of Class Counsel. The total sum that is the subject of the fee approval motion is $9,388,207.92.[4]

(c) Three levels of compensation are contemplated for Class Members with a qualifying claim, ranging in amount from a low of $1,500 to a high of $35,000. Not surprisingly, the greater the detrimental impact, the higher the recovery. Class Counsel estimate there may be approximately 12,000 Class Members eligible to claim a share of the settlement fund.

(d) The claims process is paper based. Although documentary evidence is required to support certain claims, at no time is a Class Member required to testify in person.

(e) If any portion of the settlement fund remains at the end of the claims process, it reverts to Ontario.[5]

(f) The settlement resolves all issues between the parties. The Settlement Agreement contains expansive release language.

[29] The court will approve a proposed settlement if it concludes its terms are fair, reasonable and in the best interests of the class.[6]

[30] It is clear to me that the Class Members overwhelmingly support the negotiated resolution.

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[2] Because of the date on which the actions were commenced, the provision that was in force prior to October 1, 2020 is operative. At that time, s. 29(2) of the *CPA* provided that a settlement was not binding unless approved by the court.

[3] Language to that effect is found in para. 29 of the Settlement Agreement.

[4] That amount is comprised of the following: (i) $8,198,850 for fees, (ii) $1,065,850.50 for H.S.T. and (iii) $123,507.42 for disbursements.

[5] The Settlement Agreement also contemplates payment of non-Class Counsel costs from the settlement fund. They are the Administration Costs, the Notice Plan Costs and the levy payable to the Class Proceedings Fund of the Law Foundation of Ontario.

[6] *Nunes v. Air Transat AT Inc.*, [2005] O.J. No. 2527 (S.C.J.).

[31] All of them wish for more. Even at the highest amount, the compensation seems grossly inadequate for what they endured and continue to bear. One written objection made that point.[7] That view is understandable.

[32] However, virtually all the Class Members who have expressed a view accept Class Counsel's assessment and recommendation. Something now is certain. The possibility of something more later is not. From their perspective, the former is the better option. No amount of money will ever fully repair the harm done.

[33] I have no hesitation in approving the settlement the plaintiffs and Ontario have negotiated. I commend the parties and their counsel for reaching an accord.

[34] It resolves complex actions. There was substantial risk to both sides. Settlement negotiations started at an appropriate stage. They were difficult and protracted. The settlement amount is significant. It is likely to result in meaningful – although not terribly substantial – amounts being paid to a large number of Class Members.

[35] The parties' bargain eliminates the possibility of an adverse result at trial. The claims process is as simple as it could be. It has been thoughtfully developed and tailored to the circumstances of this litigation.

[36] The settlement is well within the zone of reasonableness. In fact, in my view, an excellent result was achieved.

[37] I turn to the fee approval motion.

[38] As noted, in the Settlement Agreement, Ontario agreed to pay the aggregate sum of $9,388,207.92 on account of legal fees, H.S.T. and disbursements. The fee portion of that amount is $8,198,850.

[39] Contingency fee agreements were signed by each of the representative plaintiffs. They comply with the formal requirements set forth in the *CPA*.[8]

[40] Fees ranging from 25 to 33% of the recovery plus applicable taxes and disbursements were contemplated. There is nothing offensive about those percentages, particularly in actions of this nature and complexity. The retainer agreements are approved.

[41] If calculated based on the entire recovery, the amount sought on account of legal fees is less than the lowest percentage stipulated in the retainer agreements.

[42] According to the motion material, Class Counsel has docketed more than 8,600 hours. When hourly rates are applied, more than $4.2 million in time has accrued. As I said during

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[7] That objection was provided by Kirsty MacLeod. Her mother spoke eloquently on her behalf during the settlement hearing.

[8] See, s. 32(1).

argument, the number of hours expended and the corresponding time value are less than I had expected.

[43] The fees sought in these actions are clearly fair and reasonable. I have already mentioned considerations that apply: protracted and hard-fought litigation, uncertainty both pre- and post-certification, extensive effort and difficult settlement negotiations.

[44] These actions are of particular importance to those affected by them. It is clear from their conduct that counsel for all parties are acutely aware of that fact. Class Counsel have demonstrated sensitivity to the Class Members and have conducted these proceedings with dedication and skill. Judicial economy,[9] access to justice and it is hoped, behaviour modification, have all been achieved.

[45] The court has not forgotten that Class Counsel will not be rendering another account, even though they anticipate having to expend additional time worth approximately $600,000 to complete all remaining aspects of these matters.

[46] In my view, the compensation sought is fair and reasonable. Hence my decision to approve it.

[47] A few final words. Many of those who addressed the court expressed the view that systemic change was more important than financial gain. Many Class Members expressed concern for others and a wish for them to enjoy better days ahead.

[48] I attempted to explain to the presenters that the court has a limited role. Even if these matters had been successful at trial and on appeal, the court could not have made the kinds of orders they sought.

[49] That does not mean that their voices were not heard. On their behalf, I send this reminder. No one should mistake it for being a token one.

[50] Those detained, no matter the reason or length of time, deserve to be treated humanely. That means providing them with adequate shelter, nourishment, medical care, a reasonably safe environment and unless and then only for so long as it is unearned, respect. Those in a position of power must recognize their profound privilege and responsibility and respect it.

"Justice A.D. Grace"
Justice A.D. Grace

Date: September 18, 2023

[9] At one time, dozens of individual actions were outstanding.